

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved for Order on : 26.04.2018

Order Passed On : 09/05/2018

CR.M.P. No. 49 of 2018

Sarabjit Singh Chatwal, S/o. Late Surinder Singh Chatwal, Aged About 48 Years, R/o. S. S. Plaza, Power House Road, Korba, Chhattisgarh.

---- Petitioner

Versus

1. Central Bureau of Investigation (C.B.I.), Through -S.P.(C.B.I.), Qr. No. 4, Street -15, Sector-9, Bhilai, District- Durg, Chhattisgarh.
2. Anand Kumar, House No. 6, Officers Colony, SECL, Korba, Near Office of General Manager, Distt. Korba Chhattisgarh 495677.

-----Respondents

For Petitioner	: Mr. Ravindra Shrivastava, Sr. Advocate with Mr. Ashish Shrivastava, Mr. Abhijit Shrivastava, Mr. Soumya Rai, Ms. Ruchi Sahay, Ms. Garima Tiwari, Mr. Anshuman Shrivastava, Advocates
For Respondent No.1	: Mr. Kishore Bhaduri, Advocate with Mr. Pawan Kesharwani, Advocate

Hon'ble Shri Justice Rajendra Chandra Singh Samant

C A V Order

09/05/2018

1. This petition has been brought under Section 482 of Cr.P.C. and Section 397 read with Section 401 of the Code of Criminal Procedure with a prayer to quash the impugned order dated 01.02.2017, passed by the Special Court, CBI Cases, Raipur granting pardon to the co-accused/respondent No.2, Anand Kumar.

2. Facts of the case are this that a charge-sheet has been filed by the respondent No.1, against S.K. Ranu and four others including the petitioner, for the offence under Section 120-B, 409, 420 of the Indian Penal Code and Section 13 (ii) R/w. Section 13 (i) (c) & (d) of the Prevention of Corruption Act, 1988. It is alleged that on a receipt of an information, a joint surprise inspection was conducted by the respondent No.1 along with a team of SECL and shortage in stock of coal to the tune of 31,211.85 ton was found. This shortage was to the extent of 12.35%, for which, the co-accused persons were held responsible. The allegation against this applicant is this, that he joined in conspiracy with the co-accused persons and being the transporter, he helped in transporting coal from other areas to the stock area for the purpose of reducing shortage as a cover up in an unauthorized and illegal manner. Thus causing loss to the SECL to the tune of Rs.20.00 Lakhs.
3. Co-accused Anand Kumar at first gave statement under Section 164 of Cr.P.C. by way of confessional statement, giving all the particulars of the act committed by each of the co-accused persons. On that basis, an application under Section 306 of Cr.P.C. was filed by the respondent No.1 before the Special Court, which was allowed by the learned Special Judge by the impugned order dated 01.02.2017. It is in this statement of the co-accused, the evidence against this petitioner is present on record. This petitioner challenges the impugned order and also the statement recorded by co-accused Anand Kumar subsequently, on the ground of legality.

4. Mr. Ravindra Shrivastava, Sr. Advocate appearing on behalf of the petitioner submits that Section 306 of Cr.P.C. has not been complied and the principle laid down in this respect have not been followed. As per the requirement under Sub-Section 3 of Section 306, the learned Special Judge has not recorded any satisfaction and reasons for allowing the application. Similarly under Sub-Section 4 of the same provision has also not been complied with. Reliance has been placed on the judgment of Supreme Court in case of ***Lt. Commander Pascal Fernandes Vs. State of Maharashtra & Ors¹***, which is a judgment of three judges Bench, in which it was held that before the Special Court 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. Relying on the judgment of Dublin Commission Court (Reg. V. Robert Dunne, 5 Cox Cr. Cases 507), it was reiterated that it is the duty of the Magistrates to be very cautious as to whom they admit to give evidence as approvers, and they should carefully inquire to what extent the approver is mixed up with the transaction. It was observed that in our criminal jurisdiction, there is a tender of a pardon on condition of full disclosure. 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 in that case, the Court shall tender pardon.

1 (1968) 1 SCR 695.

5. It is further submitted that similar view has been laid down by the Supreme Court in case of ***Central Bureau of Investigation Vs. Ashok Kumar Aggarwal & Another***² that the order of pardon can not be passed mechanically and the Court has to apply its mind while exercising such powers as the tender of pardon is a judicial act. It was also held similarly in case of ***Al-Saleha Beig Vs. State and Others***³. Hence the paramount consideration for tendering pardon to an accomplice is the satisfaction of a Court that the approver shall make a full and true disclosure. The M.P. High Court in case of ***State of M.P. Vs. Laxmi @ Laxminarayan Gumnam Sindh Lodhi***⁴ has held similarly.
6. It is submitted that bare perusal of Section 306 (1) of Cr.P.C. shows that power of a Court in granting pardon is firstly “discretionary” and secondly, is exercisable only on the pre-condition of willing to make full and final disclosure of the whole of the circumstance within the knowledge of that person, who is to be tendered pardon.
7. It is also submitted by the Sr. Counsel for the petitioner, that the order passed by the Special Judge allowing the application under Section 306 of Cr.P.C. has not recorded any satisfaction as it is required and as per the principle laid down by the Superior Court. Further there is no such observation that the approver is ready to make full and true disclosure of all the circumstances within his knowledge against each persons concerned whether as principal or abettor in the commission of the offence. It is also submitted that the

2 (2013) 15 SCC 222.

3 2008 (3) Mh.L.J. 724.

4 (1985) MPLJ 581.

statement recorded before the Special Court is verbatim as it has appeared in the statement under Section 164 of Cr.P.C. recorded by the Judicial Magistrate First Class. The finding of the Special Court that approver Anand Kumar is not the principal accused in this case is erroneous that the said Court has not performed its duty in scrutinizing the case and the culpability and criminality of the approver in the case.

8. The petition brought by the co-accused S.K. Ranu under Section 482 of Cr.P.C. has been decided by this Court, by order dated 11.09.2017 in which the order granting pardon has been upheld by this Court. Learned Sr. Counsel for the petitioner submits that earlier the order passed by this Court was not correctly decided for the reasons that the judgment passed by the Supreme Court in *Lt. Commander Pascal Fernandes Vs. State of Maharashtra and C.B.I. Vs. Ashok Kumar Aggarwal (supra)* was not brought to the notice of this Court. Reliance has been placed on the judgment of Supreme Court in case of ***State Of U.P. And Anr. Vs. M/S. Synthetics And Chemicals & Anr.***⁵, in which it was held that if earlier judgment was rendered without any argument or any ignorance of any principle laid down, that can be ignored. Apart from that it is also argued, that in the earlier order passed by this Court, only one point was raised, that the approver/respondent No.2 in this case was a main accused in this case and he should not have been granted pardon. No arguments were advanced before the Court in the earlier case challenging the legality of the order passed under Section 306 of

5 (1991) 4 SCC 139.

Cr.P.C. Hence, it is prayed that case be admitted for grant of relief to the petitioner.

9. In reply, counsel for the respondent No.1/CBI submits, that grounds that were not raised in the earlier petition, shall be regarded as waived. The previous order that has been passed by this Court has a binding affect and it can not be reviewed just by bringing another petition with additional grounds. It does not empower a Court to go beyond the scope of Section 362 of Cr.P.C. Reliance has been placed on the judgment of Supreme Court in case of **Smt. Sooraj Devi Vs. Pyare Lal & Another**⁶, in which it has been held that inherent power of the Court under Section 482 can not be invoked to override the power under Section 362 of Cr.P.C.
10. I have heard the learned counsel for both the parties and perused the documents placed on record as well as the record and the order dated 11.09.2017 passed in Cr.M.P. No.605/2017.
11. Before entering into the question of legality of the impugned order granting pardon to the approver, it is all the more necessary to consider the scope of deciding the present petition.
12. In the earlier petition Cr.M.P. No.605/2017, the order was delivered on 11.09.2017. Only one point was raised that respondent No.2 in this case happens to be the main accused and he should not have been granted pardon. But the prayer made was the same that the order granting pardon on dated 01.02.2017, passed by the Special Court be set-aside.

⁶ (1981) 1 SCC 500.

13. Reliance was placed on the judgment of CBI Vs. O.P. Singhania, passed by this Court in Cr.R. No.705/2015 vide order dated 14.01.2016, in which on the basis of condition precedent that approver is willing to make full and true disclosure of the facts within his knowledge, the pardon can be granted to such accused in the interest of justice and specific finding was given that respondent No.2 can not be regarded as main accused in this case. This excludes the scope of considering about the culpability of respondent No.2 in this case as the finding has already been given by that order. The legality of the impugned order has not been considered in the earlier order passed by this Court, which can be considered or not is a question. As the prayer to set-aside the impugned order has been rejected in the earlier petition, hence, entering into the question of legality of the said order would amount to review of that order.
14. Section 362 of Cr.P.C. has a limited scope for the purpose of correcting only the clerical and arithmetical mistake committed while passing the order. Review of any order passed by the criminal Court, is totally barred under this provision as it has been held in case of Smt. Sooraj Devi Vs. Pyare Lal & Anrs. (supra) and thereafter reiterated in number of judgments subsequently passed by the Supreme Court. In case of ***Hari Singh Mann Vs. Harbhajan Singh Bajwa & Ors.***⁷, in which it has been observed in Para-8 as under :-

⁷ (2001) 1 SCC 169.

“8. We have noted with disgust that the impugned orders were passed completely ignoring the basic principles of criminal law. No review of an order is contemplated under the Code of Criminal Procedure. After the disposal of the main petition on 7.1.1999, there was no lis pending in the High Court wherein the respondent could have filed any miscellaneous petition. The filing of a miscellaneous petition not referable to any provision of the Code of Criminal Procedure or the rules of the Court, cannot be resorted to as a substitute of fresh litigation. The record of the proceedings produced before us shows that directions in the case filed by the respondents were issued apparently without notice to any of the respondents in the petition. Merely because the respondent No.1 was an Advocate, did not justify the issuance of directions at his request without notice of the other side. The impugned orders dated 30th April, 1999 and 21st July, 1999 could not have been passed by the High Court under its inherent power under Section 482 of the Code of Criminal Procedure. The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court.”

15. Full Bench of Calcutta High Court in case of **Harjeet Singh Vs. State of West Bengal**⁸ has further clarified the position. The relevant paras are reads as under :-

8 2005 Cr.L.J. 3286.

“45. In the Code of Civil Procedure Order XLVII provides for review of a judgment but in the scheme of the said Code and the said provision is literally absent. It would be doing harm to the intent of the legislature if the same is imported by a Court either in exercise of its inherent power, as seen from the decisions of the Supreme Court or by way of making alterations or corrections in a consequential manner.

46. From what we have seen and discussed in the foregoing paragraphs it is now axiomatic truth that once the Court disposes of a matter finally by way of signing its judgment it becomes functus officio and it can neither recall nor review an order passed by it in view of the bar of Section 362 of the said Code. In other words, Section 362 of the said Code operates as a stumbling block for the Court to proceed in the said direction after it has finally disposed of the matter.

47. The question has been formulated for our decision in this Reference as to whether Section 362 of the said Code would act as a bar in recalling an order passed by the Court when it is found it will offend the principles of natural justice, has to be answered in the fact situation of the particular case.

48. Earlier discussion fortifies us to the conclusion that Section 362 of the said Code under whatever situation the Order finally was passed would have full impact upon it for the purpose of recall or review of the same. In the matter at hand before Batabyal, J. he had disposed of the matter on the very first day as Unlisted Motion on the basis

of the submission of the learned Advocate for the petitioner and the materials available to his Lordship on the basis of subjective satisfaction. Even though the matter was decided ex parte and it attained finality and affected the right of property of the other side, who was not heard, the said decision can not be recalled as it was the subjective satisfaction of his Lordship, which persuaded him to pass such an order. The same was final and could not be reviewed and/or recalled by the opposite party, who felt he was not heard and his right of audience was curbed.

49. The only course left open to the Opposite Party was to have preferred an Appeal or Revision as applicable (sic) before the Higher Forum against the same but taking out an application for recalling or review does not meet the approval of Section 362 of the said Code.

50. This rule may have its disadvantage also. In a given case there may be a direction of the Court for the purpose of finally deciding a matter to issue notice upon the other side. The other side may not be properly served or some mischief in the same may occasion and it may be shown that intentionally the other side has not appeared whereas actually there was no proper service if the Court disposes of the matter finally on such premises then also rigours of Section 362 of the said Code would apply, however, unfortunate it may be. No provision for recalling the same being heard ex parte would be available to such a party who has been left out.”

In view of the interpretation of the provision under Section 362 of Cr.P.C. done by Full Bench of Calcutta High Court, the principle laid down in case of State of U.P. And Anr. Vs. M/s. Synthetics And Chemicals & Anr (Supra) can not be followed. Another reason for non-applicability of this principle is that this judgment was rendered by the Hon'ble Supreme Court in civil jurisdiction.

16. Hence, this being the clear position of law and even if it is found that the earlier judgment passed by the Court appears to be against the principle of natural justice or any other ground for consideration which was not raised earlier in that case also, the power under Section 362 of Cr.P.C. can not be exercised. Similarly the power under Section 482 Cr.P.C. can not be exercised in a manner to override the express bar laid down in the provisions of the Code. Hence, prayer made in this petition can not be entertained.
17. Resultantly, the petition has no merit and it is dismissed accordingly at the motion stage itself.

Sd/-
(Rajendra Chandra Singh Samant)
Judge