K. VEERASWAMI

v.

UNION OF INDIA AND OTHERS

JULY 25, 1991

[B.C. RAY, K. JAGANNATHA SHETTY, LALIT MOHAN SHARMA, M.N. VENKATACHALIAH AND J.S. VERMA, JJ.]

Prevention of Corruption Act, 1947: Ss. 2, 5(1)(e), 5(2), 6(1)(c)—Public servant—Possession of pecuniary resources or property disproportionate to known sources of income—Prosecution after superannuation—Previous sanction—Whether necessary.

Judge of High Court/Supreme Court—Whether 'public servant', liable to prosecution under the Act—Sanctioning authority—Who is.

Sanctioning authority—Whether vertically superior in the hierarchy in which office of the public servant exists.

Cl. (c) of s. 6(1)—Whether independent of and separate from clauses (a) and (b)—Rule of ejusdem generis—Applicability of.

Independence of Judiciary—Whether affected by application of the Prevention of Corruption Act to Judges of High Court/Supreme Court—Issuance of guidelines by Court.

Indian Penal Code, 1860: Ss. 19, 21—"Judge"—Whether includes a High Court/Supreme Court Judge—Whether 'public servant' under s. 2 of Prevention of Corruption Act.

Constitution of India, 1950: Articles 74, 79, 121, 211, 124, 217, 218—Provision for initiation of proceeding for removal of a Judge—Whether a ground for withholding criminal prosecution of a Judge for offence under s. 5(1)(e) of the Prevention of Corruption Act, 1947.

Independence of Judiciary—Effect of application of Prevention of Corruption Act, 1947 to Judges of superior Courts.

Code of Criminal Procedure, 1973: Ss. 154, 173(2), 173(5)—Offence committed by public servant under s. 5(1)(e) of the Prevention of Corruption Act, 1947—Complaint regarding—Investigation of—Requirements—Police report/Charge sheet—Contents of.

Evidence Act, 1872: S. 106—Offence committed under s. 5(1)(e) of Prevention of Corruption Act, 1947—Possession of property disproportionate to known sources—Whether fact within special knowledge of the public servant—Burden of proof—On whom.

Words and Phrases: "satisfactorily account"—Meaning of.

Statutory Interpretation: Rule of ejusdem generis—Explained.

A complaint against the appellant, a former Chief Justice of a High Court, was made to the CBI on which a case under s. 5(2) read with s. 5(1)(e) of the Prevention of Corruption Act, 1947 was registered on 24.2.1976. On 28.2.1976 the F.I.R. was filed in the court of Special Judge. The appellant proceeded on leave from 9.3.1976 and retired on 8.4.1976 on attaining the age of superannuation.

The investigation culminated in the filing of charge-sheet/final report under s. 173(2), Cr. P.C. against the appellant on 15.12.1977 before the Special Judge.

The Charge-sheet stated that the appellant after assuming office of the Chief Justice on 1.5.1969 gradually commenced accumulation of assets and was in possession of pecuniary resources and property, in his name and in the names of his wife and two sons, disproportionate to his known sources of income for the period between the date of his appointment as Chief Justice and the date of registration of the case, and thereby he committed the offence of criminal misconduct under s. 5(1)(e), punishable under s. 5(2) of the Prevention of Corruption Act, 1947. The Special Judge issued process for appearance of the appellant. Meanwhile, the appellant moved the High Court under s. 482, Cr. P.C. to quash the said criminal proceedings.

The matter was heard by a Full Bench of the High Court which dismissed the application by 2:1 majority; but granted a certificate under Articles 132(1) and 134(1)(c) of the Constitution in view of the important question of law involved.

In appeal to this Court it was contended by the appellant that the provisions of the Prevention of Corruption Act, 1947 do not apply to a Judge of a superior Court as for such prosecution previous sanction of an authority competent to remove a public servant as provided under s. 6 of the Prevention of Corruption Act, 1947 is imperative and power to remove a Judge is not vested in any single individual authority but is

vested in the two Houses of Parliament and the President under Article 124(4) of the Constitution; that the Parliament cannot be the sanctioning authority for the purpose of s. 6 and if the President is regarded as the authority, he cannot act independently as he exercises his powers by and with the advice of his Council of Ministers and the Executive may misuse the power by interfering with the judiciary; that s. 6 applies only in cases where there is master and servant relationship between the public servant and the authority competent to remove him, and where there is vertical hierarchy of public offices and the sanctioning authority is vertically superior in the hierarchy in which office of the public servant against whom sanction is sought exists; that no prosecution can be launched against a Judge of a superior Court under the provisions of the Prevention of Corruption Act except in the mode envisaged by Article 124(4) of the Constitution; that no law prohibits a public servant having in his possession assets disproportionate to his known sources of income and such possession becomes an offence only when the public servant is unable to account for it; and that the public servant is entitled to an opportunity by the investigating officer to explain disproportionality between the assets and the known sources of income and the charge sheet must contain such an averment, and failure to mention that requirement would vitiate the charge-sheet and render it invalid and, no offence under s. 5(1)(e) of the Act could be made out.

On the questions: (1) whether a Judge of a High Court or of the Supreme Court is a 'public servant' within the meaning of s. 2 of the Prevention of Corruption Act, 1947; (2) whether a Judge of the High Court including the Chief Justice, or a Judge of the Supreme Court can be prosecuted for an offence under the Prevention of Corruption Act, 1947; and (3) who is the competent authority to remove a Judge either of the Supreme Court or of the High Court from his office in order to enable that authority to grant sanction for prosecution of the Judge under the provisions of s. 6 of the Prevention of Corruption Act, 1947.

Dismissing the appeal, this Court,

HELD: (Per Majority—Ray, Shetty, Sharma and Venkatachaliah, JJ).

1. A Judge of a High Court or of the Supreme Court is a 'public servant' within the meaning of s. 2 of the Prevention of Corruption Act, 1947.

2. Prosecution of a Judge of a High Court, including the Chief

A **Justice, or a Judge of the Supreme Court can be launched after obtaining sanction of the competent authority as envisaged by s. 6 of the Prevention of Corruption Act.**

Per Verma, J. (dissenting)—

B **1. (i) A Judge or Chief Justice of a High Court is a Constitutional functionary, even though he holds a public office and in that sence he may be included in the wide definition of a public servant. But a public servant whose category for the grant of sanction for prosecution is not envisaged by s. 6 of the Act is outside the purview of the Act, not intended to be covered by the Act.**

C **1(ii) The Prevention of Corruption Act, 1947, as amended by the 1964 amendment is inapplicable to Judges of the High Courts and the Supreme Court.**

(Per Majority—Ray, Shetty and Venkatachaliah, JJ.)

D **3.1 For the purpose of s. 6(1)(c) of the Prevention of Corruption Act, 1947, the President of India is the authority competent to give previous sanction for prosecution of a Judge of a superior Court.**

3.2 No criminal case shall be registered under s. 154, Cr. P.C. E **against a Judge of the High Court, Chief Justice of the High Court or a Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter.**

3.3 If the Chief Justice of India himself is the person against whom the allegations of criminal misconduct are received, the F **Government shall consult any other Judge or Judges of the Supreme Court.**

3.4 There shall be similar consultation at the stage of examining the question of granting sanction for prosecution and it shall be necessary and appropriate that the question of sanction be guided by and in G **accordance with the advice of the Chief Justice of India.**

Sharma. J. (contra)

As to who is precisely the authority for granting previous sanction for prosecution of a Judge is a matter which did not arise in the instant H **case and will have to be finally decided when it directly arises. How-**

ever, the issues of removal under Art. 124(4) of the Constitution and sanction under s. 6 of the Act can be combined for getting clearance from the Parliament. A

Verma. J. (dissenting)

3. Section 6 of the Act is inapplicable to Judges of High Courts or of the Supreme Court and such Constitutional functionaries do not fall within the purview of the Prevention of Corruption Act, 1947. B

Per B.C. Ray, J.

1. A Judge of the High Court or of the Supreme Court comes within the definition of public servant under s. 2 of the Prevention of corruption Act, 1947. and he is liable to be prosecuted under the provisions of the Act. [223E-F] C

2.1 A Judge will be liable for committing criminal misconduct within the meaning of s. 5(1)(e) of the Act, if he has in his possession pecuniary resources or property disproportionate to his known sources of income for which he cannot satisfactorily account. [217B] D

2.2 A Judge of a superior Court will not be immune from prosecution for criminal offences committed during the tenure of his office under the provisions of the Act. [223F] E

3.1 In order to launch a prosecution against a Judge of a superior Court for criminal misconduct falling under s. 5(1)(e) of the Act, previous sanction of the authority competent to remove a Judge, including Chief Justice of a High Court, from his office is imperative. [217C-D; 221G] F

3.2 The President of India has the power to appoint as well as to remove a Judge from his office on the ground of proved misbehaviour or incapacity as provided in Article 124 of the Constitution and, therefore, he, being the authority competent to appoint and to remove a Judge, of course, in accordance with the procedure envisaged in clauses (4) and (5) of Article 124, may be deemed to be the authroity to grant sanction for prosecution of a Judge under the provisions of s. 6(1)(c) in respect of the offences provided in s. 5(1)(e) of the Act. [225G-H; 226A-B] G

3.3 In order to adequately protect a Judge from frivolous prosecution and unnecessary harassment the President will consult the Chief Justice of India who will consider all the materials placed before H

him and tender his advice to the President for giving sanction to launch prosecution or for filing FIR against the Judge concerned after being satisfied in the matter. The President shall act in accordance with the advice given by the Chief Justice of India. [226B-C]

If the Chief Justice of India is of opinion that it is not a fit case for grant of sanction for prosecution of the Judge concerned, the President shall not accord sanction to prosecute the Judge. This will save the Judge concerned from unnecessary harassment as well as from frivolous prosecution against him. [226C]

In the case of the Chief Justice of the Supreme Court, the President shall consult such of the Judges of the Supreme Court as he may deem fit and proper and shall act in accordance with the advice given to him by the Judge or Judges of the Supreme Court. [226D]

3.4 In the instant case, the appellant had resigned from his office and ceased to be a public servant on the date of lodging the F.I.R. against him by the C.B.I. and, therefore, no sanction under s. 6(1)(c) of the Act was necessary. [227A; 228C]

R.S. Nayak v. *A.R. Antulay*, [1984] 2 SCR 495, referred to.

4.1 A Judge of the Supreme Court as well as a Judge of the High Court is a constitutional functionary and to maintain the independence of the judiciary and to enable the Judge to effectively discharge his duties as a judge and to maintain the rule of law, even in respect of *lis* against the Central Government or the State Government, he is made totally independent of the control and influence of the executive by mandatorily embodying in Article 124 or Article 217 of the Constitution that a Judge can only be removed from his office in the manner provided in clauses (4) and (5) of Article 124. [222B-D]

4.2 Power to remove by impeachment or address, a person holding office during good behaviour, is an essential counterpart to the independence secured to the holders of high office by making their tenure one of good behaviour instead of at pleasure. [224D-E]

4.3 A Judge of the Supreme Court or of the High Court can only be removed on the ground of proved misbehaviour or incapacity by an order of the President passed after following the mandatory procedure expressly laid down in Article 124(4) of the Constitution. Without an address by each of the Houses of the Parliament, the President is not

empowered under the Constitution to order removal of a Judge of the Supreme Court or of the High Court from his office on the ground of proved misbehaviour or incapacity. Therefore, the repository of this power is not in the President alone but it is exercised after an address by each of the Houses of Parliament in the manner provided in Article 124(4). [218B-H; 219A]

Union of India v. *Sakalchand,* AIR 1977 SC 2328 and *S.P. Gupta and Ors.* v. *President of India and Ors,* AIR 1982 SC 149, referred to.

5. There is no master and servant relationship or employer and employee relationship between a Judge and the President of India in whom the executive power of the Union is vested under the provisions of Article 53 of the Constitution. [222E]

6. It is necessary to evolve some method commensurate with the grant of sanction in cases of serious allegations of corruption and acquisition or the possession of disproportionate assets which the Judge cannot satisfactorily account for or possession of property disproportionate to the sources of income of the Judge. Otherwise, it will create a serious inroad on the dignity, respect and credibility and integrity of the high office which a superior Judge occupies resulting in the erosion of the dignity and respect for the high office of the Judges in the estimation of the public. [225E-F]

7.1 The purpose of grant of previous sanction before prosecuting a public servant including a Judge of the High Court or of the Supreme Court is to protect the Judge from unnecessary harassment and frivolous prosecution more particularly to save the Judge from the biased prosecution for giving judgment in a case which goes against the Government or its officers though based on good reasons and rule of law. [226D-E]

7.2 Frivolous prosecution cannot be launched against a Judge for giving a judgment against the Central Government or any of its officers inasmuch as such decision does not amount to misbehaviour within the meaning of Article 124 of the Constitution. [226G-H]

Shamsher Singh & Anr. v. *State of Punjab,* [1975] 1 SCR 814 and *G.K. Daphtary* v. *O.P. Gupta,* AIR 1971 SC 1132, referred to.

Per Shetty, and Venkatachaliah, JJ.

A 1. The expression "public servant" as defined under s. 2 of the Prevention of Corruption Act, 1947 means a public servant as defined in s. 21, I.P.C. From the very commencement of the I.P.C. "Every Judge" finds a place in the categories of public servant defined under s. 21 and this expression indicates all Judges and all Judges of all Courts. It is a general term and general term in the Act should not be narrowly B construed. It must receive comprehensive meaning unless there is positive indication to the contrary. There is no such indication to the contrary in the Act. A Judge of the superior Court cannot therefore be excluded from the definition of 'public servant'. [237C; 240D; 242A-B]

2.1 A public servant cannot be prosecuted for offences specified in s. 5 of the Prevention of Corruption Act, 1947, unless there C is prior sanction under s. 6 for prosecution from the competent authority. [237E]

2.2 There are two requirements for the applicability of clause (c) of s. 6(1) to a Judge of the higher judiciary—the Judge must be a public D servant, and there must be an authority competent to remove him from his office. If these two requirements are complied with, a Judge cannot escape from the operation of the Act. [240B-C]

2.3 The Judges are liable to be dealt with just the same way as any other person in respect of criminal offence. It is only in taking of E bribes or with regard to the offence of corruption the sanction for criminal prosecution is required. There is no law providing protection for Judges from criminal prosecution. [252A-B]

It is not objectionable to initiate criminal proceedings against public servant before exhausting the disciplinary proceedings, and a F fortiori, the prosecution of a Judge for criminal misconduct before his removal by Parliament for proved misbehaviour is unobjectionable. [252D-E]

The "proved misbehaviour" which is the basis for removal of a Judge under clause (4) of Article 124 of the Constitution may also in certain cases involve an offence of criminal misconduct under s. 5(1) of G the Act. But that is no ground for withholding criminal prosecution till the Judge is removed by Parliament. One is the power of Parliament and the other is the jurisdiction of a criminal court. Both are mutually exclusive. [251A-C]

3.1 For the purpose of s. 6(1)(c) of the Act, the President of India H is the authority competent to give previous sanction for the prosecution

of a Judge of the Supreme Court and the High Court.

3.2 Section 6(1) brings within its fold all the categories of public servants as defined in s. 21 of the I.P.C. Clauses (a) and (b) would cover the cases of public servants who are employed in connection with the affairs of the Union or State and are not removable from their office save by or with the sanction of the respective government. Clause (c) states that in the case of any other person the sanction would be of the authority competent to remove him from his office. [238E-F]

The provisions of clauses (a) and (b) of s. 6 [(1)] cover certain categories of public servants and the 'other' which means remaining categories are brought within the scope of clause (c). Clause (c) is independent of and separate from the preceding two clauses. The structure of the section does not permit the applicability of the rule of *ejusdem generis*. [240A-B]

3.3 The application of the *ejusdem generis* rule is only to general word following words which are less general, or the general word following particular and specific words of the same nature. In such a case, the general word or expression is to be read as comprehending only things of the same kind as that designated by the preceding specific words or expressions. The general word is presumed to be restricted to the same genus as those of the particular and specific words. [239F-G]

3.4 The construction which would promote the general legislative purpose underlying the provision, is to be preferred to a construction which would not. [247A]

If the literal meaning of the legislative language used would lead to results which would defeat the purpose of the Act, the Court would be justified in disregarding the literal meaning and adopt a liberal construction which effectuates the object of the legislature. [247A-B]

S.A. Venkataraman v. *The State,* [1958] SCR 1040 and *M. Narayanan* v. *State of Kerala,* [1963] 2 Suppl. SCR 724, referred to.

Craies on Statute Law, (6th Edn. p. 531) referred to.

3.5 In view of the composition of Parliament, the nature of transacting business or proceeding in each House, the prohibition by Article 121 on discussion with respect to the conduct of any Judge of the Supeme Court or of a High Court, in the discharge of his duties except

upon a motion for presenting an address to the President praying for his removal, the Parliament cannot be the proper authority for granting sanction for the prosecution of a Judge. That does not, however, follow that the Judges of superior Courts are entitled to be excluded from the scope of the Act. [245C-F]

3.6 Section 6 requires to be liberally construed. It is not a penal provision but a measure of protection to public servants in the penal enactment. It indicates the authorities without whose sanction a public servant cannot be prosecuted. It is sufficient that the authorities prescribed thereunder fall within the fair sense of the language of the section. [247B-C]

The expression "the authority competent to remove" used in s. 6(1)(c) is to be construed to mean also an authority without whose order or affirmation the public servant cannot be removed. The order of the President for removal of a Judge is mandatory. The motion passed by each House of Parliament with the special procedure prescribed under Art. 124(4) will not *proprio vigore* operate against the Judge. It will not have the consequence of removing the Judge from the office unless it is followed by an order of the President. Clause (4) of Art. 124 is in the negative terms. The order of the President is *sine qua non* for removal of a Judge. The President alone could make that order. [247C-E, 248C]

3.7 The relationship of master and servant as is ordinarily understood in common law does not exist between the Judges of higher judiciary and the Government. The Judges are not bound nor do they undertake to obey any order of the Government within the scope of their duties. Indeed, they are not Judges if they allow themselves to be guided by the Government in the performance of their duties. [239B-D]

Union of India v. *H.S. Seth*, [1978] 1 SCR 423, referred to.

3.8 It is not necessary that the authority competent to give sanction for prosecution or the authority competent to remove the public servant should be vertically superior in the hierarchy in which the office of the public servant exists. There is no such requirement under s. 6 of the Act. The power to give sanction for prosecution can be conferred on any authority. Such authority may be of the department in which the public servant is working or an outside authority. All that is required is that the authority must be in a position to appreciate the materials collected against the public servant to judge whether the prosecution contemplated is frivolous or speculative. [249B-C]

R.S. Nayak v. *A.R. Antulay,* [1984] 2 SCC 183, distinguished. A

The President is not an outsider so far judiciary is concerned. He appoints the Judges of the High Court and the Supreme Court in exercise of his executive powers. [249E]

Shamsher Singh v. *State of Punjab,* [1975] 1 SCR 365 and *S.P. Gupta* v. *Union of India,* [1982] 2 SCR 365, referred to. B

Parliament has no part to play in the matter of appointment of Judges except that the Executive is responsible to the Parliament. [249G-H]

3.9 In the instant case, the view taken by the High Court that no sanction for prosecution of the appellant under s. 6 of the Act was necessary since he had retired from the service on attaining the age of superannuation and was not a public servant on the date of filing the charge-sheet, is unassailable. The question is no longer *res integra.* [254G-H; 255C] C

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S.A. Venkataraman v. *The State,* [1958] SCR 1040; *C.R. Bansi* v. *State of Maharashtra,* [1971] 3 SCR 236 and *K.S. Dharmadatan* v. *Central Government & Ors.,* [1979] 3 SCR 832, referred to.

R.S. Nayak & Ors v. *A.R. Antulay,* [1984] 2 SCR 183, referred to. E

4.1 There are various protections afforded to Judges to preserve the independence of the judiciary. They have protection from civil liability for any act done or ordered to be done by them in discharge of their judicial duty whether or not such judicial duty is performed within the limits of their jurisdiction, as provided under s. 1 of Judicial Officers Protection Act, 1850. Likewise s. 77, I.P.C. gives them protection from criminal liability for an act performed judicially. A discussion on the conduct of the Judges of the Supreme Court and the High Courts in the discharge of their duties shall not take place in Parliament or in the State Legislatures, as envisaged by Articles 121 and 211 of the Constitution. The Supreme Court and the High Courts have been constituted as Courts of Record with the power to punish for committing contempt as laid down by Articles 129 and 215. The Contempt of Courts Act, 1971 provides power to take civil and criminal contempt proceedings. The Executive is competent to appoint the Judges but not empowered to remove them. The power to remove is vested in Parliament by the process analogous to impeachment as envisaged by Article 124 of the Constitution. [251E-H; 242E] F G H

A 4.2 Previous sanction of the competent authority as contemplated by s. 6 is only to protect the honest public servants from frivolous and vexatious prosecution. The competent authority may refuse sanction for prosecution if the offence alleged has no material to support or it is frivolous or intended to harass the honest officer. But he is duty bound to grant sanction if the material collected lend credence to the offence B complained of. The discretion to prosecute a public servant is taken away from the prosecuting agency and is vested in the authority competent to remove the public servant. The latter would be in a better position than the prosecuting agency to assess the material collected in a dispassionate and reasonable manner and determine whether or not the sanction for prosecution deserves to be granted. [237F-G; 238A-C]

C 4.3 The apprehension, that the Executive being the largest litigant is likely to misuse the power to prosecute the Judges, in our over-litigious society is not unjustified or unfounded. The Act provides certain safeguards like s. 6 and trial by the court which is independent of the Executive. But these safeguards may not be adequate. Any comp-D laint against a Judge and its investigation by the CBI, if given publicity, will have a far reaching impact on the Judge and the litigant public. The need, therefore, is a judicious use of taking action under the Act. Care should be taken that honest and fearless Judges are not harassed. They should be protected. [252G-H; 253A-C]

E 5.1 There is no need for a separate legislation for the Judges. The Act is not basically defective in its application to judiciary. All that is required is to lay down certain guidelines lest the Act may be misused. This Court being the ultimate guardian of rights of people and independence of the judiciary will not deny itself the opportunity to lay down such guidelines. This Court is not a Court of limited jurisdiction F of only dispute settling. Almost from the beginning, this Court has been a law maker, albiet, 'interstitial' law maker. Indeed the Court's role today is much more. It is expanding beyond dispute settling and interstitial law making. It is a problem solver in the nebulous areas. [253E-G]

5.2 The Chief Justice of India is a participatory functionary in G the matter of appointment of Judges of the Supreme Court and the High Courts; he is to be consulted by the President of India even for transfer of a Judge from one High Court to another; and question of age of a Judge of a High Court shall be decided by the President after consulting him. The Chief Justice of India being the head of the Judiciary is primarily concerned with the integrity and impartiality of H the judiciary. Hence it is necessary that the Chief Justice of India is not

kept out of the picture of any criminal case contemplated against a Judge. He would be in a better position to give his opinion in the case and consultation with the Chief Justice of India would be of immense assistance to the Government in coming to the right conclusion. [253H; 254A-B] A

5.3 It is the responsibility and duty of this Court to apply the existing law in a form more conducive to the independence of the Judiciary. [253G] B

5.4 In the instant case then the Chief Justice of India was requested to give his opinion whether the appellant could be proceeded under the Act. It was only after the Chief Justice expressed his views that the appellant could be proceeded under the provisions of the Act, the case was registered against him. [253D] C

6.1 No criminal case shall be registered under s. 154, Cr. P.C. against a Judge of a High Court, Chief Justice of a High Court or a Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter. [254C] D

6.2 Due regard must be given by the Government to the opinion expressed by the Chief Justice of India. If he is of opinion that it is not a fit case for proceeding under the Act, the case shall not be registered. [254D]

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6.3 If the Chief Justice of India himself is the person against whom the allegations of criminal misconduct are received, the Government shall consult any other Judge or Judges of the Supreme Court. There shall be similar consultation at the stage of examining the question of granting sanction for prosecution and it shall be necessary and appropriate that the question of sanction be guided by and in accordance with the advice of the Chief Justice of India. [254D-E] F

The apprehension that the Act is likely to be misused by the Executive for collateral purpose would thus be allayed. [254E]

7. It is inappropriate to state that conviction and sentence are no bar for the Judge to sit in the Court. If a Judge is convicted for the offence of criminal misconduct or any other offence involving moral turpitude, it is but proper for him to keep himself away from the Court. He must voluntarily withdraw from judicial work and await the outcome of the criminal prosecution. If he is centenced in a criminal case he should forthwith tender his resignation unless he obtains stay of his G H

A conviction and sentence. He shall not insist on his right to sit on the Bench till he is cleared from the charge by a Court of competent jurisdiction. [250D-F]

The judiciary has no power of the purse or the sword. It survives only by public confidence and it is important to the stability of the B society that the confidence of the public is not shaken. The Judge whose character is clouded and whose standards of morality and rectitude are in doubt may not have the judicial independence and may not command confidence of the public. He must voluntarily withdraw from the judicial work and administration. [250F-G]

C *Jackson's Machinery of Justice* by J.R. Spencer, 8th Edn. pp. 369-70 referred to.

8.1 Section 5(1)(e) of the Act creates a statutory offence which must be proved by the prosecution. The first part of the Section relates to the proof of assets possessed by the public servant. It is for the D prosecution to prove that the accused or any person on his behalf has been in possession of pecuniary resources or property disproportionate to his known sources of income. When that onus is discharged by the prosecution the offence of criminal misconduct is attributed to the public servant. However, it is open to him to satisfactorily account for such disproportionality of the assets. But it does not mean that there is E no offence till the public servant is able to account for the excess of assets. If one possesses assets beyond his legitimate means, it goes without saying that the excess is out of ill-gotton gain. [259D-E; 260E-F]

8.2 It is for the public servant to prove the source of income or the means by which he acquired the assets. That is the substance of F clause (e) of s. 5(1). The section makes available the statutory defence which must be proved by the accused. It is a restricted defence that is accorded to the accused to account for the disproportionality of the assets over the income. But the legal burden of proof placed on the accused is not so onerous as that of the prosecution. However, it is just not throwing some doubt on the prosecution version. [260F-G, 259E-F]

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The legislature has advisedly used the expression "satisfactory account". The emphasis must be on the word "satisfactorily". That means the accused has to satisfy the court that his explanation is worthy of acceptance. The burden of proof placed on the accused is an evidential burden though not a persuasive burden. The accused, however, H could discharge that burden of proof "on the balance of probabilities"

either from the evidence of the prosecution and/or evidence from the defence. [259F-G] A

8.3 Parliament is competent to place the burden on certain aspects on the accused as well and particularly in matters "especially within his knowledge". (s. 106 of the Evidence Act). Adroitly the prosecution cannot, in the very nature of things, be expected to know the B affairs of a public servant found in possession of resources of property disproportionate to his known sources of income. It is for him to explain. Such a statute placing burden on the accused cannot be regarded as unreasonable, unjust, or unfair. Nor can it be regarded as contrary to Article 21 of the Constitution. The principle that the burden of proof is always on the prosecution and never shifts to the accused is C not a universal rule to be followed in every case. The principle is applied only in the absence of statutory provision to the contrary. [260A-C]

Woolmington v. *Director of Public Prosecution,* [1935] A.C. 462; *C.S.D. Swamy* v. *The State,* [1960] 1 SCR 461; *Surajpal Singh* v. *The State of U.P.,* [1961] 2 SCR 971; *Sajjan Singh* v. *The State of Punjab,* D [1964] 4 SCR 630; *Rig* v. *Hunt,* [1986] 3 WLR 1115 and *Maharashtra* v. *K.K.S. Ramaswamy,* [1978] 1 SCR 274, referred to.

State of Maharashtra v. *Wasudeo Ramchandra Kaidalwar,* [1981] 3 SCR 675, referred to.

E

9.1 To state that after collection of all material, the investigating officer must give an opportunity to the accused and call upon him to account for the excess of the assets over the known sources of income and then decide whether the accounting is satisfactory or not, would be elevating him to the position of an enquiry officer or a judge. He is not holding an enquiry against the conduct of the public servant or de- F termining the disputed issues regarding the disproportionality between the assets and the income of the accused. He just collects material from all sides and prepares a report which he files in the Court as a charge-sheet. The investigating officer is only required to collect material to find out whether the offence alleged appears to have been committed. In the course of the investigation, he may examine the accused. G Indeed, fair investigation requires that the accused should not be kept in darkness. He should be taken into confidence if he is willing to cooperate. [261B-E]

10.1 The charge-sheet is nothing but a final report of the police officer under s. 173(2) of the Cr. P.C. Section 173(2) provides that on H

A completion of the investigation the police officer investigating into a cognizable offence shall submit a report, which must be in the form prescribed by the State Government. The statutory requirement of the report under s. 173(2) would be complied with if the various details prescribed therein are included in the report and it accompanies all the documents and statements of witnesses as required by s. 172(5) Cr. B P.C. Nothing more need be stated in the report of the investigating officer. It is also not necessary that all the details of the offence must be stated. The details of the offence are required to be proved to bring home the guilt of the accused at a later stage in the course of the trial of the case by adducing acceptable evidence. [261E-H; 262A-C]

C *Satya Narain Musadi and Ors.* v. *State of Bihar,* [1980] 3 SCC 152, referred to.

10.2 In the instant case, the charge sheet contained all the requirements of s. 173(2), Cr.P.C. It stated that the investigation showed that between 1.5.1969 and 24.2.1976 the appellant had been in D possession of the pecuniary resources and property in his own name and in the names of his wife and two sons, which were disproportionate to the known sources of income over the same period and he cannot satisfactorily account for such disproportionate pecuniary resources and property. The details of properties and pecuniary resources of the appellant also were set out in clear terms. No more was required to be E stated in the charge sheet. It was fully in accordance with the terms of s. 173(2), Cr.P.C. and clause (e) of s. 5(1)(e) of the Act. [262C-E]

11. The society's demand for honesty in a Judge is exacting and absolute. The standards of judicial behaviour, both on and off the Bench, are normally extremely high. For a judge to deviate from such standards of honesty and impartiality is to betray the trust reposed on him. No F excuse or no legal relativity can condone such betrayal. From the standpoint of justice the size of the bribe or scope of corruption cannot be the scale for measuring a judge's dishonour. A single dishonest judge not only dishonours himself and disgraces his office but jeopardises the integrity of the entire judicial system. [262F-H; 263A]

G A judicial scandal has always been regarded as far more deplorable than a scandal involving either the Executive or a member of the Legislature. The slightest hint of irregularity or impropriety in the Court is a cause for great anxiety and alarm. [263A-B]

Per Sharma, J.:

H

1. The expression "public servant" used in the Prevention of

Corruption Act, 1947 is undoubtedly wide enough to denote every Judge, including the Judges of the High Courts and the Supreme Court. [263D] A

2.1 Section 2 of the Act adopts the definition of "public servant" as given in s. 21, I.P.C. which includes "Every Judge". If the legislature had intended to exclude Judges of the High Courts and the Supreme Court from the field of s. 5 of the Act, it could have said so in unambiguous terms instead of adopting the wide meaning of the expression "public servant" as given in the Indian Penal Code. [266E-F] B

2.2 No person is above the law. In a proceeding under Article 124 of the Constitution, a Judge can merely be removed from his office. He cannot be convicted and punished. In a case where there is a positive finding recorded in such a proceeding against the Judge and on that ground he is removed from his office, it cannot be said that he will escape the criminal liability. In a civilised society the law cannot be assumed to be leading to such disturbing results. [265G; 266A-B] C

2.3 It is not safe to assume that the Prevention of Corruption Act intended to make in its application any discrimination between the lower and the higher judiciary. There cannot be any rational ground on the basis of which a member of a higher judiciary may be allowed to escape prosecution while in identical circumstances a member of the subordinate judiciary is tried and convicted. Such an interpretation of the Act will militate against its constitutional validity and should not, therefore, be preferred. [265C-E] D E

3.1 The power to remove a High Court Judge from his office does exist and has to be exercised in appropriate circumstances according to the provisions of Article 124 of the Constitution. It cannot, therefore, be said that previous sanction for his prosecution cannot be made available. [266D-E] F

3.2 Section 6(1)(c) of the Act speaks of the "authority competent to remove" the public servant "from his office". An answer in the negative to the question as to whether there is some authority competent to remove a Judge of a High Court will be inconsistent with Article 124 clauses (4) and (5) read with Article 218 of the Constitution. Although more than one person are involved in the process, it is not permissible to say that no authority exists for the purpose of exercising the power to remove a High Court Judge from his office. [264A-C] G

As to who is precisely the authority in this regard is a matter H

A which does not arise in the instant case, but the vital question whether such an authority exists at all must be answered in the affirmative. [264C-D]

4.1 If the President is held to be the appropriate authority to grant the sanction without reference to the Parliament, he will be bound by the advice he receives from the Council of Ministers. This will seri-
B ously jeopardise the independence of judiciary which is undoubtedly a basic feature of the Constitution. [267D-E]

4.2 Since the Constitution itself has considered it adequate in the matter of dealing with serious accusations against the Judges by incorporating the provisions of clauses (4) and (5) in Article 124, they must be treated to be appropriate and suitable; and should be resorted
C to in the matter of prosecution also, in view of the Parliament enacting s. 6 of the Act in the language which attracts the constitutional provisions. [268B-C]

4.3 It is true that the grant of sanction will be delayed until the
D accusation is examined according to the law enacted under Clause (5) of Article 124, but once that stage is over and a finding is recorded against the Judge, there should not be any hitch in combining the two matters—the removal and the grant of sanction—which are obviously intertwined, for getting clearance from Parliament. [268E-H; 269A]

E 5.1 Protection to the public servant in general is provided under Article 311 of the Constitution and the interest of the subordinate judiciary is further taken care of by the High Courts, and this alongwith the provisions regarding previous sanction shields them from unjustified prosecution. Similarly, protection is available to the High Court and Supreme Court Judges through the provisions of clauses (4) and (5)
F of Article 124 of the Constitution. So far this aspect is concerned, the two categories of Judges—High Court and Supreme Court Judges on the one hand and the rest on the other—have not been treated by the law differently. [265C-E]

5.2 The protection to the independence of the Judiciary is in section 6
G of the Prevention of Corruption Act, 1947, which by providing for previous sanction of the authority empowered to remove the Judge, leads to Article 124 of the Constitution. [268A-B]

6.1 Taking into consideration the independence of Judiciary as envisaged by the Constitution, if the President of India is treated as the
H sanctioning authority in the case of a Judge, and the Chief Justice of

India is consulted in the matter and steps are taken in accordance with his advice, and the executive follows this rule strictly, a further protection from harassment of the Judges is uncalled for and unjustified criminal prosecution shall be not made available. But such a binding direction cannot be issued by this Court on the basis of the provisions of the Constitution and the Act. The approval of the Chief Justice of India can be introduced as a condition for prosecution only by the Parliament and not by this Court. If the Court starts supplementing the law as it stands now, it will be encroaching upon the legislative field. [266G-H; 267A-B; F-H; 268A]

7. Section 5(1)(e) does not contemplate a notice to be served on the accused. If the prosecuting authority after making a suitable enquiry, by taking into account the relevant documents and questioning relevant persons, forms the opinion that the accused cannot satisfactorily account for the accumulation of disproportionate wealth in his possession the section is attracted. [269B-D]

8. In the instant case, the records clearly indicate that after duly taking all the appropriate steps it was stated that the assets found in the possession of the appellant in his own name and in the names of his wife and two sons, were disproportionate to his known sources of income during the relevant period and for which he "cannot satisfactorily account". [269D-E]

Per Verma, J. (dissenting)-

1.1 A Judge or Chief Justice of a High Court is a Constitutional functionary, even though he holds a public office and in that sense he may be included in the wide definition of a 'public servant'. However, the holder of an office who may be a public servant according to the wide definition of the expression in the prevention of corruption Act, but whose category for grant of sanction for prosecution is not envisaged by s. 6 is outside the purview of the Act, not intended to be covered by the Act. [289F; 286D-E]

1.2 Section 6(1)(c) of the Prevention of Corruption Act, 1947, is inapplicable to a Judge of a High Court or the Supreme Court and such constitutional functionaries do not fall within the purview of the Act. [296B]

1.3 Previous sanction under s. 6 of the Prevention of Corruption Act, 1947, is a condition precedent for taking cognizance of an offence punishable under the Act, of a public servant who is prosecuted during

A his continuance in the office. The public servant falling within the purview of the Act must invariably fall within one of the three clauses in s. 6(1). If the holder of an office, even though a public servant according to the definition in the Act does not fall within any of the clauses (a), (b) or (c) of sub-section (1), he must be deemed to be outside the purview of
B the Act since this special enactment was not enacted to cover that category of public servants in spite of the wide definition of 'public servant' in the Act. [286A-B]

1.4 Section 6(1)(c) speaks of 'authority competent to remove', which plainly indicates the substantive competence of the authority to remove, not merely the procedural or formal part of it. The authority
C itself should be competent to remove or the one to decide the question of removal and not one which merely obeys or implements the decision of some other authority. It contemplates that the removing authority should have the competence to take a decision on the material placed before it for the purpose of deciding whether the public servant, against
D whom sanction is sought, has been *prima facie* guilty of abuse of his office so that there is occasion to bring about cessation of interrelation between the office and abuse by the holder of the office by his removal therefrom. [291A-C]

R.S. Nayak v. *A.R. Antulay,* [1984] 2 SCC 183, referred to.

E

1.5 The competent sanctioning authority envisaged by s. 6(1)(c) is a vertical superior in the hierarchy having some power of superintendence over the functioning of the public servant. Where no such relationship exists in the absence of any vertical hierarchy and the holder of the public office is a constitutional functionary not subject to power of
F superintendence of any superior, s. 6 can have no application by virtue of the scheme engrafted therein. [291C-D]

1.6 Construction of s. 6(1)(c) of the Act treating the President as the competent authority to remove a High Court Judge would conflict with the provisions enacted in clauses (4) and (5) of Article 124 read with Article 218 of the Constitution. Such a construction has to be
G avoided. [295B-C]

1.7 The Prevention of Corruption Act is wholly workable in its existing form for the public servants within its purview and there is no impediment in its applicability to the large number of public servants
H who have been dealt with thereunder ever since its enactment. [274A]

1.8 In view of the special provisions enacted in clauses (4) and (5) of Article 124 read with Article 218 of the Constitution, non-application of s. 6(1) of the Prevention of Corruption Act, 1947 to the Constitutional functionaries such as Judges of the High Courts and the Supreme Court, would result only in the failure of the attempt to bring them within the purview of the Act, while the Act would continue to apply to the public servants in general who fall within the scheme of s. 6 of the Act for the purpose of grant of previous sanction for prosecution which is a condition precedent for cognizance of an offence punishable under that Act. [295A-E]

2.1 The construction made of the provisions of the Act must also fit in within the scheme of clauses (4) and (5) of Article 124 read with Article 218 of the Constitution in order to present a harmonious scheme. [294C-B]

2.2 There can be no doubt that the expression 'misbehaviour' is of wide import and includes within its ambit criminal misconduct as defined in sub-section (1) of s. 5 of the Act as also lesser misconduct of a Judge falling short of criminal misconduct. The special law envisaged by Article 124(5) for dealing with the misbehaviour of a Judge covers the field of 'investigation' and 'proof' of the 'misbehaviour' and the only punishment provided is by Article 124(4) of removal from office. [294D-E]

2.3 Article 124(5) of the Constitution is wide enough to include within its ambit every conduct of a Judge amounting to misbehaviour including criminal misconduct and prescribes the procedure for investigation and proof thereof. [294E]

2.4 Even for the procedure for investigation into any misbehaviour of a Judge as well as its proof, a law enacted by the Parliament under Article 124(5) is envisaged in the constitutional scheme. Such a law in the form of the Judges (Inquiry) Act, 1968 and the Rules framed thereunder has been enacted. These provisions were made in the Constitution and the law thereunder enacted when the Prevention of Corruption Act, 1947 was in the statute book. [294F-G]

2.5 The prior enactment and existence of the Prevention of Corruption Act, 1947 at the time when clauses (4) and (5) of Article 124 of the Constitution were framed, does indicate the constitutional scheme that a separate parliamentary law to deal with the investigation and proof of misbehaviour of a Judge was clearly contemplated by providing a special machinery for this category of constitutional func-

A tionaries notwithstanding the general law available and applicable to the public servants in general, which included the Prevention of Corruption Act, 1947. [294G-H; 295A]

2.6 In view of the special provisions in the form of clauses (4) and (5) of Article 124 and Article 218 of the Constitution, and the special B enactment by the Parliament under Article 124 (5) provided in the Constitutional scheme for Judges of the High Courts and the Supreme Court, it cannot be said that they are governed by the general provisions in addition to these special provisions enacted only for them. The need for these special provisions is a clear pointer in the direction of inapplicability to them of the general provisions applicable C to the public servants holding other public offices, not as constitutional functionaries. [295A-B]

2.7 The view that Judges of the High Courts and the Supreme Court are outside the purview of the Prevention of Corruption Act, fits in with the constitutional scheme and is also in harmony with the D several nuances of the entire existing law relating to the superior Judges while the contrary view fouls with it at several junctures and leaves many gaping holes which cannot be filled by judicial exercise. [303F-G]

2.8 The Prevention of Corruption Act, 1947, as amended by the 1964 amendment, is inapplicable to Judges of the High Courts and the E Supreme Court. [304A]

46 Am. Jur. 2d. § 84, referred to.

3.1 There is practical difficulty in applying criminal misconduct, defined in clause (e) of sub-section (1) of s. 5 of the Act to a Judge of a High Court or the Supreme Court. [296C]

F 3.2 The words in clause (e) of s. 5 (1) of the Act have to be given some meaning which would place the burden on the prosecution, howsoever light, to make out a *prima facie* case for obtaining sanction of the competent authority under s. 6 of the Act and this can be done only if it is read as a part of the scheme under which the public servant is required to furnish particulars of his assets with reference to which G the disproportion and his inability to satisfactorily account can be inferred. [297A-B]

3.3 While according sanction to prosecute under s. 6 of the Act, the competent authority has to satisfy itself about the public servant's inability to satisfactorily account for possession of disproportionate H assets. The competent authority before granting sanction has to apply

its mind and be satisfied about the existence of a *prima facie* case for prosecution of the public servant on the basis of the material placed before it. In order to form an objective opinion, the competent authority must have before it the version of the public servant on the basis of which the conclusion can be reached whether it amounts to satisfactory account or not. [296E-F] A

B

3.4 The rules applicable to the public servants in general regulating their conduct require them to furnish periodical information of their assets which form a part of their service record. In the case of such public servants whenever sanction to prosecute is sought under s. 6, the competent authority can form the requisite opinion on the basis of the available material including the service record of the public servant to come to the conclusion whether the offence under clause (e) of s. 5 (1) of possession of disproportionate assets which the public servant cannot satisfactorily account is made out *prima facie*. [296F-G, 297C-D] C

3.5 In the case of Judges of the High Courts and the Supreme Court, there is no requirement under any provision of furnishing particulars of their assets so as to provide a record thereof with reference to which such an opinion can be formed and there is no vertical superior with legal authority enabling obtaining of information from the concerned Judge. This too is a pointer in the direction that even after the 1964 amendment of the Act the Legislature did not intend to include Judges of the High Courts and the Supreme Court within the purview of the enactment. [297D-F] D E

4.1 If the Act is applicable to Judges of the High Courts and the Supreme Court, it is obvious that the same must apply also to the Chief Justice of India, the Comptroller and Auditor General and the Chief Election Commissioner. Incongruous results would follow in such an event. [297F-G] F

4.2 If the involvement of the Chief Justice of India is necessary even for commencing the investigation into the offence, and the President while granting the sanction under s. 6(1)(c) is also assumed to act on the advice of the Chief Justice of India and if it is permissible to do so in the absence of any such provision in the Act, the problem would arise where such action is contemplated against the Chief Justice of India himself. [297G-H; 298A] G

4.3 Any provision which cannot apply to the Chief Justice of H

A India, cannot apply to the Judges of the Supreme Court, or for that matter even to the High Court Judges, since the Chief Justice of India is not a vertical superior of any of them, there being no such vertical hierarchy and the Chief Justice of India having no power of superintendence even over the High Court Judges, much less the Supreme Court Judges. [298A-B]

B

4.4 In the case of the Comptroller and Auditor General and the Chief Election Commissioner, the situation would be more piquant. The Chief Justice of India cannot be involved in the process relating to them and there is none else to fill that role in that situation. The Constitution, while providing that their position would be akin to that of a Judge of the Supreme Court, could not have intended to place them C on a pedestal higher than that of a Supreme Court Judge. If the Act was intended to apply to these constitutional functionaries, it could not have been enacted leaving such gaping holes which are incapable of being plugged to present a comprehensive scheme for this purpose. [298C-E]

D 5.1 The need for sanction under s. 6 of the Act for prosecution of the holder of a public office indicates the ambit and scope of the enactment for deciding whether the holder of a public office falls within the purview of the enactment. No sanction for prosecution under s. 6 is required after the public servant ceases to hold office, but it does not imply that every holder of a public office after ceasing to hold that office E is within the purview of the enactment, even though during the tenure in office, only those public servants are within its ambit in whose case sanction under s. 6 must be obtained. [298F-H; 299A]

5.2 The ambit of the enactment is to be determined on the basis of the public office held by the public servant, which office is alleged to F have been abused during the tenure for committing the offence of criminal misconduct under the Act and it is not the fact of continuance in that office or ceasing to hold it which decides the ambit of the enactment. If the holder of a public office during his tenure in office cannot be prosecuted without sanction under s. 6, then, no sanction for his prosecution after ceasing to hold the office may be necessary, but his prosecu- G tion is made because while in office he could be prosecuted with the previous sanction under s. 6. Conversely, if the holder of a public office while continuing in that office could not be prosecuted under this Act on account of inapplicability of s. 6 and, therefore, the non-feasibility of previous sanction for prosecution under s. 6, then on his ceasing to hold the office, he is not brought within the purview of the Act. [299A-C]

H

5.3 It is for the purpose of construing the provisions of the enactment and determining the scope and ambit thereof and for deciding whether the holder of a public office comes within the purview of the enactment that the feasibility of previous sanction for prosecution and applicability of s. 6 of the Act is important since it holds the key which unlocks the true vistas of the enactment. [299D-E] A B

5.4 The concept of the sanction for prosecution by a superior is so inextricably woven into the fabric of the enactment that the pattern is incomplete without it. The clear legislative intent is that the enactment applies only to those in whose case sanction of this kind is contemplated and those to whom the provision of sanction cannot squarely apply are outside its ambit. The provision for sanction is like the keystone in the arch of the enactment. Remove the keystone of sanction and the arch crumbles. [299E-G] C

R.S. Nayak v. *A.R. Antulay*, [1984] 2 SCC 183, distinguished.

6.1 The higher judiciary was treated differently in the Constitution indicating the great care and attention bestowed in prescribing the machinery for making the appointments. It was expected that any deviation from the path of rectitude at that level would be a rare phenomenon and for the exceptional situation the provision of removal in accordance with clause (4) of Article 124 was made, the difficulty in adopting that course being itself indicative of the rarity with which it was expected to be invoked. It appears that for a rare aberrant at that level, unless the Judge resigned when faced with such a situation, removal from office in accordance with Article 124(4) was envisaged as the only legal sanction. If this was the expectation of the framers of the Constitution and their vision of the moral fibre in the higher echelons of the judiciary in free India, there is nothing surprising in the omission to bring them within the purview of the Prevention of Corruption Act, 1947, or absence of a similar legislation for them alone. This position continued even during the deliberations of the Santham Committee which clearly mentioned in its Report submitted in 1964 that it has considered the judiciary outside the ambit of its deliberations. Clearly, it was expected that the higher judiciary whose word would be final in the interpretation of all laws including the Constitution, will be comprised of men leading in the spirit of self-sacrifice concerned more with their obligations then rights, so that there would be no occasion for any one else to sit in judgment over them. [305H; 306A-D] D E F G

6.2 The fact that the Parliament did not enact any other law for H

A the investigation into allegations of corruption against a superior Judge and for his trial and punishment for that offence and rest content merely with enacting the Judges (Inquiry) Act, 1968, to provide for the procedure for removal of a Judge under Article 124 (4) is a clear pointer in the direction that the Parliament has not as yet considered it expedient to enact any such law for the trial and punishment on the charge
B of corruption of a superior Judge, except by his removal from office in the manner prescribed. The provisions of the Judges (Inquiry) Act, 1968, provide the procedure for investigation and proof of an allegation of corruption against a superior Judge and if the Prevention of Corruption Act, 1947 is held applicable to them, then there would be two separate procedures under these two enactments providing for investi-
C gation into the same charge. This anomaly and incongruity cannot be attributed to a conscious act of the Parliament while enacting the Judges (Inquiry) Act, 1968, after the 1964 amendment in the Prevention of Corruption Act. [301D-F]

D 7.1 The constitutional functionaries namely Judges of High Courts, Judges of the Supreme Court, the Comptroller and Auditor General and the Chief Election Commissioner were never intended to fall within the ambit of the Act as initially enacted in 1947, when provisions similar to Articles 124(4) and (5) of the Constitution were present in the Government of India Act, 1935, nor was any such attempt made by amendment of the Prevention of Corruption Act in 1964 and the
E same position continues in the Prevention of Corruption Act, 1988. [300A-B]

7.2 If there is now a felt need to provide for such a situation, the remedy lies in suitable parliamentary legislation for the purpose preserving the independence of judiciary free from likely executive influence while providing a proper and adequate machinery for investiga-
F tion into allegations of corruption against such constitutional functionaries and for their trial and punishment after the investigation. The remedy is not to extend the existing law and make it workable by reading into it certain guidelines for which there is no basis in it, since the Act was not intended to apply to them. [300B-C]

G 7.3 The test of applicability of the existing law would be the legal sanction and justiciability of the proposed guidelines without which it is unworkable in the case of such persons. In fact, the very need to read the proposed guidelines in the existing law by implication is a clear indication that the law as it exists does not apply to them. Making the law applicable with the aid of the suggested guidelines, is not in the domain
H of judicial craftsmanship, but a naked usurpation of legislative power in a virgin field. [300C-D]

8.1 Laying down guidelines to be implicitly obeyed, if they find no place in the existing enactment and to bring the superior Judges within the purview of the existing law on that basis, would amount to enacting a new law outside the scope of the existing law and not merely construing it by supplying the deficiencies to make it workable for achieving the object of its enactment. [273E-F]

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B

S.P. Sampath Kumar v. *Union of India,* [1987] 1 SCC 124, **distinguished.**

8.2 In case a legislation like the Prevention of Corruption Act for superior Judges also is considered necessary at this point of time, the Parliament can perform its function by enacting suitable legislation, it being a virgin field of legislation. [274B]

C

8.3 There is no material to indicate that corruption in judiciary was a mischief to be cured when the Prevention of Corruption Act was enacted. For this reason, the desirability now expressed of having such a law cannot be an aid to construction of the existing law to widen its ambit and bring these constitutional functionaries within it. [273B-C]

D

8.4 Judicial activism can supply the deficiencies and fill gaps in an already existing structure found deficient in some ways, but it must stop sort of building a new edifice where there is none. [273D]

E

8.5 If it is considered that the situation has altered requiring scrutiny of the conduct of even Judges at the highest level, and that it is a matter for the Parliament to decide, then the remedy lies in enacting suitable legislation for that purpose providing for safeguards to ensure independence of judiciary since the existing law does not provide for that situation. [306D-E]

F

8.6 Any attempt to bring the Judges of the High Courts and the Supreme Court within the purview of the Prevention of Corruption Act by a seemingly constructional exercise of the enactment, appears to be an exercise to fit a square peg in a round hole when the two were never intended to match. [306E-F]

G

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 400 of 1979.

From the Judgment and Order dated 27.4.79 of the Madras High Court in Criminal Misc. P. No. 265 of 1978.

H

A Kapil Sibal, B.R.L. Iyengar, K.V. Mohan, S.R. Setia, K.R. Nambiar and A.K. Nigam for the Appellant.

A.D. Giri, Solicitor General, K.T.S. Tulsi, Additional Solicitor General, A.M. Khanwilkar and P. Parmeswaran for the Respondent.

B

The Judgment of the Court was delivered by

RAY, J. I have had the advantage of deciphering the two draft judgments prepared by my learned brothers Shetty and Verma, JJ. I agree with the conclusions arrived at by my learned brother Shetty, J. Yet considering the great importance of the questions involved in this C matter, I deem it just and proper to consider the same and to express my own views.

Three very important questions fall for decision in this case. First of all whether a Judge of the Supreme Court or a Judge of a High D Court is a public servant within the meaning of Section 2 of the Prevention of Corruption Act, 1947. Section 2 of the Prevention of Corruption Act interprets a public servant as meaning a public servant as defined in section 21 of the Indian Penal Code i.e. Act 45 of 1860. Section 21 of the Indian Penal Code states that a public servant denotes a person falling under any of the description mentioned E therein:

> "Third—Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons any adjudicarory functions."

F Thus, the definition of a public servant is very wide enough to include Judges of the Supreme Court as well as Judges of the High Court. Section 77 of the Indian Penal Code provides immunity to the Judges in respect of any act done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

G

The next question is whether a judge of the Supreme Court or a Judge of High Court including the Chief Justice of the High Court can be prosecuted for having committed the offence of criminal misconduct as referred to in clause (e) of sub-section 1 of section 5 of the Prevention of Corruption Act, 1947. Provisions of clause (e) of section H 5(1) are as follows:-

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

Therefore, it is clear that a Judge will be liable for committing criminal misconduct within the meaning of clause (e) of sub-section (1) of section 5 of the said Act if he has in his possession pecuniary resources or property disproportionate to his known sources of income for which the public servant (or a Judge as the public servant) cannot satisfactorily account. Section 6(1)(c) specifically enjoins that no court shall take cognizance of an offence punishable under Section 5 of this Act, alleged to have been committed by a public servant i.e. the Judge of the High Court including the Chief Justice of the High Court as in the present case, except with the previous sanction under clause (c) in the case of any other person, of the authority competent to remove him from his office. So to initiate a proceeding against a Judge of a Supreme Court for criminal misconduct falling under Section 5(1)(e), previous sanction of the authority who is competent to remove a Judge including Chief Justice of the High Court from his office, is imperative.

A Judge of the Supreme Court as well as a Judge of the High Court is a constitutional functionary appointed under Article 124 and under Article 217 of the Constitution respectively. Sub-article 2 of Article 124 further provides that every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. It also provides that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. Article 217 provides that every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a Judge other than the Chief justice, the Chief Justice of the High Court. Sub-article 4 of the said article 124 further enjoins that a Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has

A been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Sub-article (5) also provides that Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4). Article 218 states that provisions of clauses (4) and (5) of Article 124 shall apply in
B relation to a High Court.

On a plain reading of the provisions of sub-article 4 of Article 124, a Judge of the Supreme Court can only be removed on the ground of proved misbehaviour or incapacity by an order of the President passed after an address by each House of Parliament supported by a
C majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. In other words, the President cannot on its own remove a Judge of the Supreme Court unless an address by each House of Parliament sup-
D ported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, is passed and presented to him for removal of the Judge on the ground of proved misbehaviour or incapacity. Therefore, the repository of this power is not in the President alone but it is exercised after an address by each House of Parliament supported by a
E majority of the total membership of that House and by a majority of not less than two-third of the members of that House is presented to the President. Without such an address by each of the House of the Parliament, the President is not empowered under the Constitution to order removal of a Judge of the Supreme Court from his office. Article 218 lays down that a Judge of the High Court may be removed from his
F office by the President in the manner provided under clauses (4) and (5) of Article 124. So viewing the aforesaid constitutional provisions for removal of a Judge for proved misbehaviour or incapacity, it is imperative that each House of the Parliament shall make an address to the President after the same is supported by a majority of the total membership of that House and by a majority of not less than two-
G thirds of the members of that House present and voting. Unless that address is presented to the President in the same session for such removal, the President is not empowered under the Constitution to make the order for removal of the Judge of the Supreme Court of India or of the Judge of the High Court on the ground of proved misbehaviour or incapacity. Of course, the power of the President to
H remove a Judge of the Supreme Court or of the High Court is to be

exercised by the President in the manner expressly laid down in clause 4 of Article 124. In the case of *Union of India* v. *Sankalchand,* AIR 1977 (SC) 2328 it has been observed by majority of the Constitution Bench that there is no need or justification, in order to uphold or protect the independence of the judiciary, for construing Article 222(1) to mean that a Judge cannot be transferred from one High Court to another without his consent.

> "The power to transfer a High Court Judge is conferred by the Constitution in public interest and not for the purpose of providing the executive with a weapon to punish a Judge who does not toe its line or who, for some reason or the other, has fallen from its grace. The executive possesses no such power under our Constitution and if it can be shown-though we see the difficulties in such showing—that a transfer of a High Court Judge is made in a given case for an extraneous reason, the exercise of the power can appropriately be struck down as being vitiated by legal *mala fides*. The extraordinary power which the Constitution has conferred on the President by Art. 222(1) cannot be exercised in a manner which is calculated to defeat or destroy in one stroke the object and purpose of the various provisions conceived with such care to insulate the judiciary from the influence and pressures of the executive. The power to punish a High Court Judge, if one may so describe it, is to be found only in Art. 218 read with Art. 124(4) and (5) of the Constitution, under which a Judge of the High Court can be removed from his office by an order of the President passed after an address by each House of Parliament, supported by a majority of the total membership of that House and by a majority of not less then two-thirds of the members of that House present and voting, has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Thus, if the power of the President, who has to act on the advice of the Council of Ministers, to transfer a High Court Judge for reasons not bearing on public interest but arising out of whim, caprice or fancy of the executive or its desire to bend a Judge to its own way of thinking, there is no possibility of any interference with the independence of the judiciary if a Judge is transferred without his consent.

The same view about the independence of the judiciary from the con-

A trol of the executive has been spelt out by the observations of the Constitution Bench of Seven Judges in the case of *S.P. Gupta & Ors.* v. *President of India and Ors.*, AIR 1982 (SC) 149.

> "The concept of independence of judiciary is a noble concept which inspires the Constitutional Scheme and con-
B stitute the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and
C thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armoury of the law, that the judiciary seeks to protect the citizen against violation of his constitu-
D tional or legal rights or misuse of abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse or power by the executive and there it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured
E by the Constitution makers by making elaborate provisions in the Constitution to which detailed reference has been made in the judgments in *Sankalchand Sheth's* case (AIR 1977 SC 2326) (supra). But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pres-
F sure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class of which the Judges belong. If we may again quote the
G eloquent words of Justice Krishna Iyer:

> "Independence of the judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government's pleasure.

H

> The tycoon, the communalist, the parochialist, the faddist, the extremist and radical reactionary lying coiled up and sub-consciously shaping judicial mentations are menaces to judicial independence when they are at variance with parts III and IV of the Paramount Parchment".

> Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says "Be you ever so high, the law is above you." This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution.

The third most crucial question that falls for consideration in this case is who is the competent authority to remove a Judge either of the Supreme Court or of the High Court from his office in order to enable that authority to grant sanction for prosecution of the Judge under the provisions as enjoined by Section 6 of the Prevention of Corruption Act, 1947. Section 6 has been couched in negative terms to the following effect:

> "No Court shall take cognizance of an offence punishable under Section 161 or Section 164 or Section 165 of the Indian Penal Code (45 of 1860), or under sub-section (2) or sub-section (3A) of Section 5 of this Act, alleged to have been committed by a public servant, except with the previous sanction, ...
>
> (c) in the case of any other person, of the authority competent to remove him from his office.

In order to launch a prosecution against a Judge either of the Supreme Court or of the High Court or the Chief Justice of the High Court previous sanction of the authority competent to remove a Judge from his office is mandatorily required. The question, therefore, arises who is the authority competent to grant sanction. The Judge of the Supreme Court or the Judge of the High Court is appointed under the provisions of Article 124 or under the provisions of Article 217 respec-

A tively. A Judge of the Supreme Court shall be appointed by the President by the warrant under his hand and seal after consultation with such Judges of the Supreme Court and of the High Court in the State as the President may deem necessary for the purpose and shall hold office until he attains the age of 65 years. Similarly, a Judge of the High Court shall be appointed by the President by the warrant under B his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and in case of an appointment of the Judge other than the Chief Justice, the Chief Justice of the High Court and shall hold office except in the case of an additional judge till he attains the age of 62 years. It is, therefore, evident that a Judge of the Supreme Court as well as a Judge of the High Court is a constitutional C functionary as has been observed by this Court in the decisions cited hereinbefore and to maintain the independence of the judiciary and to enable the Judge to effectively discharge his duties as a Judge and to maintain the rule of law, even in respect of lis against the Central Government or the State Government. The Judge is made totally independent of the control and influence of the executive by mandatorily D embodying in article 124 or article 217 that a Judge can only be removed from his office in the manner provided in clause (4) and (5) of article 124. Thus, a Judge either of the High Court or of the Supreme Court is independent of the control of the executive while deciding cases between the parties including the Central Government and State Government uninfluenced by the State in any manner whatsoever. It is E beyond any pale of doubt that there is no master and servant relationship or employer and employee relationship between a Judge of the High Court and the President of India in whom the executive power of the Union is vested under the provisions of Article 53 of the Constitution. The President has not been given the sole power or the exclusive power to remove a Judge either of the Supreme Court or of the High F Court from his office though the President appoints the Judge by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Court in the States as he may deem necessary for that purpose and in case of the appointment of the Judge of the High Court, the President appoints a Judge by warrant under his hand and seal after consultation with the Chief Justice of G India, the Governor of the State and in a case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. The only mode of removal of a Judge from his office on the ground of proved misbehaviour or incapacity is laid down in clauses (4) and (5) of Article 124. It is has been eloquently and vehemently urged on behalf of the appellant that since the Judge of the Supreme H Court as well as of the High Court is a constitutional functionary and

there is no employer and employee relationship or master and servant relationship between the Judge and the President of India and for that the Central Government or the State Government there is no authority to remove the Judge from his office by the executive except by taking recourse to procedure of impeachment as envisaged in Article 124(4) and (5) of the Constitution of India. It has been further urged in this connection that if it is assumed that the President has the power to remove a Judge of the Supreme Court or of the High Court from his office it will do away with the independence of the judiciary and will being the judiciary under the control of the executive indirectly in as much as under Article 74 of the Constitution of India, the President while exercising his executive power has to act on the aid and advice of the Council of Ministers with the Prime Minister at the Head, as has been held by this Court in *Shamsher Singh & Anr.* v. *State of Punjab,* [1975] 1 SCR 814 and *S.P. Gupta & Ors. etc. etc.* v. *Union of Inida & Ors. etc. etc.,* (supra). It has been, therefore, urged that Section 6(1)(C) of the Prevention of Corruption Act, 1947 is not applicable to the case of a Judge of the Supreme Court or of the High Court. No prosecution can be launched against a Judge of the Supreme Court or of the High Court under the provisions of the said Act except in the mode envisaged in Article 124, clauses 4 and 5 of the Constitution for removal of the Judge. The FIR in question, which has been lodged against the appellant should be quashed and set-aside. Section 2 of the Prevention of Corruption Act denotes a public servant as defined in Section 21 of the Indian Penal Code (45 of 1860). It has been noticed hereinbefore that the third clause particularly of Section 21 of the Indian Penal Code includes every Judge including any person empowered by law to discharge whether by himself or as a member of any body of persons any adjudicatory functions. Therefore a Judge of the High Court or of the Supreme Court comes within the definition of public servant and he is liable to be prosecuted under the provisions of the Prevention of Corruption Act. It is farthest from our mind that a Judge of the Supreme Court or that of the High Court will be immune from prosecution for criminal offences committed during the tenure of his office under the provisions of the Prevention of Corruption Act.

In these circumstances the only question to be considered is who will be the authority or who is the authority to grant sanction for prosecution of a Judge of the High Court under section 6(1)(c) of the said Act. The Judge as a constitutional functionary being appointed by the President can only be removed by mandatory procedure provided under Article 124 of the Constitution and in no other manner. The Judges (Inquiry) Act, 1968 has been enacted by Parliament to regulate

A the procedure for the investigation and proof of the misbehaviour or incapacity of a Judge of the Supreme Court under clause (5) of sub-section 1 of Article 124 of the Constitution. The Judges (Inquiry) Rules, 1969 have been framed under section 7(4) of the Judges (Inquiry) Act, 1968. The said Act and the Rules made thereunder only provide for removal of a Judge on the ground of proved misbehaviour
B or inability. It does not provide for prosecution of a Judge for offences under section 5(1)(e) of the Prevention of Corruption Act. It is apropos to mention in this connection that in England, before the full development of ministerial responsibility, impeachment was a weapon enabling the Commons to call to account ministers appointed by, and responsible to, the Crown. As the commons acquired direct control
C over ministers, there was no need to employ the cumbersome machinery of impeachment and there has been no impeachment since 1805. As impeachment of political offenders might involve not only deprivation of office but other penalties, the royal prerogative of pardon does not extend to preventing impeachment but extends to pardoning punishments inflicted on an impeachment. In England, offices held
D during good behaviour may in the event of misconduct be determined by impeachment. In practice, however, an address to the Crown for the removal of a judge must originate in the House of Commons; the procedure is judicial and the judge is entitled to be heard. There is no instance of the removal of a judge by this method since the Act of Settlement. This power to remove by impeachment or address, a
E person holding office during good behaviour, is an essential counterpart to the independence secured to the holders of high office by making their tenure one of good behaviour instead of at pleasure.

Under Art. II, s. 4, U.S. Constitution, the President, Vice-President and all civil officers of the United States can be removed
F from office on impeachment for, and conviction of, "Treason, Bribery or other high Crimes and misdemeanours". Since the President of the United States who is the highest executive authority of the State, an impeachment has been provided for and in fact, President Johnson was impeached in 1867 for high crimes and misdemeanours. In 1913, Justice Archibald of the Commerce Court was removed from office by
G impeachment for soliciting for himself and others, favours from railroad companies, some of which were at the time litigants in his court; in 1936 the removal of Judge Wright of the Florida Court for conduct in relation to a receivership which evoked serious doubts as to this integrity, although he was acquitted of specific charges, seem to have restored the wider view. For, in neither case, were the two judges
H found guilty of an indictable offence. It has been said that:

"As to the Judges of the United States at least lack of 'good behaviour' and 'high crimes and misdemeanours' are overlapping if not precisely coincidental concepts." A

(Seervai's *Constitutional Law of India*, Third Edition, Vol.II, page 1698 paras 18.8 and 18.9).

B

It has been urged by the Solicitor General as well as the Additional Solicitor General that the Judges of the High Court cannot be said to be exempted from prosecution in respect of offences provided in the Prevention of Corruption Act. It has been urged further that under Article 361, the President and the Governor have been given protection from being answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. Clause 2 of the said Article further provides that no criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any court during his term of office. No such immunity from criminal prosecution has been provided for in the case of a Judge of the High Court or of the Supreme Court. It has, therefore, been urged that the High Court should ensure modalities for launching prosecution against a Judge under the said Act. Undoubtedly, respect for the judiciary and its public credibility and dignity has to be maintained in order to ensure respect for the Judges in public and also for the decisions rendered by the Judges. It is, therefore, necessary to evolve some method commensurate with the grant of sanction in cases of serious allegations of corruption and acquisition or the possession of disproportionate assets which the Judge cannot satisfactorily account for or possession of property disproportionate to the sources of income of the Judge. If these things are allowed to go unnoticed it will create a serious inroad on the dignity, respect, and credibility and integrity of the High Office which a Judge of the Supreme Court and of the High Court occupies resulting in the erotion on the dignity and respect for the high office of the Judges in the estimation of the public. As has been suggested by my learned Brother Shetty, J. that the President is given the power to appoint the Judges of the Supreme Court as well as of the High Court by warrant under his hand and seal and similarly even after passing of an address by both the Houses of the Parliament in the manner provided in Article 124, clauses (4) and (5) and placed before the President, a Judge cannot be removed from his office unless and order to that effect is passed by the President. The President, therefore, has the power to appoint as well as to remove a Judge from his office on the ground of

C D E F G H

A proved misbehaviour or incapacity as provided in Article 124 of the Constitution. The President, therefore, being the authority competent to appoint and to remove a Judge, of course in accordance with the procedure envisaged in Article 124, clauses (4) and (5) of the Constitution, may be deemed to be the authority to grant sanction for prosecution of a Judge under the provisions of Section 6(1)(c) in respect of the B offences provided in section 5(1)(e) of the Prevention of Corruption Act, 1947. In order to adequately protect a Judge from frivolous prosecution and unnecessary harassment the President will consult the Chief Justice of India who will consider all the materials placed before him and tender his advice to the President for giving sanction to launch prosecution or for filing FIR against the Judge concerned after being C satisfied in the matter. The President shall act in accordance with advice given by the Chief Justice of India. If the Chief Justice is of opinion that it is not a fit case for grant of sanction for prosecution of the Judge concerned the President shall not accord sanction to prosecute the Judge. This will save the Judge concerned from unnecessary harassment as well as from frivolous prosecution against him as sug- D gested by my learned brother Shetty, J. in his judgment. Similarly in the case of Chief Justice of the Supreme Court the President shall consult such of the Judges of the Supreme Court as he may deem fit and proper and the President shall act in accordance with the advice given to him by the Judge or Judges of the Supreme Court. The purpose of grant of previous sanction before prosecuting a public E servant i.e. a Judge of the High Court or of the Supreme Court is to protect the Judge from unncessary harassment and frivolous prosecution more particularly to save the Judge from the biased prosecution for giving judgment in a case whch goes against the Government or its officers though based on good reasons and rule of law. Mention may be made in this connection to the decision in *C.K. Daphtary* v. *O.P.* F *Gupta,* A.I.R. 1971 SC 1132, wherein it has been observed:

> "It seems to us that whoever drafted the Impeachment Motion drafted it with a view to bring the facts within the meaning of the express "misbehaviour" in Article 124(4) for he must have realised that to say that a Judge has com- G mitted errors, even gross errors, cannot amount to "misbehaviour".

The contention that frivolous prosecution can be launched against a Judge for giving a judgment against the Central Government or any of its Officers is of no avail in as much as such decision does not amount H to misbehaviour within the meaning of the Article 124 of the Constitution.

It is also necessary to mention in this connection that the appellant resigned his post of Chief Justice when FIR was lodged by the CBI and so he ceased to be a public servant on the date of lodging the FIR against him by the CBI. The scope and applicability of section 6 of the Prevention of Corruption Act came to be considered in the case of *R.S. Nayak* v. *A.R. Antulay*, [1984] 2 SCR 495 before a Constitution Bench of this Court where it has been observed:

> "Section 6 bars the Court from taking cognizance of the offences therein enumerated alleged to have been committed by a public servant except with the previous sanction of the competent authority empowered to grant the requisite sanction ..... Saction 6 creates a bar to the court from taking cognizance of offences therein enumerated except with the previous sanction of the authority set out in clause (a) (b) & (c) of sub-sec. (I). The object underlying such provision was to save the public servant from the harassment of frivolous or unsubstantiated allegations. The policy underlying Sec. 6 and similar sections, is that there should not be unnecessary harassment of public servant *(C.R. Bansi* v. *State of Maharashtra)*, [1971] 3 S.C.R. 236. Existence thus of a valid sanction is a pre-requisite to the taking of cognizance of the enumerated offences alleged to have been committed by a public servant. The bar is to the taking of cognizance of offence by the court. Therefore, when the court is called upon to take cognizance of such offences, it must enquire whether there is a valid sanction to prosecute the public servant for the offence alleged to have been committed by him as public servant. Undoubtedly the accused must be a public servant when he is alleged to have committed the offence of which he is accused because Sections 161, 164, 165 IPC and Sec. 5(2) of the 1947 Act clearly spell out that the offences therein defined can be committed by a public servant. If it is contemplated to prosecute public servant who has committed such offences, when the court is called upon to take cognizance of the offence, a sanction ought to be available otherwise the court would have no jurisdiction to take cognizance of the offence. A trial without a valid sanction where one is necessary under section 6 has been held to be a trial without jurisdiction by the court. *(R.R. Chari* v. *State of U.P.*, and *S.N. Bose* v. *State of Bihar)*, In *Mohd. Iqbal Ahmed* v. *State of A.P.*, it was held that the terminus

A a quo for a valid sanction is the time when the court is called upon to take cognizance of the offence. Therefore, when the offence is alleged to have been committed the accused was a public servant but by the time the court is called upon to take cognizance of the offence committed by him as public servant, he has ceased to be public servant, B no sanction would be necessary for taking cognizance of the offence against him. This approach is in accord with the policy underlying Sec. 6 in that a public servant is not to be exposed to harassment of a frivolous or speculative prosecution. If he has ceased to be a public servant in the meantime, this vital consideration ceases to exist."

C In the present appeal the appellant ceases to be a public servant as he resigned from the office. Therefore at the time of filing the FIR the appellant ceases to be a public servant and so no sanction under Sec. 6(1)(c) of the said act is necessary. The main plank of the argument regarding sanction is, therefore, non-existent.

D In these circumstances the judgment and order of the High Court dismissing the application under Sec. 482 of the Code of Criminal Procedure is in my considered opinion, wholly in accordance with law and as such the Order of the High Court has to be upheld in any circumstances. I agree with the conclusion of my learned brother E Shetty, J. The appeal is, therefore, dismissed. The trial of Criminal Case No. 46/77 filed by the Respondent be proceeded with.

K. JAGANNATHA SHETTY, J. This appeal by certificate under Articles 132(1) and 134(1)(e) of the Constitution has been filed by the former Chief Justice of the Madras High Court against the Full F Bench decision of the same High Court refusing to quash the criminal proceedings taken against him. The appeal raises the questions of singular importance and consequence to Judges of the High Courts and this Apex Court. The central issue is whether the Judges could be prosecuted for offence under the Prevention of Corruption Act, 1947 ('the Act').

G The background of the case in the barest outline is as follows: The appellant started his life as an Advocate in the High Court of Madras. He joined the Madras Bar in 1941. In 1953, he was appointed as Assistant Government Pleader. In 1959 he became Government Pleader. He held that post till 20 February 1960 when he was elevated H to the Bench as a permanent Judge of the Madras High Court. On

1 May 1969, he became the Chief Justice of the Madras High Court. During his tenure as the Judge and Chief Justice he was said to have acquired assets disproportionate to the known source of income. The complaint in this regard was made to the Delhi Special Police Establishment ("CBI"). On 24 February 1976, the CBI registered a case against him with issuance of a First Information Report which was filed in one of the Courts at New Delhi. It was alleged in the First Information Report that taking into consideration the sources of income of the appellant as a Judge and Chief Justice of the High Court and the mode and style of his living with the probable expenses required during the period of his Judgeship/Chief Justiceship, it is reasonably believed that the appellant cannot satisfactorily account for the possession of assets which are far disproportionate to his known source of income. It was further alleged that he has committed offences under Section 5(2) read with clauses (b)(d) and (e) of Section 5(1) of the Act. On 28 February 1976, a copy of the First Information Report was personally taken by the Investigating Officer to Madras and it was filed before the Court of Special Judge, Madras. The appellant on coming to know of these developments proceeded on leave from 9 March 1976 and subsequently retired on 8 April 1976 on attaining the age of superannuation.

The investigation of the case by CBI was however, continued with the culmination of filing a final report. On 15 December 1977, a final report under Section 173(2) of the Code of Criminal Procedure (Cr. P.C.) was filed against the appellant before the Special Judge, Madras. The report under Section 173(2) is generally called as the charge sheet, and we would also prefer to term it as the charge sheet. The charge sheet *inter alia* states that the appellant after assuming office as the Chief Justice of Madras gradually commenced accumulation of disproportionate assets etc. That for the period between 1 May 1969 to 24 February 1976, he was in possession of the pecuniary resources and property disproportionate by Rs.6,41,416.36 to the known sources of income over the same period. It was in his own name and in the names of his wife Smt. Eluthai Ammal and his two sons Shri V. Suresh and Shri V. Bhaskar. The appellant cannot satisfactorily account for such disproportionate assets. The appellant has thereby committed the offence of criminal misconduct under clause (e) of Section 5(1) which is punishable under Section 5(2) of the Act. The particulars of the disproportionate assets and the income of the appellant during the aforesaid period have been fully set out in the charge sheet. On perusing the charge sheet the learned Special Judge appears to have issued process for appearance of the appellant but the appel-

A lant did not appear there. He moved the High Court of Madras under Section 482 of the Cr. P.C. to quash that criminal proceedings before the High Court he contended that the proceedings initiated against him were unconstitutional, wholly without jurisdiction, illegal and void. The Full Bench of the High Court by majority view has dismissed his case. However, in view of the importance of the Constitutional questions involved B in the case the High Court granted certificate for appeal to this Court.

It may be noted that before the High Court every conceivable point was argued. They are various and varied. We may briefly refer to those contentions not for the purpose of examining them, since most of them have not been pressed before us, but only to indicate as to how C the appellant projected his case. It was *inter alia,* contended that the Judges of the High Court and Supreme Court shall not be answerable before the ordinary criminal courts but only answerable to Parliament. The Parliament alone could deal with their misbehaviour under the provisions of Articles 124(4) and (5) read with Articles 217 and 218 of the Constitution. The Judge shall hold office until the age of superan- D nuation subject to earlier removal for proved misbehaviour or incapacity. This protection to Judges will be defeated if they are compelled to stand trial for offence committed while discharging duties of their office even before retirement. Even the Parliament or the State Legislatures are not competent to make laws creating offences in matters relating to discharge of Judge's duties. Any such law would vitiate the E scheme and the federal structure of the Constitution particularly the scheme of Article 124(4) read with Article 217 and 218. If the Legislatures are held to have powers to create offence for which Judges could be tried in ordinary criminal Courts then, it may affect the very independence of the Judiciary and the basic structure of the Constitution. Though the definition of "public servant" under Section 21 of the F Indian Penal Code may include a Judge of the Higher Judiciary, since the Judge is not 'employed in connection with the affairs of the Union or State', the definition should be narrowed down only to Judges other than the Judges of the Higher Judiciary.

The jurisdiction of the CBI to register the case against the appel- G lant and to investigate the offence was also questioned. The issuance of the First Information Report and the subsequent filing of the charge sheet were impeached. It was alleged that they were actuated by collateral considerations. Alternatively, it was claimed that even assuming that all the allegations against the appellant are true, it will not constitute an offence under clause (e) of Section 5(1) of the Act since H ingredients of the offence are not present in the case. The last and

perhaps the most important contention urged before the High Court was regarding the necessity to obtain prior sanction from the competent authority for prosecution of the appellant as required under Section 6 of the Act. And since there was no such sanction obtained the Court has no jurisdiction to take cognizance of the case.

Mr. Justice Mohan, with whom Mr. Justice Natarajan, (as he then was) joined rejected all the contentions in a well considered judgment. The views expressed by Mohan, J., on all the issues except on the last one need not be set out here since all those issues have not been raised before us. On the last aspect relating to the requirement of prior sanction for prosecution of the appellant, the learned Judge, held that since the appellant has retired from service and was no longer a 'public servant' on the date of filing the charge sheet, the sanction for his prosecution required under Section 6 of the Act is not warranted. The third Judge Mr. Justice Balasubramanyan in a separate judgment has concurred with the majority views on most of the questions. He has however, differed on three points out of which one alone need be mentioned. The other two have not been supported before us by counsel for the appellant. The learned Judge has dealt with the ingredients of the offence under clause (e) of Section 5(1) with which the appellant was charged. While analysing ingredients of the offence, he went on to state that the gist of the offence is not the possession of assets merely. Nor even the sheer excess of assets over income, but the inability of the public servant in not being able to satisfactorily account for the excess. He observed that clause (e) of Section 5(1) of the Act places the burden of establishing unsatisfactory accounting squarely on the prosecution. In order to properly discharge this burden cast by the section, it would be necessary for the Investigating Officer first of all to call upon the public servant to account for the disproportionate assets. He must then proceed to record his own finding on the explanation of the public servant. He must state whether it is satisfactory or not. And the offence complained of under clause (e) of Section 5(1) is not made out without such exercise and finding by the Investigating Officer. The learned Judge, however, was careful enough to modulate his reasoning so that it may be in conformity with the constitutional protection guaranteed to the accused under Article 20(3) of the Constitution. Article 20(3) provides that no person accused of any offence shall be compelled to be a witness against himself. The learned Judge said that in view of Article 20(3) the Investigating Officer has no power to compel the accused to give his explanation for his disproportionate assets, but he must necessarily ask the public servant for an account.

A In this case, the accused-appellant has voluntarily submitted his statement of assets and income to the Investigating Officer in the course of investigation. Balasubramanyan, J., however, seems to have ignored that statement and focussed his attention on the default of the Investigating Officer in not calling upon the appellant to account for the disproportionate assets. In that view, he held that the charge-
B sheet could not be sustained and accordingly quashed the prosecution.

Before us, counsel for the appellant advanced only two propositions. The first concerns with the ingredients of the offence alleged and the requirements of the charge-sheet filed against the appellant. It also involves the duties of the Investigating Officer. In this regard counsel
C sought to support the views expressed by Balasubramanyan, J., in his dissenting judgment. The second proposition relates to the inapplicability of the Act to Judges of the High Courts and Supreme Court. The essence of the submissions made on this aspect is based on the special status and role of Judges of the higher judiciary and in the need to safeguard judicial independence consistent with the constitutional
D provisions.

We will take up the second question first for consideration because, if it is determined in favour of the appellant, the first becomes academic and we may conveniently leave it out. For a proper consideration of the submissions made by counsel on both sides the
E attention may be drawn to the relevant provisions of the Act.

Section 2 provides:

> "2. For the purposes of this Act, "public servant" means a public servant as defined in Section 21 of the Indian Penal
F Code."

Section 4 provides:

> 4. [(1)] Where in any trial of an offence punishable under section 161 or section 165 of the Indian Penal Code (or of
G an offence referred to in clause (a) or clause (b) of sub-section (1) of section 5 of this Act punishable under sub-section (2) thereof), it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing
H from any person, it shall be presumed unless the contrary is

proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under section 165A of the Indian Penal Code (or under clause (ii) of sub-section (3) of section 5 of this Act) it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed unless the contrary is proved that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 161 of the Indian Penal Code or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) and (2) the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no inference of corruption may fairly be drawn."

Two other provisions are more material namely section 5 and section 6 and must be set out in full.

Section 5 provides:

"5(1) A public servant is said to commit the offence of criminal misconduct-

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the Indian Penal Code, or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a con-

sideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

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

(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage (or)

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

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine:

Provided that the court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.

(3) Whoever habitually commits-

(i) an offence punishable under section 162 or section 163 of the Indian Penal Code, or

(ii) an offence punishable under section 165 A of the Indian Penal Code,

shall be punishable with imprisonment for a term which

shall not be less than one year but which may extend to seven years, and shall also be liable to fine:

Provided that the court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.

(3A) Whoever attempts to commit an offence referred to in clause (c) or clause (d) of sub-section (1) shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

(3B) Where a sentence of fine is imposed under sub-section (2) or sub-section (3), the court in fixing the amount of fine shall take into consideration the amount or the value of the property, if any, which the accused person has obtained by committing the offence or where the conviction is for an offence referred to in clause (e) of sub-section (1), the pecuniary resources or property referred to in that clause for which the accused person is unable to account satisfactorily.

(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.

Section 6 is in the following terms:

"6. No court shall take cognizance of an offence punishable under section 161 (or section 164) or section 165 of the Indian Penal Code, or under sub-section (2) (or sub-section 3A) 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 (Union) and is not removable from his office save by or with the sanction of the Central Government (of the) State Government;

(b) in the case of a person who is employed in connection with the affairs of (a State) and is not removable from his

A office save by or with the sanction of the Central Government (of the) State Government

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

B (2) Where for any reason whatsoever any doubt arises whether the previous sanction as required under sub-section (1) should be given by the Central or State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

C

It will be convenient, if at this stage, we also read Section 5A. Omitting the immaterial clauses, Section 5A is in these terms:

"5A. Notwithstanding anything contained in the Code of
D Criminal Procedure, 1898, no police officer below the rank-

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;

E (b) in the presidency-towns of Calcutta and Madras, of an Assistant Commissioner of Police;

(c) in the presidency-towns of Bombay, of a Superintendent of Police; and

F (d) elsewhere, of a Deputy Superintendent of Police,

shall investigate any offence punishable under Section 161, section 165 or section 165A of the Indian Penal Code or under section 5 of this Act without the order of a Presidency Magistrate or a Magistrate of the first class, as the
G case may be, or make any arrest therefor without a warrant:

Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also
H investigate any such offence without the order of a Presi-

dency Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant: A

Provided further that an offence referred to in clause (e) of sub-section (1) of Section 5 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police. B

The Act was intended to suppress bribery and corruption in public administration and it contains stringent provisions. Section 4 raises presumption unless the contrary is proved by the accused in respect of offence punishable under section 161 or section 165 of the Indian Penal Code or of an offence referred to in clause (a) or clause (b) of section 5(1) of the Act. Section 5 of the Act creates offence of criminal misconduct on the part of a public servant. The public servant defined under section 2 means a public servant as defined in Section 21 of the IPC. Section 21 of the IPC is not really defining "public servant" but enumerating the categories of public servants. It has enumerated as many as twelve categories of public servants. Section 5(2) provides punishment for such an offence of criminal misconduct up to a term of 7 years or with fine, or with both. Section 6 prohibits Courts from taking cognizance of an offence unless certain condition is complied with. We will have an occasion to consider the provisions of Section 6 in detail and for the present we may deal only with the condition prescribed by the Section for a Court to take cognizance of an offence. The condition prescribed therein is the previous sanction of a competent authority. The public servant cannot be prosecuted for offences specified in the Section unless there is prior sanction for prosecution from the competent authority. It may be of importance to remember that the power to take cognizance of an offence is vested in the Court of competent jurisdiction. Section 6 is primarily concerned to see that prosecution for the specified offences shall not commence without the sanction of a competent authority. That does not mean that the Act was intended to condone the offence of bribery and corruption by public servant. Nor it was meant to afford protection to public servant from criminal prosecution for such offences. It is only to protect the honest public servants from frivolous and vexatious prosecution. The competent authority has to examine independently and impartially the material on record to form his own opinion whether the offence alleged is frivolous or vexatious. The competent authority may refuse sanction for prosecution if the offence alleged has no material to support or it is frivolous or intended to harass the honest officer. But he cannot refuse to grant sanction if the material collected has made out

C D E F G H

A the commission of the offence alleged against the public servant. Indeed he is duty bound to grant sanction if the material collected lend credence to the offence complained of. There seems to be another reason for taking away the discretion of the investigating agency to prosecute or not to prosecute a public servant. When a public servant is prosecuted for an offence which challenges his honesty and integrity, B the issue in such a case is not only between the prosecutor and the offender, but the State is also vitally concerned with it as it affects the morale of public servants and also the administrative interest of the State. The discretion to prosecute public servant is taken away from the prosecuting agency and is vested in the authority which is competent to remove the public servant. The authority competent to remove C the public servant would be in a better position than the prosecuting agency to assess the material collected in a dispassionate and reasonable manner and determine whether sanction for prosecution of a public servant deserves to be granted or not.

Section 6 may now be analysed. Clause (a) of Section 6(1) covers D public servants employed in connection with the affairs of the Union. The prescribed authority for giving prior sanction for such persons would be the Central Government. Clause (b) of Section 6(1) covers public servants employed in connection with the affairs of the State. The authority competent to give prior sanction for prosecution of such persons would be the State Government. Clauses (a) and (b) would E thus cover the cases of public servants who are employed in connection with the affairs of the Union or State and are not removable from their office save by or with the sanction of the Central Government or the State Government. That is not the end. The Section goes further in clause (c) to cover the remaining categories of public servants. Clause (c) states that in the case of any other person the sanction would be of F the authority competent to remove him from his office. Section 6 is thus all embracing bringing within its fold all the categories of public servants as defined under Section 21 of the IPC.

It is common ground that clauses (a) and (b) of Section 6(1) of the Act cannot cover the Judges of the High Courts and the Supreme G Court since they are not employed in connection with the affairs of the Union or State. The question is whether they could be brought within the purview of clause (c) of Section 6(1). Mr. Kapil Sibal learned Counsel for the appellant stressed the need to read clause (c) in *"ejusdem generis"* to clauses (a) and (b). According to him the entire Section 6 seems to apply only to such public servants where there is H relationship of master and servant between them and their employer.

If there is no relationship of master and servant, as between public servant and the authority to appoint him, clause (c) has no application to the public servant. So far as the Judges of the High Courts and the Supreme Court are concerned, it was contended that there is no relationship of master and servant between them and the Government and clause (c) of Section 6(1) is inapplicable to them.

It is true that the relationship of master and servant as is ordinarily understood in common law does not exist between the Judges of higher judiciary and the Government. Where there is relationship of master and servant the master would be in commanding position. He has power over the employee not only to direct what work the servant is to do, but also the manner in which the work is to be done. The servant undertakes to serve the master and obey the reasonable orders within the scope of his duty. It is implicit in such relationship that the servant may disobey the master's order only at his peril. But there is no such relationship between the Judges and their appointing authority that is, the Government. The Judges are not bound nor do they undertake to obey any order of the Government within the scope of their duties. Indeed, they are not Judges if they allow themselves to be guided by the Government in the performance of their duties. In *Union of India* v. *S.H. Sheth,* [1978] 1 SCR 423 at 450 Chandrachud, J., as he then was, has illumined this idea: "the Judges owe their appointment to the Constitution and hold a position of privilege under it. They are required to 'uphold the Constitution and the laws', 'without fear' that is without fear of the Executive; and 'without favour' that is without expecting a favour from the Executive. There is thus a fundamental distinction between the master and servant relationship between the Government and the Judges of High Courts and the Supreme Court." But we cannot accept the contention urged for the appellant that clause (c) should be read in *"ejusdem generis"* to clauses (a) and (b) of Section 6(1) of the Act. The application of the *ejusdem generis* rule is only to general word following words which are less general, or the general word following particular and specific words of the same nature. In such a case, the general word or expression is to be read as comprehending only things of the same kind as that designated by the preceding specific words or expressions. The general word is presumed to be restricted to the same genus as those of the particular and specific words. (See Maxwell on *The Interpretation of Statutes,* 12th Ed. p. 297). What do we have here? Section 21 of the IPC while defining "public servant" has denoted as many as twelve categories of persons. It includes not only the State and Central Government employees but also others like Judge, juryman, assessor

A and arbitrator. It also includes every person in the service or pay of the Government or remunerated by fees or commission by the Government. Each category is different from other and there is hardly any relationship of master and servant in some of the categories. The provisions of clauses (a) and (b) of Section 6(1) of the Act covers certain categories of public servants and the 'other' which means B remaining categories are brought within the scope of clause (c). Clause (c) is independent of and separate from the preceding two clauses. The structure of the section does not permit the applicability of the rule of *ejusdem generis*.

There are, however, two requirements for the applicability of clause (c) of Section 6(1) to a Judge of the higher judiciary. First, the C Judge must be a public servant. Second, there must be an authority competent to remove the Judge from his office. If these two requirements are complied with, a Judge cannot escape from the operation of the Act. On the first requirement there is little doubt and also not seriously disputed by counsel for the appellant. His approach how- D ever, is to limit the operation of clause (c) only to Judges of the Subordinate judiciary. But we do not find any sustainance in that approach. From the very commencement of the IPC "Every Judge" finds a place in the categories of "public servant" defined under Section 21 of IPC. It was specifically denoted in the third category of public servant under Section 21 of IPC.

E

In 1962, the Government of India constituted a Committee chaired by C.K. Santhanam, MP to suggest improvements in the provisions of the Act. Nine specific terms of references were made to the Committee. The Fourth term of reference made to the Committee reads: "to suggest changes in law which would ensure speedy trial of F cases of bribery, corruption and criminal misconduct, and make the law otherwise more effective." The Committee collected a lot of material from the public relating to the nature of corruption in the administration. It was represented to the Committee by the public that corruption has increased to such an extent that people have started losing faith in the integrity of public administration. "We heard from all G sides", the Committee reported, "that corruption has, in recent years, spread even to those levels of administration from which it was conspicuously absent in the past." (See: Santhanam Committee Report, paras 2.12,2.15 and 2.16). The Committee submitted its report on 31st March 1964. While examining the Fourth term of reference extracted above, the Committee in Section 7 of its report considered the ques- H tion of amendments to the IPC. The Committee drew particular

attention to the definition of 'public servant' in Section 21 of the IPC. Under paragraph 7.6 of the Report, the Committee has suggested that the present definition of 'public servant' under Section 21 of the IPC requires to be enlarged. It has stated, among others that 'a further category should be added to include all persons discharging adjudicatory functions under any Union or State Law for the time being in force.' Under para 7.7, the Committee recommended that the third category under Section 21 of the IPC may be amended as stated below:

> "Third-Every Judge including any person entrusted with adjudicatory functions in the course of enforcement of any law for the time being in force."

This recommendation led to the enactment of Anti Corruption Laws (Amendment) Act 1964 (Act No. 40 of 1964). The Parliament by passing this enactment has reenacted Section 21 with the third category as follows:

> "21. 'public servant'-The words 'public servant' denote a person falling under any of the descriptions hereinafter following, namely;
>
> Third—Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions."

It will be seen that the Parliament has not only retained the expression "Every Judge" in the original enumeration of public servant under Section 21 of the IPC but also enlarged the expression to include any person empowered by law to discharge any adjudicatory functions. Reference may also be made to Section 19 of the IPC, in which "Judge" is defined. Section 19 reads:

> "19. "Judge"-The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person
>
> who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or

A who is one of a body of persons, which body of persons is empowered by law to give such a judgment."

The expression "Every Judge" used in the third category of Section 21 indicates all Judges and all Judges of all Courts. It is a general term and general term in the Act should not be narrowly B construed. It must receive comprehensive meaning unless there is positive indication to the contrary. There is no such indication to the contrary in the Act. A Judge of the superior Court cannot therefore be excluded from the definition of public servant. He squarely falls within the purview of the Act provided the second requirement under clause (c) of Section 6(1) is satisfied.

C The second requirement for attracting the provisions of clause (c) of Section 6(1) to a Judge of the superior Judiciary is that for the purpose of granting sanction for his prosecution, there must be an authority and the authority must be competent to remove the Judge. It is now necessary to identify such authority in relation to the higher D judiciary. In our country, the Judges of higher Judiciary are safe and secure. They are high dignitaries and constitutional functionaries. They are appointed by the President in the exercise of his executive power but they are independent of the Executive. They hold office till they attain the age of superannuation. The High Court Judge retires at 62, while the Supreme Court Judge retires at 65. They are liable to be E removed for proved misbehaviour or incapacity. The Executive is competent to appoint the Judges but not empowered to remove them. The power to remove them is vested in Parliament by the process analogous to impeachment. The power is located under Article 124 of the Constitution. Article 124 provides, so far as material, as follows:

F "124. Establishment and constitution of Supreme Court-

xxxxx xxxxx xxxxx

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed G after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

H

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4). A

Article 218 provides that the provisions of clauses (4) and (5) of Article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court. B

In exercise of the power vested under clause (5) of Article 124, the Parliament has passed the Judges (Inquiry) Act, 1968 prescribing the procedure for presentation of an address and for the investigation and proof of misbehaviour or incapacity of a Judge. It will be useful to refer to the relevant provisions of the Judges (Inquiry) Act, 1968. C Section 3(1) provides for giving notice of a motion for presenting an address to the President praying for the removal of a Judge, (a) in the case of a notice of motion given in the House of the People, it should be signed by not less than one hundred members of that House; (b) in the case of a notice given in the Council of States, it should be signed D by not less than fifty members of that Council. The notice of motion should be given to the Speaker or, as the case may be, to the Chairman who may, after consulting such persons, as he thinks fit and after considering such materials, if any, as may be available to him, either admit the motion or refuse to admit the same. Section 3(2) states that if the motion referred to in sub-section (1) is admitted, the Speaker or, E as the case may be, the Chairman shall constitute a Committee for making an investigation into the grounds on which the removal of a Judge is prayed for. There shall be three members of the Committee; of whom one shall be chosen from among the Chief Justice and other Judges of the Supreme Court; one shall be chosen from among the Chief Justices of the High Courts and one shall be a person who is, in F the opinion of the Speaker or, as the case may be, the Chairman, a distinguished jurist. The section further provides that the Committee shall frame definite charges against the Judge on the basis of which the investigation is proposed to be held and the Judge shall be given a reasonable opportunity of presenting a written statement of defence. There are Rules called the Judges (Inquiry) Rules, 1969 formed under G the Judges (Enquiry) Act prescribing procedure for holding an inquiry against the Judge. Section 4(1) of the Judges (Inquiry) Act, 1968 states that at the conclusion of the investigation, the Committee shall submit its report to the Speaker or, as the case may be, to the Chairman, stating therein its findings on each of the charges separately with such observations on the whole case as he thinks fit. The Speaker or the H

A Chairman, as the case may be, shall cause that report to be laid before the House of People and the Council of States. Section 6 provides that if the report of Committee contains a finding that the Judge is not guilty of any misbehaviour or does not suffer from any incapacity, then, no further step be taken in either House of Parliament.

B Section 6(2) states that if the report of the Committee contains a finding that the Judge is guilty of any misbehaviour or suffers from any incapacity, then, each House of Parliament shall take further steps. The motion to present an address to the President together with the report of the Committee, shall be taken up for consideration by the House in which it is pending. That address praying for removal of the C Judge must be adopted by each House of Parliament in accordance with the provisions of clause (4) of Article 124. Clause (4) of Article 124 provides that the address must be passed by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. Thereafter it shall be presented to the D President for removal of the Judge. Incidentally, it may be mentioned that the same procedure has been made applicable for removal of the Comptroller and Auditor-General of India. (See clause (1) of Article 148 and for removal of the Chief Election Commissioner. (See clause (5) of Article 324 of the Constitution.

E Counsel for the appellant while referring to the aforementioned provisions of the Constitution pointed out that the power to remove a Judge is not vested in any single individual or authority. No single person or authority is competent to take even cognizance of any allegation of misconduct of a Judge, or to take legal action for his removal. The power to remove a Judge is vested in the two Houses of F Parliament and the President. The process and power are both integrated in Parliament and Parliament alone is competent to remove a Judge. But Parliament, counsel contended, cannot be the sanctioning authority for the prosecution of a Judge. The grant of sanction requires consideration of material collected by the investigating agency and Parliament cannot properly consider the material. Parliament is wholly unsuitable to that work. It would be reasonable to G presume that the Legislature while enacting clause (c) of Section 6(1) of the Act could not have intended Parliament to be the sanctioning authority. The other authority cannot be involved to grant sanction for prosecution of a Judge since it would be inconsistent with the provisions of the Act and the Constitutional requirements. Counsel asserted H that it is necessary to exclude the Judges of the Supreme Court and of

the High Courts from the operation of the Act. A

Mr. Tulsi, learned Additional Solicitor General, on the other hand, emphasised on the role of the President in relation to removal of a Judge. He pointed out that the order of the President for removal of a Judge is imperative under clause (4) of Article 124 of the Constitution and the President could be the proper authority under clause (c) B of Section 6(1) of the Act.

Such, then, put quite shortly, were the contentions addressed to us on the authority competent to grant sanction for prosecution of Judges of the superior judiciary.

We agree with counsel for the appellant that Parliament could C not have been intended to be the sanctioning authority under clause (c) of Section 6(1). The composition of Parliament consisting of the President and two Houses (Article 79) makes it unsuitable to the task. The nature of transacting business or proceeding in each House renders it impracticable. The individual Member of the House takes D part in a proceeding usually by speech and voting; but the conduct of Judge in the discharge of his duties cannot be discussed. Article 121 provides "that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as E hereinafter provided." The only exception made in the Constitution for discussion on the conduct of a Judge is when the motion is taken up for his removal. On no other occasion the conduct of a Judge in the discharge of duties could be the subject matter of discussion in the two Houses of Parliament. Without discussion, it would be difficult for Parlaiment to make an objective judgment with regard to grant of F sanction for prosecution. Parliament cannot therefore be the proper authority for granting sanction for the prosecution of a Judge.

That does not however, follow that the Judges of superior Courts are entitled to be excluded from the scope of the Act as contended for the appellant. That would be defeating the object of the Act. The Act G was intended to cover all categories of public servants. The apparent policy of the legislation is to ensure a clean public administration by weeding out corrupt officials. The Preamble of the Act indicates that the Act was intended to prevent more effectively the bribery and corruption by public servants. This Court has an occasion to examine the broad outlines of the Act. Imam. J., in *S.A. Venkataraman* v. *The* H

A *State,* [1958] SCR 1040 while analysing the provisions of the Act observed (at 1048): "that the provisions of the Act indicate that it was intention of the legislature to treat more severely than hitherto corruption on the part of a public servant and not to condone it in any manner whatsoever." Reference may also be made to the observations of Subba Rao. J., as he then was, in *M. Narayanan* v. *State of Kerala,* B [1963] 2 Suppl. SCR 724. The learned Judge said that the Act is a socially useful measure conceived in the public interest and it should be liberally constured. To quote his own words (at 729):

> "The Preamble indicates that the Act was passed as it was expedient to make more effective provisions for the prevention of bribery and corruption. The long title as well as C the preamble indicate that the Act was passed to put down the said social evil i.e. bribery and corruption by public servant. Bribery is a form of corruption. The fact that in addition to the word 'bribery' the word 'corruption' is used shows that the legislation was intended to combat also D other evils in additon to bribery. The existing law. i.e. Penal Code was found insufficient to eradicate or even to control the growing evil of bribery and corruption corroding the public service of our country. The provisions broadly include the existing offences under ss. 161 and 165 of the Indian Penal Code committed by public servants and E enact a new rule of presumptive evidence against the accused. The Act also creates a new offence of criminal misconduct by public servants though to some extent it overlaps on the pre-existing offences and enacts a rebuttable presumption contrary to the well-known principles of Criminal Jurisprudence. It also aims to protect honest F public servants from harassment by prescribing that the investigation against them could be made only by police officials of particular status and by making the sanction of the Government or other appropriate officer a pre-condition for their prosecution. As it is a socially useful measure conceived in public interest, it should be liberally construed G so as to bring about the desired object i.e. to prevent corruption among public servants and to prevent harassment of the honest among them."

In *Craies on Statute Law,* (6th ed. p. 531) it is stated that "the distinction between a strict and a liberal construction has almost disap- H peared with regard to all classes of statutes, so that all statutes,

whether penal or not, are now construed by substantially the same rules ..... They are construed now with reference to the true meaning and real intention of the Legislature." The construction which would promote the general legislative purpose underlying the provision in question, is to be preferred to a construction which would not. If the literal meaning of the legislative language used would lead to results which would defeat the purpose of the Act the Court would be justified in disregarding the literal meaning and adopt a liberal construction which effectuates the object of the legislature. Section 6, with which we are concerned indeed, requires to be liberally construed. It is not a penal provision but a measure of protection to public servants in the penal enactment. It indicates the authorities without whose sanction a public servant cannot be prosecuted. It is sufficient that the authorities prescribed thereunder fall within the fair sense of the language of the Section. The expression "the authority competent to remove" used in clause (c) of Section 6(1) is to be construed to mean also an authority without whose order or affirmation the public servant cannot be removed. In this view, the President can be considered as the authority to grant sanction for prosecution of a Judge since the order of the President for the removal of a Judge is mandatory. The motion passed by each House of Parliament with the special procedure prescribed under clause (4) of Article 124 will not *proprio vigore* operate against the judge. It will not have the consequence of removing the Judge from the office unless it is followed by an order of the President.

The importance of an order of the President for removal of a Judge could be seen by contrasting the provisions of clause (4) of Article 124 with the provisions for removal of the President, Vice-President and Speaker. Article 61 provides procedure for removal of the President of India. Clause (4) of Article 61 reads as follows:

> "61(4) If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed."

Similar is the consequence of passing the resolution for removal of the Vice-President under Article 67 and the Speaker under Article

A 94 of the Constitution. Article 67(b) of the Constitution provides that the Vice-President may be removed from his office by a resolution of the Council of States passed by a majority of all the then members of the Council and agreed to by the House of People. Article 94(c) provides that the Speaker may be removed from his office by a resolution of the House of the People passed by a majority of all the then B members of the House. The resolution passed in accordance with the procedure prescribed under the respective provisions for removing the President, Vice-President and the Speaker, will *ipso facto* operate against those authorities. No further order from any other authority for their removal is necessary.

C But that is not the position in the case of removal of a Judge. Clause (4) of Article 124 mandates that "a Judge shall not be removed from his office except by an order of the President passed after an address by each House of Parliament ..." The clause (4) is in the negative terms. The order of the President is *sine qua* non for removal of a Judge. The President alone could make that order.

D

It is said that Section 6 envisages that the authority competent to remove a public servant from the office should be vertically superior in the hierarchy in which the office exists. Section 6 applies only in cases where there is a vertical hierarchy of public offices and the public servants against whom sanction is sought from the sanctioning authoE rity. Where the office held by the public servant is not a part of vertical hierarchy in which there is an authority above the public servant, then, Section 6 can have no application. We have been referred to the observations of Desai J., in *R.S. Nayak* v. *A.R. Antulay*, [1984] 2 SCC 183 at 206:

F > "That competent authority alone would know the nature and function discharged by the public servant holding the office and whether the same has been abused or misused. It is the vertical hierarchy between the authority competent to remove the public servant from that office and the nature of the office held by the public servant against whom G sanction is sought which would indicate a hierarchy and which would therefore, permit inference of knowledge about the functions and duties of the office and its misuse or abuse by the public servant. That is why the Legislature clearly provided that that authority alone would be competent to grant sanction which is entitled to remove the public H servant against whom sanction is sought from the office."

With the utmost respect, we are unable to agree with the above observations. It seems to us that these observations were not intended to lay down the law that the authority competent to grant sanction for prosecution of public servant should be vertically superior in the hierarchy in which the office of the public servant exists. That was not the issue in that case. The observations therefore, are not meant to be and ought not to be regarded as laying down the law. It has been said almost too frequently to require repetiton that judgments are not to be read as statutes. In our opinion, it is not necessary that the authority competent to give sanction for prosecution or the authority competent to remove the public servant should be vertically superior in the hierarchy in which the office of the public servant exists. There is no such requirement under Section 6. The power to give sanction for prosecution can be conferred on any authority. Such authority may be of the department in which the public servant is working or an outside authority. All that is required is that the authority must be in a position to appreciate the material collected against the public servant to judge whether the prosecution contemplated is frivolous or speculative. Under our enactment the power has been conferred on the authority competent to remove the public servant. Under the British Prevention of Corruption Act, 1906 the power to give consent for prosecution for an offence under that Act has been conferred upon the Attorney General or Solicitor General.

The President is not an outsider so far judiciary is concerned. The President appoints the Judges of the High Courts and the Supreme Court in exercise of his executive powers. Clause (1) of Article 217 provides that every Judge of the High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. Similarly the President appoints the Judges of the Supreme Court. Clause (2) of Article 124 provides that every Judge of the Supreme Court shall be appointed by the President in consultation with such of the Judges of the Supreme Court and of the High Courts as the President may deem necessary for the purpose and in case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. The President exercises this power with the aid and advice of his Council of Ministers under Article 74 of the Constitution. *Shamsher Singh* v. *State of Punjab*, [1975] 1 SCR 814 and *S.P. Gupta* v. *Union of India*, [1982] 2 SCR 365. Parliament has no part to play in the matter of appointment of Judges except that the Executive is responsible to the Parliament.

A In the event of President regarded as the authority competent to give prior sanction for the prosecution of a Judge, counsel for the appellant contended, that the President cannot act independently. The President exercises his powers by and with the advice of his Council of Ministers. The Executive may misuse the power by interfering with the judiciary. The Court shall avoid interpretation which is likely to impair B the independence of the judiciary. Counsel urged that a separate Parliamentary law to deal with the criminal misconduct of Judges of superior courts consistent with the constitutional scheme for their removal could be enacted and such a legislation alone would ensure judicial independence and not the present enactment. A suggestion was also made that since 'misbehaviour' under clause (4) of Article 124 of the Constitution and 'criminal misconduct' under Section 5(1) of the C Act being synonymous, the constitutional process for removal of the Judge must be gone through first and only after his removal the prosecution if need be recommended in the same process. Otherwise, it is said that it would lead to anomaly since there is no power either in the Constitution or under any other enactment to suspend the Judge or D refuse to assign work to the Judge pending his trial or conviction in the Criminal Court and the Judge can insist on his right to continue till his removal even after his conviction and sentence.

It is inappropriate to state that conviction and sentence are no bar for the Judge to sit in the Court. We may make it clear that if a E Judge is convicted for the offence of criminal misconduct or any other offence involving moral turpitude, it is but proper for him to keep himself away from the Court. He must voluntarily withdraw from judicial work and await the outcome of the criminal prosecution. If he is sentenced in a criminal case he should forthwith tender his resignation unless he obtains stay of his conviction and sentence. He shall not F insist on his right to sit on the Bench till he is cleared from the charge by a Court of competent jurisdiction. The judiciary has no power of the purse or the sword. It survives only by public confidence and it is important to the stability of the society that the confidence of the public is not shaken. The Judge whose character is clouded and whose standards of morality and rectitude are in doubt may not have the G judicial independence and may not command confidence of the public. He must voluntarily withdraw from the judicial work and administration.

The emphasis on this point should not appear superfluous. Prof. Jackson says "Misbehaviour by a Judge, whether it takes place on the bench or off the bench, undermines public confidence in the administH ration of justice, and also damages public respect for the law of the

land; if nothing is seen to be done about it, the damage goes unrepaired. This must be so when the judge commits a serious criminal offence and remains in office". (Jackson's Machinery of Justice by J.R. Spencer 8th ed. p.p. 369-370). A

The proved "misbehaviour" which is the basis for removal of a Judge under clause (4) of Article 124 of the Constitution may also in certain cases involve an offence of criminal misconduct under section 5(1) of the Act. But that is no ground for withholding criminal prosecution till the Judge is removed by Parliament as suggested by counsel for the appellant. One is the power of Parliament and the other is the jurisdiction of a Criminal Court. Both are mutually exclusive. Even a Government servant who is answerable for his misconduct which may also constitute an offence under the IPC or under Section 5 of the Act is liable to be prosecuted in addition to a departmental enquiry. If prosecuted in a criminal court he may be punished by way of imprisonment or fine or with both but in departmental enquiry, the highest penalty that could be imposed on him is dismissal. The competent authority may either allow the prosecution to go on in a Court of law or subject him to a departmental enquiry or subject him to both concurrently or consecutively. It is not objectionable to initiate criminal proceedings against public servant before exhausting the disciplinary proceedings, and a *fortiori*, the prosecution of a Judge for criminal misconduct before his removal by Parliament for proved misbehaviour is unobjectionable. B C D E

There are various protections afforded to Judges to preserve the independence of the judiciary. They have protection from civil liability for any act done or ordered to be done by them in discharge of their judicial duty whether or not such judicial duty is performed within the limits of their jurisdiction. That has been provided under Section 1 of the Judicial Officers Protection Act, 1850. Likewise, Section 77 IPC gives them protection from criminal liability for an act performed judicially. Section 77 states that "nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law". A discussion on the conduct of Judges of the High Courts and the Supreme Court in the discharge of their duties shall not take place in the State Legislatures or in Parliament (Articles 121 and 211). The High Courts and the Supreme Court have been constituted as Courts of record with the power to punish anybody for committing contempt. (Articles 129 and 215). The Contempt of Courts Act, 1971 (Act 70-71) provides power to the Court to take civil and criminal contempt proceedings. F G H

A But we know of no law providing protection for Judges from Criminal prosecution. Article 361(2) confers immunity from criminal prosecution only to the President and Governors of States and to no others. Even that immunity has been limited during their term of office. The Judges are liable to be dealt with just the same way as any other person in respect of criminal offence. It is only in taking of bribes or with B regard to the offence of corruption the sanction for criminal prosecution is required.

The position in other countries seems to be not different. In the book "Judicial Independence—The Contemporary Debate" by S. Shetreet and J. Deschenes (1985 ed.) there is an article titled as "Who C Watches the Watchman" by Mauro Cappelletti. The author has surveyed the penal liability of judges in the legal systems of some of the countries. The author states "In a number of national systems one can also find the provision of criminal sanctions for certain acts or omissions that are typical only of the administration of Justice, such as *deni de justice*, or wilful abuse of the judicial office. Even crimes which D are of more general application, such as the taking of bribes, might well be sanctioned differently—but possibly more severely—when they refer to judicial officers. In other countries, however, such as Poland, Greece and Italy, a different approach prevails. There is no criminal sanction which is specifically applicable only to judicial behaviour; rather, the judges are included in those criminal provisions E which apply generally to public servants, such as provisions concerning corruption, omission or refusal to perform activities of office, vexation, etc."

If we take the early English law it will be seen that the corruption on the part of a Judge was the most reprehensible crime and punish- F able as high treason. Even Lord Becon, the most gifted mind of the English Renaissance, acclaimed philosopher and the best legal brain was not spared from the punishment for accepting bribes. He was fined forty thousand pounds, a monumental sum, and "imprisoned in the Tower during the King's pleasure." He was also barred forever from holding any office in the "State or Commonwealth" or from sitting in G Parliament, or from coming "within the verge of the Court." King James however, liberated him from prison, remitted his fine, and pardon him fully (The Corrupt Judge by Joseph Borkin 1962 ed. p. 3, 4, & 17).

There is however, apprehension that the Executive being the H largest litigant is likely to misuse the power to prosecute the Judges.

That apprehension in our over-litigious society seems to be not unjustified or unfounded. The Act no doubt provides certain safeguards. Section 6 providing for prior sanction from the competent authority and directing that no court shall take cognizance of the offence under Section 5(1) without such prior sanction is indeed a protection for Judges from frivolous and malicious prosecution. It is a settled law that the authority entitled to grant sanction must apply its mind to the facts of the case and all the evidence collected before forming an opinion whether to grant sanction or not. Secondly, the trial is by the Court which is independent of the Executive. But these safeguards may not be adequate. Any complaint against a Judge and its investigation by the CBI, if given publicity will have a far reaching impact on the Judge and the litigant public. The need therefore, is a judicious use of taking action under the Act. Care should be taken that honest and fearless judges are not harassed. They should be protected. In the instant case the then Chief Justice of India was requested to give his opinion whether the appellant could be proceeded under the Act. It was only after the Chief Justice expressed his views that the appellant could be proceeded under the provisions of the Act, the case was registered against him. Mr. Tulsi, learned Additional Solicitor General submitted that he has no objection for this Court for issuing a direction against the Government of India to follow that procedure in every case. But Counsel for the appellant has reservations. He maintained that it would be for the State to come forward with a separate enactment for the Judges consistent with the Constitutional provisions for safeguarding the independence of the judiciary and not for this Court to improve upon the defective law. In our opinion, there is no need for a separate legislation for the Judges. The Act is not basically defective in its application to judiciary. All that is required is to lay down certain guidelines lest the Act may be misused. This Court being the ultimate guardian of rights of people and independence of the judiciary will not deny itself the opportunity to lay down such guidelines. We must never forget that this Court is not a Court of limited jurisdiction of only dispute settling. Almost from the beginning, this Court has been a law maker, albeit, in Holmes's expression, 'interstitial law maker'. Indeed, the court's role today is much more. It is expanding beyond dispute settling and interstitial law making. It is a problem solver in the nebulous areas. In this case, we consider it no mere opportunity: it is a duty. It is our responsibility and duty to apply the existing law in a form more conducive to the independence of the Judiciary.

The Chief Justice of India is a participatory functionary in the

A matter of appointment of Judges of the Supreme Court and the High Courts. (Articles 124(2) and 217(1).) Even for transfer of a Judge from one High Court to another the Chief Justice should be consulted by the President of India (Article 222). If any questionarises as to the age of a Judge of a High Court,the question shall be decided by the President after consultation with the Chief Justice of India (Article 217(3)). B Secondly, the Chief Justice being the head of the judiciary is primarily concerned with the integrity and impartiality of the judiciary. Hence it is necessary that the Chief Justice of India is not kept out of the picture of any criminal case contemplated against a Judge. He would be in a better position to give his opinion in the case and consultation with the Chief Justice of India would be of immense assistance to the Government in coming to the right conclusion. We therefore, direct that no C criminal case shall be registered under Section 154, Cr. P.C. against a Judge of the High Court, Chief Justice of High Court or Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter. Due regard must be given by the Government to the opinion expressed by the Chief Justice. If the Chief Justice is of opinion that it is D not a fit case for proceeding under the Act, the case shall not be registered. If the Chief Justice of India himself is the person against whom the allegations of criminal misconduct are received the Government shall consult any other Judge or Judges of the Supreme Court. There shall be similar consultation at the stage of examining the question of granting sanction for prosecution and it shall be necessary and E appropriate that the question of sanction be guided by and in accordance with the advice of the Chief Justice of India. Accordingly the directions shall go to the Government. These directions, in our opinion, would allay the apprehension of all concerned that the Act is likely to be misused by the Executive for collateral purpose.

F For the reasons which we have endeavoured to outline and subject to the directions issued, we hold that for the purpose of clause (c) of Section 6(1) of the Act the President of India is the authority competent to give previous sanction for the prosecution of a Judge of the Supreme Court and of the High Court.

G It remains only to deal with one short point in this part of the discussion. The High Court has expressed the view that no sanction for prosecution of the appellant under Section 6 was necessary since he has retired from the service on attaining the age of superannuation and was not a public servant on the date of filing the chargesheet. The view taken by the High Court appears to be unassailable. The scope of H Section 6 was first considered by this Court in *S.A. Venkataraman's*

case, where it was observed (at 1048) that Section 6 of the Act must be considered with reference to the words used in the section independent of any construction which may have been placed by the decisions on the words used in Section 197 of the Cr. P.C. The Court after analysing the terms of Section further observed (at 1049) that "there is nothing in the words used in Section 6(1) to even remotely suggest that previous sanction was necessary before a court could take cognizance of the offences mentioned therein in the case of a person who had ceased to be a public servant at the time the court was asked to take cognizance, although he had been such a person at the time the offence was committed." This view has been followed in *C.R. Bansi* v. *State of Maharashtra,* [1971] 3 SCR 236 and also in *K.S. Dharmadatan* v. *Central Government & Ors.,* [1979] 3 SCR 832 and finally reiterated in a Constitution Bench decision in *R.S. Nayak & Ors.* v. *A.R. Antulay,* [1984] 2 SCC 183. The question is, therefore, no longer *res integra.*

This brings us to the end of the second question and takes us on to the first question. Among the substantive points raised for the appellant, the first question relates to the nature of the offence created under clause (e) of Section 5(1). The second, allied question, is as to the invalidity of the charge-sheet filed in the instant case in as such as it failed to incorporate the essential ingredient of the offence. It was urged that the public servant is entitled to an opportunity to explain the disproportionality between the assets and the known sources of income. This opportunity should be given to the public servant by the Investigating Officer and the charge sheet must contain a statement to that effect, that is, to the unsatisfactory way of accounting by the public servant. Unless the charge sheet contains such an averment, counsel contended that under law an offence under clause (e) of Section 5(1) of the Act is not made out.

For a proper consideration of the contentions, we may have the pre-natal history of clause (e) of Section 5(1). Section 5(1) of the Act, as originally stood, provides in the four clauses (a), (b), (c) and (d) the acts or the omissions of which public servant is said to have committed an offence of criminal misconduct in the discharge of his duties. All these provisions are still there except the term 'in the discharge of his duties'. There then followed, Section 5(3) which was in these terms:

> "In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property

A 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.".

B This Section 5(3) does not create a new offence but only provides an additional mode of proving an offence punishable under Section 5(2) for which any accused person was being tried. It enables the Court to raise a presumption of guilt of the accused in certain circumstances. This additional mode is by proving the extent of the pecuniary resources or property in the possession of the accused or any other C person on his behalf and thereafter showing that this is disproportionate to his known sources of income. If these facts are proved the section makes it obligatory for the Court to presume that the accused person is guilty of criminal misconduct in the discharge of his official duty, unless the contrary is proved by the accused that he is not so D guilty. The Section 5(3) further provides that the conviction for an offence of criminal misconduct shall not be invalid by reason that it is based solely on such presumption. (See: (i) *C.S.D. Swamy* v. *The State,* [1960] 1 SCR 461; (ii) *Surajpal Singh* v. *The State of U.P.,* [961] 2 SCR 971, and (iii) *Sajjan Singh* v. *The State of Punjab,* [1964] 4 SCR 630).

E In 1962, as earlier explained, Santhanam Committee on 'Prevention of Corruption' was constituted to review, among other things, the law relating to corruption, to ensure speedy trial of cases of bribery and criminal misconduct and to make the law otherwise more effective. The Committee in its report has, *inter alia* recommended the F inclusion of clause (e) of Section 5(1) as a substantive offence in the Act. The Government accepted that recommendation and to give effect to that recommendation, enacted clause (e) of Section 5(1) replacing Section 5(3) of the Act. The Statement of Objects and Reasons accompanying the Bill leading to the enactment of 'The Anti-Corruption Laws (Amendment) Act, 1964 (Act No. 40 of 1964) by G which clause (e) of Section 5(1) was introduced into the Act reads:

"(d) The Committee has recommended a number of important amendments to the Prevention of Corruption Act, 1947. It has suggested that the presumption enunciated in sub-section (1) and (2) of Section 4 of the Act H should be made available also in respect of offences under

Section 5 *and possession of disproportionate assets should be made a substantive offence."* A

(Emphasis supplied)

For immediate reference, clause (e) of Section 5(1) is reproduced hereunder:

B

"5(1)(e) if he or any person on his behalf is in possession or has, at any time during the period of his office, been in possession, for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income".

C

The terms of clause (e) indicates that the principle underlying Section 5(3) appears to have been elevated to a substantive offence in somewhat different words. We will presently analyse the ingredients of the offence under clause (e), but before that, two decisions of this Court on the scope of clause (e) may be referred. In *Maharashtra* v. *K.K.S. Ramaswamy,* [1978] 1 SCR 274, Shinghal, J., said (at 276) that D the result of the enactment of clause (e) is that mere possession of pecuniary resources or property disproportionate to the known sources of income of a public servant, for which he could not satisfactorily account, became an offence by itself although Section 5(3) which existed prior to Section 5(1)(e) did not constitute an offence.

E

In *State of Maharashtra* v. *Wasudeo Ramachandra Kaidalwar,* [1981] 3 SCR 675, Sen, J., spelled out succintly the insight of clause (e) of Section 5(1) (at pp. 682 to 684):

"The terms and expressions appearing in s. 5(1)(e) of the Act are the same as those used in the old section 5(3). F Although the two provisions operate in two different fields, the meaning to be assigned to them must be the same. The expression "known sources of income" means "sources known to the prosecution". So also the same meaning must be given to the words "for which the public servant is unable to satisfactorily account" occurring in s. 5(1)(e). No G doubt s. 4(1) provides for presumption of guilt in cases falling under ss. 5(1)(a) and (b), but there was, in our opinion, no need to mention s. 5(1)(a) therein. For the reason is obvious. The provision contained in s. 5(1)(e) of the Act is a self-contained provision. The first part of the Section casts a burden on the prosecution and the second H

A on the accused. When s. 5(1)(e) uses the words "for which the public servant is unable to satisfactorily account", it is implied that the burden is on such public servant to account for the sources for the acquisition of disproportionate assets. The High Court, therefore, was in error in holding that a public servant charged for having disproportionate B assets in the possession for which he cannot satisfactorily account, cannot be convicted of an offence under s. 5(2) read with s. 5(1)(e) of the Act unless the prosecution disproves all possible sources of income."

On the burden of proof under Section 5(1)(e) of the Act, learned C Judge said:

"The expression "burden of proof" has two distinct meanings; (1) the legal burden i.e. the burden of establishing the guilt, and (2) the evidential burden, i.e. the burden of leading evidence. In a criminal trial, the burden of proving D everything essential to establish the charge against the accused lies upon the prosecution, and that burden never shifts. Notwithstanding the general rule that the burden of proof lies exclusively upon the prosecution, in the case of certain offences, the burden of proving a particular fact in issue may be laid by law upon the accused. The burden E resting on the accused in such cases is, however, not so onerous as that which lies on the prosecution and is discharged by proof of a balance of probabilities."

As to the ingredients of the offence, learned Judge continued:

F "The ingredients of the offence of criminal misconduct under s. 5(2) read with s. 5(1)(e) are the possession of pecuniary resources or property disproportionate to the known sources of income for which the public servant cannot satisfactorily account. To substantiate the charge, the prosecution must prove the following facts before it can G bring a case under s. 5(1)(e), namely, (1) it must establish that the accused is a public servant, (2) the nature and extend of the pecuniary resources or property which were found in his possession, (3) it must be proved as to what were his known sources of income i.e. known to the prosecution, and (4) it must prove quite objectively, that such H resources or property found in possession of the accused

were disproportionate to his known sources of income. Once these four ingredients are established, the offence of criminal misconduct under s. 5(1)(e) is complete, unless the accused is able to account for such resources or property. The burden then shifts to the accused to satisfactorily account for his possession of disproportionate assets. The extent and nature of burden of proof resting upon the public servant to be found in possession of disproportionate assets under s. 5(1)(e) cannot be higher than the test laid by the Court in *Jahgan's* case (supra), i.e. to establish his case by a preponderance of probability. That test was laid down by the Court following the dictum of *Viscount Sankey, L.C. in Woolmington* v. *Director of Public Prosecutions.*"

The soundness of the reasoning in *Wasudeo Ramachandra Kaidalwar* case (supra) has been doubted. Counsel for the appellant urged that the view taken on Section 5(3) cannot be imported to clause (e) of Section 5(1) and the decision, therefore, requires reconsideration. But we do not think that the decision requires reconsideration. It is significant to note that there is useful parallel found in Section 5(3) and clause (e) of Section 5(1). Clause (e) creates a statutory offence which must be proved by the prosecution. It is for the prosecution to prove that the accused or any person on his behalf, has been in possession of pecuniary resources or property disproportionate to his known sources of income. When that onus is discharged by the prosecution, it is for the accused to account satisfactorily for the disproportionality of the properties possessed by him. The Section makes available statutory defence which must be proved by the accused. It is a restricted defence that is accorded to the accused to account for the disproportionality of the assets over the income. But the legal burden of proof placed on the accused is not so onerous as that of the prosecution. However, it is just not throwing some doubt on the prosecution version. The Legislature has advisedly used the expression "satisfactorily account". The emphasis must be on the word "satisfactorily". That means the accused has to satisfy the court that his explanation is worthy of acceptance. The burden of proof placed on the accused is an evidential burden though not a pursuasive burden. The accused however, could discharge that burden of proof "on the balance of probabilities" either from the evidence of the prosecution and/or evidence from the defence.

This procedure may be contrary to the well known principle of

criminal jurisprudence laid down in *Woolmington* v. *Director of Public Prosecution*, [1935] A.C. 462 that the burden of proof is always on the prosecution and never shifts to the accused person. But Parliament is competent to place the burden on certain aspects on the accused as well and particularly in matters "specially within his knowledge". (Section 106 of the Evidence Act). Adroitly, as observed in *Swamy case* (at 469) and reiterated in *Wasudeo case* (at 683), the prosecution cannot, in the very nature of things, be expected to know the affairs of a public servant found in possession of resources of property disproportionate to his known sources of income. It is for him to explain. Such a statute placing burden on the accused cannot be regarded as unreasonable, unjust or unfair. Nor it can be regarded as contrary to Article 21 of the Constitution as contended for the appellant. It may be noted that the principle re-affirmed in *Woolmington case* is not a universal rule to be followed in every case. The principle is applied only in the absence of statutory provision to the contrary. (See the observations of Lord Templeman and Lord Griffiths in *Rig.* v. *Hunt*, [1986] 3 WLR 1115 at 1118 and 1129).

Counsel for the appellant however, submitted that there is no law prohibiting a public servant having in his possession assets disproportionate to his known sources of income and such possession becomes an offence of criminal misconduct only when the accused is unable to account for it. Counsel seems to be focussing too much only on one part of clause (e) of Section 5(1). The first part of clause (e) of Section 5(1) as seen earlier relates to the proof of assets possessed by the public servant. When the prosecution proves that the public servant possesses assets disproportionate to his known sources of income, the offence of criminal misconduct is attributed to the public servant. However, it is open to the public servant to satisfactorily account for such disproportionality of assets. But that is not the same thing to state that there is no offence till the public servant is able to account for the excess of assets. If one possesses assets beyond his legitimate means, it goes without saying that the excess is out of ill-gotten gain. The assets are not drawn like nitrogen from the air. It has to be acquired for which means are necessary. It is for the public servant to prove the source of income or the means by which he acquired the assets. That is the substance of clause (e) of Section 5(1).

In the view that we have taken as to the nature of the offence created under clause (e), it may not be necessary to examine the contention relating to ingredient of the offence. But since the legality of the charge sheet has been impeached, we will deal with that contention

also. Counsel laid great emphasis on the expression "for which he account satisfactorily account" used in clause (e) of Section 5(1) of the Act. He argued that that term means that the public servant is entitled to an opportunity before the Investigating Officer to explain the alleged disproportionality between assets and the known sources of income. The Investigating Officer is required to consider his explanation and the charge sheet filed by him must contain such averment. The failure to mention that requirement would vitiate the charge sheet and renders it invalid. This submission, if we may say so, completely overlooks the powers of the Investigating Officer. The Investigating Officer is only required to collect material to find out whether the offence alleged appears to have been committed. In the course of the investigation, he may examine the accused. He may seek his clarification and if necessary he may cross check with him about his known sources of income and assets possessed by him. Indeed, fair investigation requires as rightly stated by Mr. A.D. Giri learned Solicitor General, that the accused should not be kept in darkness. He should be taken into confidence if he is willing to cooperate. But to state that after collection of all material the Investigating Officer must give an opportunity to the accused and call upon him to account for the excess of the assets over the known sources of income and then decide whether the accounting is satisfactory or not, would be elevating the Investigating Officer to the position of an enquiry officer or a judge. The investigating officer is not holding an enquiry against the conduct of the public servant or determining the disputed issues regarding the disproportionality between the assets and the income of the accused. He just collects material from all sides and prepares a report which he files in the Court as charge sheet.

The charge sheet is nothing but a final report of police officer under Section 173(2) of the Cr. P.C. The Section 173(2) provides that on completion of the investigation the police officer investigating into a cognizable offence shall submit a report. The report must be in the form prescribed by the State Government and stating therein (a) the names of the parties; (b) the nature of the information; (c) the names of the persons who appear to be acquainted with the circumstances of the case; (d) whether any offence appears to have been committed and, if so, by whom (e) whether the accused has been arrested; (f) whether he had been released on his bond and, if so, whether with or without sureties; and (g) whether he has been forwarded in custody under Sec. 170. As observed by this Court in *Satya Narain Musadi and Ors.* v. *State of Bihar,* [1980] 3 SCC 152 at 157; that the statutory requirement of the report under Section 173(2) would be complied

with if the various details prescribed therein are included in the report. This report is an intimation to the magistrate that upon investigation into a cognizable offence the investigating officer has been able to procure sufficient evidence for the Court to inquire into the offence and the necessary information is being sent to the Court. In fact, the report under Section 173(2) purports to be an opinion of the investigating officer that as far as he is concerned he has been able to procure sufficient material for the trial of the accused by the Court. The report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 175(5). Nothing more need be stated in the report of the Investigating Officer. It is also not necessary that all the details of the offence must be stated. The details of the offence are required to be proved to bring home the guilt to the accused at a later stage i.e. in the course of the trial of the case by adducing acceptable evidence.

In the instant case, the charge sheet contains all the requirements of Section 173(2). It states that the investigation shows that between 1 May 1969 and 24 February 1976 the appellant as the Chief Justice of the High Court of Madras was in possession of the pecuniary resources and property in his own name and in the name of his wife and two sons etc., which were disproportionate by Rs.6,41,416.36 to the known sources of income over the same period and cannot satisfactorily account for such disproportionate pecuniary resources and property. The details of properties and pecuniary resources of the appellant also have been set out in clear terms. No. more, in our opinion, is required to be stated in the charge sheet. It is fully in accordance with the terms of Section 173(2) Cr. P.C. and clause (e) of Section 5(1) of the Act.

For the foregoing reasons, we dismiss the appeal and direct the trial court to proceed with the case expeditiously.

Before parting with the case, we may say a word more. This case has given us much concern. We gave our fullest consideration to the questions raised. We have examined and re-examined the questions before reaching the conclusion. We consider that the society's demand for honesty in a judge is exacting and absolute. The standards of judicial behaviour, both on and off the Bench, are normally extremely high. For a Judge to deviate from such standards of honesty and impartiality is to betray the trust reposed on him. No excuse or no legal relativity can condone such betrayal. From the standpoint of justice the size of the bribe or scope of corruption cannot be the scale for measuring a judge's dishonour. A single dishonest judge not only dis-

honours himself and disgraces his office but jeopardizes the integrity of the entire judicial system. A

A judicial scandal has always been regarded as far more deplorable than a scandal involving either the Executive or a member of the Legislature. The slightest hint of irregularity or impropriety in the Court is a cause for great anxiety and alarm. "A legislator or an administrator may be found guilty of corruption without apparently endangering the foundation of the State. But a Judge must keep himself absolutely above suspicion" to preserve the impartiality and independence of the judiciary and to have the public confidence thereof. B

SHARMA, J. I have gone through the learned judgments of Mr. Justice Ray, Mr. Justice Shetty and Mr. Justice Verma. I agree with Mr. Justice Ray and Mr. Justice Shetty that the appeal should be dismissed. In view of the elaborate discussion of the facts and law in the judgments of my learned brothers, I am refraining from dealing with them in detail, and am indicating my reasons briefly. C D

2. The expression "public servant" used in the Prevention of Corruption Act, 1947 (hereinafter referred to as the 'Act') is undoubtedly wide enough to denote every judge, including Judges of the High Court and the Supreme Court. The argument is that in view of the language of the Act considered along with the provisions of the Constitution especially Article 124, Section 5 of the Act must be held to be inapplicable to the High Court and Supreme Court Judges. It has not, however, been suggested, and rightly, that the Parliament lacks jurisdiction in passing a law for trial and conviction of High Court and Supreme Court Judges in cases where they are guilty of committing criminal offences. The contention is that in view of the scheme of the Act it should be inferred that the penal provisions of the Act do not apply to them. Great reliance has been placed on Section 6, requiring previous sanction of the authority competent to remove the Judge from the office as a necessary condition for taking cognizance. It has been urged that in view of this essential requirement it has to be held that the Act does not cover the case of a member of the higher judiciary while in office and consequently it cannot be made applicable to him even after his retirement. For the purpose of this argument it is presumed that there is no authority competent to remove a High Court Judge from his office within the meaning of Section 6, and the condition precedent for starting a prosecution against him, therefore, cannot be satisfied. I do not think this basic assumption is correct. E F G H

A 3. Section 6(1)(c) of the Act speaks of the "authority competent to remove him from his office". The question is as to whether there is some "authority competent" to remove a High Court Judge from his office or not. An answer in the negative will be inconsistent with Article 124 Clauses 4 and 5 read with Article 218 of the Constitution. It is significant to note that Article 124(4) speaks of "removal from his B office", and Section 6 of the Act uses similar language. The removal of a Judge does not take place automatically on commission or omission of a particular act or acts or on fulfilment of certain prescribed conditions. It is dependant on certain steps to be taken as mentioned in the Article through human agency. Initially some members of the Parliament have to move in the matter and finally an order has to be passed by the President. Thus although more than one person are involved in C the process, it is not permissible to say that no authority exists for the purpose of exercising the power to remove a High Court Judge from his office. As to who is precisely the authority in this regard is a matter which, in my view, does not arise in the present case, but the vital question whether such an authority exists at all must be answered in D the affirmative.

4. It has been strenuously contended by Mr. Sibal, learned counsel for the appellant, that the Constitution envisages an independent judiciary, and to achieve this goal it is essential that the other limbs of the State including the executive and the lagislature should be denied a E position from where the judiciary can be pressurized.

5. The State is an organisation committed to public good; it is not an end in itself. Its different branches including the legislature, judiciary and the executive are intended to perform different assigned important functions. Judiciary has a duty to dispense justice between F person and person as also between person and State itself. To be able to perform its duties effectively the Judges have to act "without fear or favour, affection or ill will". They must, therefore, be free from pressure from any quarter. Nobody can deny this basic essence of independence of judiciary. But for the judiciary to be really effective, the purity in the administration of justice and the confidence of the people G in the courts are equally essential. It is to achieve this end that the higher judiciary has been vested with the power to punish for its own contempt. This has become necessary so that an aggrieved or misdirected person may not cast aspersions on the court which may adversely affect the public confidence. If the community loses its faith in the courts, their very existence will cease to have any meaning. A H person with a just cause shall not approach the court for a legal

remedy, if according to his belief the decision of the court would be given on extreneous consideration and not on the merits of his claim. People will return to the law of the jungle for settling their dispute on the streets. These aspects are common for the entire judiciary, whether Higher or Subordinate, and to my mind no classification is permissible separating one category from another.

6. Although the Judges of the higher judiciary perform important functions and are vested with special jurisdiction, it cannot be forgotten that judicial power, wherever it is vested, is integral and basic for a democratic constitution. A large number of cases are finally decided at the stage of the subordinate judiciary. The subordinate judiciary, therefore, also needs the same independence which is essential for the higher judiciary. It is, therefore, not safe to assume that the Act intended to make in its application any discrimination between the lower and the higher judiciary. Protection to the public servant in general is provided under Article 311 and the interest of the subordinate judiciary is further taken care of by the High Court, and this along with the provisions regarding previous sanction shields them from unjustified prosecution. Similarly protection is available to the High Court and Supreme Court Judges through the provisions of Article 124(4) and (5) of the Constitution. So far this aspect is concerned, the two categories of Judges—High Court and Supreme Court Judges on the one hand and the rest on the other have not been treated by the law differently. There cannot be any rational ground on the basis of which a member of a higher judiciary may be allowed to escape prosecution while in identical circumstances a member of the subordinate judiciary is tried and convicted. Such an interpretation of the Act will militate against its constitutional validity and should not, therefore, be preferred.

7. There is still another reason indicating that the interpretation suggested on behalf of the appellant should not be accepted. If it is held that a member of the higher judiciary is not liable to prosecution for an offence under Section 5 on account of the requirement of previous sanction under Section 6, it will follow that he will be immune from the prosecution not only under Section 5(1)(e) as is the present case, but also for the other offences under Clauses (a) to (d). So far offences punishable under Sections 161, 164 and 165 of the Indian Penal Code are concerned they are also subject to such previous sanction. The result will be serious. It is a well established principle that no person is above the law and even a constitutional amendment as contained in Article 329 A in the case of the Prime Minister was struck

down in 1976 (2) SCR 347 at 470 C-D. It has to be remembered that in a proceeding under Article 124 a Judge can merely be removed from his office. He cannot be convicted and punished. Let us take a case where there is a positive finding recorded in such a proceeding that the Judge was habitually accepting bribe, and on that ground he is removed from his office. On the argument of Mr. Sibal, the matter will have to be closed with his removal and he will escape the criminal liability and even the ill gotten money would not be confiscated. Let us consider another situation where an abetter is found guilty under Section 165 A of the Indian Penal Code and is convicted. The main culprit, the Judge shall escape on the argument of the appellant. In a civilised society the law cannot be assumed to be leading to such disturbing results.

8. In adopting the other view I do not see any difficulty created either by the scheme or the language of the Act or by any constitutional provision. The statement in Santhanam Committee's report that the members did not consider judiciary to be included in the terms of the reference, is not of much help as admittedly the Act applies to the members of the subordinate judiciary. Nor can the rules relating to disclosure by some Govt. servants of their assets and liabilities determine the scope of the law. These rules differ from place to place and are amended from time to time according to the changing exigencies. As has been stated earlier, the power to remove a High Court Judge from his office does exist and has to be exercised in appropriate circumstances according to the provisions of Article 124. It is, therefore, not right to say that previous sanction for his prosecution cannot be made available. Section 2 of the Act adopts the definition of "public servant" as given in Section 21 of the Indian Penal Code, which includes "Every Judge". If the legislature had intended to exclude the High Court and Supreme Court Judges from the field of Section 5 of the Act, it could have said so in unambiguous terms instead of adopting the wide meaning of the expression "public servant" as given in the Indian Penal Code.

9. The further question as to the identity of the authority empowered to grant the necessary sanction as mentioned in Section 6 of the Act was hotly debated during the hearing of the case. Mr. Justice Shetty has held that since ultimately it is the order of the President which is necessary for the removal of a Judge, he must be treated to be the competent authority. Taking into consideration the independence of judiciary as envisaged by the Constitution, it has further been observed that the Chief Justice of India will have to be

consulted in the matter and steps would have to be taken in accordance with his advice. Mr. Justice Ray and Mr. Justice Venkatchaliah are in agreement with this view. These observations, I believe, would be not only acceptable, but welcome to the Union of India, as during the hearing it was at the suggestion of the learned Solicitor General and the Additional Solicitor General, that the desirability of the aforesaid direction in the judgment was considered by the Bench. I also fully appreciate that if the executive follows this rule strictly, a further protection from harassment of the judges by uncalled for and unjustified criminal prosecution shall be available. But in my view such a binding direction cannot be issued by this Court on the basis of the provisions of the Constitution and the Act.

10. Before proceeding further I would again state that having answered the question as to whether a Judge of the superior court can be removed by some authority whoever he or they may be, in the affirmative, it is not necessary to decide the further controversy as mentioned above. I would, therefore, be content merely by indicating some of the aspects which may be relevant for the issue, to be decided later in a case when it directly arises.

11. If the President is held to be the appropriate authority to grant the sanction without reference to the Parliament, he will be bound by the advice, he receives from the Council of Ministers. This will seriously jeopardise the independence of judiciary which is undoubtedly a basic feature of the Constitution. Realising the serious implication it was suggested on behalf of the Union of India that this Court may lay down suitable conditions by way of prior approval of the Chief Justice of India for launching a prosecution. I fully appreciate the concern of all of us including the Union of India for arriving at a satisfactory solution of the different problems which are arising, but if we start supplementing the law as it stands now, we will be encroaching upon the legislative field. To meet this objection it was contended that it is permissible for us to issue the suggested direction because the Chief Justice of India is not a stranger in the matter of appointment of a Judge of the High Court or the Supreme Court; rather he is very much in the picture. Reference was made to the provisions of Articles 124(2) and 217(1). The difficulty in accepting this argument is that the Governor of the State and the Chief Justice of the High Court are as much involved in the matter of appointment of a Judge of the High Court as the Chief Justice of India. We cannot, therefore, simplify the problem by referring to the aforesaid Articles. In my view the approval of Chief Justice of India can be introduced

A as a condition for prosecution only by the Parliament and not by this Court.

12. The question, then, is as to what is the protection available under the law as it exists today, to the independence of the judiciary of the country. The answer is in Section 6 of the Act, which by providing B for previous sanction of the authority empowered to remove the Judge, takes us to Article 124, Clauses (4) and (5). Since the Constitution itself has considered it adequate in the matter of dealing with serious accusations against the Judges by incorporating the provisions of Clauses (4) and (5) in Article 124, they must be treated to be appropriate and suitable; and should be resorted to in the matter of C prosecution also, in view of the Parliament enacting Section 6 of the Act in the language which attracts the constitutional provisions.

13. It has been argued that in view of the constitutional prohibition against any discussion in Parliament with respect to the conduct of a Judge of the superior court, except in connection with his removal D under Article 124, it will not be possible to obtain the necessary sanction as mentioned in Section 6 of the Act, except by initiating a motion for removal also simultaneously; and then, it will be a time consuming process. I will assume the contention to be correct, but for that reason I do not think that the correct interpretation of the legal position can be discorrected, as it does not lead to any illegal consequence, unten- E able position or an absurd result. It is true that the grant of sanction will be delayed until the accusation is examined according to the law enacted under Clause (5) of Article 124, but once that stage is over and a finding is recorded against the Judge, there should not be any hitch in combining the two matters—that is the removal and the grant of sanction—which are obviously intertwined. It has to be F remembered that the prosecution under Section 5(1) of the Act refers to collection by the Judge of disproportionately large amount of wealth during the period he has been in office. The two matters—the prosecution and removal—should not, therefore, be treated to be separate and unconnected with each other. Otherwise, there will be scope left for the Judge concerned to claim that although he may be G facing prosecution or may have been even convicted after trial, he still continues to be a Judge entitled to exercise his powers, as he has not been removed from his office. It was stated during the course of the hearing that actually such a situation has arisen in another country where a Judge although punished with imprisonment was insisting that he still continued in his office. I do not think that such a thing is H permissible in this country. The anomaly involved in such situations

can be satisfactorily resolved by combining the two matters and getting clearance from the Parliament. Before closing this chapter I would again repeat that this issue is not arising in the present case and will have to be considered and finally decided only when it directly arises. Since, however, opinions have been expressed, which I regret I do not find myself in a position to share, I have, with greatest respect to my learned brothers, taken the liberty to state some important considerations, which appear to be relevant to me.

14. Mr. Sibal next contended that as the appellant was not called upon to account for the property which was found in his possession, one of the essential ingredients under Section 5(1)(e) is not satisfied. There is no merit whatsoever in this point either. The section does not contemplate a notice to be served on the accused. If the prosecuting authority after making a suitable enquiry, by taking into account the relevant documents and questioning relevant persons, forms the opinion that the accused cannot satisfactorily account the accumulation of disproportionate wealth in his possession the section is attracted. The records clearly indicate that after duly taking all the appropriate steps it was stated that the assets found in the possession of the appellant in his own name and in the name of his wife and two sons, were disproportionate by a sum of over Rs.6 lacs to his known sources of income during the relevant period and which he "cannot satisfactorily account".

15. Since I do not find any merit in any of the points urged on behalf of the appellant this appeal is dismissed.

VERMA, J. I have perused the opinions of my learned brethren constituting the majority taking the view that the Prevention of Corruption Act applies. I am unable to subscribe to this view. My dissenting opinion is at best only academic. All the same I deem it fit to record the same with my reasons for taking a different view. It is indeed unfortunate that this question should at all arise for judicial determination. However, the question having arisen we are bound to give our opinion. In view of the significance of the point, I record my respectful dissent reassured by the observations of Hughes that 'unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect on public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. ..... It is better that their independence should be maintained and recognised than that

A unanimity should be secured through its sacrifice.' I would rather be a conscientious lone dissenter than a troubled conformist. It is in this spirit, in all humility, I record my dissent.

Can the Chief Justice of a High Court or any of its puisne Judges be prosecuted for an offence punishable under the Prevention of Cor-
B ruption Act, 1947 (hereinafter referred to as 'the Act')? This is the main question arising for decision in this appeal. The appellant, K. Veeraswami, a former Chief Justice of the Madras High Court filed an application under Section 482 of the Code of Criminal Procedure, 1973 (Criminal M.P. No. 265 of 1978) to quash the proceedings in C.C. No. 46 of 1977 in the Court of the Special Judge, Madras, initiated on a charge-sheet accusing him of the offence of criminal misconduct under
C Section 5(1)(e) punishable under Section 5(2) of the Act, as amended by the Amendment Act of 1964. The matter was heard by a full bench of the High Court which dismissed the application by order dated 27.4.1979 according to the majority opinion of Natarajan and Mohan, JJ. while Balasubrahmanyan, J. dissented. This appeal is by a certifi-
D cate granted by the High Court under Articles 132(1) and 134(1)(c) of the Constitution of India in view of the important question of law involved for decision.

The material facts are only a few. The appellant joined the Bar of Madras in the year 1941 and had a lucrative practice. In 1953 he was
E appointed as Assistant Government Pleader and in 1959, the Government Pleader at Madras. On 20.2.1960, he was elevated to the Bench of the Madras High Court being appointed as a permanent Judge of that Court. On 1.5.1969, he was appointed the Chief Justice of the Madras High Court, from which office he retired on 7.4.1976. On 24.2.1976, the Central Bureau of Investigation at Delhi registered a
F case against the appellant under the Act and on 28.2.1976, the First Information Report was lodged accusing the appellant of the offence of criminal misconduct under Section 5(1)(e) punishable under Section 5(2) of the Act. A charge-sheet dated 15.12.1977 was filed alleging that between 1.5.1969 and 24.2.1976, while the appellant was a public servant, he was in possession of pecuniary resources and property in
G his own name and in the names of his wife Smt. Eluthai Ammal and his two sons S/Shri V. Suresh and V. Bhaskar, which were disproportionate to the extent of Rs.6,41,416.36p. to his known sources of income during that period and that he cannot satisfactorily account for such disproportionate pecuniary resources and property. The charge-sheet also gave particulars on the basis of which the disproportion in
H assets was alleged.

The appellant filed a petition under Section 482 Cr. P.C. in the High Court for quashing the prosecution pending in the Court of Special Judge, Madras, on the above charge-sheet, with the result indicated above. Several arguments including the allegation of *mala fides* against the Central Government were advanced in the High Court on behalf of the appellant. It is, however, unnecessary to refer to all of them since at the hearing of the appeal before us, the appellant's case was confined only to the grounds stated hereafter and the ground of *mala fides* alleged in the High Court was expressly given up at the hearing before us by Shri Kapil Sibal, learned counsel for the appellant.

Shri Kapil Sibal, learned counsel for the appellant advanced two arguments only. His first contention is that the Judges of the High Courts and the Supreme Court are not within the purview of the Act, which is a special enactment applicable to public servants, in whose case prosecution can be launched after sanction granted under Section 6 of the Act, which is alien to the scheme envisaged for constitutional functionaries like Judges of the High Courts and Supreme Court. He argued that the special provisions in the Constitution of India relating to the Judges of the High Courts and the Supreme Court clearly indicate that they are not within the purview of the Act and that after their appointment in the manner prescribed, they are wholly immune from executive influence, their tenure being fixed by the Constitution, except for removal in the manner prescribed by Article 124(4). The other argument of Shri Sibal is that one of the essential ingredients of the offence of criminal misconduct, defined in Section 5(1)(e) of the Act, which is punishable under Section 5(2) thereof, is the inability of the accused to satisfactorily account for possession of disproportionate assets, which must be evident from the documents annexed to the charge-sheet to enable the Special Judge to take cognizance of the offence and this can be possible only if the accused is asked to give his account before filing of the charge-sheet. On this basis, it was argued that the procedure for grant of sanction under Section 6 of the Act which requires the sanctioning authority to see the explanation of the public servant before granting sanction, makes it feasible, which also shows its inapplicability to the superior Judges, in whose case there is no such service record or machinery provided. In a way, the second argument of Shri Sibal also is connected with his first argument. Shri Sibal argued that irrespective of the desirability of enacting a law providing for the prosecution and trial of superior Judges accused of the offence of criminal misconduct, the existing law contained in the Act is inapplicable to them. In reply, the learned Solicitor General,

A who was followed by the learned Additional Solicitor General, strenuously urged that the Judges of the High Courts and the Supreme Court also fall within the purview of the Act being 'public servants', which definition is wide enough to include 'every Judge'. They argued that there is no immunity to the superior Judges as in the case of the President and the Governor under Article 361 of the Constitution and, B therefore, there was no reason to exclude to superior Judges from the purview of the Act. The difficulty of sanction under Section 6 for the prosecution of superior Judges and the special provisions contained in clauses (4) and (5) of Article 124 read with Article 218, it was suggested, presented no difficulty since the President of India could be treated as the competent authority to grant sanction in accordance C with Section 6(1)(c) of the Act in the case of the High Court and Supreme Court Judges. The learned Solicitor General and the Additional Solicitor General also urged that adequate safeguards in the form of guidelines be suggested by this Court to prevent any abuse of executive authority or harassment to independent Judges. It was suggested that some machinery involving the Chief Justice of India for D grant of sanction for prosecution by the President of India, even for investigation into the offence, could be suggested by this Court for implicit compliance by the executive. It was argued that in this manner preservation of independence of the judiciary could be ensured while treating the superior Judges also within the purview of the Act to enable the prosecution and punishment of the corrupt ones.

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In view of the great significance of the point involved for decision which has arisen for the first time, the matter was heard at considerable length to illuminate the grey areas. At the hearing the consensus was that, this unfortunate controversy not envisaged earlier, having now arisen, may be, it is time that a clear provision be made within the F constitutional scheme to provide for a machinery to deal with the corrupt members of the superior judiciary, which itself is necessary for preservation of the independence of the judiciary. However, the difference is with regard to the adequacy of machinery enacted in the existing legislation for this purpose. In other words, the difference is about the law as it is and not about what it should be. For the purpose G of deciding this case, we have to see the law as it now exists.

The main point for consideration is whether the Chief Justices and puisne Judges of the High Courts are within the purview of the Act. It is implicit that if the answer is in the affirmative, then the Chief Justice and Judges of the Supreme Court also would fall within the H purview of the Act and so also the Comptroller and Auditor Gener?

and the Chief Election Commissioner, whose terms and conditions of office are the same as those of a Judge of the Supreme Court of India. If for any reason the Comptroller and Auditor General and the Chief Election Commissioner be considered outside the purview of the Act, that would itself indicate exclusion of certain similar constitutional functionaries from the purview of the Act. The real question, therefore, is: Whether these constitutional functionaries were intended to be included in the definition of 'public servant', as defined in the Act, and the existing enacted law is to that effect. The desirability of enacting such a law applicable to them, it was strenuously urged at the hearing, would be a matter primarily for the Parliament to consider in case the existing law as enacted does not apply to them. There is no material to indicate that corruption in judiciary was a mischief to be cured when the Prevention of Corruption Act was enacted. For this reason, the desirability now expressed of having such a law cannot be an aid to construction of the existing law to widen its ambit and bring these constitutional functionaries within it since such an exercise would be wholly impermissible in the garb of judicial craftmanship which cannot replace legislation in a vergin field. Judicial activism can supply the deficiencies and fill gaps in an already existing structure found deficient in some ways, but it must stop sort of building a new edifice where there is none. In a case like the present, the only answer can be a definite 'yes' or definite 'no', but not 'yes' with the addition of the legislative requirements in the enactment which are wholly absent and without which the answer cannot be 'yes'. In my considered view laying down guidelines to be implicitly obeyed, if they find no place in the existing enactment and to bring the superior Judges within the purview of the existing law on that basis, would amount to enacting a new law outside the scope of the existing law and not merely construing it by supplying the deficiencies to make it workable for achieving the object of its enactment. It was suggested at the hearing that the guidelines so suggested and supplied with the aid of which the existing law could be made applicable to superior Judges would be akin to the exercise performed by this Court while dealing with the Administrative Tribunals Act in *S.P. Sampath Kumar* v. *Union of India & Ors.*, [1987] 1 SCC 124. I am afraid this analogy is not apt there being no similarity in the two situations. The Administrative Tribunals Act as enacted was found to suffer from certain infirmities which would render it invalid and thereby failing to achieve the object of its enactment unless the deficiencies therein were supplied. It was to overcome this situation that this Court in *Sampath Kumar* suggested ways and means to overcome those infirmities to achieve the object of enactment of that legislation and thereby make the legislation workable as a

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valid piece of legislation. The situation here is entirely different. The Act is wholly workable in its existing form for the public servants within its purview and there is no impediment in its applicability to the large number of public servants who have been dealt with thereunder ever since its enactment. The only question which now arises is: Whether this piece of legislation also applies to certain constitutional functionaries such as the High Court Judges and if the answer is in the negative, the life of the enactment is not jeopardised in any manner. The only result is that in case such a legislation for superior Judges also is considered necessary at this point of time, the Parliament can perform its function by enacting suitable legislation, it being a virgin field of legislation. It is, therefore, difficult to appreciate such an argument when the question for our decision is only of construction of the legislation as enacted to determine the field of its operation.

Reference may now be made to certain statutory provisions on the basis of which the point has to be decided. The definition of 'public servant' given in the Act includes 'every Judge'. Sub-section (1) of Section 5 of the Act defines 'criminal misconduct' in its several clauses and Sub-section (2) thereof prescribes punishment for the offence of criminal misconduct. Section 5A deals with investigation into cases under this Act and Section 6 is the provision for previous sanction necessary for prosecution. Thus, no Court shall take cognizance of an offence punishable under Sub-section (2) of Section 5 of the Act except with the previous sanction of the competent authority envisaged by clauses (a), (b) and (c) of Sub-section (1) of Section 6 of the Act. It is for this reason that Section 6 assumes significance for the applicability of the Act since previous sanction for prosecution is necessary for taking cognizance of an offence under Section 5(2) of the Act and in situations where no such sanction can be envisaged, the Act cannot be made applicable. The relevant provisions of the Act as in existence after the 1964 amendment are quoted as under:

> "2. Interpretation.—For the purposes of this Act, "public servant" means a public servant as defined in Section 21 of the Indian Penal Code (45 of 1860).
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> xxx xxx xxx
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> 4. Presumption where public servant accepts gratification other than legal remuneration.—(1) Where in any trial of an offence punishable under Section 161 or Section 165 of the Indian Penal Code (45 of 1860) or of an offence

referred to in clause (a) or clause (b) of sub-section (1) of Section 5 of this Act punishable under sub-section (2) thereof, it is proved that an accused person has accepted or obtained, or as agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain that gratification or that valuable thing as the case may be as a motive or reward such as is mentioned in the said Section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under Section 165A of the Indian Penal Code (45 of 1860) or under clause (ii) or sub-section (3) of Section 5 of this Act, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed unless the contrary is proved that he gave or offered to give or attempted to give that gratification or that valuable thing as the case may be as a motive or reward such as is mentioned in Section 161 of the Indian Penal Code or, as the case may be, without consideration or for a consideration which he known to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections if the gratification or thing aforesaid is, in its opinion, so trivial that no inference of corruption may fairly be drawn.

5. Criminal misconduct.-(1) A public servant is said to commit the offence of criminal misconduct—

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in Section 161 of the Indian Penal Code (45 of 1860), or

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

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

(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage, or

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

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine:

Provided that the court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.

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5A. Investigation into cases under this Act.—(1) Notwithstanding anything contained in the Code of Crimi-

nal Procedure, 1898 (5 of 1898), no police officer below the rank,—

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;

(b) in the presidency-towns of Calcutta and Madras, of an Assistant Commissioner of Police;

(c) in the presidency-town of Bombay, of Superintendent of Police; and

(d) elsewhere, of a Deputy Superintendent of Police,

shall investigate any offence punishable under Section 161, Section 165 or Section 165A of the Indian Penal Code (45 of 1860) or under Section 5 of this Act without the order of a Presidency Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant:

Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Presidency Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant:

Provided further that an offence referred to in clause (e) of sub-section (1) of Section 5 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.

(2) If, from information received or otherwise, a police officer has reason to suspect the commission of an offence which he is empowered to investigate under sub-section (1) and considers that for the purpose of investigation or inquiry into such offence, it is necessary to inspect any bankers' books, then, notwithstanding anything contained in any law for the time being in force, he may inspect any bankers' books in so far as they relate to the accounts of the person suspected to have committed that offence or of any other person suspected to be holding money on

behalf of such person, and take or cause to be taken certified copies of the relevant entries therefrom, and the bank concerned shall be bound to assist the police officer in the exercise of his powers under this sub-section:

Provided that no power under this sub-section in relation to the accounts of any person shall be exercised by a police officer below the rank of Superintendent of Police, unless he is specially authorised in this behalf by a police officer of or above the rank of a Superintendent of Police.

Explanation. In this sub-section, the expressions "bank" and "bankers' books" shall have the meanings assigned to them in the Bankers' Books Evidence Act, 1891 (18 of 1891).

6. Previous sanction necessary for prosecution.—(1) No court shall take cognizance of an offence punishable under Section 161 or Section 164 or Section 165 of the Indian Penal Code (45 of 1860), or under sub-section (2) or sub-section (3A) 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 Union and is not removable from his office save by or with the sanction of the Central Government, of the Central Government;

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

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

(2) Where for any reason whatsoever any doubt arises whether the previous sanction as required under sub-section (1) should be given by the Central or State Government or any other authority, such sanction shall be given by that Government or authority which would have been com-

petent to remove the public servant from his office at the time when the offence was alleged to have been committed." A

The relevant provisions of the Constitution of India are as under:

"121. Restriction on discussion in Parliament.—No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided. B

xxx xxx xxx C

124. Establishment and constitution of Supreme Court.—(1) .....

xxx xxx xxx D

(4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. E

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4). F

xxx xxx xxx

148. Comptroller and Auditor-General of India.—(1) There shall be a Comptroller and Auditor-General of India who shall be appointed by the President by warrant under his hand and seal and shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court. G

H

xxx xxx xxx

A 211. Restriction on discussion in the Legislature.—No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.

xxx xxx xxx

B 218. Application of certain provisions relating to Supreme Court to High Courts.—The provisions of clauses (4) and (5) of Article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of reference to the High Court for references to the Supreme Court.

C xxx xxx xxx

324. Superintendence, direction and control of elections to be vested in an Election Commission.—(1) .....

D xxx xxx xxx

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of E the Election Commissions and the Regional Commissioners shall be such as the President may by rule determine:

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and F the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed G from office except on the recommendation of the Chief Election Commissioner.

xxx xxx xxx

361. Protection of President and Governors and H Rajpramukhs.—(1) The President, or the Governor or

Rajpramukh of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties: A

Provided that the couduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under Article 61: B

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State. C

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Government of a State, in any court during his term of office. D

(3) No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any court during his term of office. E

(4) No civil proceedings in which relief is claimed against the President, or the Governor of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor of such State, until F the expiration of two months next after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefore, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which G he claims."

It may also be mentioned that the Judges (Inquiry) Act, 1968 has been enacted by the Parliament to regulate the procedure for the investigation and proof of the misbehaviour or incapacity of a Judge of the Supreme Court or of a High Court and for the presentation of an H

address by Parliament to the President and for matters connected therewith, as contemplated by Articles 124(5) of the Constitution of India. It is in the background of these provisions that the point arising for our determination has to be decided.

I may also at this stage refer to the recommendations made by the Santhanam Committee which preceded the 1964 amendment in the Act. It is as a result of the 1964 amendment that clause (e) was inserted in Sub-section (1) of Section 5 of the Act to make the possession of disproportionate assets by a public servant by itself a substantive offence of criminal misconduct, while prior to this amendment such a provision was merely a rule of evidence contained in Sub-section (3) of Section 5 as initially enacted which was then available only to prove the offence of criminal misconduct defined in clauses (a) to (d) of Sub-section (1) of Section 5. In the Report of the Santhanam Committee, certain portions relating to the judiciary which may throw light on the question before us are extracted as under:

"SECTION 12

MISCELLANEOUS

xxx xxx xxx

12.2 *We did not consider the judiciary to be included in our terms of reference.* Except the Supreme Court and some subordinate courts in the Union Territories, the Government of India have no direct relation with the administration of the judiciary except that appointment of High Court Judges is made by the President. It has to be borne in mind, however, that all courts in india are common to the Centre and the States and can entertain and decide cases relating to exclusively Central subjects. Therefore, *integrity of the judiciary is of paramount importance even for the proper functioning of the Central Government.*

Though we did not make any direct inquiries, *we were informed by responsible persons* including Vigilance and Special Police Establishment Officers *that corruption exists in the lower ranks of the judiciary all over India and in some places it has spread to the higher ranks also. We were deeply distressed at this information. We, therefore, suggest that the Chief Justice of India in consultation with the Chief Justices*

of the High Courts should arrange for a thorough inquiry into the incidence of corruption among the judiciary, and evolve, in consultation with the Central and State Governments, proper measures to prevent and eliminate it. Perhaps the setting up of vigilance organisation under the direct control of the Chief Justice of every High Court coordinated by a Central Vigilance Officer under the Chief Justice of India may prove to be an appropriate method.

xxx xxx xxx

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

xxx xxx xxx

117. The Chief Justice of India in consultation with the Chief Justices of the High Courts should arrange for a thorough inquiry into the incidence of corruption, among the judiciary, and evolve, in consultation with the Central and State Governments, proper measures to prevent and eliminate it. Perhaps the setting up of vigilance organisations under the direct control of the Chief Justice of every High Court coordinated by a Central Vigilance Officer under the Chief Justice of India may prove to be an appropriate method.

(Para. 12.2)

xxx xxx xxx

REPORT ON THE GOVERNMENT SERVANTS' CONDUCT RULES

xxx xxx xxx

Rule 15

15. *The Committee attaches great importance to the changes recommended in the existing Rule 15 relating to the acquisition and disposal of property by Government servants.* On the one hand, *these reports serve as a check against corruption* and on the other, it may be irritating to honest Government servants to be subject to restrictions

not imposed on other citizens. *It is also necessary to ensure that the reports are such as to serve the purpose for which they are obtained.* Further, no reports need be obtained from those Government servants who have no opportunity to enrich themselves by unlawful means.

16. The most important change made by the Committee in this rule is the replacement of the annual immovable property return by a complete periodical statement of assets and liabilities. In the circumstances now obtaining in the country, the immovable property return has ceased to have much significance. *The Committee considers that in order to enable Government to ascertain whether any Government servant is in possession of assets disproportionate to his known sources of income or whether he is running into debt, it is necessary that the Government servant should furnish a complete statement of his assets and liabilities periodically.*

17. The Committee considers that only the more important items of movable property should be reported specifically and that it would be sufficient if Government servants report the total value of other movable property except articles of daily use like clothes, utensils, crockery, books, etc. But it is essential that the value of movable property should be stated in the statement of assets and liabilities.

18. The Committee considered the argument that there was no need for the submission of periodical returns of assets and liabilities and that it would be sufficient if such a statement is given once either on entry or after promulgation of these rules and that thereafter it should be enough if the Government servant is required to report all transactions in immovable property and all transactions in movable property exceeding a specified value. The Committee decided to recommend that Government servants should be required to submit a periodical statement of assets and liabilities, as it would not be reasonable to require the Government servants to report all the innumerable small transactions taking place continually. But as these small transactions may cumulatively be sizable and have a big effect on his financial position, the purpose will

be served only by obtaining a periodical balance-sheet. The Committee, however, considers that the reports need not be frequent and that it may perhaps be sufficient if they are submitted once in five years.

19. Another point that was considered by the Committee was whether jewellery should be included within the definition of movable property. The Committee recognises that inclusion of jewellery may be considered to be an unnecessary intrusion into the private affairs of a Government servant. But jewellery constitute important assets and if excluded from the definition of movable property, the balance-sheet submitted by the Government servant may not set out the true picture."

(emphasis supplied)

In view of the decision by a Constitution Bench in *R.S. Nayak* v. *A.R. Antulay*, [1984] 2 SCC 183 the correctness of which was not disputed before us, we have to assume for the purpose of this case that no sanction under Section 6 of the Act was required for prosecution of the appellant since cognizance of the offence was taken after the appellant ceased to hold the office of Chief Justice on 7.4.1976 on his retirement. It was, however, contended that for the purpose of deciding the question of applicability of the Act to the appellant as a Judge or Chief Justice of the High Court, the office with reference to which the offence under the Act is alleged to have been committed, it is necessary to consider the feasibility of grant of sanction under Section 6 of the Act for prosecution of a person holding such an office. In other words, the argument is that notwithstanding the fact that no sanction was required for prosecution of the appellant after his retirement, the need and feasibility of grant of the sanction under Section 6 of the Act if he was prosecuted before his retirement is the test to determine the applicability of the Act to a person holding, the office of a Judge or Chief Justice of a High Court. It is argued that if the grant of sanction under Section 6 of the Act for prosecution of the incumbent for the offence is not feasible or envisaged, the clear indication is that holder of such office does not fall within the purview of the Act. The question of grant of sanction under Section 6 for the prosecution of a Judge or Chief Justice of a High Court for an offence punishable under Section 5(2) of the Act is, therefore, of considerable importance to decide the main question in this appeal.

/Clauses (a), (b) and (c) in Sub-section (1) of Section 6 exhaus-

A tively provide for the competent authority to grant sanction for prosecution in case of all the public servants falling within the purview of the Act. Admittedly, such previous sanction is a condition precedent for taking cognizance of an offence punishable under the Act; of a public servant who is prosecuted during his continuance in the office. It follows that the public servant falling within the purview of the Act
B must invariably fall within one of the three clauses in Sub-section (1) of Section 6. It follows that the holder of an office, even though a 'public servant' according to the definition in the Act, who does not fall within any of the clauses (a), (b) or (c) of Sub-section (1) of Section 6 must be held to be outside the purview of the Act since this special enactment was not enacted to cover that category of public servants inspite of the
C wide definition of 'public servant' in the Act. This is the only manner in which these provisions of the Act can be harmonized and given full effect. The scheme of the Act is that a public servant who commits the offence of criminal misconduct, as defined in the several clauses of Sub-section (1) of Section 5, can be punished in accordance with Sub-section (2) of Section 5, after investigation of the offence in the
D manner prescribed and with the previous sanction of the competent authority obtained under Section 6 of the Act, in a trial conducted according to the prescribed procedure. The grant of previous sanction under Section 6 being a condition precedent for the prosecution of a public servant covered by the Act, it must follow that the holder of an office who may be a public servant according to the wide definition of
E the expression in the Act but whose category for the grant of sanction for prosecution is not envisaged by Section 6 of the Act, is outside the purview of the Act, not intended to be covered by the Act. This is the only manner in which a harmonious constitution of the provisions of the Act can be made for the purpose of achieving the object of that enactment. This appears to be the obvious conclusion even for a case
F like the present where no such sanction for prosecution is necessary on the view taken in *Antulay*, and not challenged before us, that the sanction for prosecution under Section 6 is not necessary when cognizance of the offence is taken after the accused has ceased to hold the office in question.

G In this context, it is useful to recall the analysis of Section 6 made in *R.S. Nayak* v. *A.R. Antulay*, [1984] 2 SCC 183, which is as under:

> "*Offences prescribed in* Sections 161, 164 and 165 IPC and *Section 5 of the 1947 Act have an intimate and inseparable relation with the office of a public servant.* A public servant
H occupies office which renders him a public servant and

occupying the office carries with it the powers conferred on the office. Power generally is not conferred on an individual person. In a society governed by rule of law power is conferred on office or acquired by statutory status and the individual occupying the office or on whom status is conferred enjoys the power of office or power flowing from the status. The holder of the office alone would have opportunity to abuse or misuse the office. These sections codify a well-recognised truism that power has the tendency to corrupt. *It is the holding of the office which gives an opportunity to use it for corrupt motives. Therefore, the corrupt conduct is directly attributable and flows from the power conferred on the office. The interrelation and interdependence between individual and the office he holds is substantial and not severable. Each of the three clauses of subsection (1) of Section 6 uses the expression 'office' and the power to grant sanction is conferred on the authority competent to remove the public servant from his office* and Section 6 requires a sanction before taking cognizance of offences committed by public servant. *The offence would be committed by the public servant by misusing or abusing the power of office and it is from that office, the authority must be competent to remove him so as to be entitled to grant sanction.* The removal would bring about cessation of interrelation between the office and abuse by the holder of the office. The link between power with opportunity to abuse and the holder of office would be severed by removal from office. Therefore, when a public servant is accused of an offence of taking gratification other then legal remuneration for doing or forebearing to do an official act (Section 161 (IPC) or as a public servant abets offences punishable under Sections 161 and 163 (Section 164 IPC) or as public servant obtains a valuable thing without consideration from person concerned in any proceeding or business transacted by such public servant (Section 165 IPC) or commits criminal misconduct as defined in Section 5 of the 1947 Act, *it is implicit in the various offences that the public servant has misused or abused the power of office held by him as public servant.* The expression 'office' in the three sub-clauses of Section 6(1) would clearly denote that office which the public servant misused or abused for corrupt motives for which he is to be prosecuted and in respect of which a sanction to prosecute him is necessary by the competent authority

entitled to remove him from that office which he has abused. *This interrelation between the office and its abuse if severed would render Section 6 devoid of any meaning. And this interrelation clearly provides a clue to the understanding of the provision in Section 6 providing for sanction by a competent authority who would be able to judge the action of the public servant before removing the bar, by granting sanction,* to the taking of the cognizance of offences by the court against the public servant. Therefore, it unquestionably follows that the sanction to prosecute can be given by an authority competent to remove the public servant from the office which he has misused or abused *because that authority alone would be able to know whether there has been a misuse or abuse of the office by the public servant and not some rank outsider.* By a catena of decisions, it has been held that *the authority entitled to grant sanction must apply its mind to the facts of the case, evidence collected and other incidental facts before according sanction. A grant of sanction is not an idle formality but a solemn and sacrosanct act which removes the umbrella of protection of Government servants against frivolous prosecutions* and the aforesaid requirements must therefore, be strictly complied with before any prosecution could be launched against public servants. (See *Mohd. Iqbal Ahmad* v. *State of A.P.*, [1979] 2 SCR 1007: [1979] 4 SCC 172: [1979] SCC (Cri.) 926: AIR 1979 SC 677). The Legislature advisedly conferred power on the authority competent to remove the public servant from the office to grant sanction for the obvious reason that *that authority alone would be able, when facts and evidence are placed before him, to judge whether a serious offence is committed or the prosecution is either frivolous or speculative.* That authority alone would be competent to judge whether on the facts alleged, there has been an abuse or misuse of office held by the public servant. That authority would be in a position to know what was the power conferred on the office which the public servant holds, how that power could be abused for corrupt motive and whether *prima facie* it has been so done. *That competent authority alone would know the nature and functions discharged by the public servant holding the office and whether the same has been abused or misused. It is the vertical hierarchy between the authority competent to remove the public servant from that office and the nature of the office held by the*

public servant against whom sanction is sought which would indicate a hierarchy and which would therefore, permit inference of knowledge about the functions and duties of the office and its misuse or abuse by the public servant. That is why the Legislature clearly provided that that authority alone would be competent to grant sanction which is entitled to remove the public servant against whom sanction is sought from the office."

(emphasis supplied)
(para 23, pp. 204-206)

It is significant from the above extract in *Antulay* that for the purpose of grant of sanction under Section 6 of the Act to prosecute the public servant, a 'vertical hierarchy between the authority competent to remove the public servant from that office and the nature of the office held by the public servant against whom sanction is sought' is clearly envisaged and, therefore, the authority competent to remove the public servant from that office should be vertically superior in the hierarchy in which the office exists having the competence to judge the action of the public servant before removing the bar by granting sanction. In other words, Section 6 applies only in cases where there is a vertical hierarchy of public offices and the public servant against whom sanction is sought is under the sanctioning authority in that hierarchy. It would follow that where the office held by the public servant is not a part of a vertical hierarchy in which there is an authority above the public servant in that hierarchy, by the very scheme of Section 6 it can have no application and holder of such office who does not have any vertical superior above him in the absence of any such hierarchy cannot be within the ambit of the enactment, the Act not being envisaged or enacted for holder of such public office. The decisions of this Court have unequivocally held that a Judge or Chief Justice of a High Court is a constitutional functionary, even though he holds a public office and in that sense, may be included in the wide definition of 'public servant'. It is for this reason that the learned Solicitor General did not place reliance on clauses (a) and (b) of Sub-section (1) of Section 6 in the present case but relied on clause (c) thereof, to contend that sanction thereunder can be obtained for the prosecution of a Judge or Chief Justice of a High Court since the holder of such an office can be removed from office by the President in accordance with clause (4) of Article 124 of the Constitution. This is the only argument for this purpose and, therefore, its tenability has to be tested.

Section 6(1)(c) provides for previous sanction 'in the case of any

other person, of the authority competent to remove him from his office'. Clauses (4) and (5) of Article 124 which apply to a Judge of the Supreme Court are made applicable to Judges of the High Courts by virtue of Article 218. These may be re-quoted here for ready-reference:

> "124. Establishment and constitution of Supreme Court.—(1) ...
>
> xxx xxx xxx
>
> (4) A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.
>
> (5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge under clause (4).
>
> xxx xxx xxx
>
> 218. Application of certain provisions relating to Supreme Court to High Courts.- The provisions of clauses (4) and (5) of Article 124 shall apply in relation to a High Court as they apply in relation to the Supreme Court with the substitution of references to the High Court for references to the Supreme Court."

According to Article 124(4), a Judge can be removed from his office by an order of the President passed after an address by each House of Parliament supported by the prescribed majority on the ground of proved misbehaviour or incapacity. Since the order of removal in such a case is to be made by the President, the learned Solicitor General contended that the competent authority to remove such a Judge as required by Section 6(1)(c) is the President and it is in this manner that Section 6(1)(c) is attracted. The question is whether this argument is tenable.

There are several fallacies in this argument. Section 6(1)(c) speaks of 'authority competent to remove' which plainly indicates the substantive competence of the authority to remove, not merely the procedural or formal part of it. In other words, the authority itself should be competent to remove or the one to decide the question of removal and not one which merely obeys or implements the decision of some other authority. This conclusion is reinforced by the above extract from the *Antulay* decision, which speaks of the vertical hierarchy between the authority competent to remove the public servant and the nature of the office held by the public servant indicating that the removing authority should have the competence to take a decision on the material placed before it for the purpose of deciding whether the public servant against whom sanction is sought, has been *prima facie* guilty of abuse of his office so that there is occasion to bring about cessation of interrelation between the office and abuse by the holder of the office by his removal therefrom. Obviously, the competent sanctioning authority envisaged thereby is a vertical superior in the hierarchy having some power of superintendence over the functioning of the public servant. Where no such relationship exists in the absence of any vertical hierarchy and the holder of the public office is a constitutional functionary not subject to power of superintendence of any superior, Section 6 can have no application by virtue of the scheme engrafted therein. The expression 'authority competent to remove' under Section 6(1)(c), unless construed in this manner, will foul with the construction made on Section 6 and its scheme in the *Antulay* decision.

In S.P. Gupta & Ors. etc. etc. v. *Union of India & Ors. etc. etc.*, [1982] 2 SCR 365 it was clearly pointed out that a High Court Judge is a high constitutional functionary and while dealing with the question of the machinery having legal sanction to deal with a High Court Judge against whom allegations of lack of intergrity and corruption were made, it was stated as under:

> "..... Baldly put, the question is: Should an Additional Judge whose misbehaviour or lack of integrity has come to the fore he continued as an Additional Judge or confirmed as a Permanent Judge? The answer at the first impulse and rightly would be in the negative but the question requires deeper consideration. If the misbehaviour or lack of integrity is glaringly self-evident the question of his continuance obviously cannot arise and in all probabilities will not engage the attention of the appointing authority,

for, the concerned Judge in such a situation would himself resign but when we talk of misbehaviour or lack of integrity on the part of an Additional Judge having come to the fore, by and large the instances are of suspected misbehaviour and/or reported lack of integrity *albeit* based on opinions expressed in responsible and respectable quarters and the serious question that arises is whether in such cases the concerned Additional Judge should be dropped merely on opinion material or concrete facts and material in regard to allegations of misbehaviour and/or lack of integrity should be insisted upon? In my view since the question relates to the continuance of a high constitutional functionary like the Additional Judge of High Court it would be jeopardising his security and judicial independence if action is taken on the basis of merely opinion material. *Moreover, no machinery having legal sanction behind it for holding an inquiry—disciplinary or otherwise against the concerned Judge on allegations of misbehaviour and or lack of integrity obtains in the Constitution or any law made by the Parliament, save and except the regular process of removal indicated in Art. 124(4) and (5) read with Art. 218 and the Judges (Inquiry) Act, 1968.* Therefore, the important question that arises in such cases of suspected misbehaviour and/or reported lack of integrity is who will decide and how whether the concerned Judge has in fact indulged in any misbehaviour or act of corruption? In the absence of satisfactory machinery possessing legal sanction to reach a positive conclusion on the alleged misbehaviour or an act of corruption the decision to drop him shall have been arrived at merely on the basis of opinions, reports, rumours or gossip and apart from being unfair and unjust to him *such a course will amount to striking at the root of judicial independence. The other alternative, namely, to continue him as an Additional Judge for another term or to make him permanent if a vacancy is available and then take action for his removal under the regular process indicated in Art. 124(4) and (5) read with Art. 218 and Judges (Inquiry) Act, 1968 may sound absurd but must be held to be inevitable if judicial independence, a cardinal faith of our Constitution, is to be preserved and safeguarded. Not to have a corrupt Judge or a Judge who has misbehaved is unquestionably in public interest but at the same time preserving judicial independence is of the highest public interest. It is a question of*

choosing the lesser evil and in inevitable course has to be adopted not for the protection of the corrupt or dishonest judge but for protecting several other honest, conscientious and hard-working Judges by preserving their independence; it is a price which the Society has to pay to avoid the greater evil that will ensue if judicial independence is sacrificed. Considering the question from the angle of public interest therefore, I am clearly of the view that while considering the question of continuance of the sitting Additional Judges on the expiry of their initial term either as Additional Judges or as Permanent Judges the test of suitability contemplated within the consultative process under Art. 217(1) should not be invoked—at least until such time as proper machinery possessing legal sanction is provided for enabling a proper inquiry against an alleged errant Judge less cumbersome than the near impeachment process contemplated by Art. 124(4) and (5) of the Constitution."

(Tulzapurkar, J.) (pp. 920-21)

"..... *As the law now stands it is not open to any single individual, whether it is the President or the Chief Justice of India or anybody else to take cognizance of any allegations of misbehaviour or of incapacity of a Judge and to take any legal action on their basis* under the Judges (Inquiry) Act, 1968. One hundred Members of the Lok Sabha or fifty Members of the Rajya Sabha alone can initiate any action on such allegations. *Naturally, all others are excluded from taking cognizance of them and acting on them.* ....."

(Venkataramiah, J.) (pp. 1338-39)

(emphasis supplied)

Even though the above observations were made in the context of continuance in office of Additional Judge of the High Court and the transfer of Judges to another High Court, yet the nature of office of a High Court Judge and the only legal sanction available under the existing law to deal with them even in the event of allegations of corruption was clearly spelt out. It was pointed out that ordinarily such a person faced with cogent material against him would resign, but in case he does not, the only remedy available is his removal from office in accordance with clauses (4) and (5) of Article 124 read with Article

218 of the Constitution till a suitable provision with legal sanction is made. It was also pointed out that the object served in this manner was the greater public interest to preserve independence of judiciary and not to protect the corrupt Judge who was an exception. The scheme of the existing law to deal with such situations was considered at length and it was also held that even the power to transfer under Article 222 of the Constitution to another High Court could not be exercised for these reasons.

In this context, clause (5) of Article 124 is also of considerable significance. The construction made of the provisions of the Act must also fit in with the scheme of clauses (4) and (5) of Article 124 read with Article 218 of the Constitution in order to present a harmonious scheme. Clause (5) of Article 124 enables enactment of a special law by the Parliament to regulate the procedure for presentation of an address and for the 'investigation' and 'proof' of the 'misbehaviour' or incapacity of a Judge under clause (4). It is in exercise of this power that the Parliament has enacted the Judges (Inquiry) Act, 1968. It is significant that clause (5) of Article 124 covers the field of 'investigation' and 'proof' of the 'misbehaviour' of a Judge. There can be no doubt that the expression 'misbehaviour' is of wide import and includes within its ambit criminal misconduct as defined in Sub-section (1) of Section 5 of the Act as also lesser misconduct of a Judge falling short of criminal misconduct. The special law envisaged by Article 124(5) for dealing with the misbehaviour of a Judge covers the field of 'investigation' and 'proof' of the 'misbehaviour' and the only punishment provided is by Article 124(4) of removal from office. There is no escape from the conclusion that Article 124(5) is wide enough to include within its ambit every conduct of a Judge amounting to misbehaviour including criminal misconduct and prescribes the procedure for investigation and proof thereof. Thus, even for the procedure for investigation into any misbehaviour of a Judge as well as its proof, a law enacted by the Parliament under Article 124(5) is envisaged in the constitutional scheme. Such a law in the form of the Judges (Inquiry) Act, 1968 and the rules framed thereunder has been enacted. These provisions were made in the Constitution and the law thereunder enacted when the Prevention of Corruption Act, 1947 was in the Statute Book. The prior enactment and existence of the Prevention of Corruption Act, 1947 at the time then clause (4) and (5) of Article 124 of the Constitution were framed, does indicate the constitutional scheme that a separate parliamentary law to deal with the investigation and proof of misbehaviour of a Judge was clearly contemplated by providing a special machinery for this category of constitutional functionaries

notwithstanding the general law available and applicable to the public servants in general, which included the Prevention of Corruption Act, 1947. If special provisions in the form of clauses (4) and (5) of Article 124 and Article 218 of the Constitution and the special enactment by the Parliament under Article 124(5) were provided in the constitutional scheme for Judges of the High Courts and the Supreme Court, there can be no valid reason to hold that they are governed by the general provisions in addition to these special provisions enacted only for them. The need for these special provisions is a clear pointer in the direction of inapplicability to them of the general provisions applicable to the public servants holding other public offices, not as constitutional functionaries. Construction of Section 6(1)(c) of the Act as suggested by the learned Solicitor General by treating the President as the competent authority to remove a High Court Judge would conflict with the provisions enacted in clauses (4) and (5) of Article 124 read with Article 218 of the Constitution. Such a construction has undoubtedly to be avoided. This is more so, since the rejection of such an argument would not in any manner jeopardise the provisions of the Act as it would result only in the failure of the attempt to bring the constitutional functionaries such as Judges of the High Courts and the Supreme Court within the purview of that Act, while the Act would continue to apply to the public servants in general who fall within the scheme of Section 6 of the Act for the purpose of grant of previous sanction for prosecution which is a condition precedent for cognizance of an offence punishable under that Act.

It can also not be overlooked that the Santhanam Committee Report did not consider the judiciary within its purview and it merely made certain recommendations to devise a machinery involving the Chief Justice of India to deal with the cases of errant Judges. The 1964 amendment made in the Act pursuant to the recommendations of the Santhanam Committee did not make any amendment in the Act to indicate that Judges of the High Courts and the Supreme Court were also brought within the purview of the Act. It was thereafter that the Judges (Inquiry) Act, 1963 and the rules framed thereunder were enacted to provide for the investigation and proof of allegations of misbehaviour of a Judge in accordance with Article 124(5) of the Constitution. The decision in *S.P. Gupta* was rendered much later and while dealing with the situations arising out of allegations of misbehaviour including corruption against High Court Judges, it was held that the only machinery with legal sanction in existence is that available under clauses (4) and (5) of Article 124 of the Constitution. It is reasonable to assume that while rendering the decision in *S.P. Gupta,*

A wherein the question of dealing with some Judges against whom allegations of lack of integrity and corruption also were made and the question was of the machinery available for dealing with them, the learned Judges could not have been unaware of the provisions of the Act while taking the view that the only legal machinery available under the existing law is that in accordance with clauses (4) and (5) of B Article 124 of the Constitution. These are strong reasons to hold that Section 6(1)(c) of the Act is inappliable to a Judge of a High Court or the Supreme Court and for that reason such constitutional functionaries do not fall within the purview of the Act.

An additional reason indicating inapplicability of the Act is the C practical difficulty in applying criminal misconduct, defined in clause (e) of Sub-section (1) of Section 5 of the Act, to a Judge of a High Court or the Supreme Court. The history of insertion of this clause by the 1964 amendment to the Act is well-known. What was earlier a rule of evidence in Sub-section (3) of Section 5 of the Act, was made a substantive offence of criminal misconduct by inserting clause (e) in D Sub-section (1) of Section 5 by this amendment. Apart from the argument of the learned counsel for the appellant that the inability to satisfactorily account for possession of disproportionate assets is an ingredient of the offence in clause (e), practical requirement of this clause is a further pointer to indicate inapplicability thereof to a Judge of a High Court or the Supreme Court. The fact remains that while E according sanction to prosecute under Section 6 of the Act, the competent authority has to satisfy itself about the public servant's inability to satisfactorily account for possession of disproportionate assets. As held in *Antulay*, the competent authority before granting sanction has to apply its mind and be satisfied about the existence of a *prima facie* case for prosecution of the public servant on the basis of the material F placed before it. In order to form an objective opinion, the competent authority must undoubtedly have before it the version of the public servant on the basis of which the conclusion can be reached whether it amounts to satisfactory account or not. It is well-known and is also clear from the Report of the Santhanam Committee that the rules applicable to the public servants in general regulating their conduct G require them to furnish periodical information of their assets which form a part of their service record. The recommendations of the Santhanam Committee after which the 1964 amendment inserting clause (e) in Sub-section (1) of Section 5 was made, suggest some amendment to the rules governing the conduct of public servants for giving periodical information of all their assets. Prescribing the sub-H stantive offence by insertion of clause (e) as a part of the same scheme

of amendment also suggests the manner in which this requirement of the offence of inability to satisfactorily account can be examined by the competent authority while granting sanction to prosecute the public servant. These words in clause (e) have to be given some meaning which would place the burden on the prosecution, howsoever light, to make out a *prima facie* case for obtaining sanction of the competent authority under Section 6 of the Act and this can be done only if it is read as a part of the scheme under which the public servant is required to furnish particulars of his assets with reference to which the disproportion and his inability to satisfactorily account can be inferred. This requirement can be easily satisfied in the case of public servants governed by conduct rules requiring them to furnish periodical returns of their assets and to intimate the superior in the hierarchy of acquisition of every material assets, so that his service record at all times contains particulars of his known assets. In the case of such public servants whenever sanction to prosecute is sought under Section 6 of the Act, the competent authority can form the requisite opinion on the basis of the available material including the service record of the public servant to come to the conclusion whether the offence under clause (e) of possession of disproportionate assets which the public servant cannot satisfactorily account is made out *prima facie*. In the case of Judges of the High Courts and the Supreme Court, there is no such requirement under any provision of furnishing particulars of their assets so as to provide a record thereof with reference to which such an opinion can be formed and there is no vertical superior with legal authority enabling obtaining of information from the concerned Judge. It does appear that this too is a pointer in the direction that even after the 1964 amendment of the Act following the Report of the Santhanam Committee when clause (e) was inserted in Sub-section (1) of Section 5 of the Act, the Legislature did not intend to include Judges of the High Courts and the Supreme Court within the purview of the enactment.

If the Act is applicable to Judges of the High Courts and the Supreme Court, it is obvious that the same must apply also to the Chief Justice of India, the Comptroller and Auditor General and the Chief Election Commissioner. Incongruous results would follow in such an event, even assuming that the guidelines suggested by the learned Solicitor General, are deemed to be incorporated in the Act by implication while dealing with persons holding these offices. Apart from the legal permissibility of implying these guidelines in the Act, there are obvious practical difficulties which cannot be overcome. In the proposed guidelines, it was suggested that the involvement of the Chief Justice of India invariably should be read even for commencing the

A investigation into the offence and the President, while granting the sanction under Section 6(1)(c), would also act on the advice of the Chief Justice of India. Assuming that it is permissible to do so in the absence of any such provision in the Act, the problem which stares us in the face is, what is to be done where such action is contemplated against the Chief Justice of India himself. Any provision which cannot B apply to the Chief Justice of India, cannot obviously apply to the Judges of the Supreme Court, or for that matter even to the High Court Judges, since the Chief Justice of India is not a vertical superior of any of them, there being no such vertical hierarchy and the Chief Justice of India having no power of superintendence even over the High Court Judges, much less the Supreme Court Judges. The incum- C bent of the office of Chief Justice of India exercises only moral authority over his colleagues in the Supreme Court and the High Court Judges, which has no legal sanction behind it making it justiciable. In the case of the Comptroller and Auditor General and the Chief Election Commissioner, the situation would be more piquant. Obviously, the Chief Justice of India cannot be involved in the process relating to D them and there is none else to fill that role in that situation. The Constitution, while providing that their position would be akin to that of a Judge of the Supreme Court, could not have intended to place them on a pedestal higher than that of a Supreme Court Judge. The infirmity of this argument advanced by the learned Solicitor General invoking the aid of certain implied guidelines involving the Chief E Justice of India in the process of contemplated action under the Act against a Judge of the High Court or the Supreme Court, leaves more questions unanswered that it answers. That apart, if the Act was intended to apply to these constitutional functionaries, it could not have been enacted leaving such gaping holes which are incapable of being plugged to present a comprehensive scheme for this purpose.

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It was also suggested at the hearing that the absence of need of sanction for prosecution under Section 6 of the Act after the public servant ceases to hold office as held in *Antulay,* suggests answer to the question of construction posed in this case. It does not appear to be so. The need for sanction under Section 6 for prosecution of the holder of G a public office indicates the ambit and scope of the enactment for deciding whether the holder of a public office falls within the purview of the enactment. No doubt, as held in *Antulay,* no sanction for prosecution under Section 6 is required after the public servant ceases to hold office, but it does not imply that every holder of a public office after ceasing to hold that office is within the purview of the enactment, H even though during the tenure in office, only those public servants are

within its ambit in whose case sanction under Section 6 must be obtained. The ambit of the enactment is to be determined on the basis of the public office held by the public servant, which office is alleged to have been abused during the tenure for committing the offence of criminal misconduct under the Act and it is not the fact of continuance in that office or ceasing to hold it which decides the ambit of the enactment. In other words, if the holder of a public office during his tenure in office cannot be prosecuted without sanction under Section 6, then, as held in *Antulay*, no sanction for his prosecution after ceasing to hold the office may be necessary, but his prosecution is made because while in office he could be prosecuted with the previous sanction under Section 6. Conversely, if the holder of a public office while continuing in that office could not be prosecuted under this Act on account of inapplicability of Section 6 and, therefore, the non-feasibility of previous sanction for prosecution under Section 6, then on his ceasing to hold the office, he is not brought within the purview of the Act merely because *Antulay* decides that no sanction for prosecution under Section 6 is needed after the holder of a public office ceases to hold that office. It is for the purpose of construing the provisions of the enactment and determining the scope and ambit thereof and for deciding whether the holder of a public office comes within the purview of the enactment that the feasibility of previous sanction for prosecution and applicability of Section 6 of the Act is important. In short, it is for the purpose of construction of the provisions of the enactment and determining its scope that Section 6 which prescribes the condition precedent of previous sanction for prosecution for the offence of criminal misconduct punishable under Section 5(2) of the Act, holds the key which unlocks the true vistas of the enactment.

The concept of sanction for prosecution by a superior is so inextricably woven into the fabric of the enactment that the pattern is incomplete without it. The clear legislative intent is that the enactment applies only to those in whose case sanction of this kind is contemplated and those to whom the provision of sanction cannot squarely apply are outside its ambit. The provision for sanction is like the keystone in the arch of the enactment. Remove the keystone of sanction and the arch crumbles.

The conclusion that the Act does not apply to these constitutional functionaries, namely, Judges of the High Courts, Judges of the Supreme Court, the Comptroller and Auditor General and the Chief Election Commissioner, need not be viewed with scepticism or treated as their exclusion from the purview of the Act as if they are ordinarily

within its ambit. A proper perception would indicate that these constitutional functionaries were never intended to fall within the ambit of the Act as initially enacted in 1947, when provisions similar to Articles 124(4) & (5) of the Constitution were present in the Government of India Act, 1935, nor was any such attempt made by amendment of the Act in 1964 subsequent to the Report of the Santhanam Committee and the same position continues in the Prevention of Corruption Act, 1988. If there is now a felt need to provide for such a situation, the remedy lies in suitable parliamentary legislation for the purpose preserving the independence of judiciary free from likely executive influence while providing a proper and adequate machinery for investigation into allegations of corruption against such constitutional functionaries and for their trial and punishment after the investigation. The remedy is not to extend the existing law and make it workable by reading into it certain guidelines for which there is no basis in it, since the Act was not intended to apply to them. The test of applicability of the existing law would be the legal sanction and justiciability of the proposed guidelines without which it is unworkable in the case of such persons. In fact, the very need to read the proposed guidelines in the existing law by implication is a clear indication that the law as it exists does not apply to them. Making the law applicable with the aid of the suggested guidelines, is not in the domain of judicial craftmanship, but a naked usurpation of legislative power in a virgin field.

It appears that the framers of the Constitution, while dealing with such constitutional functionaries, contemplated merely their removal from office in the manner provided in Article 124(4) as the only punishment; and a special law enacted by the Parliament under Article 124(5), even for investigation and proof of any misbehaviour alleged against a superior Judge instead of the general law was clearly visualised when the alleged misbehaviour is connected with his office. A charge of corruption against a superior Judge amounting to criminal misconduct by abuse of his office would certainly fall within the ambit of misbehaviour contemplated under Article 124(5), since misbehaviour of a Judge in the form of corruption by abuse of his office would be an act of gross misbehaviour justifying his removal from office, irrespective of other legal sanction, if any, to punish a corrupt Judge. It cannot be imagined that the framers of the Constitution provided for removal of a superior Judge on lesser grounds of misbehaviour but nor for the gross misbehaviour of corruption. There is no escape from the conclusion that the gross misbehaviour of corruption of a Judge must undoubtedly fall within the ambit or Article 124(5) justifying his removal in the manner provided in Article 124(4). Article 124(5) con-

templates a special law enacted by the Parliament even for investigation into any allegation of misbehaviour which must include an allegation of corruption. Can it, therefore, be said that while investigation into the allegation of corruption for the purpose of removal under Article 124(4) needs a special law made by the Parliament under Article 124(5), it is not so for his prosecution which can be made under the provisions of the existing Prevention of Corruption Act? It appears that the framers of the Constitution did not contemplate the need for prosecution of a Judge at that level and expected that a superior Judge would resign if faced with credible material in support of allegations of misbehaviour, and in case he did not resign, his removal under Article 124(5) would be suffecient to deal with the situation. The need for his prosecution was not visualised and, therefore, not provided for in the existing law. The Act had already been made when the Constitution was framed and the amendment made in the Act in 1964 was after the experience for some time of the functioning of the judiciary under the Constitution. It is siguificant that even the Judges (Inquiry) Act, 1968, was enacted under Article 124(5) of the Constitution much later and after the 1964 amendment of the Act. The fact that the Parliament did not enact any other law even then for the investigation into allegations of corruption against a superior Judge and for his trial and punishment for that offence and rest content merely with enacting the Judges (Inquiry) Act, 1968, to provide for the procedure for removal of a Judge under Article 124(4) is a clear pointer in the direction that the Parliament has not as yet considered it expedient to enact any such law for the trial and punishment on the charge of corruption of a superior Judge, except by his removal from office in the manner prescribed. It may also be noticed that the provisions of the Judges (Inquiry) Act, 1968, provide the procedure for investigation and proof of an allegation of corruption against a superior Judge and if the Prevention of Corruption Act is held applicable to them, then there would be two separate procedures under these two enactments providing for investigation into the same charge. Can this anomaly and incongruity be attributed to a conscious act of the Parliament while enacting the Judges (Inquiry) Act, 1968, after the 1964 amendment in the Act.

Maybe, need is now felt for a law providing for trial and punishment of a superior Judge who is charged with the criminal misconduct of corruption by abuse of his office. If that be so, the Parliament being the sole arbiter, it is for the Parliament to step in and enact suitable legislation in consonance with the constitutional scheme which provides for preservation of the independence of judiciary and it is not for this Court to expand the field of operation of the existing law to cover

A the superior Judges by usurping the legislative function of enacting guidelines to be read in the existing law by implication, since without the proposed guidelines the existing legislation cannot apply to them. Such an exercise by the Court does not amount to construing an ambiguous provision to advance the object of its enactment, but would be an act of trenching upon a virgin field of legislation and bringing within B the ambit of the existing legislation a category of persons outside it, to whom it was not intended to apply either as initially enacted or when amended later.

In this context, it would not be out of place to mention that this unfortunate situation has also another dimension. The framers of the C Constitution had visualised that the constitutional scheme for appointment of the superior Judges would ensure that by an honest exercise performed by all the constitutional functionaries of their obligation in the process of appointment of a superior Judge, there would be no occasion to try and punish any appointee to such a high office for an act of corruption. Appointment of superior Judges is from amongst D persons of mature age with known background and reputation in the legal profession. By that age the personality is fully developed and the propensities and background of the appointee is well known. The collective wisdom of the constitutional functionaries involved in the process of appointing a superior Judge is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices E and no doubtful persons gain entry. In the case of any late starter or an exception, the power of removal in accordance with Article 124(4) by adopting the procedure prescribed under Article 124(5) was expected to be sufficient to eradicate the exceptional menace while preserving independence of the judiciary. If this scheme is found to be inadequate in the present context, it is also indicative of the failure of the constitu- F tional functionaries involved in the process of appointments in fulfilling the confidence reposed in them. It is not unlikely that the care and attention expected from them in the discharge of this obligation has not been bestowed in all cases. The need for such a legislation now would, therefore, not be entirely on account of the absence of it so far, but also due to the failure of proper discharge of this constitutional G obligation and not any defect in the constitutional scheme. It is, therefore, time that all the constitutional functionaries involved in the process of appointment of superior Judges should be fully alive to the serious implications of their constitutional obligation and be zealous in its discharge in order to ensure that no doubtful appointment can be made even if sometime a good appointment does not go through. This H is not difficult to achieve. The working of the appointment process is a

matter connected with this question and not divorced from it. Most often, it is only a bad appointment which could have been averred that gives rise to a situation raising the question of the need of such a law. Due emphasis must, therefore, be laid on prevention even while taking curative measures.

It is a sad commentary on the working of the appointment process and the behaviour of some of the appointees which has led to this situation. The confidence reposed in them by the framers of the Constitution has been betrayed to this extent. It was expected that the superior Judges who were constituted into a different class and created as superior morally not needing the deterrence of such a law to punish them would be alive to the need of a high code of conduct regulating their behaviour justifying the absence of such a law for them. It was reasonable to further expect that the aberrations, if any, in their rank would be subject to the moral and social sanction of their community ensuring that they tread the right path. The social sanction of their own community was visualised as sufficient safeguard with impeachment and removal from office under Article 124(4) being the extreme step needed, if at all. It appears that the social sanction of the community has been waning and inadequate of late. If so, the time for legal sanction being provided may have been reached. No doubt for the judicial community in general it would be a sad day to become suspect needing such a legislation to keep it on the right track. However, that is the price the entire community has to pay if its internal checks in the form of moral and social sanction are found deficient and inadequate to meet the situation which legal sanction alone can prevent. It is for the Parliament to decide whether that stage has reached in the superior judiciary when legal sanction alone can be the remedy for maintenance of public confidence in the integrity of the superior judiciary without which independence of the judiciary would itself be in jeopardy.

The view that Judges of the High Courts and the Supreme Court are outside the purview of the Prevention of Corruption Act, fits in with the constitutional scheme and is also in harmony with the several nuances of the entire existing law relating to the superior Judges while the contrary view fouls with it at several junctures and leaves many gaping holes which cannot be filled by judicial exercise. The patchwork of proposing guidelines suggested by the learned Solicitor General apart from being an impermissible judicial exercise, also does not present a complete and harmonious picture and fails to provide answers to several obvious querries which arise. The inescapable con-

A clusion, therefore, is that the Prevention of Corruption Act, 1947, as amended by the 1964 amendment is inapplicable to Judges of the High Courts and the Supreme Court. Jurisprudentially this conclusion need not be anathema as stated in 46 Am. Jur. 2d. s. 84:—

> "In the absence of a statute, misfeasance of a judicial B officer is not a criminal offence, impeachment being the exclusive remedy."

These words summarise the true legal position in the case of superior Judges who are separately classified in the constitutional scheme itself.

C There is nothing strange about the above view since the scheme in some other countries also appears to be the same. In recent years in some countries, there were instances which provoked a strong debate on the subject and different remedies were advocated to deal with the situation. It may be mentioned that instances of punishment for corruption in earlier centuries including the indictment of Lord Bacon is D not apposite for the reason that the situation then was not akin to the scheme in the Indian Constitution for the judges of the High Courts and the Supreme Court and the protection given to them for ensuring the independence of judiciary.

As indicated earlier, while adopting curative measures for the E malady, a renewed emphasis on its prevention in the future has to be borne in mind. In this context, it is useful to recall the high esteem in which the higher judiciary was held by the prime builders of our nation in its nascent stage. In a letter dated 18th December, 1947, to the Prime Minister, Pt. Jawaharlal Nehru and the Deputy Prime Minister, Sardar Vallabhbhai Patel, the first Chief Justice of free India said:

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> "Under the Constitution Act, provisions can be made for the appointment, the salary, pension, leave and removal of the judges. In addition to that, I think it will be desirable to insert a provision under the Act, or to frame statutory rule under the Act, defining the relations bet- G ween the judiciary and the executive. All communications in respect of the appointments and the grievances, if any, of the judges should come from the Chief Justice of the provincial High Court, through the Governor and not through the Home Department of the province. I recognise that the Governor-General or the President, who will be an elected H person, will have to consult the Cabinet according to the

> Rules of Business framed for working the Central Government. It seems to me, however, fundamentally essential that the High Courts, the Federal Court and the Supreme Court (when established) should not be considered a part of, or working under, any department of the executive Government of India. It should be an independent branch of the Government in touch directly with the Governor-General or the President of the Dominion of India.
>
> I am sure the Cabinet will agree to the principle of keeping the judiciary free from the control of the executive. The duty and credit for maintaining this high tradition is on the Government in existence when the Constitution and the statutory rules are framed, and I have written this to you confidently hoping that you share my desire to safeguard the dignity and independence of the judiciary and will do the needful in the matter."

Sardar Vallabhbhai Patel promptly replied to the Chief Justice of India saying 'your views will be very helpful to us in dealing with the subject.'

> (Sardar Patel's Correspondence, 1945-50, edited by Durga Das, Vol. VI, pp. 274-76)

The framers of the Constitution had visualized the higher echelons of the judiciary as comprised of men of strong moral and ethical fibre who would provide moral leadership in the society of free India and function as the sentinel of the other wings of the State not needing scrutiny themselves. Our Constitution provides for separation of powers of the three wings of the State with judicial review as one of the essential tenets of the basic structure of the Constitution. It is thus the judiciary which is entrusted with the task of interpretation of the Constitution and ensuring that the other two wings do not overstep the limit delineated for them by the Constitution. With this duty entrusted to the higher judiciary, it was natural to expect that the higher judiciary would not require any other agency to keep a watch over it and the internal discipline flowing from the moral sanction of the community itself will be sufficient to keep it on the right track without the requirement of any external check which may have the tendency to interfere with the independence of the judiciary, a necessary concomitant of the proper exercise of its constitutional obligation. It is for this reason that the higher judiciary was treated differently in the

A Constitution indicating the great care and attention bestowed in prescribing the machinery for making the appointments. It was expected that any deviation from the path of rectitude at that level would be a rare phenomenon and for the exceptional situation the provision for removal in accordance with clause (4) of Article 124 was made, the B difficulty in adopting that course being itself indicative of the rarity with which it was expected to be invoked. It appears that for a rare aberrant at that level, unless he resigned when faced with such a situation, removal from office in accordance with Article 124(4) was envisaged as the only legal sanction. If this was the expectation of the framers of the Constitution and their vision of the moral fibre in the higher echelons of the judiciary in free India, there is nothing surpris- C ing in the omission to bring them within the purview of the Prevention of Corruption Act, 1947, or absence of a similar legislation for them alone. Obviously, this position continued even during the deliberations of the Santhanam Committee which clearly mentioned in its Report submitted in 1964 that it has considered the judiciary outside the ambit of its deliberations. Clearly, it was expected that the higher D judiciary whose word would be final in the interpretation of all laws including the Constitution, will be comprised of men leading in the spirit of self-sacrifice concerned more with their obligations than rights, so that there would be no occasion for anyone else to sit in judgment over them. If it is considered that the situation has altered requiring scrutiny of the conduct of even Judges at the highest level E and that it is a matter for the Parliament to decide, then the remedy lies in enacting suitable legislation for that purpose providing for safeguards to ensure independence of judiciary since the existing law does not provide for that situation. Any attempt to bring the Judges of the High Courts and the Supreme Court within the purview of the Prevention of Corruption Act by a seemingly constructional exercise of the F enactment, appears to me, in all humility, an exercise to fit a square peg in a round hole when the two were never intended to match.

I would, therefore, allow the appeal even though by the majority view it must fail.

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ORDER

In view of the majority judgments, the appeal is dismissed.

R.P. Appeal dismissed.