

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

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Reserved on: 18th April, 2017

Decided on: 19th May, 2017

+ **CRL.M.C. 3482/2011 & Crl.M.A. 5897/2017 (stay)**

SRIKANT JAIN

..... Petitioner

Represented by: Mr. Manoj Ohri, Sr. Adv. with
Mr. Arun Srivastava, Mr. Y.R.
Sharma, Mr. Abhimanyu Singh,
Advts.

versus

STATE THR. CBI

..... Respondent

Represented by: Mr. Narender Mann, Spl. PP
with Mr. Manoj Pant, Adv.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Challenging the impugned order dated 7th October, 2011 dismissing the application of the petitioner seeking directions for sending back the trial to the court of learned Chief Metropolitan Magistrate (CMM) Delhi, the petitioner prefers the present petition.

2. A brief background of the case before coming to the issue involved in the present petition is that RC No.3/81/CIU(A) was registered by the CBI for offences punishable under Sections 120B/380/411/414 IPC and Section 25(2) read with Section 14(3) of the Antiquities & Art Treasurer Act, 1972 (in short 'the Act')on 26th August, 1981 and on completion of investigation charge-sheet was filed before the learned CMM. On 8th February, 1983 during the course of investigation, statement of Jhanna Lal who sought to turn as an approver was recorded by learned CMM. On 28th February, 1983

the charge-sheet and the complaint case were filed. On 1st March, 1983 cognizance of the offences was taken by the learned CMM. On 8th January, 1986 case was sent to the learned Metropolitan Magistrate by the learned CMM for recording of the statement of the approver when on 17th December, 1986 statement of Jhanna Lal was recorded as PW-1 by the learned Metropolitan Magistrate in the complaint case but not in the State case. On 28th September, 1987 both the State case and the complaint case were clubbed and directed to be tried together as State case. The learned Metropolitan Magistrate also observed that since the examination-in-chief of the approver had been recorded in the complaint case only so his examination-in-chief be recorded again on 1st December, 1987. However, later vide order dated 15th March, 1989 the learned Metropolitan Magistrate noted that there was no need of examining the approver again. On 8th January, 1990 the file was sent to the learned CMM as statement of the approver had been recorded by the learned Metropolitan Magistrate. On 11th October, 1996 charge was framed against the accused and on 6th September, 1999 the learned CMM sent the case for trial to the learned Additional Sessions Judge (ASJ) when the learned ASJ re-framed the charge on 15th February, 2011. On 30th April, 2011 Jhanna Lal the approver passed away without being examined and cross-examined before the learned ASJ. Intimation of death of Jhanna Lal was given to the Court on 26th July, 2014 and on the same day, petitioner filed an application seeking transfer of the trial to the Court of learned CMM which was dismissed by the impugned order dated 7th October, 2011.

3. Contention of learned counsel for the petitioner in the present petition is that since Jhanna Lal, the approver passed away and his statement during

the course of trial was no more required to be recorded by the learned ASJ, the trial ought to have been transferred to the learned CMM which is the Court of competent jurisdiction to try the offences charged with. He contends that charge against the accused was framed by the learned ASJ on 15th February, 2011 and the information of death of Jhanna Lal was placed before the learned ASJ on 26th July, 2011 and on the same day the petitioner filed an application seeking transfer of trial to the learned CMM which was dismissed vide the impugned order dated 7th October, 2011. He further contends that the tender of pardon under Section 306 Cr.P.C. is always conditional and not absolute. Only in exceptional circumstances can the trial be conducted by the Court superior to the Court of competent jurisdiction and the conditions warranting such a trial by a superior Court do not exist, therefore, the Court of learned CMM should try the offences. He further states that aggrieved by the order dated 7th October, 2011 the petitioner preferred this petition in the year 2011 itself, however since the same could not be decided and the trial having not been stayed is at fag end therefore he does not press for de-novo trial but prays that even at this stage if the trial is transferred to the learned CMM he will not lose the right of filing an appeal before the learned ASJ which is a valuable right as held by the Supreme Court in A.R. Antulay Vs. R.S. Nayak (1988) 2 SCC 602. Learned counsel for the petitioner relies upon the decisions reported as 1989 Supp (2) SCC 77 State (Delhi Administration) Vs. Jagjit Singh, AIR 1994 SC 2420 Suresh Chandra Bahri Vs. Gurbachan Singh, 1995 CrI.L.J. 2866 M.A. Merchant Vs. State (CBI) and 2005 CrI.L.J. 3848 L.S. Asokan Vs. State of Kerala.

4. Learned counsel for the CBI on the other hand referring to the order dated 10th February, 1983 passed by the learned CMM granting conditional

pardon to Jhanna Lal states that once pardon is granted or accepted the process becomes irreversible and any subsequent events cannot divest the Court to try the offence. Further as per Section 26 Cr.P.C. the Court of Sessions is also competent to try the offences and the petitioner if convicted will not lose his right to appeal as the same will be available before the High Court. Learned counsel for the CBI further referring to the order dated 6th September, 1999 wherein on the consent of the parties case was transferred to the Court of Sessions contends that the order dated 6th September, 1999 having not been challenged the same has attained finality and merely passing away of Jhanna Lal cannot undo the finality attached to the order dated 6th September, 1999.

5. Though raised at one point of time that since the statement of Jhanna Lal was recorded by the learned MM, the trial should take place before the learned CMM, learned counsel for the petitioner gave up this argument for the reason the order dated 6th September, 1999 transferring the case for trial to Sessions Court was passed on a consent and has not been challenged. Thus, the only issue required to be considered by this Court is that on the death of Jhanna Lal and as statement of the approver was not required to be recorded by the Court of Sessions, whether the trial should be remanded back to the learned CMM or not.

6. 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.”

7. In Suresh Chandra Bahri (supra) the Supreme Court held:

“30. A bare reading of clause (a) of sub-section (4) of Section 306 of the Code will go to show that every person accepting the tender of pardon made under sub-section (1) has to be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Sub-section (5) further provides that the Magistrate taking cognizance of the offence shall, without making any further enquiry in the case commit it for trial to any one of the courts mentioned in clauses (i) or (ii) of clause (a) of sub-section (5), as the case may be. Section 209 of the Code deals with the commitment of cases to the Court of Session when offence is tried exclusively by that court. The examination of accomplice or an approver after accepting the tender of pardon as a witness in the Court of the Magistrate taking cognizance of the offence is thus a mandatory provision and cannot be dispensed with and if this mandatory provision is not complied with it vitiates the trial. As envisaged in sub-section (1) of Section 306, the tender of pardon is made on the condition that an approver shall make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. Consequently, the failure to examine the approver as a witness before the committing Magistrate would not only amount to breach of the mandatory provisions contained in clause (a) of sub-section (4) of Section 306 but it would also be inconsistent with and in violation of the duty to make a full and frank disclosure of the case at all stages. The breach of the provisions contained in clause (a) of sub-section (4) of Section 306 is of a mandatory nature and not merely directory and, therefore, non-compliance of the same would render committal order illegal.

The object and purpose in enacting this mandatory provision is obviously intended to provide a safeguard to the accused inasmuch as the approver has to make a statement disclosing his evidence at the preliminary stage before the committal order is made and the accused not only becomes aware of the evidence against him but he is also afforded an opportunity to meet with the evidence of an approver before the committing court itself at the very threshold so that he may take steps to show that the approver's evidence at the trial was untrustworthy in case there are any contradictions or improvements made by him during his evidence at the trial. It is for this reason that the examination of the approver at two stages has been provided for and if the said mandatory provision is not complied with, the accused would be deprived of the said benefit. This may cause serious prejudice to him resulting in failure of justice as he will lose the opportunity of showing the approver's evidence as unreliable. Further clause (b) of sub-section (4) of Section 306 of the Code will also go to show that it mandates that a person who has accepted a tender of pardon shall, unless he is already on bail be detained in custody until the termination of the trial. We have, therefore, also to see whether in the instant case these two mandatory provisions were complied with or not and if the same were not complied with, what is the effect of such a non-compliance on the trial?

32. It may be noticed that similar question arose for consideration of Madras High Court in Ramasamy, Re [1976 Cri LJ 770 : 1976 Mad LJ (Cri) 111 : 1976 Mad LW (Cri) 36 (Mad)] and relied on by the learned counsel for appellants, wherein the learned Magistrate had committed the case for trial to the Court of Sessions without examining the approver as a witness in his court before committing the case. But Pandian, J. (as he then was) took the view that the action of the Magistrate in committing the case to the Court of Session without examining the approver was a clear violation of the mandatory provisions of Section 306 of sub-sections (4) and (5) of the new Code and as such he committed irregularity. The learned Judge, therefore, quashed the committal order and directed the Magistrate to comply with the provisions of Section 306 of the

Code by examining the approver and then again pass fresh order of committal, if called for. In almost similar circumstances similar view was taken by the High Court of Andhra Pradesh in the case of U. Vijayaraj [1986 Cri LJ 2104 : (1986) 1 Andh LT 364 : (1986) 2 APLJ (HC) 19 (AP)] and in this case also the Magistrate was directed to examine the approver as required by sub-section (4) of Section 306 of the Code by giving an opportunity to the accused to cross-examine the approver and then pass the appropriate orders in accordance with law.”

8. In State (Delhi Administration) Vs. Jagjit Singh (supra) the Supreme Court reiterated that sub-Section 4 of Section 306 Cr.P.C. casts an obligation on the prosecution to examine the approver both in the committing court as well as in the trial Court even though he has resiled from his earlier statement and tried to conceal what was within his knowledge with regard to the offence in question.

9. A similar issue as in the present petition came up before this Court in M.A. Merchant (supra) wherein this Court held:

“22. The bare reading of Section 306(4) Code of Criminal Procedure clearly shows the intention of the Legislature that every person accepting a tender of pardon made under sub-section (1) shall be examined as a witness in the court of the Magistrate. Taking cognizance of the offence and in the subsequent trial and unless a person is examined as a witness, there cannot be any exceptions of tender of pardon. In this case, the approver H. K. Jhalla died in the year 1979 before he could be examined by the Magistrate or by the court of Sessions. Once there is no examination of the witness by any court as envisaged by Section 306, the tender of pardon is not complete and consequently, Section 306 of the Code of Criminal Procedure cannot be attracted. Their Lordships of the Supreme Court in Bipin Behari Sarkar (supra) while interpreting this Section have clearly mentioned that a mere tender of pardon does not attract

the provisions of Section 338 equivalent to 338(1) of new Code. There must be an acceptance of it. This view has been reiterated in the subsequent judgments. In the instant case, before H. K. Jhalla, approver could be examined, he died. The tender of pardon is never complete unless the concerned witness has been examined. This is the legislative mandate and has to be followed. In the instant case, the petition itself cannot be termed as bona fide because the same has been filed after 209 witnesses have been examined and after a lapse of more than a decade.”

10. As noted above, in Suresh Chandra Bahri and M.A. Merchant it was held that tender of pardon is complete only after the approver is examined before the Court and cross-examined by the parties. Where the approver dies before examination, tender of pardon is not complete and Section 306 Cr.P.C. will have no application.

11. Learned Additional Sessions Judge vide the impugned order noted that the mere fact of the approver having expired would not be in his opinion a ground to send the trial back or to reverse the procedure of tender of pardon which had already been completed, as the statement of the approver had been recorded before the committal court and further that there is no procedure of de-committal in the Code of Criminal Procedure, 1973.

12. Learned Additional Sessions Judge failed to notice that it was not otherwise a court of competent jurisdiction to try the offences charged with and was trying the offences only because the approver had been examined by the learned Metropolitan Magistrate and learned CMM and he was required to be examined before the Court of Sessions as a witness and cross-examined by the accused under Section 306(4) Cr.P.C. and only then the process of tender of pardon would have been complete. It would have been a different

case where after the trial had commenced and some witnesses examined without the examination of the approver, when the learned Additional Sessions Judge could have continued with the trial, but in the present case before any witness including the approver could be examined, the approver passed away. Thus, the very requisite of Section 306 Cr.P.C. not being there before the learned Additional Sessions Judge it ought to have transferred the trial back to the learned CMM which was the Court of competent jurisdiction to try the offences charged with.

13. During the pendency of the present petition, number of witnesses have been examined before the learned Additional Sessions Judge. Thus, the issue now before this Court is that since trial due to the pendency of the petition is at the fag end, should it be retransferred back to learned CMM for passing the final order or should it be retained by the learned Additional Sessions Judge.

14. Section 407 Cr.P.C. empowers the High Court to even transfer cases from a criminal court subordinate to its authority to any other criminal court of similar or superior jurisdiction. Thus, Cr.P.C. itself contemplates that in a given case if found fit trial can be conducted by the court of competent jurisdiction or even a superior court. Reliance of learned counsel for the petitioner on the decision of the Supreme Court in A.R. Antulay (supra) is misconceived for the reason in the said case the Hon'ble Supreme Court was dealing with a trial which could be conducted only by a Special Court. It was held that Section 7(1) of the Criminal Law Amendment Act, 1952 created a condition which is sine qua non for the trial of offences under Section 6(1) of the said Act and Section 7(1) of the Act started with a non obstante clause i.e. notwithstanding anything contained in Cr.P.C. or any

other law, the offences charged therein shall be tried by Special Judges only. It was in the light of Section 7(1) of the Criminal Law Amendment Act, 1952 Supreme Court held that it excluded the power of the High Court and the Supreme Court to transfer and try a case triable by the Special Judge exclusively.

15. In the decision reported as (2005) 12 SCC 329 Pal Singh Vs. CBI the Supreme Court set aside the order of the High Court transferring the case from one Sessions Court to another since large number of witnesses had been examined and only few more witnesses were left to be examined. The decision in Pal Singh (supra) was reiterated by the Supreme Court in its later decision reported as (2007) 3 SCC 62 Satish Jaggi Vs. State of Chhattisgarh & Ors.

16. Dealing with the issue whether after commitment of the case to the Sessions Judge whether only Sessions Judge could grant the pardon or the same could be granted even by the Chief Judicial Magistrate when both were competent to grant the pardon, Division Bench of the Madras High Court in the decision reported as 1996 CrL.L.J. 2209 In re: Deivendran held-

“35. We also find from the records and the proceedings of the Courts below that no objection was taken by any of the appellants to the procedure adopted by the trial Judge and the proceedings initialed by P.W. 19. Even after the completion of the trial, while arguing a case for the defence, there was absolutely no argument relating to the validity of the proceedings under Section 307. Cr. P.C. Looked at from another angle also, we find that absolutely no prejudice was caused to the accused appellants on account of the fact that the Chief Judicial Magistrate granted pardon to P.W. 1. In a criminal trial, one must always see that no prejudice is caused to the accused and the accused have a fair and unbiased trial. To this extent we have no hesitation in holding that the accused/appellants were not at all prejudiced by the proceedings

of the Courts below. Learned Public Prosecutor rightly relies on Sections 460 and 464. Cr. P.C. and argues that there has been no failure of justice on account of the Chief Judicial Magistrate granting pardon to the fourth accused. For all the above reasons, we do not accept the arguments advanced on behalf of the defence that the grant of pardon by the Chief Judicial Magistrate, P.W. 19. is vitiated and the evidence of P.W. 1 cannot therefore, be relied upon.”

17. Merely relying upon the decision in A.R. Antulay (supra), the petitioner cannot contend that he is prejudiced by the trial being conducted by the learned Additional Sessions Judge. No material whatsoever has been placed to show that prejudice has been caused to the petitioner during trial conducted by the learned Additional Sessions Judge. Further the appellant also does not lose his right to appeal which would be available before the High Court.

18. In view of the discussion above, though agreeing with the contention of learned counsel for the petitioner that since on the death of Jhanna Lal the process of grant of pardon came to an end before he could be examined and cross-examined as a witness during trial and as the trial was at the initial stage itself, the trial ought to have been transferred back to the Court of learned CMM however considering the fact that now the trial has proceeded and it is at the fag end, this Court does not find it to be a fit case to transfer back the trial to the learned CMM.

19. Petition and application are dismissed.

20. Trial Court Record to be sent back.

(MUKTA GUPTA)
JUDGE

MAY 19, 2017
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