CHAPTER VIII

PROSECUTION OF CIVIL SERVANTS*

A civil servant is answerable for his misconduct, which constitute an offence against the state of which he is a servant, and also liable to be prosecuted for violating the law of the land. Apart from various offences dealt with in the Indian Penal Code, sections 161 to 165 thereof, a civil servant is also liable to be prosecuted under section 5 of the Prevention of Corruption Act, 1947 (which is promulgated specially to deal with the acts of corruption by public servants). A government servant is not only liable to a departmental enquiry but also to prosecution. If 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 is dismissal. Therefore, when a civil servant is guilty of misconduct which also amounts to an offence under the penal law of the land, the competent authority may either prosecute him in a court of law or subject him to a departmental enquiry or subject him to both simultaneously or successively. A civil servant has no right to say that because his conduct constitutes an offence, he should be prosecuted; nor to say that he should be dealt with in a departmental enquiry alone.[1]

Safeguards regarding prosecution of civil servants

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, (hereafter referred to as the Act) no court is authorised to take cognisance of such an offence without the previous sanction of the authority competent to remove him from service. Civil servants are expected to discharge their duties and responsibilities without fear or favour. Therefore, in the public interest, they should also be given sufficient protection. With this object in view a specific provision has been made under section 6 of the 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 Act, the entire proceedings are invalid and the conviction is liable

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1 *Venkataraman* v. *State*, AIR 1954 SC 375; *State of U.P.* v. *Harischandra*, AIR 1969 SC 1020 at 1023; *Bhagat Singh* v. *State of Punjab*, AIR 1960 SC 1210.

to be set aside.[2] The policy underlying section 6 is that a public servant is not be exposed to harassment of a speculative prosecution. [3]

The object of section 6(1) (c) of the Act or for that matter section 197 of the Criminal Procedure Code is to save the public servant from harassment, which may be caused to him if each and every aggrieved or disgruntled person is allowed to institute a criminal complaint against him. The protection is against prosecution even by a state agency but the protection is not absolute or unqualified. If the authority competent to remove such public servant accords previous sanction, such prosecution can be instituted and proceeded with.[4]

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, being a higher authority, the authority competent to remove a civil servant. Hence, in such a case it is competent for the state Government to give sanction for prosecution after it has been refused by the disciplinary authority.[5]

Sanction for prosecution being an administrative act no opportunity of hearing is necessary: The grant of sanction for prosecution of a civil servant is only an administrative act. Therefore, the need to provide an opportunity of hearing to the accused before according sanction does not arise. The sanctioning authority is required to consider the facts placed before it and has to reach the satisfaction that the relevant facts would constitute the offence and then either grant or refuse to grant sanction. [6]

Requirement of an order giving sanction of prosecution: The order giving sanction for prosecution should be based on the application of the mind to the facts of the case. If it sets out the facts constituting the offence and shows that a *prima facie* case is made out, the order fulfils the requirement of section 6 of the Act.[7] 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.[8]

2 *State of Punjab* v. *M.L.Puri*, AIR 1975 SC 1633; *State* v. *Manikyam*, 1968(2) Mys LJ 11; *State of Mysore* v. *Satyandra Kumar*, 1972(1) Mys LJ 637; *Sailendranath* v. *State of Bihar*, AIR 1968 SC 1292; *L.D. Healy* v. *State of U.P.*, (1969) 2 SCR 948; *Baijnath Prasad* v. *State of Bhopal*, AIR 1957 SC 494; *B. Ramesh* v. *K.Shankar* 1984(1) Kar LJ 258.

3 *R. S. Nayak* v. *A.R.Antulay*, AIR 1984 SC 684.

4 *Anti-Corruption Bureau, Government of Maharashtra, Bombay* v. *Krishanchand Khushalchand Jagatiani*, AIR 1996 SC 896.

5 *State of Maharashtra* v. *Govind Purushotham*, SLR 1973(1) Bom 617; *Sampuran Singh* v. *State of Punjab*, AIR 1982 SC 1407.

6 *Superintendent of Police (CBI)* v. *Deepak Chowdhary*, 1996 (6) SCC 225.

7 *Shiv Raj Singh* v. *Delhi Administration*, AIR 1968 SC 1419: (1969)1 SCR 183.

8 *Gokulchand* v. *King*, AIR 1948 SC 182.

Sanction not necessary for prosecution under section 409 IPC: Section 405 of the Indian Penal Code and section 5(1)(c) of the Act are not identical. The offence under section 405 IPC is separate and distinct from the one under section 5(1) (c) of the 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. 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.[9]

No sanction is necessary for prosecution after a person ceases to be a government servant: Under section 6 of the Act, sanction is not necessary if a person has ceased to be a government servant.[10] The apex court observed thus: "when an offence is alleged to have been committed, the accused was a public servant but by the time the Court is called upon to take cognizance of the offence committed by him as public servant, he has ceased to be a public servant no sanction would be necessary for taking cognizance of the offence against him. This approach is in accord with the policy underlying section 6 in that a public servant is not to be exposed to harassment of a frivolous or speculative prosecution. If he has ceased to be a public servant in the meantime, this vital consideration ceased to exist. As a necessary corollary, if the accused has ceased to be a public servant at the time when the court is called upon to take cognizance of the offence alleged to have been committed by him as public servant section 6 is not attracted."[11] This applies even to a retired as well as a reinstated civil servant.

First prosecution, if invalid does not bar 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 competent court 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 Act has taken place, there being no sanction by the authority competent to remove him as required under section 6 of the 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 Act.[12]

Section 5A does not contemplate two sanctions: Section 5-A of the Prevention of Corruption Act does not contemplate two sanctions, namely,

9 *Om Prakash* v. *State of U.P.*, AIR 1957 SC 458.

10 *S.A. Venkataraman* v. *State*, AIR 1958 SC 107: 1958 SC 1037; *K.S. Dharmadasan* v. *Central Government*, SLR 1979(3) SC 81.

11 *R.S. Nayak*, *supra* note 3.

12 *Baijanath Prasad*, *supra* note 2.

one for laying the trap, and another for further investigation. The order under this provision enables the officer to do the entire investigation. [13]

Safeguards regarding investigation

Even in respect of starting investigation against a government servant relating to an offence punishable under the provisions of the Act protection is afforded under section 5-A of the Act. 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 it is conceived in the public interest and constitutes a guarantee against frivolous and vexatious prosecution.[14]

When a magistrate is approached for 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 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.[15]

Section 5-A of the Act provides a safeguard against investigation of offence committed by public servants, by petty or lower rank police officer. It has nothing to do directly or indirectly with the mode or method of taking cognisance of offences by the court of special judge. [16]

Irregularity in investigation does not vitiate trial: Section 5-A of the Act requires that investigation in respect of an offence by a government servant 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 in 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 by leading evidence, that the prosecution evidence is such that it must have been manipulated or shaped by reason of irregularity. 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 proved between the conviction and the irregularity in the investigation. The invalidity of the precedent

13 *Sailendranath Bose* v. *State of Bihar*, AIR 1968 SC 1292.

14 *State of M.P.* v. *Mubarak Ali*, AIR 1959 SC 707; *State of U.P.* v. *Bhagwanath Kishore*, AIR 1964 SC 221; *Raj Kumar* v. *State of Punjab*, SLR 1976 (1) P&H 5.

15 *H.N. Ribud* v. *State of Delhi*, AIR 1955 SC 196; 1955 SCR 1150.

16 *A.R. Antulay, supra* note 3.

investigation does not vitiate the result unless miscarriage of justice has been caused thereby.[17]

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 objective. 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 it. This is meant to ensure diligent discharge of their official functions by public servants without fear or favour. Therefore, though the invalidity of the investigation does not vitiate the result except where 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 cognisance, 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 to ignore the breach of the provision relating to investigation would be virtually to make a dead letter of the peremptory provisions incorporated on grounds of public policy even when the provision itself allows an investigation by an officer of a lower rank. Therefore, where the investigation was conducted by several officers all of whom were below the rank of deputy superintendent of police, without the requisite sanction therefor, there is clear violation of the mandatory provisions of section 5(4) of the Act. In view of the violation, it becomes necessary for the special judge to reconsider the course to be adopted.[18]

17 *State of M.P.* v. *Mubarak Ali*, AIR 1959 SC 707: 1959 Supp. (2) SCR 201; *State of U.P.* v. *Bhagawanth Kishore*, AIR 1964 SC 221; *State of M.P.* v. *Veereshwar Rao*, AIR 1957 SC 592; *H.N. Risbud*, *supra* note 15; *Munnalal* v. *State of U.P.* AIR 1964 SC 28: *Sailendranath*, *supra* note 13.

18 *H.N. Risbud*, *supra* note 15.

Government servants found involved while investigating offences by others: Where a case was registered in respect of offences punishable under section 420 IPC and section 6 of the Essential Supplies (Temporary) Powers Act, 1946 against some persons 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 Act and further investigation against them was conducted after the requisite permission by the magistrate, the continuation 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.[19]

Burden of proof on the civil servants

Certain safeguards are given to a civil servant in the public interest in the matter of investigation and prosecution in respect of an offence of corruption, which is in the public interest. At the same time the provisions of section 5(3) of the Act provide a special mode of proof as against a civil servant charged with an offence of corruption. 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 the 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 Act, Parliament has made a deliberate departure from the ordinary principle of criminal jurisprudence wherein, 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 Act, the burden of proof is 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

19 *Ibid.*

provision of law less stringent than the legislature has made it.[20]

Effect of presumption under section 5(3): When the ingredients for raising a presumption under sub-section (3) of section 5 of the Act are 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.[21]

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 Act, the burden stands discharged if the accused person establishes his case by a preponderance of probability. 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 the 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.[22]

Other matters relating to prosecution of civil servants

Jurisdiction of police officers on deputation to vigilance commission to investigate: Superior police officers on deputation to vigilance commission do not cease to be such police officers. The rules of the vigilance commission which confer power on officers of the commission who include police officers, to investigate in connection with the desirability of instituting departmental inquiries, are entirely different compared with service rules relating to inquiries. The police officers deputed to vigilance commission have to play a dual role: (i) as officers of the vigilance commission, to investigate in connection with the holding of departmental inquiry; and (ii) as police officers in their own right to investigate under the provisions of the Criminal Procedure Code, particularly when their offices in the vigilance commission are declared as police stations under section 2(k) of the Code of Criminal Procedure and in view of section 36 of the Code. Therefore, such police officers are competent

20 *Sajjan Singh* v. *State of Punjab*, AIR 1964 SC 464; *Sailendranath, supra* note 13; *State of Maharashtra* v. *Wasudeo*, SLR 1981(2) SC 68; *C.R. Bansi* v. *State of Maharashtra*, AIR 1971 SC 786; *M.M. Gandhi* v. *State of Mysore*, 1960 Mys LJ 265; *Bishwabhushan* v. *State of Orissa*, AIR 1954 SC 359; *Omprakash, supra* note 9; *V.D. Jhingan* v. *State of U.P.*, AIR 1966 SC 1762.

21 See, *ibid.*

22 *Ibid.*

to investigate into allegations of corruption against civil servants.[23]

Confiscation: Section 452 of the Code of Criminal Procedure empowers the court to confiscate the property which is the subject matter of offence. The provision is equally applicable to proceedings under the Act in view of section 4(2) of the Criminal Procedure Code. Therefore, the special judge has the power to pass an order of confiscating the property which formed the subject matter of charge.[24]

Acts not done in official capacity: When the allegation against a member of the subordinate judiciary is that he made disparaging remarks against an advocate and on that basis he is sought to be prosecuted by an advocate, the sanction of the government under section 197 of the Code of Criminal Procedure is unnecessary. Using abusive language against an advocate is not even remotely connected with the discharge of official duties.[25] The object of this provision is to provide safeguard against vexatious proceedings against judges, magistrates etc. Considering all the factors, it is the duty of the criminal court to see whether cognisance can be taken or not in the absence of a sanction.[26]

Similarly, a police officer is as much governed by general law as any private citizen. A police officer who assaults or tortures an arrested person cannot be said to have assaulted in colour of his duty or in excess of his authority. Such acts fall completely outside the scope of the duties and, therefore, not entitled to protection against prosecution.[27]

Rules not to overrule Criminal Procedure Code: The rules of service conferring discretion on the designated officer to decide whether the investigation should be conducted by a police officer or a magistrate or whether the matter should be disposed of departmentally cannot override the provisions of the Criminal Procedure Code. The exercise of the discretion cannot be regarded as condition precedent for the institution of a criminal case for offences, under the Prevention of Corruption Act.[28]

Suspension of officers of local authorities by the government: The power conferred on the State government by an Act of legislature to suspend an employee of a local authority and also institute disciplinary proceedings and impose penalty is not *ultra vires* the power of the legislature.[29]

23 *State of Bihar* v. *Saldhana*, AIR 1980 SC 326; *C.M. Prasad* v. *State of Karnataka*, 1984(1) Kar LJ 219; *Mushtaq Ahmed* v. *State of Karnataka*, SLR 1983(1) Kar 703.

24 *Mirza Iqbal Hussain* v. *State of UP*, AIR 1983 SC 60.

25 *Shambu B.S.* v. *T.S.Krishnaswamy*, SLR 1983(1) SC 701.

26 *Director of Inspection and Audit* v. *C.L. Subramanium*, 1994 (5) SLR 545, 550.

27 *Rajendra Kumar* v. *Kuberappa Nagappa*, 1974(2) Kar LJ SN 68 22.

28 *State of Punjab* v. *Charan Singh*, SLR 1981(1) SC 355.

29 *Lakkegowda* v. *State of Karnataka*, ILR 1981(2) Kar 726.

Public servants: In view of the amendment of section 21 of the Indian Penal Code, the employees of statutory corporations are to be treated as public servants and consequently the Prevention of Corruption Act becomes automatically applicable to such employees.[30]

MLA is not a public servant: In the case of giving sanction under section 6 of the Prevention of Corruption Act, MLA is not a public servant within the ambit of any of the sub-sections of section 21 of the Indian Penal Code. 1860.[31]

30 *State of M.P.* v. *Narasimhan*, SLR 1976(1) SC 64.
31 *R. S. Nayak* v. *A.R.Antulay, supra* note 3.