

A STATE THROUGH CBI, CHENNAI

v.

V. ARUL KUMAR

(Criminal Appeal No. 499 of 2016)

B MAY 13, 2016

[A. K. SIKRI AND R. K. AGRAWAL, JJ.]

*Code of Criminal Procedure, 1973 – s.306 – Tender of pardon to approver – Charge sheet filed against respondent and others before the Magistrate under Penal Code and Prevention of Corruption Act – Five individuals taken as approvers after recording their confessional statements – Application by prosecutor u/s. 306 for grant of pardon – Grant of pardon by Magistrate and thereafter committal of case to Special Judge – Special Judge upheld the order of grant of pardon – However, High Court held that the Special Judge is empowered to grant tender of pardon and such order passed by the Magistrate is not lawful – On appeal, held: In cases where charge sheet is filed before the Magistrate, the Magistrate is duly empowered to grant tender of pardon u/s. 306 even in respect of the cases which are triable by the Session Court or by the Special Judge for the offences under the PC Act – Prevention of Corruption Act, 1988.*

Allowing the appeal, the Court

**HELD:** 1.1 Sub-section (1) of Section 306 of the Code of Criminal Procedure, 1973 very categorically and unambiguously mentions Metropolitan Magistrate as one of the Judicial Officers who can exercise the power of tender of pardon to accomplice. Thus, Metropolitan Magistrate is specifically given such a power under Section 306 of the Code. Sub-section (2) of Section 306 makes it clear that this Section applies even to those offences which are triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952. Thus, even where the cases are triable by a Special Judge, the Metropolitan Magistrate is authorised to grant tender of pardon. Sub-section (5) makes the position beyond any pale of doubt, that even when an offence is triable by a Session Judge, the Magistrate has the requisite power to take cognizance

and grant tender of pardon and, thereafter, commit the case to the Special Judge for trial. Section 307 of the Code restricts the power to grant tender of pardon by conferring it in the hands of the Court to which the commitment is made, only after the commitment of a case. This provision, also lends support to the position taken by the appellant, as it makes it clear that after the committal of the case, it is only that Court to which the commitment is made has the power to tender a pardon, thereby implying that before the commitment of case, Magistrate is duly empowered. [Para 14] [496-E-H; 497-A-B]

1.2 On a plain reading of Section 306 in conjunction with Section 307 of the Code, it becomes manifest that Magistrate is duly empowered to grant tender of pardon even in respect of the cases which are triable by the Session Court or by Special Judge. [Para 15] [497-C]

*P.C. Mishra v. State (CBI) and Another* 2014 (4) SCR 183 : (2014) 14 SCC 629 – relied on.

1.3 Sub-section (1) of Section 5, while empowering a Special Judge to take cognizance of offence without the accused being committed to him for trial, only has the effect of waiving the otherwise mandatory requirement of Section 193 of the Code. Section 193 stipulates that the Court of Session cannot take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. Thus, embargo of Section 193 of the Code has been lifted. It, however, nowhere provides that the cognizance cannot be taken by the Magistrate at all. There is, thus, an option given to the Special Judge to straightway take cognizance of the offences and not to have the committal route through a Magistrate. However, normal procedure prescribed under Section 190 of the Code empowering the Magistrate to take cognizance of such offences, though triable by the Court of Session, is not given a go-bye. Both the alternatives are available. In those cases where chargesheet is filed before the Magistrate, he will have to commit it to the Special Judge. In this situation, the provisions of Section 306 of the Code would be applicable and the Magistrate would be empowered to exercise the power under the said provision. In contrast, in those cases where Special Judge takes cognizance

A of offence directly, as he is authorised to do so in view of Section 5(2) of PC Act, Section 306 of the Code would get bypassed and as the Special Judge has taken cognizance, it is Section 307 which would become applicable. Section 5(2) of PC Act makes this position clear by prescribing that it is the Special Judge who would exercise his powers to tender of pardon as can clearly be spelled out by the language employed in that provision. Section 5(2) is to be read in conjunction with Section 5(1). Once the proceedings are committed to the Court of Session, it is that court only to which commitment is made can grant pardon to the approver. [Para 17] [500-E-H; 501-A-C]

C 1.4 Section 460 of the Code treats some of the acts of the Magistrate, specified in clauses (a) to (i) as ‘irregularities’. These are treated as irregularities even when the Magistrate is not ‘empowered by law to do’ those acts. Tendering a pardon under Section 306 of the Code is included in those acts of “irregularities”. Therefore, even if it is presumed that the Magistrate was not empowered (though held otherwise), the order passed by the Magistrate is saved by s. 460(g). [Para 20] [501-H; 502-A-B]

E 1.5 The High Court formulated wrong question for consideration. The question was not as to whether Special Judge is competent to tender of pardon. The question was as to whether Magistrate rightly passed the order of tender of pardon. The High Court took circuitous route by answering that Special Judge was competent and from that concluded that Magistrate was not competent. The impugned judgment of the High Court does not stand legal scrutiny and is set aside. [Paras 21-23] [502-H; 503-A-C]

*Rajendra Singh v. State of Rajasthan* RLW 2003 (3) Raj. 1865 – disapproved.

G *Bangaru Laxman v. State (through CBI) and Another* 2011 (13) SCR 268:(2012) 1 SCC 500; *State of H.P. v. Surinder Mohan and Others* 2000 (1) SCR 659:(2000) 2 SCC 396; *A. Devendran v. State of Tamil Nadu* 1997 (4) Suppl. SCR 591:(1997) 11 SCC 720 – referred to.

#### Case Law Reference

H 2011 (13) SCR 268

referred to.

Para 4

2014 (4) SCR 183	relied on.	Para 7	A
2000 (1) SCR 659	referred to.	Para 7	
RLW 2003 (3) Raj. 1865	disapproved.	Para 11	
1997 (4) Suppl. SCR 591	referred to.	Para 12	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal  
No. 499 of 2016

From the Judgment and Order dated 05.03.2013 in Criminal  
Revision Case No. 1244 of 2012 passed by the High Court of Madras

Neeraj K. Kaul, ASG, Samar S. Kachwalia, Raghavendra M. Bajaj,  
B. V. Balaram Das, Advs. for the Appellant.

R. Basant, Sr. Adv., Anish R. Shah, Karthik Ashok, Abinash Kumar  
Mishra, Advs. for the Respondents.

The Judgment of the Court was delivered by

**A. K. SIKRI, J.** 1. Leave granted.

2. The brief facts leading to the filing of the present appeal by the  
State, challenging the correctness and legality of order dated 05.03.2013  
passed by High Court of Madras, are as follows:

A case was registered on 31.01.2004 against the respondent  
herein who was then Regional Chief of Housing Urban Development  
Corporation Ltd., Chennai, along with other co-accused. FIR was  
submitted to the Principal Special Judge, CBI on the allegation that the  
respondent herein has dishonestly sanctioned 64 loans which were  
processed by A-2 to various individuals who sought loans for purchase  
of plots developed by A-3 (firm) knowing fully well that A-3 was not a  
reputed promoter under the HUDCO Niwas Scheme. It was further  
alleged that pursuant to a criminal conspiracy, the respondent sanctioned  
loans for inflated amounts causing wrongful loss of Rs.21,07,546.50 to  
HUDCO. After completion of inquiry, a chargesheet was filed against  
the respondent and 15 others on 30.01.2006 under Section 120-B read  
with Sections 420, 467, 468, 471 of the Indian Penal Code (for short the  
'IPC') and Section 13(2) read with Section 13(1) of the Prevention of  
Corruption Act (for short the 'PC Act').

3. As per the appellant, during the course of investigation, five  
individuals were taken as approvers after recording their confessional  
statements. Accordingly, an application was filed by the Prosecutor  
under Section 306 of the Criminal Procedure Code (for short the 'Code')  
for grant of pardon. This application was entertained by the Metropolitan

- A Magistrate who passed the orders dated 30.01.2006 whereby he granted pardon to those five approvers.

4. Since the case is triable by the Special Judge under the provisions of PC Act, who is of the rank of Sessions Judge, the Metropolitan Magistrate committed the case to the Special Judge. After the committal, the Special Judge framed charges against the respondent herein (who is arrayed as A-1) as well as other accused persons i.e. A-2 to A-15. These accused persons pleaded not guilty. Much thereafter, the respondent and two accused persons (A-1 to A-3) challenged the order of grant of tender of pardon. This challenge was repelled by the trial court vide orders dated 30.08.2012 resulting in dismissing the application of the said accused persons. It was held that Section 306 of the Code does not specifically state that only the Court which inquires into or tries the case should grant tender of pardon and that the perusal of records shows that the evidence has been recorded exhaustively in the questionnaire form in accordance with Section 146 of the Indian Evidence Act. The Sessions Judge also held that the judgment of this Court in *Bangaru Laxman v. State (through CBI) and Another*<sup>1</sup>, that was cited by the respondent herein was distinguishable on facts and hence not applicable to the present case and that the challenge had been filed after a lapse of six years with the object of protracting the proceedings.

5. Feeling aggrieved by the said order, the respondent herein filed Criminal Miscellaneous Revision under Section 397 read with Section 401 of the Code, in the High Court. The primary contention raised by the respondent was that the Metropolitan Magistrate had no authority, power or jurisdiction to entertain application for grant of pardon and it is only the Special Judge who could entertain such an application. The High Court vide its impugned judgment has accepted this plea of the respondent thereby allowing the criminal revision preferred by the respondent. In the opinion of the High Court, it is the Special Judge who will have the powers of a Magistrate, though the authority mentioned in Section 306(1) of the Code includes Magistrate. On that basis, it is held that it is only the Special Judge who is empowered to grant tender of pardon and such an order passed by Metropolitan Magistrate is not lawful. As a consequence, all further proceedings held subsequent to the tender of pardon by Metropolitan Magistrate were struck off with direction to the appellant herein to initiate fresh action to get tender of pardon in accordance with law.

H <sup>1</sup> (2012) 1 SCC 500

6. The question, therefore, that falls for consideration is as to whether the Magistrate has power to grant tender of pardon under Section 306 of the Code or such powers are to be necessarily exercised only by the Special Judge having regard to the provisions of the PC Act. A

7. Mr. Neeraj Kishan Kaul, learned ASG appearing for the State/ appellant, submitted that Section 306(1) of the Code confers such a power upon the Metropolitan Magistrate in no uncertain terms and this issue stands authoritatively concluded by this Court in the case of *P.C. Mishra v. State (CBI) and Another*<sup>2</sup>. His second contention, in the alternative and without prejudice to the aforesaid contention, was that the High Court failed to take into consideration the provisions of Section 460(g) of the Code which stipulate that such an irregularity, if at all, would not vitiate the proceedings. He, thus, argued that in any case tender of pardon by the Metropolitan Magistrate was an irregularity and the High Court could not have struck off the proceedings conducted post tender of pardon. He also referred and relied upon the judgment of this Court in the case of *State of H.P. v. Surinder Mohan and Others*<sup>3</sup>, for the proposition that at the time of recording of approvers evidence by Magistrate at pre-committal stage i.e. at the time of investigation or inquiry for offence triable by Sessions Court, accused persons have no right to cross examine the approver. B C D

8. The aforesaid arguments were countered by Mr. Basant, learned senior counsel, appearing for the respondent. He submitted that power to grant pardon is an important judicial power which the Court is to grant in exercise of judicial function and while exercising such a power, Court is not discharging administrative function which would be the case, for example, when the Magistrate records statement of a person under Section 164 of the Code. His submission was that on this touchstone, it was imperative that such a power is exercised only by the Judge specifically authorised in this behalf and if the matter is dealt with by a Judge who is lower in rank, the order passed by him would be without jurisdiction. Taking this argument on the next level, he further submitted that Section 306 of the Code had to be read along with Sections 307 and 308 thereof in order to understand the scheme of grant of pardon to an accomplice. His contention was that Section 307 grants such power, after commitment of a case, to that Court to which the commitment is made. Proceeding with this line of submission, he paraphrased his E F G

<sup>2</sup> (2014) 14 SCC 629

<sup>3</sup> (2000) 2 SCC 396

- A argument with the plea that the very scheme of PC Act is that the case could be tried only by a Special Judge who would not be below the rank of Special Judge as provided under Section 4 of the PC Act, which is as under:

“4. Cases triable by special Judges.-

- B (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, or in any other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only.

- C (2) Every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

- D (3) When trying any case, a special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

- E (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, a special Judge shall, as far as practicable, hold the trial of an offence on day-to-day basis.”

9. He then referred to Section 5 to point out that there was a specific power given to the Special Judge to take cognizance even without committing the case to the Special Judge by the Magistrate. Section 5

- F reads as under:

“5. Procedure and powers of special Judge.-

- G (1) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973, for the trial of warrant cases by Magistrates.

- H (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, be deemed to have been tendered under section 307 of that Code. A

(3) Save as provided in sub-sections (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1973, shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for the 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. B C

(4) In particular and without prejudice to the generality of the provisions contained in sub-section (3), the provisions of sections 326 and 475 of the Code of Criminal Procedure, 1973, shall, so far as may be, apply to the proceedings before a special Judge and for the purposes of the said provisions, a special Judge shall be deemed to be a Magistrate. D

(5) A special Judge may pass upon any person convicted by him any sentence authorized by law for the punishment of the offence of which such person is convicted. E

(6) A special Judge, while trying an offence punishable under this Act, shall exercise all the powers and functions exercisable by a District Judge under the Criminal Law Amendment Ordinance, 1944." F

10. The submission, to be precise, was that PC Act, on this aspect was a complete Code in itself which gave powers to only the Special Judge to try the cases, without the involvement of a Magistrate even in committing the case to the Special Judge and because of this reason, provision of Section 306 of the Code stand excluded and would have no application to the cases triable under PC Act. To buttress this submission, Mr. Basant referred to Sections 4 and 5 of the Code which deal with "Trial of offences under the Indian Penal Code and other laws" as well as "saving" respectively and provide as follows: G

"4. Trial of offences under the Indian Penal Code and other laws.-

(1) All offences under the Indian Penal Code(45 of 1860) shall H



A be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. Saving.-

C Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

D 11. Specifically relying upon the provisions of Section 4(2) of the Code, the learned senior counsel made a passionate plea that if the offences are to be tried under a law, other than Indian Penal Code, the Code was subject to that law/enactment, in force at that time. He argued that since PC Act is in force with special scheme giving the powers only to the Special Judge to take cognizance without any committal of proceedings, it should be treated that the case from very beginning is the post committal case i.e. with the Sessions Judge and, therefore, Magistrate stands denuded of his powers which are given in respect of offences under the IPC to him under Section 306 of the Code. He pointed out that though there was no judgment of this Court on this aspect but Rajasthan High Court had taken the same view as projected by him, in *Rajendra Singh v. State of Rajasthan*<sup>1</sup>.

F 12. Insofar as argument of the appellant predicated on Section 460 of the Code is concerned, it was sought to repel by Mr. Basant with the submission that in the aforesaid scenario projected by him, it was not a case of irregularity but inherent lack of jurisdiction on the part of the Magistrate to pass the order of tender of pardon and, therefore, Section G 460 of the Code had no application. He relied upon the judgment in the case of *A. Devendran v. State of Tamil Nadu*<sup>3</sup>.

13. We have given our utmost consideration to the respective submissions advanced by counsel for the parties on both sides. We may

<sup>1</sup> RLW 2003 (3) Raj. 1865

H <sup>3</sup> (1997) 11 SCC 720

state at the outset that in the instant case, the chargesheet was filed by the prosecution on 30.01.2006 before the Metropolitan Magistrate. At that time, prayer for grant of tender of pardon was also made before the Magistrate taking the plea that five individuals were taken as approvers after recording their confessional statements. Order was passed by the learned Magistrate granting pardon and thereafter the case was committed to the Additional Special Judge for CBI cases, Chennai as it is triable by the Special Judge. Special Judge thereafter framed charges against the accused persons on 10.07.2012. Keeping in mind the aforesaid facts, let us take note of Section 306 of the Code to find out as to whether the Magistrate had the requisite power to grant tender of pardon under the said provision. It reads as under:

“306. Tender of pardon to accomplice.- (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any, stage of the inquiry or trial, may tender 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.

(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 (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.
- B (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—
- C (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;
- D (b) in any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.”

14. Sub-section (1) of Section 306 of the Code very categorically and unambiguously mentions Metropolitan Magistrate as one of the Judicial Officers who can exercise the power of tender of pardon to accomplice. Thus, Metropolitan Magistrate is specifically given such a power under Section 306 of the Code. Sub-section (2) of Section 306 makes it clear that this Section applies even to those offences which are triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952. Thus, even where the cases are triable by a Special Judge, the Metropolitan Magistrate is authorised to grant tender of pardon. Sub-section (3) and sub-section (4) outline the procedure that is to be followed in discharging this function. Sub-section (5), which is material for our purpose, stipulates that after the 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 will not make any further inquiry in the case and commit it for trial to a Court of Special Judge, if the offence is triable exclusively by that Court. This sub-section makes the position beyond any pale of doubt, that even when an offence is triable by a Session Judge, the Magistrate has the requisite power to take cognizance and grant tender of pardon and, thereafter, commit the case to the Special

Judge for trial. Section 307 of the Code restricts the power to grant tender of pardon by conferring it in the hands of the Court to which the commitment is made, only after the commitment of a case. This provision, also lends support to the position taken by the appellant, as it makes it clear that after the committal of the case, it is only that Court to which the commitment is made has the power to tender a pardon, thereby implying that before the commitment of case, Magistrate is duly empowered. Section 308 of the Code is of no consequence to decide the controversy before us as it deals with the trial of person not complying with conditions of pardon.

15. On a plain reading of Section 306 in conjunction with Section 307 of the Code, it becomes manifest that Magistrate is duly empowered to grant tender of pardon even in respect of the cases which are triable by the Session Court or by the Special Judge. This legal position is eloquently accepted in *P.C. Mishra's* case. That was also a case under P.C. Act in which P.C. Mishra (appellant in the said appeal) and his Reader Ravi Bhatt were made accused persons. During investigation, CBI noticed that accused Ravi Bhatt was not a leading accused in the case and it was considered necessary to take him as an approver to prove the various missing links in the chain of circumstantial evidence, which were otherwise not available to the investigating agency. In this backdrop, the CBI filed an application under Section 306 of the Code before the Special Judge, CBI, Delhi for grant of pardon to Ravi Bhatt. The Special Judge marked that application to the Chief Metropolitan Magistrate, who, in turn, referred the same to the Metropolitan Magistrate. The Metropolitan Magistrate examined the application of the CBI and passed the order, in exercise of powers conferred under Section 306 of the Code, holding that it was a fit case where pardon should be granted to Ravi Bhatt to enable the prosecution to unveil all circumstances of the case and to unearth the truth. Other accused, namely, P.C. Mishra challenged the said order exactly on the grounds which are taken before us, i.e., the Magistrate had no power to grant the pardon as the case was triable by the Special Judge. This Court repelled the contention by reading such a power in the hands of Metropolitan Magistrate as well, before the committal of the case and found that power was rightly exercised as order of committal has not been passed when the order of grant of pardon was passed by the Magistrate. Following discussion from the said judgment is worth quoting:

A 11. Power to grant pardon enjoined under Section 306 Cr.P.C. is  
a substantial power and the reasons for tendering pardon must be  
B recorded. It is for the prosecution to ask that a particular accused,  
out of several, may be granted pardon, if it thinks that it is necessary  
in the interest of successful prosecution of other offenders or else  
the conviction of those offenders would not be easy. This Court in  
C *State of U.P. v. Kailash Nath Agarwal* [*State of U.P. v. Kailash  
Nath Agarwal*, (1973) 1 SCC 751 : 1973 SCC (Cri) 698]  
recognised the power of the District Magistrate to grant pardon  
at the investigation stage. This Court in *Kanta Prashad v. Delhi  
D Admn.* [*Kanta Prashad v. Delhi Admn.*, AIR 1958 SC 350 :  
1958 Cri LJ 698] had the occasion to examine the scope of Sections  
337 and 338 of the old Code (CrPC 1898) vis-à-vis the powers of  
a Special Court constituted under the Criminal Law (Amendment)  
Act, 1952. This Court held that, reading the proviso to Section  
337 and provisions of Section 338 together, the District Magistrate  
is empowered to tender a pardon even after a commitment, if the  
Court so directs. It was also held that under Section 8(2) of the  
Criminal Law (Amendment) Act, 1952, the Special Judge has  
also been granted power to tender pardon. The conferment of  
this power on the Special Judge in no way deprives the District  
Magistrate of his power to grant a pardon under Section 337 of  
E the Code. It was held if at the time when the District Magistrate  
tenders the pardon, the case was not before the Special Judge,  
then there is no illegality committed by the District Magistrate.

12. The scope of abovementioned provisions again came up for  
consideration before this Court in *Kailash Nath Agarwal* [*State  
F of U.P. v. Kailash Nath Agarwal*, (1973) 1 SCC 751 : 1973 SCC  
(Cri) 698], wherein this Court after referring to its earlier judgment  
in *Kanta Prashad* [*Kanta Prashad v. Delhi Admn.*, AIR 1958  
SC 350 : 1958 Cri LJ 698] held as follows: (*Kailash Nath Agarwal  
case* [*State of U.P. v. Kailash Nath Agarwal*, (1973) 1 SCC 751  
: 1973 SCC (Cri) 698], SCC p. 757, para 13)

G “It will be noted from this decision that emphasis is laid on the  
fact that the proviso to Section 337 contemplates concurrent  
jurisdiction in the District Magistrate and in the Magistrate making  
an inquiry or holding the trial to tender pardon. It is also emphasized  
that the conferment of the power to grant pardon on the Special  
H

Judge does not deprive the District Magistrate of his power to grant pardon under Section 337.” A

13. In *Bangaru Laxman* [*Bangaru Laxman v. State*, (2012) 1 SCC 500 : (2012) 1 SCC (Cri) 487 : (2012) 2 SCC (L&S) 422] this Court has stated that the power of Special Judge to grant pardon is an unfettered power and held that, while trying the offences, the Special Judge has dual power of a Special Judge as well as that of a Magistrate. This Court, while interpreting Section 5, then went on to say as follows: (SCC pp. 509-10, paras 40-42) B

“40. Thus, on a harmonious reading of Section 5(2) of the PC Act with the provisions of Section 306, specially Section 306(2)(a) of the Code and Section 26 of the PC Act, this Court is of the opinion that the Special Judge under the PC Act, while trying offences, has the dual power of the Sessions 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. C D

41..... 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. E

42. In view of the discussion made above, this Court is of the opinion that the 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.” F

14. *Bangaru Laxman* (supra), therefore, emphasizes the concurrent jurisdiction of the Special Judge as well as the Chief Judicial Magistrate or Metropolitan Magistrate to grant pardon during investigation, but does not say that the Metropolitan Magistrate has no power under Section 306 Cr.P.C. to grant pardon during the investigation i.e. before filing of charge-sheet before the Special Judge. During investigation, in our view, both the Special Judge as well as the Magistrate acting under Section 306 Cr.P.C. have concurrent jurisdiction to entertain application of pardon which facilitates proper investigation of the crime. But, as already H

- A indicated, after the committal of the case, the pardon granted by the Magistrate is not a curable irregularity.”

16. In the light of the aforesaid legal position, we deal with the arguments of Mr. Basant, learned senior counsel for the respondent as to whether Section 306 of the Code has no application in the cases relating to offences under PC Act. No doubt, Section 4 of the PC Act states that the offences specified in sub-section (1) of Section 3 shall be tried by Special Judges only, notwithstanding anything contained in the Code, or in any other law for the time being in force. Further, Section 5 gives power to the Special Judge to take cognizance of offences even without the accused being committed to him for trial and sub-section (2) of Section 5 empowers the Special Judge to grant pardon as well. It was on the basis of these provisions Mr. Basant has advanced the argument that PC Act was a complete Code and power was specifically given to the Special Judge and, therefore, Section 306 of the Code had no application and Magistrate had no power to grant pardon in respect of offences triable under the PC Act. He submitted that these provisions were not taken note of by the Division Bench of this Court in *P.C. Mishra's* case and, therefore, matter required consideration by a Larger Bench. We are, however, not impressed by the aforesaid submissions.

17. Sub-section (1) of Section 5, while empowering a Special Judge to take cognizance of offence without the accused being committed to him for trial, only has the effect of waiving the otherwise mandatory requirement of Section 193 of the Code. Section 193 of the Code stipulates that the Court of Session cannot take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. Thus, embargo of Section 193 of the Code has been lifted. It, however, nowhere provides that the cognizance cannot be taken by the Magistrate at all. There is, thus, an option given to the Special Judge to straightway take cognizance of the offences and not to have the committal route through a Magistrate. However, normal procedure prescribed under Section 190 of the Code empowering the Magistrate to take cognizance of such offences, though triable by the Court of Session, is not given a go-bye. Both the alternatives are available. In those cases where chargesheet is filed before the Magistrate, he will have to commit it to the Special Judge. In this situation, the provisions of Section 306 of the Code would be applicable and the Magistrate would be empowered to exercise the power under the said provision. In contrast,

in those cases where Special Judge takes cognizance of offence directly, as he is authorised to do so in view of Section 5(2) of PC Act, Section 306 of the Code would get bypassed and as the Special Judge has taken cognizance, it is Section 307 of the Code which would become applicable. Sub-section (2) of Section 5 of PC Act makes this position clear by prescribing that it is the Special Judge who would exercise his powers to tender of pardon as can clearly be spelled out by the language employed in that provision. Section 5(2) is to be read in conjunction with Section 5(1) of the PC Act. The aforesaid legal position would also answer the argument of the learned counsel for the respondent based on the judgment of this Court in *A. Devendran* (supra). In that case, this Court held that once the proceedings are committed to the Court of Session, it is that Court only to which commitment is made can grant pardon to the approver. The view taken by us is, rather, in tune with the said judgment. A B C

18. We, therefore, do not find merit in the aforesaid contention of the learned counsel for the respondent. For these reasons, we also do not agree with the view taken by the Rajasthan High Court in *Rajendra Singh* (supra) and over-rule that judgment. D

19. The appellant would succeed even on the basis of Section 460 of the Code. Clause (g) of this Section which is relevant for us reads as under:

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

XX XX XX

(g) to tender a pardon under section 306;

XX XX XX F

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.”

20. This Section treats some of the acts of the Magistrate, specified in clauses (a) to (i) as ‘irregularities’. These are treated as irregularities even when the Magistrate is not ‘empowered by law to do’ those acts. Tendering a pardon under Section 306 of the Code is included in those acts of “irregularities”. Therefore, even if we presume that the Magistrate was not empowered (though we have held otherwise), the order passed by the Magistrate is saved by Section 460(g) of the Code. G H



A This aspect also stands clinched in *P.C. Mishra's* case where the legal position was stated in the following manner:

B 15. We may, in this regard, refer to Section 460 Cr.P.C. which refers to nine kinds of curable irregularities, provided they are caused erroneously and in good faith. Irregularity caused while granting pardon is dealt with in Section 460(g) Cr.P.C. The relevant part of that section reads as follows:

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

C

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(g) to tender a pardon under Section 306;

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.”

D

Section 461 Cr.P.C. speaks of irregularities which vitiate proceedings.

E

16. We have already held, both the Magistrate as well as the Special Judge has concurrent jurisdiction in granting pardon under Section 306 Cr.P.C. while the investigation is going on. But, in a case, where the Magistrate has exercised his jurisdiction under Section 306 Cr.P.C. even after the appointment of a Special Judge under the PC Act and has passed an order granting pardon, the same is only a curable irregularity, which will not vitiate the proceedings, provided the order is passed in good faith. In fact, in the instant case, the Special Judge himself has referred the application to the Chief Metropolitan Magistrate/Metropolitan Magistrate to deal with the same since the case was under investigation. In such circumstances, we find no error in the Special Judge directing the Chief Metropolitan Magistrate or the Metropolitan Magistrate to pass appropriate orders on the application of CBI in granting pardon to the second respondent so as to facilitate the investigation.”

F

G

H 21. In view of our aforesaid discussion, impugned judgment of the High Court does not stand legal scrutiny. In fact, we find that the High Court had formulated wrong question for consideration as is clear from paragraph 5 of the judgment and, therefore, went astray in deciding

such a question. Paragraph 5 of the High Court judgment mentions the question that was framed: A

“5. Point for Consideration: Whether the Special Judge is competent to Tender of Pardon under Section 306 Cr.P.C. And Section 5(2) of P.C. Act.”

22. The question was not as to whether Special Judge is competent to tender of pardon. The question was as to whether Magistrate rightly passed the order of tender of pardon. The High Court took circuitous route by answering that Special Judge was competent and from that concluded that Magistrate was not competent. B

23. In view of our discussion above, the judgment of the High Court warrants to be set aside. We, thus, set aside the judgment of the High Court and allow the present appeal. C

No costs.

Nidhi Jain

Appeal allowed.