

Md. Mukim Vs. State

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Court : Orissa

Decided On : Oct-14-1993

Reported in : 1993(II)OLR538

Judge : A. Pasayat, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 306, 306(4), 307 and 308

Appeal No. : Criminal Revision No. 280 of 1990

Appellant : Md. Mukim

Respondent : State

Advocate for Def. : G.K. Mohanty, Addl. Standing Counsel

Advocate for Pet/Ap. : Pradip Mohanty, B.P. Ray and A.K. Dalai

Judgement :

A. Pasayat, J.

1. Petitioner along with others was arraigned as an accused in G. R. Case No. 129 of 1988 pending in the Court of Subdivisional Judicial Magistrate, Sundargarh, on the allegation of having committed offences punishable Under Sections 467, 468, 471, 473, 420 and 120-B of the Indian Penal Code* 1860 in short, 'IPC', and Under

Sections 52, 53 and 67 of the Indian Post Office Act, 1898. On 6-8-1988 pardon was granted to him Under Section 306 of the Code of Criminal Procedure, 1977 (in short, the 'Code'). Prayer made by the petitioner to be made an approver was accepted by the learned Subdivisional Judicial Magistrate (in short, 'SDJM') on 6-8-1988 on condition that he would make a full and true disclosure of whole of the circumstances within his knowledge relative to the offence. He was examined as required Under Section 306(4) of the Code. His statement under- Section 164 of the Code was recorded on, 13-6-1988 during investigation. On 31-3-1989., when the case was transferred to the Court of Chief Judicial Magistrate, Sundargarh (in short, 'CJM') for trial the petitioner took the stand that he was not interested to be an approver, on the ground that he was forced to accept pardon. The learned CJM directed cancellation of the pardon tendered to him and to treat him as an accused in the case. This order dated 31-3-1989 and the order dated 10-4-1989 granting bail to him as an accused were assailed before the learned Sessions Judge, Sundargarh in Criminal Revision No. 37 of the 1989. The learned Sessions Judge held that the orders passed by the learned CJM were not in accordance with law. According to him, merely on refusal of an approver to be one, the pardon is not automatically cancelled. He set aside both the orders being of the view that in view of the cancellation was impermissible and the subsequent order automatically stood vacated. Direction was given to the petitioner to surrender to Court.

2. Learned counsel for petitioner submitted that even if it is conceded for sake of argument that the learned Sessions Judge was within his jurisdiction to hold that pardon granted cannot be withdrawn, his direction relating to bail is unsustainable. Conclusions relating to pardon are also assailed. The learned counsel for State on the other hand supported the order,

3. Tender of pardon to accomplice is prescribed Under Section 306 of the Code, In essence it is not a case of failure to give protection to the accused who are prosecuted, but a case of refraining from prosecution of one accused for certain reasons enjoined by the statute in the interests of the successful prosecution of certain other persons, thereby getting the best evidence possible against them. It is one of the many prerogatives which have been recognized since time immemorial as being vested in the sovereign, wherever the sovereignty might lie;

The sovereign power to grant a pardon has been recognized in our Constitution in Arts. 72 and 161 and also in Sections 432 and 433 of the Code. These provisions relate to the grant of a pardon after sentence has been imposed, and the tender of pardon to an accomplice under certain conditions as contemplated by Sections 306 and 307 is a variation of this very power. The object of the section is, that in cases involving offences of great magnitude, liable to be punished with heavy punishments, to prevent the escape of the offenders from punishment. For attaining this object, conditional pardon is tendered to the accomplice. Such conditional pardon protects from prosecution the approver who makes a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and the offenders. In Archbold's Criminal Pleading and Practice, 29th Ed. (1935) at page 463 under the heading 'Competency of Witnesses' it is stated :

'Where it is proposed to call an accomplice for the Crown, it is the practice (a) not to include him in the indictment : (b) to take his plea of guilty on arraignment, or during the trial he withdraws his plea of not guilty or before calling him either : (c) to offer no evidence and permit his acquittal : or (d) to enter a nolle prosequi.'

It was to be remembered that the approver dealt with Under Section 306 gives his testimony with a contingent charge hanging over his head; also that the evidence of an accomplice whether dealt with Under Section 306, or discharged Under Section 321(a) or acquitted Under Section 321(b) is the evidence of an approver and as such open to suspicion. When a pardon has been tendered to and the tender is accepted by a person, such a pardon is a bar to the trial of the approver for the offence or offences under inquiry as also for any of the offences of which he appears to have been guilty in connection with the same matter. Where the terms of pardon are violated, there can be trial of the person granted pardon for the offence. But a Sessions Judge cannot on non-compliance with the conditions, forfeit it. The moment pardon is granted accused ceases to be so, and becomes witness thereafter. A pardon once tendered and accepted cannot be withdrawn. Magistrate tendering pardon cannot forfeit it and commit the person for trial with other accused without following procedure laid down in Section 308 of the Code. Law requires that there shall be a definite finding as to whether condition of pardon had been complied with or not. A pardon once granted can only be forfeited if it

can be shown that a person pardoned has virtually wilfully concealed anything essential or given false evidence, and the prosecution must show that it has been so done. A pardon cannot be withdrawn but can only be forfeited on the ground of breach of conditions.

4. The power to grant pardon carries with it the right to impose a condition limiting the operation of such a pardon. Hence, a pardoning power can attach any condition, precedent or subsequent so long as it is not illegal, immoral or impossible of performance. Section 306 clearly enjoins that an approver who was granted pardon has to comply with the condition of 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 commission thereof. Because of this mandate neither can the State withdraw pardon from the approver, nor can the approver cast away the pardon granted to him till he is examined as a witness by the prosecution both in committing Court as well as in the trial Court. The approver may have resiled from the statement made before the Magistrate in the committing Court and may not have complied with the condition on which pardon was granted to him, still he has to be examined as a witness in the trial Court. It is only when the public prosecutor certifies that the approver has not complied with the condition on which the tender was made by wilfully concealing anything essential or by giving false evidence he may be tried under v. 308 of the Code not only for the offence in respect of which pardon was granted but also in respect of other offences. This position has been succinctly stated by the Apex Court in the case of *State (Delhi Administration) v. Jagjit Singh* : AIR 1989 SC 598, The moment pardon was tendered to the accused he must be presumed to have been discharged whereupon he ceased to be accused and became a witness. (See *A. J. Reiria v. State of Madras*: AIR 1954 SC 616). The order of the learned CJM was indefensible and has been rightly nullified by the learned Sessions Judge.

5. The further question is whether the order granting bail was to be set at naught. Mr. Ray for the petitioner submits that it is not a mandatory requirement that an approver should be in custody. This, according to him, is clear from the provisions of Section 306(4) of the Code postulating that every person accepting a tender of

pardon made under Sub-section (1) shall unless he is already in bail, be detained in custody until the termination of the trial. It is his submission that rightly or wrongly bail has been granted and the petitioner has not misutilised the liberty while continuing on bail for more than four years. The learned counsel for State on the other hand contended that grant of bail was made on the foundation that the petitioner was an accused, which is clearly contrary to law, and therefore, the direction by the learned Sessions Judge is in order.

6. The purpose of enactment of Clause (b) of Sub-sec (4) of Section 306 of the Code is that the approver shall not be set at large until the judicial proceedings pending against the accused persons are finished. The words 'detained in custody' mean detention in jail and not detained in police custody. The provisions of Section 306, Sub-sec (1). Clause(b) must be read as an exception to the general provisions contained in Sections 437 and 439 of the Code, It is an old and familiar principle that a special provision overrides the general. So the Court is not competent to admit an approver to bail. The only exception is where prior to the grant of pardon. The concerned person is on bail- The object of requiring an approver to remain in custody until the termination of the trial is not to punish the approver for having agreed to give evidence for the State, but to protect him from the wrath of the confederates he has chosen to expose to prevent him from the temptation of saving his erstwhile friends and companions and secure his person to await the judgment of the law. If his release on bail is illegal, it can be set aside by a superior Court.

7. The grant of bail to the petitioner by the learned CJM was on legally untenable premises. Therefore the grant of bail has no sanctity in law. But that is not the end of the matter. Even when an accused has been released without satisfying the requirements of law. the provisions relating to cancellation of bail would spring into action. Bail can be cancelled in such case on the grounds some of which have been illustrated in *Aslam Babalal Desai v. State of Maharashtra* :AIR 1993 SC 1. In *Hadiani Dei v. State of Orissa and Ors.* : 1993 (II) OLR 443. this Court considered the legality of an order directing remand to jail custody when bail was granted during investigation without considering the prohibitions contained in Section 37 of the Narcotic Drugs and Psychotropic Substances Act. 1985. It was

held that the accused was entitled to continue on previous bail unless the same is cancelled on any of the grounds illustratively indicated in Aslam Babalal's case (supra) or any ground akin to them. The learned Sessions Judge has not considered the matter in that light. Therefore, notwithstanding improper grant of bail to the petitioner of the learned CJM, the order of the learned Sessions Judge so far as it relates to setting aside the order dated 10-4-1989 passed by the learned CJM is nullified. So far as the desirability for cancellation of bail is concerned, I express no opinion.

The revision application is accordingly disposed of.

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