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DILIP SUDHAKAR PENDSE & ANR.

v.

CENTRAL BUREAU OF INVESTIGATION
(Criminal Appeal No. 966 of 2013)

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JULY 16, 2013

[H.L. GOKHALE AND MADAN B.LOKUR, JJ.]

Code of Criminal Procedure, 1973:

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s.306(5)(b) – Tender of pardon to accomplice and committal of case to Court of Session – Offences punishable u/ss 420, 468, 471 and 477-A read with s.120-B IPC – Additional Chief Metropolitan Magistrate granting pardon to one of accused on his turning approver, and committing the case to Court of Session – Held: Charges leveled against appellants are all triable by Magistrate’s Court, and cognizance is taken by Additional Chief Metropolitan Magistrate and not by Chief Metropolitan Magistrate – Further, it was also not an offence triable by Special Judge under Criminal Law Amendment Act, 1952 — It was, thus, a case falling in the category of ‘any other case’ under sub-s. (5)(b) of s.306 CrPC and had to be made over to Chief metropolitan Magistrate for trial – Order of High Court directing the case to be tried by Court of Session is set aside – Proceedings will stand restored to file of Chief Metropolitan Magistrate who shall proceed with trial — As regards cancellation of order granting pardon, it would be for appellants to apply before the Magistrate concerned.

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A charge-sheet against the appellants and others for offences punishable u/ss 420, 468, 471 and 477-A read with s.120-B IPC, was filed in the Court of Addl. Chief Metropolitan Magistrate. One of the accused turned approver and the Magistrate by order dated 10.9.2008, granted him pardon and committed the case to the Court

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of Session for trial. The Sessions Judge held that the offences were not exclusively triable by the Court of Session, and sent the case to Chief Metropolitan Magistrate for trial. However, the High Court, in the writ petition, directed the matter to be tried by the Court of Session.

Allowing the appeal, the Court

HELD: 1.1. In the instant case, the offences were triable by the Magistrate's Court and not exclusively triable by the Court of Session: and the Magistrate taking cognizance was Additional Chief Metropolitan Magistrate and not the Chief Metropolitan Magistrate. It was also not an offence triable by the Special Judge under the Criminal Law Amendment Act, 1952. That being so, it was a case falling in the category of 'any other case' under sub-s. (5)(b) of s.306 CrPC and, therefore, had to be made over to the Chief Metropolitan Magistrate for trial. Therefore, the order passed by the High Court is set aside. The proceeding will now stand restored to the file of Chief Metropolitan Magistrate who shall proceed with the trial. [para 10, 12 and 13] [652-D-F; 653-B-D]

1.2 As regards cancellation of order granting pardon, it would be for the appellants to apply before the Magistrate and it is for him to take appropriate decision if any such application is filed. [para 14] [653-D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 966 of 2013.

From the Judgment & Order dated 7.7.2011 of the High Court of Judicature at Bombay in Criminal Writ Petition No. 1737 of 2009.

P.R. Namjoshi, Vivek Gore, Shankar Narayanan, Gaurav Agrawal for the Appellants.

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A Rakesh K. Khanna, Priyanka Gupta, Prakriti Purnima, H. Prabhakar, B.V. Balram Das, Rajiv Nanda, Arvind Kumar Sharma for the Respondents.

The Judgment of the Court was delivered by

B **PER GOKHALE, J.** Leave granted.

C 1. Heard Mr. P.R. Namjoshi, learned counsel appearing for the appellants and Mr. Rakesh K. Khanna, learned Additional Solicitor General appearing on behalf of the respondent.

D 2. The appellants seek to challenge the order passed by the Bombay High Court allowing the Criminal Writ Petition filed by the respondent-C.B.I. The C.B.I. had sought to challenge the order passed by the Special Judge, C.B.I., Greater Mumbai, which had allowed the Miscellaneous Application filed by the appellants and set aside the order passed by the Additional Chief Metropolitan Magistrate.

3. The facts leading to this appeal are as under:

E The appellants herein along with one Rajendraprasad K. Jhunjunwala and others are being prosecuted for the alleged offences punishable under Sections 420, 468, 471 and 477-A read with Section 120-B of I.P.C. A charge-sheet has been filed
F by the C.B.I. against the appellants and the said Jhunjunwala and others in the Additional Chief Metropolitan Magistrate's 19th Court, Esplanade, Mumbai, which has been numbered as CC No. 113/CPW/2006. It so transpired that during the course of that proceeding the aforesaid Jhunjunwala turned approver, and his statement was recorded by the Economic Offence wing
G of C.B.I. under Section 306(4) of the Code of Criminal Procedure ('Cr.P.C.' for short) for grant of pardon. The C.B.I. moved an application dated 7.8.2008 for recording his statement before the learned Additional Chief Metropolitan Magistrate, and the learned Magistrate passed order on
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10.9.2008 granting him pardon. The learned Magistrate has thereafter passed an order committing the proceeding to the Court of Sessions for trial. The operative order of the learned Magistrate dated 10.11.2008 reads as follows: A

“1. The case is committed to the Hon'ble Court of Sessions for trial as provided under Section 306(4) of the Cr.P.C.” B

4. This order of the Learned Magistrate was challenged by the appellants by filing a Miscellaneous application in the Special Case No.783 of 2008 before the Court of Special Judge, C.B.I., Greater Mumbai. C

5. The Learned Sessions Judge allowed that application by the order dated 7.3.2009. As seen from paragraph 2 of that order, it was contended before the learned Sessions Judge that the Additional Chief Metropolitan Magistrate cannot impose jurisdiction on the superior Court. The alleged offences against the appellants are triable before a Metropolitan Magistrate, and the Sessions Court had no jurisdiction to try or entertain and decide the said offences. This submission came to be accepted by the learned Sessions Judge. It is specifically stated in paragraph 8 of his order that admittedly the offences alleged against the appellants-accused were not exclusively triable by the Court of Sessions, and therefore the matter was required to be transferred back to the Court of Chief Metropolitan Magistrate for disposal in accordance with law. Learned Sessions Judge, therefore, allowed that Miscellaneous application and directed his Registrar to send the papers of the Special case No. 783 of 2008 to Chief Metropolitan Magistrate for trial in accordance with law. D
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6. This order of the Court of Sessions was challenged by the respondent in the High Court of Bombay by filing CrI.W.P. No. 1737 of 2009 and a Learned Single Judge of the High Court has allowed that writ petition by his order dated 7.7.2011. It was held that the order passed by the Additional H

A Chief Metropolitan Magistrate was not an order of transfer, but was the order of committal to the Court of Sessions. The Learned Single Judge therefore allowed the petition in terms of prayer 'B' and 'C' whereby the matter would be now tried by the Court of Sessions.

B 7. Being aggrieved by this judgment and order the present Special Leave Petition (now converted into criminal Appeal) has been filed.

C 8. Learned counsel for the appellants Mr. Namjoshi has raised the issue of hierarchy of Courts. His principal submission has been that since the offences were triable by a Court of Magistrate, the prosecution thereof could not have been transferred to the Court of Sessions. Admittedly, the offences were not at all exclusively triable by the Court of Sessions.

D Section 306 of Cr.P.C. is relevant for our purpose. It reads as follows:-

E 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.

G 2. This section applies to:-

H (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)

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(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:-

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(a) his reasons for so doing;

(b) Whether the tender was or was not accepted by the person to whom it was made,

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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;

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(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

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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:-

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(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;

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(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;

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A (b) In any other case, make over the case to the Chief Judicial Magistrate who shall try the case himself.”

B 9. Sub-section (5) thus lays down as to whom the case is to be committed for trial;

C (i) If the case is exclusively triable by the Court of Sessions, or if the Magistrate taking cognizance is Chief Judicial Magistrate in which cases it is provided that those cases will be committed for trial to the Court of Session,

(ii) If the offence is exclusively triable by a Special Judge appointed under the Criminal Law Amendment Act, 1952, then to that Court and

D (iii) In any other case to the Chief Judicial Magistrate.

E 10. In the present case, the offences were not exclusively triable by the Court of Sessions, and the Magistrate taking cognizance was not the Chief Judicial Magistrate. It was also not an offence triable by the Special Judge under the Criminal Law Amendment Act, 1952. That being so, it was a case falling in category of ‘any other case’ under sub-section (5)(b) and therefore had to be made over to the Chief Judicial Magistrate for trial.

F 11. It is, therefore, submitted that the High Court was in error in committing the case to the Court of Sessions. It was further submitted that even if the Court of Sessions framed the charges, the matter will again have to go back to the Chief Judicial Magistrate for the trial. That being so, the order of the High Court suffered a patent error of law.

G 12. Mr. Rakesh K. Khanna, learned Additional Solicitor General appearing for the respondent, on the other hand, contended that under sub-section 5(a)(i) two options were available. He submitted that the matter has to be committed to

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the Court of Sessions undisputedly if the offence was triable exclusively by that Court. He, however, maintained that even if the matter was not exclusively triable by the Court of Sessions, it could still be committed to that Court, if the cognizance is taken by the Chief Metropolitan Magistrate. In the facts of the present case, the charges which are levelled against the appellants are all triable by the Magistrate's Court, and there is no dispute about that, the cognizance is taken by the Additional Chief Magistrate and not by the Chief Metropolitan Magistrate. That being so, it is not possible to accept this submission of Mr. Khanna.

13. In the circumstances, we allow this appeal, and set aside the order passed by the High Court. The proceeding will now stand restored to the file of Chief Metropolitan Magistrate who shall proceed with the trial.

14. Mr. Namjoshi submits that the appellants are aggrieved by the pardon granted to the aforesaid Jhunjhunwala, and they intend to apply for cancellation of that order. It would be for them to apply before the Magistrate and it is for the Magistrate concerned to take appropriate decision on such application.

15. The appeal is allowed accordingly.

R.P.

Appeal allowed.