

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16<sup>TH</sup> DAY OF JUNE, 2023

**R**

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

CRIMINAL PETITION No.1152 OF 2022

**BETWEEN:**

1 . M/S. SHREE MALLIKARJUN  
SHIPPING PVT. LTD.,  
OL OF MARCES BUILDING,  
OPP. KADAMBA BUS STAND,  
MUDAVEL, VASCO DAGAMA,  
GOA - 403 802.  
REPRESENTED BY  
SRI SATISH KRISHNA SAIL  
@ SATISH SAIL  
MANAGING DIRECTOR

ALSO AT:  
M/S. SHREE MALLIKARJUN  
SHIPPING PVT. LTD.,  
'MOHAN' NH - 17,  
CHITTAKULA, SADASHIVGAD  
KARWAR - 581 301.

2 . SRI SATISH KRISHNA SAIL  
@ SATISH SAIL  
S/O LATE KRISHNA SAIL  
AGED ABOUT 51 YEARS,  
MANAGING DIRECTOR,  
M/S. SHREE MALLIKARJUN  
SHIPPING PVT. LTD.,

'MOHAN' NH -17,  
CHITTAKULA, SADASHIVGAD  
KARWAR – 581 301.

... PETITIONERS

(BY SRI H.PAVANA CHANDRA SHETTY, ADVOCATE)

**AND:**

- 1 . CENTRAL BUREAU OF INVESTIGATION  
ANTI-CORRUPTION BRANCH  
BELLARY ROAD,  
BENGALURU – 560 032.
- 2 . SRI SUSHIL KUMAR VALECHA,  
S/O KISHAN CHAND VALECHA ,  
AGED ABOUT 73 YEARS,  
DIRECTOR, M/S. SHRI LAL MAHAL LIMITED,  
B-5, BHAGWAN DAS NAGAR,  
EAST PUNJAB BAGH,  
NEW DELHI – 110 026.

ALSO AT:

R/O PLOT NO.6, D-8,  
VIKRANT APARTMENT,  
SECTOR-13, ROHINI,  
DELHI - 110 085.

... RESPONDENTS

(BY SRI P.PRASANNA KUMAR, SPL. PP FOR R-1;  
SRI B.K.ARUN, ADVOCATE FOR R-2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF  
CR.P.C., PRAYING TO QUASH THE ORDER DATED 07.10.2021 VIDE  
ANNEXURE-A PASSED IN SPL.C.C.NO.54/2014 ON THE FILE OF  
LXXXI ADDITIONAL CITY CIVIL AND SESSIONS JUDGE AND

SPECIAL JUDGE, BENGALURU TO DEAL WITH THE CRIMINAL CASES RELATED TO MPs/MLAs IN THE STATE OF KARNATAKA, BENGALURU CITY (CCH-82).

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 02.06.2023, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

**ORDER**

The petitioners/accused 5 and 6 are before this Court calling in question order dated 07-10-2021 passed by the LXXXI Additional City Civil and Sessions Judge and Special Judge to deal with criminal cases related to MPs/MLAs in the State of Karnataka, Bangalore City in Special C.C.No.54 of 2014 whereby the concerned Court allows the petition of accused No.4 on an application filed under Section 306 of the Cr.P.C., seeking pardon on turning as an approver.

2. The facts adumbrated are as follows:-

A crime comes to be registered against several accused including the petitioners/accused 5 and 6 and the 2<sup>nd</sup> respondent /accused No.4 in RC 17(A)/2012. The crime is registered by the Central Bureau of Investigation ('CBI'). The CBI after investigation

files a charge sheet against all the accused. After filing of the charge sheet by the CBI, when the matter was posted for framing of charge, several accused filed discharge applications and those applications come to be dismissed in terms of the order of the Special Judge dated 10-11-2016. The discharge application was filed by accused No.4/respondent No.2 as well. The Court further directed framing of charge against accused No.1 for offences punishable under Sections 120B r/w 409 and 420 of the IPC and Section 13(2) r/w 13(1)(c) and (d) of the Prevention of Corruption Act, 1988 and against accused 2 and 4, one of whom was 2<sup>nd</sup> respondent for offences punishable under Sections 120B, 409 and 420 of the IPC. The said order of framing of charge was called in question before this Court in Criminal Petition No.368 of 2017 along with several other connected cases. All those petitions come to be dismissed directing continuance of trial against all the accused. Therefore, charges were sought to be framed by posting the matter for framing of charges. At that stage, the 2<sup>nd</sup> respondent/ accused No.4 files an application under Section 306 of the Cr.P.C., for grant of pardon.

3. The contention of the 2<sup>nd</sup> respondent was that he was only an employee of accused No.2-Company, was well acquainted with the day-to-day affairs of the Company and he has been arrayed as accused in the representative capacity as also individual capacity alleging the afore-quoted offences. He was willing to turn as approver in the event pardon would be granted under Section 306 of the IPC. The CBI files a memo stating that it has no objection to the application filed by accused No.4/2<sup>nd</sup> respondent and the contention was that he should give his statement under Section 164 of the Cr.P.C., disclosing all the facts. After considering the application and submissions of respective parties, the learned Special Judge by the impugned order allows the application, grants pardon to the 2<sup>nd</sup> respondent /accused No.4. It is this order that is called in question by the co-accused – accused Nos. 5 and 6.

4. Heard Sri H.Pavana Chandra Shetty, learned counsel appearing for the petitioners, Sri P.Prasanna Kumar, learned Special Public Prosecutor appearing for respondent No.1 and Sri B.K. Arun, learned counsel appearing for respondent No.2.

5. The learned counsel appearing for the petitioner would vehemently contend that if this practice is permitted every co-accused will turn as approver which would cause grave prejudice to the other accused. It is his submission that the CBI filed detailed objections and vehemently opposed the discharge application filed by the accused but did not whisper any objection to the grant of pardon to the 2<sup>nd</sup> respondent. He would submit that the learned Special Judge has not applied his mind for grant of pardon and, therefore, the order should be set aside, with a direction to the learned Special Judge to re-consider the application in the least.

6. Per-contra, the learned Special Public Prosecutor appearing for the CBI would vehemently oppose the petition and the submissions to contend that Section 306 Cr.P.C., is in the statute only for that purpose, discovery of truth is the aim of criminal justice system and if additional evidence come about in a given case, it is always good either for the prosecution or the accused. Therefore, the order passed on such application is not generally interfered with as a matter of course and accordingly seeks dismissal of the petition.

7. The learned counsel for the petitioner rejoinders such submissions only to place reliance upon the judgment of the Apex Court in the case of **CBI v. ASHOK KUMAR AGGARWAL**<sup>1</sup> and to contend that the order granting pardon should bear application of mind.

8. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

9. The afore-narrated facts are not in dispute. The issue brought before this Court lies in a narrow compass. It is a fact that petitioners/accused 5 and 6 and the 2<sup>nd</sup> respondent/ accused No.4 were all accused in Special C.C.No.54 of 2014 before the Special Court for the afore-quoted offences. All the accused in one breath sought discharge from the array of accused. Such discharge application comes to be rejected on 10-11-2016. All the accused then call the said order in question before this Court in a petition filed under Section 482 of the Cr.P.C., in Criminal Petition 368 of

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<sup>1</sup> (2013) 15 SCC 222

2017 and connected cases and all of which come to be dismissed on 16-10-2020. Therefore ended the saga of discharge and the concerned Court posted the matter for framing of charges. At that juncture, the 2<sup>nd</sup> respondent/accused No.4 comes up with an application under Section 306 of the Cr.P.C., seeking pardon from the proceedings. Since the entire issue now springs from Section 306 of the Cr.P.C., I deem it appropriate to notice the said provision. Section 306 of the Cr.P.C. reads as follows:

**"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) 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."

Section 306 mandates concerned Court to accept an application filed seeking tender of pardon to any accomplice in the crime,

subject to the condition that once pardoned he should make a full and true disclosure of whole of the circumstances within his knowledge to the Court concerning the issue. It is in terms of the aforesaid provision the 2<sup>nd</sup> respondent/accused No.4 files the application. The reason rendered in the application is that the 2<sup>nd</sup> respondent was only an employee in the Company as also representative of the Company and, therefore he cannot be arrayed as accused. He is willing to turn as approver if pardon is granted. The further averment was that he has fully cooperated with the investigation at every stage and he is 72 years old. Being a septuagenarian, he is not in a position to face trial. The CBI, on the application so filed by the 2<sup>nd</sup> respondent, accepts it by filing a memo. The memo reads as follows:

***"Memo filed on behalf of prosecution regarding say of prosecution to 306 application filed on behalf of accused no 4 Sri Sushil Kumar Valecha***

*It is humbly submitted that the accused no 4 Sri Sushil Kumar Valecha has filed an application under section 306 of CrPC Seeking for tender of pardon and the case is posted for the say of prosecution on the application filed by accused no.4.*

*It is further submitted that the complaint investigation agency has no objection to allow the application filed by accused No.4 provided that accused No 4 gives his statement u/s 164*

*CrPC discloses all the true facts. His application may be considered after recording the 164 statement of the accused disclosing the full true facts.*

*Hence it is humbly prayed that the application of the accused may be allowed in the event of accused no 4 disclosing all the facts within his knowledge under section 164 CrPC."*

The CBI accepts that it has no objection to allow the application, provided the 2<sup>nd</sup> respondent gives his statement under Section 164 of the Cr.P.C., disclosing all true facts. The concerned Court, in terms of the order impugned, considered the entire material on record as well as several judgments on the issue and allows the application by rendering the following reasons:

".... ....

29. *I have gone through Section 306, 307, 308 of Cr.P.C., and Sec.5 of the Prevention of Corruption Act. Upon cumulative reading of all these provisions, it is clear that, a Special Judge under the provisions of the Prevention of Corruption Act may take cognizance of the offences without the accused being committed to him for trial and, in trying the accused person, shall follow the procedure prescribe by the Code of Criminal Procedure, 1973, for the trial of warrant cases by Magistrates. Sec.5(2) says that '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 Sec.308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered under Sec.307 of that Code.*

*30. Therefore, there is no bar either under Sec.306, 307 of Cr.P.C., or Sec.5 of the Prevention of Corruption Act to tender pardon to an accomplice and Court can tender pardon at any stage of the investigation or inquiry into or trial of the offence. Now in this case, charge is not yet framed. At this stage, the accused No.4 filed an application seeking tender of pardon from this Court and he undertakes that he shall make 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. I do not find any malafide in filing of this application and this court requires the evidence of accused No.4 to unravel the truth of this case and it is helpful to this Court to arrive at a right conclusion and to find out the guilt of the accused and therefore, the delay in filing the application and dismissal of the discharge application does not come in the way of tendering pardon to the accused No.4. power of Special Judge to grant pardon under Sec.5(2) of the Prevention of Corruption Act and Sec.306 and 307 of Cr.P.C is unfettered power subject to compliance of condition of his making full and true disclosures of the whole circumstances within his knowledge relative to the offence. It is settled law that the power of granting pardon is within the domain of judicial discretion and basis of exercise of this power is not to judge the extent of culpability of the person 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. If the accused No.4 violates the condition or if he willfully conceal anything essential by giving false evidence, then the course is open for this Court to proceed under the provisions of Sec.308 of Cr.P.C. Therefore, I am unable to appreciate the contention raised by the learned counsel for accused No.3, 5 and 6. with these observations, I hold that the accused No.4 is entitled for the relief claimed in the above application and accordingly, I answer point No.1 in the affirmative."*

On the aforesaid reasons, the Special Judge passed the following order:

".... ....

**ORDER**

***The application filed by accused No.4 Susheel Kumar Valecha under Sec.306 of Cr.P.C. is hereby allowed.***

***Accordingly, pardon is tendered to accused No.4 Susheel Kumar Valecha as an approver, subject to his making 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 of offences being tried over here.***

***The CBI is directed to make necessary arrangement for recording of the statement of accused No.4 by the Magistrate under Sec.164 (5) of Cr.P.C.***

***After recording of said statement, CBI shall furnish copy of the same to the other accused."***

*(Emphasis added)*

10. The issue now is, whether the aforesaid order warrants any interference by this Court at the hands of co-accused, when the purport of the provision or the soul of the criminal justice system is discovery of truth by all means even by procuring additional evidence. Section 306 of the Cr.P.C. is in the statute book for that purpose and the ingredients of the said section is that one who seeks pardon will turn an approver and one who turns as approver

will divulge all facts within his knowledge under Section 164 of the Cr.P.C. The only rider to the said power to be exercised by the concerned Court on an application under Section 306 of the Cr.P.C. is that it should not be an order which bears no application of mind. It should be an order which contains reasons as to why a pardon is granted to the co-accused and those reasons should be recorded in writing and such writing should reflect application of mind. All these traits that are necessary for passing the order under Section 306 of the Cr.P.C. are indubitably present in the order impugned. It is germane to notice a three Judge Bench judgment of the Apex Court interpreting Sections 337 to 339 of the Cr.P.C. in **LT.COMMANDER PASCAL FERNANDES v. STATE OF MAHARASHTRA AND OTHERS**<sup>2</sup> wherein the Apex Court has held as follows:

***"6. Before we discuss the validity or propriety of the tender of pardon to Jagasia we shall refer briefly to the statutory provisions on the subject of the tender of pardon. The topic of tender of pardon to an accomplice is treated in the twenty-fourth chapter of the Code as part of the general provisions as to inquiries and trials. Sections 337 to 339 and 339-A contain all the provisions which refer to courts of criminal jurisdiction established under the Code. The Special Judge created under the Criminal Law Amendment Act, 1952 (Act 46 of 1952) is not one of them. For the cases triable by Special Judges under the Criminal Law Amendment Act a special***

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<sup>2</sup> (1968) 1 SCR 695

*provision is to be found in Section 8(2) of that Act, for tender of pardon to an accomplice, as part of the procedure and powers of Special Judges. The section is set out below [ "8 Procedure and powers of special judges—(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, 1898 (Act V of 1898), for the trial of warrant cases by magistrates(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 sections 339 and 339-A of the Code of Criminal Procedure, 1898, be deemed to have been tendered under section 338 of that Code(3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1898 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 trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a special judge shall be deemed to be a public prosecutor(4) \* \* \*] . The second sub-section necessarily differs in some respects from the provisions of the Code because the procedure of trial before the Special Judge is different, but on the tender of pardon by the Special Judge the provisions of Sections 339 and 339-A of the Code apply. The tender of pardon by the Special Judge is deemed by fiction to be one tendered under Section 338 of the Code for purposes of Sections 339 and 339-A. That section is set out below. [ "338 Power to direct tender of pardon—At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the*

*District Magistrate to tender, a pardon on the same condition to such person."*

**7.** Mr J.C. Bhatt contends on the basis of differences between Section 8(2) of Act 46 of 1952 and Sections 337 and 338 of the Code that the powers of the Special Judge are different and can only be exercised if the prosecution moves first. We shall consider if the differences such as they are lead to any such conclusion. To begin with it may be noticed that the action of the Special Judge is deemed to be action under Section 338 of the Code for purposes of Sections 339 and 339-A which apply equally. It is not necessary to refer to Sections 339 and 339-A in detail. The former provides that where a pardon has been tendered under Section 337 or 338 and the Public Prosecutor certifies that the person who accepted it has not wilfully complied with the conditions, the person may be tried for the offence for which pardon was tendered but not jointly with the co-accused and the prosecution must in that trial prove that the conditions had not been complied with. The statement made by the person may be tendered in evidence against him but a prosecution for the offence of giving false evidence in respect of such statement is entertainable only with the High Court's sanction. Section 339-A lays down the procedure for trial. The sections being applicable equally to tender of pardon under the Code and under the Criminal Law Amendment Act, no inference can be drawn as suggested.

**8.** We next proceed to consider the differences between Section 338 of the Code and Section 8(2) of the Criminal Law Amendment Act. The fiction in the latter part of Section 8(2) is only this that the tender of pardon is to be deemed to be one under Section 338 for purposes of applying Sections 339 and 339-A. The whole of Section 338 is not applicable. The power to order the Committing Magistrate or the District Magistrate to tender pardon is not available to the Special Judge because the fiction does not cover that part of Section 338. Similarly, the opening words of Section 338 "at any time after the commitment" are inappropriate to trials before Special Judges because there is no commitment. It is obvious that the powers of the Special Judge commence only after he has taken cognizance of the case, and they are available to him



throughout the trial. No conclusion such as is suggested by counsel can be drawn.

**9.** We may now proceed to consider the differences between Section 337 and Section 8(2). To do this we must look at some sections of the Criminal Law Amendment Act. Special Judges are appointed by the State Governments under Section 6 of the Criminal Law Amendment Act to try the following offences, namely:

"(a) an offence punishable under Section 161, Section 165 or Section 165-A of the Indian Penal Code (Act 45 of 1860) or sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947 (2 of 1947);

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a)."

**10.** Sub-section (1) of Section 337 provides that "in the case of an offence triable exclusively by the High Court or Court of Session or any offence punishable with imprisonment which may extend to seven years or any offence under Sections 161, 165, 165-A, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into or trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof". **The proviso makes provision for situations where the offence is under enquiry or trial. The section applies when the offence is not before the Special Judge for trial. This will appear presently. The remaining sub-sections of Section 337 are procedural. Sub-section (1-A) enjoins the recording of reasons for tendering pardon and the giving of a copy on payment or free of cost to the accused. Sub-section (2) lays down that a person accepting pardon shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Sub-section (2-A) requires that if the**

**Magistrate has reason to believe that the accused is guilty of an offence, the accused shall be committed to the Court of Session. Sub-section (2-B) is an exception to sub-section (2-A). It provides:**

"(2-B) In every case where the offence is punishable under Section 161 or Section 165 or Section 165-A of the Indian Penal Code or sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947, and where a person has accepted a tender of pardon and has been examined under sub-section (2), then, notwithstanding anything contained in sub-section (2-A), a Magistrate shall, without making any further inquiry, send the case for trial to the Court of the Special Judge appointed under the Criminal Law Amendment Act, 1952."

Pausing here it may be mentioned that Section 7(1) and (3) of the Criminal Law Amendment Act require that notwithstanding anything contained in the Code of Criminal Procedure or in any other law, the offences specified in Section 6(1) shall be tried by a Special Judge only and the Special Judge may also try any other offence with which the accused may be charged under the Code of Criminal Procedure at the same trial. These provisions between them establish two periods of time in relation to the tender of pardon in so far as offences mentioned in Sections 6(1) and 7(1) and (3) of the Criminal Law Amendment Act are concerned. Before the case reaches the Special Judge the provisions of Section 337(1) of the Code of Criminal Procedure apply at the stage of investigation or inquiry. If any Magistrate therein mentioned tenders pardon and the person who is tendered pardon is examined under sub-section (2), the Magistrate must, without making any further inquiry, send the case to the Special Judge, if the offence is one of those mentioned in sub-section (2-B) above set out. In other words, just as under sub-section (2-A) the Magistrate has no option but to commit the accused to the Court of Session or the High Court, under sub-section (2-B), he has no option but to stop further inquiry and send the case to the Special Judge. When the case is before that Special Judge the tender of pardon can only be by the Special Judge and it is deemed to be one under Section 338 for purposes of Section 339 and 339-A as explained above. The fiction is necessary because no committal

*proceeding is necessary before a case is sent to a Special Judge. The words underlined by us in Section 337(1) cannot apply to tender of pardon by Special Judges as some of the words of Section 338 do not apply to them.*

**11. It follows that the powers of the Special Judge are not circumscribed by any condition except one, namely, that the action must be with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to an offence. The pardon so tendered is also 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. The disclosure must be complete as to himself and as to any other person concerned as principal or abettor. There is no provision for the recording of reasons for so doing, nor is the Special Judge required to furnish a copy to the accused. There is no provision for recording a preliminary statement of the person.**

**12. There can be no doubt that the section is enabling and its terms are wide enough to enable the Special Judge to tender a pardon to any person who is supposed to have been directly or indirectly concerned in, or privy to an offence. This must necessarily include a person arraigned before him. But it may be possible to tender pardon to a person not so arraigned. The power so conferred can also be exercised at any time after the case is received for trial and before its conclusion. There is nothing in the language of the section to show that the Special Judge must be moved by the prosecution. He may consider an offer by an accused as in this case. The action, therefore, was not outside the jurisdiction of the Special Judge in this case.**

**13. There is no merit in the contention that Section 540 of the Code of Criminal Procedure governs either Sections 337 or 338 of the Code or Section 8(2) of the Criminal Law Amendment Act. That section only confers powers on the Court to summon material witnesses at any stage of any inquiry or trial or other proceeding under the Code. That power is not to**

*be confused with the power to tender pardon to an accused. The considerations for summoning witnesses as court witnesses are somewhat different from the considerations on which a tender of pardon should be made. It is no doubt necessary to bear in mind the interests of justice in either case but there the common factor ceases and other considerations arise. It is not, therefore, possible to read Section 540 with Sections 337 and 338 of the Code or with Section 8(2) of the Criminal Law Amendment Act.*

**14.** *The next question is whether the Special Judge acted with due propriety in his jurisdiction. Here the interests of the accused are just as important as those of the prosecution. No procedure or action can be in the interest of justice if it is prejudicial to an accused. There are also matters of public policy to consider. Before the Special Judge acts to tender pardon, he must, of course, know the nature of the evidence the person seeking conditional pardon is likely to give, the nature of his complicity and the degree of his culpability in relation to the offence and in relation to the co-accused. What is meant by public policy is illustrated, by a case from Dublin Commission Court (Reg v. Robert Dunne, 5 Cox Cr. cases 507) in which Torrens, J., on behalf of himself and Perrin, J., observed as follows:*

*"From what I can see of this case, this witness Bryan, who has been admitted as an approver by the Crown is much the more criminal of the two on his own showing... I regret that this witness, Bryan, has been admitted as evidence for the Crown and thus escaped being placed upon his trial. It is the duty of Magistrates to be very cautious as to whom they admit to give evidence as approvers, and they should carefully inquire to what extent the approver is mixed up with the transaction, and if he be an accomplice, into the extent of his guilt...."*

**15.** *In this case the Special Judge made no effort to find out what Jagasia had to disclose. The English law and practice is (a) to omit the proposed approver from the indictment, or (b) to take his plea of guilty on arraignment, or (c) to offer no evidence and permit his acquittal, or (d) to enter a nolle prosequi. In our criminal jurisdiction there is a tender of a pardon on condition of*

**full disclosure. Section 8(2) of the Criminal Law Amendment Act is enabling. Without recourse to it an accused person cannot be examined as a witness in the same case against another accused. To determine whether the accused's testimony as an approver is likely to advance the interest of justice, the Special Judge must have material before him to show what the nature of that testimony will be. Ordinarily it is for the prosecution to ask that a particular accused, out of several may be tendered pardon. But even where the accused directly applies to the Special Judge, he must first refer the request to the prosecuting agency. It is not for the Special Judge to enter the ring as a veritable director of prosecution. The power which the Special Judge exercises is not on his own behalf but on behalf of the prosecuting agency and must, therefore, be exercised only when the prosecuting joins tendered pardon because it does not need approver's testimony. It may also not like the tender of pardon to the the crime or the worst offender. The proper course for the Special Judge is to ask for a statement from the prosecution on the request of the prisoner. If the prosecution thinks that the tender of pardon will be in the interests of a successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, it will indubitably agree to the tendering of pardon. The Special Judge (or the Magistrate) must not take on himself the task of determining the propriety of tendering pardon in the circumstances of the case. The learned Special Judge did not bear these considerations in mind and took on himself something from which he should have kept aloof. All that he should have done was to have asked for the opinion of the public prosecutor on the proposal. But since the Public Prosecutor, when appearing in the High Court, stated that the prosecution also considered favourably the tender of pardon to Jagasia we say no more than to caution Magistrates and Judges in the matter of tender of pardon suo motu at the request of the accused. This practice is to be avoided. Since the prosecution in this case also wants that the tender of pardon be made it is obvious that the appeal must fail. It will accordingly be dismissed.**

1. "8 Procedure and powers of special judges.--(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, 1898 (Act 5 of 1898), for the trial of warrant cases by magistrates (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 sections 339 and 339-A of the Code of Criminal Procedure, 1898, be deemed to have been tendered under section 338 of that Code (3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1898 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 trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a special judge shall be deemed to be a public prosecutor (4)

\* \* \*

2. "338 Power to direct tender of pardon—At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person.""

(Emphasis supplied)

11. In the light of the aforesaid judgment of the Apex Court which considers the provisions which were earlier in the statute book, akin to Section 306 of the Cr.P.C. dealing with tendering of pardon, pardon is a permissible exercise of power by the concerned Court and if full disclosure of fact are coming about in terms of the said pardon, such pardon should be permitted.

12. Insofar as the judgment relied on by the learned counsel for the petitioner in case of **ASHOK KUMAR AGGARWAL** (*supra*) an order of grant of pardon can be assailed on limited grounds and the said ground would be for the reason that the concerned Court does not consider any of the relevant material while disposing of the application under Section 306 Cr.P.C. The effect of grant of such pardon is also taken note of by the Apex Court in the aforesaid judgment. But, the crux of the issue before the Court is found at paragraphs 25 and 26. The Apex Court holds that if by tendering of pardon prosecution thinks that it will be in the best interest of the successful prosecution of the other offenders whose conviction is not easy without the approver's testimony, then the Court should accept it.

13. The CBI and 2<sup>nd</sup> respondent/accused No.4 have filed their detailed objections. The objections of the CBI seek to bring about that for the possible conviction of the co-accused, full disclosure of facts by 2<sup>nd</sup> respondent/accused No.4 would be imperative. Therefore, the CBI has no objection to the said application. The criteria as directed by the Apex Court in the afore-quoted judgment relied on by the learned counsel for the petitioner has been adequately met in the impugned order. It is a well reasoned order which takes note of several judgments on the issue rendered by the Apex Court and allows the application filed by accused No.4. Therefore, I do not find any warrant to interfere with the order passed by the concerned Court.

14. The petition lacking in merit, stands dismissed. The concerned Court if it has not proceeded with the trial on account of pendency of the subject petition, shall now make every endeavour to conclude the proceedings by regulating its procedure.



Consequently, I.A.No.1 of 2022 also stands disposed.

**Sd/-  
JUDGE**

bkp  
CT:SS