

(2015) 11 AHC CK 0142
In the Allahabad High Court
Case No : Criminal Revision No. 4161 of 2015

Ranjeet Srivastava and Others

APPELLANT

Vs

The State of U.P. and Others

RESPONDENT

Date of Decision : 20-11-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 12, 12(2), 15, 15(1), 155
Evidence Act, 1872 — Section 118, 132
Explosive Substances Act, 1908 — Section 7
Penal Code, 1860 (IPC) — Section 306
Prevention of Corruption Act, 1988 — Section 5, 5(2)

Citation : (2016) 1 ADJ 494 : (2016) 92 ALLCC 749

Hon'ble Judges : Harsh Kumar, J.

Bench : Single Bench

Advocate : Ashutosh Yadav, Abhilasha Singh and Shyam Lal, for the Appellant

Judgement

Harsh Kumar, J.—This revision has been filed by accused persons Ranjeet Srivastava & others against the order dated 07.08.2015 passed by the learned Special Judge (Anti-Corruption), CBI, Court No. 1, Ghaziabad in Special Case No. 16 of 2011 (CBI versus Ranjeet Srivastava and others), rejecting the application of revisionists under section 319 Cr.P.C. for summoning Bankey Bihari Tripathi as co-accused for trial together with them.

2. I have heard Shri Shyam Lal, Advocate for and on behalf of revisionist, Shri N.I. Jafri, Advocate on behalf of C.B.I., learned AGA and perused the record.

3. Learned counsel for the revisionists contended that O.P. No. 3, Bankey Bihari Tripathi was also co-accused with them, but was granted pardon under section 306 Cr.P.C. by Ist Additional Chief Judicial Magistrate, Ghaziabad vide order dated 14.08.2002 as he turned to be an accomplice/approver; that Ist A.C.J.M. had no jurisdiction to grant pardon to accused as the above power vested only with the Chief Judicial Magistrate, and since it is a matter under Prevention of Corruption Act, 1988 (hereinafter referred to as "P.C. Act") the above power

vested with only the Special Judge under P.C. Act; that above Bankey Bihari Tripathi was produced by prosecution as P.W.-2 and since in view of his statement on oath as P.W.-2, there is sufficient material evidence against him upon which he may be convicted and so the Special Judge ought to have summoned him for trial together with revisionists, within the powers conferred, under section 319 Cr.P.C.

4. Referring the provisions of section 306 Cr.P.C., he contended that under the enactment, power of tendering pardon during investigation has been conferred only to the Chief Judicial Magistrate or Metropolitan Magistrate and to the other Magistrates may exercise such power only at the stage of inquiry or trial; that since the pardon has been tendered by Ist Additional Chief Judicial Magistrate during investigation, the same is wrong and he was not competent to do so; that in view of the provisions of sections 12 and 15 of Cr.P.C., Ist A.C.J.M. was subordinate to the Chief Judicial Magistrate and could not have exercised the powers conferred by law on C.J.M.; that the power delegated by enactment to the Chief Judicial Magistrate may not be further delegated by him to Ist A.C.J.M.; that in the case of State of M.P. Vs. Bhupendra Singh, , the Hon''ble Supreme Court has held that "the powers under section 7 of Explosive Substances Act, 1908 delegated by the Central Government to District Magistrate could not have been further delegated by the State Government to A.D.M".

5. He further submits that the pardon has been tendered to co-accused Bankey Bihari Tripathi against the provisions of law, and so has no meaning in the eye of law, and in the circumstances on the evidence adduced through his statement on oath, recorded as P.W. 2, he is also liable to be prosecuted and tried together with revisionists, and ought to have been summoned for trial under provisions of section 319 Cr.P.C.

6. He submitted that (i) in the case of Mrigendra Nath Ghosh Vs. D.K. Chowdhury, Deputy S.P., CBI, , in the matter of offence committed under Special Act/P.C. Act the pardon tendered by Chief Metropolitan Magistrate and Sub-Divisional Judicial Magistrate to different accused/accomplice was held illegal in view of the provisions of section 5(2) of the P.C. Act which authorizes Special Judge alone to tender pardon, (ii) in the case of Gautam Kundu Vs. State of West Bengal and Another, , it was held that in view of provisions of Section 12(2) & 15(1) of Cr.P.C. A.C.J.M. is subordinate to C.J.M., (iii) in the case of Konajeti Raja Babu Vs. State of A.P. and another 2000 STPL (LE-Crim) 27012, the Single Judge of Andhra Pradesh High court laid down principles for exercise of power under sections 306 /307 of Cr.P.C. and (iv) in the case of State of Maharashtra Vs. Abu Salem Abdul Kayyum Ansari and Others, , evidentiary value of statement of such accomplice/approver, has been stated.

7. He submits that the power and scope of section 319 Cr.P.C. is wide enough as has been laid down by the five Judges Bench of Hon''ble Supreme Court in the case of Hardeep Singh Vs. State of Punjab and Others etc. etc., and learned Special Judge has acted wrongly and illegally in refusing to summon P.W. 2 for

trial with revisionists under section 319 Cr.P.C. The learned counsel also questioned the genuineness of statement of Bankey Bihari Tripathi having been recorded on 14.08.2002, (recorded at the stage of tendering pardon), copy filed at Annexure No. 4 for want of certificate under section 281 Cr.P.C.

8. Per contra, disagreeing with the arguments advanced on behalf of the revisionists and supporting the impugned order, learned counsel for the C.B.I. contended that the pardon has been given to Bankey Bihari Tripathi by A.C.J.M. under provisions of section 306 Cr.P.C. in good faith and even if there is any mistake or irregularity in accepting the pardon tendered under section 306 Cr.P.C. the validity of order tendering pardon cannot be questioned in view of the provisions of section 460 Cr.P.C., which specifically provides that even if any Magistrate was not empowered by law to tender pardon under section 306 Cr.P.C., it will not vitiate proceedings.

9. Learned counsel for the CBI has paid reliance on Laxmipat Choraria and Others Vs. State of Maharashtra, , where upon examination of an accused Ethyl Wong without even grant of pardon, it was held by Hon"ble the Supreme Court that "she is protected by the proviso to section 132 of the Indian Evidence Act, against proceedings, except prosecution for giving false evidence by such answers".

10. He further relied on (2015) 3 SCC (Cri) 1 in the case of R. Dineshkumar Alias Deena Vs. State Represented by Inspector of Police and others, where upon raising the question as to whether the learned Sessions Court was justified in declining to summon P.W. 64 as an additional accused in exercise of authority under section 319 Cr.P.C., it was held by Hon"ble the Apex Court that "inspite of examination of PW-64 as prosecution witness, without securing pardon under section 306 Cr.P.C. the Trial Court was right in refusing to summon him as an accused to be tried along with appellant and others".

11. Relying on (2011) 2 Supreme Court Cases (Cri) 551 Chandran Alias Manichan Alias Maniyan and others Vs. State of Kerala, he argued that in above case Hon"ble the Supreme Court has held that "it is incorrect to say that the evidence of a witness will be inadmissible in evidence, when he was an accomplice/ approver, though he was neither granted pardon under section 306 Cr.P.C. nor was he prosecuted and was unfairly presented as prosecution witness by the prosecution".

12. He submitted that in the case of A. Devendran Vs. State of T.N. 1998 SCC (Cri) 220, it has been specifically held by Hon"ble the Apex Court that "If the Magistrate who was not empowered under section 306 Cr.P.C. to tender pardon but actually tendered pardon in good faith erroneously, then such an irregularity is curable under clause (g) of section 460 of Cr.P.C.".

13. Learned counsel for the C.B.I. further contended that the revisionist has no locus standi to move application under section 319 Cr.P.C. for summoning P.W.-2, Bankey Bihari Tripathi as accused for trial together with them; that the

correctness of pardon granted to P.W.-2 vide order dated 14.08.2002 was not challenged at any point of time and may not be challenged by preferring this revision against rejection of application under section 319 Cr.P.C.; that the argument of revisionist is that the statement of Bankey Bihari Tripathi, copy filed at Annexure No. 4 is inadmissible in evidence for want of certificate under section 281 Cr.P.C. is wrong and misconceived as the above statement itself speaks to have been written by the then presiding officer of the Court at the time of tendering pardon and its reference also finds place in the unchallenged order dated 14.08.2002 tendering pardon; that the statement under section 164 Cr.P.C. of Bankey Bihari Tripathi was also recorded earlier, which is on record as Annexure No. 2; that the tenor of all the three statements of P.W.-2 is consistent; that the statement of P.W.-2 was recorded without any objection having been raised by revisionists and the revisionists cross examined him at length for a long period from 11.10.2011 upto 25.09.2014; that the status of P.W.-2 Bankey Bihari Tripathi, after grant of pardon is similar to an accused, who has been discharged and may not be summoned for trial within the provisions of section 319 Cr.P.C.; that the provisions of section 319 Cr.P.C. are discretionary and not mandatory and in view of the protection granted to P.W.-2 Bankey Bihari Tripathi, under proviso to section 132 of the Indian Evidence Act, his statement may not be used as evidence against him and neither he may have been summoned nor the Court was not bound to summon him for trial together; that the application dated 28.04.2015 is misconceived and was moved with mala fide intentions and ulterior motive to delay the disposal of trial and has been rightly rejected by the Special Judge.

14. Upon hearing the learned counsel for the parties and perusal of record, I find that it is not disputed that during investigation P.W.-2 Bankey Bihari Tripathi was tendered pardon vide order dated 14.08.2002 passed by Ist A.C.J.M., Ghaziabad, and the above order of tendering pardon was not challenged by the revisionists at any stage. After framing of charges against revisionists in the year 2010, the prosecution evidence commenced and after examination of P.W. 1 statement of accomplice/approver witness Bankey Bihari Tripathi was recorded on 11.05.2011 as P.W. 2, without any objections having been raised by revisionists or any of them. Undisputedly, the revisionist did not raise any objection at any point of time and cross examined P.W. 2 at length on several dates for a long period of about 2 years from 11.10.2012 upto 25.09.2014. The application under section 319 Cr.P.C. was moved on 28.4.2015 after a period of over seven months from completion of cross examination of P.W.-2, Bankey Bihari Tripathi.

15. Before proceeding further the relevant provisions of Sections 12 , 15 , 306 , 307 , 308 and 460 of Code of Criminal Procedure as well as provisions of Section 132 of Indian Evidence Act are being re-produced here under:-

Provisions of various sections of the Code of Criminal Procedure.

"12. Chief Judicial Magistrate and Additional, Chief Judicial Magistrate, etc.-

(1) In every district (not being a metropolitan area), the High Court shall appoint a Judicial Magistrate of the first class to be the Chief Judicial Magistrate.

(2) The High Court may appoint any Judicial Magistrate of the first class to be an Additional Chief Judicial Magistrate, and such Magistrate shall have all or any of the powers of a Chief Judicial Magistrate under this Code or under any other law for the time being in force as the High Court may direct.

(3)(a) The High Court may designate any Judicial Magistrate of the First class in any sub-division as the Sub-divisional Judicial Magistrate and relieve him of the responsibilities specified in this section as occasion requires.

(b) Subject to the general control of the Chief Judicial Magistrate, every Sub-Divisional Judicial Magistrate shall also have and exercise, such powers of supervision and control over the work of the Judicial Magistrates (other than Additional Chief Judicial Magistrates) in the subdivision as the High Court may, by general or special order, specify in this behalf."

"15 Subordination of Judicial Magistrates.-(1) Every Chief Judicial Magistrate shall be subordinate to the Sessions Judge; and every other Judicial Magistrate shall, subject to the general control, of the Sessions Judge, be subordinate to the Chief Judicial Magistrate.

(2) The Chief Judicial Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Judicial Magistrates subordinate to him."

"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 a 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 principal or abettor, in the Commission thereof.

"307. Power to direct tender of pardon.-At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.

"308. Trial of person not complying with conditions of pardon.-

(1) Where, in regard to a person who has accepted a tender of pardon made under section 306 or section 307 , the Public Prosecutor certifies that in his opinion such person has, either by willfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was

made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence;

Provided that such person shall not be tried jointly with any of the other accused:

Provided further that such person shall not be tried for the offence of giving false evidence except with the sanction of the High Court, and nothing contained in section 195 or section 340 shall apply to that offence.

"460. Irregularities which do not vitiate proceedings.-If any Magistrate not empowered by law to do any of the following things, namely:-

- (a) to issue a search-warrant under section 94 ;
- (b) to order, under section 155 , the police to investigate an offence;
- (c) to hold an inquest under section 176 ;
- (d) to issue process under section 187 , for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;
- (e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of section 190 ;
- (f) to make over a case under sub-section (2) of section 192 ;
- (g) to tender a pardon under section 306 ;
- (h) to recall a case and try it himself under section 410 ; or
- (i) to sell property under section 458 or section 459 , erroneously in good faith does that things, his proceedings shall not be set aside merely on the ground of his not being so empowered".

Provisions of section 132 of Indian Evidence Act.

"132. Witness not excused from answering on ground that answer will criminate.- A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso.-Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

16. In view of provisions of section 12 of the Cr.P.C., Chief Judicial Magistrate and the Additional Chief Judicial Magistrates have same or similar and equal judicial powers and A.C.J.M. is empowered to exercise same powers which the C.J.M. may exercise, but for the purposes of administrative and general control as well as for proper distribution of work amongst several Magistrates, it has been provided by section 15 of Cr.P.C. that the C.J.M. shall be subordinate to Sessions Judge and every other judicial Magistrate shall, subject to general control of Sessions Judge, be subordinate to the C.J.M.

17. Section 306 of Cr.P.C. confers power of tendering pardon to accomplice/approver to C.J.M. or C.M.M. as well as to other Magistrates of Ist Class and while C.J.M./C.M.M. has been conferred with such power to tender pardon to accomplice/approver at any stage of investigation, or inquiry into or the trial of the offence, the other Magistrates of Ist class have been conferred with such power at any stage of inquiry or trial, only meaning thereby not at the stage of investigation.

18. In present case, pardon has been tendered by A.C.J.M. Ist, the Magistrate of Ist class, during investigation of the case and the revisionists have contended that the Ist A.C.J.M. had no such power. It is not disputed that the order tendering pardon to P.W. 1 Bankey Bihari Tripathi dated 14.8.2002 was not challenged. It is pertinent to mention that Chapter XXXV of Cr.P.C. contains provisions regarding "IRREGULAR PROCEEDINGS" and Section 460 in above chapter provides of various "Irregularities which do not vitiate proceedings" while section 461 provides of various "Irregularities which vitiate proceedings". Clause (g) of section 460 Cr.P.C. thus provides that "If any Magistrate, not empowered by law to tender a pardon under section 306, erroneously in good faith, grants such pardon, the proceedings so done in good faith shall not be set aside, merely on the ground of his not being so empowered."

19. From the provisions of section 460 and 461 of the Code of Criminal Procedure, it is crystal clear that legislature has listed the defects or irregularities in two different categories, viz. (i) curable which does not vitiate proceedings and the other (ii) incurable which vitiates proceedings. Undisputedly the correctness of order dated 14.08.2002 granting pardon was not challenged and its validity is not under challenge in this revision. The law laid down by the Single Judges of the High Court's of Calcutta and Andhra Pradesh in the cases of (i) Mrigendra Nath Ghosh Vs. D.K. Chowdhury, Deputy S.P., CBI, (ii) Gautam Kundu Vs. State of West Bengal and Another and (iii) Konajeti Raja Babu Vs. State of A.P. and another (supra) have no relevance to the present revision challenging order rejecting application under section 319 Cr.P.C., to summon P.W. 2 for trial together with revisionist. Further the law laid down in State of Maharashtra Vs. Abu Salem Abdul Kayyum Ansari and others (supra) deciding the evidenciary value of statement of such accomplice/approver witness also do not have any relevance to the order under challenge in this revision.

20. The present case is under P.C. Act and is being tried by the Special Judge

appointed under the Act.

21. In view of the provisions of section 5(2) of the Act, the power conferred on C.J.M. and A.C.J.M. under section 306 Cr.P.C. has been conferred on Special Judge under section 5(2) of Act without any restriction of its exercise at the stage of investigation or inquiry or trial and above power can be exercised at any stage of investigation or enquiry or even trial. It is settled principle of law that such power can be exercised at any stage during trial. The provisions of section 460 of the Code of Criminal Procedure clearly states that by an irregularity as alleged by the revisionist the proceedings cannot be vitiated and the Sessions Judge is competent enough to cure the defect, if any. The learned counsel for the revisionists has also relied on the law laid down by five Judges Bench of Hon''ble the Supreme Court in the case of Hardeep Singh Vs. State of Punjab and Others etc. etc., wherein, it has been observed that "power under section 319 Cr.P.C. is a discretionary and an extraordinary power which is to be exercised sparingly only where strong and cogent circumstances of the case warrants so".

22. The admissibility of evidence of accomplice/approver witness against co-accused persons as well as his immunity from prosecution, in view of the provisions of section 132 of Indian Evidence Act was upheld by Hon''ble the Apex Court in the case of Laxmipat Choraria and Others Vs. State of Maharashtra, , where Ethyl Wong was examined as a first witness and her testimony was clearly that of an accomplice. Considering the argument that Ethyl Wong could not have been examined as a witness and it was the duty of the prosecution to try her jointly with the appellants, for breach of which obligation, the trial was vitiated and even if the trial was not vitiated as a whole, the testimony of Ethyl Wong must be excluded from consideration, it was held that:-

"though no pardon could be tendered to Ethyl Wong because the pertinent provisions did not apply, yet, she could not be prevented from making a disclosure and the prosecution was not bound to prosecute her, if her evidence was necessary to break a smugglers ring. It was also held by the Apex Court that Ethyl Wong was a competent witness under section 118 of the Indian Evidence Act and if the Custom Authorities treated Ethyl Wong as a witness and produced her in Court, she was bound to answer all question and could not be prosecuted for her answers".

23. The proviso to section 132 of Evidence Act provides a safeguard to such witness "that no such answer, which the witness is compelled to give, shall expose him to any arrest or prosecution, or can be proved against him in any criminal proceedings, except a prosecution for giving false evidence by such answer"

24. In the case of R. Dineshkumar @ Deena Vs. State Represented by Inspector of Police and others, (2015) 3 SCC (Cri) I (supra), where after recording of the statement under section 161 and 164 Cr.P.C. prosecution examined an accomplice as P.W. 64, it was held that:-

"even if answers given by him are self incriminatory, apart from being evidence of the guilt of others, he cannot be prosecuted on the basis of his deposition, in view of proviso of section 132 of the Indian Evidence Act and holding the correctness of order declining to summon him for trial as an additional accused under section 319 Cr.P.C. it was also held that in the light of provisions contained in proviso to section 132 of the Indian Evidence Act, deposition of P.W. 64 cannot be treated as evidence within the meaning of that expression occurring in section 319 Cr.P.C., in order to summon him as an accused to be tried along with appellants herein and other accused already facing trial".

25. In the case of Chandran @ Manichan @ Maniyan Vs. State of Kerala, , challenging admissibility of evidence of P.W. 53 accomplice/approver witness who had neither been granted pardon under section 306 Cr.P.C. nor was he prosecuted, it was held that:-

"evidence of such a witness subject to usual caution is admissible evidence and the contention of inadmissibility of his evidence for want of pardon, was rejected being of no consequence".

26. In the case of A Devendran Vs. State of Tamil Nadu 1998 SCC (Cri) 220, (supra), where order granting pardon was held incurable for want of jurisdiction, the evidence of approver of having participated in the commission of the offence, though not to the same extent as the main accused, it was held "that the statement of such witness cannot be said to be of exculpatory nature and on that score his evidence cannot be excluded from consideration".

27. The perusal of records shows that:-

The order dated 14.08.2002 tendering pardon to Bankey Bihari Tripathi by A.C.J.M., Ghaziabad was not challenged by the revisionists and no objections were ever raised by them on his examination as P.W.-2, who cross-examined him at length for a period of about two years from 11.10.2011 to 25.09.2014 without any objections.

and

The application under section 319 Cr.P.C. was moved after lapse of a period of over seven months from the completion of cross-examination with P.W.-2 Bankey Bihari Tripathi.

28. Upon hearing the parties, perusal of record and in view of the discussions made above I have come to the conclusion that:-

(i) The irregularity if any committed in tendering pardon to an accused does not vitiate the proceedings, in view of provisions of clause (g) of section 460 and 307 of Cr.P.C. and section 5 of P.C. Act. So the irregularity committed in tendering pardon to P.W.-2 Bankey Bihari Tripathi is also curable.

(ii) The prosecution may produce an accused as prosecution witness even if he was not tendered pardon under section 306 I.P.C. or section 5 P.C. Act and his

evidence may not be discarded for want of valid tender of pardon. In this case, the prosecution was competent to produce Bankey Bihari Tripathi, as P.W.-2 and his statement may not be discarded on above score.

(iii) That the evidence of an accused produced as prosecution witness is admissible in evidence against the other accused person, even in absence of the pardon under section 306 Cr.P.C., though required to be analyzed with caution, but it may not be considered to be inadmissible. So the statement of P.W.-2 Bankey Bihari Tripathi is admissible piece of evidence against the revisionists.

(iv) That the statement of an accused produced as prosecution witness will be admissible piece of evidence against other accused but the same statement will not be treated as evidence against him within the meaning of evidence under section 319 Cr.P.C. So P.W.-2 Bankey Bihari Tripathi may not be summoned for trial together with revisionists on the basis of his evidence as P.W.-2.

(v) That the legislature has provided protection to accomplice/approver witness against protection together with other accused, under proviso of section 132 of Indian Evidence Act as well as section 308 of Cr.P.C. So Bankey Bihari Tripathi, P.W.-2 is duly protected against prosecution with revisionists or separately, except that he may be prosecuted for giving false evidence.

(vi) The Special Judge has not committed any mistake in rejecting application under section 319 Cr.P.C. and refusing to summon P.W.-2 Bankey Bihari Tripathi as accused for trial together with the revisionists.

29. The learned counsel for the revisionists has failed to show any illegality, irregularity, impropriety and incorrectness in the impugned order and there is no sufficient ground for interfering with or for setting it aside the impugned order. The revision is devoid of merits, has got no force and is liable to be dismissed at the admission stage.

30. The revision is dismissed accordingly.