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THE JUDICIAL APPROACH TO PREVENT AND CURE THE CORRUPTION PRACTICES IN INDIA

Priya Jain, Ankita Gaur , Vir Vikram Bahadur Singh, Sharwani Pandey, Kaneez Fatima

Faculty of Juridical Sciences, Rama University, Mandhana, Kanpur, U.P., India

ABSTRACT

Judicial precedent or case law consists of law found in the judicial decisions. A judicial precedent is the principle law on which a judicial decision is based. It is the ratio-decidendi otherwise known as the reason for the decision. It is not everything said by a judge in the course of his judgment that constituents a precedent, only the pronouncement on law in relation to the material facts before the judge constitutes a precedent. The doctrine of judicial precedent as a common law doctrine applies to only those Courts which are empowered to administer adjective common law of which forms part of the doctrine. Customary Courts, Sharia Courts of Appeal and area Courts are not empowered to apply adjective common law. Therefore, the common law doctrine does not apply to them nor does any legislation provide for a precedent system in customary Courts. As a common rule under the doctrine of 'stare decisis' a Court is bound to follow decisions of a higher Court in the hierarchy. But a lower Court is not bound to follow a decision of a higher Court which has been over-ruled. Further-more, a lower Court is not bound by a decision of a higher Court where that decision is in conflict with a decision of another Court which is above such higher Court in the hierarchy. In principles, a lower Court is entitled to choose which of the two conflicting decisions of a higher Court of equal standing it would follow. It should be noted that a binding precedent may be abolished by the legislation.

KEY WORDS: Corruption, Judicial Activism Etc

INTRODUCTION

The Indian Constitution has created a democratic, republic and a trinity of instrumentalities to enforce its paramount provisions without fear or favor, affection or ill-will. The executive echelons, when they exceed their power as inscribed and circumscribed in the 'suprema lex', are subject to scan, scrutiny and correction by the higher judiciary. The legislature has vast law-making powers and is functionally competent to perform an inquest into the administration. But, when it transgresses its constitutional bounds, the court can quash its action by writs, or command fresh operation by means of appropriate directions. The dishonest practices indulged in by the public men and bureaucrats have already been criminalized. The drawback in the Indian Penal Code in the matter of offences dealing with bribery and accepting of illegal gratifications by public servants have been sought to be remedied by passing a specific legislation, "The Prevention of Corruption Act". State legislatures have also taken steps to supplement in the corruption control. Even the National Police

Commission has acknowledged partiality, corruption and failure to register cognizable offence in the police departments. A major amount of the cases, which go without prosecution, are corruption cases. The only organization now sought to intervene in the field is Judiciary. In fact, the higher judiciary by way of its judicial activism has tried to fill in the gaps created by the executive including the prosecuting and the investigating agencies and competent higher sanctioning authorities. It has even tried to fill up some of the lacunae created by the legislature because of its passive or lethargic response to the problem of corruption.

MEANING OF CORRUPTION

Corruption in any form treated as an incurable disease is caused mainly by social and economic evils in the society. It damages the moral and ethical character of the civilization. Undisputedly, corruption breads many bad practices in the society. Once the seeds of corruption start growing's, it takes roots slowly and increasingly and cancerously. It passes through the whole Nation and becomes a dangerous disease. The Santhanam Committee on the prevention of corruption in India describes the corruption as any improper or self-interested exercise of power and authority attached to a public office or to the special position one occupies in a public life. Corruption has been taken into consideration one of greatest challenges impeding the growth of contemporary India. Though India's economy stands tall and firm, it has not realized, its true potential as corruption has, in the present scenario, slow down and undermines not only the economic growth, but also the effective performance of democracy." Corruption, a social menace, has made our country vulnerable to and defenceless against the oncoming forces of anti-social elements. Corruption in India is a significance of the nexus between bureaucracy, politics and criminals. India is now no longer measured a soft State. It has now become welfare state where all can be considered that corruption has a corrosive impact on economy. It worsens our reflection in the international market and leads to loss in a foreign country opportunities. Significantly, corruption in India flows from the political class. It manifests latently in party actions and election funds. Further, political investment gives an aura of invincibility to corruption and deprives it of all moral and legal worries[1].

JUDICIARY ON PUBLIC SERVANTS

One of the recommendations of the Santhanam Committee was to include Ministers including Ministers of State, Deputy Ministers and Parliamentary Secretaries holding such office in the Union or State Government within the definition of the 'public servant'. There is no express provision making a Minister, a public servant. It is

[1]S. Prabhu, Corruption In India: Causes And Remedies', IJSR - International Journal of Scientific Research

necessary to look into the judicial pronouncements to know how the courts, through their interpretative techniques have held that a minister is a public servant.

JUDICIAL ACTIVISM

The three organs of the State, provided under the constitution, namely the Legislature, the Executive and Judiciary, to run the affairs of the country are complementary to each other. The Constitution framer had envisaged a clear distribution of powers and functions for these three organs. The passing of laws is the exclusive domain of the Legislature at the Union level as well as the State level, while the Executive – the most important, the powerful one, is entrusted with the duty to implement the legislation. The role of the Judiciary is to administer justice in accordance with the law of the land, and also to adjudicate the constitutional validity of the law enacted by the Legislature. 'Judicial Activism' denotes the encroachment by Judiciary into the Executive and Legislative domain. Let us see the present position of the Legislature and the Executive and then juxtapose the comparatively holy status the judiciary holds. The harsh reality is that the masses in the country have been let down by the Executive and the elected representatives. "With the growing deinstitutionalization of Indian polity, the role of the elected representatives has been brought down from legislation to that of power brokers.

The politicians of all shades have contributed in a big way to bring the present day impasse where corruption is the rule of the day and to be an M.L.A. or M.P. is treated as a licence to indulge in all sorts of unlawful activities." One of the major tasks of the Executive is crime detection and crime prevention. In the 'hawala cases, fodder scam and other corruption cases' the criminals involved are high politicians and ministers who control the Executive. The Police, the investigative agencies and even the prosecutors are influenced by them. In this situation, can it be expected that these corruption cases will be conducted at all the by the executive? It is in this circumstance that the judicial activism took a different colour and shape. The judiciary is the only organ which could not be took over by the politicians. It is this faith among the public that gave momentum to judicial activism. The 'hands off' doctrine adopted by the Judiciary in the year 1980, underwent a drastic change in the nineties since the Judiciary felt that it is necessary to protect the constitutional guarantees and the democratic principles[2].

[2]Nye, Joseph S., Corruption and Political Development: A cost-benefits analysis‖ American political science review, Vol.61.No.2., June 1967, p.417

ROLE OF JUDICIARY IN INVESTIGATION FOR PREVENTING THE CORRUPT PRACTICE

PRELIMINARY INQUIRY BEFORE FIR

An important decision that preliminary enquiry was necessary before lodging a First information Report was given by the Supreme Court in P. Sirajuddin. In this case Sirajuddin was a Chief Engineer Highways and Rural Works. Before his retirement, there were certain allegations against him and after a preliminary enquiry a fully fledged investigation was ordered. The Supreme Court observed: "In our view the procedure adopted against the appellant before laying the First Information Report, though not in terms forbidden by law, was as unprecedented and outrageous as to shock ones sense of justice and fair play. No doubt when allegations of dishonesty of a person of appellant rank were brought to the notice of the Chief Minister, it was his duty to direct an inquiry into the matter. The Chief Minster in our view pursued the right course. The High Court was not pressed by the allegation of the appellant that the Chief Minister was moved to take an initiative at the instance of a person who was going to benefit by the retirement of the appellant and who was said to be a relation of the Chief Minister. The High Court rightly held that the relationship between the said person and the Chief Minister, if any, was so distant that he could not have possibly influenced him and we are of the same view." In Shashikant, the Supreme Court held that the CBI is empowered to conduct a preliminary inquiry according to the procedure laid down in the CBI Manual and particularly on the receipt of an anonymous complaint preliminary enquiry can be conducted without registering the FIR[3].

COMPETENT INVESTIGATING OFFICER

The Supreme Court in Muni Lal vs state of uttar pradesh has held that it is not necessary that every one of the steps in the investigation has to be done by the Deputy Superintendent of Police in person or that he cannot take the assistance of his deputies, or that he is bound to go through each and every one of the steps in every case. That being the case, where certain statements of witnesses had been recorded by a Sub-Inspector of Police but according to the Deputy Superintendent of Police, they were written down by the sub inspector on his dictation and under his supervision.

In Kanhaiya Lal vs state of Rajasthan, the court held that "the investigation conducted by an officer below the rank of a Deputy Superintendent of Police would be vitiated only, if, it could be shown that the irregularity had prejudiced the accused and had resulted in a miscarriage of justice. Merely because there was some irregularity in the investigation, or that the investigating officer had some animus against the accused, or

[3]R.B.Jain, Public Administration in 21st Century for Good Governancel, Deep and Deep Publications, New Delhi, p.223,2001.

that the investigation was being supervised by a person, who was interested, cannot by itself lead to an inference that the accused has necessarily been denied a fair trial. Before an accused can in such circumstances claim that he has been prejudiced, he has to indicate precisely the manner in which a fair trial has been prejudiced.

The Ismail Ibrahim Sayed, the court held that where an investigation into offence was carried out by an inspector was challenged on technical point before trial Judge, who ordered re-investigation by a Deputy Superintendent of Police and accordingly Deputy Superintendent of Police made a fresh panchanama after examining the panch witnesses, it was held that a seizure once made cannot be redone because the seized property is already in possession of the police, and that the subsequent investigation by Deputy Superintendent of Police, amounted to farce only[4].

RECIPIENT OF BRIBE

In Parkash Singh Badal vs union of india, the appellant Shri Sukhbir Singh Badal had taken the stand that he being a Member of Parliament, he is a public servant and cannot be charged with offences under Sections 8 and 9 of the Act. The Contention was that Sections 8, 9, 12, 14 and 24 of the Act are applicable to private persons and not to public servants. The Supreme Court held that "the opening word of Sections 8 and is 'whoever'. The expression is very wide and would also cover public servants accepting gratification as a motive or reward for inducing any other public servant by corrupt or illegal means. Restricting the operation of the expression by curtailing the ambit of Sections 8 and 9 and confining to private persons would not reflect the actual legislative intention."

LAYING OF TRAP AND TRAP MONEY

The practice of laying traps employing spies and trap witnesses for detection of offences has been recognized in this country since a very long time. His Lordship Ramaswami J., traced the historical genesis of this practice in Re Ambujam Ammal. The extracts are given below: "So far as this country is concerned the employment of spies, agents provocateurs and trap-witnesses is in accordance with the best traditions of Hindu and Muslim state craft. I have dealt elsewhere at length with this aspect of administration of justice in Pre-British India. It is enough to point out here that our historical literature is replete with reference to the employment of such agents. Both, the epics of Ramayana and Mahabharata give extensive directions for the employment of such agents in the detection of offences and the promotion of justice."

In Rao Shiv Bahadur Singh state of vidhya pradesh, "it was held that it may be, that the detection of corruption may sometimes call for the laying of traps, but there is no jurisdiction of the police authorities to bring about the taking of a bribe by supplying the bribe money to the giver, where he had neither got it nor has the capacity to find it

[4] SenturiaJoseph,j'political corruption' Encyclopedia of social sciences' op.cit,page no.448

for himself." Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of frail endurance and provoked into breaking the law; and more particularly by those who are the guardians and keepers of law. However regrettable the necessity of employing agents and provocateurs may be, it is one thing to tempt a suspected offender to over action when he is doing and all he can do commit a crime and has every intention of carrying through his nefarious purpose from start to finish and quite another to egg him on to do that which it has been finally and firmly decided shall not be done. The very best of men have moments of weakness and temptation, and even the worst, have times when they repent of an evil thought and are given an inner strength to sets at an behind them; and if they do, whether it is because of caution or because of their better instincts, or because some other has shown them the wickedness of wrong doing, it behaves society and the State, to protect them and help them in their good resolve and not to place further temptation in their way and start afresh a train of criminal thought which had been finally set aside[5].

TESTIMONY OF BRIBE GIVER

In Gulam Mahmood malek vd state of Gujarat, the Supreme Court held that in a trial under Section 5 (1) (d) read with Section 5 (2), though the bribe giver is a competent witness to speak of the facts which are alleged to be constituting the offence, but as a rule of caution, it would be unsafe to convict the accused relying on his testimony alone. Where the bribe giver had been paying bribe to the accused voluntarily on several occasions, in such a case the nature of his evidence would be that of an accomplice, and without corroboration thereof by material particulars, the same cannot form the basis of a finding that the accused had demanded the money. This being a crucial aspect to constitute the offence under Section 5 (1) (d) the evidence of bribe giver cannot be relied upon without corroboration.

PHENOLPHTHALEIN – SODIUM CARBONATE TEST

This test is based on the fact that phenolphthalein is colourless in acid and neutral medium and deep purple in alkali medium. Phenolphthalein is a coal tar product and it is available in the form of a light powder. The currency notes or other articles intended for the purpose of bribe are coated with phenolphthalein powder to form a thin layer and it is hardly visible to the naked eye. When the currency note or other articles dusted with phenolphthalein powder are touched by a person his hands will invariably collect a few particles of the powder. When those hands are dipped into a solution of sodium carbonate, the solution turns to purple or pink colour. This method is being commonly used over a number of years by the Investigating Agencies for

[5]Mark Philip, Defining Political Corruption‖ Political Studies, Vol.45 No.3, special issue 1997.

providing conclusive proof of the fact that an accused person has come in contact with the bribe amount or article of bribe in question.

PIL AND CORRUPTION

In Shri Rama Krishna Dalmia, it was held that Article 14 does not forbid reasonable classification for the purposes of legislation but if, it appears that the impugned legislation is based on a reasonable classification founded on intelligible differentia and that the said differentia have a rational relation to the object sought to be achieved by it, its validity cannot be successfully challenged under Article 14. In C.I. Emden, "it was held that there can be no doubt that the basis adopted by the legislature in classifying one class of public servants who are brought within the mischief of Section 4 (1) is on perfectly rational basis.

It is based on an intelligible differentia and there can be no difficulty in distinguishing the class of persons covered by the impugned section from other classes of persons who are accused of committing other offences. Legislature presumably realized that experience in courts showed how difficult it is to bring home to the accused persons on the charge of bribery. Evidence which is and can be generally adduced in such cases in support of the charge is apt to be treated as trained and so it is not very easy to establish the charge of bribery beyond a reasonable doubt. Legislature felt that the evil of corruption amongst public servants posed a serious problem and had to be effectively rooted out in the interest of clean and efficient administration. That is why the Legislature decided to enact Section 4 (1) with a view to require the raising of the statutory presumption as soon as the condition precedent prescribed by it in that behalf is satisfied. The object, which the Legislature, thus, wanted to achieve, is the eradication of corruption from amongst public servants, and between the said object and the intelligible differentia on which the classification is based, there is a rational and direct relation[6].

J.A.C. SALDANA CASE : HANDS OFF DOCTRINE

In J.A.C. Saldana though was decided in 1980, an era of judicial activism, the apex court took a hands off position. D.A. Desai J. opined: "There is a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the Executive through the police department, the superintendence over which vests in the State Government. The Executive, which is charged with added duty to keep vigilance over law and order situation, is obliged to prevent crime and if, an offence is alleged to have been committed, it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigates, and finds, an offence have been committed, it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and

[6]Naphaniel Leff, Economic Development through Corruption‖ in Heidenheimer, id at 389.

the investigating officer submits report to the court to take cognizance of the offence, under Section 190 of the Code of Criminal Procedure, its duty comes to an end." "It is clear from this that the judiciary was reluctant to play any role in the matters of investigation, though it had started supervising the prison administration. A critical analysis of this step taken by the judiciary reveals that, unless and until, the investigating officer submits report to take cognizance of the offence, the court will not be bothered to see that the culprits are booked. The police and other investigating agencies being the part of the Executive, can never be expected to 'investigate into the offence and bring the offender to book' when the offender himself is the Prime Minister, Chief Minister, other Ministers or powerful politicians. If, at all, investigation is conducted, it would be against the politicians in the opposition[7].

These kinds of incidents give a vivid picture of the investigation of cases against politicians being conducted in our country. The compelling factor which made the judiciary to interfere even with the investigation is very clear from this. The number of political corruption cases involving top political leaders came to be known very frequently after 1995, obviously due to the atavistic Judiciary. Even though, so far this activism could not achieve anything material, and bring the offenders to book, the very fact that at least investigation is being conducted and the people of the country could know what their representatives are doing, is itself a good result.

CONCLUSION

To eradicate the evil of corruption, the Central Government has enacted a number of Anti-Corruption Laws such as the Prevention of Corruption Act 1988, the Prevention of Money Laundring Act, Indian Penal Code etc, and constituted a number of commissions such as Central Vigilance Commission (CVC), Central Bureau of Investigation (CBI) and Anti Corruption Bureau (ACB) to enforce these AntiCorruption Laws effectively. Ordinary citizens face unnecessary problems in their routine interactions with the Government organizations. In many instances, it is observed that it is the lack of monitoring mechanisms or their poor enforcement which encourages public servants at different levels to seek or accept illegal gratification. Today, there is hardly any institution in India that can claim freedom from corruption. From the Office of the Prime Minister to the Secretary of the Village Panchayat the cases of corruption have been worryingly obvious. Despite Legislations and Commissions appointed by the Government, there is a rapid growth of corruption in India. This is evident from the reports of Transparency India International, a Berlin based NGO that India ranks 76 from 168 countries indicating that despite some progress-corruption continues to be perceived as rampant in every walk of life

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