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pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption."

The next section No. 6 refers to sanction for prosecution and reads:—

"No Court shall take cognizance of an offence punishable under section 161 or section 165 of the Indian Penal Code or under subsection (2) of section 5 of this Act, 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 Federation and is not removable from his office save by or with the sanction of the Central Government or some higher authority, Central Government;

(b) in the case of a person who is employed in connection with the affairs of a Province and is not removable from his office save by or with the sanction of the Provincial Government or some higher authority, Provincial Government;

(c) in the case of any other person of the authority competent to remove him from his office."

Finally section 7 provides that any person charged with an offence punishable under section 161 or 165 of the Indian Penal Code or under subsection (2) of section 5 of the Act 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, and then follow certain safeguards regarding its being optional for the accused to appear as his own witness, and regarding the absence of any presumption against him if he does not choose to appear as a witness, and the nature of the questions which can be asked from him if he does so.

The effects of the Act may now be summed up as follows:—

(1) Public servants accused of having committed offences under sections 161 and 165 of the Indian Penal Code may still be tried on charges under those actual sections, but even so, their trials will be governed by the other changes introduced by the Act regarding the presumptions to be drawn against them, the necessity for the sanction of the appropriate authority under section 6, and the privilege of the accused to give evidence on oath as a competent witness if he so desires under section 7.

(2) Subsections (1) and (2) of section 5 are more or less based on sections 161 and 165 of the Indian Penal Code but create new offences by somewhat enlarging the scope of these sections. Section 5 (1) (d) creates a new offence of obtaining favours by abuse of official position. Section 5 (1) (c), with which we are primarily concerned in this case is for all practical purposes the same as section 409, Indian Penal Code, so far as it relates to offences by public servants, and it is difficult, if not impossible, to conceive of any such offence committed by a public servant which would be punishable under one of these sections and not under the other.

(3) A radical change is introduced regarding the necessity for previous sanction for prosecution. This aspect of the prosecution of public servants was hitherto governed entirely by the provisions of section 197 of the Criminal Procedure Code, subsection (1) of which reads:—

> "When any person who is a judge within the meaning of S. 19 of the Indian Penal

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Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Provincial Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take congnizance of such offence except with the previous sanction—

(a) in the case of a person employed in connection with the affairs of the Federation, of the Governor-General exercising his individual judgment; and

(b) in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province exercising his individual judgment."

Thus two major changes have been introduced by the new Act. The first of these is that while under section 197 the sanction of the Governor-General or the Provincial Governor, as the case may be, was only necessary for the prosecution of public servants who were not removable from their offices save with the sanction of the Central Government or the Provincial Government respectively, no such qualification is contained in section 6 in which the words used are committed by a public servant. Thus under the Criminal Procedure Code no sanction was ever required to prosecute a public servant removable by a lesser authority than the Provincial or Central Government, whereas now the sanction of the appropriate authority is necessary for the prosecution of any public servant, however subordinate, alleged to have committed an offence under section 161 or 165 of the I.P.C. or under section 5 of the Act. The second change is that introduced by the omission in section 6 of the Act of the words appearing in section 197 "while acting or purporting to act in

the discharge of his official duty." This omission appears to be deliberate, and to have been made in consequence of decisions of various High Courts and the Federal Court to the effect that an officer who had accepted a bribe or embezzled Government property was neither acting nor purporting to act in the discharge of his official duty, and that, therefore, no sanction for his prosecution was necessary. The sanction of the appropriate authority is, therefore, now necessary for the prosecution of any public servant under the Act.

(4) Another major change is the introduction by section 7 of the Act of the privilege of an accused person in a case under section 161 or 165, Indian Penal Code, or section 5 of the Act, to appear as a competent witness and give evidence on oath in disproof of the charges made against him or any other co-accused. So far as I am aware this is the first granting of such privilege to a person on trial for a criminal offence in this country. Thus, although neither the provisions of section 342 (4), Criminal Procedure Code, which specifically states that no oath shall be administered to the accused, and the latter part of section 5 of the Oaths Act of 1873, which provides that nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person, are mentioned at all in section 7, these provisions of law are clearly repealed by section 7 for the purpose of trials under the Act.

(5) There is also one important change regarding the sentences for embezzlement by a public servant. The penal clause, section 5(2), fixes a maximum sentence of seven years imprisonment or a fine, or both, for the offences set out in section 5(1) (a) (b) (c) and (d), whereas under section 409, Indian Penal Code, the words regarding sentence read:—

> "shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

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Thus not only is the maximum term of imprisonment under section 5 (2) for an offence under section 5 (1) (c) considerably less than that under section 409, I.P.C., but also under section 409, I.P.C., a sentence of imprisonment is mandatory, while under section 5 (2) the sentence need only be a fine without any sentence of imprisonment.

The question before us is whether in view of these changes introduced by Act II of 1947, particularly regarding the necessity for previous sanction of the appropriate authority for prosecution, the right of the accused to give evidence as a witness and the change of sentence, it is now open to the authorities concerned, when a public servant is accused of committing an offence which would be punishable either under section 409, Indian Penal Code, or section 5 (1) (c) of the Act, to choose which of these two sections the offender should be prosecuted under, and, by choosing to proceed under section 409, Indian Penal Code, to dispense with the necessity for any previous sanction in the case of a public servant removable from office by an authority subordinate to the Provincial or Central Government, and also to deny him the privilege of giving evidence on oath as a competent witness on his own behalf. *Prima facie* it would appear to be unlikely that this was the intention of the Legislature when it passed Act II of 1947, the avowed object of which was to deal more effectively with bribery and corruption of public servants, for which purpose the prevalent forms of these offences were collected into a single Act, and what was thought to be a more effective procedure for trying offences of this kind was introduced. The general impression that section 5 (1) (c) was intended to supersede section 409, Indian Penal Code, for offences of this type committed by public servants is greatly strengthened by the fact that the Act specifically provides for the trial of offences under sections 161 and 165, Indian Penal Code, with the procedural changes introduced by the Act, whereas section 409, Indian Penal Code, is nowhere mentioned in the Act. On behalf of the State reliance was chiefly placed, as

it was before me in the previous case, on the provisions of section 26 of the General Clauses Act which reads—

> "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."

If this section is taken by itself, then clearly a public servant who has committed an offence falling either under section 409 or section 5 (1) (c) of the Act can be tried on a charge under either of these sections, and the only limitation is that he cannot be convicted and sentenced for the same offence under both of them. Clearly there would be no difficulty whatever in accepting the position of the State in the matter if Act II of 1947 simply made an offence already punishable under section 409, Indian Penal Code, punishable also under section 5 1(c) and went no further. There are, however, the three important changes regarding sanction, the right of the accused to give evidence on oath and the change in the quantum and nature of the sentence to be taken into consideration, and they certainly complicate the question. There is no doubt, as was contended by Mr. Bishan Narain on behalf of the State, that as a matter of general principle repeal by implication is not favoured. There are, however, obviously exceptions to this general principle. Such a case arose when a Full Bench consisting of seven Judges of the Lahore High Court considered the inconsistent provisions of section 162 of the Criminal Procedure Code and section 27 of the Evidence Act both of which were fundamental Acts of long standing, regarding the admissibility of statements made by accused persons in Police custody, and it was held by the whole Court, the decision being reported as *Hakam Khuda Yar* v. *Emperor* (1), that section 162 of the Criminal Procedure Code, the later Act, repealed section 27 of the Evidence Act. This decision was not reversed by

(1) A.I.R. 1940 Lah. 129

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any higher Court, and as a matter of fact section 162 of the Criminal Procedure Code was subsequently amended so as to leave the provisions of section 27 of the Evidence Act intact. In spite of the fact that nearly two and a half years have elapsed since my earlier decision on the point in dispute, there does not appear to be any decision of any of the High Courts in India, or the Federal Court or the Supreme Court, in which the same point has been considered, and in my opinion the most relevant authorities are still the passages from Craies on Statute Law, and Maxwell on the Interpretation of Statutes, on which my earlier decision was mainly based. The first of these passages from Craies, page 314, reads as follows:—

> "In Rv. Judge of Essex County Court (1887, 18 Q. B. D. 704) Esher M.R. laid it down as an ordinary rule of construction that 'where the Legislature has passed a new statute giving a new remedy, that remedy alone can be followed.' But the phrase 'new' as applied to a statute is either needless or ambiguous. The old distinction between '*vetera*' and '*nova statuta*' is obselete; and the word 'new' is insensible unless applied to statutes creating rights or remedies unknown to the common law or to previous enactments. And for modern use the rule could perhaps be more accurately laid down thus. In the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, forms or remedies there prescribed, and no others, must be followed until altered by subsequent legislation."

The following passage is also from Craies, page 315—

> "In *Middleton* v. *Crofts* (1), Lord Hardwicke said:—'Subsequent Acts of

(1) (1736) 2 Atk. 650

Parliament in the affirmative, giving new penalties and instituting new modes of proceeding, do not repeal former methods and penalties ordained by preceding Acts without negative words.'

"If, however, as Lord Campbell said in *Mitchell* v. *Brown* (1), a later statute again describes an offence which had been previously created by a former statute and affixes a different punishment to it, and varies the procedure, or if the later enactment expressly altered the quality of the offence as by making it a misdemeanour instead of a felony or a felony instead of a misdemeanour, the later enactment must be taken as operating by way of substitution and not cumulatively'."

The next passage is from page 195 of Maxwell:—

"Indeed, it has been laid down generally, that if a later statute again describes an offence created by a former one and affixes a different punishment to it, varying the procedure—giving, for instance, an appeal where there was no appeal before—the earlier statute is impliedly repealed by it."

As against these passages of undoubted weight, the only fresh argument which Mr. Bishan Narain was able to advance was that the cases on which they were based were prior to the enactment of the English Interpretation Act of 1889 which in some respects is similar to the Indian General Clauses Act. Section 33 of this Act reads—

"Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of

(1) (1859) 28 L.J.M.C. 65

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this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence."

In essence this section is the same as section 26 of the General Clauses Act, the only change of any importance being the introduction of the words in the English Act "Unless the contrary intention appears" which do not appear in the Indian Act. I do not, however, consider that the fact that the cases relied on by Craies and Maxwell were prior to the Act of 1889, or the difference in the wording of section 33 of the Act and section 26 of the General Clauses Act, really have much effect on the argument, or on the principles set forth by Craies and Maxwell, which are obviously fundamental principles governing the interpretation of statutes. I do not consider that the terms of section 26 of the General Clauses Act, broad as they are, preclude the possibility of repeal by implication, and in order to decide the point it is again necessary to consider the provisions of Act II of 1947. There is no doubt whatever that this Act does repeal by implication certain other provisions in existing statutes. As I have already pointed out, section 7 repeals by implication, without mentioning them, certain provisions in section 342 of the Criminal Procedure Code and section 5 of the Oaths Act. The presumptions raised in section 4 and section 5 (2) also modify, and to that extent repeal certain provisions of the Evidence Act without mentioning this Act. The only provisions in the Act which expressly repeal or modify provisions of other statutes are those by which offences under sections 161 and 165, Indian Penal Code, are made cognizable offences, and those by which investigation or arrest without a warrant are taken away from Police Officers under the rank of Deputy Superintendent of Police, these being only minor changes. The major amendments to existing statutes in the Act are all only by implication, and it is, therefore, not

difficult to come to the conclusion that the Legislature by including the essentials of an offence under section 409, Indian Penal Code, by a public servant in section 5 (1) (c) also intended to supersede section 409, Indian Penal Code, so far as it concerns public servants by section 5 (1) (c), and to apply the procedural and other changes contained in the Act to public servants who committed offences punishable previously under section 409, Indian Penal Code. To hold otherwise would lead to an anomalous situation, and I must confess that I am unable to understand the attitude of the State in wishing still to have the liberty to proceed against public servants under section 409 of the Indian Penal Code, and thereby deny them the benefits of Act II of 1947 including the right to appear as witnesses, the necessity of sanction for their prosecution and the possibility not only of receiving a lesser maximum sentence of imprisonment, but also of not being sentenced to any imprisonment at all on conviction. I would, therefore, adhere to my previous decision and hold again that as long as section 5 of Act II of 1947 remains in force the provisions of section 409, Indian Penal Code, so far as they concern offences by public servants are *pro-tanto* repealed by section 5 (1) (c) of the Act II of 1947.

The other question for consideration is the effect of the fact that Gurcharan Singh respondent had been removed from public service before the chalan in the case against him was put into Court. This question falls into two parts, the first being whether the word ' is ' in the phrase ' is employed ' which is used both in section 197, Criminal Procedure Code, and in subsections (a) and (b) of section 6 of Act II of 1947 refers to the date on which the alleged offence was committed, or to the date on which the Court takes cognizance of the case, and the second being whether in the present case the Court took cognizance of the case on the date on which the chalan was presented before it, or on the date on which, immediately following his arrest, the accused applied for and was granted bail. There is no doubt that on the first of these points the weight of authority is very heavily on

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the side of the State. There are two decisions reported as *Sugan Chand* v. *Seth Narainda* (1), and *S. Y. Patel* v. *State* (2), in which the Courts took the view that the word 'is' in section 197, Criminal Procedure Code, referred to the time of the commission of the alleged offence, and not to the date on which the Court took cognizance of the case, but these views have been dissented from in *Suraj Narain Chaube* v. *Emperor* (3), *Prosad Chandra Banerjee* v. *Emperor* (4), and *Emperor* v. *P. A. Joshi* (5). There are as yet apparently no decided cases under section 6 of Act II of 1947, but both in section 197, Criminal Procedure Code, and in this section the relevant words are similar. The essential part of section 197 reads—

> "Or when any public servant who is not removable from his office * * * * *, is accused of any offence * * * * *, no Court shall take cognizance of such offence"

and the relevent words of section 6 are—

> "No court shall take cognizance of an offence * * * *, alleged to have been committed by a public servant, except with the previous sanction,—
>
> * * * * *
>
> in the case of a person who is employed."

In view of this form of wording in the two sections, clearly the same principles would apply to them in this matter. The views of the Calcutta and Bombay High Courts were that without any doubt the protection afforded by section 197, Criminal Procedure Code, was only intended to be enjoyed by judges, Magistrates and other public servants while still in office, and that no sanction was necessary for the prosecution of a Government servant who had already been discharged from service before the case was brought against him, and I entirely agree with this interpretation.

(1) A.I.R. 1932 Sind. 177
(2) A.I.R. 1937 Nag. 293
(3) A.I.R. 1938 All. 776 (S.B.)
(4) A.I.R. 1943 Cal. 527 (D.B.)
(5) A.I.R. 1948 Bom. 248

Finally, there is the question whether the trial Court could be said to have taken cognizance of the case merely by entertaining the respondent's bail application while he was still a public servant a week before he was discharged from service. In my opinion, the view of the learned Sessions Judge on this point was correct. It is not clear how the respondent's bail application came to be filed in the Court of this particular Magistrate, but it is suggested that the reason was that the learned Magistrate was a Special Magistrate dealing generally with cases of this type. It is, however, quite clear that at the time the bail application was filed and accepted by him the investigation was still far from complete, and that at a later stage either the case might be withdrawn, or it might go to the Court of some other Magistrate. Admittedly the meaning of the phrase "taking cognizance" has not been precisely defined in the Code of Criminal Procedure, but as the learned Sessions Judge has pointed out, bail applications are frequently considered both by sessions judges and by the High Court during the preliminary stages of cases and yet section 198 of the Code of Criminal Procedure provides that no sessions court shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been duly committed, and section 194 provides for the circumstances under which a High Court may take cognizance of an offence. From this it can be deduced that the term 'taking cognizance' has no connection with entertaining a bail application while a case is still at the stage of a Police investigation. Moreover, many bail applications are dealt with by so-called "duty" Magistrates, in whose case it is merely a co-incidence if they subsequently have to deal with particular cases in which they have already dealt with bail application in their capacity as duty Magistrates. I, therefore, agree with the view that dealing with a bail application is something quite separate and distinct from taking cognizance of a case.

The net result is that while the case against the respondent must proceed against him under

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section 5(1)(c) of Act II of 1947, the case can proceed without any sanction as provided in section 6 of the Act. I would accordingly accept the recommendation of the learned Sessions Judge and set aside the order of the trial Court discharging the accused and remand the case to it for trial according to law. The other revision petitions which were put up for hearing along with this may now be returned for hearing by Single Judges and decision on the various points involved in the light of the decision on the first point decided above.

KHOSLA, J.—I agree.

FULL BENCH

Before Harnam Singh, Falshaw, and Soni, JJ.

THE COMMISSIONER OF INCOME TAX, DELHI,—*Petitioner*

versus

THE DELHI FLOUR MILLS COMPANY, LIMITED, DELHI,—*Respondent*

1952

December, 30th

Civil Reference No. 18 of 1952

Excess Profits Tax Act (XV of 1940)—Section 4—Excess Profits Tax, nature of—Net profits, meaning of—Commission payable to managing Agents on net profits—Whether excess profits tax to be deducted from the profits before arriving at the net profits—Agreement—Construction of, rule stated.

Clause II of the agreement between the assessee Company and its managing agents provided :

> "In consideration for acting as Managing Agents the Company should pay to the firm—a commission equal to ten per cent of the annual profits. Such net profits will be arrived at after allowing the working expenses, interest on loans and due depreciation, but without setting aside anything to reserves or other special funds."

The question referred to the High Court was :

> "Whether on a true construction of the Managing Agency Agreement between the assessee Company and its Managing Agents entered into in

1936, the relevant clause of which is quoted above, the Excess Profits Tax payable should be deducted from the profits of the Company for the purpose of arriving at the annual net profits of which a percentage should be paid to the Managing Agents as their commission."

Held, that the agreement is to be interpretted as it is. The Courts are not to make a new agreement for the parties, or to speculate how they would have dealt with the new contingency had they anticipated it, but that (except in cases when the intervening event produces frustration) the Courts have to take the words of the agreement as they stand and apply them, as best as can be to the new situation which has caused the difficulty. A different agreement cannot be spelt out by means of judicial construction.

Held, on the construction of the managing agency agreement that excess profits tax does not fall to be deducted from the profits of the Company for the purpose of arriving at the annual net profits of which a percentage should be paid to the managing agents as their commission.

Held, that the excess profits tax is not an expenditure incurred in the earning of profits but is an impost which has to be paid as a portion of the profits which the company has made. It is a tax on income and a disbursement of profits earned.

L. C. Limited v. *G. B. Ollivant, Ltd. and others* (1), *James Finlay & Co., Ltd.* v. *Finlay Mills, Ltd.* (2), relied upon.

Held, that "net profits" of a trading company when ascertained in accordance with the ordinary commercial practice are the profits before and not after deducting the direct taxation which has to be paid in respect of them.

L. C. Limited v. *G. B. Ollivant, Ltd. and others* (1), *William Hollins and Co., Ltd.* v. *Pagent* (3), *and Thomas* v. *Hamlyn* (4), relied on.

Case-law reviewed.

Patent Casting Syndicate, Limited v. *Etherington* (5), and *Vulcan Motor and Engineering Company, Ltd.* v. *Hampson* (6), held not applicable; *Walchand & Company, Limited* v. *Hindustan Construction Company, Ltd.* (7), held wrongly decided.

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(1) (1944) 1 A.E.R. 510
(2) 47 B.L.R. 774
(3) (1917) 1 Ch. 187
(4) (1917) 1 K.B. 527
(5) (1919) 2 Ch. 254
(6) (1921) 3 K.B. 597
(7) A.I.R. 1944 Bom. 5

Case referred to the above full Bench, vide the order of Division Bench, consisting of the Hon'ble the Chief Justice, and Mr. Justice Harnam Singh, dated 30th October 1952.

Case referred by Shri K. Srinivassan, Registrar, Income-tax Appellate Tribunal, Bombay, with his letter No. R.A. 843 of 1951-52, dated the 29th May, 1952, under section 66(1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) for orders of the High Court.

A. N. KIRPAL and D. K. KAPUR, for Petitioner.

KIRPA RAM BAJAJ, for Respondent.

ORDER

The point in this matter is identical with that in Civil Reference No. 7 of 1950 which was referred for decision by a Full Bench by order made on the 12th of September, 1952. We order, therefore, that this case should similarly, be referred and be heard so far as is practical along with Civil Reference No. 7 of 1950. Papers to be sent to Simla, immediately.

(Sd.) E. Weston,

Chief Justice.

(Sd.)-A. N. Bhandari,

30th October, 1952. Judge.

Mr. S. M. SIKRI, Advocate-General, Punjab and Mr. HEM RAJ MAHAJAN, Advocate, for Petitioner.

MR. TEK CHAND, Advocate, for Respondent.

ORDER

Harnam Singh, J.

HARNAM SINGH, J. In Civil Reference Case No. 18 of 1952, the question referred to us for decision is in these terms :—

"Whether on a true construction of the Managing Agency Agreement between

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For the reason that the only reported case on the point, *Walchand & Co. Ltd.*, versus *Hindustan Construction Co. Ltd.* (1), did not arise on a reference under the Indian Income-tax Act, a Division Bench of this Court has referred for decision to the Full Bench the question stated above.

Clearly, the answer to the question referred to us for decision turns on the construction of clause II of the managing agency agreement which provides for payment of commission to the managing agents of the following amount:—

> "In consideration for acting as Managing Agents the Company should pay to the firm * * * * * * a commission equal to 10 per cent of the annual net profits. Such net profits will be arrived at after allowing the working expenses, interest on loans and due depreciation, but without setting aside anything to reserves or other special funds."

Now, the agreement says nothing about excess profits tax for the very good reason that in India no such tax was in existence or in contemplation in April, 1936, when the managing agency agreement was made. In construing such an agreement the rule to be followed was stated by Viscount Simon Lord Chancellor in *L. C. Limited* versus *C. B. Ollivant, Ltd., and others* (2), in these words—

> "The rule to be followed in such cases is clear. The only difficulty is in applying it. The rule is that we are not to make a new agreement for the parties, or to speculate how they would have dealt with the new contingency had they anticipated it; but that (except in cases when the intervening event produces frustration) we have to take the words of the agreement as they stand and apply them, as best we can, to the new situation which has caused the difficulty."

(1) A.I.R. 1944 Bom. 5
(2) (1944) 1 A.E.R. 510

Excess profits tax was imposed in India by Act XV of 1940, and the charging section, section 4, provides:—

> "Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount by which the profits during any chargeable accounting period exceed the standard profits a tax (in this Act referred to as 'excess profits tax') which shall, in respect of any chargeable accounting period ending on or before the 31st day of March 1941, be equal to fifty per cent of that excess, and shall, in respect of any chargeable accounting period beginning after that date, be equal to such percentage of that excess as may be fixed by the annual Finance Act."

In the chargeable accounting period excess profits tax was an amount equal to sixty-six and two-third per cent of the amount by which the profits of the business during that period exceeded the standard profits.

From a perusal of section 4 of Act XV of 1940, it is plain that the excess profits tax is not an expenditure incurred in the earning of profits but is an impost which has to be paid as a portion of the profits which the Company has made. On this point *L. C., Ltd.* v. *G. B. Ollivant, Ltd. and others* (1), and *James Finlay & Co., Ltd.*, v. *Finlay Mills, Ltd.* (2), may be seen.

In (1944) I A.E.R. 510, Vicount Simon, L. C. said at page 513 :—

> "Both by name and by nature it is part of the profits, and it is none the less so, because the Crown takes this part and

(1) (1944) 1 A.E.R. 510
(2) 47 B.L.R. 774

the assessee Company and its Managing Agents entered into in 1936, the relevant clause of which is quoted above, the Excess Profits Tax payable should be deducted from the profits of the Company for the purpose of arriving at the annual net profits of which a percentage should be paid to the Managing Agents as their commission."

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By clause II of the managing agency agreement made in April, 1936, the Delhi Flour Mills Company, Limited, hereinafter referred to as the assessee-company, agreed to pay to the managing agents commission equal to ten per cent of the annual net profits to be computed after allowing the working expenses, interest on loans and due depreciation, but without setting aside anything to reserves or other special funds.

In calculating the commission of the managing agents for the period between the 1st of November, 1944, and the 31st of October 1945, the assessee-company did not take into account the income-tax and the excess profits tax. The Income-tax Officer, however, held that in arriving at the annual net profits of which a percentage was the commission of the managing agents the excess profits tax was to be deducted. On appeal the decision given by the Income-tax Officer was upheld by the Appellate Assistant Commissioner.

In proceedings under section 33 of the Indian Income-tax Act, 1922, hereinafter referred to as the Act, the Income-tax Appellate Tribunal found that the excess profits tax, not being an expense for the purpose of earning profits of the business, was not to be deducted in computing annual net profits of the Company on which commission was to be paid to the managing agents.

On the application of the Income-tax Commissioner under section 66(1) of the Act, the Appellate Tribunal referred for decision to this Court the question of law stated above.

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leaves only the balance, if any, available for distribution among shareholders. If the excess profits tax were to be retrospectively repealed, this would not increase the profits of the Company in the least, it would only change their destination. The profits would be the same as before, but, as the Crown in that event would take less, the shareholders would receive more."

In 47 Bombay Law Reporter 774, Beaumount, C. J. said—

> "But the tax itself is undoubtedly a tax on the profits of the business, and is collected under the provisions of the later sections of the Act by reference to powers contained in the Income-tax Act, for the collection of Income-tax. If default in payment is made, the assessee is liable, and not merely the assets of the business. In my opinion there can be no question that excess profits tax is a tax on income, * * *."

In agreeing with the opinion expressed by Beaumount, C. J., Kania, J., said in 47 Bombay Law Reporter 774 :—

> "It seems to me that the Legislature, instead of amending very largely the Income-tax Act and embodying the provisions of the Excess Profits Tax Act therein, found it more convenient to enact a separate piece of legislation to deal with the particular set of circumstances under which it was considered desirable and necessary to impose an additional tax. The fact, that the Excess Profits Tax Act is a different Act from the Income-tax Act, does not by itself, therefore, make the tax any the less a tax on income."

Excess profits tax being a tax on income the question is whether on a true construction of the managing agency agreement the excess profits tax should be deducted from the profits of the Company for the purpose of arriving at the annual *net profits* of which a percentage is to be paid to the managing agents as their commission.

In plain English clause II of the managing agency agreement provides what and what only are to be the deductions before net profits are to be ascertained, and only those items have priority. Subject to those items, the commission of the managing agents comes next as a charge on the net profits, and in priority to income-tax or excess profits tax.

But it is said that the list of deductions given in clause II of the agreement is not exhaustive and that in assessing the amount of the net profits of the Company account must necessarily be taken of all expenses incurred in the earning of profits. The argument amounts to saying that excess profits tax is an expenditure incurred in the earning of profits. For the reasons given hereinbefore I think that the payment of a tax levied on profits cannot be considered to be an expense incurred to earn those profits. Indeed, excess profits tax is a disbursement of profits earned.

Then, it is said that in the relevant clause of the agreement computation of net profits means the computation of profits which would be divisible amongst the shareholders as dividend. The word 'divisible' does not occur in the agreement and I have no doubt that in reading the word 'divisible' for the word 'net' occurring in clause II of the agreement the Court would not be construing the agreement but making a new agreement for the parties. That this is not permissible is conceded.

Indeed, *Profits of a trading company available for* distribution amongst shareholders of that Company are a part of the net profits of the Company. In considering this matter Viscount Simon, L. C., said in *L. C., Limited* v. *G. B. Ollivant, Ltd. and others* (1), at p. 513—

(1) (1944) 1 A.E.R. 510

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> "Moreover, it is a misapprehension to suppose that excess profits tax is, as a matter of course, introduced into a profit and loss account. If the accounts of the enterprise are set out in full, there will normally be first a trading account in which the receipts of the business are set off against the expenses directly incurred in earning those receipts. The "gross profits" arrived at in the trading account will then be carried to a profit and loss account as its opening item, to which would be added on the credit side such items as interest on investments, rents or the like, and against these will be set the overhead expenses of the business, so as to produce the 'net profit.' So far, according to the more usual practice of accountants in dealing with the affairs of a company, no charge in the nature of direct taxation will have been debited at all. The net profit from the profit and loss account will then be taken to an appropriation account, where there will be set against the net profits the various purposes for which the *net profits are being used so much for taxation, so much for reserves, so much for dividends*, etc."

From the observations of Viscount Simon, L. C. set out in the preceding paragraph it appears that the net profits of a trading company when ascertained in accordance with the ordinary commercial practice are the profits *before, and not after, deducting the direct taxation which* has to be paid in respect of them. That income-tax is not a deduction which has to be made in order to arrive at profits is admitted. In no case cited before us was it said that the excess profits tax is not a tax on income. In *L. C., Limited* v. *G. B. Ollivant, Ltd. and others* (1), Lord Macmillan said that excess profits tax is in short a "super income tax." For the purposes of the excess

(1) (1944) 1 A.E.R. 510

profits tax the profits arising from a trade or business are to be "computed on income-tax principles" with certain adaptations. In dealing with this point Lord Macmillan said in *L. C., Limited* v. *G. B. Ollivant, Ltd. and others* (1), at page 517 :—

> "How can it be a necessary implication of this agreement that income-tax should not be deducted and at the same time a necessary implication that excess profits tax should be deducted; that a tax on profits should not be deducted, but a tax on excess profits should be deducted."

With very great respect I accept the view expressed by Lord Macmillan, and think it unnecessary to discuss the difference in detail between income-tax and excess profits tax which has been pointed out in the different English cases cited.

Mr. Sarv Mittar Sikri urges that we should approach a profit sharing agreement of the type that we are called upon to construe with the presumption, that unless the parties have otherwise provided, they probably did not intend to base commission on excess profits which the employer is not entitled to retain.

In an earlier part of this judgment I have examined the implications of the agreement and shown that there are indications in the agreement that the parties intended to base commission on excess profits tax. In any case, the commission paid to the managing agents is for the efforts they put in the affairs of the company, and it is not their concern that the company is not allowed to retain part of such profits.

For the foregoing reasons, I think that in calculating the annual net profits of the company for the purposes of the managing agents commission excess profits tax is not to be deducted.

Before parting with this case it is necessary that I should say a few words about some of the previous cases which have been cited to us. *Patent Casting Syndicate, Limited* v. *Etherington* (2).

(1) (1944) 1 A.E.R. 510
(2) (1919) 2 Ch. 254

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was the first case in the English Court of Appeal decided in May 1919. In that case clause 5 of the agreement dated the 30th of October, 1916, which came up for construction provided for the payment of the following commission to the Works Manager of the company :

> "And shall also pay to the Works Manager at the end of each business year of the Company during the continuance of this agreement and within seven days of the holding of the annual general meeting a further sum by way of commission, such sums to be made up as follows : (1) 5 per cent upon the net profits for the year (if any), of the said business up to 5,000 £ and (2) 7½ per cent upon such net profits for the year as exceeds 5,000 £."

In giving the leading judgment in *Patent Casting Syndicate, Limited* v. *Etherington* (1), Warrington, L. J. said—

> "One would have thought that in dealing with a business agreement of this kind, made between a company and their servant for the division of the net profits of the company between themselves and their servant in certain proportions, that the Company would be intending to divide between them and their servant, and that in which they were proposing to give the servant an interest, would be what belonged to themselves, and not a sum of money which did not belong to themselves, but was payable to another person, namely, in the case of excess profits duty to His Majesty's Treasury."

In that case Dukes, L. J. and Eve, J., agreed with Warrington, L. J. From the report it appears that Dukes, L. J., based himself upon grounds of equality and rateability whereas Eve, J. thought

(1) (1919) 2 Ch. 254

that the expression "profits of the business" occurring in the agreement meant the ultimate balance of the gross profits which was capable of being lawfully divided as dividend.

In the first place, the agreement which was to be construed in that case was made after the coming into operation of the Finance Act of 1915. In the second place, no definition of the expression "net profits" was given in that agreement. In any case, the agreement in that case was worded differently from the agreement that we have to construe. In these circumstances the decision given in *Patent Casting Syndicate, Limited* v. *Etherington* (1), does not govern the present case.

In May 1921, was decided by the English Court of Appeal *Vulcan Motor and Engineering Company, Limited* v. *Hampson* (2). In that case by an agreement made in 1912 the defendant was appointed Works Manager of the business of the plaintiff Company at a salary, and in addition he was to be paid a commission equal to 50 £ for every 5 per cent "profit earned by the Company", or fraction of five per cent *pro rata* after ten per cent had been earned by the Company. Of the three Judges who decided that case Warrington, L. J., followed his previous decision in *Patent Casting Syndicate, Limited* v. *Etherington* (1). Bankes, L. J., followed that decision without expressing approval or disapproval, but Scrutton, L. J. indicated that but for the decision in *Etherington's case,* he would have felt a difficulty in distinguishing for the purposes of that case excess profits tax from income-tax.

In re. the Agreement of *G. B. Ollivant & Company, Limited,* that came up before the English Court of Appeal in October, 1942, the relevant clauses of the agreement were :—

" (1) The profits of the purchasers shall be computed by the auditors for the time being of the purchasers. Subject to any special provision in this agreement contained, the general principles to be

(1) (1919) 2 Ch. 254
(2) (1921) 3 K.B. 597

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adopted by them in making such computations *shall be those of ordinary commercial practice* but they shall be entitled to make such adjustments as they think appropriate in order to give effect to the principles of this agreement.

(3) The account shall include all usual and proper expenditure attributable to the working of the business whether in this country or abroad.

(8) No deduction shall be made for general reserves or for income-tax."

In construing that agreement Lord Green, M. R., thought that when the agreement required the auditors for the purpose of computing the profits of the purchasers to apply *"the general principles of ordinary commercial practice," the* reference must be to the computation of the profits of a trading company in order to arrive at the amount of distributable profits. Lord Clauson and Du Parcq, L. J., agreed with the Master of the Rolls.

On appeal the decision given in *G. B. Ollivant & Co., Limited,* was upheld in the House of Lords by Lord Thankerton, Lord Russell of Killowen and Lord Wright, Viscount Simon, L. C. and Lord Macmillan dissenting.

In India the matter came up for decision in *Walchand & Company, Limited* v. *Hindustan Construction Company,* (1). In deciding that case Beaumont, C. J. (Rajadhyaksha, J., concurring), said—

> "I should approach a profit sharing agreement of this nature with the presumption that, unless the parties have otherwise provided, they probably did not intend to base commission on excess profit which the employer is not entitled to retain."

In deciding that case Beaumont, C. J., thought that the decisions given in *Patent Casting Syndi-*

(1) A.I.R. 1944 Bom. 5

cate, Limited v. *Etherington* (1), *Vulcan Motor & Engineering Company, Limited* v. *Hampson* (2), and *In re the Agreement of G. B. Ollivant & Co., Limited* (3), supported the view that he was inclined to take apart from authority.

In deciding this case I have examined the argument on which the judgment in *Walchand & Company, Limited* v. *Hindustan Construction Company* (4), proceeds with profound respect for the views of its author on such a point.

In *Walchand & Company, Limited* v. *Hindustan Construction Company* (4), Beaumont, C. J., noticed that it was open to the managing agents to say that their remuneration was based on the profits made as a result of their efforts and it was not their concern that the company was not allowed to retain a part of such profits. Beaumont, C. J., however, thought that in a profit sharing agreement, under which an employer is paying an employee a commission based on the profits of the business, in the absence of a contract to the contrary, it is reasonable to suppose that the parties did not intend to base commission on excess profits which the employer is not entitled to retain. In *James Finlay & Co., Limited* v. *Finlay Mills, Limited* (5), Beaumont, C. J., himself was critical of this line of reasoning. In that case, *Patent Casting Syndicate, Limited* v. *Etherington* (1), and *Vulcan Motor & Engineering Company, Limited* v. *Hampson* (2), were cited. In dealing with those cases Beaumont, C. J., said—

> "Those cases were, I think, founded on the general consideration, that where one is dealing with a profit sharing agreement, an agreement under which an employer is paying an employee a commission based on the profits of the business, it is reasonable to suppose that what the parties intended to share were the profits which otherwise would have belonged to the employer, and that a portion

(1) (1919) 2 Ch. 254
(2) (1921) 3 K.B. 597
(3) (1942) 2 A.E.R. 528
(4) A.I.R. 1944 Bom. 5
(5) 47 B.L.R. 774

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of the profits taken bodily by the revenue authorities, which the employer himself never gets the benefit of, was probably not intended to be shared with the employee. But in arriving at that conclusion, the Judges were in the difficulty of having to distinguish excess profit tax from income tax, because it was very well settled at the dates when those cases were decided that one could not deduct income-tax from divisible net profits in such a case. It had been held that income-tax is something which is payable out of profits after they are ascertained, and not a liability to be deducted in ascertaining the profits. No doubt, it was rather difficult to explain why the same principle should not be applied to excess profits duty, but I think the Judges felt that if they did apply the same principle, they would be reaching very inequitable results, and they did manage to distinguish the case of excess profits duty from the case of income-tax. Whether all the grounds of distinction are sound in law, it is not necessary to consider, because those cases are really only relevant, if the excess profits tax is not expressly dealt with in this agreement as another tax on income.

From the observations of Beaumont, C.J., in the passage cited it is plain that that eminent Judge himself doubted the correctness of the decision given by him in *Walchand & Co., Ltd.* v. *New Hindustan Construction Company* (1).

For the reasons given above, I think that *Walchand & Co., Limited* v. *Hindustan Construction Company* (1), was wrongly decided.

In parting with this case I wish to say a few words about two cases, *William Hollins & Co., Ltd.* v. *Paget* (2), and *Thomas* v. *Hamlyn* (3).

(1) A.I.R. 1944 Bom. 5
(2) (1917) 1 Ch. 187
(3) (1917) 1 K.B. 527

In *William Hollins & Co., Ltd.* v. *Paget* (1), the expression that came up for construction before Eve, J., was "profits made during the financial year." In construing that expression Eve, J., said :—

> "It (Excess Profits Duty) is, in my opinion, a contribution to the Exchequer of a proportion of the Company's profits, and for the purpose with which I am dealing stands very much on the same footing as the income-tax. It ought not, I think, be deducted before ascertaining the excess profits on which the defendant's commission is to be calculated."

In *Thomas* v. *Hamlyn & Co.* (2), it was held that the excess profits duty could not be deducted in computing the net profits upon which the plaintiff was entitled to receive commission.

I do not propose to deal with other English cases cited, because in none of them the construction of a document similarly worded as in this case was in question.

In these proceedings it is not absolutely necessary to express any final opinion upon the soundness of the decision given in *Patent Casting Syndicate, Limited* v. *Etherington* (3), *Vulcan Motor & Engineering Company, Limited* v. *Hampson* (4), and *L. C., Limited (in Liquidation) v. G. B. Ollivant, Limited and others* (5), for the language of the agreements in those cases was different from the language of the agreement in the present case. In *L. C., Limited (in Liquidation)* v. *G. B. Ollivant, Limited and others* (5), the agreement was not a managing agency agreement and that agreement required the auditor for the purpose of computing the profits of the purchasers to apply *'the general principles of ordinary commercial practice'* and *to make such adjustments as they thought 'appropriate in order to give effect to the principles of the agreement.'*

(1) (1917) 1 Ch. 187
(2) (1917) 1 K.B. 527
(3) (1919) 2 Ch. 254
(4) (1921) 3 K.B. 597
(5) (1944) 1 A.E.R. 510

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of the profits taken bodily by the revenue authorities, which the employer himself never gets the benefit of, was probably not intended to be shared with the employee. But in arriving at that conclusion, the Judges were in the difficulty of having to distinguish excess profit tax from income tax, because it was very well settled at the dates when those cases were decided that one could not deduct income-tax from divisible net profits in such a case. It had been held that income-tax is something which is payable out of profits after they are ascertained, and not a liability to be deducted in ascertaining the profits. No doubt, it was rather difficult to explain why the same principle should not be applied to excess profits duty, but I think the Judges felt, that if they did apply the same principle, they would be reaching very inequitable results, and they did manage to distinguish the case of excess profits duty from the case of income-tax. Whether all the grounds of distinction are sound in law, it is not necessary to consider, because those cases are really only relevant, if the excess profits tax is not expressly dealt with in this agreement as another tax on income."

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For the reasons given above, I think that *Walchand & Co., Limited* v. *Hindustan Construction Company* (1), was wrongly decided.

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> "It (Excess Profits Duty) is, in my opinion, a contribution to the Exchequer of a proportion of the Company's profits, and for the purpose with which I am dealing stands very much on the same footing as the income-tax. It ought not, I think, be deducted before ascertaining the excess profits on which the defendant's commission is to be calculated."

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I do not propose to deal with other English cases cited, because in none of them the construction of a document similarly worded as in this case was in question.

In these proceedings it is not absolutely necessary to express any final opinion upon the soundness of the decision given in *Patent Casting Syndicate, Limited* v. *Etherington* (3), *Vulcan Motor & Engineering Company, Limited* v. *Hampson* (4), and *L. C., Limited (in Liquidation) v. G. B. Ollivant, Limited and others* (5), for the language of the agreements in those cases was different from the language of the agreement in the present case. In *L. C., Limited (in Liquidation)* v. *G. B. Ollivant, Limited and others* (5), the agreement was not a managing agency agreement and that agreement required the auditor for the purpose of computing the profits of the purchasers to apply *'the general principles of ordinary commercial practice'* and *to make such adjustments as they thought 'appropriate in order to give effect to the principles of the agreement.'*

(1) (1917) 1 Ch. 187
(2) (1917) 1 K.B. 527
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(4) (1921) 3 K.B. 597
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Giving the matter my anxious consideration, I find that we must answer the question put to us in the negative and hold on the construction of the managing agency agreement that excess profits tax does not fall to be deducted from the profits of the company for the purpose of arriving at the annual net profits of which a percentage should be paid to the managing agents as their commission.

No orders as to costs.

SONI, J. I agree to the answer according to the facts of the case and the circumstances prevailing in the country. The agreement was entered into in 1936, while the Excess Profits Tax was imposed in 1940. In this country there is a most deplorable lack of interest taken by the shareholders in their company, and one can assume that had the Excess Profits Tax been in existence when the agreement was to have been entered into, the Managing Agents would have got the agreement differently worded without much difficulty. Had it not been because of this circumstance of lack of interest prevailing in the country I would have found it difficult not to agree with the majority opinion in the House of Lords in *Ollivant's case* (1), cited by my learned brother Harnam Singh. As matters stand in this country the agreement must be taken as it is. A different agreement cannot be spelt out by means of judicial construction.

FALSHAW, J. I have had the advantage of perusing the judgments of my learned brethren, and agree with the answer proposed. I cannot usefully add anything to the exhaustive statement of the case by my learned brother Harnam Singh, J, and I also agree with my learned brother Soni, J., that if the Excess Profits Tax had been in existence it is probable, that the Managing Agents would have had the agreement worded differently in their favour.

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(1) (1944) 1 A.E.R. 510

APPELLATE CRIMINAL

Before Harnam Singh and Dulat, JJ.

NISHAN SINGH,—*Convict—Appellant.*

1953

October, 12th

versus

THE STATE,—*Respondent.*

Criminal Appeal No. 356 of 1953.

Criminal Law Amendment Act (XLVI of 1952)—Section 7—All Sessions Judges and Additional Sessions Judges specified as Special Judges—Sessions Judge transferring case to Additional Sessions Judge—Case tried by Additional Sessions Judge—Entire prosecution evidence and part of defence evidence recorded before State Government allocated the case to the Additional Sessions Judge under section 7(2)—Proceedings before Additional Sessions Judge prior to such allocation—Whether valid—Code of Criminal Procedure (Act V of 1898)—Sections 193, 409 and 529(e) & (f)—Effect of—Prevention of Corruption Act (II of 1947) Section 3—Permission under—Form of—Section 6—Sanction under—Facts whether should be shown on the face of the sanction—Indian Evidence Act (I of 1872)—Section 114, Illustration (e)—Presumption under—'regularly performed'—Meaning of.

N was arrested on 21st May, 1952, for accepting a bribe and a Magistrate of the First Class acting under section 3 of the Prevention of Corruption Act, 1947, granted permission to Police officers below the rank of Deputy Superintendent of Police, to investigate the case. Sanction to prosecute N under section 161, Indian Penal Code, and section 5(2) of the Prevention of Corruption Act was granted by the Deputy Commissioner as required by section 6 of the said Act. The Challan was put in the Court of the Additional District Magistrate who recorded a part of the prosecution evidence when the Criminal Law Amendment Act, 1952, came into force and the case became triable by a Special Judge. Under section 7 of the said Act all Sessions Judges and Additional Sessions Judges were specified as Special Judges by the State Government. On 7th October 1952, the Additional District Magistrate sent the case to the Sessions Judge who kept on postponing its trial and on 29th May 1953, transferred it to the Court of Additional Sessions Judge who began its trial on 4th June 1953, and finished the entire prosecution evidence and most of the defence evidence by 13th July 1953. On that day the case was adjourned to 21st July, 1953, on which date the remaining defence evidence was recorded and the case was adjourned to 30th July, 1953, for order. On 20th July 1953, a letter was received from the Home Secretary

allocating this case for trial to the same Additional Sessions Judge. N was convicted on 30th July 1953, and he filed an appeal in the High Court. In appeal it was submitted that the proceedings before the Additional Sessions Judge from 4th June 1953 to 13th July 1953, were without jurisdiction, that the permission granted under section 3 of the Prevention of Corruption Act, to police officers below the rank of the Deputy Superintendent of Police was not valid and that the sanction given by the Deputy Commissioner under section 6 of the said Act, was also not valid.

Held, that between 4th June 1953 and the 13th July 1953, when proceedings were taken in the Court of the Additional Sessions Judge, he was a Special Judge within the meaning of section 6 of the Criminal law Amendment Act, and had jurisdiction to try the case. But in the exercise of the jurisdiction possessed by him, the Additional Sessions Judge indisputably did not act according to the mode prescribed by the Statute. If so, the objection relates obviously not to the existence of jurisdiction but to the exercise of it in an irregular manner. It is a well-settled rule that where a Court has jurisdiction to try an offence it is, as a rule, immaterial whether it has taken cognizance of the offence without being empowered to do so or whether the case has been transferred to it by another Court which was not empowered to make the orders of transfer. Clauses (e) and (f) of section 529, Criminal Procedure Code, provide that the commission of some irregularity of this kind prior to the commencement of the trial does not vitiate the trial itself. In the present case, too, the irregularity in the exercise of jurisdiction does not vitiate the trial.

Jhakar Abir and others v. *Province of Bihar* (1), and *Henry Peter Pisani* v. *Her Majesty's Attorney-General for Gibralter and others* (2), relied on.

Held, that section 3 of the Prevention of Corruption Act, 1947, does not require the permission to be in any particular form, nor even to be in writing. Illustration (e) appended to Section 114 of the Indian Evidence Act provides that the Court may presume that judicial and official acts have been regularly performed. In the Illustration the words 'regularly performed' mean done with due regard to form and procedure.

Held further, that it is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential, since section 6 of the Prevention of Corruption Act does not require the sanction to be in any particular form, nor even to be in writing.

(1) A.I.R. 1945 Pat. 98
(2) (1874) Law Reports 5 Privy Council 516

Gokal Chand Dwarkadas Morarka v. *The King* (1), relied on.

Appeal from the order of Shri Tirath Das Sehgal, Special Judge, Gurdaspur, dated the 30th July, 1953, convicting the appellant.

NARINJAN SINGH KEER, for Appellant.

KARTAR SINGH, Assistant Advocate-General and K. L. JAGGA, for Respondent.

ORDER

Soni, J.

SONI, J. Nishan Singh, a clerk in the office of the Deputy Commissioner, Gurdaspur, was charged under section 161 of the Penal Code and section 5(1)(d) of the Prevention of Corruption Act for having on the 21st of May, 1952, accepted from Darshan Singh a sum of Rs. 12 as gratification other than legal remuneration as motive for rendering service to him by helping him to obtain certain copies and also to have been guilty of criminal misconduct in the discharge of his duties. He was found guilty by the Special Judge trying the case under the provisions of the Prevention of Corruption Act, 1947, as amended, of both charges and was sentenced to six months rigorous imprisonment under each charge, the sentences to run concurrently. He has apealed.

There is one point of considerable importance in this case for which I consider that this case should be referred to a Division Bench. The facts are that this case was originally sent up for trial before the Additional District Magistrate, Gurdaspur. *The challan was put before him on the 2nd of June 1952.* He examined the first witness on the 4th of July, 1952. On the 8th of August, 1952 prosecution evidence was closed. During this interval the Criminal Law Amendment Act XLVI of 1952 came into force on the 28th of July 1952. Under the provisions of this Act offences *punishable under section 161, Indian Penal Code and punishable under subsection (2) of section 5 of the Prevention of Corruption Act could* only be tried

(1) A.I.R. 1948 P.C. 82

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by Special Judges. The Additional District Magistrate, therefore, on the *7th of October 1952* sent the case to the Special Judge. I suppose the case was not sent earlier because there was no notification appointing a Special Judge till the 5th of September 1952. *By notification No. 7782-JJ-52/3980, dated the 5th of September 1952, published in the Punjab Gazette on the 12th September 1952, all Sessions Judges in the State were appointed* Special Judges for the trial of cases under the Prevention of Corruption Act. This notification was issued under clause (2) of section 6 of the Criminal Law Amendment Act XLVI of 1952. When the case came before the Sessions Judge as Special Judge he went on adjourning it without recording any evidence. Eventually *on the 29th* of May 1953 there is an order by the Judge sending the case to the Additional Sessions Judge who during this interval had also been appointed as a Special Judge. There is a notification No. 10576-JJ-52/17944, dated the 6th of November 1952, published in the Punjab Gazette of the 14th November 1952, by which all Additional Sessions Judges were appointed Special Judges to try cases under the Prevention of Corruption Act. This having been done the Additional Sessions Judge as a Special Judge began to try this case. He began examining witnesses on the 4th of June 1953. On the 13th of July 1953, all defence witnesses were examined except one. That one was examined on the 21st of July 1953. Thereafter judgment was delivered by the Special Judge on the 30th of July 1953. During the interval that the Additional Sessions Judge was trying the case as a Special Judge it seems to have been brought to somebody's notice that *cases cannot be transferred by the Sessions Judge to the Additional Sessions Judge. Under section 7 clause (2) of the Criminal Law Amendment Act* it is provided that every offence specified in subsection (1) of section 6 shall be tried by the special judge for the area within which it was committed, 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 State Government.* Attention of the State Government was drawn by the Registrar of this Court

by a letter of the 10th June 1953 that Government should take steps to make the allocation of cases to the Additional Sessions Judges. Thereafter lists were prepared of the various Additional Sessions Judges who had been made Special Judges and of the various cases that were pending in various districts. On the *20th of July 1953, by letter No. 9891-JJ-53/49958* the Home Secretary to the Punjab Government wrote to the Registrar of this Court allocating various cases to various judges specifying them as Ist and IInd Additional Sessions Judges as the case may be. The present case is allocated to Mr. Tirath Das Sehgal, the Additional Judge. The point that has been argued in this case is that at the time when the present Special Judge, Mr. Tirath Das Sehgal, began the *proceedings* in the present case which was on the 4th of June 1953, there had been no allocation of the present case to him by the State Government and as there was no allocation to him by the State Government, it is argued that the *proceedings before him were void.* The letter of the Home Secretary, dated the 20th of July, 1953, appears on the scene towards the end of the proceedings before the Special Judge. A copy of the Home Secretary's letter is sent to the Sessions Judge on 24th July 1953. It is argued that it cannot possibly *cure the initial* defect that had existed when the Special Judge, Mr. Tirath Das Sehgal, began to take cognizance and to record evidence in this case. On behalf of the appellant attention is drawn to a ruling of their Lordships of the Privy Council in *Nusserwanjee Pestonjee and others* v. *Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadoor,* (1). At page 155 their Lordships say—

> "The present question turns upon this principle, that wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India (which has the same effect as an Act of Parliament), and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is

(1) 6 Moore's Ind. App. 134

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a universal principle that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with the jurisdiction does not arise."

Thier Lordships then went into the facts of the case with which they were dealing which was the matter of an award. The arbitrators could have taken cognizance of the award only on certain conditions and their Lordships found that those conditions not having been fulfilled as specified by the Regulation under which they were acting the whole proceedings were bad. It is argued that this case decided by their Lordships of the Privy Council coincides with the present case. In the present case the Special Judge could have only jurisdiction under clause (2) of section 7 of the Criminal Law Amendment Act, 1952, if the case had been sent *on to him for trial by the State Government. As the State Government never did this on or before the 4th of June 1953*, when he began to record evidence in this case it is argued that he had no jurisdiction in this case and the letter of the Government, dated the 20th July 1953, reached too late and would not give him jurisdiction in a case in which he had *ab initio* no other jurisdiction at all. On behalf of the State it is stated that that ruling of their Lordships of the Privy Council was distinguished by Mr. Justice Mookerjee in the case of *Khosh Mahomed Sirkar* v. *Nazir Mahomed*, (1), decided by a Full Bench of the Calcutta Court. Rampini and Mookerjee, JJ., referred the case which was pending before them to a Full Bench. There an initiatory order under section 145 (1) of the Criminal Procedure Code was drawn up in a form according to which it was argued that the magistrate had no jurisdiction. Mr. Justice Mookerjee at page 357 dealing with the judgment of their Lordships of the Privy Council in Moore's Indian Appeals said:—

"By that Regulation jurisdiction was conferred upon the Civil Courts to deal with arbitration awards made out of Court,

(1) I.L.R. 33 Cal. 352

provided the reference to arbitration and the award complied with certain conditions minutely detailed in the Regulation itself. One *of these conditions was that the agreement of reference should specify the time for the completion* of the award. An agreement of reference to arbitration was made which contravened this condition and specified no time within which the award was to be made. It was held by their Lordships of the Judicial Committee that an award made upon such a reference was not an award which the Civil Court could deal with under the Regulation, because the Civil Court had been given jurisdiction over awards made under a specified condition, and the award in suit was not an award of that description. That was, therefore, a case which stood on an entirely different ground and has no analogy to the case now before us. We are consequently unable to hold that the omission to state the grounds in the initial order makes it an order without jurisdiction so as to invalidate the whole proceedings."

The Full Bench agreed with the view thus expressed in the referring order. In the present case it is urged that Mr. Tirath Das Sehgal, Special Judge, had jurisdiction in the matter of trial of cases punishable under section 161, Indian Penal Code, and subsection 2 of section 5 of the Prevention of Corruption Act because a notification of the State Government had been issued on the *6th of November 1952, appointing all Additional Sessions Judges as Special Judges. It is stated that that was the notification* which gave Mr. Tirath Das Sehgal jurisdiction over all cases of this nature. So far as the allocation of a particular case is concerned that matter is dealt with in another section of the Criminal Law Amendment Act, that section being section 7 *clause (2) which authorises the* State Government to allocate the various cases. It is argued that this is a purely ministerial duty and

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that clause (2) of section 7 might as well have given this duty of allocation of cases to the Sessions Judges or to the High Court or to anybody else which the Legislature pleased but that so far as the actual vesting of the jurisdiction is concerned, clause (2) of section 7 has nothing to do with it. *That matter of vesting of jurisdiction is dealt with in clause (2) of section 6 and when a notification is issued under clause (2) of section 6 all Additional Sessions Judges become Special Judges competent to try* cases of the present nature. Mr Chawla, one of learned counsel for the State, in an able argument drew my attention to section 529 of the Criminal Procedure Code. In that section it is provided—

> "If any Magistrate not empowered by law to do any of the following things, namely:—
>
> * * * * *
>
> (e) to take cognizance of an offence under section 190, sub-section (1), clause (a) or clause (b);
>
> * * * * *
>
> erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered."

If reference is made to section 190 we find that it is stated as follows:—

> "190 (1). Except as hereinafter provided any Presidency Magistrate. District Magistrate or Sub-Divisional Magistrate and any other Magistrate specially empowered in this behalf may take cognizance of any offence—
>
> (a) upon receiving a complaint of facts which constitute such offence;
>
> (b) upon a report in writing of such facts made by any police-officer;
>
> * * * * *

Ordinarily Magistrates cannot take cognizance of offences directly. This is a privilege which is given to the District Magistrates, the Sub-Divisional Magistrates or the Magistrates specially empowered for that purpose. But otherwise Magistrates take cognizance of cases which are ordinarily sent to them either by the Sub-Divisional Magistrate or the District Magistrate. *Section 529 enacts that if any Magistrate not empowered by law to take such cognizance erroneously in good faith takes cognizance, then his proceedings will not be set aside merely on the ground that he was not so empowered.*, It is argued that in this case Mr. Tirath Das Sehgal acted *bona fide*, that no objection at all was taken to his proceedings from the beginning right to the end when he delivered his judgment and that this objection is being taken now for the first time in this Court. Mr. Chawla referred me to a Full Bench judgment of the Patna High Court in the case of *Jhakar Abir and others* v. *Province of Bihar* (1), in which Mr. Justice Shearer at page 102 says—

> "The jurisdiction of every criminal Court to try a particular offence is derived from statute, either from the statute which creates the Court or from the statute which defines the offence (see Bailey on Jurisdiction Vol. 1, P. 486)."

At page 103 the learned Judge said—

> "Where a Court has jurisdiction to try an offence it is, as a rule, immaterial whether it has taken cognizance of the *offence without being empowered to do so or whether the case has been* transferred to it by another Court which was not empowered to make the order of transfer. Clauses (e) and (f) of S. 529, Criminal P.C., provide that the commission of some irregularity of this kind prior to the commencement of the trial does not vitiate the trial itself."

(1) A.I.R. 1945 Pat. 98

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It is urged that in the present case the jurisdiction of Mr. Tirath Das Sehgal was conferred on him by the notification of the *6th of November 1952*, issued under the provisions of clause (2) of section 6 of the Criminal Law Amendment Act. That notification issued under statutory powers was the basis of the jurisdiction of Mr. Tirath Das Sehgal and his exercise of jurisdiction had nothing to do with his getting the jurisdiction. The exercise of that jurisdiction was no doubt irregular as the case had not been transferred to him by an order of the State Government but had been sent on to him by the order of the Sessions Judge but that irregularity, it is urged, is not fatal because it is not urged that Mr. Tirath Das Sehgal was not acting *bona fide* or that any failure of justice has been occasioned and it is also urged that the objection is being taken too late. Under the provisions of section 537 of the Criminal Procedure Code it is said—

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or *other proceedings before or during trial* or in any inquiry or other proceedings under this Code.
>
> * * * * *
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> * * * * *
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> unless such error, omission, irregularity or misdirection has in fact occasioned failure of justice."

It is urged that in this particular case no failure of justice has been accasioned much less proved.

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Attention was also drawn to the explanation of section 537. The explanation says—

> "In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

It is said that if the attention of Mr. Tirath Das Sehgal had been drawn to the fact that he was not competent to try this case as the case had been sent on to him by the Sessions Judge he would have stayed his hand and would have drawn the attention of the Sessions Judge or of other officers to the fact that the case should be sent on to him by the State Government and on that irregularity having been pointed out the State Government would have sent the case on to him at a date earlier than the 20th of July 1953. Mr. Chawla drew my attention also to a ruling of the Peshawar Court in the case of *Pearey Lal Bhatia,* (1). In this case Almond J.C. said at page 43—

> "A Senior Subordinate Judge does not exercise his powers in view of any authority delegated to him by the Provincial Government, but in view of the satutory provisions embodied in the Civil Procedure Code".

Reference may also be made to a judgment of their Lordships of the Privy Council in the case *Ledgard* v. *Bull* (2). At pages 144-45 their Lordships say—

> "The Defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it, and that the order of transference was also incompetently

(1) A.I.R. 1940 Pesh. 41
(2) 13 I.A. 134

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made. The District Judge was perfectly competent to entertain and try the suit, if it were competently brought, and their Lordships do not doubt that, in such a case, a Defendant may be barred, by his own conduct, from objecting *to irregularities in the institution* of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. *But there are numerous authorities which establish that when in a cause which the Judge is competent to try, the parties* without objection join issue, and go to trial upon the merits, the Defendant cannot subsequently dispute his jurisdiction upon the grounds that there were *irregularities in the initial procedure, which, if objected to at the time,* would have led to the dismissal of the suit."

This case no doubt was a case of a civil nature but the principles which their Lordships enunciated in this case are of general application. I have already referred to the case of *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (1). In the same volume there is another case decided by the Full Bench, *Sukh Lal Sheikh* v. *Tara Chand* (2). In the order of reference to the Full Bench it is stated at page 71—

"Another class of question may, however, arise, namely, whether a Court in the exercise of the jurisdiction which it possesses, has acted according to the mode prescribed by the Statute. If such a question is raised, it relates obviously not *to the existence of the jurisdiction, but to the exercise of it in an irregular*

(1) I.L.R. 33 Cal. 352
(2) I.L.R. 33 Cal. 68

or an illegal manner. We are not prepared to accept the view that a non-compliance with every rule of procedure destroys the jurisdiction of the Court."

The Full Bench at page 78 said—

"In our opinion the mere fact that the Court omitted to have a copy of the Magistrate's order, referred to in section 145, published by affixing it in some conspicuous place at or near the subject of dispute did not deprive the Court of its jurisdiction to deal with the case. We express this opinion with some diffidence, as a different view has been expressed by Division Benches of this Court, which is entitled to every consideration and respect. Assuming that subsection (1) of section 145 has been complied with, the Court had undoubted jurisdiction to deal with the case. Has this jurisdiction been lost by reason of the omission as to notice referred to above? We think not. We regard the provision as to publication of the order in subsection (3) of section 145 as directory, and as a matter of procedure only, and not as destroying the jurisdiction of the Court, if not complied with."

In the case of *Vishnu Sakharam Nagarkar* v. *Krishnarao Malhar* (1), West, J., said at page 158—

"It is this, that where jurisdiction over the subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to *exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings* due to his own invitation or negligence."

Later at the same page West, J., says—

"Had there indeed been no jurisdiction over the subject-matter, the acquiescence of

(1) I.L.R. 11 Bom. 153

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the parties concerned could not create it; but as there was a jurisdictional power, and the questions at issue were investigated and determined, the irregularity, according to the subsequent ruling in another case, was covered by the assent with which this Court acted."

and reference is made to a number of authorities by the learned Judge. The matter is again dealt with by Mr. Justice Mookerjee in the case of *Gurdeo Singh* v. *Chandrikah Singh* (1). At page 207 Mookerjee, J., states as follows:—

"An entirely different class of questions, however, arises, when it is suggested that a Court in the exercise of the jurisdiction which it possesses, has not acted according to the mode prescribed by the Statute. If such a question is raised, *it relates obviously, not to the existence* of jurisdiction, but to the *exercise of it in an irregular or illegal manner.* This distinction between elements, which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised, *is of fundamental importance,* but has not always been sufficiently recognised. That the distinction is well-founded is manifest from cases of high authority. Thus, in *Pisani* v. *Attorney-General of Gibraltar* (2), their Lordships of the Judicial Committee held that, where there is jurisdiction over the subject matter, but noncompliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. The same principle was adopted in *Ex-parte Pratt* (3), and *Ex-parte May* (4), which are authorities for the proposition that where jurisdiction over the subject-matter exists requiring only

(1) I.L.R. 36 Cal. 193
(2) (1874) L.R. 5 P.C. 515
(3) (1884) 12 Q.B.D. 334
(4) (1884) 12 Q.B.D. 497

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to be invoked in the right way, the party, who has invited or allowed the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence; see *Vishnu Sakharam Nagarkar* v. *Krishna Rao Malhar,* (1). Although the objection that a Court is not given jurisdiction over the subject-matter by law, cannot be waived, *Golab Sao* v. *Chowdhury Madho Lal,* (2), yet defects of jurisdiction arising from irregularities in the commencement of the proceedings, may be waived by the failure to take objection at proper stage of the proceedings."

The learned Judge quotes American cases in his support. The learned Judge then continues at page 208—

"To put the matter from another point of view, it is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that maxim applies that consent cannot give jurisdiction; in all other cases, this objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed."

It is urged that the Additional Sessions Judge's jurisdiction cannot be split up by reference in one instance to clause (2) of section 6 and in a second instance to clause (2) of section 7 of the Criminal Law Amendment Act, but that both these clauses must be read together and when read together it is clear that Mr. Tirath Das Sehgal could only have jurisdiction over the subject matter of this case if the State Government were to send this case on to him. It is urged

(1) (1886) I.L.R. 11 Bom. 153
(2) (1905) 2 C.L.J. 384

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that the Privy Council had repeatedly held that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all and other methods of performance are necessarily forbidden : *Nazir Ahmad's* case, (1).

The letter of Government, dated the 20th of July 1953, affects a large number of cases in which proceedings had been started before Additional Sessions Judges as Special Judges before the letter was issued and vitally affects the trial of those cases. The matter is of general importance and I consider that though I am inclined to hold that there is no substance in the objection, the matter be heard by a Division Bench.

So far as the merits of the case are concerned, there are also some difficulties in the case. The case for the prosecution is that a man, called Darshan Singh, wanted certain copies. He applied to the Copying Department on the 7th of May, 1952. The copies were not delivered. Then he again wanted certain other copies and made an application on the 19th of May 1952 which was registered on the 20th of May. It was found that the copies related to a certain file which had to be sent for and it is said that Nishan Singh accused was the person who had to send for the file and he told Darshan Singh that unless some money was paid the file would not be sent for and the copies would not be made, or, at any rate, considerable delay would take place. It is said that Darshan Singh was accompanied by a relation of his, Tek Singh, whose wife is Darshan Singh's father's maternal uncle's daughter. They both asked Nishan Singh to get on with the work but Nishan Singh would not do so unless a sum of Rs. 12 was given to him. They promised to bring the money the next day. Next day they went to him and wanted to bargain but Nishan Singh was adamant and wanted his Rs. 12. Thereupon they went to a Police Inspector, Sohan Lal, who recorded the statement of Darshan Singh. After recording the

(1) I.L.R. 17 Lah. 629

statement of Darshan Singh he was taken to Mr. Abhairaj Singh, Magistrate, who also recorded his statement and thereafter marked currency notes of the value of Rs. 12 were given to Darshan Singh and a raid was organized. It is said that Mr. Abhairaj Singh, the Magistrate, and others kept behind while Darshan Singh and Tek Singh went towards the Copying Department. They took Nishan Singh aside and there it is alleged that the Rs. 12 were paid and on a signal being given the Magistrate and the raiding party approached and the marked currency notes of Rs 12 were recovered from the pocket of Nishan Singh. Thereafter an application was made to Mr. Abhairaj Singh by Sohan Lal for permission to investigate the case which permission Mr. Abhairaj Singh gave, Mr. Abhairaj Singh made a report of what had happened to the District Magistrate. The District Magistrate on that report ordered the prosecution of Nishan Singh as Nishan Singh worked under the Deputy Commissioner who was incharge of the Copying Department. It was probably felt by the Police that the permission to investigate by Mr. Abhairaj Singh was perhaps not proper. So another application was made by Sohan Lal to Mr. Ajit Singh, Magistrate for permission to investigate the offence. He also applied for permission to be given to Assistant Sub-Inspector, Gurbakhsh Singh to investigate the case and these permissions were granted by Mr. Ajit Singh. All this was done on the 21st of May 1952. A few days later the Deputy Commissioner also gave the permission to prosecute Nishan Singh. It is urged that the permission to investigate the case was improperly obtained. In my opinion it would have been better on the part of Mr. Abhairaj Singh not to give the permission as he himself was the person who was acting in the case and the permission to investigate the case should have been given by another Magistrate. It is then urged that the permission which was given by Mr. Ajit Singh was improper as the application of Sohan Lal to Mr. Ajit Singh was in the folowing terms—

> "I may kindly be permitted to conduct the investigation of case *Crown* v. *S. Nishan*

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Singh, second Moharrir, in the Copying Agency.

(Sd.) Sohan Lal,

Inspector, Police

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It is urged that there is nothing to show that Mr. Ajit Singh was apprised of any facts before permission was granted. Mr. Ajit Singh has not been examined as a witness and there is no statement of anybody saying that the facts were given to Mr. Ajit Singh. It is however urged on behalf of the State that when *Mr. Ajit Singh was approached we must not presume that he did act blindfold but that he asked the Inspector what this application was about and that the Inspector must have told him what had happened.* Moreover all this took place within the Court compound and everybody must have come to know of it including the Magistrate, Mr. Ajit Singh. Under the provisions of section 114 of the Evidence Act the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The grant of permission to investigate an offence to an officer of an inferior rank of police does not stand on the same footing as the sanction of the prosecution of a person accused of an offence. In an investigation facts have to be found out and the only question to be considered by the authority granting permission to investigate is whether a particular police officer of a rank inferior to that of a Deputy Superintendent of Police should or should not investigate the offence. A Deputy Superintendent can always investigate. In my opinion there is no substance in this objection.

It is next urged that the permission to prosecute, given by the Deputy Commissioner, Mr. H.B. Lall, was not proper. The sanction to prosecute

by Mr. H.B. Lall was given in the following terms:—

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"I, H.B. Lall, Deputy Commissioner, Gurdaspur, do hereby accord sanction under section 6 of the Prevention of Corruption Act to the prosecution of Nishan Singh, son of Harnam Singh, Mazhbi Sikh of Sohal, a Clerk in my office for offences under section 5(2) of the aforesaid Act and section 161, I.P.C. in having accepted on 21st May 1952 a sum of Rs. 12 as bribe or gratification other than legal remuneration as a motive or reward for doing an act in the discharge of his official duties, from Darshan Singh Jat, of village Marrar, Police Station Sadar Batala, for supplying him copies of his claim reports.

(Sd.) H.B.Lall,

30-5-52

Deputy Commissioner
Gurdaspur."

It is urged that this sanction is improper and reference is made to a ruling of their Lordships of the Privy Council in *Gokulchand Dwarkadas Morarka* v. *The King* (1), where the sanction was in the following terms:—

"Government is pleased to accord sanction under Cl. 23, Cotton Cloth and Yarn (Control) Order, 1943, to the prosecution of Mr. Gokulchand Dwarkadas Morarka for breach of the provisions of Cl. 18(2) of the said Order.

By Order of the Governor of Bombay,
(*Signed*).
Deputy Secretary to Government, Bombay."

The Privy Council held that in that case there were no sufficient facts given and nor was there any extraneous evidence to show that any facts had been placed before the Governor at the time when he accorded the sanction. But in the present

(1) A.I.R. 1948 P.C. 82

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case we have the evidence of the Deputy Commissioner's Clerk Hansa Singh, P.W. 5 to the effect that an application, Ex. P.B., was sent by the Superintendent of Police to the Deputy Commissioner for obtaining sanction for prosecution. This application, Ex. P.B., reads as follows:—

> "A *prima facie* case has been made out against Nishan Singh, accused, cited as subject for offences under section 5(2) Prevention of Corruption Act and section 161, I.P.C. in having accepted a sum of Rs. 12 from one Darshan Singh Jat, of Marar, Police Station Sadar Batala, as bribe or gratification other than legal remuneration as motive or reward for supplying him copies of his claim reports—an act in the discharge of his official function.
>
> It is therefore, requested that sanction for his prosecution for the above-said offence as required under section 6 of the said Act may kindly be granted."

This application does give the facts of the case. We have moreover the evidence of Mr. Abhairaj Singh that he sent his report of what had happened to the Deputy Commissioner, his report being Ex. P.W. 6/C which gives details of all that happened on the 21st of May, 1952. I must presume that this report of Mr. Abhairaj Singh reached the Deputy Commissioner. The detailed report of Mr. Abhairaj Singh and the application, Ex. P.B., of Superintendent of Police made to the Deputy Commissioner apprised him of all the facts and it cannot be urged that he did not know what he was doing. The sanction, Ex. P.C., of the Deputy Commissioner, dated the 30th of May 1952, gives in my opinion, *sufficient facts and I think that there is no substance in this objection.*

It was next urged that this sanction referred to a charge under section 161, Indian Penal Code, only while there were two charges framed against the accused one under section 161, Indian Penal

Code, and another under section 5(1)(d) of the Prevention of Corruption Act. In my opinion there is no *substance in this objection.* The two sections in certain respects overlap and the section even if it be granted for the sake of argument that it was only for an offence under section 161, Indian Penal Code, is really a sanction for the prosecution of offences punishable under section 161 Indian Penal Code, or section 5(2) of the Prevention of Corruption Act. It is next urged that there is no evidence in the case from which it can be concluded that this sum of Rs. 12 was given to corrupt Nishan Singh. I have already given the facts of the case. It is urged that Darshan Singh is an accomplice and that his statement requires corroboration. It was urged on behalf of the State that his conduct is corroboration, his conduct being that he wanted certain copies and not being able to get those copies without payment of Rs. 12 he made a report of this to the inspector of Police Sohan Lal and later on reported his grievance before the Magistrate Mr. Abhairaj Singh and then repeated what had happened to the Court. It is urged that a repetition by a person any number of times does not corroborate. The corroboration must be from a source other than the person to be corroborated. It is urged on behalf of the State that Tek Singh corroborated him. First of all Tek Singh is a relation of Darshan Singh and secondly in my opinion Tek Singh and Darshan Singh were both acting jointly and they are both accomplices and therefore the statement made by Tek Singh would not corroborate the statement made by Darshan Singh. One accomplice cannot corroborate another. The corroboration must be by a person who is not an accomplice. It is next urged that the corroboration is by circumstances in so far as that at the time when the currency notes of Rs. 12 were demanded from the accused by Mr. Abhairaj Singh, Magistrate, at the time of the raid the accused did not tell the Magistrate that this sum was not an illegal gratification but was what he subsequently alleged to be part payment of a loan of Rs. 25 due from Darshan Singh to the accused. It is said that his silence at the time shows his guilt and is corroborative of the evidence of Darshan Singh. It