CHAPTER VIII

Prosecution of Civil Servants

A civil servant is answerable in respect of his misconduct which also constitutes an offence under the law of the land, to the Master, namely, the State of which he is a servant. As a citizen he is also liable to be prosecuted for violating the law of the land. Apart from the various offences dealt with in the Indian Penal Code, Sections 161 to 165 thereof and also Section 5 of the Prevention of Corruption Act which is promulgated specially to deal with the acts of corruption by public servants, deal with offences by public servants. A Government servant committing such offences is not only liable for being subjected to a departmental enquiry by the State, but he is also liable for prosecution in addition to being subjected to a departmental enquiry. If he is prosecuted in a criminal court, he is liable to be punished by way of imprisonment or fine or with both. But in a departmental enquiry, the highest penalty that could be imposed on a civil servant is dismissal. Therefore, when a civil servant is guilty of misconduct which also amounts to an offence under the penal law of the land, it is competent for the Government or the competent authority either to prosecute him in a court of law or subject him to a departmental enquiry or to subject him to both simultaneously or one after another. A civil servant has no right to say that because his conduct constitutes an offence, he should be prosecuted. Similarly he has no right to say that he should be dealt with in a departmental enquiry alone.[1–2]

1. Safeguards Regarding Prosecution of Civil Servants

(1) *Sanction Mandatory :* While it is permissible to prosecute a civil servant in respect of his conduct in relation to his duties as a civil servant, which amounts to an offence punishable under the provisions of the Indian Penal Code or under Section 5 of the Prevention of Corruption Act, alleged to have been committed by a civil servant, no court is authorised to take cognizance of such an offence without the previous sanction of the authority competent to remove him from service. The civil servants are expected to discharge their duties and responsibilities without fear or favour. Therefore, in public interest, they should also be given sufficient protection. With this object in view specific provision has been made under Section 6 of the

1 Venkataraman *V.* State—AIR 1954 SC 375.

2 (*a*) Bhagat Singh *V.* State of Punjab—AIR 1960 SC 1210.
(*b*) State of U.P. *V.* Harischandra—AIR 1969 SC 1020 at 1023.

Prevention of Corruption Act for the sanction of the authority competent to remove a civil servant before he is prosecuted. Therefore, when a civil servant is prosecuted and convicted, in the absence of the previous sanction of a competent authority as prescribed under Section 6(1) of the Prevention of Corruption Act, the entire proceedings are invalid and the conviction is liable to be set aside.[3]

(2) When under the provisions of the Police Act, it is provided that no police officer shall be prosecuted without the sanction of the State Government in respect of allegations against him when there is close connection between the acts alleged and the official duty with which he was entrusted, a police officer against whom allegations of having committed certain offences in the course of discharging of his duties is made, cannot be prosecuted without the sanction of the State Government.[4]

(3) *Sanction by State Government when refused by disciplinary authority :* Though in the case of members of the subordinate service disciplinary authority having power to remove a civil servant is the appointing authority, the State Government is also the authority competent to remove a civil servant being a higher authority. Hence, in the case of such a person it is competent for the State Government to give sanction for prosecution after it has been refused by the disciplinary authority.[5]

(4) *Requirement of an order giving sanction for prosecution :* The order giving sanction for prosecution of a civil servant should be by the application of the mind to the facts of the case. If the order sets out the facts constituting the offence charged against the civil servant concerned and shows that a prima-facie case is made out, the order fulfils the requirement of Section 6 of the Prevention of Corruption Act.[6] But an order giving sanction only specifies the name of the person to be prosecuted and specifies the provision which he has violated, it is invalid.[7]

(5) *Sanction not necessary for prosecution under Section* 409 *IPC :* Section 405 of the Indian Penal Code and Section 5(1)(*c*) of the Prevention of Corruption Act are not identical. The offence under Section 405 IPC is separate and distinct from the one under Section 5(1)(*c*) of the Prevention of Corruption Act and the latter does not repeal Section 405 IPC. Offence under Section 409 IPC is an aggravated form of offence by a public servant.

3 (*a*) Sailendranath *V.* State of Bihar—AIR 1968 SC 1292—1968(3) SCR 563.
(*b*) L. D. Healy *V.* State of U.P.—(1969) 2 SCR 948.
(*c*) Baijnath Prasad *V.* State of Bhopal—AIR 1957 SC 494—1957 SCR 650.

4 (*a*) State *V.* Manikyam—1968(2) *Mys. L. J.* 11.
(*b*) State of Mysore *V.* Satyendra Kumar—1972(1) *Mys. L. J.* 637.

5 State of Maharashtra *V.* Govind Purushotham—SLR 1973(1) Bom. 617.

6 Shiv Raj Singh *V.* Delhi Administration—AIR 1968 SC 1419—(1969) 1 SCR 183.

7 Gokulchand *V.* The King—AIR 1948 PC 82.

A public servant does not normally act in his capacity as a public servant when committing a criminal breach of trust and therefore no sanction is necessary to prosecute a public servant for offences under Sections 405 and 409.[8]

(6) *Sanction not necessary for prosecution after a person ceases to be a Government servant :* Where the prosecution launched against a person who was a Government servant, after he ceased to be in Government service, no sanction as required under Section 6 of the Prevention of Corruption Act is necessary. Once a person ceases to be a Government servant, he does not come within the meaning of Section 6(1)(*a*) of the Prevention of Corruption Act and therefore no sanction for his prosecution is necessary.[9]

(7) *First prosecution if invalid there is no bar for second prosecution :* The basis of Section 403 of the Criminal Procedure Code is that when the first trial against a person has taken place before a court competent to hear and decide the case, and it records conviction or acquittal, then there would be a bar for a second prosecution for the same offence. But if the first trial was not competent, then the whole trial is null and void and therefore it does not bar a second prosecution. Therefore, when a trial against a civil servant under the provision of the Prevention of Corruption Act takes place, there being no sanction by the authority competent to remove him as required under Section 6 of the Prevention of Corruption Act, the entire trial starting from its inception is null and void. Therefore, it is competent to prosecute such a civil servant for the same offence after obtaining necessary sanction under Section 6 of the Prevention of Corruption Act.[10]

2. Safeguards Regarding Investigation

(1) Even in respect of starting investigation against a Government servant relating to an offence punishable under the provisions of the Prevention of Corruption Act said to have been committed by the civil servant, protection is afforded to the civil servant under Section 5-A of the Prevention of Corruption Act to the effect that except with the previous permission of a Magistrate no investigation can be started against the Government servant by an officer below the rank of a Deputy Superintendent of Police. It is a statutory safeguard to a civil servant and must be strictly complied with as the said safeguard is conceived in public interest and it is a guarantee provided against frivolous and vexatious prosecution.[11]

8 Om Prakash *V.* State of U.P.—1957 SC 458.

9 S. A. Venkataraman *V.* The State—AIR 1958 SC 107—1958 SCR 1037.

10 Baijanath Prasad *V.* State of Bhopal—AIR 1957 SC 494—1957 SCR 657.

11 (*a*) State of M.P. *V.* Mubarak Ali—AIR 1959 SC 707—(1959) Suppl. (2) SCR 201.
(*b*) State of U.P. *V.* Bhagwanth Kishore—AIR 1964 SC 221.
(*c*) Sailendranath *V.* State of Bihar—AIR 1968 SC 1292—1968(3) SCR 563.
(*d*) L. D. Healy *V.* State of U.P.—(1969)2 SCR 948.

(2) When a Magistrate is approached for granting permission for investigation in respect of an alleged offence of corruption by a civil servant, by an officer below the rank of a Deputy Superintendent of Police, as required under Section 5-A of the Prevention of Corruption Act, the Magistrate is expected to satisfy himself that there are good and sufficient reasons for authorising an officer of a lower rank to conduct investigation. It should not be treated as a routine matter but should be given in exercise of judicial discretion having regard to the policy underlying the provision.[12]

(3) *Irregularity in investigation does not vitiate the trial :* The provisions of Section 5-A of the Prevention of Corruption Act require that investigation in respect of an offence by a Government servant punishable under the provisions of the Prevention of Corruption Act when conducted by an officer lower in rank than the Deputy Superintendent of Police should be conducted only with the previous permission of a magistrate. However, any irregularity committed in conducting the investigation cannot be made the sole ground for setting aside the conviction when there has been a fair trial. It is necessary for the accused in such a case to throw a reasonable doubt that the prosecution evidence is such that it must have been manipulated or shaped by reason of irregularity by putting his defence or adducing his evidence in respect of the same. The conviction cannot be set aside only on the ground of some irregularity or illegality in the matter of investigation. There must be sufficient nexus either established or probabalised between the conviction and the irregularity in the investigation. The invalidity of the precedent investigation does not vitiate the result unless miscarriage of justice has been caused thereby.[13]

(4) *Irregularity in investigation must be cured when objection is raised at early stage :* When the legislature has evolved in emphatic terms such a provision it is clear that it has a definite policy behind. It is relevant to note that under the Code of Criminal Procedure offences by or relating to public servants (Chapter IX) and offences against public justice (Chapter II) are all non-cognizable. The underlying principle in making these offences non-cognizable appears to be that public servants who have to discharge their functions—often enough in difficult circumstances—should not be exposed to the harassment of investigation against them on information levelled possibly by persons affected by their official acts, unless a magistrate is satisfied that an investigation is called for and on such satisfaction authorises the same. This is meant to ensure diligent discharge of their official functions by public servants without fear or favour. Therefore, though the invalidity of the in-

12 H. N. Rishbud *V.* State of Delhi—AIR 1955 SC 196—1955 SCR 1150.

13 (*a*) State of M.P. *V.* Mubarak Ali—AIR 1959 SC 707—(1959) Suppl. (2) SCR 201.
(*b*) State of U.P. *V.* Bhagawanth Kishore—AIR 1964 SC 221.
(*c*) Sailendranath *V.* State of Bihar—AIR 1968 SC 1292—1968(3) SCR 563.
(*d*) State of M.P. *V.* Veereshwar Rao—AIR 1957 SC 592.
(*e*) H. N. Rishbud *V.* State of Delhi—AIR 1955 SC 196—1955 SCR 1150.
(*f*) Munnalal *V.* State of U.P.—AIR 1964 SC 28.

vestigation does not vitiate the result except in specific cases it is established that there has been miscarriage of justice, it does not follow that the invalidity of the investigation is to be completely ignored by the court during trial. When the breach of such mandatory rule is brought to the knowledge of the court at a sufficiently early stage, the court while not declining cognizance will have to take necessary steps to get the illegality cured and the defect rectified by ordering such an investigation as the circumstance of an individual case may call for. The court will have to consider in such cases the nature and extent of violation and pass appropriate orders for reinvestigation as may be called for wholly or partly and by such officer as it considers appropriate. The objection taken at the earliest opportunity is a pertinent factor even when the accused had to make out that there was failure of justice as a result of such an error. In such a situation where the objection is taken at the earliest opportunity to ignore the breach of the provision relating to investigation would be virtually to make a dead letter of the peremptory provision incorporated on grounds of public policy for the benefit of such an accused. It is true that the provision itself allows an investigation by an officer of a lower rank. But that is no indication by the legislature that an investigation by an officer of a lower rank without such permission cannot be said to cause prejudice. Therefore in a case where the investigation was conducted by several officers all of whom were below the rank of Deputy Superintendent of Police, without having obtained from the Magistrate the requisite sanction therefor there is clear violation of the mandatory provisions of Section 5(4) of the Act. In view of the said violation it becomes necessary for the special judge to reconsider the course to be adopted.[14]

(5) *Government servants found involved while investigating offences by others :* In a case where it was found that some persons who are not Government servants are involved in an offence and the case was registered in respect of offences punishable under Section 420 IPC and Section 6 of Essential Supplies (Temoprary) Powers Act 1946 against them and in the course of investigation it was found that some Government servants are also involved and are liable to be prosecuted under Section 5(2) of the Prevention of Corruption Act and further investigation against them was conducted after the requisite permission by the Magistrate the continuatinon of such portion of the investigation as remained, as against public servants concerned by the same officer after obtaining permission of the Magistrate is reasonable and legitimate and there was no such defect in the investigation as to call for interference.[14]

3. Burden of Proof on the Civil Servants

(1) While certain safeguards are given to a civil servant in public interest in the matter of investigation and prosecution in respect of an offence of

14 H. N. Rishbud *V.* State of Delhi—AIR 1955 SC 196—1955 SCR 1150.

corruption, which is in public interest, at the same time, the provisions of Section 5(3) of the Prevention of Corruption Act provide a special mode of proof as against a civil servant who is charged with having committed an offence of corruption. According to the said provision, the burden of the prosecution to prove the guilt of the accused is required to be held as having been discharged if certain facts as mentioned therein are proved, namely:—

(1) The extent of the pecuniary resources or property in the possession of the accused or any other person in his behalf;

(2) the said asset or property is disproportionate to his known sources of income;

(3) The accused person cannot satisfactorily account for such possession.

If these facts are proved, the section makes it obligatory for the courts to presume that the accused person is guilty of criminal misconduct in the discharge of his official duty unless the contrary is proved by the accused. The section says that the conviction for an offence of criminal misconduct shall not be invalid by reason only that it is based solely on such presumption. In enacting the special provision contained in Sub-section (3) of Section 5 of the Prevention of Corruption Act, the Parliament has made a deliberate departure from the ordinary principle of criminal jurisprudence. Under the ordinary principles of criminal jurisprudence, the burden of proving the guilt of the accused in a criminal proceeding lies on the prosecution. Under the provisions of Sub-section (3) of Section 5 of the Prevention of Corruption Act, the burden is placed on the accused. The provisions of such a section however, are required to be construed strictly. There can be no justification however for adding any words to make the provision of law less stringent than the legislature has made it.[15]

(2) *Effect of presumption under Section* 5(3) : When the ingredients for raising a presumption under Sub-section (3) of Section 5 of the Prevention of Corruption Act is established, it is the duty of the court to convict the accused even if the other evidence produced does not prove the guilt of the accused. The fact that the prosecution has failed to prove by other evidence the guilt of the accused does not entitle the court to say that the accused has succeeded in proving that he did not commit the offence.[15a–c]

15 (*a*) Sajjan Singh *V.* State of Punjab—AIR 1964 SC 464.
(*b*) C. R. Bansi *V.* State of Maharashtra—AIR 1971 SC 786.
(*c*) M. M. Gandhi *V.* State of Mysore—1960 *Mys. L. J.* 265.
(*d*) Bishwabhushan *V.* State of Orissa—AIR 1954 SC 359—1955 SCR 92.
(*e*) Om Prakash *V.* State of U.P. —AIR 1957 SC 458.
(*f*) Dhanwantrai *V.* State of Maharashtra—AIR 1964 SC 575.
(*g*) V. D. Jhingan *V.* State of U.P.—AIR 1966 SC 1762—1966(3) SCR 736.
(*h*) Sailendranath *V.* State of Bihar—AIR 1968 SC 1292—1968(3) SCR 563.

(3) *Burden on the accused is not the same as that of prosecution :* Whenever a law raises a presumption against an accused person unless the contrary is proved by him the burden of proof on the accused is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt. In a case where a presumption is raised against the accused Government servant under Section 4(1) of the Prevention of Corruption Act, the burden stands discharged if the accused person establishes his case by a preponderance of probability and it is not necessary that he should establish his case by the test of proof beyond a reasonable doubt. In other words, the onus on an accused person may well be compared to the onus on a party in civil proceedings. The court should uphold the plea of the accused if a preponderance of probabilities is established by the evidence led by him.[15]