'C.R.'

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

TUESDAY, THE 14TH DAY OF JUNE 2022 / 24TH JYAISHTA, 1944

CRL.A NO. 213 OF 2022

AGAINST THE ORDER DATED 17.1.2022 IN CRL.MP NO.252/2021 IN R.C.NO.01/2021/NIA/KOC OF SPECIAL COURT FOR TRIAL OF NIA CASES,ERNAKULAM

APPELLANT/A6:

SURESH RAJ
AGED 40 YEARS, S/O.ARASIRATNAM,
NO.126-8TH CROSS STREET, SAMAYAPURAM, IRANDAM,
KATTALAI, KUNDRATHUR, CHENNAI – 69 (NOW INMATE
NO.551 AT CENTRAL PRISON & CORRECTIONAL HOME,
TRISSUR, PIN - 680010)

BY ADV SANGEETHA LAKSHMANA

RESPONDENT/COMPLAINANT:

NATIONAL INVESTIGATION AGENCY - KOCHI,
28/443, GIRI NAGAR, KADAVANTHRA, ERNAKULAM –
682 020 [REPRESENTED BY SPECIAL PUBLIC
PROSECUTOR, NIA, KOCHI]

BY ADVS.
MANU S., ASG OF INDIA()
SINDHU RAVISHANKAR(K/1152-A/1999)
SMT.MINI GOPINATH, CGC(CG-375)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30.5.2022, THE COURT ON 14.06.2022, DELIVERED THE FOLLOWING:

'C.R.'

K.VINOD CHANDRAN & C.JAYACHANDRAN, JJ.

Crl. Appeal No.213 of 2022

Dated this the 14th day of June, 2022

J U D G M E N T

Jayachandran, J.

1. Whether a Special Court constituted under the National Investigation Agency Act, 2008 can invoke the powers under Section 306 of the Code of Criminal Procedure to grant pardon to an accused at the post cognizance stage, is the issue posed by the appellant in this appeal. The incidental issue, which pops up, is whether pardon can be granted at the post cognizance stage to a person, who has not been arraigned as an accused in the final report.

2. The appellant herein is presently the sixth accused in S.C No.04/2021/NIA on the files of the Special Court for Trial of NIA Cases, Ernakulam. In the instant appeal, the appellant impugns the order dated 17.1.2022 in Crl.M.P No.252/21, as per which, application filed by the N.I.A at the investigation stage seeking grant of pardon to accused nos.3, 8 and 14, has been taken up for consideration in

the post cognizance stage, overruling the objections raised by the appellant/A6 and directed production of the said accused persons before the court in the next posting date.

3. The prosecution allegations and incidents, which culminated in the impugned order are narrated herein below:-

A Sreelankan fishing boat by name 'Ravihansi' was intercepted by the Indian Coast Guard in the Arabian Sea, which contained huge quantities of narcotic drugs, along with 5 AK-47 riffles and 1000 nos of 9 mm ammunition. The boat was seized by the Narcotic Control Bureau on 25.3.2021. A case, numbered as 2/2021, in respect of the narcotic drug (Heroin) seized, was registered against the six Sreelankan nationals, who travelled in the said boat on 26.3.2021. In respect of the other items found in possession of the accused persons, Crime No.498/2021 was registered before the Vizhinjam Police Station on 5.4.2021 under Section 27 of the Arms Act, read with Section 34 of the Penal Code against the said six accused persons.

Pursuant to a notification issued, the N.I.A took over the investigation and the case was re-registered as R.C.No.1/2021/NIA/KOC under Sections 7, read with 25(1AA) of the Arms Act. After effecting formal arrest of the six accused persons from the Central Jail, Poojappura, they were produced before the Special Court, Kochi. In the custodial interrogation of the accused persons, the role of accused nos.7 (appellant herein) and 8 were revealed and they were arrested on 2.8.2021. According to the prosecution, accused nos.7 & 8 are members of the proscribed organisation, Liberation Tigers of Tamil Eelam (for short LTTE). Subsequently, offences under Sections 38, 39 and 40 of the Unlawful Activities (Prevention) Act were also incorporated.

4. On 27.9.2021, the National Investigation Agency filed Crl.M.P No.177/2021 before the Special Court seeking to record confession of accused nos.3, 8 and 14. The Special Court directed the N.I.A to file necessary application before the Chief Judicial Magistrate. As directed by the Chief Judicial Magistrate, statements of accused nos.8, 3

and 14 under S.164 Cr.P.C were recorded by the Judicial First Class Magistrate's Court No-III, Ernakulam on 20.10.2021, 24.11.2021 and 25.11.2021, respectively.

5. On 4.12.2021, the N.I.A filed the subject Criminal M.P (Crl.M.P No.252/2021) seeking tender of pardon to accused nos.3, 8 and 14. On 15.12.2021, the N.I.A filed final report, wherein the above referred three persons have neither been arraigned as accused persons, nor as witnesses. On account of the exclusion of the third accused (one among the three proposed approvers), the appellant, who was originally accused no.7, became accused no.6 in the array. On 30.12.2021, the Special Court took cognizance of the case.

6. Thereafter, the Special Court proceeded to consider Crl.M.P No.252/2021, whereupon the present appellant/A6 preferred Annexure-4 objection. However, the impugned order dated 17.1.2022 was passed overruling the appellant's objection, challenging which, the instant appeal is filed.

7. Heard Smt. Sangeetha Lakshmana, learned counsel for the appellant/A6 and Sri.S.Manu, learned Assistant Solicitor General of India for the respondent/N.I.A.

8. After taking us through Sections 306 and 307 of the Code, learned counsel for the appellant contended that an application for tender of pardon filed at the investigation stage/pre-cognizance stage ought to have been proceeded under Section 306 of the Code, by forwarding the request for compliance to the concerned Chief Judicial Magistrate, who alone has the power to tender pardon under Section 306. The Special Court seriously erred in considering such an application under Section 307, Cr.P.C, after filing the final report and after the Special Court taking cognizance of the case. According to the learned counsel, the Special Court cannot mix up the powers under Sections 306 and 307 of the Code. That apart, in order to invoke the powers under Section 307 by the Special Court at the post cognizance stage, accused nos.3, 8 and 14 ought to have been in the array of

accused in the final report filed by the N.I.A. The N.I.A having failed to show the said accused persons in the array, the Special Court lacks powers under Section 307 Cr.P.C to tender pardon to them. Learned counsel pointedly invited our attention to the fact that the said accused persons have not been arrayed even as witnesses in the final report.

9. Secondly, learned counsel pointed out that the Special Court under the N.I.A Act, going by Section 16(3) of the Act, is a Court of Session for all purposes and the offences are liable to be tried as if the Special Court is a Court of Session and in accordance with the procedure prescribed in the Code, wherefore, an application preferred at the investigation stage, obviously under Section 306 of the Code, cannot be taken up by the Special Judge at the post cognizance stage to pass orders under Section 307 of the Code. Inasmuch as the Special Court has not taken cognizance as against accused nos.3, 8 and 14 and has not issued summons to them, an application under Section 307 also cannot be entertained by the Special

Court, is the submission of the learned counsel for appellant.

10. Since the revisional powers have not been conferred on the Sessions Court, or for that matter, a Special Court, the impugned order cannot be revised or modified and the only course open to the Special Court is to make a reference under Section 395 Cr.P.C to the High Court and to get the cognizance taken cancelled, by setting aside the order dated 31.12.2021 to issue summons to the accused persons.

11. Refuting the above contentions, learned ASGI submitted that the Special Court can invoke the powers under Sections 306 and 307, both, in the matter of grant of pardon, it being a court of original criminal jurisdiction. The legal position in this regard is settled by a catena of decisions of the Hon'ble Supreme Court. The learned ASGI placed specific reliance upon the judgments in P.C.Mishra v. State (CBI) and Ors. [(2014) 14 SCC 629], Bangaru Laxman v. State (through CBI) and Ors. [(2012) 1

<u>SCC 500]</u> and <u>Harshad S.Mehta and Ors</u> v. <u>State of Maharashtra [(2001) 8 SCC 257]</u> in support of the above argument. Inasmuch as the powers under Sections 306 and 307 are available to the Special Court, there is no procedural irregularity in the impugned order, contends the learned ASGI. As regards non-arraignment of accused nos.3, 8 and 14, learned ASGI propounded a two fold argument, one based on facts and the other, on interpretation of Sections 306 and 307 of the Code. On facts, learned ASGI submitted that it has been specifically referred to, in the final report that the application seeking pardon in respect of the said three accused persons is pending and that N.I.A reserves its right to file supplementary charge sheet, if the application is rejected for some reason or other. On law, learned ASGI invited our attention to the language employed in Section 306, as also, Section 307 to point out that the word 'accused' is not employed in these two Sections. Instead, the language employed is '*any person supposed to have been directly or indirectly concerned in or privy to an offence*'. Thus, according to

the learned ASGI, it is not the requirement of law that a person in whose favour pardon is sought for under Section 306 should have been arraigned as an accused person. The requirements are met, if the person who is sought to be pardoned is supposed to have been directly or indirectly concerned in or privy to the offence concerned. The learned ASGI contended that a co-accused has no *locus standi* to challenge a proceeding for grant of pardon to another. The instant appeal is not maintainable is the final argument of the learned ASGI, in as much the order impugned is an interlocutory order, pure and simple.

12. Having heard the learned counsel appearing on both sides, we will first examine the binding precedents on the powers of a Special Court in the matter of grant of pardon.

13. In Commander Pascal Fernandes, Lt. v. State of Maharashtra and Others [AIR 1968 SC 594], a three Judge Bench of the Hon'ble Supreme Court, after discussing the powers under Sections 327 and 338 of the old Code,

corresponding to Sections 306 and 307 of the new Code, held in paragraph no.11 that the powers of the Special Judge are not circumscribed by any condition, except that it 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 Supreme Court also held that the Special Judge can exercise such power at any time after the case is received for trial, and before its conclusion.

14. In A.Deivendran v. State of T.N. [(1997) 11 SCC 720], a two Judge Bench of the Hon'ble Supreme Court held in paragraph no.6 that after committal of the case, it is the Court of Session which has the power to grant pardon under Section 307 of the Code. The legal position was analysed after juxtaposing Section 307 of the present Code with the corresponding Section 338 of the old Code, to find that the option available under Section 338 of the old Code to order the committing Magistrate or the District Magistrate to tender pardon is conspicuously absent in Section 307 of the new code. The Hon'ble Supreme Court also held that a

pardon tendered by the Chief Judicial Magistrate after committal proceedings is not a curable irregularity within the ambit of Section 460(g) of the Code.

15. In this context, it is apposite to extract the following commentary from <u>Sohoni's Code of Criminal Procedure</u> (20th Edn.) on Sections 306 and 307 of the Code, which are essentially based on the dictum laid down in <u>A.Deivendran</u> (*supra*).

> "***14. Tender of Pardon After Commitment to Sessions***
> *There is a difference in the phraseology employed in S.307 of the 1973 Code, and that employed in the correspondent S.338 in the 1898 Code. Under the scheme of the 1898 Code, the court of session, after the commitment of the case, had the power not only to grant pardon itself, but could also to direct the committing magistrate or the district magistrate to tender pardon. However, under S.307 of the Code of 1973, only the court to which the commitment is made is competent to grant pardon. The retention of the marginal heading of S.338 of the 1898 Code, 'Power to direct tender of*

pardon', without any change in S.307 of the Code of Criminal Procedure 1973, may appear misleading. However, the said marginal heading cannot be used to imply anymore a power of the court of session to direct any subordinate magistrate to grant pardon, after the committal of the case.

The tender of pardon by the chief judicial magistrate, after the committal of the case is illegal and beyond his powers, and the said illegality can neither be cured under S.460(g) Cr P.C., nor can S.465 Cr P.C. be applied to such a patent error of jurisdiction. A tender of pardon by a magistrate in good faith but without any authority may be curable, but a magistrate after committing the case to the court of session lacks the jurisdiction to tender pardon. Under S.525(8) of the 1898 Code, it was specifically stated that if any magistrate not empowered by law to tender pardon under ss.337 or 338 of the 1898 Code, granted pardon, the same would not vitiate the proceedings. In S.460 of the Code corresponding to S.525 of the 1898 Code, the legislature omitted S.307 from cl.(g), and thus such irregularity committed by a magistrate is no longer curable."

16. In <u>Harshad S.Mehta and Ors</u> v. <u>State of Maharashtra [(2001) 8 SCC 257]</u>, the Hon'ble Supreme Court examined the powers of a Special Court established under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 in tendering pardon. Relying upon a Constitution Bench decision in <u>A.R.Antulay</u> v. <u>Ramdas Sriniwas Nayak [(1984) 2 SCC 500]</u>, it was held that a Special Court is a court of original criminal jurisdiction and it has to function as such, not being bound by the terminological status description of Magistrate's Court or a Court of Session. Under the Code, a Special Court will enjoy all powers which a court of original criminal jurisdiction enjoys, save and except the ones specifically denied. The Supreme Court went on to hold that a Special Court has all the powers of a Court of Session and/or Magistrate, as the case may be, and that the width of the power of the Special Court will be same, whether trying such cases as are instituted before it or transferred to it. Being a court of original criminal jurisdiction, the Special Court has all the powers of such a Court under the Code, including those of Sections 306 to 308, the same not

having been excluded specifically or otherwise.

17. In <u>Bangaru Laxman v. State (through CBI) and Ors. [(2012) 1 SCC 500]</u>, the contention raised was that pardon could not be granted by the Special Court prior to the filing of charge sheet, that the power to grant pardon is not an inherent power and the same has to be specifically conferred and that the powers under Section 306 of the Code having not been conferred, the Special Judge under the Prevention of Corruption Act, 1988 ('P.C Act') could not have exercised the same. The contention was also that Section 5(2) of the P.C Act specifically deemed the pardon granted by the Special Court to be one under Section 307 and hence there is no question of the Special Court under the P.C Act invoking Section 306 of the Code. To repel the above contentions, at the outset, it was held that the power of the Special Judge to grant pardon is an unfettered power, subject to stipulation made in that section and that such power can be exercised at any stage. The deeming provision under Section 5(2) was to enable application of sub-sections (1) to (5) of Section 308 to a

pardon granted under Section 5(2) and not to exclude the power under Section 306. The Hon'ble Supreme Court also took stock of the dictum laid down in Harshad S.Mehta (*supra*) that even in the absence of a provision like Section 5(2) in the P.C Act, still a Special Court established for the trial of offences relating to transactions in securities, is a court of original criminal jurisdiction having all the powers under the Code, including those under Sections 306 and 308. Further, reliance was placed upon the judgment in State of Tamilnadu v. V.Krishnaswami Naidu and Another [(1979) 4 SCC 5] to find that a Special Judge has the power of remand, since a Magistrate would include a Special Judge, going by Section 3(32) of the General Clauses Act, 1897. The Supreme Court concluded that a Special Judge under the P.C Act has the dual power of a Session Judge as well as that of a Magistrate and he conducts proceedings under the Code, both prior to filing of the charge sheet as well as after filing the charge sheet. On the strength of such finding, the contention that a Special Court cannot grant pardon at the investigation stage was repelled. Especially

when the Special Court is not hidebound by terminological status descriptions of Magistrates or Courts of Session and are empowered to function as a court of original criminal jurisdiction.

18. In P.C.Mishra v. State (CBI) and Ors. [(2014) 14 SCC 629], another two Judge Bench of the Hon'ble Supreme Court held that the powers under Section 306, Cr.P.C, can be concurrently exercised by a Magistrate, as also, a Special Judge during the pre-committal stage; however, after committal, the power to grant pardon vests with the Special Court only, to which the case was committed. In this case also, the offences alleged were under the P.C Act. The dictum laid down in A.Deivendran (*supra*) that grant of pardon after committal of the case by the Magistrate is not a curable irregularity has been reiterated in P.C.Mishra (*supra*). As regards exercise of jurisdiction under Section 306 of the Code by the Magistrate, even after appointment of the Special Judge under the P.C Act, the Hon'ble Supreme Court held that the same is only a curable irregularity, incapable of

vitiating the proceedings, more so when the Special Judge himself had referred the application for grant of pardon to the Chief Judicial Magistrate, since the case was under investigation.

19. In State through CBI, Chennai v. V.Arul Kumar [(2016) 11 SCC 733], the challenge was against an order of the Metropolitan Magistrate granting pardon to five accused persons in respect of offences under the P.C Act, on the ground that the Special Judge alone has the power to tender pardon. The challenge was repelled by the Hon'ble Supreme Court holding that Section 5(1) of the P.C Act enabling the Special Judge to take cognizance, without the accused being committed for trial, only waives the mandate under Section 193, Cr.P.C, and the same cannot be understood to mean that the Special Court alone can take cognizance. The normal procedure prescribed under Section 190, Cr.P.C, empowering the Magistrate to take cognizance is not given a go bye. It was held that both the alternatives are available and if the charge-sheet is filed before the Magistrate, then there should be a

committal proceeding and prior to that, the Magistrate can exercise the power under Section 306. In contrast, if the Special Judge takes cognizance directly, then Section 306 gets bypassed and the Special Judge gets the power under Section 307. The enabling provision under the P.C Act, Section 5(1), bypassing the procedure under Section 190, is akin to Section 16(3) of the N.I.A Act. In the present case, there was no committal proceeding and hence the Special Court could have exercised the power under Section 307 at any stage after cognizance is taken.

20. A Full Bench of this Court in Mastiguda Aboobacker and Another v. National Investigation Agency (N.I.A) & Others [2020 (6) KLT 522] held that the N.I.A Act does not prescribe a special procedure for investigating, inquiring into or trying the offences under the Act. The N.I.A Act is intrinsically interlinked with the provisions of the Code, in the matter of investigation and trial. The Full Bench took stock of Sections 14 and 16 of the N.I.A Act, of which the latter stipulates that a Special Court may take cognizance of any offence without the accused being

committed to it for trial. After referring to the various provisions, the Full Bench concluded that except for some minor deviations, all other procedural aspects envisaged by the Code for trial of a Session Case are made applicable in the trial before the Special Court constituted under the N.I.A Act.

21. Having scanned the binding precedents, we will now examine and analyse the statutory provisions, which govern the topic. It is true that an enabling provision akin to that of Section 5(2) of the P.C Act is not engrafted in the N.I.A Act to grant pardon. However, Section 16(3) specifically provides that a Special Court shall have all the powers of a Court of Session for the purpose of trial of any offence and shall try the offence, as if it were a Court of Session, so far as may be in accordance with the procedure prescribed in the Code for trial before a Court of Session. Section 5(2), as has been held in Bangaru Laxman *(supra)*, only enables application of Section 308, Cr.P.C, in cases of default to testify after getting pardon under that provision; which is deemed to be a

pardon granted under Section 307. For offences, which are punishable with imprisonment for a term not exceeding three years or with fine, Section 16(2) provides that such offences can be tried summarily, in accordance with the procedure prescribed by the Code.

22. Having bestowed our conscious attention to Section 16(3) of the Act, we are of the definite opinion that the said Section does not act as a fetter in resorting to any of the provisions of the Code of Criminal Procedure, but in fact, is an enabling one. All powers of a Court of Session is seen vested with a Special Court, with certain modifications/exceptions, like the one provided in Section 16(1) of the N.I.A Act to take cognizance without the accused being committed for trial. The obvious purpose is to expedite the business transacted by the Special Court, so as to ensure a speedy trial in respect of offences falling under the N.I.A Act. Therefore, the absence of an enabling provision to grant pardon, as the one available in the P.C Act, would not fetter a Special Court under the N.I.A Act, in any manner, inasmuch as it is stipulated

specifically that the Code will govern the procedure for trial before the Special Court. We are also justified in taking this view garnering support from the authoritative pronouncement in A.R.Antulay (*supra*), that is to say, unless a Special Court is specifically denuded of a power, the power should be deemed to be existing with such Court.

23. Now, coming to Sections 306 and 307, it is amply clear from a perusal of the provisions that so far as offences, which are triable exclusively by a Court of Session or Special Court, the power under Section 306 is to be exercised in the pre-committal stage, whereas the power under Section 307 at the post committal stage. A.Devaindran (*supra*) held in unmistakable terms that the Chief Judicial Magistrate/Metropolitan Magistrate cannot order grant of pardon, once a case has been committed to the Court of Session. It was also held that such an exercise is not a curable irregularity under Section 460, Cr.P.C. However, in the case of a Special Court, there is coalescence of the powers of both a Magistrate and a Special Judge, as held in Bangaru Laxman *(supra)*.

Therefore, uninfluenced by the stage of investigation, inquiry or trial, a Special Court can entertain an application for grant of pardon, since it has the powers under Sections 306 and 307; both. Therefore, it cannot be argued that an application preferred at the investigation stage cannot be considered/entertained by the Special Judge. It is the contention of the learned counsel for the appellant that an application preferred at such stage ought to have been forwarded to the C.J.M for the purpose of grant of pardon; and having failed to do so, the Special Court cannot consider such an application under Section 307 of the Code, since that Section contemplates power only at the post committal stage. We are unable to endorse the legal position canvassed by the learned counsel for the appellant. Being a court of original criminal jurisdiction and having been specifically bestowed with the power to take congnizance, without a formal commitment of the case, a Special Court can exercise the powers to grant pardon, either under Section 306 or under Section 307, at any stage of the proceedings; of course subject to the propriety, good faith and *bona*

fides of exercise of such power, which also has to be made judiciously.

24. As regards the separation of authority regarding the power to grant pardon as envisaged under Sections 306 and 307, we find a specific logic, which we may indicate herein. It is settled that the exercise of the power to grant pardon is a judicial act, to be performed judiciously with due application of mind. [See in this regard 1). Ashok Kumar Aggarwal *(supra)* – paragraph 20 ; and 2). *Santhosh Kumar Satishbhushan Bariyar v State of Maharashtra* {(2009) 6 SCC 498}]. Several factors, as referred to in Sections 306 and 307, are to be considered and assessed by the Magistrate or the Sessions Judge, as the case may be. It follows that all the relevant materials/records should be available with the Court tendering pardon for a proper exercise of such power. At the pre-committal stage, such records/materials are with the Magistrate, whereas at the post committal stage, with the Sessions Court. This explains the bifurcation of power to grant pardon as between the two courts as envisaged

under Sections 306 and 307, separately. This precisely would be the underlying logic in A.Deivendran (*supra*) that the Magistrate's Court does not have power to grant pardon, once the case is committed to the Court of Sessions. In the touch stone of the above elucidated concept, we are of the opinion that it is always advisable for a Special Court to consider an application for grant of pardon by itself, albeit power being available to refer the same to the C.J.M.; if cognizance is taken directly.

25. In the light of the above discussion, we repel the first limb of the appellant's argument that a Special Court lacks power under Section 306 of the Code to entertain an application for tender of pardon - preferred during the investigation stage - after filing the charge sheet and taking cognizance.

26. WHETHER PARDON CAN BE TENDERED TO AN ACCUSED PERSON ALONE?

The second bone of contention of the appellant is that the proceedings initiated to grant pardon to accused nos.3, 8

and 14, who have not been arraigned as accused in the final report, is grossly illegal. In other words, the person to whom pardon is being granted under Section 306, or for that matter, Section 307, should necessarily be an accused person. Learned counsel would also attach infirmity to the final report, inasmuch as the said three persons were not shown as witnesses either.

27. For a correct understanding of this issue, it is necessary to have a closer look at Sections 306(1) and 307, which are extracted herein below:-

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

28. We notice, at the outset, that the language employed in Section 306, as also, Section 307 is not "an accused person", but "any person" supposed to have been directly or indirectly concerned in or privy to an offence, to which Section 306 applies. Thus, pardon can be tendered to "any person", who would satisfy the above requirements; he neither has to be an accused person nor requires to be arraigned as an accused in the final report. A conscious non-employment of the term "accused person" in Sections 306 and 307 abundantly answers the appellant's contention

afore referred. We take note of the expression "supposed to have been". Referring to *__Continental Casualty Co__* v. *__Paul__* __[209 Ala 166]__, Ballentine's Law Dictionary (3rd Edition) defines the term "supposition" thus:

> *"Something regarded as true, without proof. In the law of evidence, an inference is a deduction from the facts proved and differs widely from "a supposition", which requires no such premise for its justification."*

29. It could thus be seen that the person in whose favour pardon is sought to be tendered should be supposed or considered to have been concerned in or privy to the offence. The expression 'supposed to have been' is an elastic one, providing ample room for the person concerned to have a lessor role.

30. Again, the person to whom pardon is to be tendered, need only be "directly or indirectly concerned in or privy to" the offence. The expression "directly or indirectly" indicates the nature of such person's involvement in the crime, of which, the latter tends to be less incriminating. Relying upon __R.Dalmia__ v. __Commissioner of__

Income Tax [(1977) 2 SCC 467], Wharton's Law Lexicon (15th Edn.) defines the term "concern" as follows:

> *"The word 'concern' is not a term of art, having a precise, fixed meaning. It has several nuances, and is used to convey diverse shades of meaning over a wide spectrum. It may mean "to have a relation to, or bearing on, be of inherent or importance" or "to have an anxiety, worry." "Concerned" as an adjective may mean "interested", "involved"."*

The term "privy" is defined in Wharton's Law Lexicon (15th Edn.) thus:

> *"Privy - Having participation in some act, so as to be bound thereby. (Woodhouse v. JenKins [(1832) 9 Bing 441].*

It could thus be seen that the expression "privy to" indicates a larger, active and direct participation in the crime. The same language, as employed in Section 306, is employed in Section 307, insofar as the recipient of pardon is concerned.

31. We, therefore, conclude on the basis of the above discussion and having regard to the terminology and expressions employed in Sections 306 and 307 that the person to whom pardon is to be tendered need not necessarily be an accused; rather it is not a *sine qua non*. The fact that in many an occasion, pardon is being granted to an accused person, is no indication for a conclusion that such person should always be arraigned as an accused person. In adopting the above interpretation, we are fortified by the judgment of the Hon'ble Supreme Court in Commander Pascal Fernandes (*supra*), the relevant findings of which are extracted below :

> *"**12.** There can be no doubt that the section is enabling and its terms are wide enough to enable the Special Judge to tender 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."* (underlined by us for emphasis)

A Division Bench of the Orissa High Court in Rabi Das & Ors v. State [1976 Crl.LJ 2004] and the Bombay High Court

in <u>Makbool Abdulrazzak</u> v. <u>State of Maharashtra [LAWS (BOM)-2004-8-141]</u> took a similar view, with which we respectfully agree.

32. That apart, N.I.A has satisfactory explanation on facts as well to this issue raised by the appellant. Firstly, accused nos.3, 8 and 14, in whose favour tender of pardon is sought for, have been arraigned as accused in the F.I.R. Secondly, in the final report filed, it is indicated that the application for tender of pardon to the accused aforereferred is pending and that the N.I.A reserves its right to file a supplementary charge sheet, in case the pardon sought for is declined. We are of the view that the above factual premise affords adequate explanation to the non-inclusion of the said three accused persons in the array of accused persons in the final report. Nonetheless, we may also observe that, in the fitness of things, they should have been shown in the final report in the array of accused, with a rider - proposed approver - and it amounts to a minor irregularity in excluding the said accused person from the

party array, on the expectation that the pardon sought for will be allowed. However, this minor irregularity is a curable one by filing a supplementary charge sheet, or an additional list of witnesses, depending upon the outcome of the tender of pardon sought for. The following excerpts from a Privy Council decision in <u>Faquir Singh</u> v. <u>Emperor</u> <u>[AIR 1938 PC 266</u>] is apt :

> *"If the manner in which the tender of pardon is made, follows in substance the method prescribed in Section 337, then, the Section must apply. Minor and immaterial irregularities or variations cannot be taken to affect the operation of the Section."*

Point concluded accordingly.

33. Before leaving this judgment, we are also persuaded to consider the issue whether the appellant in his capacity as a co-accused can assail, an order/proceeding of the Special Court purporting to consider an application for tender of pardon preferred by the investigating officer. The contention of the N.I.A in this regard that the appellant herein has no locus to challenge an order to

consider the tender of pardon sought for, was accepted by the learned Special Judge in the order impugned.

34. We notice the judgment of the Honourable Supreme Court in CBI v. Ashok Kumar Aggarwal and Another [2014(14) SCC 295] wherein, it was held that the Magistrate tendering pardon is bound to consider the consequence of grant of pardon, taking into consideration the policy of the State and to certain extent, compare the culpability of the person seeking pardon, qua the other co-accused. Inasmuch as the grant of pardon is likely to visit the co-accused with adverse consequences, one will be persuaded to think in favour of recognising the right of accused to challenge the same by virtue of the above observation of the Honourable Supreme Court. However, in the same judgment, the Supreme Court in paragraph no.26, clarifies that a co-accused has no legal right to raise any grievance in the matter of tender of pardon, particularly in view of the law laid down in Ranadhir Basu v. State of West Bengal [(2000) 3 SCC 161]. Nevertheless, the Supreme Court held that revisional powers under Sections 397, r/w 401,

Cr.P.C, can be exercised by the Court *suo moto.*

35. In Ranadhir Basu v. State of West Bengal [(2000) 3 SCC 161], the Hon'ble Supreme Court distinguished the judgment in Suresh Chandra Bahri v. State of Bihar [(1995) Supp. 1 SCC 80] to hold that examination of the person to whom pardon was tendered in the Court of Magistrate taking cognizance as contemplated in Section 306(4) need not be in the presence of the accused. The Supreme Court held that examination of a witness does not necessarily include cross-examination of the witness and the type of examination contemplated would depend upon the object and purpose of that provision. Section 202, Cr. P.C, was relied upon to point out that examination of witness stipulated therein is at a stage where the accused has no *locus standi*, having regard to the object and purpose of that Section.

36. Taking stock of Ashok Kumar Aggarwal and Ranadhir Basu *(supra)*, we hold that a co-accused has no *locus standi* to challenge an order for considering the tender of

pardon sought for by the investigating agency. Of course, a co-accused gets a substantive right to assail the truth of the facts confessed by the approver, when he is examined during the course of trial. Point concluded as above.

37. Lastly, we also notice that the instant appeal is liable to be dismissed on the question of maintainability as well. Sections 21(1) and 21(3) of the N.I.A Act as relevant in this context are extracted herein below:

> *"21(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.*
>
> *(2).........*
>
> *(3) Except as aforesaid, no appeal or revision shall lie to any Court from judgment, sentence or order including an interlocutory order of a Special Court."*

The order impugned before us only rejected the objections of the appellant as regards the legality in invoking the

powers under Sections 306 and 307, Cr.P.C, having regard to the stage at which it was sought to be done. The order impugned has not considered as to whether the pardon sought for should be tendered or not. After rejecting the objections, the Special Court merely directed the accused persons to be produced in the next posting date, as per the impugned order. This is, for sure, an interlocutory order and therefore, the appeal is not maintainable in view of Section 21(1) of the Act. As regards the scope of a revision under Sections 397, read with 401 Cr.P.C, we are bound to notice the mandate under Section 21(3) of the N.I.A Act, specifically barring a revision from any judgment, sentence or order of the Sub Court, including an interlocutory order. We, therefore find that the instant appeal is not maintainable. However, since we spent considerable time on the issue raised by the appellant and that clarity as regards the procedure is warranted for future guidance, we thought it appropriate to address the issues on merits as well.

38. We, therefore, reject this appeal. However, we make

it clear that we have not expressed any opinion as regards the merits of the application seeking tender of pardon in favour of accused nos.3, 8 and 14. The learned Special Judge will consider the said application on merits in accordance with law, taking stock of the statutory provisions and binding precedents, untrammeled by any of the observations made by us in this judgment.

K.VINOD CHANDRAN
JUDGE

C.JAYACHANDRAN
JUDGE

jg/sbna

APPENDIX OF CRL.A 213/2022

APPELLANT'S ANNEXURES

Annexure1	TRUE COPY OF THE CHARGE SHEET NO.2/2021 DT.15.12.2021 FILED BY THE RESPONDENT.
Annexure2	TRUE COPY OF THE PROCEEDINGS DT.31.12.2021 OF THE HON'BLE SPECIAL COURT FOR TRIAL OF NIA CASES, KERALA AT ERNAKULAM IN RC NO.01/2021/NIA/KOC
Annexure3	TRUE COPY OF THE CRL.M.P 252/2021 DT.04.12.2021 FILED BY THE RESPONDENT BEFORE THE HON'BLE SPECIAL COURT FOR TRIAL OF NIA CASES, KERALA.
Annexure4	TRUE COPY OF THE OBJECTIONS DT. 14.01.2021 FILED BY THE APPELLANT HEREIN, IN CRL.M.P 252/2021 IN RC NO.01/2021/NIA/KOC.
Annexure5	TYPED COPY OF THE PROCEEDINGS IN RC NO.01/2021/NIA/KOC AND SESSIONS CASE 4/2021 FROM 15.06.2021 TILL DATE AS NOTED IN THE A-DIARY OF THE HON'BLE SPECIAL COURT FOR TRIAL OF NIA CASES, KERALA AT ERNAKULAM
Annexure6	TRUE COPY OF THE ORDER DT.13.08.2021 ISSUED BY HON'BLE SPECIAL COURT FOR TRIAL OF NIA CASES, ERNAKULAM IN CRL.M.P NO.150/2021 IN RC-01/2021/NIA/KOC
Annexure7	TRUE COPY OF THE ORDER DT.13.08.2021 ISSUED BY HON'BLE SPECIAL COURT FOR TRIAL OF NIA CASES, ERNAKULAM IN CRL.M.P NO.149/2021 IN RC-01/2021/NIA/KOC
Annexure8	TRUE COPY OF THE COMPLAINT LETTERS DT.28.08.2021 SENT BY THE APPELLANT AND SOUNDAR RAJAN @ SOUNDAR (A8) FROM SUB JAIL ALUVA AND THE REPORT DT.28.08.2021
Annexure9	TRUE COPY OF THE DT. 27.09.2021, THE HON'BLE SPECIAL COURT IN CRL.M.P.177/2021 DT.23.09.2021 IN RC-01/2021/NIA/KOC.
Annexure10	TRUE COPY OF THE STATEMENT DT. 20.10.2021 U/S.164 CR.P.C, OF A8 SOUNDARAJAN RECORDED

	BY HON'BLE JUDICIAL FIRST CLASS MAGISTRATE'S COURT-III, ERNAKULAM.
Annexure11	TRUE COPY OF THE LETTER DT.17.11.2021 ISSUED BY THE HON'BLE SPECIAL COURT FOR TRIAL OF NIA CASES, TO THE SUPDT SUB JAIL ALUVA
Annexure12	TRUE COPY OF THE STATEMENT DT 24.11.2021 OF MENDIS GUNASHEKARA (A3) RECORDED BY HON'BLE JUDICIAL MAGISTRATE'S COURT-III ERNAKULAM.
Annexure13	TRUE COPY OF THE STATEMENT DT 24.11.2021 OF AHAMED FASLY(A14) RECORDED BY HON'BLE JUDICIAL MAGISTRATE'S COURT-III ERNAKULAM
Annexure14	TRUE COPY OF THE STATEMENT DT. 08.12.2021 OF SURESH RAJ IN CRL.M.P 242/2021 IN RC-01/2021/NIA/KOC RECORDED BY THE HON'BLE SPECIAL COURT.
Annexure15	TRUE COPY OF THE ADDITIONAL STATEMENT DT.10.01.2021 IN CRL.M.P.242/2021 IN RC-01/2021/NIA/KOC.
Annexure16	TRUE COPY OF THE ORDER DT. 17.01.2022 PASSED BY THE HON'BLE SPECIAL COURT IN CRL.M.P.242/2021 IN RC-01/2021/NIA/KOC.
Annexure17	TRUE COPY OF THE CRL.M.P 268/2021 DT.24.12.2021 IN RC.01/2021/NIA/KOCHI FILED BY THE APPELLANT HEREIN BEFORE THE HON'BLE SPECIAL COURT.
Annexure18	TRUE COPY OF THE ORDER DT.17.01.2021 PASSED BY THE HON'BLE SPECIAL COURT IN CRL.M.P 268/2021 IN RC.01/2021/NIA/KOCHI