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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 620 OF 2023**

Aziz Unni Mohammed ... Appellant

Versus

1. State of Maharashtra

2. Danish Ali Jamaluddin Ahmed ... Respondents

Mr. Nitin Sejpal a/w. Ms. Pooja Sejpal and Ms. Akshata Desai for
the Appellant.

Ms. P. P. Shinde, APP for the State.

Mr. Maruti Kadam, Anti Extortion Cell, Crime Branch, Mumbai.

**CORAM : REVATI MOHITE DERE &
GAURI GODSE, JJ.**

DATE : 26th JUNE 2023

ORAL ORDER (PER REVATI MOHITE DERE, J.)

1. Heard learned counsel for the parties.
2. By this petition, the petitioner seeks the following
substantive reliefs :

(a) That this Hon'ble Court in exercise of the

jurisdiction of this Hon'ble Court under Section 12 of the M.C.O.C. Act, 1999, be pleased to quash and set aside the impugned Judgment and Order dated 28th March 2023 passed by the learned Special Judge under M.C.O.C. Act, 1999 for Greater Mumbai at Mumbai below Exhibit 196 in M.C.O.C. Special Case No. 16 of 2018 along with M.C.O.C. Special Case No. 02 of 2019 along with M.C.O.C. Special Case No. 24 of 2019 and this Hon'ble court be further pleased to revoke the Tender Pardon granted to the Respondent No. 2 – original Accused No. 3 Danish Ali Jamaluddin Ahmed in M.C.O.C. Special Case No. 2 of 2019 pending before the learned Special Judge under the M.C.O.C. Act, 1999 for Greater Mumbai arising out of F.I.R. No. 36 of 2018 registered with the D.C.B., C.I.D. Unit D, Mumbai (corresponding F.I.R. No. 326 of 2018 registered with the Malad Police Station) and the Respondent No. 2 – original Accused No. 3 Danish Ali Jamaluddin Ahmed be directed to face trial as original Accused No. 3 in the present crime.*

**sic*

3. Learned counsel for the appellant submits that the pardon granted to Respondent No. 2 - Danish Ali Jamaluddin Ahmed – (original accused no.3), ought to have been revoked by the learned Special Judge. He submitted that the material on record will show that the Respondent No.2 - Danish Ali, was the main accused in the crime, and in this circumstance, he ought not to have been granted pardon by

the trial court. He further submits that if the pardon granted is not revoked, serious prejudice would be caused to the appellant and the other co-accused who are facing trial. Learned counsel in support of his submissions relied on the statement of Danish Ali recorded under section 9(3) of the M.C.O.C. Act, 1999, to show the complicity of Danish Ali in the alleged crime.

4. Learned counsel also relied on the judgment of the Apex Court in the case of *Central Bureau of Investigation Vs. Ashok Kumar Aggarwal and Another*¹ and the judgment of the Gujarat High Court in the case of *Central Bureau of Investigation Vs. N. K. Amin and Others*.²

5. Learned APP opposed the appeal. She submitted that no interference was warranted in the impugned order. She submitted that the appellant has not impugned the order dated 17th March 2020 granting pardon to Danish Ali on his application, nor has the appellant challenged the order dated 19th April 2022, by which the trial court

1 (2013) 15 SCC 222

2 (2010) 3 G.L.H. 727

fixed a date for conducting the procedure of recording Danish Ali's statement as an approver under sections 306, 307 of Cr.P.C. r/w. Section 9(3) of the M.C.O.C. Act.

6. Learned APP submits that pursuant to the order dated 19th April 2022, Danish Ali's statement was recorded, and thereafter, his evidence has also been recorded by the trial Court. She further submits that Danish Ali's evidence is over and that the counsel appearing for the accused, including the appellant have conducted a lengthy cross-examination of Danish Ali, in the said case.

7. According to the learned APP, even during the examination of Danish Ali, several objections were raised by the appellant, however, the said objections were rejected/dismissed by the learned Special Judge. She states that even the said orders have not been challenged by the appellant. She submits that a co-accused cannot challenge the pardon granted, to another co-accused, in the present case to Respondent No. 2 - to Danish Ali, since the same is in accordance with law.

8. Perused the papers. It appears that an FIR was lodged by Sarika More, PSI with the Malad Police Station, Mumbai as against unknown persons, on **22nd June 2018**, alleging offences punishable under section 387 r/w. Section 34 of the IPC. It appears that on **11th July 2018**, sanction was granted, and MCOC Act was invoked against the accused in the said case. After investigation, charge sheet was filed and thereafter, supplementary charge sheet was filed against respondent no. 2- Danish Ali. It appears that respondent no. 2 - Danish Ali's (original accused No.3) confession came to be recorded on **20th December 2018** and **21st December 2018** and that on **29th July 2019** the said confession was retracted by him.

9. Thereafter, on **18th February 2020**, Danish Ali, filed an application under section 306 of Cr. P.C (**Exhibit-50**) seeking tender of pardon and a prayer for invoking section 307 of Cr.P.C.

10. Reply was submitted by the ACP to the said application. In the reply, it was stated that they have no objection if pardon is granted

to Danish Ali under sections 306 and 307 of the Cr. PC and if he is made an approver, as per his request. The application filed by Danish Ali is on page 259, and the reply from the police at page 264 of the appeal memo.

11. The trial court vide order dated 17th **March 2020** allowed the said application. Learned Special Judge in his order, observed as under;

“In view of obtaining the evidence pardon can be tendered on condition that accused shall make a full and true disclosure of the whole circumstance within his knowledge relative to the present officers and to every other person concerned. The pardon tendered to accused subject to section 308 of Cr.P.C. is deemed to be tendered u/s 307 of Cr.P.C.”

12. In view of Covid, there was no progress i.e. after the said order, and hence the Respondent No. 2 - Danish Ali again preferred an application (**Exhibit-130**), praying therein, that necessary orders be passed on his application seeking grant of pardon under section 307 of the Cr.P.C. r/w. Section 9(3) of the MCOC Act. The said application

was preferred by the respondent no. 2 – Danish Ali on **11th March 2022**. The said application is at page 267 of the appeal memo.

13. The learned Special Judge (MCOCA), Mumbai vide order dated **19th April 2022** partly allowed the said application (**Exhibit-130**), with a direction to the Prison Authority to keep the Respondent No. 2 Danish Ali present on the next date, for conducting further procedure of recording his statement, as an approver under sections 306, 307 of Cr.P.C. read with section 9(3) of the MCOC Act. The said order is at page 272 of the appeal memo.

14. Admittedly, neither of the orders, i.e. the order dated **17th March 2020** nor the order dated **19th April 2022**, have been challenged by the appellant or any other co-accused, earlier or even in the aforesaid appeal, and as such, the said orders have attained finality.

15. It appears that, pursuant thereto, Respondent No. 2 - Danish Ali's statement was recorded under section 9(3) of the MCOC

Act on **14th July 2022**. The said statement recorded is from pages 277 to 281 of the appeal memo. After recording Danish Ali's statement under section 9(3) of the MCOC Act, the prosecution commenced with the recording of his evidence. Accordingly, the prosecution examined Danish Ali, as PW-1. Danish Ali's evidence commenced on **20th August 2022** and was over on **3rd February 2023**.

16. A perusal of Danish Ali's evidence, which is annexed at 'Exhibit-D' from pages 282 to 340, shows that Danish Ali was cross-examined at length by the counsel appearing for the respective co-accused, including by the counsel for the appellant. A perusal of the said evidence so recorded also shows that the counsel for the appellant had raised several objections during Danish Ali's cross examination, with respect to grant of pardon, however, the said objections were rejected by the trial court. Admittedly, none of the orders rejecting the objections raised by the appellants have been challenged by the appellant, before any court nor in the present Appeal.

17. The cross-examination of Danish Ali concluded on **3rd February 2023** and on the very same day, the appellant filed an application (**Exhibit-196**) i.e. 3rd February 2023, seeking revocation of the pardon granted to Danish Ali, as an approver by the trial court. The said application is at page 342 of the appeal memo.

18. In the said application, it is prayed, that the trial court forthwith revoke the pardon granted to Danish Ali, as an approver and he be treated as an accused. Pursuant to the said application, the trial court, after hearing the parties rejected the said application vide order dated **28th March 2023**, passed below Exhibit 196. The said impugned order has been impugned before us.

19. The learned Special Judge after noting certain material facts, has, in paragraph 38 of the impugned order, observed as under :

“(38) The next contention raised by the accused nos. 1, 2, 4 and 5 is that, the prosecutor has not issued certificate. In this regard, the procedure laid down to revoke the pardon to witness and to treat him as an accused has been laid down in S.308 of Cr.P.C. and S.308(1) clearly states that, when pardon has been tendered u/s/.306 or 307 of the Code of Criminal

Procedure and the Public Prosecutor certifies that, in his opinion such person, has either by willfully concealing anything essential or by giving false evidence not complied conditions imposed on him while tendering pardon, such person can be tried for the offence in respect of which the pardon was tendered or for any other offence of which he appears to have been guilty in connection with same matter and also for the offence of giving false evidence. Thus, it is obvious that unless the prosecution comes to a conclusion that the person has not complied the conditions imposed on him while tendering pardon to him and comes to a conclusion that he has been guilty of suppressing true and material facts and he has given false evidence then only the prosecutor can issued a certificate for prosecuting the person to whom the pardon was tendered. In present case at hand, the prosecution specifically contended in its reply that accused no. 3/approver (PW-1) has supported its case and made full and true disclosure of the whole circumstances within his knowledge relating to the offence. It is also specifically contended by the prosecution in its reply that the prosecution does not want to issue such certificate. Hence, the applicants/accused has no locus to ask for such certificate.”

20. According to the learned counsel for the appellant, Danish Ali ought not to have been granted pardon, considering that he had a major role to play in the commission of the offence and that the learned judge, as well as the prosecution, had failed to consider the same.

21. According to the prosecution, the approver had supported its case and made full and true disclosure of the case, the circumstances relating to the offences and, as such the question of revoking the pardon granted to Danish Ali did not arise. The prosecution also challenged the locus of the appellant/co-accused, to file such an application, seeking revocation of pardon granted to Danish Ali. It is well settled that the discretion lies with the prosecution and the court, as to whether the person who has been granted pardon has complied with the conditions imposed upon him, while granting pardon and whether he has made a true and full disclosure, on the basis of which pardon was granted to him. It is well settled that tender of pardon is well within the domain of judicial discretion of the court before which request is made for tender of pardon.

22. In the present case, as observed herein above, the orders dated 17th March 2020 and 19th April 2022 granting pardon and further directing the recording of the statement of the accused, Danish Ali, have not been challenged by the appellant nor has the appellant

challenged the orders by which the objections raised by the appellant's counsel, time and again, whilst recording evidence of Danish Ali were rejected/dismissed.

23. It is not the prosecution case that Danish Ali has not supported the prosecution case or that he has not made a true and full disclosure, on the premise on which he was granted pardon. It is well settled that the tender of pardon and its acceptance by a person concerned is a matter between the court and the person to whom it is made, and the other co-accused have no right to object to the same.

24. The judgments relied upon by the learned counsel for the appellant have no application to the facts and circumstances of the case and as such are clearly distinguishable.

25. Considering what is stated and observed hereinabove, the appeal being devoid of merits, stands dismissed.

GAURI GODSE, J.

REVATI MOHITE DERE, J.