
(2013) 08 DEL CK 0007
In the Delhi High Court
Case No : Criminal M.C. 1036 of 2013

Jayalakshmi Jaitly

APPELLANT

Vs

Central Bureau of Investigation and Another

RESPONDENT

Date of Decision : 14-08-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 306, 307, 438
Prevention of Corruption Act, 1988 — Section 5(2)

Citation : (2013) 08 DEL CK 0007

Hon'ble Judges : S.P. Garg, J

Bench : Single Bench

Advocate : Nitya Ramakrishna and Mr. Aaditya Vijay Kumar, for the Appellant;

Final Decision : Dismissed

Judgement

S.P. Garg, J.—The petitioner challenges the validity and propriety of order dated 11.12.2006 of learned Special Judge, CBI by which Surendra Kumar Surekha (2nd respondent) was granted pardon on the condition that he would make true and full account of the facts and circumstances within his knowledge relating to the offence committed by him in conspiracy with co-accused either as a principal or an abettor. I have heard the learned counsel for the petitioner and have examined the Trial Court record. Counsel urged that pardon was granted mechanically without application of mind by the learned Special Judge. CBI deliberately did not place before the Court all the circumstances surrounding the recording of respondent No. 2's statement as also the circumstances preceding the impugned order as it (CBI) was in collusion with him (2nd respondent) and had procured 164 statement with tacit understanding to grant him pardon. It was not a voluntary statement being inspired by inducement. For that reason CBI did not object grant of anticipatory bail to him. He was not arrested immediately after recording statement u/s 161 Cr.P.C. on 04.03.2005. Counsel further argued that the learned Special Judge did not appreciate variations in 161 and 164 Cr.P.C. statements. The statement tendered u/s 164 Cr.P.C. could not have been

believed and acted upon. She further pointed out that various documents relating to the petitioner including previous statements made before Commission of Inquiry were not placed before Special Judge, CBI and she was kept in the dark on vital facts. Requirements of Sections 306 and 307 Cr.P.C. were not complied with. Pardon could not have been granted to the respondent No. 2 who was not a reliable witness.

2. It is a matter of record that CBI registered First Information Report on 06.12.2004 as RC AC3/2004 A0005. Statement of 2nd respondent u/s 161 Cr.P.C. was recorded on 04.03.2005. On 17.03.2005, he (2nd respondent) moved Special Judge, CBI u/s 438 Cr.P.C. for grant of anticipatory bail. CBI did not oppose it and he (2nd respondent) was granted bail on 23.03.2005. On 24.03.2005, he (2nd respondent) moved an application before Special Judge, CBI through his counsel Sh. Ramesh Gupta, Advocate for recording his statement u/s 164 Cr.P.C. Sh. V.K. Khanna, the then Metropolitan Magistrate (CBI Court) recorded it on 27.04.2005. It is not in dispute that subsequently an application u/s 5(2) Prevention of Corruption Act, 1988 read with Section 306 of Criminal Procedure Code for grant of pardon to Surendra Kumar Surekha was moved on 07.11.2006 before Special Judge, CBI duly forwarded by Ms. Padmini Singh, Spl.PP for CBI. On 21.11.2006, Special Judge directed to put up the application with FIR and statement of Surendra Kumar Surekha recorded u/s 164 Cr.P.C. On 11.12.2006 for detailed reasons pardon was extended to respondent No. 2. 2nd respondent's statement u/s 164 Cr.P.C. was discussed in detail in the impugned order. It is further a matter of record that subsequently a charge-sheet was filed in the Court on 27.12.2006. By an order dated 28.02.2012, charges under various sections were framed. CBI, thereafter, examined nine witnesses. Surendra Kumar Surekha has been partly examined as PW-10.

3. There is considerable delay in challenging the impugned order of pardon. The petitioner has not given plausible explanation for the inordinate delay when she was aware of it from the very inception after the filing of the charge-sheet in 2006. At no stage (even at the time of consideration of charge), the petitioner opted to challenge the validity and propriety of the pardon granted to the 2nd respondent.

4. I find no irregularity in the application moved through counsel Sh. Ramesh Gupta, Advocate to record statement u/s 164 on 24.03.2005. On 26.04.2005, Spl.P.P. for CBI consented to it. Since CBI had not moved the Court to record 2nd respondent's statement u/s 164 Cr.P.C., no fault can be found when CBI's consent to record it was obtained. Metropolitan Magistrate put preliminary questions to the 2nd respondent before recording confession to ascertain if it was being made voluntarily. It is true that in the statement (Ex. PW-10/A) there is mention that "Application has been moved by Surendra Kumar Surekha for becoming approver/witness". Counsel urged that learned Metropolitan Magistrate did not apply his mind as no such application for becoming approver/witness was moved before him. In my view, this lapse cannot be taken as non-application of

mind. The proceedings are to be scrutinized as a whole. There is specific mention that confession of applicant Surendra Kumar Surekha u/s 164 Cr.P.C. was being recorded. CBI did not ask to grant pardon to 2nd respondent soon after making of statement u/s 164 Cr.P.C. It was moved only on 07.11.2006. Before considering this application, vide order dated 21.11.2006, Special Judge directed FIR and statement, u/s 164 Cr.P.C. to be placed before her. On 11.12.2006, after considering all the relevant facts and circumstances including the confessional statement Special Judge proceeded to examine Surendra Kumar Surekha with regard to his request for grant of pardon u/s 306 Cr.P.C. and his prayer to become approver. Several questions were put to him to ascertain the veracity of whatever he had stated in his confessional statement u/s 164 Cr.P.C. and the full accounts of the circumstances relating to the case. The Special Judge, thereafter, recorded her satisfaction that the applicant and co-accused were involved in the commission of offence and it would be in the interest of justice, if his evidence was obtained as an approver. She was satisfied that CBI was not motivated by any malice in endorsing the request for getting him pardon u/s 306 Cr.P.C. She considered it a fit case where tender and pardon u/s 306 Cr.P.C. should be granted. Accordingly, Surendra Kumar Surekha was granted the pardon. The conditions of pardon were read over and explained to him in Hindi and English.

5. The citation Ashok Kumar Aggarwal Vs. Central Bureau of Investigation and Another, relied on by the petitioner is not applicable to the facts and circumstances of this case. In the said case, apparently, CBI had not placed the entire relevant material before the Special Judge to form an opinion as to whether it was a case of grant of pardon or not. The matter was remanded to Special Judge to consider the application afresh as the charge-sheet had not yet been filed; antecedents of the applicant & list of criminal cases being investigated by different agencies as asked for was not furnished; and the reply from Swiss Bank on certain points referred in Letter Rogatory was still awaited. In the instant case, there was no such requirement/query of Special Judge which were to be complied or replied by CBI. The FIR and statement u/s 164 Cr.P.C. were before the Special Judge while considering the application of CBI for grant of pardon to 2nd respondent. It was a detailed application which contained brief facts of the case. The satisfaction recorded by Special Judge cannot be faulted on flimsy grounds by the petitioner after a considerable delay of about 8-9 years particularly when the 2nd respondent's statement as approver has been partly recorded.

6. It is well settled that the tender of pardon and its acceptance by the person concerned is a matter entirely between the Court concerned and the person to whom it is made and if the tender of a pardon is accepted by the accomplice concerned, the only obligation placed upon the prosecution is to examine him as a witness in the case. He will then be subjected to cross-examination by the co-accused and it will be for the co-accused to show by such cross-examination that the statement that is made by the accomplice is a false statement. Whether the statement made by the accused seeking for pardon is voluntary or not is to be

decided by the Court alone. If it is the case of the other accused that the statement of the approver is wrong, it has to be established by subjecting the approver to cross-examination.

7. The pardon proceeding which takes before the Magistrate is neither an enquiry nor a trial in which an opportunity must be given to the other accused to show to the Court that the statement of the accused seeking pardon is not true. Only during the course of trial, the opportunity will be given to the accused to show to the Court that the approver's evidence at the trial is untrustworthy in view of the contradictions or improvements made by him by allowing the accused to cross-examine. Petitioner's contention that the statement given by 2nd respondent is self-exculpatory and has been given implicating others in order to escape from the punishment has no merit at this juncture. For granting pardon u/s 306 Cr.P.C., it is not a pre-requisite condition that the statement of a person on whose behalf pardon is sought must be in the nature of confession or he must implicate himself fully in the offence. What the section requires is to obtain statement from the person who is supposed to be directly or indirectly concerned in or privy to the offence and such a person can be granted pardon on the condition of his making a full and true disclosure of whole of the circumstance within his knowledge relative to the offence. Central Bureau of Investigation Vs. N.K. Amin and Others,

8. The circumstances highlighted by the learned counsel can't be taken as absolutely relevant to form an opinion to grant pardon or not. The petition is unmerited and is dismissed.