

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.07.2016
(Orders reserved on 14.07.2016)

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH

Crl.R.C.No.513 of 2016

CBI represented by
Additional Superintendent of Police,
SPE: CBI: ACB, Chennai. Petitioner/Petitioner
(Complainant)

Vs.

1. Shri. Andasu Ravindar
2. Shri. Padmanabhan Kishore
3. Shri. Uttam Chand Bohra Respondents/Accused 1 to 3

Criminal Revision Case filed under Section 401 read with 397 Cr.P.C. against the order dated 06.02.2014 in Crl.M.P.No.103 of 2013 in C.C.No.3 of 2013 on the file of the IX Additional Special Judge for CBI cases, Chennai.

For petitioner : Mr.K.Srinivasan,
Special Public Prosecutor for CBI cases

For respondents : Mr.V.Krishnamoorthy for R-1
Mr.S.Ashok Kumar for R-2
Mr.C.S.S.Pillai for R-3

ORDER

This Criminal Revision Petition is filed by the CBI against the order dated 06.02.2014 passed by the learned IX Additional Special Judge for CBI cases, Chennai, in Crl.M.P.No.103 of 2013 in C.C.No.3 of 2013, whereby, the petition filed by CBI seeking permission to include A4, A5 and A6, whose names have been mentioned in the final report in the second column as 'not sent up for trial', as additional witness, was dismissed.

2. Brief facts which are necessary to decide the issue involved in this revision petition, are as follows:

(a) The revision petitioner herein/CBI, on their source information, registered a case in R.C.No.33A/2011 on 29.08.2011

on the allegation that Shri.Andasu Ravindar, IRS (A1), while functioning as Additional Commissioner of Income Tax, Company Range, Chennai, had organised a survey proceedings under the Income Tax Act in the premises of M/s.Everonn Education Limited, Perungudi, Chennai, an educational company run by Shri.Padmanabhan Kishore (A2), Managing Director of the Company. Proceedings conducted by the Income Tax officials revealed that the above Company had concealed taxable income to the tune of Rs.100 Crores. A1 had demanded Rs.50 Lakhs from Shri.Padmanabhan Kishore (A2) for showing him undue favour for concealing the Income Tax liability. It was reliably learnt that A2 was to hand over a bribe amount of Rs.50 Lakhs on 29.08.2011 to A1 at his residence. Further, the said bribe amount was to be taken by Shri.Uttam Chand Bohra (A3), a close associate of A1 from the residence of A1 to an unknown place. Since the above facts disclosed offences punishable under Section 120-B IPC read with Section 7 of the Prevention of Corruption Act by the accused persons, a case was registered by the CBI in the above said crime number in R.C.33(A)/2011.

(b) Following registration of the case, a CBI team was deputed to carry out a search under Section 165 Cr.P.C. on 29.08.2011 in the office and residence premises of A1 at No.121, I.T. Colony, Uttamar Gandhi Road, Nungambakkam, Chennai-34. After reaching the residential premises of A1, A3 was seen to reach the residence of A1 located in the First Floor, Income Tax Colony, Nungambakkam in a car bearing Registration No.TN-04-Ad-9747 and A1 came down from his residence on the First Floor with a polythene bag containing a carton box and met A3. They boarded the said car together and when they were about to proceed, the CBI team intercepted the said car and searched the polythene bag in the possession of A1, which was found to contain Rs.50 Lakhs in the denominations of Rs.1,000/- in 50 bundles of 100 notes each. When questioned, neither A1 nor A3 could offer any satisfactory explanation about the possession of the above said huge amount and hence, it was seized under suspicion of having involved in the commission of offence under proceedings in the presence of and attested by independent witnesses.

(c) Further investigation revealed that A1 demanded an amount of Rs.5 Crores from A2 for helping him to conceal the tax evasion unearthed during the course of survey conducted by the Income Tax Department in the premises of M/s.Everonn Education Limited on 04.08.2011. It was further revealed that A1 introduced A4 - B.Ramakrishnan, Chartered Accountant to A2 in the office of A1 on 08.08.2011 and discussed the ways to help him in the matter.

(d) During the course of investigation, it further revealed that A5 - Shri.T.Banusekar is a Chartered Accountant practising in the Settlement Commission of Income Tax, Chennai, who assisted the Company M/s.Everonn Education Limited on a previous occasion. Within a few days of meeting A4 in the office of A1, A2 was informed by A1 through A4 and A5 regarding the demand of Rs.5 Crores as bribe to conceal the tax evasion unearthed during the course of the above mentioned survey, which was reduced to Rs.50 Lakhs at their instance. A6 - Shri.P.Chandrasekaran is a Chartered Accountant of M/s.Everonn Education Limited. The demand of Rs.50 Lakhs was informed by A2 to A6, and A6, based on a discussion made with A4 and A5, also instigated A2 to pay the amount demanded by A1, thereby abetting the offence. Thus, it was concluded that A4, A5 and A6 abetted the payment of the reduced bribe of Rs.50 Lakhs demanded by A1. Hence, initially the CBI was of the opinion that A4 to A6 also have to be included as accused persons along with A1 to A3 in the case.

(e) During the course of investigation, confession statements of A4 to A6 were recorded under Section 164(1) Cr.P.C. before XIX Metropolitan Magistrate, Chennai on 30.09.2011. Since the statements recorded under Section 164(1) Cr.P.C. were exculpatory in nature and sufficient evidence has not come to light to prove their involvement in the conspiracy, on conclusion of the investigation, a charge sheet was filed against A1, A2 and A3 for the offences punishable under Section 120-B IPC read with Sections 7, 12 and 13(2) read with 13(1) (d) of the Prevention of Corruption Act. As investigation could not establish the involvement of A4 to A6, they were not sent up for trial and a petition in CrI.M.P.No.103 of 2013 in C.C.No.3 of 2013 was filed by the CBI before the trial Court to include A4 to A6 as additional witnesses, as they been mentioned in the charge sheet / final report in the second column as "accused persons not sent up for trial".

(f) The said petition in CrI.M.P.No.103 of 2013 was not opposed by A3 and the learned counsel for A3 made an endorsement "no objection" in the petition before the Court below. But, A1 and A2 have filed counter affidavit(s) by raising strong objection, stating that A4 to A6 have not been tendered pardon under Section 306 Cr.P.C. by a competent Court of law and that the Police are not empowered to tender pardon and without filing a closure report against them in the Court and obtaining orders for closure, the status of an accused cannot be changed to that of witness by the Police and that the statements under Section 164(1) Cr.P.C., stated to have been recorded on 21.09.2011, have not been filed with the charge sheet and have been filed only

with the petition, which discloses that the prosecution is attempting to build a case which was based on inadmissible evidence on the alleged statements and that if those statements have been filed with the charge sheet, the Court would have taken cognizance of the offences against them also by sending summons to them as accused, and therefore, A1 and A2 prayed for dismissal of the petition filed by CBI before the Court below.

(g) The trial Court, after hearing the arguments of both sides, dismissed the said petition in CrI.M.P.No.103 of 2013 in C.C.No.3 of 2013 by the impugned order dated 06.02.2014, by assigning the following reasons:

"7. The correct legal procedure mentioned in Cr.P.C. to permit the accused to be treated as witnesses has not been followed by the prosecution in this case by taking steps for tendering pardon to them by competent court of law. Hence it can be said that these accused who have not been tendered pardon by competent court of law cannot be examined as witnesses until they have been discharged or convicted or acquitted or the case is closed against them by competent court of law on the filing of closure report by the prosecution before such court of law. For the reasons stated above, this court is not inclined to grant the request prayed for by the prosecution to include the three accused as three additional witnesses in this case."

Challenging the above said order passed by the trial Court, the CBI has filed this revision petition.

3. Learned Special Public Prosecutor appearing for the revision petitioner/CBI submitted that though initially FIR was registered only against A1 to A3, the prosecution has filed a Memo, dated 23.09.2011 before the Court below to include A4 to A6 in the FIR. He further submitted that thereafter, the statements of A4 to A6 were recorded under Section 164(1) Cr.P.C. on 30.09.2011 by XIX Metropolitan Magistrate, Chennai. Since, in the statements of A4 to A6, there was no incriminating material against A4 to A6, their names were dropped in the charge sheet and in column No.2 of the charge sheet, A4 to A6 were shown as "accused persons not sent up for trial". He further submitted that as A4 to A6 are not accused persons, there is no need for tendering pardon by treating them as approvers by the concerned Magistrate, as envisaged under Section 306 Cr.P.C. Hence, learned Special Pubic Prosecutor submitted that there cannot be any legal impediment in examining A4 to A6 as witnesses, since their names have been dropped in the charge-sheet by mentioning them as "accused persons not sent

up for trial". Hence, the reasons assigned by the trial Court in the above extracted paragraph 7, are not legally sustainable. In this regard, learned Special Public Prosecutor appearing for the revision petitioner/CBI, by relying upon the decision of the Supreme Court reported in 2014 (3) SCC 306 (Dharam Pal Vs. State of Haryana), submitted that in the instant case, charge sheet / final report, which was filed by the CBI showing A4 to A6 as "accused persons not sent up for trial", was not disagreed by the Court below and therefore, as on date, there cannot be any bar in examining A4 to A6 as witnesses. Under such circumstances, the trial Court ought to have allowed the petition filed by the CBI to treat them as additional witnesses.

4. Apart from the above submissions, learned Special Public Prosecutor appearing for the revision petitioner/CBI also submitted that under Section 311 Cr.P.C., the Court has got ample powers to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. Therefore, learned Special Public Prosecutor submitted that the request of the CBI to include and examine A4 to A6 as additional witnesses, cannot be denied by the trial Court. Hence, he prayed for setting aside the impugned order of the trial Court and to allow this revision petition.

5. Countering the above submissions, the learned counsels appearing for the respondents 1 to 3 / A1 to A3 submitted that the prayer of the CBI to include A4 to A6 as additional witnesses, cannot be countenanced. In this regard, they submitted that A4 to A6 were shown as accused persons by their names and that being so, unless they have been discharged/dropped from the case or pardoned by the competent Court, A4 to A6 continued to be accused persons even as on date and therefore, they cannot be included as additional witnesses in the case. It is their further submission that the investigation officer has no power under any provisions of the Criminal Procedure Code or the Prevention of Corruption Act or any other law of the land to suo-motu drop or discharge the accused and the power to do so is only vested with the Courts upon the prosecution filing closure report and only if the closure report has been accepted by the competent Court, then only the accused will come out from the clutches of criminal law. In this regard, learned counsels made detailed arguments by highlighting the provisions of Sections 169 and 306 Cr.P.C.

6. In support of their submissions, learned counsels for the respondents 1 to 3 relied on a decision of the Bombay High

Court reported in 1877 (1) Bom. 611 (Reg. Vs. Hanmanta), wherein, it has been held that the effect of Sections 344, 345 and 347 Cr.P.C. (of the old Cr.P.C--Act X of 1872) is to render it illegal for a Magistrate to convert an accused person into a witness, except when a pardon has been lawfully granted under Section 347 (of the said old Cr.P.C.) and it was further observed that the accused persons therein not having been legally pardoned, could not be examined as witnesses, until they had been acquitted or discharged or convicted. Learned counsels for the respondents 1 to 3 also invited the attention of this Court to a decision of the Supreme Court reported in AIR 1968 SC 594 = 1968 (1) SCR 695 (Lt.Commander Pascal Fernandes Vs. State of Maharashtra and others), wherein, the Apex Court held that in our criminal jurisdiction, there is a tender of a pardon on condition of full disclosure and Section 8(2) of the Criminal Law Amendment Act is enabling and without recourse to it, an accused person cannot be examined as a witness in the same case against another accused. Thus, by relying upon the above judgments of the Supreme Court, learned counsels for the respondents 1 to 3 submitted that in order to treat an accused as a witness in a case, either there should be a tender of pardon by treating the accused as approver by the competent Court or the accused should have been discharged or convicted or acquitted by a competent Court. In the case on hand, neither a pardon was tendered as stipulated under Section 306 Cr.P.C., nor they have been discharged or convicted or acquitted by the competent Court as per the provisions of the Cr.P.C.

7. With regard to the submission made by the learned Special Public Prosecutor regarding Section 311 Cr.P.C., it is the contention of the learned counsels appearing for the respondents 1 to 3 that as on date, A4 to A6 are only to be treated as accused persons, and hence, the question of examining them by invoking Section 311 Cr.P.C. does not arise in this case.

8. Learned counsels appearing for the respondents 1 to 3 / A1 to A3 further contended that as per provisions of Section 164(4) Cr.P.C., the confession shall be recorded in the manner provided in Section 281 of Cr.P.C. for recording the examination of an accused person and shall be signed by the person making the confession and the Magistrate shall make a memorandum (i.e. certificate) at the foot of such record by making necessary certificate regarding such recording of such confession to the effect that the confession was voluntarily made, it was taken in the presence of the Magistrate and hearing, was read over to the person making it and admitted by him to be correct, etc. In the instant case, after recording the statements of A4 to A6 under Section 164(1) Cr.P.C., the concerned Magistrate has not given any such kind of certificate at the foot of recording of such

confession from the accused persons, as stipulated under Section 164(4) Cr.P.C. Therefore, according to the learned counsels, the statements of A4 to A6 recorded under Section 164 (1) Cr.P.C., are illegal for want of the above said memorandum/certificate at the foot of the confession statements. That being the case, the said statements recorded under Section 164(1) Cr.P.C. from A4 to A6 cannot be relied upon or marked by the prosecution by treating A4 to A6 as additional witnesses.

9. In the above context, learned counsels appearing for the respondents 1 to 3 relied on an order dated 06.11.2015 passed by this Court in CrI.R.C.No.1060 of 2015, wherein, the learned Judge has held that since the statement recorded under Section 164 of Cr.P.C. from the fourth accused therein is not in accordance with law, the same cannot be relied upon and the order of the Court below therein was held to be illegal and not sustainable.

10. It is reiterated by the learned counsel for the respondents 1 to 3 that the power of the Court to convert an accused in the FIR as a witness, is only vested with the Court and not with the investigating agency or the prosecution and an accused can be treated and examined as a witness only after tender of pardon or discharge of an accused by the competent Court of law.

11. Learned counsels appearing for the respondents 1 to 3 / A1 to A3 also submitted that as per Section 169 Cr.P.C., if, upon an investigation, it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable round of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial. The learned counsels reiterated their contention that the investigating officer has no power to suo-motu drop or discharge an accused and the power to do so is only vested with the Courts upon the prosecution filing closure report. The learned counsels further contended that the trial Court's order shows that the Court has taken cognizance of the offences mentioned in the charge sheet against the accused and ordered for issuance of summons to the accused. No separate order has been passed by the learned trial Judge accepting A4 to A6 as "accused persons not sent up for trial" or closed the case against them, and therefore, it cannot be said that A4 to A6 are deemed to have been discharged, since no judicial order was passed against them. It is therefore submitted that the

discharge order in a negative report is a judicial order and therefore, an order in writing shall be passed before discharging an accused.

12. With regard to the submission of the learned Special Public Prosecutor that since the Court has accepted the charge sheet / final report and taken the case of the prosecution on its record / file, in which A4 to A6 were shown as "accused persons not sent up for trial", there cannot be any bar in examining them as witnesses, it is the reply of the learned counsels for the respondents 1 to 3 that at the time of taking the final report on file, the Court is taking cognizance of the case only with regard to the offences alleged against the accused persons and not with regard to the status of the accused persons. In support of their submissions, learned counsels for the respondents 1 to 3 relied on a decision of the Supreme Court reported in 1978 (4) SCC 58 (Hareram Satpathy Vs. Tikaram Agarwala) and submitted that in the absence of tender of pardon by the competent Court by treating the accused persons as approvers, or in the absence of discharge of an accused from the status of an accused by an order of the competent Court, A4 to A6 in this case are only continuing as accused persons, and therefore, they cannot be treated as witnesses in the case as contended by the prosecution. For all the above reasons, learned counsels appearing for the respondents 1 to 3 / A1 to A3 prayed for dismissal of the revision petition.

13. I have given my anxious consideration to the submissions made on either side and perused the materials available on record.

14. On an analysis of the materials available on record and on considering the facts of the case on hand, the following points arise for consideration in this revision petition:

(i) Without even tender of pardon by the Magistrate concerned after treating A4 to A6 as approvers in the case, as stipulated under Section 306 Cr.P.C., or without any order discharging them from the case, whether the prosecution may be permitted to include A4 to A6 as additional witnesses and examine them, who have been shown as "accused persons not sent up for trial" by the prosecution in the charge-sheet and also as to whether the said tender of pardon is necessary in the case on hand ?

(ii) Since the confession statements of A4 to A6 recorded under Section 164(1) Cr.P.C. did not contain the certificate of the Magistrate at the foot of the confession statements, as enunciated under Section 164(4) Cr.P.C., whether the said confession statements could be relied upon and marked by the prosecution through their witnesses?

(iii) Whether A4 to A6 can be examined by invoking Section 311 Cr.P.C. ?

15. Before dealing with the above points, it is worthwhile to extract Sections 164, 306 and 311 Cr.P.C., as follows:

"Section 164: Recording of confessions and statements:

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any, time afterwards before the commencement of the inquiry or trial:

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If, at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-

"I have explained to _____ (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.,

Magistrate".

(5) Any statement other than a confession made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried."

"Section 306: Tender of pardon to accomplice:

(1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to--

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952 (XLVI of 1952);

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record--

(a) his reasons for so doing;

(b) Whether the tender was or was not accepted by the person to whom it was made,

and shall, on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)--

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any :

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case,--

(a) Commit it for trial--

(i) to the Court of Session if the offence is triable exclusively by that Court or if the Magistrate taking cognizance is the Chief Judicial Magistrate;

(ii) To a court of Special Judge appointed under the Criminal Law Amendment Act 1952 (XLVI of 1952), if the offence is triable exclusively by that Court;

(b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself."

"Section 311: Power to summon material witness or examine person present:--

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

16. With regard to the first point, this Court finds that originally, the case was registered against A1 to A3; subsequently, the prosecution filed a Memo before Court to add A4 to A6 and their confession statements were recorded by the concerned Magistrate. Since there is no incriminating material against A4 to A6 in the said confession statements, A4 to A6 were dropped by the prosecution in the case and in the charge

sheet in column No.2, their names were shown as "accused persons not sent up for trial". Therefore, it is the stand of the prosecution that A4 to A6 are not to be treated as accused persons. But, when the CBI has filed petition before the trial Court to include A4 to A6 as additional witnesses, the trial Court rejected the said request, which is challenged in this revision petition.

17. In the above backdrop, it is strenuously contended by learned counsel for the respondents 1 to 3 / A1 to A3 that the prosecution has no legal right to drop them from the array of accused persons on their own accord and to include them as witnesses and examine them, without even tender of pardon by the competent Magistrate by treating them as approvers. It is further contended that the prosecution ought to have obtained an order of discharge against A4 to A6 and in the absence of the above procedures, A4 to A6 are still continuing as accused persons, and therefore, the question of including them as witnesses and examine them, does not arise, more particularly, when the investigating officer has no power under any of the provisions of Cr.P.C. or the Prevention of Corruption Act or any other law for the time being in force to suo-motu drop them from the array of the accused or discharge them from the case and the power to do so is only vested with the Courts upon the prosecution filing closure report, which needs to be accepted by the competent jurisdictional criminal Courts and only if the same is accepted, the accused will come out of the purview of the case.

18. It is the main contention of the learned counsels for the respondents 1 to 3 that only under Section 169 Cr.P.C., the investigating officer has limited power to release the accused on bail and it does not give him the discretion of discharging the accused or dropping the accused from the case, even though the evidence is deficient against the accused. Hence, it is the main submission of the learned counsels for the respondents 1 to 3 that without tender of pardon by the competent Court after treating A4 to A6 as approvers, as well as in the absence of any specific order of discharge of the accused from the case by the competent Court on filing a negative report by the prosecution, it has to be construed that A4 to A6 are continuing only as accused persons, and therefore, the prosecution cannot be permitted to include A4 to A6 as additional witnesses for examining them.

19. From the above submissions, I find that at the time of filing final report / charge sheet, as contended by the learned Special Public Prosecutor appearing for the revision petitioner/CBI, A4 to A6 were only shown as "accused persons

not sent up for trial" in column No.2 therein, and the said charge sheet / final report was duly accepted by the Court and the Court has not disagreed with the final report filed by the CBI with regard to the status of A4 to A6. When once the charge sheet / final report is accepted by the Court below, by treating A4 to A6 as "accused persons not sent up for trial", their continuance as accused persons in the case does not at all arise. Hence, I do not find any force in the submissions made by the learned counsels for the respondents 1 to 3.

20. Further, I am of the opinion that if and only if A4 to A6 are shown as accused persons in the charge sheet / final report, the question of tender of pardon by the competent Magistrate after treating them as approvers, will arise. But, A4 to A6 have been shown as "accused persons not sent up for trial" in column No.2 of the charge sheet. Furthermore, I am of the opinion that there is no need to obtain any specific order of discharge from the Court by filing a closure report against A4 to A6 alone, because, in the very same charge sheet, A1 to A3 are shown as "accused persons sent up for trial" in column No.1 therein. The charge sheet has not been disagreed by the Court below. Therefore, when A4 to A6 were shown as "accused persons not sent up for trial", I do not find any substance in the submission of the learned counsels for the respondents 1 to 3 that A4 to A6 are only still continuing as accused persons in the case. In this connection, a reference could be made to the decision of the Supreme Court reported in 2014 (3) SCC 306 (Dharam Pal Vs. State of Haryana), relied upon by the learned Special Public Prosecutor, in which, the Apex Court observed as follows:

"34. the Magistrate has ample powers to disagree with the final report that may be filed by the police authorities under Section 173(2) of the Code and to proceed against the accused persons de hors the police report ... सत्यमेव जयते

35. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) Cr.P.C. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in Column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he

may commit the case to the Court of Session to proceed further in the matter.

36. ... if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Sessions Court."

21. In the case on hand, the Court has been satisfied with the charge sheet/final report with regard to A4 to A6 and the Court issued summons only to A1 to A3. When the Court has not disagreed with the charge sheet/final report, the question of tender of pardon under Section 306 CrPC, by treating A4 to A6 as approvers by obtaining a specific order discharging them from the case, does not arise. Hence, the submission made by the learned counsels for respondents 1 to 3 that unless there is a tender of pardon by the concerned Court or there is a specific order by the concerned Court discharging A4 to A6 from the status of accused persons, A4 to A6 have to be treated only as accused persons, is not legally sustainable. Therefore, I am of the opinion that the reasons assigned by trial Court in para 7 of its order for rejecting the request of the revision petitioner/CBI to include A4 to A6 as additional witnesses so as to examine them, are not sustainable.

22. With regard to the second point for consideration, it is contended by the learned counsels for the respondents 1 to 3 that since the confession statements of A4 to A6 recorded under Section 164(1) Cr.P.C. did not contain the certificate at the foot of the confession statements as provided under Section 164 (4) Cr.P.C., the same cannot be relied upon and marked through witnesses. On going through Section 164 Cr.P.C. extracted above, in this case, it is seen that the confession statements of A4 to A6 have been recorded under Section 164(1) Cr.P.C., but the mandate stipulated under Section 164(4) Cr.P.C. has not been followed by recording a certificate at the foot of the confession statement. But as per Section 164(5) Cr.P.C., for recording any statement other than confession statement made under sub-section (1), no such certificate at the foot of the statement, is necessary. In the instant case, in the confession statements of A4 to A6 recorded by the Magistrate under Section 164(1) Cr.P.C., there was no incriminating material against them and when there is no such incriminating material against them, it has to be construed only as statements of the witnesses. Therefore, in the absence of certificate at the foot of the confession statement with contents mentioned under Section 164 (4) Cr.P.C., the said confession statements recorded under Section 164(1) Cr.P.C. cannot be said to be illegal and those

confession statements are only to be treated as statements other than confession statements as envisaged under Section 164(5) Cr.P.C., and therefore, non-containing of the certificate at the foot of the confession statements as stipulated under Section 164(4) Cr.P.C., would not make the statements of A4 to A6 unreliable and hence, the prayer of the prosecution/CBI to include A4 to A6 as additional witnesses for examining them, has to be accepted. Therefore, I do not find any acceptable reason to reject the marking the above confession statements of A4 to A6 through witnesses on the side of the prosecution.

23. Coming to the third point for consideration, ample power is vested with the Court under Section 311 Cr.P.C., at any stage of any inquiry, trial or other proceeding under Cr.P.C., to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. In order to substantiate his contentions, learned Special Public Prosecutor appearing for the revision petitioner/CBI relied on a decision of the Supreme Court reported in 2013 (14) SCC 461 (Rajaram Prasad Yadav Vs. State of Bihar), wherein, the Apex Court held as follows:

"14. A conspicuous reading of Section 311 CrPC would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding" "person as a witness", "person in attendance though not summoned as a witness" and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 CrPC.

It is, therefore, imperative that the invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examining of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution."

24. Therefore, in view of the dictum laid down by the Supreme Court in the above case, when A4 to A6 in this case cannot be treated as accused persons, there cannot be any impediment for the prosecution to examine them before the Court under Section 311 Cr.P.C., more particularly, when the fact remains that the charge sheet relating to A4 to A6 by showing them as "accused not sent up for trial", has not been disagreed by the Court below.

25. Thus, for the above stated reasons, the impugned order is liable to be set aside. Accordingly, the same is set aside. The CrI.R.C. is allowed. The trial Court shall permit the prosecution/CBI to include A4 to A6 as additional witness so as to examine them and proceed with the trial of the case in accordance with law and complete the trial and dispose of the case as expeditiously as possible.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

CS

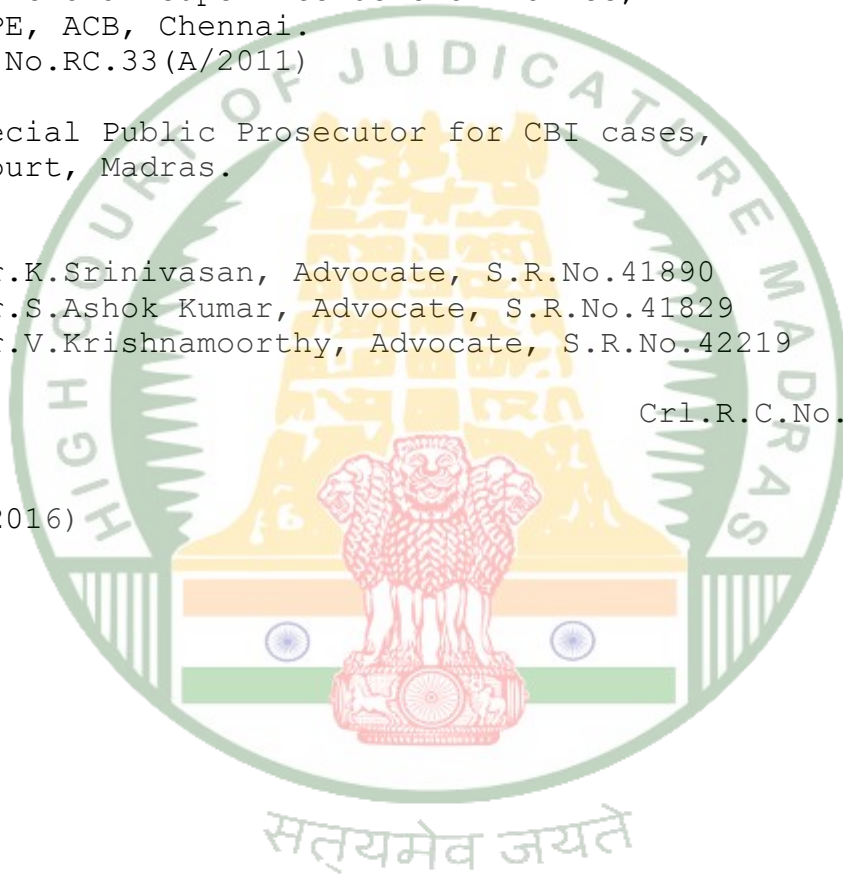
To

1. The Principal Special Judge for CBI Cases,
Chennai.
2. The IX Additional Special Judge for CBI cases,
Chennai.
3. The Additional Superintendent of Police,
CBI, SPE, ACB, Chennai.
(Crime No.RC.33(A/2011))
4. The Special Public Prosecutor for CBI cases,
High Court, Madras.

+1cc to Mr.K.Srinivasan, Advocate, S.R.No.41890
+1cc to Mr.S.Ashok Kumar, Advocate, S.R.No.41829
+1cc to Mr.V.Krishnamoorthy, Advocate, S.R.No.42219

Cr1.R.C.No.513 of 2016

VGI (CO)
CA(16/08/2016)



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