

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 27th August 2015
Judgment Pronounced on: 29th October, 2015

+ **CRL.M.C. 1346/2012**

GURVINDER SINGH BHATIA Petitioner
Through: Mr. Joy Basu, Senior Advocate
with Mr. Abhimanyu Bhamdari,
Mr. Akshay Anand & Ms. Kartika
Sharma, Advocates
versus

CBI Respondent
Through: Ms. Sonia Mathur, Standing
Counsel for respondent No.1- CBI
with Mr. Sushil Kumar Dueby,
Advocate with I.O. Mr.R.L. Yadav
Mr. Sunil Fernandes, Mr. Deepak
Pathak & Mr. Mithu Jain,
Advocates for respondent No.2
Mr. Vaibhav Sharma, Advocate for
respondents No.3 and 5
Mr. Vijay Aggarwal, Mr. Puneet
Jaiswal, Mr. Prateek Arora & Mr.
S.Ali, Advocates for respondent
No.8

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR
JUDGMENT

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Tender of pardon to the second respondent-herein in RC
No.AC1/2011/A0001/CBI/ACU-1/New Delhi under Sections 120-B of
IPC read with Sections 7/8/9 and Section 13(2) read with Section

13(1)(d) of *The Prevention of Corruption Act, 1988* by the trial court vide impugned order of 17th December, 2011 is assailed in this petition by petitioner, who is accused in the aforesaid RC case.

The factual background of this case already stands noted in the impugned order and so, it needs no reproduction. Suffice it would be to note that there are three set of accused in the instant case. The bribe taker is accused-A. K. Srivastava, a government servant; the middleman is accused-B.L. Bajaj and the bribe givers are petitioner-accused- G. S. Bhatia and respondent No.2-accused- Bijay Mandhani. The relevant facts, which are necessary for the purpose of this petition as noticed in the impugned order, are as under: -

“In his statement u/s. 164 Cr.P.C., applicant/accused Bijay Mandhani stated before Ld. MM that he is making the statement voluntarily. Accused Bijay Mandhani has disclosed material facts relating to the criminal conspiracy and the commission of offence. In his statement, accused Bijay Mandhani has deposed about his meeting with accused A.K. Srivastava in a hotel at Delhi where accused A.K. Srivastava asked accused Bijay Mandhani to arrange some payment as reward for this tender for 2 lac metric ton. In statement, it is further stated that accused A.K. Srivastava gave the mobile phone number of B.K. Bajaj and asked him to discuss the matter with B.L. Bajaj. Accused Bijay Mandhani further disclosed that he was contacted by accused B.L. Bajaj and met him in Delhi in a hotel. The bribe was asked for ₹200/- per metric ton for accused B.L. Bajaj and accused A.K. Srivastava. It was finally agreed for ₹150/- per metric ton for complete job. Accused B.L. Bajaj told accused Bijay Mandhani that tender for 2 lac metric ton will be divided in the ratio of 60:40 between accused Bijay

Mandhani and G.S. Bhatia. He asked accused Bijay Mandhani to inform accused G.S. Bhatia. He further stated that he contacted G. S. Bhatia and told the demand of accused A.K. Srivastava and B.L. Bajaj. Accused G.S. Bhatia agreed to share the bribe amount according to the share of tender. Accused Bijay Mandhani further stated that he paid ₹1 crore to accused B.L. Bajaj through his friend Sh.A.K. Singh in Delhi. Accused G.S. Bhatia informed that he has already paid ₹60 lacs and then another instalment of ₹20 lacs to accused B.L. Bajaj. Accused Bijay Mandhani deposed in his statement, that during investigation he heard the conversation of accused B.L. Bajaj, G.S. Bhatia and himself and recognized the voice of all three.”

The necessary ingredients of the main offence alleged are ‘the demand’, ‘the acceptance’ and ‘the recovery of the bribe’. Criminal proceedings were initiated in the instant case in March, 2011 and the charge-sheet was promptly filed in April, 2011 wherein seven accused persons were charge-sheeted and in the charge-sheet filed, it was stated that the investigation *qua* respondent No.2-Approver and his associate-A.K. Singh were continuing. Later on, a supplementary charge-sheet was filed. Before that, respondent No.2-Approver had filed an application in October, 2011 under Section 306 of Cr.P.C. volunteering to become an Approver. Statement of respondent No.2-Approver under Section 164 of Cr.P.C. was got recorded and after obtaining reply to the aforesaid application from CBI and petitioner herein, the application under Section 306 of Cr.P.C. stands allowed vide impugned order.

At the hearing, learned senior counsel for petitioner assailed the impugned order on the ground that it erroneously proceeds on the premise

that while considering the tender of pardon, the extent of culpability of the approver is not to be seen and what is to be seen is that an offender does not go unpunished for lack of evidence. It was pointed out that trial court while taking cognizance of the offence in question had opined that sufficient evidence is available to summon the accused whereas in the impugned order, diametrically opposite stand is taken by trial court i.e. of there not being much direct evidence to establish various aspects of criminal conspiracy.

On behalf of petitioner, it was submitted that the act and conduct of the Investigating Agency reveals a glaring bias as petitioner had also volunteered to become an approver but the prosecution has chosen respondent No.2, whose role is far more graver than that of petitioner. It was asserted on behalf of petitioner that lack of incriminating evidence cannot be a ground to create evidence by way of an approver's statement. It was pointed out that although non-bailable warrants were issued against respondent No.2 (now made Approver), but the prosecuting agency did not deliberately pursue the application under Section 82 of Cr.P.C. Reliance was placed upon Apex Court's decision in *Lt. Commander Pascal Fernandes v. The State of Maharashtra & Ors.* AIR 1968 SC 594 and *Ashok Kumar Aggarwal v. Central Bureau of Investigation & Anr.* 2007 [4] JCC 2557 to submit that the court has to keep in mind the interest of the accused persons also while considering the grant of pardon and the trial court has failed to do so and therefore, the impugned order deserves to be quashed.

Learned counsel for respondent No.8-R. *P. S. Bhatia* supported the afore-referred stand taken on behalf of petitioner and further made three

fold submissions. The first submission advanced was that prosecution does not gain anything from the evidence of respondent No.2-Approver and in any case, prosecution case does not fail in the absence of evidence of the Approver. The second submission advanced was that there is no requirement or need of the evidence of Approver and in any case, respondent No.2 is the main accused and so, he cannot be granted pardon at the cost of his co-accused. The third and the last submission advanced was that the contradictions in the statement of respondent No.2-Approver recorded under Section 50 of *Prevention of Money Laundering Act, 2002* and his statement under Section 164 of Cr.P.C. render the grant of pardon to second respondent irregular.

It was pointed out by learned counsel for eighth respondent that second respondent was negotiating the deal and his phone was put on tapping first and higher advantage of the deal was to respondent No.2 and so, grant of pardon to him is unwarranted. To assert that pardon should not be granted at the cost of co-accused, reliance was placed upon a Single Bench decision of this Court in *Ashok Kumar Aggarwal v. C.B.I.* 2007 (4) JCC 2557.

It was further pointed out that Section 306 (4) of Cr.P.C. mandates that the person, who is granted pardon, should be in custody till the conclusion of trial so that he does not go back on his words. It was pointed out that second respondent had obtained pre-arrest bail and the grant of pardon to him is not conditional to his being in custody and so, impugned order deserves to be quashed particularly in view of the contradictions in the statements of second respondent recorded under Section 50 of *Prevention of Money Laundering Act, 2002* and under

Section 164 of Cr.P.C..

On behalf of respondent No.3-accused, it was submitted that no time was given to respondent No.2 before recording of statement under Section 164 of Cr.P.C., which was not a voluntary statement, and it was not told to second respondent that he was not bound to make the statement. Thus, it was submitted that the recording of the statement of second respondent i.e. of Approver is not in conformity with Section 24 of *The Indian Evidence Act*. It was pointed out that second respondent was permitted to go abroad although the investigation against him was pending and in his bail application, second respondent has denied his role in commission of this offence and therefore, the grant of pardon to second respondent is wholly unjustified. To assert that the recording of the statement of second respondent under Section 164 of Cr.P.C. was in utter disregard to the statutory provisions, reliance was placed upon decision in *Preetam v. State of Madhya Pradesh* 1996 (5) SCALE 664, *Shivappa v. State of Karnataka* (1995) 2 SCC 76, *Devendra Prasad Tiwari v. State of U.P.* AIR 1978 SC 1544, *Tulsi Singh v. State of Punjab* 1996 (3) Crimes 319 (SC), *Rabinder Kumar Pal v. Republic of India* AIR (2011) SC 1436, *Pyaare Lal Bhargava v. State of Rajasthan* AIR 1963 SC 1094, *Babuhai Udeshein Parmar v. State of Gujarat* AIR 2007 SC 420 and *S. Arul Raja v. State of Tamil Nadu* 2010 (3) Crimes 320 (SC).

On behalf of respondent-CBI, it was vehemently asserted that impugned order does not suffer from any illegality or infirmity as second respondent-approver had made full and true disclosure of the entire circumstances of this case and had provided vital link to connect main accused i.e. respondent No.3 - A. K. Srivastava with the offence in

question. It was further asserted by learned counsel for CBI that to prove the demand of bribe, there is no evidence against respondent/accused - *A. K. Srivastava* except the statement of respondent No.2 recorded under Section 164 of Cr.P.C..

It was pointed out by learned counsel for respondent-CBI that none of the accused except respondent No.2 had interaction with the main accused i.e. respondent No.3-A. *K. Srivastava*. It was submitted that the adequacy of evidence of second respondent cannot be undermined at this initial stage and what weightage is to be attached to it, is to be seen at trial and after analysing the role of accused persons, it was found that second respondent is best suited to become an approver and the decision in this regard has been taken in the best interest of prosecution and there is no question of petitioner or his co-accused suffering any prejudice as culpability alone is not to be seen and the aspect of an accused being privy to offence is to be considered and after considering this aspect, pardon has been granted to second respondent. In support of these submissions, reliance was placed upon Apex Court's decision in *State of Rajasthan v. Balveer @ Balli* (2013) 16 SCC 321. Thus, rejection of this petition is sought.

Learned counsel for second respondent vehemently maintained that grant of pardon to respondent No.2 is fully justified as he is the vital link to connect the main accused i.e. respondent No.3 - *A.K. Srivastava* and his co-accused with the offence in question. It was pointed out that pardon can be granted at any stage provided the accused makes a full disclosure. To submit so, reliance was placed upon Apex Court's decision in *Bangaru Laxman v. State* (2012) 1 SCC 500. Reliance was also placed

upon Apex Court's decision in *Lt. Commander Pascal Fernandes v. State of Maharashtra and Ors.* AIR 1968 SC 594 to submit that when grant of pardon considerably increases the chance of conviction, then in such a case, pardon ought to be granted as the court cannot act as a veritable director of prosecution.

It was asserted by learned counsel for second respondent-Approver that it is for the prosecution to decide whether it requires an approver to prove its case and if so, then who is best suited. It was pointed out that in the instant case, second respondent is a vital link between the accused and the offence in question and to secure the conviction, evidence of second respondent is of paramount importance. It was submitted that co-accused of second respondent had never seriously sought pardon and had merely projected themselves as victims of circumstances. Lastly, it was submitted that accused cannot sit in judgment to decide what constitutes sufficient evidence as it is the prerogative of the prosecution and the discretion has been rightly exercised and that the decision in *Ashok Kumar (supra)* is of no avail to petitioner and his co-accused and so, this petition deserves dismissal.

After having considered the submissions advanced, impugned order, the material on record and the decisions cited, this Court finds that co-accused have no legal right to raise any grievance against order granting pardon. It has been so reiterated by Apex Court in *C.B.I. v. Ashok Kumar Aggarwal* (2013) 15 SCC 222 with a rider that in exercise of revisional/inherent powers, correctness, legality or propriety of an order granting pardon can nevertheless be *suo moto* examined. The

grounds of interference with an order of pardon, as highlighted by Apex Court in *C.B.I. v. Ashok Kumar Aggarwal (supra)*, are as under: -

“The grounds of interference may be, where the facts admitted or approved, do not disclose any offence or the court may interfere where the facts do not disclose any offence or where the material effects of the party are not considered or where judicial discretion is exercised arbitrarily or perversely.”

In the light of the afore-noted legal position, I have minutely scrutinized the impugned order and I find that role of the Approver alone is not the paramount consideration for deciding as to whether pardon is to be granted or not. It is so said in view of the dictum of the Apex Court in *Balveer @ Balli (supra)*, which is as under: -

“This Court in Suresh Chandra Bahri v. State of Bihar [1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60] explained the object of Section 306 CrPC in the following words: (SCC p. 106, para 42)

“42. ... The object of Section 306 therefore is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon the offence may be brought home to the rest. The basis of the tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but the principle is to prevent the escape of the offenders from punishment in heinous offences for lack of evidence. There can therefore be no objection against tender of pardon to an accomplice simply because in his confession, he does not implicate himself to the same extent as the other accused because all that Section 306 requires is that pardon may be tendered to any person believed to be involved directly or indirectly in or privy to an offence.” (underlined to supply emphasis)

It needs no reiteration that at the stage of taking cognizance, in-depth scrutiny of the material on record is not required. Merely because cognizance has been taken, it cannot be said that a *prima facie* case is made out and evidence of Approver is not necessary. In the instant case, the essential ingredient of the offence is demand of bribe. To prove this necessary ingredient, there is no cogent direct or indirect evidence on record. However, from the evidence of Approver, this necessary ingredient can be proved. It has to be kept in mind that the evidentiary value of Approver's evidence is not to be weighed in golden scales at this stage. Whether the statement of Approver recorded under Section 164 of Cr.P.C. is implicitly reliable or not, is not required to be prejudged at this initial stage. So, the decisions relied upon on this aspect are not required to be considered by this Court while dealing with the impugned order. This aspect is left open to be considered by trial court at the appropriate stage. Non-compliance of Section 306 (4) of Cr.P.C. does not negate the impugned order because second respondent was never in custody and to now take him in custody to ensure that he does not back out from his statement under Section 164 of Cr.P.C. would be futile because the privilege of pardon granted to second respondent can always be revoked if he violates the condition of disclosing the complete truth as disclosed in his statement under Section 164 of Cr.P.C..

In this considered opinion of this Court, petitioner or his co-accused do not suffer any prejudice nor any bias can be inferred as the evidence of the Approver certainly advances the prosecution's case. In view of the dictum of the Apex Court in *C.B.I. v. Ashok Kumar Aggarwal* (*supra*), implicit reliance placed upon *Pascal Fernandes* (*supra*) and

Ashok Kumar (supra) is of no avail. It would be premature to say that no case is made out against petitioner and his co-accused. Neither it can be said that the discretion has been arbitrarily or perversely exercised by the trial court because in the facts of the instant case, petitioner had portrayed himself to be a victim of circumstance and had not come forward to give a true disclosure and in any case, second respondent appears to be best suited to become an Approver. There is no basis whatsoever to reasonably conclude that pardon has been granted to second respondent at the cost of petitioner and his co-accused.

Consequently, finding no arbitrariness or perversity in the impugned order, this petition is dismissed. Needless to say, if second respondent deviates from the stand taken by him in his statement under Section 164 of Cr.P.C., then the privilege of pardon granted to him shall stand withdrawn and the challenge to second respondent's statement under Section 164 Cr.P.C. is left open, to be considered at the appropriate stage of trial.

(SUNIL GAUR)
JUDGE

OCTOBER 29, 2015

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