

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.2164-2165 OF 2011
(Arising out of SLP (Crl.) Nos.3834-35/2011)

Bangaru Laxman

.....Appellant(s)

- Versus -

State (through CBI) & another

.....Respondent(s)

J U D G M E N T

GANGULY, J.

1. Leave granted.

2. The challenge in these appeals is to an order dated 17.7.2006 by which the learned Special Judge granted pardon to respondent No. 2-Shri T. Satyamurty on the condition that the said respondent shall make full disclosure of the facts and circumstances relating

to the offence committed by him in conspiracy with the appellant and one Shri N. Umamaheshwar Raju.

3.The charge-sheet in this case was filed next day i.e. 18.7.2006 against the appellant and Shri N. Umamaheshwar Raju. The said order granting pardon was challenged before the High Court but the said challenge was turned down by the High Court by its order dated 30.8.2010. The main argument by the appellant in this case is that pardon could not be granted by the Special Court prior to the filing of the charge-sheet.

4.Certain facts which are relevant to decide this controversy may be recorded.

5.On 21.4.2005 the confessional statement of the respondent no.2 was recorded under Section 164 Cr.P.C. The said confessional statement of respondent No.2 recorded his involvement and the

involvement of the appellant in the incident. On considering the said statement, the prosecution formed an opinion that the evidence of PW-2 is of great value to the prosecution and thereafter on 3.7.2006 the prosecution moved an application before the Court of the Special Judge for grant of pardon to respondent No.2 so that respondent No.2 could be examined as an approver in the case against the appellant.

6. Thereafter, by an order dated 17.7.2006, pardon was granted by the Special Court.

7. Mr. Sunil Kumar, learned counsel for the appellant mainly assailed the order granting pardon, inter-alia, on the ground that the Special Court has no jurisdiction and authority to do so before the filing of the charge sheet.

8. Learned counsel has of course raised an ancillary grievance that at the stage of granting pardon the

Court had already formed its opinion on the guilt or otherwise of the appellant rendering the trial a mere mockery. However, his main argument was focused on the jurisdiction of the Special Court to grant pardon prior to the filing of the charge sheet.

9. In support of his submission, the learned counsel referred to the provisions of Sections 306 and 307 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') and also referred to Section 5(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the 'P.C.' Act)

10. For proper appreciation of the questions involved in this case, those provisions are set out below:

"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 dis-closure 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.

(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.

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.

S.5(2) of P.C. Act:

S.5(2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to, an offence, tender a pardon to such person on 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, in the commission thereof and any pardon so tendered shall, for the purposes of sub-sections (1) to (5) of section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered under section 307 of that Code."

11. Adverting to those provisions, the learned counsel submitted that power to grant pardon is not an inherent power of the Court. The said power has to be specifically conferred and the learned counsel submitted that power under Section 306 of the Code cannot be exercised by a Special Judge under the P.C. Act.

12. Learned counsel for the State on the other hand submitted that the Court of Special Judge under the P.C. Act is a Court of original jurisdiction. Section 5 of the P.C. Act clearly enables a Special Judge with the power to grant pardon and he further

submitted that Sub-section 3 of Section 5 of the P.C. Act saves the provision of Sub-section 2 of Section 5 and that Section 5(2) must be read with Section 5(3). Sub-section (3) of Section 5 of the P.C. Act is also set out below:

"5(3) Save as provided in sub-sections (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor."

13. It is further submitted by the learned counsel for the State that the power of a Special Judge to grant pardon under Section 5(2) of the Act is an unfettered power and the deeming clause has been employed only for the purpose of sub-sections (1) to (5) of section 308 of the code. Sub-sections 1 to 5 of Section 308 run as follows:

"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 wilfully 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.

(2) Any statement made by such person accepting the tender of pardon and recorded by a Magistrate under section 164 or by a Court under sub-section (4) of section 306 may be given in evidence against him at such trial.

(3) At such trial, the accused shall be entitled to plead that he has complied with the condition upon which such tender was made, in which case it shall be for the prosecution to prove that the condition has not been complied with.

(4) At such trial, the Court shall-

(a) if it is a Court of Session, before the charge is read out and explained to the accused;

(b)

if it is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of pardon was made.

(5) If the accused does so plead, the Court shall record the plea and proceed with the trial and it shall, before passing judgment in the case, find whether or not the accused has complied with the conditions of the pardon, and, if it finds that he has so complied, it shall, notwithstanding anything contained in this Code, pass judgment of acquittal."

14. Mr. Sunil Kumar, learned counsel for the appellant in support of his submissions relied on several decisions which are considered by this Court now.

15. He relied on a decision of this Court in the case of

Lt. Commander Pascal Fernandes vs. State of Maharashtra and Ors. - AIR 1968 SC 594.

16. Learned counsel for the appellant also relied on the decision of this Court in A.R. Antulay vs. Ramdas Srinivas Nayak and Anr. - (1984) 2 SCC 500 in order to contend that the procedure for granting pardon which has been indicated in Section 5(2) read with

Section 307 of the Code must be followed namely that the Special Judge being a Court of Sessions can only grant pardon after the commencement of the trial. But in the instant case pardon has been granted at the stage of investigation. Therefore, pardon has not been granted, according to the learned counsel for the appellant, after following the proper procedure.

17. Learned counsel relying on para 22 in **Antulay's** case (supra) urged that when the procedure has been provided then everything has to be done following the said procedure and other modes of performance are necessarily forbidden.

18. Learned counsel also referred to paragraph 27 at page 524 of the report in **Antulay** (supra) to point out that the Special Judge is a Court of original jurisdiction and the trial of offences before him shall follow the procedure in the Code for trial of warrant cases by the Magistrate. Learned counsel

also submitted that pardon is to be granted by the Special Judge, under provision of Section 307 of the Code which is corresponding to Section 308 of the old Code.

19. Learned counsel also relied on a decision of this Court in State of U.P. vs. Singhara Singh - AIR 1964 SC 358 (para 8 at page 361 of the report) in order to contend that the principles in Taylor vs. Taylor (1876) 1 Ch. D. 426 must be followed in the instant case. The said principle stipulates that where a statute required the doing of a certain thing in a certain way, the thing must be done in that way or not at all.

20. Learned counsel also referred to the decision in the case of Queen Empress vs. Batera & Ors. reported in Criminal Judgments No.3 (Case No. 2838 of 1897) where the Court held that provision of Section 337 of the old Code must be strictly construed.

21. We are unable to appreciate the aforesaid contentions raised by the learned counsel. It goes without saying that under Section 5(2) of the P.C. Act the power of the Special Judge to grant pardon is an unfettered power subject to stipulation made in the Section itself. Such power can be exercised at any stage and there is no stipulation that power can be exercised by the Special Judge only at the stage of trial as urged by the appellant's counsel. The deeming clause which has been introduced in Section 5(2) is for a very limited purpose mentioned in Section 5(2) of the P.C. Act. Sub-Sections 1 to 5 of Section 308 have already been set out above and it is clear therefrom that the said provisions have been enacted for a different purpose namely for holding trial of a person for not complying with the conditions of pardon.

22. It is well known that a deeming provision is a legal fiction and an admission of the non-existence of the

fact deemed. (See M/s. J.K. Cotton Spinning and Weaving Mills Ltd. and another vs. Union of India and others - AIR 1988 SC 191 at 202). Therefore, while interpreting a provision creating a legal fiction, the Court has to ascertain the purpose for which the fiction is created.

23. The law on this aspect has been very neatly summed-up by Lord Justice James in Ex Parte Walton, in re Levy (1881) 17 Ch. D. 746. At page 756 the learned Judge formulated as follows:

"...When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to..."

24. The aforesaid formulation has been approved by Constitution Bench of this Court in State of Travancore Cochin and others vs. Shanmugha Vilas Cashewnut Factory, Quilon reported in AIR 1953 SC 333. At page 343 of the report the aforesaid principles have been referred to by this Court along

with the various other decisions and which are set out:

""When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to...

The above observations were quoted with approval by Lord Cairns and Lord Blackburn in *Arthur Hill v. East and West India Dock Co.*, (1884) 9 A.C. 448. Lord Blackburn went on to add at page 458:

"I think the words here 'shall be deemed to have surrendered' mean, shall be surrendered so far as is necessary to effectuate the purposes of the Act and no further;....."

(emphasis added)

25. Following the aforesaid well-settled principle, as we must, we hold that the deeming provision introduced in Section 5(2) of the P.C. Act is not for fettering the power of the Special Judge to grant pardon in terms of Section 306 of the Code. The purpose of introducing the deeming provision in Section 5(2) of the P.C. Act is manifest from the text of Section 5(2), namely, the same is introduced only for the purposes of sub-sections 1 to 5 of

Section 308 of the Code and it is only for the said purpose that the sanction is deemed to have been tendered under Section 307 of the Code.

26. If this Court accepts the contention of learned counsel for the appellant that the Special Judge under the P.C. Act has no power to grant the pardon under Section 306 of the Code in view of the deeming clause under Section 5(2) of the P.C. Act, that will amount to reading Section 5(2) of P.C. Act in a manner which is revolting to reason and by doing violence to the plain words of the statutes.

27. The contention of the learned counsel for the appellant cannot be accepted for other reasons also which are discussed hereinbelow.

28. The decision in **Pascal** (supra) was rendered on an interpretation of Section 8(2) of Criminal Law

Amendment Act, 1952. Section 8(2) of Criminal Law Amendment Act, 1952 is set out below:

"(2) A Special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on 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, in the commission thereof; and any person so tendered shall, for the purposes of Secs. 339 and 339-A of the Code of Criminal Procedure, 1898, (5 of 1898) be deemed to have been tendered under Sec. 338 of that Code."

29. Section 8(2) of Criminal Law Amendment Act, 1952 is virtually in parimateria with Section 5(2) of the P.C. Act

30. The said decision in **Pascal** (supra) was rendered when the old Criminal Procedure Code of 1898 was in force. After the enactment of the new Code of 1973, Sections 337 to 339 of the old Code were substituted by the Criminal Law Amendment Act and Sections 306 to 308 of the present Code conferred powers to grant pardon on the Magistrate and also on the Court to

which commitment is made. The decision in **Pascal** (supra) was rendered in the context of a substantially different statutory provision. Section 337 of the old Code is different from Section 306 of the present Code. Specially Section 306(2)(a) which has been quoted above was not there in Section 337 of 1898 Code. Section 306(2)(a) clearly makes Section 306 applicable to the Court of Special Judge under the P.C. Act. Such a conclusion is inescapable on a conjoint reading of Section 306(2)(a) with Section 26 of the P.C. Act, which is set out below:

26. Special Judges appointed under Act 46 of 1952 to be special Judges appointed under this Act.- Every special Judge appointed under the Criminal Law Amendment Act, 1952, for any area or areas and is holding office on the commencement of this Act shall be deemed to be a special Judge appointed under section 3 of this Act for that area or areas and, accordingly, on and from such commencement, every such Judge shall continue to deal with all the proceedings pending before him on such commencement in accordance with the provisions of this Act."

31. Apart from that, the questions which fell for consideration in **Pascal** (supra) are: (a) the difference between Sections 337 and 338 of the old

Code and Section 8(2) of the Criminal Law Amendment Act (b) that the power of Special Judge in tendering pardon under Section 8(2) of the Criminal Law Amendment Act is limited to an application by the prosecution and the Special Judge cannot act suo motu (c) the further question was that the powers of the Special Judge under Section 8(2) are circumscribed by considerations under Section 540 of the old Code and (d) the further contention was that Special Judge had not exercised his discretion properly in the case.

32. None of the above considerations are relevant in the present case. Therefore, the said decision does not render any assistance to the appellant in connection with the points which have been urged on his behalf.

33. The learned counsel for the State relied on a three Judge Bench decision of this Court in the case of **Harshad S. Mehta and others** vs. **State of Maharashtra**

reported in (2001) 8 SCC 257. In the case of **Harshad Mehta** (supra) this Court was considering the Special Court (Trial of Offences Relating to Transactions in Securities) Act and it is admitted that the Court under the aforesaid Act is like the Special Court under P.C. Act. Both are Courts of Original Criminal Jurisdiction. In paragraph 21 of the judgment in **Harshad Mehta** (supra) this Court held as follows:

"21. We have no difficulty in accepting the contention that the Special Court, per se, is not a Magistrate falling in any of the categories of Magistrates as enumerated in Section 306(1) and also that it is not a court to which the commitment of a case is made. But, it does not necessarily follow therefrom that the power to tender pardon under Sections 306 and 307 has not been conferred on the Special Court."

JUDGMENT

34. In coming to the conclusion that a Special Court is a court of original criminal jurisdiction, this Court in **Harshad Mehta** (supra) relied on the law laid down by the Constitution Bench of this Court in **Antulay's** (supra) in which the Court was considering the provisions of the P.C. Act.

35. Relying on the ratio in **Antulay** (supra), where Special Judge has been considered a court of original criminal jurisdiction this Court held in **Harshad Mehta** (supra) that in order to make the said Court functionally oriented some powers are conferred by the statute setting it up and except those powers which are specifically denied, it has to function as a court of original criminal jurisdiction not being hidebound by the terminological status description of Magistrates or a Court of Session. Under the Code, it will enjoy all the powers which a court of original criminal jurisdiction enjoys save and except the ones which are specifically denied. (see para 22, page 269 of the report)

36. The Court in **Harshad Mehta** (supra) also considered the decision of this Court in **Pascal** (supra). After considering the decision in **Pascal** (supra), this Court in **Harshad Mehta** (supra) came to the

conclusion that the Special Court enjoys all powers which a court of original criminal jurisdiction enjoys whether of a Magistrate or as a Court of Session, save and except the one specifically denied. (See para 50 page 281).

37. The conclusion reached by three Judge Bench in **Harshad Mehta** (supra) after considering the decision in **Pascal** (supra) is as follows:

"62. Our conclusion, therefore, is that the Special Court established under the Act is a court of exclusive jurisdiction. Sections 6 and 7 confer on that court wide powers. It is a court of original criminal jurisdiction and has all the powers of such a court under the Code including those of Sections 306 to 308."

38. If we may note, the Court reached the aforesaid conclusion in **Harshad Mehta** (supra) even though under the aforesaid Act there is no provision like Section 5(2) in the P.C. Act.

39. If we follow the ratio of **Harshad Mehta** (supra) to the interpretation of Section 5(2) of the P.C. Act,

it is clear that the power to grant pardon under Section 306 of the Code has not been specifically denied. If it is not specifically denied, then as a court of original criminal jurisdiction the Special Court under P.C. Act has the power to grant pardon under Section 306 of the present Code. Any different interpretation will be contrary to the plain words of Section 306 of the Code and also the law laid down by this Court in **Harshad Mehta** (supra) on the principles decided in **Antulay** (supra).

40. Reference in this connection can also be made to the decision of the Supreme Court in the case of **State of Tamil Nadu vs. V. Krishnaswami Naidu and another**, reported in (1979) 4 SCC 5. In that case the question was whether the Special Judge has the power of remand. This court, by referring to Section 3(32) of the General Clauses Act, 1897 defining a Magistrate, held that Magistrate will include a Special Judge. Therefore, a Special Judge shall be a Magistrate for the purposes of Section 167 of the Code even though the word 'Special Judge' is not

mentioned in Section 167 (see para 7, pg. 8 of the report).

41. It is therefore clear that, on the ratio of **V. Krishnaswami** (supra), the Special Judge has been given a very important magisterial function, namely the power of remand. Compared to that, the power to grant pardon is an ancillary power. Therefore under the scheme of the Code, read with Section 5(2) of the PC Act, and in light of the consistent view of this Court, a Special Judge will include a magistrate. On the same parity of reasoning a Special Judge, unless specifically denied, will have the power to grant pardon. Here there is no question of specific denial, rather Section 5(2) of the P.C. Act clearly confers this power subject to the deeming clause, the limited purpose of which has been discussed above.

42. Thus, on a harmonious reading of Section 5(2) of the P.C. Act with the provisions of Section 306,

specially Section 306(2)(a) of the Code and Section 26 of the P.C. Act, this Court is of the opinion that the Special Judge under the P.C. Act, while trying offences, has the dual power of the Session Judge as well as that of a Magistrate. Such a Special Judge conducts the proceedings under the court both prior to the filing of charge sheet as well as after the filing of charge sheet, for holding the trial.

43. It has already been held by this Court that the Special Judge is fully vested with the powers of remand. The power of granting remand is very wide power compared to the power of granting pardon. Since this Court has already held that the Special Court is clothed with the magisterial power of remand, thus in the absence of a contrary provision, this Court cannot hold that power to grant pardon at the stage of investigation can be denied to the Special Court.

44. In view of the discussion made above, this Court is of the opinion that power of granting pardon, prior to the filing of the charge sheet, is within the domain of judicial discretion of the Special Judge before whom such a prayer is made, as in the instant case by the prosecution.

45. Any other conclusion would be detrimental to the administration of justice, in as much as, the power to grant pardon is contemplated in situations where serious offence is alleged to have been committed by several persons and with the aid of the evidence of the person, who had been granted pardon, the offence committed may be proved. The basis of exercise of this power is not to judge the extent of culpability of the persons to whom the pardon is tendered. The main purpose is to prevent failure of justice by allowing the offender to escape from a lack of evidence.

46. Therefore, this Court does not find any merit in the contention urged on behalf of the Appellant. However, this Court makes it clear that in the course of holding trial, the Special Judge will not be in any way influenced by the observations in the order granting pardon but will act independently of the same. In this case, the Special Judge who granted pardon is not holding the trial. Therefore, at the time of holding trial, it is directed that the Special Judge will independently apply his mind to the facts of the case in arriving at his conclusions.

47. With this direction the appeals, being without merit, are dismissed.

.....J.
(ASOK KUMAR GANGULY)

New Delhi
November 22, 2011

.....J.
(GYAN SUDHA MISRA)

