

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

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Reserved on: 5th December, 2016

Decided on: 4th January, 2017

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CRL.M.C. 4035/2016 & Crl.M.A. 16890/2016

KAMLESH KUMAR JHA & ORS.

..... Petitioner

Represented by: Mr. Sanjiv Kumar, Sr. Adv.
with Mr. S.K. Santoshi and Mr.
Sunil Sethi, Advs.

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Represented by: Ms. Rajidipa Behura, Spl. PP.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Aggrieved by the order dated 8th August, 2016 passed by the learned CMM declining the prayer of the applicants to not commit the case for trial to the Court of learned Sessions Judge and the order dated 18th October, 2016 passed by the learned Special Judge dismissing the revision petition, the petitioners prefer the present petition.

2. RC No. CY1 2009 E 0006 under Sections 405/418/420/486/34 & 120B IPC read with Section 63 of the Copyright Act and 66B of the IT Act was registered on the complaint of Microsoft India Ltd. wherein a charge-sheet was filed before the learned ACMM. On 13th December, 2012 the learned ACMM recorded the statement of Krishna Kumar, one of the co-accused and granted him pardon subject to the condition that in case he fails

to disclose true and correct facts in terms of his statement recorded under Section 164 Cr.P.C. during the course of trial, appropriate order would be passed. Learned ACMM took cognizance of the offence vide order dated 13th December, 2012 where after the statement of approver Krishna Kumar was recorded by the learned CMM from 9th July, 2014 to 27th May, 2016 under Section 306(4) Cr.P.C. Vide the impugned order dated 8th August, 2016 the learned CMM committed the case for trial to the Court of Sessions. The petitioners preferred a revision petition against the order dated 8th August, 2016 which was dismissed vide impugned order dated 18th October, 2016.

3. Emphasizing on the provision of Section 306(5) Cr.P.C. learned Senior counsel for the petitioner submits that after the statement had been recorded by the learned ACMM and a pardon granted to the co-accused Krishna Kumar the case could not have been committed to the learned Sessions Court for trial but ought to have been committed to the Court of learned CMM who erroneously recorded the second statement of the approver Krishna Kumar.

4. Reliance is placed on the decision of the Supreme Court in Dilip Sudhakar Pendse & Anr. Vs. Central Bureau of Investigation CrI.A. 966/2013 decided on 16th July, 2013. It is contended that committal of the trial to the Court of Sessions has materially prejudiced the petitioners inasmuch as they lose a right of filing a revision petition against the order on charge or an appeal in case of conviction. The reasoning of the learned Special Judge that since the learned CMM examined the approver under Section 306(4) Cr.P.C. it would defeat the objective of Section 306 Cr.P.C. if the trial is conducted by the same Court is erroneous and illegal.

5. Learned Spl. PP for the State on the other hand submits that the issue stands settled by the Division Bench of Bombay High Court in the decision reported as 1979 (81) BOM LR 184 State of Maharashtra Vs. Shanti Prasad Jain. Referring to the decision of a Single Judge of Tamil Nadu High Court reported as 1987 Cr.L.J. 1012 V. Krishnaswami Vs. State of Tamil Nadu it is contended that committal under Section 306 Cr.P.C. can be made only by a judicial authority of a lower rank to a judicial authority of a higher rank.

6. The issue which arises for consideration in the present petition is whether after a statement of the co-accused Krishna Kumar was recorded by the learned ACMM and a subsequent statement was recorded under Section 306 (4) Cr.P.C. by the learned CMM, whether the case was required to be committed to the Court of Sessions for trial or retained by the learned CMM.

7. Before advertng to the rival contentions, it would be appropriate to note Section 306 Cr.P.C.

“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.”

8. The Division Bench of the Bombay High Court in State of Maharashtra (supra) considering the various provisions of the Criminal Procedure Code 1898 and Criminal Procedure Code 1973 held that a Court of an Additional Chief Metropolitan Magistrate is not subordinate to Chief

Metropolitan Magistrate and once the statement was recorded either by the learned ACMM or the learned CMM the case ought to have been committed to the Court of Sessions. It was held:

“1. This is a reference by the Additional Chief Metropolitan Magistrate, third Court, Esplanade, Bombay, under Section 395(2) of the Criminal Procedure Code. He has formulated the following three points for decision of the High Court;

(1) Additional Chief Metropolitan Magistrate, Bombay, being invested with all the judicial powers of the Chief Metropolitan Magistrate, whether Additional Chief Metropolitan Magistrate can be considered on par with the Chief Metropolitan Magistrate for the purpose of Section 306 of the Criminal Procedure Code?

(2) Whether in Sub-clause (i) of Clause (a) of Sub-section (5) of Section 306 viz. "... or if the Magistrate taking cognizance is the Chief Judicial Magistrate", the expression "Chief Judicial Magistrate (Chief Metropolitan Magistrate in Bombay)" includes Additional Chief Metropolitan Magistrate?

(3) Whether if the Magistrate taking cognizance of the offence under Section 306 is Additional Chief Metropolitan Magistrate, he like the Chief Metropolitan Magistrate, has to commit the case for trial to the Court of Session under Sub-clause (0 of Clause (a) of Sub-section (3) of Section 306 or whether he has to make over the case for trial to the Chief Metropolitan Magistrate under Clause (b) of Sub-section (5) of Section 306?

2 to 36. xx xx xx xx

37. If this is so, can we say that an Additional Chief Metropolitan Magistrate, who has all the powers of the Chief Metropolitan Magistrate so far as the judicial functions are concerned, be treated in any different way? In fact the permissive provisions of the Code which authorise the High

Court to appoint one or more Additional Chief Metropolitan Magistrate, assume that more Courts may be required due to the increase of the litigation which require infliction of punishment upto seven years. In other words, more Courts of that jurisdiction parallel to that of the Chief Metropolitan Magistrate are required by the state of litigation and enough number of such Magistrates are to be provided by the High Court for disposal of business. The Chief Metropolitan Magistrate and the Additional Chief Metropolitan Magistrate are thus Courts of the same status having the same and identical jurisdiction so far as the trial of criminal cases is concerned.

38. If that is so, the effect of directing the transfer of a case which involves an approver, from the Court of the Additional Chief Metropolitan Magistrate to the Court of Chief Metropolitan Magistrate would defeat the very purpose and run counter to the principle underlying the provisions of Section 306(5) (fr). On the contrary the intention of the Legislature can be best carried out by reading the expression 'Chief Judicial Magistrate' in that sub-section to include also the 'Additional Chief Judicial Magistrate'. While reading that sub-section in relation to Bombay Metropolitan area it will mean that the expression 'Chief Metropolitan Magistrate' also includes the 'Additional Chief Metropolitan Magistrate'."

9. In the decision relied upon by the learned counsel for the petitioner i.e. Dilip Sudhakar Pendse (supra) cognizance was taken by the Court of Magistrate and the statement of the approver was also recorded by the same Court which granted pardon to the accused. It is in that fact situation the Supreme Court held that since the offences were not exclusively triable by the Court of Sessions and the Magistrate taking cognizance was not the Chief Judicial Magistrate nor were offences triable by the Special Judge

under the Criminal Law Amendment Act, 1952 therefore the case had to be made over to the Chief Judicial Magistrate for trial.

10. Vide the order dated 8th August, 2016 the learned CMM held that since statement was recorded by the learned ACMM and then by the learned CMM the case had to be committed to the Court of learned Sessions Judge even though offences were not exclusively triable by the Court of Sessions. The same view was taken in the revision filed before the learned Special Judge vide the impugned order and this Court finds no error therein.

11. An attempt has also been made by the learned senior counsel to contend that the learned CMM was not authorized to record the second statement under Section 164 Cr.P.C. as the one had already been recorded by the learned ACMM and thus the same is liable to be ignored and the case ought to have been committed to the learned CMM who was competent to try the offences alleged. Even assuming that there was no need of recording a second statement under Section 306(4) Cr.P.C. the fact remains that both the statements were recorded by Courts of same/coordinate jurisdiction and thus even in the absence of a statement being recorded by the learned CMM, since the statement under Section 164 Cr.P.C. had been recorded by the learned ACMM, the case could be committed only to the Court of the learned Sessions Judge.

12. Consequently, the petition and application are dismissed.

(MUKTA GUPTA)
JUDGE

JANUARY 04, 2017
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