

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

% Decided on: 9th December, 2016

+ **CRL.M.C. 4589/2016**

KUNAL SINGH

..... Petitioner

Represented by: Mr. Meet Malhotra, Sr. Adv.
with Mr. Ajit K. Singh, Mr.
Kumar Sameer, Advs.

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Represented by: Mr. Sanjeev Bhandari, Spl. PP.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

CrI.M.A. 19201/2016

Exemption allowed subject to just exceptions.

CRL.M.C. 4589/2016

1. Aggrieved by the order of the learned Special Judge dated 5th October, 2012 on an application filed by the investigating officer for grant of pardon to accused Pankaj Bajaj under Section 306 Cr.P.C., the petitioner who is a co-accused prefers the present petition.

2. The operative portion of the impugned order reads as under:

“3. I have made inquiries from the accused Pankaj Bajaj and have gone through the material on record including his statement u/s. 164 Cr.P.C. recorded by Ms. Sheetal Chaudhary, Ld. MM, New Delhi on 03.10.2012 and 04.10.2012. Accused Pankaj Bajaj has stated that he has voluntarily made the confessional statement u/s. 164 Cr.P.C. before Ld. MM and has

truly disclosed the facts relating to the case. He has stated that he is aware about the implications of grant of tender of pardon to him. He has further stated that he will truthfully make full and true disclosure of the facts and circumstances of the case within his knowledge and persons relating to the offence. He has also stated that he will be liable for legal consequences u/s. 308 Cr.P.C. if he will be found guilty, concealing any material fact or giving false statement

4. Accused has already given his statement u/s. 164 Cr.P.C. before the Ld. MM which has been considered by me. His statement has been separately recorded today before me. He is ready to accept the tender of pardon and to accept all conditions including that he will disclose full and true facts pertaining to the offence in the present case within his knowledge relating to him and the other co-accuseds, failing which he will be liable to be prosecuted in accordance with the law.

He states that after taking legal consultation from his lawyer he has voluntarily decided to accept tender of pardon subject to the conditions imposed by the Court.

5. After careful consideration and in view of the above discussion, I am satisfied that there is need for procuring the evidence of the accused for prosecution in order to support its case against the other accused persons. I accordingly grant pardon to accused Pankaj Bajaj as requested by him, subject to condition of his making full and true disclosure of facts within his knowledge relating to the offence and to every other person relating to the offence at the stage of trial and failing which he will be liable to be prosecuted in accordance with section 308 Cr.P.C. The tender of pardon is subject to further condition u/s. 308 Cr.P.C. i.e. if the accused conceals any material fact, or gives false statement, he will be tried for the offence alleged against him."

3. The challenge to the impugned order by the petitioner is four-fold firstly that the impugned order granting pardon is not a speaking order as it does not consider that Pankaj Bajaj was the main accused and could not be

granted pardon, secondly, that the pardon was not granted on the application of the accused which is mandatory under Section 306 Cr.P.C., thirdly, the very fact that the investigating officer filed the application immediately after the statement of the co-accused was recorded under Section 164 Cr.P.C. shows that both the co-accused Pankaj Bajaj and investigating officer were hand in glove and fourthly, the statement of the co-accused was hit by Section 25 of the Evidence Act, hence cannot be used in evidence.

4. Per contra learned counsel for the CBI challenges the very maintainability of the present petition on the ground of delay contending that the petitioner cannot challenge the order dated 5th October, 2012 for grant of pardon after a period of more than four years.

5. A brief exposition of facts before dealing with the legal issues. A charge-sheet was filed for offences punishable under Section 120B IPC read with Sections 7, 12 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (in short the PC Act) against the officials of ELDECO Group and officers of the Income Tax department, including the petitioner, who was working as Director, Income Tax, Kanpur, pursuant to raid conducted on the ELDECO group of companies in March 2012 which included the residential and official premises of Pankaj Bajaj, Managing Director of group. It is alleged that after the raid, Pankaj Bajaj and Anil Kumar Jaiswal, Advocate to get the matter of income tax evasion settled by illegal means approached the various officials of Income Tax whereafter bribe was paid to the petitioner. The FIR in question was registered on 3rd June, 2012, when a raid was conducted at the house of the petitioner wherein the petitioner was found along with Pankaj Bajaj who according to the case of prosecution delivered ₹30 lakhs. On 3rd and 4th October, 2012 statement

of Pankaj Bajaj was recorded under Section 164 Cr.P.C. and on 5th October, 2012 the investigating officer of CBI filed an application under Section 306 Cr.P.C. seeking full and complete pardon for Pankaj Bajaj who had turned approver. A charge-sheet was filed and cognizance was taken by the learned Special Judge on 23rd February, 2013.

6. The first argument of learned counsel for the petitioner is that the order granting pardon is a non-speaking order and that the learned Trial Court has not dealt with the fact that the co-accused Pankaj Bajaj was the main accused at whose residence searches were made and absolving the main accused, the petitioner is sought to be implicated. As noted above, Section 306 Cr.P.C. also does not qualify that a person who is the main accused cannot be granted pardon. The requirement of the provision is that any accused who volunteers to make a full and true disclosure of the facts and circumstances of the case within his knowledge can be made an approver and pardon may be granted to him. In confirmation case No.2/2004 (State of Maharashtra Vs. Santosh Kumar Satish Bhushan Bariyar and Others) decided on 12th August, 2005, the Court held:

“We are unable to agree with Mr. Gupte. The role played by the accused can never be the consideration for grant or refusal of pardon. All that the learned Judge has to consider is whether the person to whom pardon is to be granted wants to make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. It is only on that condition pardon can be granted. Once that condition is satisfied, order granting pardon will have to follow because it is sought by the prosecuting agency with a view to obtaining evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence. The learned Judge cannot go into the aspect of the nature of his involvement or possible weight of his evidence.”

7. As regards the second contention that only an accused could have filed an application seeking pardon and not the investigating officer, learned counsel for the petitioner refers to the decision of the Supreme Court reported as (2013) 15 SCC 222 Central Bureau of Investigation Vs. Ashok Kumar Aggarwal & Ors. Referring to Para 7 of the report learned counsel submits that an application was filed by the accused therein for becoming an approver. Thus, no application could be filed by the investigating officer.

8. The judgment of the Supreme Court in Ashok Kumar Aggarwal (supra) has not dealt with the issue that an application filed by the investigating officer seeking pardon under Section 306 IPC for an accused is not maintainable. Merely because in the said case the application was filed by the approver would be no reason to come to the conclusion that an application by the investigating officer is not maintainable.

9. Section 306 Cr.P.C. reads as under:

“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 (46 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 (46 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.”

10. A plain reading of Section 306 Cr.P.C. shows that it does not qualify the person who can make an application for declaring an accused as an approver. Thus the said application can be filed by the accused who seeks pardon or by the investigating officer as well. The issue has been dealt by

the Supreme Court in the decision reported as (2001) 8 SCC 289 Jasbir Singh Vs. Vipin Kumar Jaggi & Ors. and it was held:

“18. Although the power to actually grant the pardon is vested in the court, obviously the court can have no interest whatsoever in the outcome nor can it decide for the prosecution whether particular evidence is required or not to ensure the conviction of the accused. That is the prosecution's job. This was the view expressed in *Lt. Commander Pascal Fernandes v. State of Maharashtra* [AIR 1968 SC 594 : 1968 Cri LJ 550] where it was said: (AIR p. 599, para 15)

“Ordinarily it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Special Judges he must first refer the request to the prosecuting agency. *It is not for the Special Judge to enter the ring as a veritable director of prosecution.* The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency, and must, therefore, be exercised only when the prosecution joins in the request. The State may not desire that any accused be tendered pardon because it does not need approver's testimony. It may also not like the tender of pardon to the particular accused because he may be the brain behind the crime or the worst offender. The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interests of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case.”

(emphasis supplied)”

11. Since the prosecution is competent to file an application seeking pardon to an accused who has agreed to turn an approver, no mala fide can be attributed in the prosecution filing the application seeking pardon immediately after the recording of the statement of the said accused under Section 164/306 Cr.P.C.

12. Learned counsel for the petitioner further contends that since Pankaj Bajaj is a co-accused rather the main accused, his confessional statement recorded is hit by Section 25 of the Evidence Act and thus not admissible in evidence.

13. Whether statement of co-accused is admissible or not is not required to be considered at this stage for the reason vide the impugned order the learned Trial Court on the basis of the statement of co-accused Pankaj Bajaj recorded under Section 164 Cr.P.C. has granted him pardon and this plea would be available to the petitioner to be urged during the course of trial. In Jasbir Singh(supra) the Supreme Court noted that while considering application for tendering pardon, the Court is not required to consider the possible weight of the approver's evidence or its probative value. It was held:

“19. Judged by this standard, the first order of the Sessions Judge refusing pardon to Respondent 1, even though it was actively canvassed for by the Special Public Prosecutor, was wrong. It was not for the Sessions Judge to have considered the possible weight of the approver's evidence, even before it was given. In any case, the evidence of an approver does not differ from the evidence of any other witness except that his evidence is looked upon with great suspicion. But the suspicion may be removed and if the evidence of an approver is found to be trustworthy and acceptable then that evidence might well be decisive in securing a conviction. [1995 Supp (1) SCC 80 :

1995 SCC (Cri) 60 : AIR 1994 SC 2420] The Sessions Judge could not and indeed should not have assessed the probable value of the possible evidence of Respondent 1 in anticipation and wholly in the abstract”

14. Though there is weight in the argument of learned counsel for the CBI that the present petition ought not to be entertained for the reason it has been filed belatedly after a period of more than four years, however this Court finds that besides delay even on merits no case is made out in favour of the petitioner.

15. Petition is accordingly dismissed.

(MUKTA GUPTA)
JUDGE

DECEMBER 09, 2016
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