

Before S. S. Sandhwalia, C.J. and C. S. Tiwana, J.

STATE OF PUNJAB, Petitioner

versus.

HANS RAJ and others, Respondents.

Criminal Revision No. 3-R of 1980.

September 7, 1981.

Code of Criminal Procedure (11 of 1974)—Section 395(2)
Criminal Law (Amendment) Act (XLVI of 1952)—Sections 6 and
8—Prevention of Corruption Act (11 of 1947)—Section 5(2)—Special
Judge appointed under the aforesaid section 6—Whether competent
to make a reference to the High Court under section 395(2) of the
Code—Special Judge—Whether to be deemed to be a Court of
Sessions for such a reference.

Held, that sub-section (3) of section 8 of the Criminal Law
(Amendment) Act, 1952, manifestly lays down that the Court of
Special Judge shall be deemed to be a Court of Sessions. In the
eye of law the Special Judge stands completely equated with the
Court of Sessions barring exceptions spelled out in sub-section (3-A)
or any other law. Once that is so, it is equally provided by sub-
section (3) that the provisions of the Code of Criminal Procedure
would be applicable subject to the provisions of sub-sections (1)
and (2). In the matter of making a reference to the High Court
under section 395(2) of the Code, there is no inconsistency between
the two statutes, nor are the saving provisions of sub-sections (1)
and (2) of section 8 in any way attracted. Consequently, it would
follow that the Special Judge would automatically be clothed with
the powers of a Court of Sessions by section 395(2) of the Code
and can, therefore, validly make a reference to the High Court on
a point of law. (Para 3)

Case reported under section 438 Cr.P.C. by Shri H. L. Randev,
Special Judge, Jullundur Division, Jullundur.—vide his order dated
17th January, 1980 to this Hon'ble Court under section 395(2)
Cr.P.C. for deciding the important question of law arising in the
case.

Case referred by Hon'ble Mr. Justice C. S. Tiwana, on 24th
November, 1980 to the larger Bench for the opinion of the impor-
tant question of law raised by the Special Judge, involved in the
case. The Division Bench consisting of Hon'ble the Chief Justice
Mr. S. S. Sandhwalia, and Hon'ble Mr. Justice C. S. Tiwana, has
finally decided the case on 7th September, 1981.

D. S. Brar, A. A. G. Punjab, for the Petitioner.

P. S. Mann, Advocate, for the Respondents.

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JUDGMENT

S. S. Sandhawalia, C.J.

(1) Whether a Special Judge appointed under section 6 of the Criminal Law (Amendment) Act, 1952, is competent to make a reference on a point of law under section 395(2) of the Code of Criminal Procedure is the question which has arisen at the very threshold in this case.

(2) The proceedings arise from the registration of a case under section 5(2) of the Prevention of the Corruption Act together with the allied offences under Sections 120-B, 467, 468 and 471 of the Indian Penal Code against Shri Harbhajan Lal Moudgil, Tehsildar, Ramesh Chand Patwari, and Dhian Singh and some others. During the course of investigation, the Chief Judicial Magistrate, Gurdaspur, by an order dated the 30th of July, 1977, had tendered pardon to one of the accused persons, namely, Dhian Singh. Thereafter, the statement of the said Dhian Singh as approver was recorded by the Chief Judicial Magistrate on the same day and subsequently another statement under section 164 of the Code was recorded by the Judicial Magistrate, Ist Class, Pathankot, on the 5th of August, 1977. Later, the challan in the case was presented before the Sub-Divisional Judicial Magistrate, Pathankot, on the 18th of December, 1978, and H. L. Moudgil aforesaid made his appearance before him on the 23rd of December, 1978, but thereafter he absconded. Warrants for his arrest were then issued but before these could be executed he presented a petition under section 482 read with section 397 of the Code in the High Court praying that the proceedings against him pending before the Sub-Divisional Judicial Magistrate should be quashed. On 2nd February, 1979, this petition came up before Bains, J., and was allowed by an order the operative part of which is as follows :—

“ * * * offence are triable by a Special Judge in view of the provisions of Section 7 of the Criminal Law (Amendment) Act. In this situation, the Magistrate had no power to take cognizance of the case as there is no commitment needed in these proceedings. I do not know how the learned magistrate took cognizance of this case and how he dealt with the matter when the same was exclusively triable by a Special Judge.

The learned State counsel also could not defend the impugned order of the Magistrate and could not show me any material under which the case could be dealt with by the Magistrate. In this situation, the impugned order is quashed and it is directed that the case against the petitioner be transferred to the Additional Sessions Judge Gurdaspur, exercising the powers of the Special Judge under the Act."

In accordance with the above the case then went to the Court of the Special Judge, Gurdaspur, and thereafter was transferred to the Court of Special Judge, Jullundur, under a notification issued on the 16th of March, 1979.

(12) Meanwhile, the State of Punjab moved a petition for leave to appeal to the Supreme Court and Bains, J., whilst dismissing the same by his order dated the 12th of November, 1979, made the following further observations :—

"In this case registered under the prevention of Corruption Act, only the Special Judge has jurisdiction to try such cases in view of the provision of section 7 of the Criminal Law (Amendment) Act, 1952, and under section 8 of the said Act the Special Judge can also tender pardon. The prosecution in this case should have approached the Special Judge instead of Judicial Magistrate for tendering pardon to Dhian Singh, one of the accused, but instead it approached the Magistrate for such purpose. In my view, the Magistrate has no power under the Criminal Law Amendment Act to deal with such cases. However he has got some powers under section 306, Criminal Procedure Code, to tender pardon. The Magistrate, after tendering pardon to an accused person and examining him as a witness, has to commit the case for trial to the Court of Session if the offence is triable exclusively by that Court or to a Court of the Special Judge appointed under the Criminal Law Amendment Act, 1952, if the offence is exclusively triable by that Court. It is settled law that where special provision is made under a special enactment for certain offences, then

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that procedure is to be followed and not the general procedure. Under section 7 of the Criminal Law (Amendment) Act, the Special Judge is empowered to try cases under the Prevention of Corruption Act, which is a special enactment and under section 8 of the Criminal Law Amendment Act he is also empowered to tender pardon. At the time of hearing of the revision petition, counsel for the State did not oppose the transfer of the proceedings from the Court of the Judicial Magistrate to the Court of the Special Judge. *So the whole proceedings, including the tendering of pardon were transferred to the Special Judge.*"

Subsequently during the course of the trial before the Special Judge when the case was fixed for recording of the prosecution evidence, the Public Prosecutor on the 17th of January, 1980, raised the objection that in view of the aforesaid observations of Bains, J., the question, about the admissibility of the evidence of the approver and the validity of the pardon tendered by the Chief Judicial Magistrate would not arise. It was also urged that the Sub-Divisional Judicial Magistrate was required to pass an order of committal under section 306(5)(a) (ii) of the Code before the case could be tried by the Special Judge. The trial Judge then doubted its own powers to send the case back to the Sub-Divisional Judicial Magistrate in view of the specific order of transfer passed by the High Court itself. Faced with a rather difficult legal situation the Special Judge has framed the following three questions of law and referred them under section 395(2) of the Code for decision by the High Court:—

- (1) Whether I would be legally competent to continue with this case when the challan was presented by the prosecution in the Court of Sub-Divisional Judicial Magistrate, after choosing one of the two options open to it under section 306(5) Cr. P.C. and section 8 of the Criminal Law (Amendment) Act, 1952, and the case was not committed by him to the Court of Special Judge, rather it was received by him through transfer under the said order of his Lordship and subsequently received in this Court under general order of transfer.

- (2) Whether I would be competent to tender fresh pardon to Dhian Singh under section 8(2) of the Criminal Law (Amendment) Act of 1952 when he has been already tendered pardon by the said Chief Judicial Magistrate under section 306(3) Cr. P.C. on having been approached for the purpose by the prosecution under section 306(1) of the Code during the investigation of the case.
- (3) Whether in the absence of fresh tender of pardon by me under section 8(2) of the Criminal Law (Amendment) Act, 1952 Dhian Singh is to be deemed to be a competent witness in the case by virtue of his having been tendered pardon by the said Chief Judicial Magistrate under section 306(3) Cr. P.C. on having been approached by the prosecution under section 306(1) Cr. P.C. during the investigation of the case."

At the very outset the very competency of the aforesaid reference was sought to be challenged, on the ground that section 395(2) authorised only a Court of Session or a Metropolitan Magistrate to make a reference on a question of law to the High Court. It was contended that since the words 'Special Judge' did not even remotely figure in section 395, there was no statutory warrant for such a reference by him. It would appear that the aforesaid contention arises from an overly isolated approach to the provisions of section 395 of the Criminal Procedure Code, 1973. The relevant sub-section thereof which alone is relevant is in the following terms :—

"395(2) A Court of Session or a Metropolitan Magistrate may, if it or he thinks fit in any case pending before it or him to which the provisions of sub-section (1) do not apply refer for the decision of the High Court any question of law arising in the hearing of such case."

It is true that the aforesaid provision authorises a reference only by the Court of Session or a Metropolitan Magistrate. However, for resolving the issue before us the aforesaid provision has to be read harmoniously with section 8 of the Criminal Law Amendment Act, 1952. It is apt to read the relevant provisions thereof as well:—

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(2)

(3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1898, shall, so far as they are not inconsistent with this Act, apply to the proceedings before a Special Judge; and for the purposes of the said provisions, the Court of the Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and a person conducting a prosecution before a Special Judge shall be deemed to be a public prosecutor.

(3A) In particular, and without prejudice to the generality of the provisions contained in sub-section (3), the provisions of sections 350 and 549 of the Code of Criminal Procedure, 1898, shall, so far as may be, apply to the proceedings before a Special Judge, and for the purposes of the said provisions a Special Judge shall be deemed to be a Magistrate."

As a matter of legislative history it is worth recalling that the aforesaid sub-section (3A) was inserted by way of amendment by Act No. 2 of 1958. This was apparently done to resolve a conflict of judicial precedent as to whether a Special Judge was *stricto sensu* a Court of session only or it could equally exercise the powers of a Magistrate where so required. The amending Act was, therefore, to effectuate the above-said purposes and it seems to be plain that sub-section (3A) of section 8 is in the nature of an exception to the general provision contained in the previous sub-section (3). Obviously in the present context these exceptional provisions of sub-section (3A) are not attracted and the applicability of sub-section (3) alone calls for consideration. This manifestly lays down that the Court of Special Judge shall be deemed to be a Court of Session. Once this is so, the following dictum of the Privy Council in *Commissioner of Income-tax v. Bombay Trust Corporation Ltd.*, (1), with regard to such a deeming provision becomes straightaway applicable :—

***** Now when a person is 'deemed to be' something the only meaning possible is that whereas he is not in reality

that something the Act of Parliament requires him to be treated as if he were."

It must, therefore, be held that in the eye of law the Special Judge stands completely equated with the Court of Session barring exceptions spelled out in sub-section (3A) or any other law. Once that is so it is equally provided by sub-section (3) that the provisions of the Code of Criminal Procedure would be applicable subject to the provisions of sub-sections (1) and (2). Now it is the common case here that on this point there is no inconsistency between the two statutes nor are the saving provisions of sub-sections (1) and (2) of section 8 in any way attracted. Consequently, it would follow that the Special Judge would automatically be clothed with the powers of a Court of Session by section 395(2) of the Code and can, therefore validly make a reference on a point of law.

(3) Even though the matter appears to be plain on principle, authority though not directly covering the point is not lacking by way of analogy. In *State of Delhi v. S. M. Krishna Swamy and others*, (2), it was held that a Special Judge is deemed in the eye of law to be a Court of Sessions and, therefore, could issue a commission as warranted by section 503 of the Code.

(4) To conclude on this aspect the relevant statutory provisions, when read together as also on principle and precedent there would be little doubt that a Special Judge is competent to make a reference on a question of law arising in a case before him.

(5) The initial hurdle having been crossed, one may straightaway advert to the three questions framed by the learned Special Judge. There is little doubt that the true answer to the legal question implied therein requires an in-depth consideration. This would appear to be manifest from the erudite and exhaustive order of reference made by my learned brother C. S. Tiwana, J., and the doubts raised therein which necessitated it. However, it is the firm stand of both the learned counsel for the State as also of the respondent that for the purposes of this reference we are now precluded from examining the aforesaid legal question afresh in view of the fact that the judgment of Bains, J., covering the present case

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has achieved finality. As at present advised, we see no reason to take a view contrary to the joint and firm stand of both the learned counsel for the parties. This appears to be the more so in view of the settled canon of criminal law that there is no power of review in the Criminal Court after judgment has been rendered. Recently, it has been authoritatively reiterated by the final Court in the following words in *State of Orissa v. Ram Chander Agarwala* etc. 3.

"In the result we accept the contention put forward by Mr Mukherjee for the state and hold that High Court has no power to revise its own order. The appeal is allowed."

(6) It is in the light of the above that the learned counsel for the parties appeared to be correct in their stand that the judgment of Bains, J., in this very case having achieved finality the same cannot be reviewed or revised either directly by him or indirectly by this Division Bench by rendering an answer to the questions of law contrary to what had been laid down in the earlier judgment. It may be kept in mind that even sitting singly the judgment of Bains, J., is the judgment of this High Court and it having achieved finality it cannot now be altered or modified by a flanking attack before the Division Bench.

(7) Now a look at the three questions of law framed by the learned Special Judge would indicate that these are not framed in abstract but in the peculiar context of the case before him. The competency and the power of the Special Judge here is not an open issue but is within the close circuit of the earlier order of the High Court rendered by Bains J. We would, therefore, scrupulously avoid to opine on this legal question in abstract (despite considerable doubts raised with regard to the correctness of the view taken by Bains J.) because it appears to us that in any case that Court of Special Judge is now bound by the earlier judgment of the High Court and cannot deviate therefrom.

(8) The aforesaid aspect becomes highlighted when viewed in the following correct sequence. The challan in the present case was presented before the Sub-Divisional Magistrate on the 18th of December, 1978, whilst the tender of pardon was even earlier, during

the course of the investigation. These proceedings including the cognizance taken by the Sub-Divisional Magistrate were the specific subject-matter for quashing before Bains J., and it was held in no uncertain terms that no cognizance of the case could be taken and it could not have been dealt with at all by him as the same was exclusively triable by a Special Judge. In terms the proceedings before the Sub-Divisional Magistrate were quashed and the whole case was transferred to the Court of the Special Judge, Gurdaspur. Against this the State sought special leave to appeal to the Supreme Court and apparently after hearing arguments on order was passed on the 12th of November, 1979, which set at rest all doubts with regard to the tender of pardon also because it was clarified that the whole proceedings including the tendering of pardon had been transferred to the Special Judge by the earlier judgment. Against the aforesaid order the State presented a Special Leave Petition which admittedly has been dismissed *in limine*.

(9) It would thus be manifest that at least so far as the present case is concerned the afore-quoted judgment of Bains J., has achieved finality with regard to the present proceedings. It is, therefore, not possible to travel beyond the field covered by this judgment (and in particular because of the dismissal of the Special Leave Petition by the Supreme Court) for the purpose of answering the three questions of law in the peculiar context in which they have been raised.

(10) One may now advert to the three questions seriatim. The first pertains to the competency of the trial Court to continue with the case in view of the suggested infirmity that the challan had Divisional Magistrate and the latter had not committed it to the Court of Special Judge. I would take the view that the prior history of the proceeding is now no longer relevant for determining this question. It is undisputed that the case was transferred to the Court of Special Judge by the order of the High Court as recorded by Bains J., and as already noticed the said judgment having achieved finality continues to govern the said transfer. Consequently the Special Judge draws legal sanction to try the case by virtue of the aforesaid judgment of the High Court. Any earlier infirmities with regard to the presentation of the challan and the lack of the commitment proceedings which are prior to the order of the High Court cease to have any meaningful relevance. The answer to the first

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question is, therefore, rendered in the affirmative, that is, that the Special Judge is competent to continue with the case and try and the same.

(11) Adverting now to the second question, the position appears to me as identical. In his judgment dated the 12th of November, 1979, Bains J., had expressly opined as follows :—

“ * * * so the whole proceedings including the tender of pardon were transferred to the Special Judge.”

As long as the aforesaid observations held the field the fact of the earlier tender of pardon and its consequent effect has to be totally ignored from consideration. The judgment of the High Court had expressly authorised the Special Judge for tendering of the pardon, whilst virtually quashing and wiping out of the earlier proceedings. The answer to this question would, therefore, also be rendered in the affirmative.

(12) In view of the above, the answer to the third question is rendered rather hypothetical. Once it is held that the Special Judge would be competent to tender a fresh pardon then this question would not arise at all, if such a pardon is later tendered to him as it might well be. But even in the absence thereof it would appear that the true legal effect of the two judgments of Bains J., is that the earlier proceedings before the Chief Judicial Magistrate and the Sub-Divisional Magistrate having been quashed must now be deemed as wholly still-born and virtually non-est. The position in the eye of law must be viewed as if the case was straightaway instituted in the Court of the Special Judge and a blind eye must be turned to the proceedings prior thereto. In that view of the matter, in the absence of any fresh tender of pardon by the Special Judge, Dhian Singh would continue to be in the position of a co-accused and consequently would not be a competent witness. Of course, the tender of a fresh pardon in compliance with the requirements of law would again place Dhian Singh on the pedestal of an approver and a witness as such. Question No. 3 is answered in these terms.

I would, therefore, answer the reference on the three questions of law in the terms aforesaid.

H.S.B.