CHAPTER – IV

AN ANALYSIS OF THE PREVENTION OF CORRUPTION ACT, 1988

4.1. INTRODUCTION

The Prevention of Corruption of Act, 1988 is an important legislation to fight with evil of corruption. It is an effective instrument to curb this evil. The success of movement against the evil of corruption depends upon the performance of this legislation. Hence it becomes important for us to know about the efficacy of this legislation. We have to find out the lacuna in the legislation if they exist in this legislation. We have to do away with the draconian provisions existing within the Act. Similarly the introduction of new provisions into the Act will also be fruitful.

As we have observed in Chapter – II, the evil of corruption has been in existence from the ancient times. It has affected the society all over the world. Because of a number of factors it has affected our nation badly. We have already observed in Chapter – I that all the fields of life are affected by the evil of corruption. Even the Education Sector is not immune from this evil which is expected to incorporate ideal ethical behavior among the students. For instance, two senior officers of the Directorate of Higher Education were arrested by the Anti-Corruption Bureau for demanding and accepting a bribe of Rs. 20,000 from a Professor[299]. There have been various reasons behind the expansion of corruption. The evil of corruption has affected the prospects of economy in an enormous way because of multifarious nature of the evil. The cases of corruption have increased manifold. We have enacted many anti-corruption laws to tackle with this evil. Yet there is no end to the instances of corruption. Even the members of elite class are promoting the evil of corruption irrespective of the money and resources they are having. Similarly, top bureaucrats

[299] *"Two Directorate of Higher Education officials held for graft", Available at:* http://www.business-standard.com/article/pti-stories/two-directorate-of-higher-education-officials-held-for-graft-114122400650_1.html (visited on December 25, 2014).

and politicians are also a part of this deadly nexus. Not only the persons who are enjoying top government positions are exploiting their position for wrong reasons, but their proxies are also a part of this deadly nexus which is evident from a number of instances[300].

Fighting corruption has appeared as a vital development issue in India in recent years. More and more policymakers, businesses, and civil society organizations, have begun to confront the issue openly. At the same time the general level of understanding about corruption has risen significantly. Until recently, it was not uncommon to hear someone discuss anti-corruption strictly in law enforcement terms. By contrast, most people working in the field today acknowledge that public education and prevention are equally important. The field has also come to appreciate how critical the role of civil society is for effective and sustained reform[301].

The people enjoying top positions and status are exploiting the machinery of the administration in a negative and destructive way. Irrespective of the public opinion against the evil and repeated attempts of enacting new laws to curb the evil of corruption, a huge amount of black money is still lying into tax heavens. It is also evident from a recent analysis by a trio of senior economists from the Bank of Italy[302]. The estimate of Indians' share in this is about $152-181 billion as per this report. These estimates are only for the wealth invested in shares and debt securities or held in bank deposits. The report does not give any idea about the wealth invested in physical assets like real estate, gold or art. So it is an alarming situation as there has been no permanent solution to curb this evil.

Not only this, but recent other estimates have also shown the same trend where Gabriel Zucman, of London School of Economics, estimating it at $7.6 trillion,

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300 *"Child security officer, brother held taking bribe", Available at*: http://www.hindustantimes.com/ludhiana/ludhiana-child-security-officer-brother-held-taking-bribe/article1-1283687.aspx (visited on April 20, 2015).

301 Alberto Ades and Rafael di Tella, "The Causes and Consequences of Corruption: A Review of Recent Empirical Contributions" 27 (2) *IDS Bulletin* 6-11 (1996).

302 Subodh Varma, *"$181 billion Indian black money in tax havens?" Available at*: http://timesofindia.indiatimes.com/india/181-billion-Indian-black-money-in-tax-havens/articleshow/51487042.cms (visited on March 21, 2016).

Boston Consulting Group at $8.9 trillion and Tax Justice Network at $21 trillion[303]. Daily we are coming across to a number of revelations where people from politics, entertainment to the sports world are found to be owning big numbers of unaccounted or black money. Recently, millions of confidential documents ("Panama Papers") have leaked from one of the world's most secretive law firms; Mossack Fonseca based in Panama[304]. It has exposed a number of rich and powerful people who have hidden their money in tax heavens. The documents of the firm have revealed a massive leak of 11.5 million taxes which has exposed the secret offshore dealings of aides to Russian president Vladimir Putin, world leaders and celebrities including Barcelona forward Lionel Messi. In addition, Dictators and other heads of state have also been accused of laundering money, avoiding sanctions and evading tax, according to these leaked documents which show the inner workings of the law firm. There are many persons from India as well from different parts of society including business communities, top politicians and film-stars whose name has appeared into the "Panama Papers Leaks".

A number of factors explain growing emphasis and concern on fighting corruption. Expansion and consolidation of democracy at the grassroots level has enabled citizens to use the vote and new-found civil liberties to confront corruption, prompting leaders and opposition figures to show a stronger anti-corruption commitment. Internationally, since the end of the Cold War, donor governments have focused less on ideological grounds for foreign assistance and concentrated more on trade and development, both of which are undermined by corruption. Countries with high levels of corruption, like India, have found themselves less able to attract investment and aid in a competitive global market. At the same time, business within the country has faced ever stiffer competition with the globalization of trade and capital markets, and has become less willing to tolerate the expense and risk associated with corruption.

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303 *Ibid.*

304 Rachael Revesz, *"Panama Papers: Millions of leaked documents reveal how world's rich and powerful hide their money", Available at*: http://timesofindia.indiatimes.com/world/us/Panama-Papers-Millions-of-leaked-documents-reveal-how-worlds-rich-and-powerful-hide-their-money/articleshow/51677505.cms (visited on April 4, 2016).

There is little doubt that corruption in present-day India pervades all levels and all services, not even sparing the Indian Administrative Service and Judicial Service. The bureaucracy of the British India was considered to be largely untainted with corruption. Compulsions of electoral politics in independent India changed this image and the administrative as well as the police and judicial services came to be charged with colluding with the political leadership to indulge in systemic corruption, making a mockery of democratic governance and frustrating the prime object of welfare State.

Professor Edwin H. Sutherland has done a remarkable job to find out the traces of crime out of disguised activities of people. He is the pioneer of the study of "white collar crimes" through which he which breached the ancient legal view that a king could do no wrong. His analysis of white collar crimes is a significant tool to find out the genesis and mechanism of corruption. White collar crimes are the illegal acts done by the persons who are rich and belong to upper strata of the society in terms of money, power and position. They misuse the machinery of the State at the cost of poor and needy people. They indulge into activities involving economic crimes. This richer socio-economic group exploits the resources of the economy to the detriment of the public at large. In fact, these activities affect the total crime phenomenon and results into a vicious circle of crimes related to each other in a subtle way. Another important part of his study reveals that the relation between status and criminal behavior is not one-dimensional and even the people of higher strata are also a part to certain crimes. These crimes are categorized as 'white collar crimes'. Hence there are no class-specific explanations to interpret such behavior of people involved into crime.

In this way Professor Sutherland has broken the traditional belief that people who live below the poverty line are more prone to indulge into crimes and show criminal behavior. Traditional hypotheses of criminal conduct put much accentuation on poverty as the reason for the wrongdoing or on the other social conditions and individual characteristics which are thought to be connected with deprivation or poverty. The assumption behind these speculations is that criminal conduct can be explained through these unreasonable elements social or individual. The social pathologies which have been underlined are poverty and related elements like poor

lodging, absence of training and interruption in family life. The individual pathologies which have been recommended as clarification of criminal conduct were, at in the first place, physical anomalies. He argued that the traditional theories of criminal behavior taking their data from poverty and other related conditions are scanty and unacceptable. He contended that there are two reasons behind it. Firstly, the traditional theories do not correspond to the data collected for the purpose of establishing criminal behavior. Secondly, these theories are founded upon prejudiced and biased sample of all criminal acts.

Sutherland kept up that standard components are not poverty and other related factors, but rather the social and individual relations which are related now and then with poverty and at times with wealth and sometimes with both. The hypotheses of criminal conduct which are held by most researchers working in this field have been founded on investigations of the culprits who are captured, tried in the criminal courts, and, if indicted, fined, put on post-trial supervision, or perpetrated to corrective and reformatory organizations[305]. Such offenders have their cause in a substantial extent of cases in the lower socio-economic status. Thus, these biased samples cannot be taken as an authentic basis for the research.

Professor Sutherland maintained that the persons of upper socio-economic class are also engaged in crimes and have such criminal behavior, though the instances and types of crime may be different. According to Prof. Sutherland, the people who belong to upper strata are indulged into economic crimes and since they enjoy good positions in life are called "white-collar criminals". This criminal conduct is not quite the same as the criminal conduct of the lower financial class, mainly, in the administrative procedures which are utilized as a part of managing the wrongdoers. According to Sutherland, "a white-collar crime is defined as a violation of the criminal law by a person of the upper socio-economic class in the course of his occupational activities"[306]. Hence there are three main elements of white collar crimes:

i. there is violation of criminal law,

[305] Edwin H. Sutherland, "Crime and Business" 217 *AAAP&SS* 115 (1941).
[306] *Id*. at 112.

ii. by a person of the upper socio-economic class,

iii. in the course of his occupational activities.

Prof. Sutherland maintains that his definition of "white collar crimes" is not definite one and is just approximate. But, this definition is generally accepted by the concerned persons. The upper financial class is characterized by its wealth as well as by its respectability and esteem in the general society. It alienates the idea of poverty as causation of criminal behavior from the common belief which used to express otherwise. However, Heremann Mannheim is of the opinion that Prof. Sutherland has underestimated the influence of poverty on other forms of crime[307]. But this opinion of Mannheim does not take away any credit away from Prof. Sutherland who has done a remarkable job into the field of criminology and to find out the reasons behind criminality of the wrongdoers.

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Amid the time of IInd World War, a huge amount of money was raised and spent on war arrangements. New offices were opened; a substantial number of contractual workers were employed for execution of government work associated with war endeavors. Since the assignments were to be finished within the fixed or stipulated time, the adherence to money related guidelines and regulations was avoided many a times, in this way, a circumstance was made which was quickly misused by deceitful, covetous and greedy persons (both authorities and non-authorities) for their personal benefits at the expense of society and government. The

307 *"Understanding White-Collar Crime", Available at*: http://www.sagepub.com/sites/default/files/upm-binaries/43839_2.pdf (visited on April 2, 2016).

then existing Government of India understood the wickedness of the issue and made special staff was vested by Deputy Inspector General of Police and the superintendence of special staff was vested with War and Supply Department.

Since this new Department was made by an executive order of Central Government which was not in harmony with the provisions of the Government of India Act, 1935 the power and jurisdiction of the Investigating Officers were tested in Court of Law which required declaration of an Ordinance on July 12, 1943 (No. XXII of 1943). The Ordinance provided for the establishment of Special Police for the examination of specific classes of offenses with jurisdiction in British India. Another ordinance was declared on September, 25, 1946 preceding the failure of the past ordinance issued in 1943.

In this way, the seeds of corruption find their roots from the pre-Independence period which affected the future generations and the evil of corruption continued as a tradition. The mid-1960s is considered to be the great divide in the history of public administration in India. It marked the fading away of the Gandhian and Nehruvian era of principled politics and the emergence of new politics the keynote of which was amorality. The scams and scandals of the nineties revealed that among the persons accused of corruption were former Prime Ministers, former Chief Ministers, and even former Governors. India's experience with corruption has shown that laws, rules, regulations, procedures and methods of transaction of government business, however sound and excellent cannot by themselves ensure effective and transparent administration if the political and administrative leadership entrusted with their enforcement fails to do so and abuses its powers for personal gain. The moral up-gradation of people in all the walks of life along with effective implementation of anti-corruption laws can be of big help in this context.

There has been disintegration of moral values among the people for the sake of attaining an extravagant life-style. Hence, they are prompted to indulge into mala fide dealings to attain a lavish standard of life. All this has resulted into a chaos into the society. The segment which is suffering badly because of this evil is the common man. The common man is unable to get what is his basic right being a citizen of the biggest

democracy of the world. A democracy can never be successful in real terms if there is an atmosphere of corruption. In this chapter we are going to study about the provisions of the Prevention of Corruption Act, 1988 and their efficacy. We are also going to observe whether there is any need of amendment or incorporation of some new provisions in the present statute.

4.2. DEFINITION OF PUBLIC SERVANT

As the Act covers the wrongful acts committed by the public servants, it becomes necessary to know about the persons who are public servants. Simply, we can say the persons who are in the employment of the Government are public servants. But the term 'public servant' has to be seen in a broader perspective. The State of modern world is a welfare State and it has to perform a number of activities to serve the people in a better way. For this purpose the State has to act in numerous ways by involving a number of agencies or instrumentalities. The purpose of prevention of corruption is to regulate the administration so that the benefits of the schemes should reach the poor and downtrodden people effectively. So it becomes the duty of the Government to regulate the behavior not only of the persons who are in the employment of the Government, but also of the persons who are part of these agencies and instrumentalities. So a broader definition is needed and the Act provides the same. The definition covers a number of people who are the part of the system in one or other way.

'public servant' means[308]:

i. *any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty;*
ii. *any person in the service or pay of a local authority;*
iii. *any person in the service or pay of a corporation established by or under a Central, provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government*

[308] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 2 (c).

company as defined in Section 617 of the Companies Act, 1956 (1 of 1956);

iv. *any judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;*

v. *any person authorised by a Court of justice to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such Court;*

vi. *any arbitrator or other person to whom any cause or matter has been referred for decision or report by a Court of justice or by a competent public authority;*

vii. *any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election;*

viii. *any person who holds an office by virtue of which he is authorized or required to perform any public duty;*

ix. *any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956);*

x. *any person who is a chairman, member or employee of any Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board;*

xi. *any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by*

whatever designation called, of any University and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations;

xii. *any person who is an office-bearer or an employee of an educational, scientific, social, cultural or any other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority.*

Explanation I: *Persons falling under any of the above sub-clauses are public servants, whether appointed by the Government or not.*

Explanation II: *Wherever the word "public servant" occurs, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.*

The term "public servant" is one of the most important terms given under the Prevention of Corruption Act, 1988. It is of utmost importance because of being deciding factor of one's liability being a public servant. Previous anti-corruption legislation i.e., the Prevention of Corruption Act, 1947 did not define the term "public servant". It used to adopt[309] the definition as is given under Section 21 of the Penal Code, 1860. Thus, the Prevention of Corruption Act, 1988 provides a broader definition of the term within the Act itself under Section 2 (c).

4.2.1. ORIGIN AND DEVELOPMENT OF THE TERM "PUBLIC SERVANT"

The Prevention of Corruption Act, 1947 punished the wrongdoers (public servants) for the acts committed by them in violation of the provisions of the Act. But, it did not define the term "public servant" explicitly. It was dependent[310] upon the definition of the term as is given in the Indian Penal Code[311]. The term "public servant" was defined for the first time within an anti-corruption legislation under the

309 The Prevention of Corruption Act, 1947 (Act 2 of 1947), s. 3.
310 *Ibid.*
311 The Indian Penal Code, 1860 (Act 45 of 1860), s. 21.

Prevention of Corruption Act, 1988[312]. The Prevention of Corruption Act, 1988 gives a broader definition of the term as compared to previous enactments concerned.

First of all, we have to analyze the Indian Penal Code to know about the origin and development of the term. The first Law Commission was constituted in 1834 by the Charter Act of 1833 under the Chairmanship of Lord Macaulay which recommended codification of the Penal Code, the Criminal Procedure Code and a few other matters[313]. The term was used for the first time in any legislation in India.

The Indian Penal Code was initially drafted by the 1st Law Commission constituted in 1834 on the resourcefulness of Lord Macaulay who moved the House of Commons in 1833 for codifying the Criminal Law. The draft code was submitted to the Governor-General of India in Council, in the year 1837 by the Commission under the president-ship of Lord Macaulay, Macleod Anderson and Milett were other Commissioners as members. The assignment before the commission was massive; as it needed to accommodate the current law without upsetting diverse classes, groups and ethnic congregations. Lord Macaulay examined while completing the job, "I trust that no nation ever stood in such a great need of getting a code of law as India and I accept likewise that there never was a nation in which the need may be so effortlessly supplied. Our Principle is basically this consistency when you can have it, differing qualities when you should have it, yet in all cases conviction". Macaulay Code couldn't be completed as it was transferred to the Law Advisers of the Crown, then to another Commission which presented its 2nd and last report in 1847. Again it was modified by Bethune and Peacock, who were the Law Members from the Council of Governor-General.

At the occasion of dialog and debate on the draft of the code the objections were raised that, Section 21 of the Code is excessively far reaching yet it was

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312 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 2 (c).

313 Available at the official website of Law Commission of India at: http://www.lawcommissionofindia.nic.in/main.htm#a1 (visited on April 7, 2016). It was Commission constituted during pre-Independence time. Afterwards, Ist Law Commission was constituted under the chairmanship of Mr. M. C. Setalvad, Former Attorney General of India for the period 1955-1958 in post-Independence period. Recently, Twenty-First Law Commission was constituted by the Central Government under the chairmanship of Dr. Justice Balbir Singh Chauhan.

overruled by Lord Macaulay who supported it. Later on, we find that the same provision of the Act could not adapt to the needs of the dynamic culture and was required to be altered over and over. The Indian Penal Code was finalized on 6th October, 1860 (however, after correction draft code was submitted in the year 1847) a century prior to India earned independence, which clarifies why the provisions made with respect to public servant were discovered and required amendments on numerous occasions.

People who are listed as public servant under Section 21 of Indian Penal Code are mentioned in the Code with regards to offenses done by them (Chapter VI, Sections 128 and 129; Chapter VII-Offenses relating to Army, Navy and Air Force, Chapter IX, Sections 161-169) furthermore the offenses as for them (Chapter VI, Sections 124; Chapter IX, Section 170-171; Chapter X, Section 172-190; Chapter XVI, Sections 332-333; Chapter XXI, Sections 500-502). The anti-corruption laws are related with public servants with regards to offenses carried out by them, in this way, the Prevention of Corruption Act, 1988 has repealed Sections 161-165A (both inclusive) of the Indian Penal Code (Act 45 of 1860) and provisions have been consolidated in the new Act besides repealing the Prevention of Corruption Act, 1947 (2 of 1947) and Criminal Law Amendment Act, 1952 (46 of 1952).

The provisions of Section 2 (c) of the Prevention of Corruption Act, 1988 which defines the term "public servant", have been procured from Section 21 of the Indian Penal Code and new provisions have also been incorporated to make it more comprehensive and broad. Section 21of the Indian Penal Code was clause 14 in the draft of the bill introduced by Lord Macaulay. There were just 10 Clauses and 1 Explanation in the original Act of 1860. The eleventh clause with Explanation 3 was introduced in 1920 by the Indian Election Offenses and Enquiries Act, 1920[314]. The twelfth clause and Explanation 4 were included the year 1958 Criminal Law Amendment Act, 1950, which included 'officers in the service or pay of the local authority or corporation' and so forth in the class of public servants. On the recommendation of Santhanam Committee Report the Anti-Corruption Laws

[314] The Indian Election Offenses and Enquiries Act, 1920 (Act 31 of 1920), s. 2.

(Amendment) Bill, 1964 was presented in the Parliament and framed as Criminal Law (Amendment) Act, 1964 rolling out amendments in Clauses 3, 4, 8, 9 and 12. While Clause 12 has been altered and divided into clauses, has been changed and partitioned into Clause 12 (a) and Clause 12 (b).

The Prevention of Corruption Act of 1988 further broadens the meaning of public servant. At present, there are twelve Clauses and two Explanations given under Section 2 (c) of the Act which are sufficient enough to cover a number of desired persons within the term "public servants". By reading the concerned provisions from both the enactments (Indian Penal Code, 1860 and the Prevention of Corruption Act, 1988), we can find that the provisions (i), (ii), (iii), of Section 2 (c) of the Prevention of Corruption Act corresponds to Clause (12) of Section 21 of the Indian Penal Code and Clauses (iv), (v), (vi), (vii) of Section 2 of the Prevention of Corruption Act, 1988 relate to Clause (3), (4), (6), (11) of Section 21 of the Indian Penal Code. The Clauses (vii), (ix), (xi), (xii) of Section 2 of the Prevention of Corruption Act, 1988 are new provisions.

The Prevention of Corruption Act, 1988 has also put up at rest the controversy made by clashing judgments of different High Courts which had resulted into uncertainty and confusion into the brains of the police, investigation agencies and the Courts regarding the cases of bribery and corruption. The Clause (b) has been added in Section 2 which characterizes 'public duty' as "duty in the discharge of which the State, the public or the community at large has an interest". In this way the term 'public duty' is in consonance with the term "public servant" and the parameter for establishing nature of the employment has shifted from pay and remuneration to public duty, which is a welcome move. The Explanation to the clause (b) of Section 2 of the Prevention of Corruption Act clarifies the word 'State' which includes "a Corporation established under a Central, Provincial or State Act or Authority or a Body owned or controlled or aided by the Government or a Government Company as defined in Section 617 of Company Act, 1956 (1 of 1956)". Section 2 (c) Clauses i-ii of the Prevention of Corruption Act, 1988 along with Explanation to Section 2 (b)

characterizes 'public servants' on the basis of pay or remuneration given by or drawn from the State or Government fund.

Indeed, even before the existence of the Prevention of Corruption Act, 1988 it was held in *G.A. Monterio v. State of Ajmer*[315] that genuine test to find out if a person is a public servant is whether he is in pay or remuneration of Government and whether he is endowed with the execution of a public duty and in case if both these preconditions are fulfilled then the nature of office does not make a difference.

The Clauses iv-vi of Section 2 (c) of the Prevention of Corruption Act mentions officers of the Court. Just minor variations have been made in Section 21 of the Indian Penal Code. Correspondingly, the Clause (vii) of Section 2 (c) of the Act does not require any explanation in this context. Section 2 (c), Clause (viii) of the Act is another provision which added a fresh classification to the term "public servant" and gives another idea to the definition by importing the term "public duty" in Section 2 (b). A *Sarpanch* of *Gram Panchayat* is a public servant as per the meaning of this provision. It was held in *Bhanwar Lal Mali v. State of Raj*[316] that a *Sarpanch* is a public servant therefore previous sanction is necessary before initiating prosecution.

The question whether an M.L.A. or M.P. can be held a public servant as per the domain of Section 2 (c) (viii) was challenged in Courts before establishment of the Prevention of Corruption Act, 1988 and it was held in dominant instances that he is not a public servant inside of the domain of Section 21 of I.P.C. Presently, after the making the Prevention of Corruption Act, 1988 circumstances have changed definitely and interpretation has become obsolete as the new definition covers M.L.A. and M.P.'s as well. In another case, *Habibulla Khan v. State of Orissa*[317] it was held that, however a M.L.A would come within the meaning of term "public servant"' yet he is not the sort of "public servant" for whose prosecution previous sanction is required. This anomaly was further settled by a 5-judge Bench of the Hon'ble apex court in *P.V. Narasimha Rao v. State (C.B.I.)* [318]which held that a Member of Parliament holds an

315 AIR 1957 SC 13
316 1994 (3) Crimes 791 (Raj)
317 1993 (Cr. L.J. 3604)
318 1998 Cr. L.J. 2930

office and by virtue of such office he is required or accredited to perform duties and such duties are in the nature of public duties. As a result, an MP would therefore fall within the ambit of sub-clause (viii) of clause (c) of section 2 of the Prevention of Corruption Act, 1988 even though there is no authority who can grant sanction for his prosecution under section 19(1) of the Act. It was also held that sanction is not necessary for the court to take cognizance of the offences and the prosecuting agency shall take permission ofbthe Chairman of the Rajya Sabha or Speaker of the Lok Sabha as the case may be before filing the charge sheet.

The Sub Clauses (x) to (xii) to the Clause (c) of Section are explicit and these classes of public functionaries have been categorized as public servants with all their privileges and liabilities. The Explanations 1 and 2 have been added to remove confusion and to deal with any controversial situation. Any person, who undertakes upon himself duties and responsibilities attached to a public servant, should be considered as a public servant and the fact that he is not receiving any salary or remuneration should not be permitted to change the position. An ex-public servant may also be prosecuted under the Prevention of Corruption Act, 1988 as decisive date for the purpose of applying the provisions of the Act is the date of commission of the offence and not the date of superannuation, resignation, removal and

The Monumental Acts, specifically, the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act were made over a century back completely in a different socio-political atmosphere yet they were able to tackle all the problems for which they were made even after the because of the foresightedness of the vision of the individuals who drafted these legislations. The Indian Penal Code was the first to be drafted but came into law books as a law after 26 years of its proposal and final review by Bethune and Peacock, who were the law members of the Governor-General's Council. It is implied that the Commission and different Committees constituted for the draft drew intensely on English Laws and then-prevailing Indian law. In addition, necessary help was taken from Livingstone's Louisiana Code and the Code of Napoleon. In spite of the way that men of prominence were connected with the drafting of statutes and they took assistance from

all relevant sources of that time; furthermore that the Act was viewed as most state-of-the-art for just about 100 years, it required changes particularly in context of anti-corruption law and were appropriately affected.

The changes made to these enactments predominantly went for making the law more successful and with this in perspective endeavors have been made to bring presumptions in favour of prosecution. The progressions were likewise introduced to remove practical hindrances hampering the fair investigation of cases. The jurisdiction, controls and powers of the investigating agencies were additionally improved. The idea of Welfare State changed the aggregate situation and the State entered in the field of industry and business which started the allocation of government's scheme and budget to the fields and persons unreached until now. A class of new functionaries rose to the picture that took care of huge government cash which originated the seeds of corruption among the public servants who were in charge of those schemes and budget. As a result of it there came into existence an atmosphere of chaos and dissatisfaction among the general public which originated the demand of responsibility, accountability and susceptibility of the highest public servants which further resulted into the introduction of changes into the definition of public servants.

The growing public opinion in favour of establishing the offices of *Lokayuktas* in States and *Lokpal* at Centre is also a result of decreasing ethical and professional responsibility on the part of public servants. There is a strong public opinion in favour of bringing Ministers, Chief Ministers and Prime Minister under the *Lokayuktas* and *Lokpal* which is evident from the protests and *dharnas* initiated by a vast section of the people including civil society in recent years. The Prevention of Corruption Act, 1988 is point of interest in this context as it has brought together the provisions of other enactments by consolidating them besides extending the scope of Section 21 of I.P.C to make it harmonious and consistent with present socio-economic changes and environment.

In this way the complete scenario has been changed and we have to evolve new methods, schemes, procedure and techniques to control the evil of corruption. The

Court has adjudged a number of persons as public servant by giving the term 'public servant' a broad interpretation. Following persons have been held as public servant:

4.2.2. MINISTER, CHIEF MINISTER AND PRIME MINISTER – WHETHER PUBLIC SERVANT OR NOT?

A Minister, Prime Minister and Chief Minister is a public servant in terms of Clause (12) of Section 21 of the Indian Penal Code itself which corresponds to sub-clause (i) of clause (c) of Section 2 of the Prevention of Corruption Act, 1988. The honorable Supreme Court in *M. Karunanidhi v. Union of India*[319], held that a Minister is appointed and dismissed by the Governor and is therefore subordinate to him, that he gets salary for the public work done or the public duty performed by him and that the said salary is paid to him out of the government funds.

A Member of Legislative Assembly (MLA), however, was held not to be a public servant under Section 21 of the Indian Penal Code but he comes within the purview of the sub-Clause (viii) of Clause (c) of section 2 of the Prevention of Corruption Act, 1988. As held by the High Court of Orissa, an M.L.A. "holds an office" and "performs public duty" in *Habibulla Khan v. State of Orissa*[320]. In the appeal, the Supreme Court proceeded "assuming" that M.L.A. is a public servant. In a later decision in the case of *P.V. Narasimha Rao v. State (C.B.I).*[321], (decided on 17-4-1998), a 5-judge Bench of the Apex Court laid down that a Member of Parliament holds an office and by virtue of such office he is required or authorised to perform duties and such duties are in the nature of public duties. An MP would therefore fall within the ambit of sub-clause (viii) of clause (c) of section 2 of the Prevention of Corruption Act, 1988 even though there is no authority who can grant sanction for his prosecution under section 19 (1) of the Act. Sanction is not necessary for the court to take cognizance of the offences and the prosecuting agency shall, before filing a charge sheet for offences punishable under sections 7, 10, 11, 13 and 15 of the Act

319 1979 Cr. L. J. 773, AIR 1979 SC 598
320 1993 Cr. L.J. 3604
321 1998 Cr. L.J. 2930

against an M.P. in a criminal court, obtain the permission of the Chairman of the Rajya Sabha or Speaker of the Lok Sabha as the case may be.

4.3. DEFINITION OF THE TERM 'PUBLIC DUTY'

The Prevention of Corruption Act, 1988 is an effective tool to fight with the evil of corruption. It is important to discuss general terms given into the Act. It is a reformed enactment as compared to its earlier versions because it has removed various doubts by defining various terms which were not defined earlier. These terms are important because these are used within the Act a number of times. One of such terms is 'public duty'. Like the term 'public servants'; 'public duty' is also defined under the Prevention of Corruption Act, 1988. The term 'public duty' is relevant to decide the liability of the public servants under various circumstances. The breach of duty results into criminal omission. The Act provides a broad definition of the term to cover all present and future instances without leaving any scope of confusion regarding the functions of the public servants when it comes to their duties and discretionary powers. It defines the term as[322]:

> '*public duty' means a duty in the discharge of which the State, the public or the community at large has an interest;*
>
> *Explanation - In this clause 'State' includes a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956.*

Recently, on 23rd February 2016, the Hon'ble Supreme Court of India has widened the definition of 'public servants' by taking help of the term 'public duty'. In *Central Bureau of Investigation, Bank Securities & Fraud Cell v. Ramesh Gelli & Others*[323] and *Ramesh Gelli v. Central Bureau of Investigation through*

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322 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 2 (b).

323 [Criminal Appeal Nos. 1077-1081 of 2013], *Available at*: http://supremecourtofindia.nic.in/FileServer/2016-02-23_1456211032.pdf (visited on May 30, 2016).

Superintendent of Police, BS & FC & Anr.[324] the Court held that every chairman who is appointed on a whole-time basis, managing director, director, auditor, liquidator, manager and any other employee of a banking company shall be deemed to be a public servant for the purposes of the Indian Penal Code. In an another case, *Dadaji v. State of Maharashtra*[325], the Hon'ble Supreme Court has held that public duty means a duty in the discharge of which the State, public or community at large has an interest. This definition should be extended to semi-Government authorities, bodies and their Departments where the employees are entrusted with public duty.

4.4. PRIVATE PERSONS ARE ALSO COVERED TO SOME EXTENT

As we have discussed, the Prevention of Corruption Act, 1988 is applicable upon public servants. To some extent, it is also applicable upon a category of private persons; which we are going to discuss in this part. Though the Prevention of Corruption Act, 1988 punishes for the offences committed by the public servants, yet there are some instances where it is applicable upon some private persons as well. These are the situations where a person takes illegal gratification to influence a public servant. It is provided under the Act that[326]:

> *"Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant, whether named or otherwise, to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be*

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324 [Writ Petition (Crl.) No. 167 of 2015], *Available at*: http://supremecourtofindia.nic.in/FileServer/2016-02-23_1456211032.pdf (visited on May 30, 2016).

325 2016 (3) RCR (Criminal) 741

326 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 8.

punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine."

Thus, whenever an illegal remuneration is received by a person other than a public servant upon the conditions given under Section 8 of the Act (which are same as are given under Section 7), such other person shall also be liable for the offence. The punishment provided under the Act is from six months of imprisonment to five years along with the fine. Similarly, the acts committed by the persons who use their personal influence with the public servants to get illegal gratification are also committed under the Act. The relevant provision states that[327]:

"Whoever accepts or obtains or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant whether named or otherwise to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine."

Thus, the persons who are somewhere related with the public servants involved into corrupt practices are covered under this Section. It is an important provision considering V.I.P. culture in our country. There are a number of persons who happens to be relatives, acquaintance or friends of public servants who boasts of their relation with such public servants and try to get illegal benefits at many places. In addition, this provision also discourages the public servants' intention of getting illegal benefits by hiding their identity behind the identity of some other persons.

[327] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 9.

4.5. INTERPRETATION OF 'KNOWN SOURCES OF INCOME' IN PREVENTION OF CORRUPTION ACT, 1988

The term 'known source of income' is quite relevant in implementing anti-corruption law. A public servant is under the duty of performing various functions of State. For this he is paid salary which comes from the money paid by the taxpayers. Hence it becomes the duty of the public servants to account for their dealings with respect to government and general public. He is responsible to work in a transparent manner towards the general public. He has to declare all the sources of income for the sake of transparency. Under Clause (e) of sub-section (1) of Section 13, the Prevention of Corruption Act, 1988 we come across to an offence which is generally called 'possession of disproportionate assets'. It is described in the following words - A public servant commits the offence of criminal misconduct if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources of income. Thus it becomes a part of the offence of criminal misconduct if such public servant is in possession of assets for which he cannot satisfactorily account for.

It might be correlated here to specify that the offence of having disproportionate assets was for the first time incorporated into the law by introduction of Section 13 (5) (e) of the earlier Prevention of Corruption Act, 1947. It did not existed there originally but was introduced later by the Criminal Law Amendment Act, 1964 (40 of 1964) on the premise of the suggestions of the Santhanam Committee formed by the Central Government. It might be further specified that before its turning into a substantive offence without precedent for 1964, the act of possessing disproportionate resources by a public servant was just a rule of evidence characterized under Section 5 (3) of the Prevention of Corruption Act, 1947 with just an option for proving the offence of criminal misconduct alternatively.

The above mentioned definition makes it profusely clear that the commission of the said offence gets completed just when the ownership of financial assets of property is unbalanced to the known sources of income. The expression "known

sources of income" was not characterized in the erstwhile Prevention of Corruption Act, 1947 or in the Criminal Law Amendment Act, 1964 which incorporated this offense for the first time. However, the term was devised by the courts of law later on.

In *Tarsem Singh & Others v. State, Chandigarh Administration*[328], Sections 420, 471, 468 of the Indian Penal Code and Section 389 of the Criminal Procedure Code were in question. The conviction of accused who was a public servant was suspended. Considering Section 13 (1) (d) and Section 13 (2) of the Prevention of Corruption Act, 1988, it was held by the Court that the discretion should not be applied routinely without considering all the aspects including implication of suspending such sentence.

In *Parkash Singh Badal and another v. State of Punjab and others*[329], under Section 197 of the Code of Criminal Procedure, it was held that where prosecution of a public servant with respect to an offence perpetrated amid discharge of official duty, the court cannot take cognizance of the offence without previous consent of competent sanctioning authority which is compulsory. The implication of words "no" and "shall" in Section 197 of the Code of Criminal Procedure makes it inexhaustibly clear that the bar on taking cognizance of the offence by the court is complete and unqualified. Hence, very cognizance by the courts is prohibited. Section 19 of the Prevention of Corruption Act, 1988 describes that where a criminal act is done under the guise of power but in reality, it is done for such public servant's own pleasure or advantage then such acts shall not be made immune as per the Doctrine of State Immunity. Where the act is performed under the shade of office for the advantage or pleasure of such officer Section 19 (1) will be applicable. In this way, Section 19 (1) is related with the time and type of the offence concerned.

The case of *C.S.D. Swamy v. State*[330] is also relevant in this context. In this case it was held by the court that the burden of proving the source of disproportionate assets lies upon the accused. The Legislature by using the expression "satisfactorily

328 2006 (1) RCR (Criminal) 831 (P&H)
329 2007 (1) RCR (Criminal) 1
330 AIR 1960 SC 7

account" in Section 5 (3) of the Act, cast the burden on the accused not only to offer a plausible explanation as to how he came by the large wealth disproportionate to his known sources of income, but also to satisfy the court that his explanation was worthy of credence. Consequently, cases under the general law where it had been held that the accused could be exonerated if he offered a plausible explanation could have no application[331].

The court also explained the application of the term "known source of income". The expression "known sources of income" used in that section referred to such sources of income as became known to the prosecution as a result of the investigation and could not mean those that were within the special knowledge of the accused, and it was no part of the duty of the prosecution to lead evidence in that regard. The prosecution cannot, in the very nature of things, be expected to know the affairs of an accused person. Those will be matters especially within the knowledge of the accused within the meaning of Section 106 of the Evidence Act. Where the prosecution fulfilled the conditions laid down by the earlier part of Section 5 (3) of the Act, the statutory presumption had to be raised and it would be for the accused to rebut the same by cogent evidence.

The above mentioned elucidation of the term "known source of income" was repeated by the Hon'ble Supreme Court in *Sajjan Singh v. State of Punjab*[332] and *Hemant Kumar Mohanti v. State of Orissa*[333]. What is important to know here is that the term "known source of income" has been defined under the Prevention of Corruption Act, 1988 which is described as[334]:

> *"Explanation :- 'Known Sources of Income" means income received from any lawful source and such receipt has been intimated in accordance with the provision of the law, rules or orders for the time being applicable to a public servant".*

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331 *Available at*: https://indiankanoon.org/doc/620182/ (visited on May 15, 2016).
332 AIR 1964 SC 464, 1964 SCR (4) 630
333 1973 (1) SLR 1121
334 Explanation to the Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 13 (1) (e).

Thus, there is no need to take inference from other sources about the meaning of the term "known source of income" as the term is specifically defined under the Act. Now, we can conclude here that for a source of income to be qualified as a "known source of income" under Section 13 (1) (e) of the Prevention of Corruption Act, 1988, following conditions have to be fulfilled:

i. Income has to be drawn out from a lawful source of income, and
ii. There should be an intimation of the receipt of such income from a lawful source, in accordance with the provision of the law, rules or orders applicable upon such public servant, for the time being in force.

As a natural consequence, it can be deduced that:

i. any income received from a source which is not lawful cannot be considered for inclusion in the expression known sources of income for the purpose of Section 13 (1) (e) of the said Act, even if such an income was actually received by the concerned public servant. Any income or other amount of money obtained from a source which is not legal cannot find a place into the term "known source of income" given under Section 13 (1) (e) of the Prevention of Corruption Act.
ii. Any income received even from a legal source, cannot in the same manner be considered to be included within the term "known sources of income" for the above mentioned purpose, if the acknowledgment of such income other amount of money has not been intimated to the concerned authority in accordance with the provision of any law, rules or orders for the time being in force applicable upon such concerned public servant.

In this manner, it is abundantly clear from the above discussed analysis that even if the presence of a specific source of income is demonstrated by a public servant, it will not be considered as a "known source of income" if both of the requirements, which we have discussed recently, are not fulfilled. When it comes to ascertain that whether an offence of possessing disproportionate assets under Section 13 (1) (e) of the Prevention of Corruption Act, 1988 has been made out or not, if these two

requirements are not fulfilled, the prosecution will not be able to start legal proceeding against such person alleged to be having disproportionate source of income or assets.

There have been a few hesitations in some corners such that the above said meaning of "known sources of income" results into some problem or impediment or unfairness to the charged public servant and spots an overwhelming burden of proof upon him to guarantee that his sources of income be legal, as well as that receipt of any of such sources be informed to the concerned authorities as per the provisions of any law, rules or orders for the time being in force applicable upon such public servant. Any resistance with both of these two fundamental requirements in appreciation of a specific source of income received by a public servant will keep such source of income out of the definition of "known sources of income" for the purpose of determining as to whether an offence under Clause (e) of sub-section (1) of Section 13 of the Prevention of Corruption Act, 1988 is committed or not.

In this way, this provision has resulted into a kind of imbalance between prosecution and defence, by favouring prosecution and causing hardship or inconvenience for the defence. In perspective of this, the contentions of bringing hardship, disadvantage, unfairness or injustice to a public servant accused of having disproportionate assets because of the above discussed meaning of "known sources of income" are now and again discussed in some corners and it is questioned whether the said definition will serve the purpose of awarding justice in a court of law. But these contentions do not deserve much support because of dreaded consequences of the acts of bribery and corruption. Giving some relaxations in this regard will also defeat the purpose of erecting zero-tolerance policy against the evil of corruption which is the need of the hour to combat this ever growing evil defeating the noble cause of social justice.

4.6. INVESTIGATION OR ENFORCEMENT AGENCIES

The present day range of economic offences is far too many in its range as well as level of sophistication of its commission.[335] Considering the significance to cope

[335] Upendra Thakur, *Corruption in Ancient India* 89 (Abinav Publications, New Delhi, 1979).

with such sort of offenses which undermine the economy of the nation, the Government of India has set up various investigation or enforcement agencies having the essential ability and expertise to scrutinize such kind of violations with fruitful results. These investigation agencies are exceptionally authorised under pertinent provisions of the different Acts as recorded in the forthcoming paragraphs with the essential goal of dealing with economic offenses falling under their particular ambits. Mutual participation and coordination among various law implementation authorities is must to accomplish their objective. Directorate exists to guarantee that serious offences, frauds, cheatings and tricks are adequately examined for successful results of trial.

The underlying endeavors in this course of setting up Special Agencies to explore wrongdoings of such nature falling under the scope of economic offenses furthermore to cope with bribery and corruption with respect to public servants, was accomplished by an extraordinary enactment to be specific "The Delhi Special Police Establishment Act, 1946". The Special Police Establishment constituted in 1946 now known as Central Bureau of Investigation since 1962, is in presence with the end goal of examination of specific offences of certain classes of offenses as given under Section 3 of the Delhi Special Police Establishment Act, including the Economic Offenses, in harmony with endeavors of the State Governments, wherever essential.

This specific agency has nationwide operation comparable to monetary offenses as well as offenses identifying with corrupt dealings by public servants and of typical violations of importance by shared assent of Central and also of State Governments[336]. In addition there are several other specific agencies dealing with different economic crimes involving corrupt and illegal dealings which are given under the following table. According to this table, we can easily recognize as to what type of economic offence should be dealt with which specific agency. Furthermore, a great level of participation, cooperation and coordination is required to get the desired results into the field of anti-corruption. Following is the Table showing various

[336] Girish Mishra, *White Collar Crimes* 95 (Gyan Publishing House, Delhi, 1998)

economic crimes, their respective legislations and enforcement authorities dealing with such crimes:

Sr. No.	Economic Crimes	Enforcement Authorities	Act or Legislation
1	Evasion of Tax	Central Board of Direct Taxes (CBDT)	Income Tax Act, 1961
2	Illegal imports or Trafficking of Goods	Collectors of Customs	Customs Act, 1962
3	Illegal Transferring of Smuggled Goods	Central Board of Direct Taxes (CBDT)	Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA), 1947
4	Evasion of Excise Duty	Collectors of Central Excise	Central Excise Act, 1944
5	Theft of Cultural Objects	Police/CBI	Antiquity and Art Treasures Act, 1972
6	Money Laundering	Directorate of Enforcement	The Prevention of Money Laundering Act, 2002
7	Undisclosed Foreign Contributions	Police/CBI	The Foreign Exchange Management Act, 1999 (FEMA)
8	Unlawful Drug Trafficking	Narcotics Control Bureau/Police/CBI	The Narcotic Drugs and Psychotropic Substances Act, 1985
9	Deceitful Bankruptcy	Central Bureau of Investigation	Banking Regulation Act, 1949
10	Corruption and Bribery by Public Servants	Central Bureau of Investigation	Prevention of Corruption Act, 1988

11	Fraud Relating to Banks	State Vigilance Bureau/CBI	Indian Penal Code
12	Insurance Frauds	Police/CBI	Indian Penal Code
13	Unlawful Foreign Trade	Directorate General of Foreign Trade/CBI	The Foreign Trade (Development And Regulation) Act, 1992
14	Fraud relating to Credit/ATM Cards	Police/CBI	The Information Technology Act, 2000 & Indian Penal Code
15	Terrorist Activities	Police/CBI	The Prevention of Terrorism Act, 2002 (POTA)
16	Illegal Trafficking in Arms	Police/CBI	The Prevention of Terrorism Act, 2002 (POTA)
17	Illegal Trafficking in Explosive substances	Police/CBI	Prevention & Control of Explosive Substances Act, 1908
18	Company Frauds	Police/CBI	The Companies Act, 2013

Table: 4.1

Thus it is manifest from the Table: 4.1 that numerous special laws have been legislated in the country which regulate the following areas: Customs, Excise, Taxes, Foreign Exchange, Bribery and Corruption, Narcotics Drugs, Banking, Insurance, Smuggling, Money Laundering, Trade and Commerce relating to export and import etc. The corresponding enactments directly help in implementation of the laws by their corresponding Departmental Enforcement Agencies created. These investigating or enforcement agencies execute legal powers of Enquiry, Investigation, Adjudication, Imposing of Fine and Penalties as are entrusted to them by various enactments or directions. These officers of these Investigating or Enforcement Agencies are also

equipped with powers similar to those of Police in context of summoning witnesses, search and seizure of goods, documents and confiscation of proceeds of crime.

The Economic offenses which aim to further the main motive of attaining illicit benefits require exceptional treatment to counter the problem of bribery and corruption. The all-around developing lawful plan of action to battle Economic Crimes which is prevalently getting described as Money Laundering is by enacting such Legislations which provide for the provisions of attachment and confiscation of the proceeds of crime so as to defeat the basic motive of the wrongdoers by denying them monetary advantage.

There are various statutes or enactments in our country which provide for the confiscation of the proceeds of crime and forfeiture of assets. These enactments include:

i. The Criminal Law (Amendment) Ordinance, 1944;

ii. The Customs Act, 1962 (Sections 118 to 122);

iii. The Code of Criminal Procedure, 1973 (Sec. 452);

iv. Smugglers And Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976;

v. Narcotic Drugs and Psychotropic Substances Act, 1985;

vi. The Foreign Exchange Management Act, 1999 (FEMA).

The provisions given in these enactments have proved to be having great deterrence effect. Hence, keeping in mind this deterrence effect of these provisions new enactments may also be executed in the same way having similar provisions to wipe out the existing dodges and to bring into force an inclusive framework of enactments to make confiscation of properties and forfeiture of assets more effective, in the light of new legislations adopted in different countries.[337]

[337] 47th Report, *"The Trial and Punishment of Social and economic offences"* (Law Commission of India, Ministry of Law and Justice, New Delhi, 1972)

The Table: 4.1 as is shown in this chapter mention various acts which fall under the category of 'Economic Offences'. Various special laws have also been enacted to deal with such acts of 'economic offences'. The Table also indicates the Enforcement or Investigation Agencies authorized to enquire and investigate on getting information of commission of such offences. These agencies or authorities are assembled beneath in the following list for appreciation:

i. Central Bureau of Investigation (CBI);

ii. Enforcement Directorate (ED);

iii. Central Board of Direct Taxes (CBDT);

iv. Reserve Bank of India (RBI) (not directly but by giving guidelines regarding various policies);

v. Directorate of Revenue Intelligence (DRI);

vi. Directorate of Preventive Operations (DPO);

vii. Narcotics Control Bureau (NCB);

viii. Financial Intelligence Unit (FIU);

ix. Directorate General of Foreign Trade (DGFT);

x. Directorate of Income Tax (DIT);

xi. Directorate of Vigilance (State Vigilance Bureaus in States);

xii. Directorate of Enforcement (In States).

In this way, we have discussed about various agencies which are entrusted with the responsibility of carrying out investigation for the prevention of corrupt activities. We may not get the desired results if these agencies work in an isolated way. An effective participation, coordination and co-operation among these agencies can give tremendous results in context of prevention of corruption. The government has recently announced that a multi-agencies group will be constituted comprising various

government agencies – the CBDT, FIU, FT&TR (Foreign Tax and Tax Research) and the RBI[338]. The function of this multi-agency group will be to monitor the accounts disclosed by "Panama Papers" and to book the concerned persons under the relevant law. "Panama Papers" have disclosed that there are five hundred Indians having such account. This kind of arrangement may be adopted in other instances as well to get desired results.

4.7. POLICE OFFICERS AUTHORISED TO INVESTIGATE UNDER THE PREVENTION OF CORRUPTION ACT, 1988

An investigation into the offence is of great essence in criminal justice system. The investigation part is done by the police generally. It is their prime responsibility to collect evidences and try to find out the real persons behind the crime. For this purpose huge powers are given to the police. But, sometimes these wide powers are misused by the police. As in here the matter is related with administration and governance by the public servants, these powers should be scrutinized effectively. For this purpose not all the policemen are allowed to investigate. Only the police officers above a specified rank are allowed to investigate into the case. The police officer competent to investigate the offences would be one not below the rank of[339]:

(a) an inspector of Police of Delhi special police establishment (CBI);

(b) an Assistant Commissioner of Police in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of Section 8 of the Code of Criminal Procedure, 1973;

(c) a Deputy Superintendent of Police or a police officer of equivalent rank, elsewhere; or

(d) an Inspector of Police authorized by state government by general or special order in this behalf.

338 "Multi-agencies to probe Panama Papers", *The Tribune*, April 5, 2016

339 As given under the Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 17.

Further, it is also provided under the same provision that such concerned officer may investigate without getting an order from Metropolitan Magistrate or a Magistrate of first class, as the case may be. In addition, he may go ahead to arrest the accused without any warrant from such Metropolitan Magistrate or a Magistrate of first class, as the case may be; as we have discussed. In this way, we can analyze that not all the policemen are allowed to investigate into the cases of corruption under the Prevention of Corruption Act, 1988. Only the specified police officers can carry out investigation into the offences. Thus, an effective arrangement has been made in context and a fine balance has been made between the two parties i.e., the accused and prosecution so that no public servant is harassed by the police inappropriately. It is an effective arrangement to control the evil of corruption and to establish the rule of law carrying out the noble purpose of natural justice.

4.8.1. PRESUMPTION OF CORRUPTION IN CERTAIN CASES

Presumption is a rule of law which permits a court to assume a fact is true until such time as there is a preponderance (greater weight) of evidence which disproves or outweighs (rebuts) the presumption[340]. Generally, in instances of corruption covered by anti-corruption laws; a presumption is made against the accused that he has received illegal benefits from some other person. It is an effective arrangement to control the evil of corruption by putting the burden of proof upon the accused. There are numerous provisions inside the English law to clarify the origins of presumption in various areas. *Parmod Chander alias Parbodh Chander v. State of Punjab*[341] is a good example of this provision where the accused was working as *Naib Tehsildar* in Punjab. He demanded Rs. 1000/- for attesting the Will of the complainant. A trap was arranged for this purpose and the bribe money was recovered by Police, which the accused had kept on his desk under a paperweight. The shadow witness turned hostile. Conviction was upheld. The accused was not able to explain why the amount of Rs. 1000/- was lying on his table and he also had not given any explanation as to why he

340 *Available at*: http://legal-dictionary.thefreedictionary.com/presumption (visited on May 2, 2016).
341 2006 (2) RCR (Criminal) 239

was falsely implicated into the case by the police and hence his conviction was upheld.

Moreover, it is also not proper to presume that a "trap witness" is an "interested witness". The burden of proving this fact lies upon the defence. In *D. Velayutham v. State Rep. by Inspector of Police, Salem Town, Chennai*[342], the Hon'ble Supreme Court held that:

> *"It would be a derogation and perversion of the purpose and object of anti-corruption law to invariably presuppose that a trap/ decoy witness is an "interested witness", with an ulterior or other than ordinary motive for ensuring the inculpation and punishment of the accused. The burden unquestionably is on the defence to rattle the credibility and trustworthiness of the trap witness' testimony, thereby bringing him under the doubtful glare of the Court as an interested witness. The defence cannot be ballasted with the premise that Courts will, from the outset, be guarded against and suspicious of the testimony of trap witnesses."*

Moreover, it was also settled by the Court in *Vinod Kumar v. State of Punjab*[343] that even when the complainant becomes hostile will not result into collapse of whole case of prosecution and other evidences on record shall also be evaluated for corroboration.

In this part we are going to talk about the presence of presumption in these areas and its genesis. In England, if it is proved during a proceeding under English law i.e., under the Prevention of Corruption Act, 1960; or the Public Bodies Corrupt Practices Act, 1889, that a person has been paid any money gift or received any benefit from any other person or his agent while such first person is in employment of his Majesty or any other government department for holding or seeking to attain a contract from his Majesty or any other government department or public body, then he shall be deemed to have received such money, gift or any other consideration corruptly, unless the contrary is proved beyond any reasonable doubt. Similarly, such

342 AIR 2015 SC 2506
343 AIR 2015 SC 1206

provisions regarding presumption have also been incorporated within Indian law to shift burden of proof upon the accused for preventing the incidents of bribery and corruption among the public servants.

4.8.2. PRESUMPTION *JURIS ET DE JURE*[344]

The presumption regarding instances of corruption in some provisions is *juris et de jure*. These are interpretations drawn by the law in a mandatory way. These are derivations of facts so overwhelming that law won't allow proof to be called to repudiate them. These are similar to the words "conclusive proof" used in Indian Evidence Act.

4.8.3. PRESUMPTION 'SHALL PRESUME'

These are derivations of facts which just hold until proof has been given which repudiates them. They provide only a prime facie verification which might be ousted by evidences which negatives it or by involvement with some other proofs and still more confirmed presumption which proposes an opposite derivation. They are similar to the words 'shall presume' utilized as a part of the Indian Evidence Act and are described effectively under the Act[345]. The rule of presumption is an important part of law of evidence.

4.8.4. PRESUMPTION MAY PRESUME

These do not generally should be classed amongst legitimate presumptions like two classes of presumption discussed earlier because they are inductions of facts and the law does not as in earlier cases order force to draw them yet just advices their doing as such. They are similar to the words "may presume" utilized as a part of Indian Evidence Act e.g. in any trial of an offence culpable under Section 11; under clause (b) of sub-sec (1) of Section 13 it is to be proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself or has agreed to accept or attempted to obtain for himself or for any other person any

344 This phrase is a rule of law of Evidence used to denote conclusive presumptions of law, which cannot be rebutted by evidence. *Available at*: http://legal-dictionary.thefreedictionary.com/Juris+et+de+jure visited on May 3, 2016.

345 The Indian Evidence Act, 1872 (Act 1 of 1872), s. 4.

gratification or any valuable thing from any person it shall be presumed unless the contrary is proved that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing as the case may be as a motive or reward such as is mentioned in Section 7 or as the case may be without consideration or for a consideration which he knows to be inadequate. The provision for legal presumption is given under Section 20 of the Prevention of the Corruption Act, 1988 which corresponds to earlier provision i.e. Section 4 of the Prevention of Corruption Act, 1947. Now we have to analyse the term under the present Act of 1988.

4.8.5. DIFFERENCE BETWEEN PRESUMPTION UNDER SECTION 4 OF THE PREVENTION OF CORRUPTION ACT, 1947 (CORRESPONDING SECTION 20 OF THE NEW ACT) AND SECTION 114 OF EVIDENCE ACT

Under Section 114 of the Evidence Act it is upon the Court to attract or not to attract a presumption with regards to the presence of specific facts while it is mandatory upon the court to attract such presumption under Section 4 (1) of the Prevention of Corruption Act, 1947 (or Section 20 of the Prevention of Corruption Act, 1988). Nevertheless if it is proved that any gratification (other than legal remuneration) or any valuable thing was evidenced to have been received by an accused person then it was mandatory upon the court to draw a presumption that the person received that thing as motive or reward. Therefore, the court has no option in the matter once it was recognized that the accused person had received a sum of money which had not been due to him as legal remuneration or reward. The Privy Council in *Dhanwantrai Balwantrai Desai v. State of Maharashtra*[346], observed that a non-compulsory presumption of fact which ascend from recent possession of stolen property under Section 114 of the Evidence Act in the absence of any judicious clarification only but the exact statutory and mandatory presumption of law under Section 4 of the Prevention of Corruption Act, 1947 could not be so warded off without the definite proof of facts clarifying the receipt of a gratification or reward.

[346] AIR1964 SC 575

4.8.6. NATURE OF PRESUMPTION

Now we are going to find out the nature of the presumption given into the Prevention of Corruption Act. The presumption given under Section 4 emerged not just when the accused had received or had acquired for himself or for some other individual any gratification but additionally when he had received or had gotten for himself or for some other individual any profitable thing from any individual. Cash notes cannot be denied as profitable or valuable things. The presumption under this Section is a presumption of law and hence it is compulsory on the Court to bring this presumption up for each instance brought under this Section because in light of the fact it is a presumption of law and not of facts. In this way the presumption of law constitutes a rule of jurisprudence. This being a presumption of law, when the proofs necessary for raising the presumption are either verified or proved or confessed the court has to carry on the basis that the satisfaction or valuable thing attained by the accused was received by him as a motive or reward until the contrary is proved.

The lawmaking body probably understood that it is hard to convict the accused on the charge of bribery. In these types of cases it could have been very difficult to prove the charge in the absence of presumption because of the peculiarities of the instances. The evidences given in these types of cases are often trained evidences so it was not very easy to establish the charge of bribery beyond the reasonable doubt. The legislature was conscious about the fact that the evil of bribery or corruption amongst public servants represented a major issue and must be adequately dealt with. Hence they introduced the necessity of presumption under various sections of the Prevention of Corruption Act for the sake of transparent and well-organized administrative framework. The presumption given under various sections of the Prevention of Corruption Act is accessible to the Court which is going to try the offences culpable under these provisions. It has provided a relief to the prosecution of the burden of proving the motive in accepting the said gratification. The presumption can be rebutted by the prosecution by providing evidence to the contrary. In *Indra Vijay Alok v. State of Madhya Pradesh*[347] an amount of Rs. 1000/- was given by the respondent to

[347] AIR 2015 SC 3681

the appellant which was later on recovered from his person (appellant). The Hon'ble Court held that the presumption of receiving illegal gratification is made against the accused, unless it is rebutted. In present case, the presumption was not rebutted by the accused and he was sentenced accordingly.

4.8.7. ACCEPTANCE OF GRATIFICATION IS TO BE PROVED FIRST

The presumption under Section 4 (or under Section 20 of new Act) emerges just after verifying that the accused has obtained/accepted or has acquired or had endeavored to get for himself or for any other person any delight/gratification (other than lawful remuneration) or any profitable thing from any individual and that any delight/gratification (other than the lawful remuneration) or any valuable thing had been given by a accused person. This provision required that the prosecution ought to prove that the accused obtained/accepted or consented to obtain/accept the sum as delight/gratification. The expression "accept" signifies "to obtain or take or get with a consenting mind". In this way it was necessary upon the prosecution to demonstrate not just the passing of cash to the accused but additionally that he obtained it with a consenting mind. This would require confirmation of either an agreement to accept/acknowledge before the actual acceptance/acknowledgment or of his consent to accept/acknowledge the same as delight/gratification at the time the money was presented.

Where there was no evidence that the accused acknowledged/accepted the cash as unlawful delight/gratification and the plea of the accused was that the cash was put into his pocket under a false ploy was more plausible than the instance of the presumption. The presumption under Section 4 could not be figured it out. Regardless of the possibility that such presumption emerges it was adequately rebutted if there were condition demonstrating that the prosecution version was not right. It is obligatory for the prosecution to raise presumption under Section 4 to ascertain that not merely the payment of money or thing had been made over to the accused but additionally it had to be proved by the prosecution that such payment or kind amounted to delight/gratification other than legal payment. It was further established that the payment/thing received without motive would not amount to gratification

other than legal remuneration and there was no scope for raising the presumption under Section 4 of the Prevention of Corruption Act (earlier Act).

In the event that one acknowledges delight/gratification or a profitable thing for some other person, he comes under the scope of the Section and shall be charged accordingly. But it is not the case with the person receiving such delight/gratification inadvertently, unconsciously and unknowingly and the bearer or transmitter would not come under the scope of the Section. It was held that such presumption may be rebutted by the accused not just by oral confirmation of witnesses giving evidence for the sake of accused additionally by the statement of the accused given under Section 342 of the Code of Criminal Procedure and by any document produced in favour of accused or by the encompassing circumstances for the case. In *Amrit Lal v. State of Punjab*[348], Section 7 of the Prevention of Corruption Act, 1988 was discussed dealing with bribery. The evidence of complainant regarding the demand of the bribe money not confirmed because of lack of corroboration. The statement of complaint was contradicted regarding the amount of money demanded as bribe. In addition, two witnesses before whom the tainted money was recovered were not examined and given up unnecessarily. The Court held that the appellant was entitled to benefit of doubt and hence was acquitted of the charge.

The presumption raised under Section 4 of the Prevention of Corruption Act, 1947 was not limited to the cases where the accused was in fact charged under Section 161 of the Indian Penal Code but it was also accessible in cases where the accused was charged under some other provision where the graveness of the offence was of same nature as is provided under Section 161 of Indian Penal Code. Additionally, it was also observed that Section 5 of the 1947 Act provided for the same arrangement because the graveness of the offence is same as provided under Section 161 of Indian Penal Code.

Therefore, where the accused was charged under Section 5 of the Prevention of Corruption Act, 1947 the Trial Court was completely right in applying the presumption raised under Section 4 of the Act. While discussing the scope of extent of

348 2006 (3) R.C.R. (Criminal) 796

burden of proof located upon the accused to refute the presumption it was held by the Court that it was adequate if the accused person succeeded in raising a preponderance of probability in his favour and consequently will get the benefit of doubt. In *Sanjay v. State of Maharashtra*[349], Court held that if an accused is tricked into taking the amount, it hardly be treated as an acceptance so as to attract presumption laid down in Section 20 of the Prevention of Corruption Act.

4.9. OFFENCES UNDER THE ACT

In this part we are going to discuss about various acts which are made punishable under the Act. There is a classification of offences under the Act based upon the degree of their consequences. Similarly, acts of abetment, conspiracy, agreement and attempt to do these offences have also been made punishable because it is more important to cut the nip from the bud to discourage such acts of bribery and corruption. Various acts have been categorized under various Sections and are made punishable accordingly. One of the most important offences is the offence of criminal misconduct; which we have already discussed in detail. The habitual offenders committing repeated acts of corruption are punished under this offence. They are awarded higher punishments as they have refused to get reformed and are more dangerous to the society because of their frequent involvement into the crimes. Now, we are going to discuss about various acts made punishable under the Prevention of Corruption Act, 1988:

4.9.1. PUBLIC SERVANTS TAKING ILLEGAL GRATIFICATION

It is a generalized offence mentioned into the Act committed by a public servant taking gratification other than his legal remuneration from any person. Section 7 of the Prevention of Corruption Act, 1988 punishes this offence. The main body of the provision[350] tells about various aspects of the offence of taking illegal gratification which is given as under:

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349 2016 (3) R.C.R. (Criminal) 732

350 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 7.

"Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine."

It is a beautifully crafted provision covering almost all the aspects of offence of receiving a gratification other than legal remuneration. It covers all public servants as well as persons who expect themselves to be public servant though they may not be public servants in actual terms e.g. some defect or lacuna in their employment. Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and thus induces that person to give the public servant, money or any other gratification as a reward for this service, the public servant has committed an offence under this section[351]. In addition, it punishes the act of receiving illegal gratification at all the stages of crime i.e. attempt to commit, agreement to commit and the commission of the act itself. Thus, the provision has great deterrent effect to control this offence. The act is punishable when a public servant accepts or obtains an illegal gratification for himself or any other person. The word "gratification" has also been used broadly and it covers a number of instances and transactions within itself. The word "gratification" is not restricted to pecuniary gratifications or to gratifications estimable in money[352].

[351] The Prevention of Corruption Act, 1988 (Act 49 of 1988), Explanation (e) to s. 7.
[352] The Prevention of Corruption Act, 1988 (Act 49 of 1988), Explanation (b) to s. 7.

The concerned act is committed by the public servant for the consideration of a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person. In this way, the acts of showing or forbearing to show favour or disfavor to any person for the sake of an illegal gratification are made punishable under the Act. The concerned public servant may be associated with Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2. The act of taking gratification by a public servant, other than his legal remuneration, is punishable with an imprisonment which shall be not less than six months but which may extend to five years in addition with fine. The Hon'ble Supreme Court in *Mukhtiar Singh v. State of Punjab*[353] held that the demand and voluntary acceptance of illegal gratification are sine qua non for proving the offence under Section 7 of the Prevention of Corruption Act.

4.9.2. RECEIVING VALUABLE THING WITHOUT CONSIDERATION OR FOR AN INADEQUATE CONSIDERATION

We have observed that many of the public servants are indulged into corrupt practices. As there is an ever growing demand of establishing a sound vigil-mechanism to find out their bad practices, their plans of action have also changed tremendously. They have evolved new methods to receive such illegal payments through presents and gifts. Hence, the legislature has enacted provisions to cover all such practices of receiving valuable things without any consideration or for a consideration not adequate from persons concerned in proceeding or business transacted by such public servant. The relevant provision given under the Act describes that[354]:

> *"Whoever, being a public servant, accepts or obtains or agrees to accept or attempts to obtain for himself, or for any other person, any valuable*

[353] 2016 (3) RCR (Criminal) 558

[354] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 11.

thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine."

Thus the act of receiving a valuable thing by a public servant, without consideration or for a consideration which such public servant knew to be inadequate, from a person whom such public servant knew to be or likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, is punishable. Not only the acts, but attempts or agreement to accept or obtain are also punishable. It is an important thing to control the evil of bribery and corruption effectively. All such acts, attempts or agreements are punishable under the Act, even though such acts, attempts or agreements were initiated by the person agent of such interested persons. The punishment provided under the Section is the imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

4.9.3. OFFENCE OF CRIMINAL MISCONDUCT

Criminal Misconduct is one of the main offences provided under the Prevention of Corruption Act, 1988. Criminal misconduct in discharge of official duty is made punishable under the Act. It is provided under Section 13 of the Act. In this part we are going to discuss about the offence and punishment provided under Section 13. Criminal misconduct has to be evaluated in context of misdeeds done by the public servants while discharging their official duties. The related provision[355] tells us that:

[355] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 13.

1. A public servant is said to commit the offence of criminal misconduct:

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification (other than legal remuneration) as motive or reward such as is mentioned in Section 7; or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been or to be likely to be concerned in any person whom he now to have been or to be likely to be concerned in any proceeding or business transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from whom any person whom he knows to be interested in or related to the person so concerned; or

(c) If he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d) If he, -

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public

servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

It is also provided under the provision[356] that the guilty public servant may be punished by way of imprisonment which should not be less than one year and which may be extended up to 7 years. In addition, he shall also be liable to pay such amount as fine as directed by the Court. The Explanation to the Section 13 (1) provides that the term "known source of income" means the income received from any lawful source and it should not be from any illegal source. It is also mandatory that the receipt of such income should be intimated to the concerned authorities in accordance with the provisions of any law, rules orders issued by such concerned authority or State or Central government having authority over such concerned public servant. Thus, a duty has been imposed upon public servant to avoid difficulties in future.

4.9.4. OFFENCE COMMITTED BY HABITUAL OFFENDERS

There are various offences categorized under the Prevention of Corruption Act, 1988. Some of these are of higher degree, whereas others are of lesser degree. Offences of higher degree attract more severe punishment than the offences of lower degree. The purpose of the punishment is to create a deterrent effect upon the possible future offenders along with the reformation of accused. But, it is the nature of some offenders to commit the offences repeatedly. The severity of punishment put no pressure upon them to restrict them to commit such crimes. They have to be put behind the bars for a longer period for committing such acts more than once. There are provisions into the Prevention of Corruption Act as well to deal with such offenders. A higher degree of punishment is provided for them for a longer duration. In this part, we are going to discuss about such instances. It is provided under the Act that[357]:

"Whoever habitually commits-

(a) an offence punishable under section 8 or section 9; or

(b) an offence punishable under section 12,

356 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 13 (2).
357 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 14.

shall be punishable with imprisonment for a term which shall be not less than two years but which may extend to seven years and shall also be liable to fine."

Not only this, there are other provisions as well where the acts committed by habitual offenders are dealt with. The word "habitually" used under Section 13 (1) (a) and (b) also provide punishment for offences committed by such persons.

It is also interesting to note here that there is no limit as to number of instances to establish the 'habit' of the accused. And this point will be considered by the Hon'ble Court as per the facts and circumstances of a particular case. It is necessary to establish a number of instances of bribery spread over a reasonable period of time. It was held in *Biswabhusan Naik v. State*[358] that the legislature has not imposed any limit as to the number of instances or the period to be covered as being sufficient or necessary for proof, which it might well have done. The test of Reasonableness shall be adopted in this context.

4.9.5. OFFENCES COMMITTED BY THE PERSONS OTHER THAN PUBLIC SERVANTS

In this part, we are going to discuss about the acts committed by the persons other than public servants. Though the Prevention of Corruption Act, 1988 applies upon public servants, yet there are some instances where it is applicable upon some other persons as well. These are the situations where a person takes illegal gratification to influence a public servant. It is provided under the Act that[359]:

> *"Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant, whether named or otherwise, to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government or any State*

358 AIR 1952 Ori. 289.
359 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 8.

Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine."

Thus, whenever an illegal remuneration is received by a person other than a public servant upon the conditions given under Section 8 of the Act (which are same as are given under Section 7), such other person shall also be liable for the offence. The punishment provided under the Act is from six months of imprisonment to five years along with the fine. Similarly, the acts committed by the persons who use their personal influence with the public servants to get illegal gratification are also committed under the Act. The relevant provision states that[360]:

"Whoever accepts or obtains or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant whether named or otherwise to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine."

Thus, the persons who are somewhere related with the public servants involved into corrupt practices are covered under this Section. It is an important provision considering V.I.P. culture in our country where a number of persons try to use their connections for evil motives. There are a number of persons who happens to be relatives, acquaintance or friends of public servants who boasts of their relation with

[360] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 9.

such public servants and try to get illegal benefits at many places. In addition, this provision also discourages the public servants' intention of getting illegal benefits by hiding their identity behind the identity of some other persons.

4.9.6. ABETMENT OF CERTAIN OFFENCES IS ALSO AN OFFENCE

If a public servant, with respect to whom an offence has been committed as mentioned under Sections 8 and 9, abets the acts of such other persons given into the same sections, the very act of abetment shall also be punishable under the Act[361]. Here, it is immaterial that whether that offence is committed in consequence of that abetment or not. The abettor shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine. Thus, the same type of punishment will be there for the abettor as well. It is a welcome provision when it comes to discouraging the persons to abet others to do offence under the Act providing the same quantum of punishment for the abettor even when the offence abetted is committed or not.

Similarly, Section 12 also makes it punishable to abet an offence mentioned in Sections 7 and 11. Under Section 7, the offence of taking gratification other than legal remuneration in respect of an official act, by a public servant is punishable. On the other hand, under Section 11, the acts of public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant, is made punishable. It is provided under the provision[362] that:

> *"Whoever abets any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine".*

It is interesting to note here that the act of abetment is punishable irrespective of the fact that the act, for which the abetment was made, was committed or not in consequence of the abetment. It is also notable to mention here that the same

361 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 10.
362 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 12.

punishment is provided under the Section as is provided for the offence committed under Section 7 or 11, even though the act, for which the abetment was made, was committed in consequence or not.

4.10.1. ANALYSIS OF THE TERM 'CRIMINAL MISCONDUCT' (SECTION 13 OF THE PREVENTION OF CORRUPTION ACT, 1988)

Criminal misconduct in discharge of official duty is made punishable under the Prevention of Corruption Act, 1988. It is provided under Section 13 of the Act. In this part we are going to discuss about the features and implications of this term. Criminal misconduct has to be evaluated in context of misdeeds done by the public servants while discharging their official duties. The related provision[363] tells us that:

1. *A public servant is said to commit the offence of criminal misconduct:*
   - *(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification (other than legal remuneration) as motive or reward such as is mentioned in Section 7; or*
   - *(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been or to be likely to be concerned in any person whom he now to have been or to be likely to be concerned in any proceeding or business transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from whom any person whom he knows to be interested in or related to the person so concerned; or*
   - *(c) If he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or*
   - *(d) If he, -*

[363] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 13.

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

It is also provided under the provision[364] that the guilty public servant may be punished by way of imprisonment which would not be less than one year and which may extend to 7 years. In addition he shall also be liable to pay a fine as directed by the Court. The Explanation to the Section 13 (1) provides that the term "known source of income" means the income received from any lawful source. It is also mandatory that the receipt of such income should be intimated to the concerned authorities in accordance with the provisions of any law, rules orders issued by such concerned authority or State or Central government having authority over such concerned public servant.

In *B. Noha v. State of Kerala & Another*[365], Section 7 and 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988 were in question in context of conviction upon illegal gratification. Appreciation of evidence was the main deciding factor which came before the consideration of the Court. Where it is proved that there was willful and cognizant acceptance of the cash, there is no further weight upon the prosecution to prove by direct evidence the motive or demand of the accused. It has just to be derived from the facts and circumstances acquired in the specific case. At the point when sum is found to have been gone to public servant the burden is upon him i.e. public servant to prove that it was not by method for illegal

364 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 13 (2).
365 (2006) 12 SCC 277

gratification/reward. This was not accomplished by the accused and hence the conviction of the accused was upheld by the honorable Court.

4.10.2. CRIMINAL MISCONDUCT ON THE BASIS OF SECTION 5 OF PREVENTION OF CORRUPTION ACT, 1947

Earlier, before the passing of the Prevention of Corruption Act, 1988, Section 5 of the Prevention of Corruption Act, 1947 dealt with criminal misconduct. Therefore, here it is important to discuss the prior position i.e., position under the Prevention of Corruption Act, 1947, to know criminal misconduct in detail. The Act created new offences under the Indian Penal Code like those under Section 161. The Legislature extended the scope of the crimes related to bribery and corruption by providing a very wide definition in Section 5 with a view to cover the persons holding public office and taking unlawful advantage of their official position to obtain profitable thing or pecuniary favour.

Before the nation got independence the existing law i.e. the Indian Penal Code, 1860 was found to be insufficient to eliminate or even control the increasing evil of bribery and corruption. The provisions of the Prevention of Corruption Act, 1947 broadly included the existing offences committed by public servants given under Sections 161 to165 of the Indian Penal Code. The Act established the rule of evidence of presumption against the accused. The Act also created a new offence of criminal misconduct by public servants though to some extent it overlapped on the pre-existing provisions. The Prevention of Corruption Act, 1947 created a new offence categorized it as criminal misconduct in discharge of official duty under Section 5 of the Act. It deals with the instances of the offence of habitual corruption.

If a public servant continually acknowledges bribe as rewards or attempts to get things of value as corruption for exercising his authority extraordinarily and deceptively misuses property entrusted to him as a virtue of such position or he mis-uses his position keeping in mind the end goal to get for himself any profitable thing he shall be guilty of criminal offense in discharging his obligation related to his post. As a result of it he shall be guilty for the commission of offense with a punishment up

to seven years of imprisonment. He shall also be liable to the fine as directed by the Court.

The relevant provision of the Prevention of Corruption of Act, 1947 i.e. Section 5 was expected to cover that sort of crime in which government worker or public servants with no apparent sources were living richly over their salary and were in a position to put resources into property which prima facie showed to be unimaginable that they ought to have amassed those assets with honesty. This section created a novel offence and used the terminology criminal misconduct in the discharge of official duty for this offence. In spite of the fact that Section 5 Clause (c) overlapped to some degree with the meaning of Criminal Breach of Trust, it is one type of criminal offence as characterized by the section. Now, as per present situation, Section 5 has been revoked and it has been replaced by Section 13 of the Prevention of Corruption Act, 1988 which now deals with the offence of criminal misconduct by public servants in discharging their official duties.

4.10.3. SCOPE OF SECTION 5 OF THE PREVENTION OF CORRUPTION ACT, 1947

Section 5 of the Prevention of Corruption, 1947 deals with the instances where the corruption is done by the public servants habitually. This section was applicable not only to the habitual offenders but also to the cases in which the accused was charged with having taken illegal gratification or where he had criminally misappropriated the property entrusted to him on a single instance. This is evident from the reading of clause (c) and clause (d) of sub section (1) of this section.

Earlier, under section 161 and 165 of the Indian Penal Code, 1860 a prosecution could be laid even on account of a solitary instance by which a public servant has accepted an illegal delight or satisfaction. However, to prosecute a public servant under sec. 5(1) (a) and (b) there must be habitual commission of the crime. Any stray or single occurrence was not adequate to bring inside the ambit of the Section the offense as planned under Section 5 (1) (a) and (b). Where an offense was culpable under the Indian Penal Code and in addition under the Prevention of

Corruption Act, 1947 the accused could be tried under the Indian Penal code. In that situation he was to be punished under the IPC and the provisions of the Prevention of Corruption Act, 1988 were not pertinent.

Where a new offence has been incorporated by an enactment the accused must be dealt with in accordance with that enactment. However, where an Act makes an act already punishable under some former law punishable the operation of the former is not repealed by the latter. The operation of the former Act has to be done away with specific words within the new Act. Section 2 of General clauses Act[366] provides the necessary guideline in this regard. It becomes unavoidable on the prosecution agency either to prosecute the public servant under the general law or the special law. In this way, an accused may be proceeded against under any of the two Acts.

The following elements were essential to punish an offender under Section 5 (1) (a) of the Prevention of Corruption Act, 1947:

(a) the accused had been a public servant;

(b) he had habitually accepted or had obtained from any person gratification for himself or for any other person as is given under Section 161 0f IPC;

(c) he had done so as a motive or reward for doing or forbearing to do an official act.

In the same way, following were the essential elements of Section 5 (1) (b):

(a) the accused had been a public servant;

(b) he had habitually accepted or had obtained or had agreed or had attempted to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knew to be inadequate;

[366] Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

(c) he had received it from any person whom, he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested or related to the person so concerned.

4.10.4. ANALYSIS OF THE OVERLAPPING OF SECTION 5 (1) (a) AND SECTION 161 OF INDIAN PENAL CODE

As we have discussed earlier also, the necessary elements of the offence under Section 5 (1) (a) of the Prevention of Corruption Act, 1947 were the same as were of the offence committed under Section 161 of Indian Penal Code, 1860. Hence a kind of reappearance of the offence under Section 161 Penal Code came into the picture as offence of criminal misconduct under Section 5 (1) (a) of the Prevention of Corruption Act, 1947. Hence, where an accused was indicted under Section 5 (1) (a) of the Prevention of Corruption Act, the facts specified in the charge sheet were of such type so as to constitute a different offence culpable under Section 161 of Indian Penal code. The joined impact of these particulars being the completion of an intensified type of such slighter offences, the conviction of the accused under Section 161 of the Penal Code was flawlessly legitimate if any one of numerous instances out of the few occurrences determined in the charge had been verified against him. In this way the conviction of the charged under Section 161 of IPC was lawful and maintainable. In endorsing such a conviction against the accused the Court was acting inside the extent of Section 238 (1) of the Code of Criminal Procedure.

4.10.5. JOINT TRIAL UNDER SECTION (5 OR 13 OF THE PREVENTION OF CORRUPTION ACT, 1947 OR 1988 RESPECTIVELY) AND SECTION 409 OF INDIAN PENAL CODE

The circumstance that specific special provisions of law are relevant to the trial of one offence however not to the trial of alternate does not at all lessen the operation of application of Section 235 (2) of the Code of Criminal Procedure. In this manner a

joint trial under Section 5 of the Prevention of Corruption Act and under Section 409 of IPC was lawful regardless of the unique method of proof in Section 5 (3) of the Prevention of Corruption Act and that proof on the oath accused under Section 7 of the same Act couldn't be accessible in the trial of the charge under Section 409 Indian Penal Code.

4.11. INVESTIGATION OF THE OFFENCES

The aim of law is to establish a system into the society which is based upon the principles of equity and natural justice. These principles are dependent upon effective working of criminal justice system. An effective criminal justice system seeks for justice and provides adequate relief to the victim. Before coming to a conclusion in a particular case, we have to conduct an effective and fair investigation to obtain all the relevant evidences necessary to prove the guilt or innocence of the accused. Investigation into the cases under this Act can be made by the following persons or higher rank[367]:

(a) In the case of Delhi Special Police Establishment, an inspector of police;

(b) In the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan areas notified as such under sub sec. (1) of sec. 8 of the Code of Criminal Procedure 1973 (2 of 1974), an Assistant Commissioner of Police;

(c) Elsewhere a Deputy Superintendent of police or a police officer of equivalent rank;

(d) Any police officer not below the rank of an Inspector of police; specially authorized by the State Government in this behalf.

These persons can make investigation into the cases under this Act notwithstanding anything given or contained in the Code of Criminal Procedure. The power of investigation into the cases can be applied even without the order of a Metropolitan Magistrate or a Magistrate of first class. Another significant aspect of this power is that the investigating officer can make arrest without a warrant. The proviso to the main Section 17 also provides that if an officer of police not below the

[367] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 17.

rank of an Inspector of Police is specially authorized by the State government in this behalf, he shall also be having the same powers as are given to other officers as are mentioned in (a) to (c). It is also provided that such authorized police officer shall not investigate the case under Section 13 (1) (e) of the Act, without the order of a police officer not below the rank of a Superintendent of Police.

Now, we are going to discuss as to how the procedure for the investigation into the offences of bribery and corruption is executed by the concerned police officers. If the police officer has reason to suspect that, upon information received or otherwise, an offence has been committed by any person and for which he is authorized to investigate or inquire, shall go on to start investigation or inquiry as he thinks appropriate. For this purpose, he may inspect Bankers' Books[368] if they are of some relevance to the finding or discovery related to the offence alleged to have been committed. He may go on to inspect that these account books are related with the offence or not.

In addition, he may also inquire about the account books of other persons related to the accused to find out the truth behind the account books, as such person may be holding money or property on behalf of the accused. He can take or cause to be taken certified copies of the relevant entries made into those account books and it shall be the responsibility of such concerned bank to provide all necessary assistance to the police officer making the investigation under the Act. All other related provisions shall also be abided by the police officer making the investigation e.g. no power under this section in relation to the accounts of any person shall be exercised by a police officer below the rank of a Superintendent of Police, unless he is specially authorized in this behalf by a police officer of or above the rank of a superintendent of Police[369]. These are some basic aspects of investigation discussed under the Act.

The Act was passed as the preamble indicates to make more effective provisions for the prevention of bribery and corruption among the public servants. New definition of criminal misconduct in discharging an official duty and new rules

[368] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 18.
[369] The Prevention of Corruption Act, 1988 (Act 49 of 1988), Proviso to s. 18.

of presumption against accused in the case of the said offence are incorporated in the Act. But in the year 1952 by Act 59 of 1952 presumably on the basis of the experience gained, Sec. 5-A was inserted in the Act to protect the public servants harassment and victimization. If it was in the interest of the public that corruption should be eradicated it was equally in the interest in public that honest public servants should be able to discharge their duties free from false, frivolous and malicious accusations. To achieve these object high ranks of police officers were authorized to conduct investigation.

The Preamble of the Act shows the intention and true objectives of the legislature behind the enactment. The Act was enacted to make more powerful provisions for the prevention of bribery and corruption among the public servants. New meaning was given to the term "criminal misconduct" in discharging official functions by the public servants. In addition, new rules were framed to raise presumption against the accused regarding various offences committed under the Act. In the year 1952, by Act 59 of 1952 probably on the premise of the experience gained in this area, Section 5-A was embedded in the Act to ensure the protection of public servants.

It is in the interest of the society to punish the wrongdoers. Similarly, it is also the duty of the State to protect honest public servants from harassment and illegal victimization so that they may feel themselves ready to fight with this evil of the society. Hence, they should be prevented and protected from false accusation and malicious prosecution. The said amendment was made into the Act to further the idea of witness protection. To accomplish this purpose a system was created where only the police officers of higher ranks were authorized to make investigation into the offences of bribery and corruption by the public servants.

4.12.1. PREREQUISITE OF SANCTION BEFORE TAKING COGNIGANCE

As of now, we have discussed about various provisions of the Prevention of Corruption Act, 1988 regarding investigation of the offences relating to bribery and corruption. We have also discussed about the categorization of various police officers authorized to make investigation into the offences under the Act. Now we are going to

discuss about the requirement of sanction before taking cognizance by the Court of the offences relating to bribery and corrupt dealings by the public servants. Previous sanction is necessary for prosecution and no court can take cognizance of the offence without it[370]. This Section of the Prevention of Corruption Act states that:

> *(1) No court shall take cognizance of an offence punishable under section 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-*
>
> > *(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;*
> >
> > *(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;*
> >
> > *(c) in the case of any other person, of the authority competent to remove him from his office.*
>
> *(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.*
>
> *(3) Notwithstanding anything contained in the code of Criminal Procedure, 1973,-*
>
> > *(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in,*

[370] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 19.

the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation.-For the purposes of this section,-

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature.

The prerequisite of taking sanction before taking cognizance is mandatory to the court. This prerequisite cannot be avoided in any case. Now we are going to discuss an important case in this perspective. In *Manohar Lal Soni v. State of Punjab*[371] the sanction for prosecution was given under Section of the Act. Here the sanction for prosecution was given by the Managing Director. The impugned order of the Managing Director was questioned by the petitioner in the higher court on the ground that it was passed without the approval of Administrative Committee. The

[371] LAWS (P&H)-2006-5-433

Court held that there was no illegality in the impugned order as the question whether the sanction was granted by the competent authority is a question of fact, and will be established by the prosecution during the course of evidence, which are yet to be recorded. The Court held that the trial court was right in keeping the matter to be open to be decided after the recording the evidences. It is also evident from the provision provided[372] under the Act that a court shall not stay any such proceeding for the want of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice.

In *Nanjappa v. State of Karnataka*[373], the Hon'ble Supreme Court was of the opinion that when the order of sanction is not valid or legal, the Court (Trial) should have discharged the accused rather than recording an order of acquittal on the merit of the case. The Trial Court is not competent to take cognizance of the offence in the absence of legal sanction. In this way it is an important obligation on the part of prosecution to seek previous sanction from the appropriate authority.

4.12.2. THE ROLE OF COMPETENT AUTHORITY IN GIVING SANCTION

The provision of giving sanction for the prosecution of cases of bribery and corruption of public servants is one of the most talked about concept in recent years. The issue has gained importance because of some lacunas on the part of executive to accord sanction within a reasonable time. The question regarding the sanction to be given by the competent authority for initiating prosecution against an accused public servant sought by police or any other investigating agency, after thorough investigation into the allegations against him, has anticipated importance in recent times. Should he function like a judge and fastidiously look at the evidences given by the prosecution or apply his own mind to the material which has been set before him. It is also the point of consideration that whether that authority should initiate a parallel inquiry to find out the truth behind the crime.

372 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 19 (3) (b).
373 AIR 2015 SC 3060

The question was effectively answered by the Bombay High Court in the case of *Parasnath Pande and anr. v. State*[374]. The Court observed that section 6 of the Prevention of Corruption Act, 1947 which corresponds to section 19 of the Prevention of Corruption Act, 1988, does not command the sanctioning authority to look into any particular material. It is not the function of such authority to find out the truth or otherwise of the facts or material placed before him. The act of awarding sanction is not a judicial act but completely an executive act. But at the same time we have to analyse the other aspect as well. The honorable Supreme Court has considered this feature in various cases and has propounded that the act of giving sanction for initiating prosecution is not a simple formality. The Court has directed that the concerned authority has to consider the evidences produced before it before coming to a conclusion in the circumstances that whether the sanction for the prosecution should be given or not. It is a welcome step by the honorable Supreme Court to dishearten the malicious and vexatious complaints against the public servants. Hence, a kind of balance should be maintained in favour of justice. In other words, sanction shall not be denied or delayed in genuine cases, shall also not to be awarded in malicious and vexatious allegations for the interest of justice.

In fact, Section 19 of the Prevention of Corruption Act, 1988, and Section 197 of the Code of Criminal Procedure prevent the prosecution of public servants accused of an offence of bribery or corruption committed under the Act from mala fide, false and vexatious accusations. Another main aspect of the provision is that there is no requirement for initiating prosecution against the retired public personnel. The extent of application of Section 19 of the Prevention of Corruption Act, 1988, which makes it mandatory to obtain prior sanction before starting prosecution against a public servant, is more extensive than Section 197 of the Code of Criminal Procedure.

It is, however important to specify here that previous sanction is not legally required for registration of a case against a public servant to initiate criminal proceedings against him. The requirement is there only at the time of taking cognizance by the trial court. The court takes cognizance of a matter when it firstly

[374] AIR 1962 Bom. 205, (1962) 64 Bom LR 188

applies its judicial mind for issuing process against the accused and to summon him to face the trial and answer all criminal charges imposed upon him. The provision restricts taking of cognizance of the offence by the court but does not restrict the police's power to record statements and collect evidences for this purpose.

In practical, the police or any other investigation agency conducting investigation of an offence under the Prevention of Corruption Act, 1988, approach the concerned competent authority only after completing whole investigation and not prior. All the records, evidences or any other relevant material so collected during investigation by a police officer is then evaluated by senior police officers. Such senior police officer after scrutinizing it generally seeks the legal opinion in this context. After receiving legal opinion in this context the whole record is sent to the concerned competent authority to seek sanction.

Beyond any doubt an authority giving sanction needs to apply its brain before awarding sanction, yet the procedure ought not to take a more drawn out time that might be required in the circumstances of a case as it will undoubtedly give wrong message. It might be called attention to that the matter with respect to initiating prosecution of the accused regarding prosecution of a public servant is prepared at different levels in the Government in the light of the report of the investigation agency, in addition with the evidences adduced supporting the report in context. In light of these facts the function of the concerned authority going to sanction the prosecution becomes important.

The concerned sanctioning authority is lawfully right not to give assent for inappropriate, malicious or vexatious prosecutions which are politically motivated or propelled by any other extraneous consideration. However, he is not anticipated to examine the proceeding or witnesses like a judicial proceeding by a judicial officer. He is just to see whether any prima facie case is made out against the persons alleged to have committed a crime on the basis of evidences produced before it. In cases where genuine violations were made to amass huge wealth by way of indulging into corrupt dealings by way of conspiracy with other persons, the function of the

sanctioning authority becomes typical as such crimes are execute in secrecy and there is little possibility of getting material evidences.

In these types of cases, it would be a pointless effort to seek evidences against a particular accused involved in conspiracy because of under-cover dealings of various accused persons. Legitimately, criminal conspiracy amongst different persons can be demonstrated by some indirect evidences or by inference because direct proof is once in a while accessible. The main culprit in this type of cases act behind a veil and it is not easy to establish his direct involvement into the corrupt dealings. He might have executed his plan by engaging some other persons for this purpose. It does not mean that he cannot be booked for these misdeeds as he was not actively involved into those corrupt activities. It is not in any manner essential that every one of the conspirator consent to do one single act of corruption to accomplish the object of connivance. There might be majority of acts and division of execution and after that one plotter might be an outsider to the next. In these situations the function of the sanctioning authority might be difficult to give sanction in light of secret dealings of the accused persons, yet it has to apply its mind in favour of justice to unearth such corrupt dealings between persons responsible for carrying out welfare schemes for the betterment of poor and underdeveloped sections of the society.

The Hon'ble Supreme Court in *Mohammad Usman Mohammad Hussain Maniyar and Another v. State of Maharashtra*[375] has established that for the offence of criminal conspiracy the prosecution need not as a matter of course prove that the culprits explicitly consented to do or cause to be done an illegal act. Such a connivance of the accused persons may be proved by necessary implication. Hence the concerned authority which is going to deny or award sanction at the has basically to rely upon possible inference or circumstantial evidence and it is not its function to examine the evidences like a judge which function is attributed only to a Court of Law having competent jurisdiction in this context. In *State of Bihar and others v. Rajmangal Ram*[376], the sanction was granted by the Law Department of State and not

[375] AIR 1981 SC 1062, 1981 SCR (3) 68
[376] AIR 2014 SC 1674

by the parent department to which respondents belonged. The Hon'ble Supreme Court held that the order of High Court to interdict the criminal proceedings was not appropriate, as it did not result into any failure of justice.

For a situation where affirmations of bribery and corruption are made against Chief Minister and the investigation agency can gather essential legitimate proof which by all appearances demonstrate his association straightforwardly or by implication his involvement into the crime, it is reasonable as well as virtuous that he ought to instantly demit his office so that the law has its own course without any biasness on the part of executive. Looking at the matter from the point of constitution as it seems to be, a Governor works through his Council of Ministers headed by the corrupted Chief Minister would not go forward to endorse his own prosecution in any way.

Where a Governor is confronted with such a curious and intriguing circumstance it would be a significant more secure course for him to endorse sanction for the prosecution of the accused Chief Minister in the event that at first sight proof uncovers facts constituting the offence against him and look for judicial decision. On the off chance that the accused has been erroneously involved or that there is no legitimate proof against him, he would acquire respectable discharge or acquittal as the case may be, which has happened on account of numerous national leaders in some cases. All this support the basic idea that concerned sanctioning authority is not in any manner required to assess the evidences provided by the prosecution or to postpone this matter essentially to spare the accused person.

We have seen in a number of instances that some competent sanctioning authorities decline to give sanction to benefit an accused even when there is substantial evidence against him. Such an approach should be condemned as it barely supports the cause of justice. On the other hand, it emboldens the criminal elements to execute their misdeeds with much more energy. There is one instance to demonstrate the functioning of sanctioning authority which is the case of *G. Nagarajan v. State*

rep. by Deputy Supdt. of Police, Vigilance & Anti-Corruption Special Cell[377], decided by Madras High Court. The Court observed that the sanctioning authority had refused sanction on relatively insubstantial grounds.

The case is related to the illegal felling of the trees in huge numbers from the forests owned by the government under the guise of felling from the private properties. After the change of the felled trees into timber, the forest contractor applied for the permit to export these felled trees. The Forest Block Officer gave a declaration that the timber looked to be sent out is not mixed with the timber of unlawful origin and that there has been no illegal felling in the area under his jurisdiction. As per the investigation agency it was a fabricated declaration in perspective of the huge scale felling in the forests owned by the government. The concerned Chief Conservator of Forests, who was the appropriate competent sanctioning authority in this case, was persuaded that in perspective of the evidences provided by the prosecution, albeit circumstantial it would be practical for him to review his earlier order of refusing sanction to prosecute. Consequently, he gave his assent and the trial Court punished the wrongdoer as per law.

The apex court of the country has reaffirmed its view regarding award of sanction in a number of cases and has stressed that this power should be cautiously used by the competent authority. The Hon'ble Supreme Court in, *Mohd. Fasal Ahmed v. State of A. P.*[378] has said that:

> *"It is incumbent on the prosecution to prove that a valid sanction has been granted by the Sanctioning Authority after it was satisfied that a case for sanction has been made out constituting the offence. This should be done in two ways either (1) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction and (2) by adducing evidence to show the facts placed before the Sanctioning Authority and the satisfaction arrived at by such authority. Any case instituted without a proper sanction must fail because this being a manifest defect in the*

377 2010 (14) R.C.R. (Criminal) 207
378 AIR 1979 SC 677

prosecution, the entire proceedings, are rendered void, ab initio. What the Court has to see is whether or not the Sanctioning Authority at the time of giving sanction was aware of the facts constituting the offence and applied its mind for the same; any subsequent fact which may come into existence after the grant of sanction is wholly irrelevant. The grant of sanction is not an ideal formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to Government servants against frivolous prosecution and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned."

The honorable Supreme Court in, *Periasamy v. Inspector Vigilance & Anti-Corruption, Tiruchirapalli*[379], has held that: "The sanction order given by authority to prosecute an accused under the Prevention of Corruption Act is not an empty formality but it should be after full satisfaction on the basis of the materials and evidence made available with regard to the allegations made against the particular accused and that the non-giving of any reasons pertaining to the grounds of satisfaction amounts to invalidate the sanction order itself and not in accordance with law." Thus, we can conclude that the act of awarding sanction for the prosecution against a public servant is an important stage into the process of cases of corruption and bribery. It should be executed by the appropriate sanctioning authority with due care and caution. The sanctioning authority should provide its assistance in attaining the course of justice and should not be a party into the defeat of justice. In situations where there is by all appearances substantial proof against an accused, it should act quickly and rapidly by lifting its brake to give assent for the prosecution of the accused and should leave the rest matter for a Court of law where there will be an opportunity even for the accused to prove his innocence or non-involvement into the crime of bribery and corruption.

[379] 1992-L.W. (Crl.) 582

4.12.3. QUASHING OF SECTION-6A OF DELHI SPECIAL POLICE ESTABLISHMENT ACT, 1946

Recently, a development has been seen in context of sanction given by the competent authority in relation with prosecution of the public servant in cases of bribery and corruption. The honorable Supreme Court has quashed the Section-6A of the Delhi Special Police Establishment Act, 1946, according to which the prior sanction is mandatory for starting inquiry or investigation against the public officials of the rank of Joint Secretary and above. The Section reads as under[380]:

6A. Approval of Central Government to conduct inquiry or investigation[381]:

(1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to:

(a) The employees of the Central Government of the level of Joint Secretary and above; and

(b) Such officers as are appointed by the Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.

(2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for the cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to Section 7 of the Prevention of Corruption Act, 1988 (49 of 1988).

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380 Delhi Special Police Establishment Act, 1946 (Act 25 of 1946), s. 6A.

381 Inserted by Section 26 of the Act 45 of 2003, w.e.f. September 1, 2003.

A constitutional bench of the court had quashed Section 6A of the Delhi Special Police Establishment Act, which mandated such prior sanctions from the government for acting against senior officers in corruption cases.[382] It is a welcome step to further the interest of justice by providing speedy justice in cases of corruption by eliminating impediments of procedure to initiate prosecution proceedings against the accused. But still there is urgent need to done away with these restrictive provisions of law or there should be a time limit to grant sanction in cases of bribery and corruption as there is a strong public opinion in against these provisions of law. A balance should be maintained between speedy disposal of the cases and in the same way it should be guaranteed that honest public servants are not harassed by malicious, vexatious and frivolous accusations.

4.13. ACCUSED PERSON TO BE A COMPETENT WITNESS

The persons who have been accused under the Prevention of Corruption Act, 1988 shall be competent witnesses in the eyes of law under some specified circumstances. This provision[383] was added to give fair opportunity to the accused to defend his case. Hence, the provision favours the concept of natural justice by providing an accused all opportunities to plead his case and he may act as a witness for himself or any other persons accused under the same case. Under Section 21 of the Act, any person punishable under the Prevention of Corruption Act 1988 shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial provided that:

(a) He shall not be called as a witness except on his own request.

(b) His failure to give evidence shall not be made the subject of any comment by the prosecution or given rise to any presumption against himself or any person charged together with him at the same trial.

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382 Vikas Dhoot, "*Government mulls changes in anti-corruption laws to protect official"*, A*vailable at:* http://articles.economictimes.indiatimes.com/2014-06-09/news/50447971_1_parakh-anti-corruption-law-cbi (Visited on June 10, 2014).

383 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 21.

(c) He shall not be asked and if asked shall not be required to answer any question tending to show that he has committed or been convicted of any offence with which he is charged or is of bad character unless-

(i) the proof that he has committed or been convicted of such offence is admissible evidence to that he is guilty of the offence with which he is charged, or

(ii) he has personally or by his pleader asked any question of any witness for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution, or

(iii) he has given evidence against any other person charged with the same offence.

In this way we can analyse that it is a welcome provision of the Act giving fair opportunity to the accused to fight his case without any biasness on the part of law. Equal opportunity is available to him to prove his innocence as well as of other persons implicated under the same case. He is a competent witness for defence and should be called upon to give his evidence only upon his request. In case of his failure to give evidence, he should not be subject to any comment by the prosecution. In addition, no presumption shall be made against him as a result of non-giving of evidence.

The safeguards provided to the accused are for the sake of fair play in doing justice and furthers the principles of natural justice. He shall also not to be asked inappropriate questions relating to his association in any other offence he has committed or convicted or of his bad character. But these questions may be asked in three situations: firstly, where the proof that he has committed or been convicted of such offence is admissible in evidence to that he is guilty of the offence with which he is charged. Secondly, where in the trial he has already given evidences of his good character, then evidences of his bad character may be given which is also in the line of law of evidence. And thirdly, where he has given evidences against any other person in the same trial.

4.14.1. APPOINTMENT OF SPECIAL JUDGES

The main purpose of law is to try to attain a crimeless society. A perfect crimeless society has always been a distant dream because of various complex reasons. Then the rule of priority comes to the picture which seeks to prevent those offences which affect society on a larger scope on priority basis. The aim of law is to prevent such crimes which are more dangerous to the society. The crimes of bribery and corruption come in this category because these are posing hindrances to the constitutional objectives of bringing equality and restricting the functions of welfare State. Not only this, these are also the mother of many other crimes. Thus, the prevention of offences of bribery and corruption is necessary and has to be dealt with caution and on priority basis.

For fulfilling the above mentioned purpose, there are provisions of establishing Special Courts for the effective and speedy disposal of the cases of bribery and corruption. Sections 3 to 6 and Section 26 of the Prevention of Corruption Act, 1988 deal with the appointment, working and functions of the Special Judges. The power to appoint Special Judges is given to the Central Government and State government both[384]. The provision given in the Act states that the Central government or the State government by Notification in the Official Gazette may appoint as many special judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences namely:

a) Any offence punishable under this act; and
b) Any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

It is also provided under the Act that every special Judge appointed under the Criminal Law Amendment Act, 1952 for any area or areas and is holding office on the commencement of this Act shall be deemed to be a special Judge appointed under Section 3 of this Act for that area or areas and, accordingly, on and from such commencement, every such Judge shall continue to deal with all the proceedings pending before him on such commencement in accordance with the provisions of this

[384] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 3 (1).

Act[385]. Thus Section 26 of the Prevention of Corruption Act, 1988 brings light upon the jurisdiction of special judges.

4.14.2. QUALIFICATION REQUIRED TO BE APPOINTED AS SPECIAL JUDGE[386]

A person shall not be qualified for the appointment as a special judge under the Prevention of Corruption Act, 1988 unless he is or has been a Session Judge or an Assistant Session Judge under the Code of Criminal Procedure 1973 or in any other law for the time being in force. The offences specified in sub-section (1) of section 3, which we have studied in previous paragraph, shall be tried by special judges only. A special judge has to work under great responsibility for the prevention of evil of corruption, that's why he has to be efficient and qualified enough in that regard.

4.14.3. CASES TRIABLE BY SPECIAL JUDGE

In this part we are going to discuss about the cases triable by Special Judges. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, or in any other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only[387]. Every such offence shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government[388]. The Hon'ble Supreme Court in *State through CBI, New Delhi v. Jitender Kumar Singh*[389] held that a Special Judge appointed under Section 3 (1) of the PC Act has got jurisdiction to proceed exclusively against a public servant and exclusively against a non-public servant as well, depending upon the nature of the offence referred to in Chapter III of the PC Act. The Hon'ble Supreme Court in *M/s Hcl Infosystem Ltd. V. Central Bureau of Investigation*[390], reiterated the same as discussed above. In this particular case, the accused public servant died before the

385 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 26.
386 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 3 (2).
387 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 4 (1).
388 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 4 (2).
389 AIR 2014 SC 1169
390 2016 (3) RCR (Criminal) 1012 (SC)

framing of charge. The Court held that the Special Judge could continue the proceedings against the private persons after the death of public servant and even when there was no charge under Corruption Act.

4.14.4. PROCEDURE TO BE FOLLOWED AND POWERS OF SPECIAL JUDGE

The powers given to the Special Judges appointed and the procedure to be adopted by them to decide cases under the Act are specifically defined under various provisions[391]. These powers are necessary to implement the provisions of the Act and provide justice. These powers are essential for the prevention of cases of bribery and corruption among public servants. Following powers are given to, or procedure to be adopted by, the Special Judges appointed under the Prevention of Corruption Act:

a) A special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 for the trial of warrant cases by Magistrates[392]. This power of the Special Judge empowers him to do justice without following the technicalities of procedure.
b) It is provided under the Act that it is also within the power of the Special Judge to try any offence other than an offence specified under the Act to be triable by Special Judge, if the accused is charged with such offence in the same trial[393].
c) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and any pardon so tendered shall, for the purposes of sub-sections (1) to (5) of section 308 of the Code of Criminal Procedure, 1973, be deemed to have been tendered under section 307 of that Code[394]. It is an

391 The Prevention of Corruption Act, 1988 (Act 49 of 1988), ss. 4-6.
392 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 5 (1).
393 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 4 (3).
394 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 5 (2).

important provision when it comes to obtain evidences under the Act. Most of the time the acts of bribery and corruption done by the accused person are performed in a very secret manner. Co-conspirators perform various functions in an atmosphere difficult to find out by others. Hence it is the need of the hour to use testimony of some of them against others for the interest of justice. That is why there are provisions of pardon to the approvers.

d) Save as provided in sub-section (1) or sub-section (2) of Section 5, the provisions of the Code of Criminal Procedure, 1973 shall be followed by the Special Judge during the proceedings, if they are not inconsistent with the Act. For the purpose of the proceedings before a special Judge of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and shall have all the powers of a Sessions Court. In addition, the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor[395]. Thus a Special Judge is equipped with all the general powers of a Sessions Judge to conduct proceedings of the offences committed under the Act. It is also one of the important provisions provided under the Act furthering the cause of justice.

e) Subject to the provision discussed above, a Special Judge appointed under the Act shall follow the proceedings as given under sections 326 and 475 of the Code of Criminal Procedure, 1973. While conducting such proceedings he shall be deemed to be having all the powers of a Magistrate[396]. Whenever any Judge or Magistrate after having heard or recorded the whole or any part of the evidences in an inquiry or a trial, ceases to have jurisdiction and is succeeded by another Judge or Magistrate, the Judge or Magistrate so succeeding may act on the basis of evidences recorded by his predecessor. In addition, he may also re-summon the witness whose evidences have been already recorded for the interest of justice[397].

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395 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 5 (3).
396 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 5 (4).
397 The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 326.

f) A special Judge also has the power to pass upon any person convicted by him any sentence authorized by law for the punishment of the offence of which such person is convicted[398].

g) A special Judge while trying an offence punishable under this Act shall be having all the powers and functions of a District Judge which are given to such Judge under the Criminal Law Amendment Ordinance, 1944. The Criminal Law Amendment Ordinance, 1944 contains provisions for the attachment of the property of the accused.

h) Notwithstanding anything contained in the Code of Criminal Procedure 1973, a Special Judge shall as far as practicable hold the trial of an offence on day-to-day basis[399].

i) A Special Judge appointed under the Act shall be having the power to conduct summary trial of the cases under specific circumstances. Where a special Judge tries any offence specified in sub-section (1) of section 3, alleged to have been committed by a public servant in relation to the contravention of any special order referred to in sub-section (1) of section 12 A of the Essential Commodities Act, 1955 or of an order referred to in clause (a) of sub-section (2) of that section, then, notwithstanding anything contained in sub-section (1) of section 5 of this Act or section 260 of the Code of Criminal Procedure, 1973, the special Judge shall try the offence in a summary way, and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trial[400].

It is provided under the Proviso that in the case of any conviction in a summary trial under Section 6, it shall be lawful for the Special Judge to pass a sentence of imprisonment for a term not exceeding one year. The Special Judge may refrain himself to try the case summarily if he is of the opinion that a sentence exceeding one year is necessary in the case or it is undesirable to try the case summarily. In that situation, the special Judge shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed

398 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 5 (5).
399 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 4 (4).
400 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 6 (1).

to hear or re-hear the case in accordance with the procedure prescribed by the said Code for the trial of warrant cases by Magistrates[401]. There shall be no appeal by a convicted person in any case tried summarily under Section 6 in which the special Judge passes a sentence of imprisonment not exceeding one month, and of fine not exceeding two thousand rupees. But such an appeal under the relevant provisions may lie to the appropriate higher court if the sentence or fine exceeds the above said limit[402].

It is also provided under the Act that the procedure to be adopted by the court while deciding a case under the Act be on the lines of the Code of Criminal Procedure, 1973, but subject to certain modifications as are given as under[403]:

> *(a) in sub-section (1) of section 243, for the words "The accused shall then be called upon", the words "The accused shall then be required to give in writing at once or within such time as the Court may allow, a list of the persons (if any) whom he proposes to examine as his witnesses and of the documents (if any) on which he proposes to rely and "he shall then be called upon" had been substituted;*
>
> *(b) in sub-section (2) of section 309, after the 'third proviso, the following proviso had been inserted, namely:-*
>
> *"Provided also that the proceeding shall not be adjourned or postponed merely on the ground that an application under section 397 has been made by a party to the proceeding.";*
>
> *(c) after sub-section (2) of section 317, the following sub-section had been inserted, namely:-*
>
> *"(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), the Judge may, if he thinks fit and for reasons to be recorded by him, proceed with inquiry or trial in the absence of the accused or his pleader*

401 The Prevention of Corruption Act, 1988 (Act 49 of 1988), 2nd Proviso to s. 6(1).
402 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 6 (1).
403 The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 22.

and record the evidence of any witness subject to the right of the accused to recall the witness for cross-examination.";

(d) in sub-section (1) of section 397, before the Explanation, the following proviso had been inserted, namely:-

"Provided that where the powers under this section are exercised by a Court on an application made by a party to such proceedings, the Court shall not ordinarily call for the record of the proceedings:-

(a) without giving the other party an opportunity of showing cause why the record should not be called for; or

(b) if it is satisfied that an examination of the record of the proceedings may be made from the certified copies."

4.15. APPLICABILITY OF THE PREVENTION OF CORRUPTION ACT UPON JUDICIAL OFFICERS

In this part we are going to discuss whether the judicial officers come under the ambit of Prevention of Corruption Act, 1988. There has never been any uncertainty that the Prevention of debasement Act covers Judicial Officers in the subordinate courts. Indeed, even along these lines, Judicial Officer is once in a while prosecuted under the Act. The same is almost the position in appreciation of administrative staff in the subordinate courts. The cause behind why Judicial Officers are not prosecuted under the Act is not that the number of dishonest officers is insignificant, but the true reason is that there is no viable mechanism to prosecute them. Instances of corruption in subordinate judiciary is significantly less when contrasted with different departments, but even then the time has now come when one ought to consider criminal prosecution as an impediment to control such instances.

Now let us discuss whether the judges of higher courts come under the purview of the Prevention of Corruption Act, 1988. The Constitution of India provides under various provisions has protected and preserved the judges position as a constitutional

functionary and holds an office, not a post or service[404]. K. Ramaswami J. former Hon'ble Chief Justice of Madras High Court is of the opinion that the judge functions as a court. He is the court, a third branch of the State itself and such a court is not and should not by any stretch of imagination, be a servant or public servant[405]. In *K. Veeraswami v. Union of India and others*[406], Justice J.S. Verma, by descending majority view, said that a judge of higher judiciary is a constitutional functionary, even though he holds a public office and in that sense, he may be included in the wide definition of public servant. But, as there was no authority nominated into the Prevention of Corruption Act to sanction prosecution of Supreme Court and higher court judges they could not be classified as public servant under the Prevention of Corruption Act, 1988[407]. Hence, the judges of higher judiciary are not public servants and do not come under the ambit of the Prevention of Corruption Act, 1988. The position is different when it comes to the judicial officers of the subordinate courts, though they barely prosecuted under the Act.

However, in majority judgment [Ray, B.C. (J), Shetty, K.J. (J), Sharma, L.M. (J) and Venkatachalliah, M.N. (J) consenting], it was established that a Judge of the High Court or of the Supreme Court comes within the definition of public servant under Section 2 of the Prevention of corruption Act, 1947 and he is liable to be prosecuted under the provisions of the Act. A Judge will be liable for committing criminal misconduct within the meaning of Section 5 (1) (e) of the Act, if he has in his possession pecuniary resources or property disproportionate to his known sources of income for which he cannot satisfactorily account. In order to launch a prosecution against a Judge of a superior Court for criminal misconduct failing under Section 5 (1) (e) of the Act, previous sanction of the authority competent to remove a Judge, including Chief Justice of a High Court, from his office is imperative. The President of India has the power to appoint as well as to remove a Judge from his office on the ground of proved misbehaviour or incapacity as provided in Article 124 of the

404 The Constitution of India, art. 124 (4), (5) and 218.
405 K. Veeraswami, *Whither – Laws and Justice* 23-28 (Eastern Law House Pvt. Ltd., Kolkata, 2001).
406 AIR 1991 (3) SC 196
407 Atul Lalasaheb More, *An Appraisal of the Judicial System in India: A Critical Study on Judicial Independence Vis-à-vis Judicial Accountability* 180 (Laxmi Book Publication, Solapur, 2015).

Constitution and, therefore he, being the authority competent to appoint and to remove a Judge, of course, in accordance with the procedure envisaged in clauses (4) and (5) of Article 124 may be deemed to be the authority to grant sanction for prosecution of a Judge under the provisions of Section 6 (1) (c) in respect of the offences provided in Section 5 (1) (e) of the Act. In order to adequately protect a Judge from frivolous prosecution and unnecessary harassment the President will consult the Chief Justice of India who will consider all the materials placed before him and tender his advice to the President for giving sanction to launch prosecution or for filing FIR against the Judge concerned after being satisfied in the matter. The President shall act in accordance with the advice given by the Chief Justice of India. If the Chief Justice of India is of opinion that it is not a fit case for grant of sanction for prosecution of the Judge concerned, the President shall not accord sanction to prosecute the Judge. This will save the, rubbish concerned from unnecessary harassment as well as from frivolous prosecution against him.

4.16. WITNESS PROTECTION MECHANISM

Protection of witnesses is the main essential of an effective criminal justice system. Every criminal trial is dependent upon collection of evidences. Without appropriate evidences it would be very difficult for the court to decide upon a given matter. Collection of evidences is dependent upon testimony of witnesses along with certain other elements. Therefore, it is of utmost importance to encourage witnesses to come to the court to help in a given case. Many a times, criminals try to intimidate witnesses to omit them to give evidence in a court of law. Hence, witness protection is quite relevant in present context. Moreover, a witness may be discouraged by the procedural technicalities, for example, when he is also indicted upon because of giving, offering bribe to a public servant. If this happens, a witness will never come forward to give his testimony because of fear of accusation or indictment. There is a certain provision provided under the Act giving this protection to the offeror or bribe giver. This provision is described as follows[408]:

[408] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 24.

"Notwithstanding anything contained in any law for the time being in force, a statement made by a person in any proceeding against a public servant for an offence under sections 7 to 11 or under section 13 or section 15, that he offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under section 12."

4.17. NEXUS OF PREVENTION OF CORRUPTION ACT WITH INCOME TAX ACT, 1961

The definition of the term "public servant" is given under Clause (iv) of Sub-section (c) of Section 2 of the Prevention of Corruption Act, 1988 and it covers a number of government servants and other persons as well including judges. The Hon'ble Supreme Court of India in *K. Veeraswami v. Union of India and others*[409] by a majority of 4:1 has held that the Prevention of Corruption Act is applicable even upon the Judges of the Supreme Court and the High Court. Section 7 encircles a public servant with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, rendering favour or disfavour to any person and the act is made punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

In our country the instances and scope of bribery and corruption has increased manifold because of its characteristic of being a developing economy. In a developing economy, a substantial amount of government money is disbursed for development of infrastructure and industrial development. For this the government has to engage a number of employees to give effect to the strategic plans. These plans and schemes include the imposition and continuation of controls, issuing of licenses/tenders, giving Government properties on lease, exceptional favours in the matters of employment and a number of other activities which has opened the doors for favouritism and corruption. The era of liberalization has also played its role in increasing corruption as

409 AIR 1991 (3) SC 196

a result of above mentioned reasons. A democratic government duly elected by the people has to be accountable and should work in a transparent manner in accordance with the law of the land. But the government has failed badly in achieving this noble objective of democracy. That is why; the judiciary had to come forward to control this evil by way of adopting power of judicial activism and has put the law into motion by taking former Prime Minister, Chief Ministers, Ministers and other high rank officials within its reach.

The Income Tax Act, 1961 is one of the socio-welfare legislation which seeks to serve the idea of social justice by collecting a minimum amount of money from the taxpayers which can in turn to be utilized for the welfare of weaker sections of the society by implementing various schemes made for that purpose. The procedure for search and seizure given under the Act is relevant in this context[410]. Section 132 (4) provides for examination on oath of any person who is in possession of properties. The statement such given by such person may be used in evidence in any proceeding under the Act. In this way Section 132 (4) of the Act helps the prosecutions under the Act significantly. An assessee[411] submitting a false statement as return is also liable for prosecution under the Act[412]. Similarly, falsification of books of account or document, etc. is also punishable[413]. The procedure for prosecutions and various offences are given under the Chapter XXII. In addition, the provisions for penalty are laid down under the chapter XXI.

Attaining of immovable properties in certain instances of transfer, to neutralize avoidance of tax, is administered under Chapter XX-A of the Act. There is also an important provision for the acquisition of immovable property transferred for evading tax[414]. Procurement of properties for an amount of money clearly improper and which is clearly lesser than the honest estimation of the property and which encourage both the transferor and transferee for disguise of income and avoidance of income tax are

410 Income Tax Act, 1961 (Act 43 of 1961), s. 132.
411 Defined under Section 2 (7) of Income Tax Act, 1961 as "a person by whom any tax or any other sum of money is payable under this Act, and includes…."
412 Income Tax Act, 1961 (Act 43 of 1961), s. 277.
413 Income Tax Act, 1961 (Act 43 of 1961), s. 277-A.
414 Income Tax Act, 1961 (Act 43 of 1961), s. 269 C.

covered under Section 269-C and the competent authority duly empowered under Income Tax Act may go on to initiate proceedings for the acquisition of such property as per the given provisions. This won't just deny the wicked acquirer of his property, but additionally a huge part of the property will go to the government. There will also be additional liability as per the Prevention of Corruption Act, 1988. This is an incredible stride without any procurement under the Prevention of Corruption Act, for procurement, acquisition or seizure of property, other than detainment.

After considering all the reasons discussed above, we can easily conclude that it is the need of the hour to establish a strong legitimate nexus of cooperation between Income Tax Department, which is working under the Central Board of Direct Taxes in the Ministry of Finance, with the investigation agency conducting the prosecution under the Prevention of Corruption Act. A fiery stride towards this end will reinforce the cases under the Prevention of Corruption Act. In light of all these facts, an amendment into the Prevention of Corruption Act might be made, for confiscation of the property, even in the name of *benemidar*. The apparent owner does not dare to disclose for the apprehension of the Prevention of Corruption Act, if he happens to be a public servant. The *benamidar* is not troubled in light of the fact that he is not the real owner and it is not his property. Incorporation of these amendments into the anti-corruption law will tackle the issue of corruption considerably. The same amendment may likewise be made pertinent to the overall population. It is by this procedure, the evil of corruption may be thwarted out of many places reasonably. The Government must have the willpower to incorporate all these necessary changes into the law after due consideration and parliamentary debates and discussion. In this way the true purpose of democracy may be served by punishing the wrongdoers and developing new measures to provide equal opportunities to the weaker and underdeveloped sections of the society, which in turn will serve the noble purpose of social justice enshrined into the Constitution.

4.18. PENALTIES OR PUNISHMENT UNDER THE ACT

Imposition of punishment or penalty is the basic essential of criminal justice system. Without penalty or punishment, the purpose of law is difficult to attain.

Penalty or punishment has a deterrent effect upon the minds of possible future wrongdoers. It dents their urge to commit crime for their selfishness. It creates an atmosphere into the society that the crimes will not be accepted by the civil society. It discourages the wrongdoers and establishes the faith of general public into administration. In this part, we are going to discuss about the nature and quantum of the punishment imposed upon the wrongdoers for the violation of provisions enshrined onto the Prevention of Corruption Act, 1988.

The degree, quantum and duration of the punishment play an important role into the reformation of the accused. Apart from it, these factors also play their role in creating a deterrent effect upon the possible future offenders. It proves to be a bad bargain for them to get involved into crimes. Under the Prevention of Corruption Act, 1988 the general punishment provided is from three years of imprisonment to seven years for the offences of lower degree (under Sections 7 to 12), in addition with fine. The offences of higher degree are punishable with more punishment, for example, the acts committed by the accused under Section 13. The offence of criminal misconduct as given under Section 13 is punishable with imprisonment for a term which shall be not less than four years but which may extend up to ten years and shall also be liable to fine. The persons who have committed offences mentioned under Section 14, i.e. habitual committing of offences under Sections 8, 9 and 12, are liable to be punished with an imprisonment of five years which may be extended up to ten years of imprisonment. In addition, he shall also be liable to pay fine as directed by the court in this regard. The attempts to commit offences are also punishable under the Act[415]. It is provided that whoever attempts to commit an offence referred to in clause (c) or clause (d) of sub-section (1) of section 13 shall be punishable with imprisonment for a minimum term of two years which may be extended to five years of imprisonment with fine. It is also provided under the Act that the Court should consider the value or pecuniary interest into the thing or property subject matter of the offence committed[416].

[415] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 15.
[416] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 16.

Earlier, the Prevention of Corruption Act of 1988 provided only for a minimal term of punishment which was insufficient in effectively controlling the evil of corruption. The term of punishment was later extended by the Lokpal and Lokayuktas Act, 2013 (No. 1 of 2014). It was extended because of mounted pressure from all the quarters of life against the evil of corruption. During the recent days, the civil society has contributed immensely in this regard by establishing a strong public opinion against the evil of corruption. The Lokpal and Lokayuktas Act, 2013 was the result of this consciousness in addition with the legal obligation of the government towards the implementation of the provisions of UNCAC.

4.19. JURISDICTION OR PROCEDURE OF COURTS UNDER MILITARY, NAVAL AND AIR FORCE OR OTHER LAW NOT TO BE AFFECTED BY THE PREVENTION OF CORRUPTION ACT[417]

It is notable to mention here that the Prevention of Corruption Act, 1988 does not affect the jurisdiction of, or procedure to be applied by, any court or other authority, granted to it under the Army Act 1950, the Air Force Act, 1950, the Navy Act, 1957, the Border Security Force Act, 1968, the Coast Guard Act, 1978 and the National Security Guard Act, 1986. For removing all doubts it is also provided that the court of a special judge shall be considered to be a court of ordinary criminal jurisdiction i.e. like any court of criminal jurisdiction, the court of special judge shall also be incompetent to govern the jurisdiction and procedure of a court established under above mentioned legislations.

4.20. PROVISIONS RELATING TO APPEAL AND REVISION

The power relating to appeal and revision relating to the offences f bribery and corruption under the Act is accorded to the High Court concerned. Subject to the provisions of this Act, High Court may exercise, so far as they may be applicable, all the powers of appeal and revision conferred by the Code of Criminal Procedure, 1973 on a High Court as if the court of the special Judge were a court of session trying

[417] The Prevention of Corruption Act, 1988 (Act 49 of 1988), s. 25.

cases within the local limits of the High Court[418]. Thus the court of a Special Judge shall be considered a Sessions Court for the purpose of appeals and revision. In this way, the salient features of the Prevention of Corruption Act, 1988 have been discussed in detail. There are various significant provisions under the Act which have proved to be helpful in curbing the evil of corruption. Yet, there is further need to explore more into the Act to make it more effective. Next chapters of the study deal with this context.

[418] Section 27, the Prevention of Corruption Act, 1988