

(1998) 09 BOM CK 0031

In the Bombay High Court

Case No : Misc. Application No. 483 and 484, of 1998 in Special Case No. 6 of 1994

Harshad S. Mehta

APPELLANT

Vs

Central Bureau of Investigation

RESPONDENT

Date of Decision : 21-09-1998

Acts Referred:

Constitution of India, 1950 — Article 14
Criminal Law (Amendment) Act, 1952 — Section 8(1)
Criminal Procedure Code, 1898 (CrPC) — Section 337
Criminal Procedure Code, 1973 (CrPC) — Section 164, 190, 306, 307, 308
Evidence Act, 1872 — Section 118, 133
Penal Code, 1860 (IPC) — Section 120
Prevention of Corruption Act, 1988 — Section 13(1)(c), 13(2), 5
Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 — Section 6, 9(2)

Citation : (1998) 5 BomCR 783 : (1998) 2 BOMLR 114

Hon'ble Judges : M.S. Rane, J

Bench : Single Bench

Advocate : Mrs. Sushma S. Singh, Mohan Pungalia, Harish Gulati, Dinesh Parekh, V.G. Pradhan and R.S. Mhamane, M.R. Jethmalani and A.D. Chougule, instructed by Chougule and Co., Amit Desai and Vijay Garg, instructed by Thakore Jariwala and Associates, for the Appellant;

Judgement

M.S.Rane, J.—These applications have been presented by and on behalf of accused Nos. 1, 2 and 5. Reliefs claimed in both these applications and the grounds upon which same are claimed being identical, the same are being disposed of with the common judgment.

2. The reliefs which are claimed are more in the form and nature of a declaration. The applicants vide these applications are questioning the tender of pardon granted by Mr. R.K. Yadav, the then Hon'ble-Metropolitan Magistrate, Delhi to Shri Mohan Khandelwal an approver and who is listed as P.W. No. 20 in the list of witnesses accompanying the charge sheet filed in this case. It is inter

alia prayed that this Court should declare the said order of Tender of Pardon as illegal, null and void, etc.

3. It is inter alia asserted that the said Tender of Pardon, in the first instance, is without jurisdiction and secondly, has been passed in breach of relevant statutory provisions, namely, section 306 of Cr.RC. For convenient purpose the reliefs as claimed, which in more details have been set out in Misc. Application No. 483 of 1998 of accused No. 5-Harshad S. Mehta and are re-produced here in below to appreciate the nature and extent challenges.

"(a) This Hon"ble Court be pleased to declare that the Tender of Pardon by Shri R.K. Yadav P.W. 20 to Shri Mohan D. Khandelwal is illegal and that Shri Mohan D. Khandelwat accordingly continues to be an accused person ;

(b) The prosecution be directed to arraign Shri Mohan D. Khandelwal as an accused in the instant case;

(c) Pending the hearing and final disposal, of this application Shri Mohan D. Khandelwal"s evidence be not recorded;

(d) For such further and other reliefs as this Hon"ble Court deems just and proper in the circumstances of this case."

However relief as formulated in prayer clause (b) above is not pressed.

4. The reliefs claimed in another application being 484 of 1998 filed by accused Nos. 1 & 2 i.e. Pramod Kumar Pritamlal Manocha and Ambuj Sushilkumar Jain respectively, also proceed on the similar lines. It will be noticed from the above reliefs that what the applicants accused are seeking this Court to do is to declare the Tender of Pardon to Mohandas Khandelwal passed by the Ld. Metropolitan Magistrate, Delhi as illegal and that he continues to be the accused in this case and be directed to arraign him as an accused in this case. Consequential relief is claimed that till the disposal of these applications this Court should not record the evidence of said Mohandas Khandelwal-Approver. It may be stated that said Mohandas Khandelwal is an ex-employee of the applicant in the first application i.e. Harshad S. Mehta.

5. It is thought necessary to briefly advert to the nature of prosecution case. This case has been instituted before this Court by filing charge-sheet by C.B.I. under the provisions of The Special Court (Trial of Offences Relating to the Transactions in Securities) Act, 1992, (hereinafter referred to for the sake of brevity as "the said Act".)

6. All the 5 accused in this case have been charged for various offences viz. u/s 120-B read with 409 I.P.C. and-section 13(2) read with section 13(1)(c) and (d) of Prevention of Corruption Act, 1988 and substantive offences u/s 409 of I.P.C. and section 13(2) read with section 13(1)(c) and (d) of the Prevention of Corruption Act. It needs to be stated that at this stage the offences alleged against the present accused are concerned to the Security Scam which broke out

some where in the year 1992 which led the Legislature to legislate the said Act constituting this Court as Special Court for trying offences relating to the Security Transactions. The prosecution has for that purpose relied upon 5 such Security Transactions which are ostensibly and purportedly shown to be between Maruti Udyog Limited which at the relevant time was the Government Managed Company and United Commercial Bank, Hamam Street Branch, Bombay. One transaction which is the first one is a Dis-investment Transaction by Maruti Udyog Limited (hereinafter referred to as "MUL") and other four transactions which, as stated earlier, are ostensibly and purportedly between MUL and UCO Bank are of investments by MUL. The transactions in question have taken place in March, April, and May 1991. It is the case of the prosecution that in fact all the questioned transactions in securities were at the behest of the accused No. 5- Harshad S. Mehta himself which were not backed up by the securities, but by using as UCO Bank as mediatory, in connivance with its officer i.e. accused No. 3- V. N. Deosthali, managed to divert the funds to his benefit (i.e. of accused No. 5).

8. It will be necessary to notice the position/status of each of the accused in this case. Accused Nos. 1 & 2 i.e. Pramod Kumar Pritamlal Manocha and Ambuj Sushilkumar Jain at the relevant time worked as concerned officers with MUL, accused No. 3-Vinayak Narayan Deosthali was an officer with UCO Bank, Hamam Street Branch, Bombay,. Accused No. 4-Ram Narayan Popli worked as an officer with ANZ Grindlays Bank, Parliament Street Branch, New Delhi and accused No. 5. Harshad Shantilal Mehta was stock and share broker. Shri Mohandas Khandelwal who is an approver and whose examination is questioned was an ex-employee of Harshad S. Mehta-Accused No. 5 and applicant in the first application.

9. Although it is not necessary to have detailed advertance to the factual background certain course of sequence of events in chronological order are thought necessary to appreciate the challenges made.

i) As noticed the questionable transactions in securities have taken place during March to May, 1991.

ii) Security Scam revealed somewhere around in May 1992.

iii) C.B.I. at Delhi registered the offences vide Case No. RC-2(A)/93, ACU(VII) on 15-4-1993 against six accused which includes accused Nos. 1 to 5 and Shri Anuj Kalia as accused No. 6.

iv) On 10-8-1994 accused Nos. 1, 2 and 4 named above and Mohandas Khandelwal-Approver were arrested and who were produced before special Judge, Delhi on the same day i.e. on 10-8-1994 and were released on bail also on the same day.

v) On 26-8-1994 accused Nos. 3 and 5 Vinayak Narayan Deosthali and Harshad Shantilal Mehta respectively were arrested in Delhi and produced on the same day before Metropolitan Magistrate, Delhi and released on bail on the same day.

- vi) On 1 -9-94 Mohandas Khandelwal-Approver was questioned by C.B.I.
- vii) On 1-9-94 C.B.I. made application before the Chief Metropolitan Magistrate Delhi requesting for recording the statement of the approver Shri Mohandas Khandelwal u/s 164 of Cr.P.C.
- viii) On 1-9-94 the Learned Chief M.M., Delhi assigned the matter to Mr. R.K. Yadav then Metropolitan Magistrate, Delhi (already examined as P.W. 20 before this Court in this case) for recording the statement of said approver u/s 164 of Cr.P.C.
- ix) On 21-10-94 learned Metropolitan Magistrate Mr. Yadav recorded Khandelwal's statement u/s 164 Cr.P.C. after completing necessary formalities and sent the same in sealed envelope to Ld. Chief Metropolitan Magistrate, Delhi.
- x) On 29-11-94 C.B.I. applied before Chief Metropolitan Magistrate, Delhi for grant of Tender of Pardon to Mr. Mohandas Khandelwal and on the same day, the Ld. Chief Metropolitan Magistrate Delhi assigned the said application to Ld. Metropolitan Magistrate Mr. R.K. Yadav (P.W. 20). On the same day Ld. Metropolitan Magistrate Mr. R.K. Yadav called for statement of Mr. Mohandas Khandelwal recorded by him u/s 164 of Cr.P.C. from Ld. Chief Metropolitan Magistrate, Delhi.
- xi) On 30-11-94 Mr. R.K. Yadav the Ld. Metropolitan Magistrate after perusal of section 164 statement of Mohandas Khandelwal granted pardon after accepting the conditions thereof by the said approver Mr. Khandelwal (it may be stated that the said statement tender section 164 of Cr.P.C. as also the pardon order have been produced and proved by the then Metropolitan Magistrate Mr. R.K. Yadav who now is Additional Sessions Judge, Delhi vide Exhibits 139 and 141 on the record of this Court.)
- xii) On 15-12-94 Charge-sheet in this case was filed by C.B.I, before the Special Court presided over by my brother Judge Shri S.N. Variava who issued the process to the accused.
- xiii) On 18-3-1994 Charge-sheet and papers etc. in this case were furnished to all the accused which included copies of statement of Mr. Khandelwal, u/s 164 as also order of Metropolitan Magistrate of Tender of Pardon.
- xiv) On 5-7-1995 the prosecution submitted first draft charges and again on 14-2-1996 submitted revised draft charges and again on 21-4-1997 submitted revised draft charges, copies whereof were furnished to the accused.
- xv) On 19-2-1997 Hon'ble Chief Justice assigned this case to this Court.
- xvi) On 29-9-1997 after hearing the prosecution and the defence at considerable length this Court framed the charges against the accused rejecting the pleas made by them for their discharge.
- xvii) Accused Nos. 1 & 2 preferred an appeal being Appeal No. 1126 of 1997

before the Hon'ble Supreme Court against the order of this Court, framing the charges and rejecting the pleas for discharge and the Apex Court dismissed the said appeal on 12-12-1997.

xviii) The trial of this case commenced on 22-7-98 when prosecution examined its first witness and as on today the prosecution has examined its 22 witnesses and the witnesses who are to be examined are the said approver i.e. said Mr. Mohandas Khandelwal and Investigating Officers. As defence suggested that the learned Metropolitan Magistrate recording section 164 statement and tendering pardon be examined before the examination of the Approver, said Ld. Metropolitan Magistrate Mr. R.K. Yadav has also been examined as P.W. 20 as stated earlier.

xix) The prosecution has applied for issuance of witness summons to Mr. Mohandas Khandelwal, approver on 27-8-1998 and said application was granted, to the knowledge of the defence, on the same day and witness summons was issued by the office.

xx) It is at this stage that the applications have been presented by accused Nos. 5 and 1 and 2 on 15-9-1992, when prosecution was about to commence the examination of the approver Mr. Mohandas Khandelwal who has been summoned as witness pursuant to the witness summons issued and who is based in Delhi.

10. Having thus considered the stage of the trial, I propose to dilate over the pleas that have been raised and contentions taken in both these applications. At the out set it may be stated that both these applications more or less proceed on similar lines. The points raised are briefly summarized as under:--

i) It is contended that the Special Court constituted under the provisions of the said Act has no power to grant pardon to a person accused in the case registered under the provision of said Act. The corollary follows since the Special Court enjoys the status of the Sessions Court, which is the higher Court, and the Metropolitan Magistrate's Court being inferior Court (expression "inferior" quoted as was submitted before Court by the defence) it will have no power and jurisdiction to tender pardon.

ii) it is submitted that there is no specific provision made in the said Act in respect of Tender of Pardon to the accused which is the case in various other special statute like Special Court Act, 1979 and prevention of Corruption Act 1988. Since said Act does not contain the provisions for Tender of Pardon, so called Tender of Pardon to Mohandas Khandelwal is illegal. Reference is made to a decision rendered by my brother Judge Shri Variava on 6-2-1996 in Misc. Civil Application Nos. 10 and 11 of 1996 in Special Case No. 1 of 1993 also instituted by C.B.I. before that Court under the provisions of said Act. It is stated that my brother Judge Shri Variava in that judgment, which is common judgment in both the applications, has proceeded to reject the said pleas of the defence about lack of jurisdiction of the Special Court to tender pardon u/s 306 of Cr.P.C. and against which the parties concerned and affected by the said judgment and order

have approached the Apex Court and the appeal has been admitted and examination of the approver in that case is stayed.

iii) There is a breach of statutory provisions in the proceedings of grant of Tender of Pardon to the said approver Mr. Mohandas Khandelwal. In as much as it is asserted that as provided in sub-section 4 of section 306 of Cr.P.C. after accepting conditions of pardon followed by Tender of Pardon, the Learned Metropolitan Magistrate has not examined the said Mr. Khandelwal as approver at all and thereby the defence has been deprived of the opportunity of cross examination of the approver before the committal Court. It is submitted in this behalf that the id. Metropolitan Magistrate, Delhi who granted Tender of Pardon had done so after taking the cognizance of the offence as provided u/s 190 of Cr.P.C. and therefore it was necessary for him to examine the said approver before committing the matter to this Court.

iv) The prosecution has opposed both these applications.

11. I would now advert to the submissions advanced by both the sides. On behalf of defence Ld. Counsel Mr. Jethmalani, for accused No. 5 and Mr. Amit Desai for accused Nos. 1 and 2 made submissions which were supported by the other defence counsel. At the outset it may be stated that the submissions advanced, by and large, are based on the basis of pleadings in the applications summarized as under :

(a) i) There is no express provision contained in the said Act empowering the Special Court to grant Tender of Pardon. That being so grant of pardon by the Ld. Metropolitan Magistrate, Delhi, which is subordinate Court to the Special Court, in this case to Mr. Khandelwal, is without jurisdiction and consequently null and void, etc.

ii) Tender of Pardon is in breach of statutory provisions. In as much there is no compliance of the provisions as contained in sub-section (4) of section 306 of Cr.P.C. there being failure on the part of Ld. Metropolitan Magistrate who tendered and accepted pardon has not examined the approver and thereby defence has lost opportunity to cross examine the approver. Reference is made in support of such contentions to certain statutes viz. the said Act, certain provisions of Cr.P.C. and Evidence Act, Special Act of 1979, Prevention of Corruption Act, 1988 as also to certain authorities which will be referred to later on;

(b) The Ld. P.P. while opposing the said applications and countering the submissions of defence submitted:

(a) that the reliefs claimed therein are in a nature of declaration challenging the efficacy of the order of Tender of Pardon. He states that such orders cannot be challenged the way the same are sought to be challenged since the order of Tender of Pardon are final orders and the remedy if at all, will be to file Revision before the Appellate Court ;

(b) the applications presented are not bona fide being filed at the belated stage. The Ld. P.P. made reference to the sequence of events in this case which have already been mentioned earlier in para 9 hereinabove to highlight that the recording of statement u/s 164 of Cr.P.C. of the approver and subsequent grant of pardon were known to the defence long back as the relevant record in respect thereof was made available to them including the copy of the statement recording section 164 as also Tender of Pardon and conditions thereof when the copies thereof were furnished to them along with charge-sheet. Thereafter matter was argued at considerable length when charges were framed and it is at the belated stage when the prosecution was about to examine the said approver-Mr. Khandelwal that these applications have been presented. Ld. P.P. therefore asserts that the applications presented are not bona fide.

iii) The Ld. P.P. also makes reference to the judgment of my brother Judge Variava dated 6-2-1996 in Misc. Application Nos. 10 and 11 of 1996 in Special Case No. 1 of 1993 referred to earlier. He also relies upon decisions of the Supreme Court in the case of Sardar Iqbal Singh v. State (Delhi Administration) and others, AIR 1977 S.C 2437 and V. Krishnaswami v. State of Tamil Nadu, 1987 Cri. L.J. 1012 of Madras High Court to which a detailed reference will be made later on; And

iv) He further points out that the Tender of Pardon to Mr. Khandelwal by the Ld. Metropolitan Magistrate, Delhi has been done in accordance with the provisions of the statute. He submits that in the case in hand there was no question of stage of committal of the case as such since charge sheet has been filed directly before the Special Court which has exclusive jurisdiction to take cognizance of the said case under the provisions of the said Act. That being so, the Ld. P.P. asserts, there was nothing before the Ld. Magistrate of which he was expected to take cognizance in the matter as such. He further submits that the Ld. Magistrate has limited role in the context of Tender of Pardon and as provided in section 306 sub-sections (1), (2) and (3) thereof he has taken various steps and which is evident from his deposition before the Court. He was subjected to cross examination on behalf of the defence and he has deposed before the Court the various steps which he took to ensure the adherence to the provisions of the statute as also precautionary safeguards required to be taken qua the approver. Therefore according to the Ld. P.P. question of compliance of provisions of sub-section (4) of section 306 of Cr.P.C. would not arise in the instant case.

12. In order to appreciate divergent contentions as already slated hereinabove, we have noticed the stage of the trial of this case when the applications have been presented by and on behalf of the applicants-accused herein questioning the validity and efficacy of the order of grant of pardon by Ld. Metropolitan Magistrate. It is therefore not necessary to repeat the same. It is crystal clear that the Tender of Pardon was accepted by the Ld. Metropolitan Magistrate and the copy of order thereof was already furnished to the defence long back. The statement of the Approver u/s 164 of Cr.P.C. was also furnished long back. The

prosecution has cited the said Approver as also the Ld. Metropolitan Magistrate as its witnesses and in fact as noticed earlier has also examined the Ld. Metropolitan Magistrate as P.W. 20.

13. Notwithstanding all these the defence chose to remain silent till the stage of examination of the approver reached. To that extent the submission made by the L.d. P.P. that the applications have been made at belated stage appears to be justified.

14. It may further be stated that the defence indicated during the course of trial that the examination of the Ld. Metropolitan Magistrate who accepted the Tender of Pardon and passed the order in that behalf be done before the Approver stepped into the witness box, which was also acceded to. In as much as although the witness summons to the said Approver Mr. Khandelwal was issued on 27-8-1998 and which was to the knowledge of the defence that these applications have been presented only on 16-9-1998. Taking into consideration all these aspects I find considerable substance in the submission of Ld. P.P. that the applications presented are not bona fide.

15. That apart The Court however proposes to consider the merits of the submissions advanced.

Power of Special Court regarding grant of pardon and so called illegality in grant of pardon.: It is submitted on behalf of the defence as noticed earlier, that there is no express provision made conferring power upon the Special Court constituted under the said Act to grant pardon to the accused/accomplice. Reference is made for buttressing the said argument to section 9 of the said Act. It is asserted that sub-section (2) of section 9 of the said Act, although it provides that the provision of Cr.P.C., 1974 shall be applicable in a general way, there is no express and specific provision to be found as being made applicable to the Special Court regarding Tender of Pardon to an accomplice as contained in Chapter XXIV of Cr.P.C. in particular of sections 306 to 308 thereof. Reference is made to the special Statutes like (1) The Special Court Act, 1979 (Act 22 of 1979) and (2) Prevention of Corruption Act, 1988. It is emphasized that the provisions of the said Special Court Act are para materia with that of 1979 Act in material aspects and in sub-section (2) of section 9, there is specific provision made regarding Tender of Pardon by the Special Court. Similarly in section 5 of Prevention of Corruption Act such specific provision has been made. Referring to this, it is contended that since no such specific provision is to be found in section 9 of the said Act, it is manifest that Legislature intended not to invest this Special Court with the power to tender pardon to an accomplice. Since the Special Court has no such power, it follows that the Metropolitan Magistrate which is subordinate Court, will have no such power to tender pardon. As a corollary to this, it is submitted by the defence that under the said Act there is no power to tender pardon at all. This is the thrust of submission.

16. Reference is made and reliance is placed on the following decisions :

1) Anwarali Sarkar and Others Vs. The State, 2) State of Uttar Pradesh Vs. Singhara Singh and Others, 3) Sanjay Gandhi Vs. Union of India (UOI) and Others, 4) Lt. Commander Pascal Fernandes Vs. The State of Maharashtra and Others, . As also to : 5) The Special Court Act, 1979; 6) Parliament Debate on The Special Court Act, 1979; 7) In re: Ramasamy and Others, 8) R. Ravindran Nair and Others Vs. Superintendent of Polic, Special Police Establishment, C.B.I. and Others, 9) Ajit Kumar Palit Vs. State of West Bengal, 10) Uravakonda Vijayaraj Paul Vs. The State and Others, 11) AIR 1936 253 (Privy Council) 12) In Re : Chief Judicial magistrate, 13) State (Delhi Administration) Vs. Jagjit Singh, 14) State of Kerala and etc. Vs. Monu D. Surendran and Another etc., 15) 33 Cri.L.J. 1932, Arunachala Reddi v. Crown. 16) A.J. Peiris Vs. State of Madras, 17) 45 Cri.L.J. 1944, Rambharose v. Emperor. 18. Raj Kishore Prasad Vs. State of Bihar and another, Reference was also made to the appeal pending before the Supreme Court filed against the common order and judgment passed by my brother Judge Variava presiding over the other Special Court on 6-2-1996 in Misc. Application Nos. 10 and 11 of 1996 in Special Case No. 1 of 1993, C.B.I. v. K. Margabanthu & others, which is filed under the provisions of the said Act and pending on the file of that Court. (More about it later on).

17. The Ld. P.P. has vehemently repelled the said submissions of the defence. He made reference to the said Act, in particular, its preamble and various sections and submitted that the said Act itself is Self Contained Code and its comparison with other statutes as sought to be done by the defence, is misplaced and misconceived. He also refers to sections 306 to 308 of Cr.P.C. and sections 118 and 133 of Evidence Act and submits that pardon once tendered cannot be forfeited or withdrawn save and except as provided u/s 308 of Cr. P.C. He further submits that the way the defence is questioning the efficacy of the Tender of Pardon, vide these applications, at such a belated stage, as if defence is seeking this Court to sit in appeal against the said order of grant of pardon which course is not permissible as the Tender of Pardon is a final order.

18. To buttress his submissions the Ld. P.P. refers to the decisions of the Supreme Court in the case of Sardar Iqbal Singh v. state (Delhi Administration) and others (supra), Division Bench judgment of Madras High Court in the case of V. Krishnaswami v. State of Tamil Nadu (supra) and judgment of my brother Judge Variava dated 6-2-1996 in Misc. Application Nos. 10 and 11 of 1996 in Special Case No. 1 of 1993 (supra).

19. On careful consideration of the divergent contentions raised as noticed above as also critical analysis and close examination of the relevant statutory provisions in its proper perspective and principles of law as enunciated in judicial pronouncements, I do not find any merits, as would be pointed out hereinafter, to the various challenges levelled by the defence in both these applications.

20. It will be appropriate to notice the scheme of the said Act and the circumstances in which the same came to be enacted in order to appreciate the objections of the defence. It is necessary to note the statutory scheme of the

said Act under which the Special Court is functioning. The said Act was ascended to by the President of India on 18-8-1992 and it was brought in force from 6-6-1992 with retrospective effect as an Ordinance had preceded it from the earlier date. The Statement of Objects and Reasons of the said Act clearly indicates the purpose behind the said enactment :

"In the course of the investigations by the Reserve Bank of India, large scale Irregularities and malpractices were noticed in transactions in both the Government and other securities, indulged in by some brokers in collusion with the employees of various Banks and financial institutions. The said irregularities and malpractices led to the diversion of funds from Banks and financial institutions to the individual accounts of certain brokers.

2. To deal with the situation and in particular to ensure the speedy recovery of the huge amount involved, to punish the guilty and restore confidence in and maintain the basic integrity and credibility of the Banks and financial institution the Special Court (Trial of Offences Relating to Transactions in Securities) Ordinance, 1992 was promulgated on the 6th June, 1992. The Ordinance provides for the establishment of a Special Court with a sitting Judge of a High Court for speedy trial of offences relating to transactions in securities and disposal of properties attached. It also provides for appointment of one or more Custodians for attaching the property of the offenders with a view to prevent diversion of such properties by the offenders."

21. Further as the title of the said Act would show, which is, The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 it is suggestive of the fact that the said Act was enacted with the object of ensuring trial of offences relating to the transactions in securities during the statutory period. The expression "Offences" appearing in its name would speak a volume. This is also demonstrated from the fact that its preamble also spells out the purpose for the establishment of Special Court which is for "Trial of Offences Relating to Transactions in Securities" and matters connected therewith or incidental thereto. Then in section 2 subsection (1) which contains definitions it lays down "Code" which means the Code of Criminal Procedure, 1973. Section 5 provides for the establishment of the Special Court. Section 6 speaks of cognizance of cases by Special Court and trial thereof. Then section 8 again speaks of joint trial of the case by the Special Court in the case of charge of conspiracy and then section 9 which is important provides by sub-sections (1) that the Special Court shall in the trial of such cases follow the procedure prescribed by Code i.e. Criminal Procedure Code. Since section 9 is relevant the same is reproduced hereunder :

"9. Procedures and powers of Special Court.--

(1) The Special Court shall in the trial of such cases, follow the procedure prescribed by the Code for the trial of warrant cases before the Magistrate.

(2) Save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the

proceedings before the Special Court and for the purposes of the said provisions of the Code, the Special Court shall be deemed to be a Court of Session and shall have all the powers of a Court of Sessions, and the person conducting a prosecution before the Special Court shall be deemed to be a Public Prosecutor.

(3) The Special Court may pass upon any person convicted by it any sentence authorized by law for the punishment of the offence of which such person is convicted.

(4) While dealing with any other matter brought before it, the Special Court may adopt such procedure as it may deem fit consistent with the principles of natural Justice."

Plain reading of section 9 of special Act reproduced hereinabove in particular subsections (1) and (2) thereof will show that the provisions of the Criminal Procedure Code are made applicable to the Special Court. It goes further that the Special Court shall be deemed to be a Court of Sessions and shall have all the powers of Court of Sessions. Sub-section (3) empowers the Court to award sentences. Sub-section (4) which is very material and which is not to be found in the other statutes enjoins and empowers the Court to adopt such procedure as it may deem fit and proper and consistent with the principles of natural justice. This is the salient feature in the said Act which is not the case in the other statute. Section 13 of the said Act provides that the provisions of the said Act shall have overriding effect over the other statute. All this would show what was the intent of the Legislature in enacting the said Act. It will be legitimate to note that the said Act was enacted giving adequate powers to the Special Court to try the cases relating to the security transactions during the statutory period. There are no fetters imposed as is sought to be suggested by and on behalf of the defence. On the contrary the scheme of the said Act would indicate otherwise. In any event, there is no justification or basis for restricting the power of the Special Court in the context of Tender of Pardon as provided in sections 306 and 308 of Cr.RC. The Act as its title and its preamble and the various provisions referred to hereinabove clearly indicate that the Act has been enacted empowering the Special Court to follow the procedure as will be necessary.

22. The procedure which this Court is to follow as stated is of a warrant case. Considering the various provisions of the said Act referred to hereinabove it needs to be emphasized and it is well established canon of construction that the Court should read the section as it is and it cannot rewrite it to suit its convenience, nor does any canon of construction permit the Court to read the section in such manner as to render it to some extent otiose. It needs to be further emphasized that this Court as Special Court established under the said Act is a Court of Original Criminal Jurisdiction. As a Court of Original Criminal Jurisdiction in order to make it effectively and truthfully functionary oriented various powers which conferred by the statute setting up the said Court except those specifically conferred and specifically denied, it has to function as a Court of Original Criminal Jurisdiction not being high bound by the terminology status

description of Magistrate or Court of Sessions. Since Cr.P.C. is made applicable it has to be held that it enjoys all powers which the Court of Original Criminal Jurisdiction would enjoy save and except those specifically denied. This being the position the submissions of the defence that since there is no specific provision made with regard to the Tender of Pardon it should be held that the Special Court lacks jurisdiction and power in that behalf requires to be rejected.

23. In this contest there is a decision of the Apex Court directly on the point and which has been referred to by the Ld. P.P. and upon which he has placed strong reliance. The case in question is *Sardar Iqbal Singh v. State (Delhi Administration) and others* (supra). The said case is directly on the point and squarely applies to the facts and circumstances as obtained in the matter herein. There also the question was for consideration before the Apex Court the power of the special Judge in the context of Tender of Pardon. The constitutional vires under Article 14 of section 337 of the Old Cr. P.C. which corresponds to section 306 of the new Cr.P.C. was challenged. In that case also it emerged that Tender of Pardon was granted by the Magistrate at the stage of investigation. Subsequently charge-sheet was filed before the Special Court as offence fell under the jurisdiction of the Special Court and Tender of Pardon was granted by the Magistrate. The provision as contained in section 306 of Cr.P.C. new Code is identical to that of section 337 as contained in the old Cr.P.C. The Apex Court made reference to Criminal Law Amendment Act, 1952, provisions of which also run in identical manner as far as section 9 of the said Act is concerned. In paras 5 and 6 the Apex Court luminously resolved the controversy holding thus :

"5. From these provisions it would appear that where a person has accepted a Tender of Pardon under sub-section (1) of section 337 at the stage of investigation in a case involving any of the offences specified in subsection (2-B), the prosecution can file the charge-sheet either in the Court of a competent Magistrate or before the special Judge who u/s 8(1) of the Criminal Law Amendment Act, 1952 has power to take cognizance of the offence without the accused being committed to him for trial. It follows that if the Magistrate takes cognizance of the offence, the approver will have to be examined as a witness twice, once in the Court of the Magistrate and again in the Court of Special Judge to whom the Magistrate has to send the case for trial, but if the charge-sheet is filed directly in the Court of Special Judge, he can be examined once only before the Special Judge. This means that in a case where the Charge-sheet is filed in the Court of the Magistrate, the accused gets an opportunity of having the evidence of the approver at the trial tested against what he had said before the Magistrate: the accused is denied this opportunity where the charge-sheet is filed in the Court of the Special Judge whether the accused will get the advantage of the procedure which according to the appellant is more beneficial to the accused, thus depends on the Court in which the proceeding is initiated and, it is contended, if the choice of forum is left to the prosecution, it will result in discrimination. Mr. Sen submits that the only way to avoid this position is to read sub-sections (1), (2) and (2-B) of section 337 of the Code and section 8(1) of

the Criminal Law Amendment Act, 1952 together and to construe them in a way to require that in every case where an accomplice is granted pardon, the charge-sheet must be filed in the Court of a Magistrate.

6. We are unable to accept the contention. It is clear from the scheme of section 337 that what is required is that a person who accepts a Tender of Pardon must be examined as a witness at the different stages of the proceeding. Where, however, a Special Judge takes cognizance of the case, the occasion for examining the approver as a witness arises only once. It is true that in such a case there would be no previous evidence of the approver against which his evidence at the trial could be tested, which would have been available to the accused had the proceeding been initiated in the Court of a Magistrate who under sub-section (2-B) of section 337 of the Code is required to send the case for trial to the Special Judge after examining the approver. But we do not find anything in sub-section (2-B) of section 337 to suggest that it affects in any way the jurisdiction of the Special Judge to take cognizance of an offence without the accused being committed to him for trial. Sub-section (2-B) was inserted in section 337 in 1955 by Amendment Act 26 of 1955. If by enacting sub-section (2-B) in 1955 the legislature sought to curb the power given to the Special Judge by section 8(1) of the Criminal Law Amendment Act, 1952, there is no reason why the legislature should not have expressed its intention clearly. Also, the fact that the approver's evidence cannot be tested against any previous statement does not seem to us to make any material difference to the detriment of the accused transgressing Article 14 of the Constitution. The Special Judge in any case will have to apply the well established tests for the appreciation of the accomplice's evidence. This Court in *Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and Others*, held that the mere availability of two procedures would not justify the quashing of a provision as being violative of Article 14 and that "what is necessary to attract the inhibition of the Article is that there must be substantial and qualitative difference between the two procedures so that one is really and substantially more drastic and prejudicial than the other..... In our opinion there is no such qualitative difference in the two procedures whether a witness is examined once or twice does not in our opinion make any such substantial difference viz. that one of them could be described as more drastic than the other."

In my view the principles as laid down by the Apex Court clinches the issues as have been sought to be raised in this matter by the defence. By reading the above paragraphs of the judgment of the Supreme Court it will be noticed that the facts and circumstances as obtained in the matter in hand are almost similar. The offences were exclusively triable by Special Court. The tender of Pardon was granted by the Magistrate at the stage of investigation as in the case in hand. The charge-sheet was directly filed at subsequent stage before the Special Court as is also in the case in hand. The challenge was on behalf of the accused about the non-compliance of the examination of the approver as in the case in hand. While rejecting the Apex Court has clarified the position luminously as

reproduced hereinabove needing no further elaboration.

24. At this juncture it will be useful to make a reference to the judgment of my brother Judge Variava in Misc. Application Nos. 10 and 11 of 1996 in Special Case No. 1 of 1993 (supra). There also the power of the Special Court was challenged on similar grounds. In that case pardon was granted by the Special Court. However the Special Court rejected the same objection holding that the Special Court possessed power as contained in section 306 of Cr. P.C. Although it is stated that the appeal has been filed against the said order before the Apex Court, on consideration of the facts and circumstances as obtained in the matter in hand and the legal principles in that behalf which my learned brother Judge Variava has considered and dealt with, I am in respectful concurrence and agreement with the same.

25. The Ld. defence Counsel referred to various decisions as mentioned hereinabove in para 16 before this Court as also before my brother Judge Variava in the said case (supra) which are as under :

i) Anwarali Sarkar and Others Vs. The State, ii) State of Uttar Pradesh Vs. Singhara Singh and Others, iii) In re: Ramasamy and Others, iv) R. Ravindran Nair and Others Vs. Superintendent of Polic, Special Police Establishment, C.B.I. and Others, v) Ajit Kumar Palit Vs. State of West Bengal, vi) Uravakonda Vijayaraj Paul Vs. The State and Others, vii) AIR 1936 253 (Privy Council) viii) In Re : Chief Judicial magistrate, ix) State (Delhi Administration) Vs. Jagjit Singh, x) State of Kerala and etc. Vs. Monu D. Surendran and Another etc., respectively at Sr. Nos. 1, 2, 7, 8, 9, 10, 11, 12, 13 and 14 in para 16 of this judgment deal with the cases in which pardon were tendered and were required to be committed by the Magistrate, who took cognizance, to other Court either Special Court or the Sessions Court. Since the commitment of the cases was merged in these cases the provisions of sub-section (4) of section 306 was held to be applicable and also mandatory. However this is not the position as far as case in hand is concerned as notice hereinabove. There is no question of committal as such. The other decisions cited, inter alia, in the cases of i) 33 Cri.L.J. 1932 Arunachala Reddi v. Crown ii) A.J. Peiris Vs. State of Madras, iii) 45 Cri.L.J. 1944 Rambharose v. Emperor, iv) Sanjay Gandhi Vs. Union of India (UOI) and Others, v) Lt. Commander Pascal Fernandes Vs. The State of Maharashtra and Others, and vi) Raj Kishore Prasad Vs. State of Bihar and another, in view of the position in law as explained hereinabove and in particular in view of the decision of the Supreme Court in the case of Sardar Iqbal Singh v. State (Delhi Administration) and others (supra) it has to be held that the ratios of these judgments will not apply to the case in hand will not be of any assistance to the defence.

26. It is necessary to note that my brother Judge Variava in his judgment in the said case (supra) after considering the various such authorities has held same being inapplicable in the context of provisions of the said Act to which this Court, as stated earlier, is in agreement with. It needs to be stated that while no one

would dispute the propositions and the legal principles as laid down in the above cases, in view of the facts and circumstances of the case in hand same will be entirely inapplicable in this case. In as much as in all these cases the position was that the Magistrate or the Court who were concerned in Tender of Pardon were seized with the matter and the same were required to be committed before the concerned courts. Therefore the cognizance as contemplated by such courts was at two stages; one at the time of when the Tender of Pardon proceedings were to be considered and secondly at the stage of committal of the cases. Whereas this is not the position in the case in hand. So was the position in the case of *Sardar Iqbal Singh v. State (Delhi Administration) and others* (supra) before the Supreme Court. This ratio is also reiterated by the Division Bench of Madras High Court in *V. Krishnaswami's case* (supra). The relevant portion as it appears in Head Note (B) posits as under :

(B) Criminal P.C. (2 of 1974), Section 306(4) and (5)- Approver-Absence of double examination-No prejudice.

"If there is no double examination of the approver as provided u/s 306(4) and (5) of the Code, he could not be said to be prejudiced. u/s 306(4), Cr.P.C. in the phrase, "Every person accepting a Tender of Pardon made under sub-section (1) (a) shall be examined as a witness in the Court of Magistrate taking cognizance of the offence and in the subsequent trial, if any, "the stress is on the word "witness". There is nothing mandatory on the fact that he should be examined twice. What is mandatory is that he should be examined as a witness and the provision for an examination by the Magistrate taking cognizance of the offence is not for the purpose of providing an earlier statement on oath for the purpose of cross examination by the accused at the ultimate trial, but to have an earliest possible statement on oath by the approver for the purpose of knowing the truth. Secondly, the double examination which has been prescribed in the interest of justice need not be resorted to in all cases. It is not the law that whenever there is an approver, there should be necessarily a double examination. The provisions of section 307, Cr.P.C. as well as those u/s 8(2) of the Criminal Law Amendment Act, 1952, are there to show that whenever the statements are made when the witnesses are examined by the highest possible Court, there is no reason for a double examination."

Therefore the said decision of the Supreme Court is a complete answer to the various submissions advanced on behalf of the defence.

27. Although it is not necessary and it will not be proper for the purposes of these applications, the Court thinks it appropriate to make reference as to what has been made available before the Court in respect of the proceedings concerning Tender of Pardon to the said approver. For that matter, the then Ld. Magistrate Mr. R.K. Yadav who granted Tender of Pardon has been examined as P.W. 20 and he has made available the entire record and the proceedings. He was subjected to cross-examination whether he took cognizance of the matter and committed the matter and he rightly answered that since there was no matter for

him for committal there was no such question as such. This would clearly show that in the case in hand no question arose for its committal as was the case before the Apex Court and Madras High Court in above referred cases.

28. Therefore I do not find any merits in the various contentions raised by and on behalf of the defence in seeking the reliefs of these applications of declaring the Tender of Pardon as illegal, null and void. Apart from the fact that in such proceedings by way of applications the same cannot be granted, the Court has also considered the matter in all respect and perspective in the light of material made available and also position of law and has come to the conclusion that the Ld. Metropolitan Magistrate, Delhi has complied with the provisions with regard to Tender of Pardon and has accepted after having satisfied about the same. At such a belated stage it is not proper and also not justified for this Court to grant reliefs as have been claimed in the applications. The fact that the applications have been made at the belated stage is also one of the circumstances which certainly militates against the applicants-accused. The Court also does not find any merits as discussed hereinabove.

29. Before concluding the Court wishes to clarify that the evidence to be adduced in this case, which would include the evidence of the approver and also of the Ld. Magistrate would be considered, assessed and evaluated at appropriate stage when trial gets concluded in the light of Rules of Evidence on its merits. The defence will be entitled to cross examine the approver and test his veracity and credibility. The Court keeps its mind open in that respect and the defence at the appropriate stage certainly urge and canvass the points germane in so far as evidence of approver is concerned.

30. With this clarification the Court holds that there is no substance in the applications and the same stand rejected.

ORDER

i) Misc. Application No. 483 of 1998 filed by applicant-accused No. 5-Harshad S. Mehta and Misc. Application No. 484 of 1998 filed by applicants-accused Nos. 1 and 2-Pramod Kumar Pritamlal Manocha and Ambuj Sushilkumar Jain respectively stand rejected.

ii) At this stage Ld. Counsel Mr. Jethmalani on behalf of accused No. 5 requests that operation of this order be stayed to enable the applicant accused to approach the Supreme Court against the order herein. He says that if the examination of the approver proceeds it will cause prejudice to the defence. He also makes reference to SLP filed in other matter against the judgment of my brother Judge Variava referred to in the judgment hereinabove and grant of stay by the Apex Court. The other defence Counsel also support Mr. Jethmalani in the said application.

iii) Ld. P.P. Mr. Pradhan says that such a request cannot be granted. He says that in the case being subject matter of the appeal before the Supreme Court, there

are 131 witnesses and so far only half a dozen witnesses have been examined and rest are yet to be examined. Whereas in the case in hand all the prosecution witnesses, except the approver and the Investigating Officers, have been examined. He says to grant the stay would mean to stay the entire trial.

iv) He further emphasizes that the offences in this case have taken place in March/April, 1991, crime was registered in the year 1994, and all the papers, including the order of pardon etc. were already furnished to the defence long back. They were also aware that the process by way of witness summons was issued against the said approver Mr. Khandelwal by this Court on 27-8-1998. The applications have been made by the defence at very belated stage and there is no explanation offered for such a delay. Ld. P.P. says that the facts as obtained in the matter which is subject matter of SLP and as obtained in the matter herein are different and so also the basic points of law.

v) On consideration of the submissions made as above the Court is of the view that it will not be appropriate at this stage of the matter to defer the examination of the approver Mr. Khandelwal. Virtually, as Ld. P.P. rightly says, that same would amount to staying further trial of this case. Matter was hotly contested at the stage of framing charges also. The defence was aware about the issuance of process upon the said approver Mr. Khandelwal. The offences in the case have taken place in 1991 and it is more than 4/ 5 years that the case is pending. Taking into consideration all these aspects in my view, it will not be appropriate to defer the recording of the evidence of the approver. The Court therefore rejects the said application.

vi) However Court wishes to clarify that the acceptance and reading of the evidence of the approver in this case will be subject to whatever the Supreme Court would direct. With this, prayer for deferment of the examination of said approver Mr. Khandelwal stands rejected.