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VipIn Kumar Vs. Union of India and Another

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Court : Delhi

Decided On : Jan-31-2000

Reported in : 2000IIAD(Delhi)573; 2000CriLJ1555; 84(2000)DLT33; 2000(52)DRJ672; 2000(71)ECC812

Judge : M.S.A. Siddiqui, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 306, 307 and 482; Narcotics Drugs and Psychotropic Substance Act, 1985 - Sections 64(1)

Appeal No. : Crl. M (M) 420/96

Appellant : VipIn Kumar

Respondent : Union of India and Another

Advocate for Pet/Ap. : Mr. Sudhir Chandra Agarwal, Sr. Adv. and; Ms. Nitya Ramakrishnan, Adv

Judgement :
ORDER

M.S.A. Siddiqui, J.

1. By this petition under Section 482 Cr.P.C., the petitioner seeks quashing of the order dated 24.11.1995 passed by Shri S.M. Aggarwal, Additional Sessions Judge, New Delhi.

2.Briefly stated, the facts giving rise to this petition are that somewhere in 1987 the Narcotics Control Bureau received secret information about smuggling and drug trafficking activities of the petitioner and his associates namely Jasbir Singh Sandhu, Sukhdev Singh Sandhu, Dev Singh Chahal, Narender Vishnoi, Aziz Ahmed and Smt. Shoma Abionkar Around 17.11.1987, an information was received by the Narcotics Control Bureau that two separate consignments of heroin had been dispatched from Bombay to USA and the petitioner had been deputed for their disposal in the USA. As per prosecution case, the accused Jasbir Singh gave certain directions to the petitioner on telephone regarding disposal of the contraband and the said telephonic conversation was intercepted and recorded on a tape by the Narcotics Control Bureau. On 20th November, 1987 officials of the Drug Enforcement Administration (USA) seized 9.5 kgs. of heroin from two Indians and one Italian National. On receipt of the said information, officials of the Narcotics Control Bureau, Delhi rounded up Narender Bishnoi, Devender, Aziz Ahmed, Mrs. Shoma Abionkar and the petitioner and recovered 2.5 kgs of heroin at Bombay. On a search of the accused Jasbir Singh's residence at Delhi, certain incriminating documents relating to the drug trafficking activities of the accused Jasbir Singh were seized. Thereafter, a complaint under Sections 21/23/29 of the Narcotics Drugs and Psychotropic Substances Act 1985 (for short 'the Act') was filed against the accused persons including the petitioner.

3.On 23.11.1989, the petitioner made an application to the Narcotic Control Bureau for the grant of pardon and on 19.4.1990, he filed similar application before the Additional Sessions Judge which was rejected vide orders dated 4.10.1990. Thereafter, the petitioner gave to the Narcotic Control Bureau a transcript of his recorded telephonic conversation with the accused Jasbir Singh. On 18.12.1990, the petitioner made an application to the Director General of the Narcotics Control Bureau for grant of immunity from prosecution. By the order dated 18.8.1992 the Government of India, in exercise of the power conferred under Section 64(1) of the Act' tendered to the petitioner the immunity from prosecution on the condition of his making full and true disclosure of the whole circumstances relating to the alleged offences.

4.On 24th February, 1993 the Public Prosecutor appearing for the Narcotics Control Bureau filed an application under Section 311 Cr.P.C. before the Additional Sessions Judge seeking leave to examine the petitioner as a witness in the case. BY the impugned order dated 24.11.1995, the learned Additional Sessions Judge rejected the application holding that the Central Government had no power to tender to the petitioner the immunity from prosecution under sub Section (1) of Section 64 of the Act. Aggrieved thereby the petitioner has come up before this Court under Section 482 Cr.P.C.

5.The question that arises for consideration in this petition is:

6.Whether the Government is competent under sub Section (1) of Section 64 of the Act to tender immunity from prosecution to an accused person in respect of an offence under the Act when the Court before whom the trial had been pending had rejected a request to tender pardon under the provisions of the Code of Criminal Procedure?

7.While interpreting the provisions of Section 64 of the Act, and the provisions of Sections 306 and 307 Cr.P.C, the learned Additional Sessions Judge took the view that the provision of Section 64 of the Act can be invoked only before the prosecution is launched against the accused person and the said power comes to an end on taking of cognizance of the offence by the Court. It is now necessary to refer to the material provisions of the Code of Criminal Procedure and the provisions of Section 64 of the Act. Sections 306 and 307 of the Code of Criminal Procedure are as under:-

306. Tender of pardon to accomplice - (1) With a view to obtaining the evidence of any person supposed to have been directly orindirectly concerned in or privy to an offence to which thissection applies, the Chief Judicial Magistrate or a MetropolitanMagistrate at any stage of the investigation or inquiry into, orthe trial of, the offence, and the Magistrate of the first classinquiring into or trying the offence, at any stage of the inquiryor trial, may tender a pardon to such person on condition of hismaking a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to everyother person concerned, whether as principal or abettor, in thecommission 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 LawAmendment Act, 1952 (46 of 1952);

(b) any offence punishable with imprisonment which may extend toseven 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 subsection(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 undersub-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 exclusivelyby that Court or if the Magistrate taking cognizance is the Chief judicial Magistrate;

(ii) to a Court of Special Judge appointed under the Criminal LawAmendment 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, tendera pardon on the same condition to such person.'

8.A perusal of Section 306 of the code shows that the Chief Judicial Magistrate or a Metropolitan Magistrate may tender pardon in the circumstances mentioned therein at any stage of the investigation or inquiry into or trial of the offence. Similarly, where the offence is under inquiry or trial, the Magistrate of the first class inquiring into or trying the offence can exercise the power. Sub Section (1) makes it obligatory on the Magistrate tendering pardon to record his reasons for so doing and also of furnishing the accused with a copy of his order. Section 307 deals with the grant of pardon after the stage of commitment has been reached but before the judgment is passed. It gives full power to the Court to which the commitment is made to tender pardon on the same conditions.

9.Section 64 of the Act reads as under :-

'64. Power to tender immunity from prosecution. - (1) The CentralGovernment or the State Government may, if it is of opinion (thereasons for such opinion being recorded in writing) that with aview of obtaining the evidence of any person appearing to havebeen directly or indirectly concerned in or privy to the contravention of any of the provisions of this Act or of any rule ororder made there under it is necessary or expedient so to do,tender to such person immunity from prosecution for any offenceunder this Act or under the Indian Penal Code (45 of 1860) orunder any other Central Act or State Act, as the case may be, forthe time being in force, on condition of his making a full andtrue disclosure of the whole circumstances relating to suchcontravention.

(2) A tender of immunity made to, and accepted by, the personconcerned, shall, to the extent to which the immunity extends,render him immune from prosecution for

any offence in respect ofwhich the tender was made.

(3) If it appears to the Central Government or, as the case maybe, the State Government, that any person to whom immunity hasbeen tendered under this section has not complied with the conditions on which the tender was made or is wilfully concealinganything or is giving false evidence, the Central Government or,as the case may be, the State Government, may record a finding tothat effect and thereupon the immunity shall be deemed to havebeen withdrawn and such person may be tried for the offence in respect of which the tender of immunity was made or for any otheroffence of which he appears to have been guilty in connectionwith the same matter.'

10. Section 64 of the Act provides for grant of immunity from prosecution. This immunity can only be tendered by the Government with respect to an offence committed under the Act. Section 64 contemplates grant of immunity from prosecution on condition of the person granted immunity to make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence under the Act and to every other person concerned, whether as principal or abettor, in the commission thereof; and this means that the person to whom immunity under Section 64 is granted is expected to tell the whole truth including details of any other subsidiary offence which might have been committed in the course of the commission of the offence for which immunity is granted. Sub-section (3) provides that where it appears to the Government that any person to whom immunity has been tendered under this Section has not complied with the conditions on which the tender was made or his wilfully concealing anything or is giving false evidence, it may record a finding to that effect and thereupon the immunity shall be deemed to have been withdrawn.

11. It is well settled principle of interpretation of statute that a statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim: 'Ut rest magic valeat Quam Pereat'. (Deep Chand and Others v. The State of Uttar Pradesh and Others, AIR 1959 SC 666, The Management of Advance Insurance Co. Ltd. Vs . Shri Gurudasmal and Others, : [1970]3SCR881 , The Municipal Council Madurai Vs .

R. Narayanan etc. : [1976]1SCR333). Thus the Courts should strip hard to give meaningful life to legislative enactments and avoid cadaveric consequences (Krishna Chandra Gangopadhyaya etc. Vs . The Union of India and Others, : AIR 1975 SC1389). The Courts cannot usurp legislative function under the disguise of interpretation and they must avoid the danger of a priori determination of the meaning of a provision based on their own perceived notions or schemes into which the provisions to be interpreted is somehow fitted D.R. Venkatachalam etc. Vs . Dy. Transport Commissioner and Others : [1977]2SCR392 . As noticed earlier the learned Additional Sessions Judge took the view that provisions of Section 64 of the Act cannot be invoked after cognizance of the offence is taken by the competent court. He also observed that 'the immunity from prosecution is not synonymous with pardon from trial'. Relying upon the decision rendered by the Supreme Court in Thomas Dama Vs . State of Punjab, : 1959 CriLJ392 , the learned Additional Sessions Judge has attempted to highlight distinction between `prosecution' and `trial' and has held that the power to tender immunity from prosecution under Section 64 of the Act comes to an end on taking of cognizance of the offence under the Act by the Court of competent jurisdiction. In my opinion, the view of the learned Additional Sessions Judge is based on a mistaken or erroneous interpretation of the principles enunciated by their Lordships in the case of Thomas Dama (supra). In that case, the question which arose for determination was whether the proceedings before the Sea Customs Authorities under Section 167(8) of the Sea Customs Act were prosecution within the meaning of Article 20(2) of the Constitution. Their Lordships, on an analysis of the entire scheme of the Sea Customs Act, held that the aforesaid proceedings were not prosecution within the meaning of Article 20(2) of the Constitution. Thus the ratio deciding of Thomas Dama (supra) does not govern the case like in hand.

12. It is to be remembered that a pardon granted under Sections 306 or 307 of the Code of Criminal Procedure and an immunity from prosecution granted under Section 64 of the Act is a protection from prosecution. Failure to comply with the conditions on which pardon is tendered or immunity from the prosecution is granted removes that protection. The moment the pardon is tendered under the said provisions of the Code or immunity from prosecution is granted to the accused under Section 64 of the Act, he must be presumed to have been

discharged whereupon he ceases to be an accused and becomes a witness. (A.J. Peiris Vs . State of Madras, : AIR 1954 SC616).

13. As noticed earlier the provisions of Sections 306 and 307 of the Code of Criminal Procedure and Section 64 of the Act are cognate legislations. In other words they are legislations which are para materia. They form one Code. They must be taken together as forming one system and as interpreting and enforcing each other. thereforee, the provisions of Sections 306 and 307 of the Code may be looked at as a guide to the construction of Section 64 of the Act. As was stated by Lords Blackburn in Ports mouth Corporation v. Smith (1885) 10 A.C. 364 that:-

'when a single section of an Act of Parliament is introduced intoanother Act, I think it must be read in the sense it bore in theOriginal Act from which it was taken, and that consequently, IT is perfectly legitimate to refer to all the rest of the Act inorder to ascertain what that Section meant, though those othersections are not incorporated in the new Act'.

14. When the Legislature intended that the power to tender pardon under Section 306 Cr.P.C. and the power to tender immunity from prosecution is to be exercised by different authorities specified therein, the duty of the Court is to act upon the true intention of the Legislature, the means or Sententia Legis (South Asia Industries Private Ltd. Vs . S. Sarup Singh and Others : [1965]3SCR829). Thus, the conferment of the power to tender pardon under Sections 306 and 307 of the Code in no way deprives the Government of the power to grant immunity from prosecution under Section 64 of the Act. The power under Section 64 is independent of the power under Section 306 or Section 307 of the Code of Criminal Procedure exercisable by the various Courts mentioned therein. The immunity from prosecution can be tendered at any stage of the investigation, inquiry or trial but before judgment is passed by the trial court. The words 'before judgment is passed' employed in Section 307 of the Code provide for the extreme limit or the ultimate point of time up to which pardon can be tendered to an accused. The learned Additional Sessions Judge took the view that the immunity from prosecution under Section 64 of the Act can be tendered by the Government only before the prosecution is launched and such power comes to an end on

taking of cognizance of the offence by the Court. I am unable to find any such restriction placed upon the power of the Government by the wordings of the Section 64 itself. Needless to add, the duty of a Judge is to expound and not to legislate is a fundamental rule (The State of Haryana and Others Vs . Sampuran Singh, : [1976]1SCR626 and Carew and Company Ltd. v. Union of India, 2260). In Union of India v. Deokinandan Aggarwal AIR 1991 SCW 2754, it was held that the Court can't to re-write, re-cast or reframe the legislation for the very good reason that it has no power to legislate. There is nothing either in Section 306 or in Section 307 of the Code of Criminal Procedure to exclude the operation or applicability of Section 64 to the prosecution launched under the Act. Provisions of Section 64 are not inconsistent with the provisions of Section 306 or Section 307 of the Code. The power of the Government under Section 64 of the Act insofar as tendering immunity from prosecution is concerned is not exhausted by Sections 304 or 307 of the Code of Criminal Procedure or all of them put together. Thus the proposition propounded by the learned Additional Sessions Judge that power under Section 64 of the Act comes to an end on taking of cognizance of the offence by the Court is unsound and erroneous.

15. In State of U.P. Vs . Kailash Nath, : 1973 CriLJ1196 , it was held that even if a pardon has been refused on one occasion, a further request may be made before the same magistrate or Court and such a further request can be entertained and considered if fresh or additional facts are placed by the party concerned. On the same analogy, it can be held that the Government can tender immunity from prosecution under Section 64 of the Act to an accused person when the Court before whom the trial had been pending had rejected a request to tender pardon if fresh or additional facts are placed by the party concerned. Thus mere refusal to tender pardon under the provisions of the Code does not debar the Government from exercising power under Section 64 of the Act. In the instant case, the order dated 18.8.92 reveals that the Government had granted immunity to the petitioner under Section 64 of the Act on the basis of the fresh or additional facts placed by him. In the facts and circumstances of the case the Government was competent to grant immunity under Section 64 of the Act.

16. It needs to be highlighted that impugned order amounts to withdrawal of the immunity granted to the petitioner by the Government under Section 64 of the Act. The pardon tendered under Sections 306 and 307 of the Code or the immunity from prosecution granted by the Government under Section 64 of the Act can be withdrawn only on violation of the conditions enumerated in the Code of Criminal Procedure or the Act, as the case may be. That being so, the learned Additional Sessions Judge was legally incompetent to revoke or withdraw the immunity from prosecution tendered by the Government under Section 64 of the Act. The learned Additional Sessions Judge also lost sight of the fact that the moment the immunity from prosecution was tendered to the petitioner under Section 64 of the Act he must be deemed to have been discharged whereupon he ceased to be an accused and became a witness and his examination by the Court was a statutory requirement. (Sardar Iqbal Singh v. State (Delhi Admn.) 1977 SC 2437, Sanjay Gandhi Vs . Union of India and Others, : 1978 CriLJ642 , State (Delhi Admn.) Vs . Jagjit Singh, : 1989 CriLJ986 , Suresh Chandra Bahri and Others Vs . State of Bihar, : 1994 CriLJ3271).

17. For the foregoing reasons I am of the opinion that the impugned order passed by the learned Additional Sessions Judge is not sustainable in law as it has resulted in flagrant miscarriage of Justice. Accordingly, the petition is allowed and the impugned order dated 24.11.1995 is quashed. The trial court is directed to examine the petitioner as a witness in the case.

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