

## CRIMINAL MISCELLANEOUS

*Before Falshaw and Dulat, JJ*

DEVI RAM AND OTHERS,—Petitioners.

*versus*

THE STATE,—Respondent.

1954

February

Criminal Miscellaneous No. 450 of 1953.

*Prevention of Corruption Act (II of 1947)—Section 2—  
Railway servant—Whether a public servant—Indian Penal  
Code (Act XLV of 1860)—Section 21—Railways Act  
(IX of 1890)—Section 137.*

*Held*, that having regard to section 137 of the Railways Act a Railway servant can be called a public servant within the meaning of Section 21, Indian Penal Code only for the purposes of offences under Chapter IX of the Code and he cannot otherwise be called a public servant for the purposes of the Indian Penal Code. If, therefore, a railway servant is prosecuted under section 408 of the Indian Penal Code, he cannot be called a public servant and no question of the application of the Prevention of Corruption Act 1947 arises since that Act applies only to public servants.

(Case referred by the Hon'ble Chief Justice to the above Division Bench,— *vide* his order, dated the 30th September 1953).

*Petition under Section 526, Criminal Procedure Code, praying that the case "The State versus Devi Ram and another" pending in the court of S. Udham Singh, Magistrate, 1st Class, Hissar, may be transferred to the Special Judge, Hissar and the trial be proceeded with according to law.*

H. L. SIBAL, for Petitioners.

D. N. AWASTHY, for Advocate-General for Respondent.

## ORDER

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BHANDARI, C. J. Two points require determination in the present case namely (1) whether a railway servant can be deemed to be a public servant within the meaning of section 2 of the Prevention of Corruption Act, 1947, and (2) whether a public servant, who is prosecuted under section 408 or section 409 of the Penal Code, can be tried only in accordance with the provisions of section 5A, 6 and 7 of the Prevention of Corruption Act, 1947, and of section 7 of the Criminal Law Amendment Act, 1952.

The petitioners in the present case, who are Goods Clerks, were employed at the Railway Station at Bhiwani. It is alleged that towards the end of December 1952 the complainants deposited certain sums of money with them by way of security for the booking of wagons. After the wagons had been booked and despatched, the complainants asked for the return of the security deposited by them, but the petitioners retained certain sums of money and refunded the balance. A first information report under section 5(2) of the Prevention of Corruption Act, read with section 161, of the Penal Code was recorded and the petitioners were arrested under those sections. In the final report which was submitted by the Police, these sections were scored out and the petitioners were prosecuted under section 408 of the Penal Code in three different cases in the Court of a Magistrate of the first class at Hissar. On the 17th August 1953, a petition was presented on behalf of the petitioners in which it was alleged (a) that the prosecution should have been under section 5(2) of the Prevention of Corruption Act and not under section 408 of the Penal Code, (b) that prosecution could have been lodged only after the sanction of the appropriate authority had been obtained under the provisions of section 6 of the Prevention of Corruption Act, 1947 and (c) that the case should have been placed for trial before a Special Judge appointed under section 6 of the Criminal Law Amendment Act, 1952, and not before a Magistrate of the first class.

The first point for determination is whether a railway servant can be deemed to be a public servant within the meaning of section 2 of the Act of 1947. Mr. Avasthy, who appears for the State, contends that the provisions of the Act of 1947, can apply to a person who is a public servant, that is, a public servant as defined in section 21 of the Indian Penal Code. Subsections (1) and (4) of Section 137 of the Railways Act are in the following terms—

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- “(1) Every railway servant shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code.”
- “(4) Notwithstanding anything in section 21 of the Indian Penal Code, a railway servant shall not be deemed to be a public servant for any of the purposes of that Code except those mentioned in subsection (1).”

It is accordingly contended that even though the petitioners in the present case fall within the ambit of the expression “public servant” as defined in section 21 of the Penal Code inasmuch as it was their duty to keep property on behalf of Government, they cannot be prosecuted under section 5(2) of the Prevention of Corruption Act as only persons who are public servants within the meaning of section 21 of the Penal Code can be prosecuted and railway servants have been expressly excluded from that category by the provisions of section 137 of the Railways Act. Mr. Sibal, on the other hand, contends that section 2 of the Act of 1947, declares in clear language that for the purposes of the said Act, a “public servant” means a public servant as defined in section 21 of the Indian Penal Code. According to him, the definition of the expression as given in section 21 of the Penal Code, should be deemed to be incorporated in the Act of 1947. If this contention can be allowed to prevail, it is obvious that every railway servant, who performs one or other of the duties set out in section 21 of the Penal Code, must be deemed to be a public servant for the purposes of this Act.

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The second and perhaps the more difficult question is whether the provisions of the Acts of 1947 and 1952 can apply to the case of a public servant who is prosecuted under section 408 of the Penal Code. In *The State v. Gurcharan Singh* (1), a Division Bench of this Court held that as long as section 5 of the Prevention of Corruption Act is in force, the provisions of section 409 of the Penal Code so far as they concern offences by public servants are *pro tanto* repealed and consequently that no prosecution can be initiated under section 409 of the Penal Code. On the 12th August 1952, Parliament enacted the Prevention of Corruption (Second Amendment) Act, 1952, by which subsection (4) of section 5 of the Prevention of Corruption Act, was replaced by the following subsection, namely—

“(4) The provisions of this section shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this section, be instituted against him.”

Mr. Sibal contends that although the Legislature in their wisdom declared that it would be open to the State to prosecute a public servant either under section 409 of the Penal Code or under section 5 (2) of the Prevention of Corruption Act, it was obligatory on the Court to comply with the provisions of section 5 (A), 6 and 7 of the Act of 1947 and of section 7 of the Act of 1952. In other words, the contention is that although a public servant may be tried under section 409 of the Penal Code, it is open to him to claim that the trial should take place only after the appropriate authority has accorded its sanction to his prosecution and only in the Court of a Special Judge appointed under section 6 of the Criminal Law Amendment Act, 1952.

As the points which have arisen in the present case are likely to arise in other cases and as these

points are of some importance, I am of the opinion that this case should be placed before a larger Bench for decision.

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Let the records of cases be sent for at once.

### ORDER

DULAT, J. The petitioners are Goods Clerks, employed by the Railway and they are being prosecuted in the Court of a first class Magistrate on charges under section 408, Indian Penal Code. It is contended on their behalf that the offences imputed to them are offences under section 5 of Act II of 1947, triable by a Special Judge alone and not capable of being tried by a Magistrate and it is therefore suggested, that the cases may be transferred from the Court where they are pending to the Court of the Special Judge.

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No evidence has been heard in these cases yet and it is therefore not possible to say with any precision what facts exactly the prosecution will succeed in proving. In a general way, however, the allegations against the petitioners are that they received from certain persons certain sums of money by way of deposits in connection with the booking of some goods wagons, the deposits being refundable, but that the petitioners did not refund the entire amount that had to be refunded to the persons making the deposits but kept back some part of it with themselves and thus committed criminal breach of trust. At one stage it appears that the suggestion was that these amounts of money were retained by the petitioners as bribes, but the learned Assistant Advocate-General has stated before us clearly that that is not the case to be proved.

Mr. Sibal on behalf of the petitioners contends that even on the facts sought to be established the offences would fall under Act II of 1947 because the breach of trust has been committed by public servants which would be an offence under section 5 of Act II of 1947. In reply the learned Assistant

Devi Ram and Advocate-General states that the prosecution do not think and do not intend to prove that the petitioners are public servants within the meaning of Act II of 1947 and they cannot, therefore, undertake a prosecution under that Act. It is common ground that Act II of 1947 applies only to public servants. Section 2 of the Act says—

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“For the purposes of this Act, ‘Public Servant’ means a public servant as defined in section 21 of the Indian Penal Code.”

so that it is clear that if the petitioners are not public servants within the meaning of section 21 of the Indian Penal Code, they cannot be called public servants for the purposes of Act II of 1947 either. A reading of section 21, Indian Penal Code, would show that in the absence of any exception in respect of Railway servants a Goods Clerk in the service of Government would ordinarily be included in the definition. It appears, however, quite clearly that an exception has been made by the Indian Railways Act, 1890 in respect of Railway servants. Section 137 of that Act runs—

“Every railway servant shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code”. and then subsection (4) adds—

“Notwithstanding anything in section 21 of the Indian Penal Code, a railway servant shall not be deemed to be a public servant for any of the purposes of that Code except those mentioned in subsection (1)”.

Chapter IX of the Indian Penal Code consists of sections 161 to 171 only, and it is for the purposes of these sections alone therefore that a Railway servant can be called a public servant within the meaning of section 21, Indian Penal Code, and he cannot otherwise be called a public servant for

the purposes of the Indian Penal Code. If, there-  
fore, the prosecution case is that the petitioners  
committed offences under section 408, Indian  
Penal Code, only, they cannot call the petitioners  
public servants and no question of the application  
of Act II of 1947 arises. In my opinion, therefore,  
the petitioners are being rightly proceeded against  
in the Court of a Magistrate and there is no oc-  
casion for withdrawing these cases from that  
Court. These petitions fail and are dismissed.

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FALSHAW, J. I agree.