

State of U. P.

Vs

Kailash Nath Agarwal and Others

Criminal Appeal No. 193 of 1969

(C.A. Vaidialingam, I.D. Dua, A. Alagiriswami JJ)

16.03.1973

JUDGMENT

VAIDIALINGAM, J. -

1. The question that arises for consideration in this appeal by the State of U.P. on certificate is :

"Where a District Magistrate is competent under Section 337(1) of the Code of Criminal Procedure to grant pardon to an accused person when a First Class Magistrate, before whom the inquiry proceedings had been pending, had rejected such a request."

2. Before we proceed to state the facts, it has to be mentioned that it has been brought to our notice that Sarwan Lal, the fourth respondent, died after the appeal was filed in this Court by the State. In consequence the appeal has abated against him. However, in the course of the judgment, we will have to refer to him also when we state the case of the prosecution.

3. The prosecution case against the accused was as follows :

The first respondent, Kailash Nath, along with Sarwan Lal, Moti Chandra and Smt. Shanti Devi, Respondents 4 to 6 respectively, were the Directors of M/s. M. K. Brothers (P) Ltd., Kanpur and were doing business in cotton in Kanpur. In the course of their business, they used to purchase cotton from out-stations and sell them to the Textile Mills at Kanpur. The second respondent, Kesardeo Budhia, was an employee of M/s. M. K. Brothers (P) Ltd. and used to look after the work of taking delivery of cotton bales from the Kanpur Railway Station. The third respondent, Devi Prasad Agarwal, was a representative of J. K. Cotton Mills, Kanpur. In 1958 the financial position of M/s. M. K. Brothers (P) Ltd. became very precarious and in consequence they committed considerable delay in clearing the consignments of cotton from the station premises and this resulted in their being liable for heavy arrears of demurrage and wharfage.

4. As the textile industry itself was facing a crisis in 1958, the Government, with a view to give some assistance, granted several concessions. One such was that the consignees, who had their own railway sidings, were granted remission in respect of demurrage and wharfage payable to the railway authorities. This enabled the consignees to take delivery of goods according to their convenience. In the said year, as M/s. M. K. Brothers (P) Ltd. had received a large number of consignments of cotton bales, they evolved a scheme to avail themselves of the benefit granted to the textile industry by the Government. For this purpose, they thatched a plan by which they misrepresented that the consignments of cotton bales received at Kanpur Railway Station, though in

their name, actually belonged to M/s. J. K. Cotton Mills, Kanpur. The second respondent, an employee of M/s. M. K. Brothers, the third respondent, an employee of J. K. Cotton Mills and Respondents 1 had 4 to 6, the Directors of M/s. M. K. Brothers, entered into a conspiracy in furtherance of their object and as a result thereof, they submitted false applications to the railway authorities on behalf of J. K. Cotton Mills for remission on the representation that the goods had been consigned to J. K. Cotton Mills. In furtherance of the object of this conspiracy, they also made false endorsements on the railway receipts for transfer of the bales. As a result of the conspiracy, they defrauded the railway administration during the year 1958-59 of very large amounts. Accordingly a charge-sheet was filed against respondents 1 to 6 under Section 120(B), 420, 467, 468 and 471 of the Indian Penal Code.

5. The inquiry proceedings were started in the Court of First Class Magistrate, Kanpur, as the case was triable as a Sessions case. On June 30, 1962, the second respondent, Kesardeo Budhia, made a confessional statement. Similarly, Devi Prasad Agarwal, the third respondent, gave a confessional statement on July 12, 1963. Both Respondents 2 and 3 made applications on December 17, 1964, under Section 337 of the Criminal Procedure Code before the First Class Magistrate praying for grant of pardon. The said applications were supported by the prosecution, but the other accused opposed the grant of pardon. The Magistrate by his order, dated September 27, 1965, declined to grant pardon and rejected the applications of both the accused. However, on behalf of the State its special counsel filed an application on April 15, 1966, before the District Magistrate, Kanpur, to grant pardon to Respondents 2 and 3 on condition of their making a full and true disclosure of the whole of the circumstances. In this application, it was stated that the First Class Magistrate, Kanpur, was inquiring into the matter and was recording evidence of witnesses for the purpose of being satisfied that a prima facie case had been established. It was stressed that the direct evidence of conspiracy would be furnished by Respondents 2 and 3 if they are granted pardon and examined as witnesses. Reference was also made to the effect that a request made by those accused for grant of pardon was rejected by the Magistrate enquiring into the offences. The application was opposed by Respondents 1 and 4 to 6 on the ground that the District Magistrate has no power to grant pardon when once the enquiring Magistrate has declined a similar request. The District Magistrate rejected this contention and held that he had jurisdiction to consider the application on merits, notwithstanding the fact that the enquiring Magistrate had declined to grant pardon. On merits, the Magistrate held that in the circumstances it is enough if the second respondent, Kesardeo Budhia alone is tendered pardon. Accordingly, by his order, dated June 1, 1966, he granted pardon under Section 337 to this accused alone on condition of his making a full and proper disclosure of the whole of the circumstances within his knowledge relating to the offences.

6. The first respondent filed Criminal Revision No. 85 of 1966 before the District Judge, Kanpur, challenging the order of the District Magistrate which was ultimately dealt with by the Civil and Sessions Judge, Kanpur. The jurisdiction of the District Magistrate to grant pardon, after the First Class Magistrate having refused, was again the subject of debate before the Sessions Court. The State and the second respondent contended before the Civil and Sessions Judge that the Revision was not competent. The Civil and Sessions Judge rejected the contention of the State that no revision lies. It upheld the plea of the first respondent that the District Magistrate was not competent to grant pardon to Kesardeo Budhia. The view of the Civil and Sessions Judge is that if the State was dissatisfied with the order, dated September 27, 1965, passed by the First Class Magistrate, that order should have been challenged in revision before the District Judge or the District Magistrate. Not having done so, it cannot invoke the jurisdiction of the District Magistrate under Section 337. The Civil and Sessions Judge has further held that the order of the District Magistrate was wholly without jurisdiction and in consequence by his order, dated June 16, 1967, referred the matter to the

High Court with a recommendation that the order, dated June 1, 1966, of the District Magistrate granting pardon to the second respondent should be quashed.

7. This reference of the Civil and Sessions Judge before the High Court was Criminal Reference No. 234 of 1967. The High Court by its judgment and order, dated September 11, 1968, has held that the District Magistrate has no power to grant pardon after it has been once refused by the First Class Magistrate enquiring into the matter and that the order of the District Magistrate was revisable by the Civil and Session Judge. In this view, the High Court accepted the reference and quashed the order, dated June 1, 1966, of the District Magistrate, Kanpur.

8. Mr. Rana, learned counsel for the State, has raised three contentions :

(1) The power under Section 337 of the Criminal Procedure Code exercisable by the various Magistrates mentioned therein is concurrent and the District Magistrate in the circumstances of this case was competent to grant pardon to respondent No. 2.

(2) The Revision filed by the first respondent before the Civil and Sessions Judge against the order of the District Magistrate was incompetent.

(3) In any event, the grant of pardon by the District Magistrate is only an irregularity, which is cured by clause (g) of Section 529 of the Criminal Procedure Code; and as such the High Court was in error in interfering with the said order.

9. Mr. B. P. Maheshwari, learned counsel appearing for Respondents 5 and 6, has supported the order of the High Court. According to him, the scheme of Section 337 clearly shows that the question of granting or refusing pardon has to be dealt with in the circumstance and by the officers referred to therein. When once that jurisdiction has been invoked before one officer it cannot be reopened before another officer. The counsel contended that it may be that if fresh facts have come to light later and are placed before the court, it may have jurisdiction to reconsider an order passed at the early stage of proceedings. In this case, the State had not placed any material before the District Magistrate that was not already before the First Class Magistrate. That being so, the District Magistrate had no jurisdiction to consider on the same facts a second request made for the same purpose. Mr. Maheshwari further pointed out that if the State was aggrieved by the order of the Magistrate, dated September 27, 1965, it should have challenged the same in revision before the Session Judge. In view of these circumstances, he pointed out that the High Court had rightly held that the order of the District Magistrate was without jurisdiction.

10. It is now necessary to refer to the material provisions of the Criminal Procedure Code. Though Section 337 is the relevant section, nevertheless, it is necessary to refer to Section 338 also. These two sections occurring in Chapter XXIV dealing with "general provisions as to inquiries and trials" are as follows :

"337. (1) Tender of pardon to accomplice. - In the case of any 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 any of the following sections of the Indian Penal Code, namely, Section 161, 165, 165-A, 216-A, 369, 401, 435 and 477-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 enquiry into, or the 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 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 :

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(1-A) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record :

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of costs.

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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."

11. Section 435(1) gives power to the High Court, the Sessions Judge and to the other authorities mentioned therein to call for records of inferior courts for the purposes mentioned therein. Sub-section (4) provides that if an application under Section 435 has been either to the Sessions Judge or the District Magistrate, no further application shall be entertained by the other of them. Section 529 occurring in Chapter XLV under the heading "of irregular proceedings" deals with irregularities which do not vitiate proceedings. The material part of this section relevant for the present purpose is as follows :

"529. Irregularities which do not vitiate proceedings. - If any Magistrate not empowered by law to do any of the following things, namely -

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(g) to tender a pardon under Section 337 or Section 338 :

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erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered."

12. A perusal of Section 337(1) shows that the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or any Magistrate of the First Class may tender pardon in the circumstances mentioned therein at any stage of the investigation or inquiry into or trial of the offence. But under the proviso, if the offence is under inquiry or trial, the District Magistrate and only the Magistrate making the enquiry or holding the trial can exercise the power. Similarly, where the offence is under investigation, it is only a Magistrate having jurisdiction in a place where the offence might be enquired into or tried, can exercise the power. Even such a Magistrate can exercise that power only if the sanction of the District Magistrate has been obtained. While there is a restriction on the powers of the Magistrate of the First Class, no such restriction is to be found in the proviso on the powers of the District Magistrate either at the stage of investigation or inquiry into or trial of the offence. Sub-section (1-A) makes it obligatory on the Magistrate tendering pardon to record his reasons for so doing and also of furnishing the accused has to pay for the same unless the Magistrate thinks fit, for some special reasons, to furnish the order free of cost.

13. Section 338 deals with the grant of pardon after the stage of commitment has been reached but before judgment is passed. It gives full power to the court, to which commitment is made, to tender pardon or order the committing Magistrate or the District Magistrate to tender pardon on the same conditions. The question arose in *Kanta Prashad v. Delhi Administration* (1958 SCR 1218, 1224-25 : AIR 1958 SC 350 : 1958 SCJ 668) whether the District Magistrate had power to tender a pardon under Section 337 in cases where the offence was triable exclusively by the court of the Special Judge. Having regard to the provisions of the Criminal Law (Amendment) Act, 1952 and the scheme of Section 337 of the Criminal Procedure Code, this court held that as the court of the Special Judge was in law a court of Session, the District Magistrate had power to grant pardon. The contention that under such circumstances the proper authority to grant pardon was the Special Judge was rejected, as the position of the Special Judge was similar to that of a Judge of a Court of Session. It was observed :

"The proviso to Section 337 of the Code of Criminal Procedure contemplates concurrent jurisdiction in the District Magistrate and the Magistrate making an inquiry or holding the trial to tender a pardon. According to the provisions of Section 338 of the Code, even after commitment but before judgment is passed, the court to which the commitment is made may tender a pardon or order the committing Magistrate or the District Magistrate to tender a pardon. It would seem, therefore, that the District Magistrate is empowered to tender a pardon even after a commitment if the court so directs. Under Section 8(2) of the Criminal Law (Amendment) Act, 1952, the Special Judge has also been granted power to tender pardon. The conferment of this power on the Special Judge in no way deprives the District Magistrate of his power to grant a pardon under Section 337 of the Code."

It will be noted from this decision that emphasis is laid on the fact that the proviso to Section 337 contemplates concurrent jurisdiction in the District Magistrate and in the Magistrate making an inquiry or holding the trial to tender pardon. It is also emphasised that the conferment of the power to grant pardon on the Special Judge does not deprive the District Magistrate of his power to grant pardon under Section 337. In *A. J. Peiris v. State of Madras* (1954 Cri LJ 1638 : AIR 1954 SC 616, 620) the question arose before this Court whether after commitment had already been made, the District Magistrate has power to grant pardon. From the facts mentioned in the judgment it is seen that on July 24, 1951, the police submitted the charge-sheet against the accused and one Albert. Albert, however, could not be traced and the other accused were committed to the Sessions on August 4, 1952. Albert was arrested on July 28, 1952, and his confession was recorded by the

Magistrate after complying with all the necessary formalities required by law. On August 28, 1952, he was granted pardon by the District Magistrate, South Kanara. The evidence of Albert was relied on for convicting the other accused. This Court rejected the contention that after commitment the only court having power to tender pardon was the Court of Sessions Judge and not the District Magistrate. It was observed :

"By Section 338, Criminal Procedure Code, power is no doubt given after commitment is made to tender pardon, before judgment is passed, to any person supposed to have been directly or indirectly concerned with any offence or order the Committing Magistrate or the District Magistrate to tender the pardon. The section vests the court to which commitment is made, with power to tender pardon or order the Committing Magistrate or the District Magistrate to tender pardon during the trial of the case but it does not take away the power conferred under the proviso to Section 337(1) of the Criminal Procedure Code ....."

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The proviso contains an additional provision which empowers the District Magistrate to tender where the offences are under inquiry or trial. The present case is covered by the proviso to Section 337 and not by Section 338 of the Criminal Procedure Code. We hold, therefore, that the tender of pardon by the District Magistrate on August 28, 1952, was valid."

14. In *State of Andhra Pradesh v. Cheemalapati Ganeswara Rao and Another* ((1964) 3 SCR 297 : AIR 1963 SC 1850 : (1963) 2 Cri LJ 671) one of the question that came up for consideration was whether a pardon under Section 337(1) by the Additional District Magistrate in a case, where an inquiry was pending before the District Magistrate, was illegal. It was contended that under Section 337 only the powers of a District Magistrate, namely, the powers under Entry 7(a) in Part V of Schedule III of the Code of Criminal Procedure, as distinguished from the power under the proviso to the said section, can be conferred upon an Additional District Magistrate. This Court, having regard to the order of Madras Government No. 3106, dated September 9, 1949, and Entry 7(a) in Part V of Schedule III, rejected this contention. It is the view of this Court that (Ibid. SCR p. 352-52) :

"The power conferred by sub-section (1) of Section 337 on the different classes of Magistrates is of the same character. The power to grant pardon in a case pending before another Magistrate is no doubt conferred by the proviso only on the District Magistrate. But Entry 7(a) in Part V of Schedule III when it refers to the power of a District Magistrate under Section 337(1) does not exclude the power under the proviso."

15. The decisions referred to above clearly establish that the powers conferred on the District Magistrate and the other Magistrates under Section 337 are concurrent and that a District Magistrate, even after commitment, has power to tender pardon. The proviso to Section 337(1) makes it clear that the District Magistrate, in addition to the Magistrates referred to therein, has power to tender pardon during inquiry into or trial of the offence. Though the above decisions had no consider whether the District Magistrate has power to tender pardon, when the Magistrate enquiring into the offence has once refused, we are not able to find any such restriction placed upon the power of the District Magistrate by the wording of the section itself. As the power conferred by

sub-section (1) of Section 337 on the different classes of Magistrate is concurrent and is of the same character, it follows that the power to tender pardon can be exercised by everyone of the authorities mentioned therein subject to the limitations specified in the section itself. The mere fact that a Magistrate of the First Class enquiring into the offence has declined to grant pardon, as in the case before us, does not take away the power or jurisdiction of the District Magistrate to entertain a further application for grant of pardon. Though the District Magistrate has got power to consider a further application, nevertheless, it is needless to state that he will have due regard to the views expressed by the Magistrate for refusing to grant pardon. We must, however, state that judicial property requires that if a higher authority had declined to tender pardon, a lower authority should not grant pardon except on fresh facts which were not and could not have been before the higher authority when it declined to grant pardon. Even if pardon has been refused on one occasion, a further request may be made before the Magistrate or the District Magistrate. But such a further request can be entertained and considered only if fresh or additional facts are placed by the party concerned.

16. The above principles will apply even to proceedings under Section 338. Even after commitment, a District Magistrate will have power to grant pardon. But if the Court of Session had declined to grant pardon, the District Magistrate will not on the same facts entertain a similar application for grant of pardon. It is necessary to bear in mind the principles stated above so that the authorities under Sections 337 and 338 can exercise jurisdiction in harmony in order to further the interest of justice and avoid conflicting orders being passed.

17. The conferment of concurrent powers is also to be seen in Section 498. Under sub-section (1), the High Court or Court of Session has got power to direct that any person be admitted to bail or to reduce the bail required by a police officer or a Magistrate. Even though the Court of Session may have refused a request in this behalf for grant of bail, the High Court can be approached for a similar relief. Under sub-section (2), again power has been given to the High Court or Court of Session to order the re-arrest of a person admitted to bail under sub-section (1).

18. When the legislature intended that two authorities should not exercise jurisdiction on an identical matter, it has used appropriate language to that effect. For instance, under Section 435(1), the Sessions Judge and the District Magistrate, in addition to the High Court and Sub-Divisional Magistrate, have been empowered to call for and examine the records of any proceedings before any inferior criminal court. Though it may appear from sub-section (1) that a District Magistrate can be moved even after the similar relief has been refused by the Sessions Judge or vice versa, the position is made clear by sub-section (4). That sub-section provides that if either the Sessions Judge or the District Magistrate has been moved, no further application shall be entertained by the other of them. Though under sub-section (1) both of them have concurrent power, nevertheless, sub-section (4) clearly places a restriction on their powers by stating that if one of them had been moved, the other cannot entertain an application for the same purpose.

19. In view of the decisions of this Court referred to above, it is not necessary for us to refer to the decisions of the High Courts taking one view or the other. From what is stated above, it follows that the view of the High Court that when once the Magistrate enquiring into the offence had refused to grant pardon, the District Magistrate had no jurisdiction to entertain an application for the same purpose, is erroneous.

20. The further question is whether the State should have filed a revision against the order of the Magistrate, dated September 27, 1965, refusing to grant pardon instead of approaching the District

Magistrate for the same purpose. This raised the question whether an order refusing to grant pardon is revisable ? The High Court has taken the view that the said order is revisable and that the State, if it was aggrieved, should have filed a revision before the Sessions Judge. We have already referred to the fact that the first respondent had filed a revision before the Sessions Court against the order of the District Magistrate, dated June 1, 1966. This revision has been held by the High Court to be a proper one. As we have held that the District Magistrate has got concurrent powers and that he can be approached under Section 337 even after the Magistrate enquiring into the offence has declined to grant pardon, the question whether the State should have filed a revision against the order of the Magistrate becomes really academic. On the view expressed by us, the State was justified in approaching the District Magistrate even after the Magistrate had refused to grant pardon.

21. However, the question regarding the revisability of an order granting pardon arises regarding the competency of the revision filed by the first respondent before the Sessions Court challenging the order of the District Magistrate, dated June 1, 1965. Section 435, which deals with the power to call for the records of inferior courts, takes in the High Court, Sessions Judge, District Magistrate and any Sub-Divisional Magistrate empowered by the State Government in that behalf. The power is given to call for and examine the records of any proceedings before any inferior criminal court for the purpose of satisfying itself as to the correctness, legality or propriety of "any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court ....." In our opinion, an order granting pardon under Section 337 or 338 is certainly an order recorded or passed and the revisional court has got jurisdiction to consider the correctness, legality or propriety of such an order. At any rate, tender of a pardon is certainly a proceeding of a criminal court. The revising authority can call for the records to satisfy itself as to the regularity of any proceedings of an inferior criminal court. It should also be noted that sub-section (1-A) of Section 337 imposes an obligation on the Magistrate tendering pardon to record his reasons for so doing. Whether a revisional authority will interfere with the order of an inferior criminal court tendering pardon, is altogether a different matter. That does not mean that a revisional court has no jurisdiction to entertain a revision against an order granting pardon.

22. The decision that has been brought to our notice holding that Section 435 cannot be invoked in the case or an order made either under Section 337 or under Section 338 is that of a learned single Judge of the Delhi High Court in *M. M. Kochar v. The State* (AIR 1969 Delhi 21 : 1969 Cri LJ 45 : 70 Punj LR (D) 390). The learned Judge has held that the tender of pardon and its acceptance by the person concerned is a matter entirely between the court and the person to whom pardon is tendered and that a co-accused has no power to challenge the same, as it is a purely executive or administrative action and not a judicial decision. Tendering of pardon, it is further stated, is only an exercise of one of the many prerogatives of the sovereign. After having held that the High Court's jurisdiction cannot be invoked under Section 435, the learned Judge on merits held that the tender of pardon was legal.

23. This decision of the Delhi High Court was challenged before this Court in Criminal Appeal No. 109 of 1968. In its judgments, dated September 16, 1968, this Court on merits agreed with the High Court that the tender of pardon was proper. The question of the nature of the power exercised in granting pardon and the other question whether an order granting pardon was revisable by a superior court, were, however, left open. We have indicated earlier that an order granting pardon is open to revision, but whether the court whose powers are invoked for that purpose will interfere or not, is a matter depending upon the circumstances of each case. Accordingly we hold that the first respondent's revision before the Sessions Court was competent and reject the second contention of Mr. Rana.

24. Coming to the third contention of Mr. Rana, it has been held by this Court in State of Andhra Pradesh v. Cheemalapati Ganeswara Rao and Another case (supra), that "a pardon granted bona fide is fully protected by the provisions of Section 529 of the Criminal Procedure Code". We have already extracted the relevant part of Section 529. On the view expressed by us that the order of the District Magistrate granting pardon is legal and valid, it is not necessary for the State to rely on Section 529, clause (g) in this case.

25. In the result the order and judgment of the High Court, dated September 11, 1968, insofar as it holds that the grant of pardon by the District Magistrate was illegal are set aside and to that extent the appeal is allowed in part. The order, dated June 1, 1966, of the District Magistrate, Kanpur, will stand restored.

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