

PROSECUTION OF VIGILANCE CASES

Orders of High Court Himachal Pradesh in Prem Raj Case No. CWP 1807/2010 and other related cases decided on 05.05.2010

Sanction for Prosecution:

Under section 19 of the Prevention of Corruption Act, 1988, it is necessary for the prosecuting authority to have the previous sanction of the appropriate administrative authority for launching prosecution against a public servant. For ready reference the text of the section is reproduced below: -

"19. Previous sanction necessary for prosecution-

- (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 and of the Central Government.
 - (b) in the case of a person who is employed in connection with the affairs of a State and is not removable from the office, save by or with sanction of State Government, of the State 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 whether the previous sanction as required under sub-section (1) should be given by the Central or 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.

Prior to the enactment of the Prevention of Corruption Act, 1999, the prosecution of a public servant was subject to the provisions of section 197 (1) of the Code of Criminal Procedure, 1973. This section reads as follows: -

SECTION 197 Cr.P.C.-Under section 197 (1) d the sanction of the Central or of a State Government was necessary for the prosecution of only such public servants as were not removable from their offices save with the sanction of the respective Government. No sanction is required under that section to prosecute a public servant removable by a lower authority. After the enactment of the Prevention of Corruption Act, 1947, the prosecution of any public servant, however, subordinate, who is alleged to have committed an offence under section 5 of that Act and /or under section 161, 164 and 165 of the Indian Penal Code requires the previous sanction of the appropriate administrative authority. But prosecution sanction is not required while prosecuting a Government servant who is removable without the sanction of the Government concerned, who is alleged to have committed an offence under section 409 I.P.C.

Need for Sanction:

The requirement of previous sanction is intended to afford a reasonable protection to a public servant, who in the course of strict and impartial discharge of his duties may offend persons and create enemies, from frivolous, malicious or vexatious prosecution and to save him from unnecessary harassment or undue hardships which may result from an inadequate appreciation by police authorities of the technicalities of the working of a department. The prosecution of a Government servant for an offence challenging his honesty and integrity has also a bearing on the morale of the public services. The administrative authority alone is in a position to assess and weigh the accusation on the basis of the background of their own intimate knowledge of the work and conduct of the public servant and the overall administrative interest of the State.

The protection of previous sanction is available under section 6 of the Prevention of Corruption Act only to a person who was a public servant when the offence was committed and also when a court is asked to take cognizance of the offence. The provisions of the section will not be attracted if the accused was not at the time of the commission of the alleged offence a public servant but was merely

expecting to be a public servant. Similarly, previous sanction under this section will not be required in the case of a person who was a public servant at the time of commission of the offence but who had ceased to be so at the time when the court was asked to take cognizance of it.

If the prior sanction of the competent authority is not obtained, the trial would be void ab initio and if commenced will have to be set aside. A fresh prosecution would be necessary after a proper sanction had been obtained and a charge sheet against the accused will need to be filed afresh for his trial for offences covered by the sanction.

Sanction for prosecution under section 409, Indian Penal Code:

If a public servant is charged under section 409 of the Indian Penal Code, the requirement of previous sanction as prescribed in section 6 of the Prevention of Corruption Act will not apply. However, if such accused public servant cannot be removed from his office except by an order of the Central or State Government, sanction for his prosecution will be required under section 197 of Criminal Procedure Code.

Investigation by the Anti-Corruption Unit:

As a general rule allegations involving offences punishable under section 13 of P.C. Act, 1988 and section 409 of I.P.C. will be investigated, at the instance of administrative authority or as a result of information gathered through their own sources, by the Anti-Corruption Unit, Himachal Pradesh.

Action after judgment and conviction:

As soon as the judgment is pronounced a report about conviction will be sent by the Anti-Corruption Unit to Administrative Department concerned and to the Vigilance Department. The Anti-Corruption Unit will also take immediate steps to obtain a copy of the judgment and to forward copies of it to the authorities mentioned above. While doing so the Anti-Corruption Unit may give their comments, if any, on any matters arising out of the judgment.

As soon as the report about the conviction is received from the Anti-Corruption Unit and if it happens that the Government servant convicted had not been placed under suspension, the appropriate disciplinary authority should decide whether he should now be suspended. In cases where the conviction is for a term of imprisonment exceeding 48 hours, the Government servant shall be deemed to have been suspended under Rule 10(2) (b) of Central Civil Services (Classification, Control and Appeal) Rules, 1965. A formal order about such deemed suspension will be issued by the disciplinary authority for purpose of administrative record.

As soon as a copy of the judgment convicting the accused is received from Anti-Corruption Unit, the Vigilance Department would consider the course of further departmental action to be taken against the accused public servant and advise the appropriate disciplinary authority accordingly.

If the disciplinary authority after consultation with the Vigilance Department comes to the conclusion that the offence for which public servant has been convicted was such as to render his retention in the public service prima-facie undesirable, it can impose upon him under rule 19(i) of the C.C.S. (CCA) Rules, 1965, the penalty of dismissal or removal or compulsory retirement from service, as may be considered appropriate, with reference to the gravity of the offence, without holding any inquiry or giving him a show-cause notice as provided in proviso to Article 311 (2) of the Constitution.

In a case in which the offence for which a Government servant has been convicted is not considered such as to render his retention in public service prima-facie undesirable, the appropriate disciplinary authority after consultation with the Vigilance Department may impose any of the penalties, other than those of dismissal, removal or compulsory retirement from service. Specified in rule 11 of the C.C.S.(CCA) Rules, 1965, as may be considered appropriate, under rule 19 (i) of the Rules without holding any further inquiry or giving the public servant concerned a show-cause notice.

Action to impose any of the penalties referred to in sub paragraph 13.3 & 13.4 above should not be taken before the period for filing an appeal has elapsed or, if an appeal has been filed, before the appeal has been decided in the first court of appeal. In counting the period for filing the appeal, time taken for getting the copies of court's decision is not to be counted. The disciplinary authorities should make arrangement for getting the result of the first appeal very promptly and take due action

thereafter without delay and without inquiring whether the Government servant concerned has or intends to file a second appeal. If, however, a restraining order from an appellate court is produced action has to be withheld or taken according to the court's direction.

Consultation with Himachal Pradesh Public Service Commission:

In cases where the State Public Service Commission has to be consulted, a reference to the Commission should ordinarily be made after the period for filing an appeal has elapsed or if an appeal has been filed after the appeal has been decided in the first court of appeal.

However, in a case in which Government are legally advised that there is little chance of conviction being reversed in appeal, the reference to the State Public Service Commission may be made without waiting for the expiry of the period for filing an appeal. The Commission may, however, suggest even in such a case that their advice may be sought only after the judgment of the first appellate court is known or after expiry of period of appeal, if no appeal has been filed.

Action on acquittal:

In cases in which a public servant is acquitted by the trial court, the judgment will be examined by the Anti-Corruption Unit in consultation with the Public Prosecutor concerned to consider whether an appeal or an application for revision should be filed in the first court of appeal. If the Anti-Corruption Unit comes to the conclusion that such an appeal or an application for revision should be filed, a copy of the judgment together with the copy of the comments of the Anti-Corruption Unit and Public Prosecutor concerned will be forwarded by them to the Vigilance Department. If the Vigilance Department agree with the recommendations of the Anti-Corruption Unit, then Vigilance Department will forward to the State Government a certified copy of the judgment and its comments for filing an appeal or revision as the case may be. A copy of such reference will be endorsed by the Vigilance Department to the Anti-Corruption Unit. The administrative department may also be kept informed of the developments.

In the case of a Government servant who is under suspension and against whom acquittal an appeal or a revision has been, it may be considered whether it is necessary to continue him under suspension. If not, the order of suspension may be revoked immediately.

If the Government servant is acquitted by the first appellate court, the Vigilance Department will decide whether the acquittal should be challenged further in the higher court, and if it is so decided, action to institute proper proceedings will be taken by it.

If the conviction is upheld by the appellate court, further action should be taken as outlined in para 15.

Departmental action after acquittal:

If the Government servant is acquitted by trial or appellate court and if it is decided that the acquittal should not be challenged in a higher court, the competent authority should decided in consultation with the Vigilance Department whether or not the facts and circumstances of the case are such as to call for a departmental enquiry on the basis of the allegations on which he was previously charged and convicted.

One identical set of facts and allegations may constitute a criminal offence as well as misconduct punishable under the C.C.S(CCA) Rules, or other corresponding rules. If the facts or allegations had been examined by a court of competent jurisdiction and if the court held that the allegations were not true, it will not be permissible to hold a departmental enquiry in respect of a charge based on the same facts or allegations. If, on the other hand, the court has merely expressed a doubt about the correctness of the allegations, departmental enquiry may be held into the same allegations if better proof than what was produced before the court is forthcoming.

If the court has held that the allegations are proved but do not constitute the criminal offence with which the Government servant was charged, a departmental enquiry could be held on the basis of the same allegations if they are considered good and sufficient ground for departmental action. Departmental action could also be taken if the allegations were not examined by court e.g. , the discharge of the accused on technical grounds without going into the merits of the allegations, but, if the allegations are considered good and sufficient for departmental action.

A departmental enquiry may be held after acquittal in respect of a charge which is not identical with or similar to the charge in the criminal case in the prescribed form.

If it is decided that a departmental enquiry should be held in any of the circumstances mentioned above, further action should be taken in accordance with the procedure described in chapter IX to XI.

Withdrawal of prosecution:

Once a case has been put in a court, it should be allowed to take its normal course. Proposal for withdrawal of prosecution may, however, be initiated by the Anti-Corruption Unit on legal considerations. In such cases the Anti-Corruption Unit will forward its recommendations to the Vigilance Department and to the administrative department concerned by which prosecution sanction was accorded. The Vigilance Department will consult the Law Department and will decide as to the further course of action in such cases.

Request for withdrawal of prosecution may also come up from the accused. Such request should not generally be entertained except in very exceptional cases where, for instance, attention is drawn to certain fresh, established or accepted facts which might alter the whole aspect of the case. In such cases also the administrative department concerned should consult the Law Department and their advice accepted.