

(2007) 08 DEL CK 0002

In the Delhi High Court

Case No : Criminal M.M. No. 3741 of 2001 and Criminal M. No's. 4876 of 2001 and 522, 3297 of 2002

Ashok Kumar Aggarwal

APPELLANT

Vs

Central Bureau of Investigation and Another

RESPONDENT

Date of Decision : 20-08-2007

Acts Referred:

Criminal Law (Amendment) Act, 1952 — Section 8(2)

Criminal Procedure Code, 1973 (CrPC) — Section 163, 164, 173, 195, 306

Penal Code, 1860 (IPC) — Section 120B, 193, 211, 342, 467

Citation : (2007) 98 DRJ 80

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Ram Jethmalani, Lata Krishnamoorthy, Aman Vachher, Ashutosh Dubey and Malaji, for the Appellant; Dayan Krishnan and Gautam Narayan for respondent No. 1 and Sidharth Luthra and Rajni Gupta, for the Respondent

Judgement

A.K. Sikri, J.—We are concerned, in the present petition, with the validity and propriety of order dated 7.9.2001 passed by the Special Judge, Tis Hazari, Delhi, in the proceedings initiated by the Central Bureau of Investigation (for short, "CBI") and pending before him u/s 120B read with Sections 193/467/471/342 of the Indian Penal Code (hereinafter referred to as "IPC"). Two persons who are arraigned as accused persons in these proceedings are Mr. Ashok Kumar Aggarwal and Mr. Abhishek Verma. The respondent No. 2 had moved a petition on 18.7.2000 seeking his pardon. CBI, namely the prosecution, had no objection for grant of pardon to the respondent No. 2. The petitioner herein, who is the co-accused in the said proceedings, however, strenuously opposed the said application. The Special Judge, after hearing the parties, passed the impugned order dated 7.9.2001 allowing the application and tendering pardon to the respondent No. 2. Feeling aggrieved and visibly upset by this order, the effect of which is to proceed against the petitioner alone, the instant petition is filed by the petitioner challenging this order.

2. In the first instance, let me take note of the facts, in brief, which led to the filing of the aforesaid case impleading the two accused persons.

3. The petitioner is an officer who belongs to Indian Revenue Service. At relevant time, i.e. in November 1996, he was posted as Deputy Director of Enforcement (Delhi Zone). As per the First Information Report (FIR) dated 29.1.1999 lodged by Mr. Abhijit Chakraborty, Additional Director, Enforcement Directorate, New Delhi with the Delhi Special Police SIU-VIII Branch, New Delhi, against unknown officers of Delhi Zone, Enforcement Directorate, New Delhi, a letter was received from the Enforcement Directorate in which four instances of misconduct were mentioned. Three of them pertain to administrative misconduct whereas the fourth instance, prima facie, reveal commission of a criminal offence. Accordingly, a DO letter was sent to the Enforcement Directorate requesting that a formal written complaint giving brief facts connected with the alleged fabrication of evidence may be given to the CBI. In response to the same, Mr. Abhijit Chakraborty gave written complaint dated 25.1.1999. As per this complaint, the Delhi Zonal office of the Enforcement Directorate conducted a search on 1.1.1998 at the office and residential premises of one Mr. Subhash Chander Bharjatya at G-51, Lajpat Nagar-III, New Delhi and his business premises consisting three shops at Hotel Maurya Sheraton, New Delhi. The Investigating Officer of the case was Mr. J.P. Kujur, Enforcement Officer. The then Assistant Director was Mr. Ravinder Nath (Retd.) and the then Deputy In-charge of the Delhi Zonal office was Mr. Ashok Kumar Aggarwal (since transferred). During the search the officers of the Enforcement Directorate seized a FAX message (debit advice) from one of the shops of Mr. Bharjatya purportedly from Swiss Bank Corporation, Zurich, Switzerland which reflected a debit of US\$ 150,000 from the account of Royale Foundation, Zurich, Switzerland in favor of one Mr. S.K. Kapoor, holder of account No. 002-9-608080, Hong Kong and Shanghai Banking Corporation (HSBC), head office at Hong Kong, as per the advice of the customer i.e. Royale Foundation. Mr. Bharjatya filed a complaint dated 4.1.1998 alleging that the said FAX message was a forgery and was planted in his premises during the course of search in order to frame him and further that he and his employee were illegally detained on the night of 1.1.1998 and were threatened and manhandled. Enquiries were held into this complaint which indicated that the file related to the search action against Mr. Bharjatya was created by backdating the entries to 23.12.1997. Mr. Bharjatya was arrested on 28.1.1998 on the basis of the above-mentioned FAX message. Later, in the month of March 1998, Mr. Bharjatya submitted to the Enforcement Directorate a letter obtained by Mr. M. Kapur, his Chartered Accountant, from Mr. Eric Huggenberger, Attorney of Swiss Bank Corporation, Zurich, Switzerland, confirming that the above said FAX message was a forged document and was never issued by the said Bank. In these circumstances, in the complaint it was alleged that these facts prima facie pointed out to a criminal conspiracy hatched by the officers of the Delhi Zonal Office, Enforcement Directorate, to create a forged document and not only used it as a genuine document but also create

false evidence to implicate Mr. Bharjatya. On the basis of this complaint, case u/s 120B read with Sections 193/467/471/342 IPC was registered and it was entrusted to an officer of the CBI for investigation.

4. As per the CBI, investigation revealed that the petitioner entered into a criminal conspiracy with the respondent No. 2 with an object to frame Mr. Bharjatya in a FERA case and in order to achieve the object of conspiracy a forged FAX message, purportedly sent by the Swiss Bank Corporation, Zurich, Switzerland, to Mr. Bharjatya at his FAX number, was planted on the night of 31.12.1997 and on the next morning the petitioner conducted the raid at the premises of Mr. Bharjatya and reference was made to the aforesaid FAX message planted on Mr. Bharjatya's FAX machine on the previous night. This FAX message was used illegally to nail Mr. Bharjatya.

5. According to the prosecution, during investigation the file relating to the FERA case against Mr. Bharjatya was examined and it revealed that some person had contacted HSBC, New Delhi as Mr. S.K. Kapoor and had left a mobile phone number of Delhi. On enquiry it was found that this number was of Mr. Abhishek Verma, respondent No. 2 herein. The respondent No. 2 could not be examined immediately as he was reported to be out of country. In November 1999, when it was learnt that Mr. Verma returned to India, he was summoned to the CBI office and was examined. In his statement he disclosed certain facts, including the role played by the petitioner. According to the CBI, he had disclosed the true facts of the case and there was no apprehension of his tampering with the evidence. Therefore, he was arrested and bailed out as per law. Thereafter, the respondent No. 2 moved an application in the Court of Chief Metropolitan Magistrate on 29.11.1999 for recording his confessional statement. Such a statement was recorded on 2.12.1999 u/s 164 of the Code of Criminal Procedure by the learned MM. In his statement, he stated that at the instance of the petitioner he forged a fax message containing details of hawala transactions made by another FERA accused, namely, Shri Subhash Chander Bharjatya, and the details of hawala transactions were obtained by him from the shop of Mr. Bharjatya itself. He further alleged that it was done by him at the instance of the petitioner, to whom he also paid Rs.10 lacs as bribe. According to the prosecution, the petitioner was earlier examined but he had tried to mislead the investigation. After the aforesaid confessional statement of the respondent No. 2 was recorded, it was decided to re-examine the petitioner. However, he was trying to avoid investigation and had gone into hiding. Search for the petitioner was launched countrywide. He was subsequently arrested from Saharanpur on 23.12.1999, where he was staying in Hotel Taj under an assumed name of "Ravi Garg". He was remanded to Police custody till 31.12.1999 and ultimately released on bail on 29.1.2000. On 18.7.2000, the respondent No. 2 moved an application before the Special Judge, CBI, Tis Hazari, Delhi for becoming an approver and grant of pardon to him. The CBI gave no objection to the Special Court for grant of pardon to him on 1.9.2000. On the previous date, i.e. on 31.8.2000, the petitioner moved an application u/s 306 Cr.P.C. praying for an opportunity of

being heard at the time of considering the application of the respondent No. 2 for grant of pardon to him in which notice was issued to the CBI on 1.9.2000. The learned Special Judge asked for certain information about the respondent No. 2 before deciding this application. However, while this application was pending, on 3.1.2001 the CBI submitted to the Court that request of the respondent No. 2 for grant of pardon be considered only after the conclusion of investigation of the case. The respondent No. 2 also agreed for such a deferment. On 2.5.2001, the respondent No. 2 moved application for revival of his earlier application seeking pardon. When this application came up for hearing on 3.5.2001, CBI again gave no objection if the respondent No. 2 was made an approver and granted pardon. The petitioner, however, moved another application seeking opportunity of hearing in the application filed by the respondent No. 2. Vide impugned order dated 7.9.2001 the learned Special Judge, CBI, granted pardon to the respondent No. 2.

6. The reading of the impugned order would indicate that in the reply dated 3.5.2001 the CBI had mentioned that investigation was complete, except that reply was awaited from Swiss Bank Corporation, Zurich, Switzerland on certain points referred in the letterrogatory. It was also stated by the CBI that there were certain vital facts related to the case, which the prosecution would not be able to prove independently and the statement of the accused respondent No. 2 would be essential to bring home the charges against the petitioner, who was the principal accused.

7. The learned Special Judge thereafter noted the allegations against the petitioner as well as the respondent No. 2 about the alleged criminal conspiracy between them to frame Mr. Bharjatya and in order to do that forging of the FAX message and planting it in the FAX machine of Mr. Bharjatya on 31.12.1997 before conducting the raid on 1.1.1998. The learned Special Judge also took note of statement of the respondent No. 2 recorded u/s 164 Cr.P.C. The reasons given by the learned Special Judge while allowing the application moved by the respondent No. 2 need verbatim reproduction:

4. I have heard applicant/accused Abhishek Verma in person and Sh. T.P. Singh, Sr.P.P. for CBI. I have gone through the FIR, case diaries, statements of witnesses recorded u/s 161 Cr.P.C. and the statement of applicant accused Abhishek Verma recorded u/s 164 Cr.P.C. I am satisfied that in the absence of the statement of applicant/ accused Abhishek Verma prosecution may not be able to prove the existence of criminal conspiracy between principal accused Ashok Kr. Aggarwal and the applicant/accused Abhishek Verma. Forging of debit advice by the applicant/ accused on the direction of accused Ashok Mr. Aggarwal, demand and acceptance of illegal gratification of Rs.10,00,000/- from applicant/ accused Abhishek Verma by principal accused Ashok Kr. Aggarwal and certain other material facts, I am, Therefore, of the belief that it would be expedient in the interest of justice to tender pardon to applicant/accused Abhishek Verma, with a view to unearth all facts of conspiracy and to establish the role played by

principal accused Ashok Kr. Aggarwal, in framing Subhash Chander Barjatia in a FERA case and the receipt of illegal gratification of Rs.10,00,000/- by him.

5. I am conscious of the fact that applicant/accused Abhishek Verma has played an active role in furtherance of the criminal conspiracy to frame Subhash Chander Barjatia forged and fabricated documents included fax message and is also accused of paying illegal gratification to principal accused Ashok Kr. Aggarwal, yet I have been persuaded to tender pardon to the applicant/accused to prevent the escape of principal offender from punishment in heinous offences for want of evidence. As has been held by Hon"ble Supreme court in a case reported in Suresh Chandra Bahri Vs. State of Bihar with Gurbachan Singh, that the basis of tender of pardon is not the extent of culpability of the person to whom pardon is granted but the principle is to prevent and escape of the offender from punishment in heinous offences for lack of evidence.

6. I, Therefore, while allowing the petition dated 18.7.2000, tender pardon to applicant/accused Abhishek Verma on the condition of his making full and true disclosure of whole of the circumstances and facts within his knowledge, relating to the offences and to every other person concerned, whether as principal or abettor in the commission of those offences.

8. According to the petitioner, grave illegality has been committed by the learned Special Judge in granting pardon to the respondent No. 2. Certain facts and allegations, which are noted above, are mentioned by the petitioner on the basis of which he has founded his challenge to the order. Apart from alleging that the petitioner is framed in a false case at the instance of the then Director of Enforcement and subsequently by the Joint Director Shri Neeraj Kumar, who conspired with the respondent No. 2 and exhorted him to make statement u/s 164 Cr.P.C., which led to respondent No. 2 making a tutored statement, it is submitted that when the application was moved initially by the respondent No. 2 seeking pardon, the then Special Judge passed order dated 1.9.2000 on the said application directing the CBI to submit list of criminal cases being investigated by different agencies involving the respondent No. 2, including the outcome of the investigation in the FERA case of hawala payment of US \$ 150,000. The court also wanted to know the role of each accused so as to enable the court to decide who played major role in the commission of the alleged crime and, Therefore, observed that such an application could not be considered unless investigation was complete. The petitioner has further stated that on the next date i.e. on 21.9.2000, the CBI did not furnish any details as earlier asked for by the Special Judge and the matter was adjourned to 30.10.2000 and again to 3.11.2000, on which date the CBI changed its stand and requested the court that application of the respondent No. 2 for grant of pardon be considered only after the conclusion of the investigation of the case. Following order was passed by the Special Judge on 3.11.2000:

The applicant (Abhishek Verma) has submitted a petition stating that in view of the stand taken by the CBI, the decision on this application for grant of pardon

may be deferred till the conclusion of the investigation.

In view of the aforesaid, application for approver is consigned sine die with the remarks that the approver may get it revived by moving an application after the conclusion of the investigation.

It is alleged that investigation was still not concluded and no charge sheet was filed, but the respondent No. 2 again moved the application on 2.5.2001 for revival of earlier application seeking pardon in which no objection was given by the CBI on the very next date, i.e. on 3.5.2001. The petitioner has further alleged that on 8.6.2001 the petitioner moved application u/s 340 read with Section 195 Cr.P.C. for the forgeries of messages purported to have been received from INTERPOL, Singapore and concealment of misrepresentation of facts by the officials of the CBI. On this, the learned Special Judge issued notices to the Joint Director, Enforcement Directorate and DSP, CBI as to why complaint under Sections 193/211/471 IPC be not filed against them. The petitioner also filed writ petition in this Court on 31.8.2001 highlighting the repeated acts of malafides, forgeries and highhandedness on the part of the CBI officials praying for transfer of investigation of the case from the aforesaid two persons and in this writ petition also Court had issued notices to the said officials. In spite of these facts and when the investigation had not been concluded/ completed and no charge sheet was filed, on the misrepresentation of the facts if the case by the respondent No. 2, the learned Special Judge passed the impugned order granting pardon.

9. The petitioner has also stated in detail the antecedents of the respondent No. 2 alleging that he is involved in a number of cases, details whereof are also given in the petition as well as in the affidavit filed subsequently on 13.9.2006, on the basis of which it is contended that such a person cannot be made approver and cannot be granted pardon. The petitioner has also alleged that the respondent No. 2 and the officials of the CBI are hand-in-glove with each other and the attempt was to shield and save the respondent No. 2. It is also stated that even the order of the earlier Special Judge directing the CBI to submit a list of criminal cases being investigated by different agencies involving the respondent No. 2 was not complied with and those facts placed before the learned Special Judge. Further, the impugned order could not have been passed and application considered in the face of earlier order dated 3.11.2000, as per which the decision of the application was deferred "till conclusion of the investigation" and investigation had not been completed, which could be treated as completed, u/s 163 Cr.P.C., only by filing charge sheet.

10. Learned Counsel for the petitioner summed up his submissions by highlighting:

(a) order was passed at a stage when even the charge-sheet was not filed, which was filed subsequently only on 28.6.2002. The application was got revived before filing the charge-sheet with the sole purpose that the petitioner is not heard in

the matter inasmuch the petitioner as accused could get chance to participate in the proceedings only after the filing of the charge-sheet;

(b) impugned order does not disclose any awareness about the letterrogatory and subsequent correspondence exchanged between the prosecution/court and the Swiss authorities. It could, Therefore, be inferred that the learned Judge was oblivious about these developments. It was submitted that it is the moral and legal duty of the prosecution to disclose all facts, including those which go against the prosecution. Not doing so also reflects upon the impartiality of the prosecution and the motivated attempt to save the respondent No. 2. FIR dated 25.2.2000 lodged by the respondent No. 2 against the petitioner u/s 506 IPC, was referred to in which he has described himself as the key witness in the present case and such a self-stated description is given even before he was granted pardon. Likewise, in another proceedings against the respondent No. 2, wherein the Enforcement Directorate had moved application for cancellation of bail granted to him, he had stated before the learned CMM, New Delhi, that he was an approver in the instant case as is clear from the order dated 9.9.2000 passed in the said case. Thus, even before passing of the impugned order he had assumed that he is declared as an approver. He made the same averment in his additional affidavit filed in Crl. Rev. Pet. No. 367/2000 in this Court. Number of judgments were cited in support of the aforesaid submissions which shall be referred to and dealt with at the time of my discussion on these arguments;

(c) so much so, no antecedents of the respondent No. 2 were stated in the application or given to the Court. This was in spite of the fact that the predecessor Presiding Officer had specifically asked for this information from the prosecution (page 38 of the paper book). It was pointed out that there was as many as 13 cases pending against the respondent No. 2 and going by his dubious credentials, it was not a fit case where the pardon should have been granted to him accepting him as approver.

11. Mr. Gopal Subramaniam, learned Additional Solicitor General of India, appeared on behalf of the respondents and refuted the aforesaid submission of the learned senior counsel for the petitioner. His submission was that the main accused in this case was the petitioner. Case was registered on 29.1.1999 on the written complaint of Sh. Abhjit Chakraborty, Additional Director, Enforcement Directorate, Ministry of Finance, which was on the basis of complaint dated 4.1.1998 of Sh. Barjatia to the Director, Enforcement Directorate, wherein it was alleged that the fax message from the Swiss Bank Corporation was a forgery and was planted in his premises during the course of search conducted on 1.1.1998. He also mentioned about the conduct of the petitioner herein by pointing out that after the confessional statement of the respondent No. 2 was recorded on 2.12.1999, the petitioner had absconded from justice and it was found that he was staying in Hotel Taj at Saharanpur under the assumed name of Ravi Garg from where he was arrested on 23.12.1999. He also submitted that after the application for grant of pardon was adjourned sine die and the respondent No. 2

moved application for revival of the said application on 2.5.2001, the CBI filed reply dated 3.5.2001 to the said application stating that investigation was complete excepting that reply to the letterrogatory was awaited. It was also pointed out that the result of the investigation on the points referred to in the letterrogatory would be mainly corroborative in nature and, Therefore, application of the respondent No. 2 could have been taken into consideration at that stage and there was no impediment in view of earlier orders passed by the learned Special Judge deferring the decision on this application till the conclusion of the investigation. The petitioner had moved application on 3.5.2001 stating that he had a right o pass the application filed by the respondent No. 2 seeking pardon, which application was dismissed by the learned Special Judge on the same date. The petitioner preferred revision petition against that order, which was disposed of on 10.7.2001 clearly holding that there was no bar in granting pardon before the stage of charge-sheet. It was also held that at the stage of investigation when the accused applied for pardon and the prosecution supported him, the matter was between the Court and the accused and the other accused had no right whatsoever to intervene or ask for hearing. He had right only to cross-examine the approver at the stage of trial. He also submitted that reply dated 18.7.2001 to the letterrogatory was received by the CBI on 30.7.2001, which was placed before the Court on 1.8.2001 and the impugned order was passed on 7.9.2001 and, Therefore, the Court was possessed of the entire material and had perused the same, including the case diary, which included the reply to the letterrogatory.

12. In view of the aforesaid, submission of the learned ASG, was that : (a) the petitioner had no right to intervene and the right of the petitioner as co- accused in respect of an approver arises only at the stage of trial, as held by the Supreme Court in Ranadhir Basu Vs. State of West Bengal, and State of Himachal Pradesh Vs. Surinder Mohan And Others, ; (b) it was for the prosecution to take the decision as to whether prosecution agrees to the tender of pardon. The Special Judge could not have taken upon himself and, Therefore, rightly did not take upon himself the task of considering the possible weight of the approver's evidence before it is even tendered and the Court must not take upon itself the task of determining the propriety of tendering pardon. Reference was made to Lt. Commander Pascal Fernandes Vs. The State of Maharashtra and Others, and Jasbir Singh Vs. Vipin Kumar Jaggi and Others, . Mr. Sidharth Luthra, Advocate appearing for the respondent No. 2 adopted these submissions.

13. I have considered the respective submissions of the counsel for the parties. At the outset, I may state that the learned Counsel for the petitioner has endeavored to show that the fax in question was not planted one but was a genuine document and for this purpose, reply to the letterrogatory and the correspondence exchanged between the prosecution and the replies to the Swiss Bank were referred to. On the other hand, the prosecution had tried to allege that it was an infiltrated document. However, it is not necessary for me to go into this controversy at all inasmuch as that is a matter of evidence before the

learned trial court. The very charge against the petitioner and the respondent No. 2 relates to the alleged forgery of the said document. The issue before me is entirely different. When charge is such in which both the petitioner and the respondent No. 2 are arraigned, the scope of the present petition is to consider as to whether it was appropriate on the part of the learned Special Judge to grant pardon to the respondent No. 2 and allowing the request of the prosecution that he be made approver in the case, having regard to the facts and circumstances of this case.

14. Section 306 of the Cr.P.C. Deals with tender of pardon to accomplice and 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 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 principle 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.

15. Section 307, likewise, gives power to the Court to direct tender of pardon after committal, but before the judgment is pronounced. The object underlying these provisions is to allow pardon in the cases where a grave offence is alleged to have been committed by several persons, so that with the aid of the evidence of the person pardoned, the offence could be brought to home as against the rest. The basis of tender of pardon is not the extent of the culpability of the person to whom the pardon is granted. The principle is to prevent the escape of the offender from punishment in the heinous offences for lack of evidence. The principle, which are to govern the cases granting pardon by the court are well settled. There is no bar in granting pardon before the stage of charge- sheet. At the stage of investigation, if the accused applies for pardon and the prosecution also supports him, normally the matter is between the Court and the accused and other co-accused have no right whatsoever to intervene or ask for hearing. The right of a co-accused in respect of an approver arises only at the stage of trial. It is also well-settled that once prosecution agrees to tender of pardon, the Special Judge would not take upon himself the task of considering the possible weight of the approver's evidence or to determine the propriety of tendering pardon. The law is eloquently explained by the Supreme Court in the case of Lt. Cdr. Pascal Fernandes's case (supra) in the following words:

(11) It follows that the powers of the Special Judge are not circumscribed by any condition except one, namely, that the action must be with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to an offence. The pardon so tendered is also a condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor. The disclosure must be complete as to himself and as to any other person concerned as principal or abettor. There is no provision for the recording of reasons for so doing, nor is the Special Judge required to furnish a copy to the accused. There is no provision for recording a preliminary statement of the person.

(12) There can be no doubt that the 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 offence by an accused as in this case. The offer by an accused as in this case. The action, Therefore, was not outside the jurisdiction of the Special Judge in this case.

16. In this case itself when the petitioner had come earlier challenging the move on the part of the respondent No. 2 to seek pardon, which was supported by the prosecution, the Court held that Special Judge had power to tender pardon at investigation stage, i.e. before filing of charge-sheet and it could not be objected to by a co-accused. Said judgment entitled as Ashok Kumar Aggarwal Vs. Central Bureau of Investigation, The judgment would show that three questions were raised by the petitioner herein, which were answered against him. It would be of interest to note the third question and the answer given thereto. This question was "Whether tender of pardon can be granted an accused, who is absolutely unreliable, untrustworthy and whose statement would be of no help to the prosecution" The answer to this is found in paragraph 9 of the judgment and the said paragraph is reproduced in toto, verbatim:

9. Learned Counsel for the petitioner has further submitted that the accused-Abhishek Verma, to whom pardon is likely to be tendered, is an absolutely unreliable and untrustworthy witness and as such, his evidence would be of no help to the prosecution. It is also submitted that the petitioner can show to learned Special Judge that the evidence and material already available on record is sufficient and the evidence of approver is not required in this case, which is being done merely with a view to shield a person, who is the principal accused. Learned Counsel for the petitioner argues that in case he is given an opportunity of being heard, he can satisfy learned Special Judge that there are no good grounds for tender of pardon to accused-Abhishek Verma. As discussed above, at the stage of investigation when an accused applies for pardon and the prosecution also supports him, the matter remains between the Court and the accused applying for pardon and the other accused have no right whatsoever to intervene or ask for hearing. The other accused against whom evidence of the approver is likely to be used, shall have sufficient opportunity to cross-examine the approver when examined in the course of trial and show to the Court that his evidence is not reliable or he is not a trustworthy witness. Whatever material the petitioner intends to use against the approver, he would be entitled to use it against him during trial to discredit him. The law does not prohibit tender of pardon to a principal accused even. The tender of pardon remains within the domain of judicial discretion of the Court before which the request of an accused for tender of pardon is made. Therefore, a co-accused cannot be permitted to raise objections against tender of pardon to another accused at this stage.

17. The Court did not decide as to whether pardon should be tendered to the accused as he was allegedly unreliable and untrustworthy. The petitioner wanted to be heard in the matter so that he could satisfy the Special Judge that there

were no good grounds for tender of pardon to the respondent No. 2. However, it was held that at that stage the petitioner had no ground to intervene, as it was not the stage of investigation and the matter remained between the Court and the accused. It was observed that when the stage of approver's evidence comes, the petitioner shall have sufficient opportunity to cross-examine him and show that his evidence was unreliable.

18. Now, that the pardon has been granted by the Special Judge, the argument advanced by the learned Counsel for the petitioner is that the facts of this case did not warrant grant of such a pardon. It was predicated on the following: (a) the order was obtained by suppression of material documents; (b) the manner in which the application application was revived even when the predecessor of the learned Special Judge vide order dated 3.11.2000 deferred the consideration of the application till the conclusion of investigation, was mala fide and in any case, such condition had not been satisfied, namely, investigation had not come to an end; (c) the character of the accomplice is highly relevant in deciding as to whether such an accomplice is to be granted pardon or not. Learned Counsel conceded that the grant of pardon is a matter between the prosecution and the accused. However, submission was that the Court had to take into account the interest of the accused as well and a person with such antecedents as the respondent No. 2 could not have been granted pardon in view of the Supreme Court dicta laid down in Lt. Cdr. Pascal Fernandes's case (supra).

19. When the matter is examined from this perspective, I am of the opinion that the petitioner has been able to make out a case for interference. The respondent No. 2 moved application with the Special Judge for being an approver and grant of pardon to him on 18.7.2000. The CBI gave no objection for grant of pardon to him before the Special Court on 1.9.2000. The Special Judge asked for certain information about the respondent No. 2 before deciding this application. The information asked for by the Special Judge in his order dated 1.9.2000 was crucial and would reflect the mind of the Special Judge, as he wanted to know about the antecedents of the respondent No. 2 before bestowing his consideration on the request made by him for pardon. In this order, the learned Special Judge accordingly also directed CBI to submit a list of criminal cases being investigated by different agencies involving Abhishek Verma including the outcome of the FERA investigation for hawala payments of USD 1,50,000 to the Court which was the foundation of forgery in the present case as per the CBI and the matter was adjourned for 21.9.2000.

20. Curiously, the CBI did not submit this information. Instead, on 3.1.2001 request was made for consideration of this application be deferred till after the conclusion of investigation of the case. The respondent No. 2 had also agreed for such a deferment. However, after a period of four months, i.e. On 2.5.2001 the respondent No. 2 moved the application for revival of his request contained in the earlier application seeking pardon. No doubt, there were further investigations in the case during this period but investigation had not concluded

inasmuch as no charge-sheet was filed u/s 173 of the Cr.P.C. Though the learned Counsel for the CBI had made an attempt to show that investigation was almost complete, except that reply was awaited from Swiss Bank Corporation on certain points referred in the letterrogatory, that argument is misconceived. As per this argument itself, the investigation was still incomplete as the CBI was awaiting reply from Swiss Bank Corporation which was rather crucial. It is only thereafter that charge-sheet could be prepared and filed and only then it could be deemed that investigation is complete.

21. From here, we proceed further. The application was moved on 2.5.2001 and on the very next date, i.e. 3.5.2001, when this application came up for hearing, the prosecution gave its no objection. The query raised by the earlier Special Judge on 1.9.2000 had also not been answered by that time and that aspect of the matter was scuttled.

22. I am, Therefore, of the opinion that entire material was not placed before the learned Special Judge (which was specifically ordered by his predecessor) when the application for pardon was considered. Maybe, even if such material was there, he could have still come to the same conclusion. But this guess work is not permissible and we cannot proceed on this hypothesis. What is important is that all relevant material should have been before the Special Judge before he could consider as to whether the respondent No. 2 should be granted pardon or not. In the light of the aforesaid material only the Special Judge could form an opinion as to whether it was a case for grant of pardon keeping in mind the following dicta of the Supreme Court Lt. Cdr. Pascal Fernandes's case (supra):

(14) 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. What is meant by public policy is illustrated by a case from Public Commission Court (Reg. v. Robert Dunne (1851) 5 CCC 507 in which torrens, J. on behalf of himself and Perrin, J. observed as follows :

From what I can see of this case, this witness Bryan, who has been admitted as an approver by the Crown is much the more criminal of the two on his own showing.

... I regret that this witness, Bryan, has been admitted as evidence for the Crown and thus escaped being placed upon his trial. It is the duty of 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, and if he be an accomplice, into the extent of his guilt.

(15) In this case the Special Judge made no effort to find out what Jagasia had

to disclose. The English law and practice is (a) to omit the proposed approver from the indictment, or (b) to take his plea of guilty on arraignment, or (c) to offer no evidence and permit his acquittal, or (d) to enter an *nolle prosequi*.

In our criminal jurisdiction there is a tender of a pardon on condition of full disclosure. Section 8(2) of the Criminal Law Amendment Act is enabling. Without recourse to it an accused person cannot be examined as a witness in the same case against another accused. To determine whether the accused's testimony as an approver is likely to advance the interest of justice, the Special Judge must have material before him to show what the nature of that testimony will be. Ordinarily it is for the prosecution to ask that a particular accused, out of several, may be tendered pardon. But even where the accused directly applies to the Special Judges he must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency, and must, Therefore, be exercised only when the prosecution joins in the request. The State may not desire that any accused be tendered pardon because it does not need approver's testimony. It may also not like the tender of pardon to the particular accused because he may be the brain behind the crime or the worst offender. The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interest of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case. The learned Special Judge did not bear these considerations in mind and took on himself something from which he should have kept aloof. All that he should have done was to have asked for the opinion of the Public Prosecutor on the proposal. But since the Public Prosecutor, when appearing in the High Court, stated that the prosecution also considered favorably the tender of pardon to Jagasia we say no more than to caution Magistrates and Judges in the matter of tender of pardon *suo motu* at the request of the accused. This practice is to be avoided. Since the prosecution in this case also wants that the tender of pardon be made it is obvious that the appeal must fail. It will accordingly be dismissed. Appeal dismissed.

23. As held in the aforesaid case, the Court observed, in no uncertain terms, that no procedure or action can be in the interest of justice if it is prejudicial to an accused. The Special Judge is not to assume the role of the public prosecutor and he is to ask the opinion of the public prosecutor on the proposal. However, at the same time, it needs to be emphasised that the Court is not a mute spectator and keeping in mind the interest of co-accused persons, he should at least consider that the prosecution is not unduly favoring the person seeking pardon, at the cost of the co-accused. It has been held by this Court in *M.M. Kochar Vs. The State*, that tender of pardon and its acceptance by the person concerned is a

matter entirely between the Court and the person to whom the tender is rendered and it is a purely executive or administrative action and not a judicial decision. This judgment was approved by the Apex Court in *State of U.P. Vs. Kailash Nath Agarwal and Others*, . Treating the action as administrative action, the principles on which judicial review of administrative action is permissible would come into play.

24. It is trite law that every administrative action has to be supported by valid reasons and also that while taking decision all relevant material was placed before the authority to ensure that the authority which took the decision did not exclude from considering all the aspects.

25. The impugned order is, Therefore, set aside and the matter is remanded back to the Special Judge to consider the application afresh in the light of the charge-sheet, which has since been filed, the entire material available with the CBI and also after obtaining the information about the various cases pending against the respondent No. 2. The petition and the applications are accordingly disposed of.