THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.8775 OF 2017

ORDER:

This criminal petition is filed under Section 482 Cr.P.C to quash the order in Crl.M.P.No.255 of 2008 in R.C.No.4(A) of 2006 (later registered as C.C.No.14 of 2010).

Crl.M.P.No.255 of 2008 is filed under Section 5 of Prevention of Corruption Act r/w Section 306 of Cr.P.C to grant tender of pardon to the petitioner, treating him as an approver, alleging that during the year 2000 to 2003, the petitioner had a fabrication unit for iron grills, windows and doors in the name and style of M/s Srinivasa Engineering Works at Motinagar, Erragadda, near glass factory. The petitioner had a bank account in the name of Srinivasa Engineering Works at IOB, Rajbhavan Road with A/c No.11922 in IOB, Kalyan Nagar and the petitioner availed housing loan in the said bank. Further, the petitioner also had bank accounts in OBC (Old GTB), Banjara Hills, Road No.12 and HDFC, Sanjiva Reddy Nagar, Hyderabad. It is stated that the petitioner was implicated in an offence which is punishable under the provisions of Prevention of Corruption Act and the petitioner is no way connected with the said offence, though he was arrayed as an accused. The petitioner submits that he is ready to disclose true facts, if permission is granted to him granting pardon.

On receipt of notice in the petition, the Inspector of Police, C.B.I., Visakhapatnam, filed a memo dated 26.02.2008 before the Court of Special Judge for C.B.I. Cases, Visakhapatnam, informing that the prosecution i.e. C.B.I has no objection if the Court

considers tender of pardon to the petitioner with a view to obtain the evidence, as the petitioner is supposed to have been directly or indirectly concerned in or privy to the offence, 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. The Court below dismissed Crl.M.P.No.255 of 2008 on the ground that though the Court below granted several adjournments, to record the statement of the petitioner and posted the matter as last chance, there was no representation either on behalf of the petitioner or the counsel appearing on behalf of him was appealed.

During hearing, learned counsel for the petitioner contended that the petitioner is ready to disclose the true facts, if pardon is granted and that apart, several accused were granted pardon by exercising power under Section 5(2) of Prevention of Corruption Act r/w Section 306 I.P.C and denial of pardon to the present petitioner while granting pardon to the other accused is nothing but discrimination of similarly situated persons. Therefore, learned counsel for the petitioner requested this Court to grant pardon to the petitioner.

Learned Public Prosecutor for C.B.I. opposed the petition on the ground that the other accused were granted pardon vide Crl.M.P.Nos.256 & 257/08 in R.C.4(A)/06 of C.B.I., Visakhapatnam and the petitioner is arrayed as an accused in Crl.M.P.No.255 of 2008 in R.C.No.4(A) of 2006.

In view of the above contentions, the point that arose for consideration is:

"Whether the petitioner is entitled for pardon under Section 5(2) of Prevention of Corruption Act r/w Section 306 Cr.P.C."

The main contention of the learned counsel for the petitioner is that, the Court can grant pardon by exercising power under Section 5(2) of Prevention of Corruption Act or under Section 306 Cr.P.C.

Learned counsel also relied on a judgment reported in ***Amitbhai Anilchandra Shan v. Central Bureau of Investigation and another***[1] to the same effect.

The petitioner filed this petition under Section 5(2) of the Act which is in pari materia with Section 306 of Cr.P.C. Section 5(2) of the Act and Section 306 of Cr.P.C., confers discretionary power on the Court to grant pardon to the accused only when no other evidence is available to prove guilt of accused in serious offences and recording of satisfaction by the Court is mandatory.

In ***State of Maharashtra v. Abu Salem Abdul Kayyum Ansari and others***[2], the salutary principle of tendering a pardon to an accomplice is to unravel the truth in a grave offence so that guilt of the other accused persons concerned in commission of crime could be brought home. It has been repeatedly said by this Court that the object of Section 306 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

[1] (2013) 6 SCC 348
[2] (2010) 10 SCC 179

pardon, the offence may be brought home to the rest. Section 306 Cr.P.C. empowers the Chief Judicial Magistrate or a Metropolitan Magistrate to tender a pardon to a person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies, at any stage of the investigation or inquiry or trial of the offence on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence. The Magistrate of the first class, under Section 306, is also empowered to tender pardon to an accomplice at any stage of inquiry or trial but not at the stage of investigation on condition of his making full and true disclosure of the entire circumstances within his knowledge relative to the crime. Section 307 vests the court to which the commitment is made, with power to tender a pardon to an accomplice. The expression, `on the same condition' occurring in Section 307, obviously refers to the condition indicated in sub-section (1) of Section 306, namely, on the accused 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. An accomplice who has been granted pardon under Section 306 or 307 Cr.P.C gets protection from prosecution. When he is called as a witness for the prosecution, he must comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge concerning the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and if he suppresses anything material and essential within his

knowledge concerning the commission of crime or fails or refuses to comply with the condition on which the tender was made and the Public Prosecutor gives his certificate under Section 308 Cr.P.C. to that effect, the protection given to him is lifted. The power to grant pardon carries with it the right to impose a condition limiting the operation of such a pardon. Hence a pardoning power can attach any condition, precedent or subsequent so long as it is not illegal, immoral or impossible of performance. Section 306 clearly enjoins that the approver who was granted pardon had to comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other concerned whether as principal or abettor, in the commission thereof."

In similar lines, in ***P.C. Mishra v. State (C.B.I.) and another***[3], the Hon'ble Apex Court held that power to grant pardon enjoined under Section 306 Cr.P.C. is a substantial power and the reasons for tendering pardon must be recorded. It is for the prosecution to ask that a particular accused, out of several, may be granted pardon, if it thinks that it is necessary in the interest of successful prosecution of other offenders or else the conviction of those offenders would not be easy. This Court in State of U.P. v. Kailash Nath Agarwal and others (1973) 1 SCC 751 recognised the power of the District Magistrate to grant pardon at the investigation stage. This Court in Kanta Prashad v. Delhi Administration AIR 1958 SC 350 had the occasion to examine the scope of Section 337 and 338 of the old Code (Cr.P.C. 1898) vis- à-

[3] (2014) 14 SCC 629

vis the powers of a Special Court constituted under the Criminal Law (Amendment) Act, 1952. This Court held that, reading the proviso to Section 337 and provisions of Section 338 together, the District Magistrate is empowered to tender a pardon even after a commitment, if the Court so directs. It was also held that under Section 8(2) of the Criminal Law (Amendment) Act, 1952, the Special Judge has also been granted power to tender pardon. The conferment of this power on the Special Judge in no way deprives the District Magistrate of his power to grant a pardon under Section 337 of the Code. It was held if at the time when the District Magistrate tenders the pardon, the case was not before the Special Judge, then there is no illegality committed by the District Magistrate. The scope of above-mentioned provisions again came up for consideration before this Court in Kailash Nath Agarwal (supra), wherein this Court after referring to its earlier judgment in Kanta Prashad (supra) held that it will be noted from this decision that emphasis is laid on the fact that the proviso to Section 337 contemplates concurrent jurisdiction in the District Magistrate and in the Magistrate making an inquiry or holding the trial to tender pardon. It is also emphasised that the conferment of the power to grant pardon on the Special Judge does not deprive the District Magistrate of his power to grant pardon under Section 337. In Bangaru Laxman (supra), this Court has stated that the power of Special Judge to grant pardon is an unfettered power and held that, while trying the offences, the Special Judge has dual power of a Special Judge as well as that of a Magistrate. This Court, while interpreting Section 5, then went on to say that on a harmonious

reading of Section 5(2) of the PC Act with the provisions of Section 306, specially Section 306(2)(a) of the Code and Section 26 of the PC Act, this Court is of the opinion that the Special Judge under the PC Act, while trying offences, has the dual power of the Sessions Judge as well as that of a Magistrate. Such a Special Judge conducts the proceedings under the court both prior to the filing of charge-sheet as well as after the filing of charge- sheet, for holding the trial. Since this Court has already held that the Special Court is clothed with the magisterial power of remand, thus in the absence of a contrary provision, this Court cannot hold that power to grant pardon at the stage of investigation can be denied to the Special Court. In view of the discussion made above, this Court is of the opinion that the power of granting pardon, prior to the filing of the charge- sheet, is within the domain of judicial discretion of the Special Judge before whom such a prayer is made, as in the instant case by the prosecution.

The same view is taken in a latter judgment of Hon'ble Apex Court in State of Rajasthan v. Balveer @ Balli and another4.

As per the decision in P.C. Misra's case it is for the prosecution to ask that a particular accused, out of several, may be granted pardon, if it thinks that it is necessary in the interest of successful prosecution of other offenders or else the conviction of those offenders would not be easy. But this question came up before Hon'ble Apex Court earlier in Lt. Commander Pascal Fernandes v. The State of Maharastra and others5, wherein the Hon'ble Apex Court held that there can be no doubt that the

[4] AIR 2014 SC 1117
[5] AIR 1968 SC 594

section is enabling and its terms are wide enough to enable the Special Judge to tender a. pardon to any person who is supposed to have been directly or indirectly concerned in, or privy to an offence. This must necessarily include a person arraigned before him. But it may be possible to tender pardon to a person not so arraigned. The power so conferred can also be exercised at any time after the case is received for trial and before its conclusion. There is nothing in the language of the section to show that the Special Judge must be moved by the prosecution. He may consider an offer by an accused as in this case. The action, therefore, was not outside the jurisdiction of the Special Judge in this case.

The Hon'ble Apex Court also held that there is nothing in the language of the section to show that the Special Judge must be moved by the prosecution. The Special Judge may consider an offer by an accused as in this case. The action, therefore, was not outside the jurisdiction of the Special Judge in this case. The Apex Court further held that the next question is whether the Special Judge acted with due propriety in his jurisdiction. Here the interests of the accused are just as important as those of the prosecution. No procedure or action can be in the interest of justice if it is prejudicial to an accused. There are also matters of public policy to consider. Before the Special Judge acts to tender pardon, he must, of course, know the nature of the evidence the person seeking conditional pardon is likely to give, the nature of his complicity and the degree of his culpability in relation to the offence and in relation to the co-accused.

Thus, from the long line of perspective pronouncements of Hon'ble Apex Court, it is for the Court to decide when the Court pardon the accused by exercising power conferred under Section 306 of Cr.P.C., or Section 5 (2) of the Act, only when the Court came to the conclusion that the guilt of the accused in heinous crimes cannot be bring home unless the person who came forward to give evidence as approver. Therefore, it is for the Court to decide whether to grant pardon or not, even the Public Prosecutor or the respondent opposed such application or the petitioner himself voluntarily approached this Court for grant of such pardon.

If the culpability of the petitioner is taken into consideration and when the Court concluded that there is some other material to bring home the guilt of other accused the Court can negate such request by exercising power under Section 306 of Cr.P.C. No absolute right is conferred on the accused to seek pardon either under Section 5 (2) of the Act and Section 306 of Cr.P.C., but it is for the Court to decide whether such pardon can be granted to the accused who approached the Court by filing an application taking into consideration of the entire material before the Court including the evidence to be let in by the prosecution and unless the Court concludes that the case against the other accused cannot be brought home the guilt, unless, the petitioner is granted pardon and examined as a witness, more particularly in heinous and serious offences.

Here, the alleged offences committed by the accused is serious offences punishable under the Prevention of Corruption Act, therefore, the order under challenge, declining to grant pardon

to the petitioner is not erroneous warranting interference by this Court under Sections 397 and 401 of Cr.P.C.

Learned counsel for the petitioner contended that similar applications were filed by the other accused and they were granted pardon and the petitioner is also placed similarly and requested this Court to extend the similar benefit to this petitioner. But, this contention cannot be accepted for the reason that granting pardon is almost exempting him from the trial, though he was arrayed as an accused and such power can be exercised sparingly by the Courts in exceptional circumstances where the Courts found that no other evidence available to prove the guilt of the prime accused except the evidence of approver and the Court is not required to grant pardon to the accused, whoever approaches the Court, as a matter of routine. If the Court goes on extending benefit under Section 5(2) of Prevention of Corruption Act or Section 306 Cr.P.C, then there will not be any proceedings pending against anyone of them. But, such power cannot be exercised to grant pardon to each and every accused who filed an application. Merely because such benefit was extended to the other accused, the petitioner is not entitled to claim such benefit as a matter of right though he is similarly placed. It is for the Court to decide whether the guilt of the prime accused can be brought home with the aid of the other accused and in exceptional circumstances where the Court considers that there was no other material to prove the guilt of prime accused, except that the evidence of an accomplice. Therefore, it is for the satisfaction of the Court to decide whether the benefit under Section 5(2) of Prevention of Corruption Act or

Section 306 Cr.P.C can be extended to this petitioner or not. In fact, in view of extending such benefit to the other accused who are accomplices, as the prime accused to this petitioner, question of granting such benefit to this petitioner does not arise in ordinary course. Therefore, this contention of the learned counsel for the petitioner would not stand to any legal scrutiny and it is rejected.

Hence, I find no ground to interfere with the findings of the order passed by the Court below and to grant pardon to this petitioner since the Trial Court recorded its reason that the prosecution cannot prove the complicity of other accused even without the aid of evidence of the petitioner.

In the result, the Criminal Revision Case is dismissed.

Consequently, miscellaneous petitions, if any, pending in this Criminal Revision Case shall stand closed.

JUSTICE M. SATYANARAYANA MURTHY

Date:18.09.2017

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