BEST: International Journal of Humanities, Arts, Medicine and Sciences (BEST: IJHAMS)
ISSN (P): 2348-0521, ISSN (E): 2454-4728
Vol. 4, Issue 4, Apr 2016, 97-106

PROSECUTION OF CIVIL SERVANTS IN INDIA: JUDICIAL APPROACH

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ABSTRACT

Constitution of India provides certain safeguards to protect civil servants from unnecessary exploitation. There were number of civil & criminal cases against civil servants which draw our attention towards rising corruption inside civil servant fraternity. The power to suspend a civil servant pending departmental inquiry proceedings vests in the government as in the case of other employments. This power is purely administrative in nature and there is no legal requirement to hear a civil servant before his suspension since such administrative action has not been considered a punishment attracting the principles of natural justice. Such a power was always implied. It is well settled that a writ court has power to direct an administrative authority to exercise its discretionary power if it had failed to do so. Compulsory retirement of a civil servant to accomplish public interest is a controversial area wherein administrative discretion is prominently present. At times, the Supreme Court has been described it as an 'absolute discretion' (Union of India v. J. N. Sinha, A.I.R. 1971 S.C.), wherein the court observed that the rule provides that the appropriate authority has the absolute right to retire a Government servant if it is of the opinion that it is in the public interest to do so. Judicial system is the only authority which can curb the corruption via its judgments.

KEYWORDS: Prosecution of Civil Servants in India, Rising Corruption Inside Civil Servant Fraternity 'Absolute Discretion'

INTRODUCTION

A civil servant is answerable for his misconduct, which constitutes an offence against the state of which he is 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, Section 161 – 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 civil servants).

Safe Guards Provided to Civil Servants

Indian Constitution has specific provisions for civil servants under Article 308 to 323 of Part XIV of the constitution. But safeguards have been provided under Article 311. We will briefly discuss these safeguards with the help of bare act language and few case laws.

Dismissal, Removal or Reduction in Rank of Persons Employed in Civil Capacities under the Union or a State

- No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed[1]

[1]Article 311(1) The Constitution of India 1950

- No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges[2]

Article 311 is a fortification of civil servants. This is an important guarantee which severely restricts the doctrine of pleasure contained in Article 310 (1) of the Indian Constitution. Article 311 envisages three major penalties which may be inflicted on a civil servant. These penalties are dismissal, removal and reduction in rank. Dismissal and removal from service are grave penalties which end the services of an employee. Article 311 gives more protection to a civil servant against these penalties. Reduction in rank does not end the services of an employee and, has been treated differently.

Reasonable Opportunity of Hearing

A civil servant can't be dismissed, removed or reduced in rank unless:

- An inquiry is made in which
- He is informed of the charges against him
- Given a reasonable opportunity of being heard in respect of those charges.

This provision incorporates the rule of natural justice which is one of fundamental principle of constitution.

REASONABLE OPPORTUNITY

Reasonable Opportunity is basic principle &a facet of natural justice. The basic purpose and motive is to ensure fairness, impartiality and reasonableness which are fundamental to our constitutional principles.

The following points are generally kept in mind for ensuring reasonable opportunity

- The civil servant against whom action is to be taken must be given notice of such charges.
- The charges must be clear and precise without any ambiguity.
- The delinquent civil servant must be informed of the evidence by which those charges are sought to be proved against him.
- Copies of relevant document must be supplied to the employee before proceedings are started.
- No evidence and witness should be taken in absence of delinquent employee.
- Personal hearing if demanded by the delinquent civil servant, should be given;
- The civil servant charged must be given an opportunity to cross-examine the witnesses produced against him;
- All the witness should be examined in the presence of delinquent and he should be given an opportunity to cross-examine them; that is biparte rule should be followed.
- The civil servant against whom an inquiry is being held has a right to argue his own case. It is a part of personal hearing;
- Inquiry officer should not bias and rule against biasness should be followed.

[2]Article 311 (2) The Constitution of India 1950

- The decision by inquiry officer must be reasoned one and must be substantiated by facts and evidence.
- Inquiry officer can't be witness himself.

Exceptions to Constitutional Safeguards

The **proviso** under Article 311provides for certain circumstances in which the procedure envisaged in the substantive part of the clause need not be followed. These are as follows:

- Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his connection on criminal charge; or
- Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry
- Where the president or the governor as the case may be, is satisfied that in the interest of the security of the state it is not expedient to hold such inquiry.

Prosecution of Civil Servants by the Courts of Laws

A civil servant is answerable for his misconduct, which constitutes an offence against the state of which he is 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, Section 161 – 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 civil servants)

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, no court is authorized to take cognizance of such offence without the previous sanction of the authority competent to remove him from service.

> 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.

Sanction by State Government When Refused by Disciplinary Authority

Though in 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.

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.

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 of the case. If it sets out the facts constituting the offence and shows that a *prima facie* case is made out, the order fulfills the requirement of section 6 of the Act. But an order giving sanction only specifies the name of the person to be prosecuted and specifies the provisions which he has violated it is invalid.

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 later does not repeal section 405 IPC. Offence under section 409 IPC is an aggravated form of offence by a public servant when committing a criminal breach of trust and therefore no sanction is necessary to prosecute a public servant for offences under section 405 and 409.

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. 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 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. This applies even to a retired as well as 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 the 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.

Section 5 A Does Not Contemplate Two Sanctions

Section 5 A of the prevention of Corruption Act does not contemplate two sanctions, namely, one for laying the trap and another for further investigation. The order under this provision enables the officer to do the entire investigation.

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

It is to be admitted that administration would suffer if the authorities are unable to deal with corrupt, inefficient insubordinate or antinational elements inside the departments. But at the same time it is the bounden duty of the Court to see also that such a power is not abused or exercised to attain an ulterior purpose or on any extraneous consideration.

Judicial Decision: Landmark Judgment

The Humble Supreme Court of India in the case titled as ***Inspector of police and orsvsBattenapatkavenkataRatnam and ors [2015 (5) SCALE 253]*** have dealt with the question that whether sanction under section 197 of Cr. Pc is required to initiate criminal proceedings against the public servant and can a public servant take shield to protect themselves when the criminal proceeding is initiated against the public servant for fraud, criminal conspiracy. The brief facts of the cases are as under:-

- Whether sanction under section 197 of the Code of Criminal Procedure, 1973 is required to initiate criminal proceedings in respect of offences under sections 420, 468, 477A, 120B read with 109 of the Indian Penal Code in the question arising for consideration in these cases.
- The District Registrar, Vijayawada lodged a complaint with the Inspector of Police, CBCID Vijayawada on 07.07.1999. The main allegation against the Respondents was that while they were working as Sub-Registrars in various offices in the State of Andhra Pradesh, they conspired with stamp vendors and document writers and other staff to gain monetary benefit and resorted to manipulation of registers and got the registration of the documents with old value of the properties, resulting in wrongful gain to themselves and loss to the Government, and thereby cheated the public and the Government.
- On the basis of the complaint, F.I.R. No. 35/1999 was registered by the Appellant, and after investigation, report Under Section 173(2) Code of Criminal Procedure against 41 persons including the Respondents herein, and was submitted before the III Additional Chief Metropolitan Magistrate, Vijayawada. The Respondents raised the objection that there was no sanction Under Section 197 Code of Criminal Procedure and hence the proceedings could not be initiated.
- Learned Magistrate on 03.07.2007 passed an order holding that: Whether the sanction is required under section 197 of Code of Criminal Procedure or not to be considered during the trial and it is the burden on the complainant to prove that the accused acted beyond in discharge of their official duties and there is no nexus between the acts committed and their official duties and at this stage the question that the accused acted within their official duties cannot be decided. Aggrieved, Respondents move the High Court under Section 482 Code of Criminal Procedure leading to the impugned order whereby the criminal proceedings were quashed on the sole ground that there was no sanction Under Section 197 Code of Criminal Procedure, and hence the appeals. After perusal of the arguments of both the sides; the Hon'ble Supreme court was of the view that:
- No doubt, while the Respondents indulged in the alleged criminal conduct, they had been working as public

servants. The question is not whether they were in service or on duty or not but whether the alleged offences have been committed by them "while acting or purporting to act in discharge of their official duty" and that question is no more res Integra.

Few Other Judicial Decisions

- In **ShambooNath Mishra v. State of U.P. and Ors.** (1997) 5 SCC 326, at paragraph-5, this Court held that: The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of pubic fund etc. can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial court on the question of sanction is clearly illegal and cannot be sustained.
- In **Parkash Singh Badal v. State of Punjab and Ors.** (2007) 1 SCC 1, at paragraph-20, this Court held that: The Principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity
    - The question relating to the need of sanction Under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage.
- In a recent decision in **RajibRanjan and Ors. V. R. Vijaykumar** (2015) 1 SCC 513, at paragraph-18 this Court has taken the view that. "Even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct such misdemeanor on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted".
    - Public Servants have, in fact, been treated as special category Under Section 197 Code of Criminal Procedure, to protect them from malicious or vexatious prosecution. Such protection from harassment is given in public interest; the same cannot be treated as shield to protect corrupt officials.
- In **Subramanian Swamy v. Manmohan Singh and Anr.** (2012) 3 SCC 64, at paragraph-74, it has been held that the provisions dealing with Section 197 Code of Criminal Procedure must be construed in such a manner as to advance the cause of honesty, justice and good governance.
    - To quote: Public Servant/Civil Servant are treated as a special class of persons enjoying the said protection so that they can perform their duties without fear and favor and without threats of malicious prosecution. However, the said protection against malicious prosecution which was extended in public

interest cannot become a shield to protect corrupt officials. These provisions being exceptions to the equality provision of Article 14 are analogous to the provisions of protective discrimination and these protections must be construed very narrowly. These procedural provisions relating to sanction must be construed in such a manner as to advance the causes of honesty and justice and good government as opposed to escalation of corruption.

- The alleged indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. Their official duty is not to fabricate records or permit evasion of payment of duty and cause loss to the Revenue. Unfortunately, the High Court missed these crucial aspects. The learned Magistrate has correctly taken the view that if at all the said view of sanction is to be considered, it could be done at the stage of trial only.

The Hon'ble Supreme Court of India has rightly decided the question relating to the need of sanction Under Section 197 of the Code of Criminal Procedure, 1973 is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This questions whether sanction is necessary or not may have to be determined from stage to stage.

Are Civil Servants Unquestionable? No Not at All

No one is above the law. Recently, a media report quoted the Karnataka Chief Minister, S. M. Krishna saying, "I don't have the power to punish corrupt civil servants" and making a case for amending the Constitution to enable state governments to act against erring civil servants.

I was both elated and distressed. Elated as, the chief minister of progressive state saw the morass we are stuck in and is seeking sensible solutions. Distressed because the union and most state governments' track record doesn't augur well for such an initiative. In fact, the Union Government's recent legislation giving the CVC statutory status is clearly antithetical.

The "Single Directive" (SD) policy which earlier made it mandatory for the CBI to seek prior permission of the government to prosecute senior civil servants is given a firmer footing by incorporating it in the new legislation. This was done contrary to the earlier Supreme Court (SC) ruling that the SD is illegal as it is discriminatory in nature and blurs the distinction between decision-making officers and other civil servants. The SC again sought the government's explanation for retaining the provision in the CVC Act.

The notion of protecting civil servants from consequences of any untoward official decisions was originally intended to protect honest and upright bureaucrats from harassment. Such a policy was premised on the need to nurture an impartial, upright and independent civil service as crucial component of our democracy. However, Article 311 of the Constitution regulating the dismissal and removal of civil servants has been grossly abused over the past five decades and is being routinely interpreted as the civil servants' guarantee of tenure and protection from prosecution. Defending the inclusion of the SD in the CVC Bill, the Union Minister for Law, ArunJaitley, argued that this enabled bureaucrats to exercise their discretion without fear of harassment by malicious investigations. This is exactly the argument that bureaucrats employ to defend the Directive which they portray as a necessary protection against an investigating agency more than capable of misusing its powers.

It is common knowledge that AP government has been sitting tight on files seeking permission to prosecute scores

of civil servants for alleged corruption and other misdeeds. Due to both collusive and other factors, the civil services are largely perceived to be above law. This has created an aura of invincibility among the bureaucrats leading to an utter lack of accountability in their functioning at all levels. The governments and courts have made it impossible to remove an officer resulting in highly unprofessional and unaccountable behavior.

It is indeed a startling admission by the civil servants and politicians that crime investigation agencies can be manipulated to settle scores with political investigation and governance process? The solution lies in separating the crime investigation process from political control and placing it under quasi-judicial control. Needless to say, a competent, dedicated, non-partisan and accountable civil service is vital to our governance system. It is in our best interests that such a bureaucracy is in place and the requisite systems and instruments to hold them accountable are adopted. Only then would competent and honest governance be ensured. Anything short of it will only confirm the lordly civil servants belief in his being above law, without any will to mend his ways. These are no holy cows in our democracy except freedom, citizen sovereignty and rule of law.

Corruption Cases against Public Servants: Supreme Court Observation in 2G Scam Case

Supreme Court raps PMO for delay in Okaying a Raja prosecution. The Supreme Court has pulled up the Prime Minister's Office for taking 16 months to decide on an application from Janata Party President SubramaniamSwamy to prosecute then telecom minister A Raja.

However, a bench comprising Justices AK Ganguly and GS Singhvi appeared to absolve Prime Minister Manmohan Singh of any personal blame on the ground that he could not be expected to go into details of every case before him.

"We have no doubt that if the prime minister had been apprised of the factual and legal position regarding the representation made by Swamy he would have surely taken appropriate decision and would not have allowed the matter to linger for a period of more than one year. By the very nature of the office held by the prime minister, he was not expected to personally look into minute details of each case placed before him and has to depend on his advisers and other officers. Unfortunately, those who were expected to give proper advice to him and place full facts and legal position before him failed to do so," the bench said.

These remarks appear to have diluted the political fallout of the judgment, though BJP leaders were quick to claim that the verdict was an embarrassment to the government. In interviews to television channels Swamy described the verdict as loss of prestige for the PM.

The PMO seized on the partial reprove and in a statement said: "We welcome the fact that both the learned judges have completely vindicated the prime minister whilst appreciating the onerous duties of his office. The government is examining their directions regarding the manner in which applications for sanctions are to be dealt with."

Pointing to the inherent loopholes that delay decision on granting prosecution, Justice Ganguly said: "If we look at Section 19 of the Prevention of Corruption Act, we find that no time limit is mentioned. This has virtually armed the sanctioning authority with unbridled power which has often resulted in protecting the guilty and perpetuating criminality and injustice in society."

The judges said the government could not sit on complaints seeking sanction to prosecute. It recommended

Parliament to bring a law fixing a time limit of four months. “While considering the issue regarding grant or refusal of sanction, the only thing which the competent authority is required to see is whether the material placed by the complainant or the investigating agency prima facie discloses commission of an offence. The competent authority cannot undertake a detailed inquiry to decide whether or not the allegations made against the public servant are true,” said the bench.

CONCLUSIONS & SUGGESTIONS

Constitutional safeguards were provided to civil servants but even though they are not allowed to misuse these safeguards. Judiciary must stop civil servants from taking shield of safeguards to abuse and disrupt judicial process initiated against them. Strict judgment must be passed against convicted civil servants. Parliament and government should stop causing hindrances in Judicial workflow in fact must cooperate with judiciary in punishing guilty civil servants. Stricter punishment should be added under IPC 1860 & Prevention of Corruption Act 1988. Although there were land mark judgments in which civil servants prosecuted but still we need to prosecute each culprit so that we can achieve zero tolerance policy towards corruption.

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