

GUJARAT HIGH COURT

Manshanker Prabhashanker Dwivedi

Vs.

State of Gujarat

Criminal Appeals Nos. 486 and 555 of 1966,

(Akbar S. Sarela. J. and B.R. Sompura, JJ.)

09.09.1968

JUDGMENT

AKBAR S. Sarela, J.

1. The appellant in Criminal Appeal No. 486/66, Manshanker Prabhashanker Dwivedi (hereinafter referred to as accused No. 1), was at the relevant time a senior Lecturer at the D. K. V. College, Jamnagar, which is a Government College. The appellant in Criminal Appeal No. 555/66, Vallabhdas Gordhandas Thakkar (hereinafter referred to as accused No. 2) was a legal practitioner taking Income-tax and Sales-tax cases. He also resided at Jamnagar. In April 1964 the Physics Practical Examination for F.Y.B.Sc. equivalent to Inter Science was to be held by the Gujarat University and one of the centres was Surendranagar. The accused No. 1 had been appointed as the Examiner for Physics Practical. It is in respect of that examination that he is alleged to have accepted a gratification of Rs. 500/- other than legal remuneration for showing favour to one candidate Jayendra Jayantilal by giving him more marks in the said examination. It was alleged by the prosecution that he obtained that sum through accused No. 2 on 27-4-1964. Therefore, the charge against accused No. 1 was under Section 114 of the Indian Penal Code. Both these charges against both the accused have been found proved by the learned Special Judge, Surendranagar, who by his judgment and order dated 27-5-1966 convicted them of these offences and sentenced each of them to rigorous imprisonment for two years and a fine of Rs. 1000/- in default of payment of which to undergo further rigorous imprisonment for six months. Against those convictions and sentences these appeals have been filed.

(2-30) x x x x x x x

31. For these reasons we agree with the learned Special Judge that the prosecution case against the accused in respect of the demand and acceptance of bribe of Rs. 500/- for the purpose of giving more marks to Jayendra has been made out.

32. It is argued on behalf of the accused that even if the prosecution case as to demand and acceptance of the bribe is held to be established, neither Section 161, Indian Penal Code, nor Section 5(1) (d) of the Prevention of Corruption Act would be attracted in this case. The argument as regards Section 161, Indian Penal Code, is that the offence under that section relates to a public servant who attempts to obtain or obtains a bribe and one of the necessary ingredients of the offence is that he does so as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show in the exercise of his official function favour or disfavour to any person. Therefore, the necessary ingredients are firstly that the person is a public servant and secondly that the act which is a reward or favour was in the matter of doing any official act or done in the exercise of official functions. In this case, it was argued, accused No. 1 was no doubt a public servant in the sense that he was in the Government service as a senior Lecturer in a Government College, but the bribe in this case was obtained not in connection with any official act or in connection with exercise of his official functions as such servant but in connection with his work as an Examiner of the Gujarat University. As such Examiner he was not a public servant because he was appointed as such Examiner independently of his being Government servant in a Government College and was being paid by the Gujarat University fees for the work done for that University. It has nothing to do with his being a Government servant. It was conceded that if even as an Examiner he was a public servant then as this bribe was obtained for giving more marks it would be in connection with an official act or in exercise of his official functions, but as he cannot be called a public servant in relation to his office as such Examiner the basic requirement of Section 161, Indian Penal Code, was lacking in this case. As regards Section 5(1)(d) of the Prevention of Corruption Act the argument is that that provision also concerns an offence committed by a public servant and if accused No. 1 as an Examiner of the Gujarat University is not a public servant in relation to acceptance of bribe in this case then clause (d) of Section 5(1) would also not be attracted because although he is generally a public servant being in the service of the Government as a senior Lecturer, the necessary ingredient for the offence under clause (d) is that he abuses his position as a public servant. In the present case he has no doubt abused his position as an Examiner but not as a Government servant in which capacity only he is a public servant.

33. The learned Special Judge accepted the submission that as a Government servant the offence would not fall under Section 21 of the Indian Penal Code as it then stood. As regards the argument relating to Section 5(1) (d) of the Prevention of Corruption Act the learned Judge took the view that having regard to Supreme Court decision in *Dhaneshwar v. Delhi Administration*¹, it was not necessary that the misconduct which is an offence under clause (d) of Section 5(1) should be committed in the discharge of the public servant's duties and therefore the clause is much wider than Section 161 of the Indian Penal Code and even if the offence did not fall under Section 161, Indian Penal Code, it would fall under that clause. He also took the view that if the payment is held to have been obtained by corrupt or illegal means it was not necessary that the accused should abuse his position as a public servant or that he should have obtained the money

while acting as a public servant.

34. The learned Assistant Government Pleader relied on the Ninth clause of Section 21 of the Indian Penal Code as it then stood. That clause read as under :-

"Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government or to make any survey, assessment or contract on behalf of the Government or to execute any revenue process, or to

¹ AIR 1962 SC 195

investigate, or to report, on any matter affecting the pecuniary interests of the Government or to make, authenticate or keep any document relating to the pecuniary interest of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government, and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty." The words on which reliance was placed are "and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty." It was not contended either before the lower Court or before us that as an Examiner accused No. 1 was an officer in the service or pay of the Government. The contention was that accused No. 1 fell within the four corners of the words "or remunerated by fees or commission for the performance of any public duty" and it was this contention which found favour with the lower Court. The argument is that examining the question papers is in the nature of a public duty and accused No. 1 was remunerated for the performance of that duty by fees by the Gujarat University. It was argued by Mr. Choksi, the learned advocate for accused No. 1, that if the last words of clause Ninth on which reliance is placed are read in the context of the words which immediately precede them or in the context of the Ninth clause as a whole it is obvious that when that part of the clause speaks of being remunerated by fees or commission what is implicit is being so remunerated by Government. That argument will have to be accepted for more than one reason. The clause does not say remunerated by whom. If it does not say so the reason obviously is that this is implied in the context and the words immediately preceding supply the context when they refer to Government as the paying authority. Any other interpretation would widen the scope of the last part of the Ninth clause to absurd limits. Discharge of functions relating to education may be treated as a public duty. Tendering the sick amongst the poor would also be considered as a public duty. If the last words of clause Ninth are read without any qualification, an honorary doctor working in a hospital run by a trust and receiving honorarium would be covered by it and would become a public servant. The context supplies another indication also in the words "every officer". The person to be remunerated by fees or commission must be an officer. The word 'officer' implies the holding of an office. In *R. K. Dalmia v. Delhi Administration*², paras 285 and 286, it was urged that an Investigator appointed by Government under Section 33(1) of the Insurance Act, 1938, was a public servant in view of the Ninth clause of Section 21 of the Indian Penal Code. The Supreme Court pointed out that the Investigator Annadhanam was not an employee of the Government but was a Chartered Accountant who had been directed by the order of the Central

Government to investigate into the affairs of the Insurance Company and to report to the Government on the investigation made by him. Of course, he was to get some remuneration for the work he was entrusted with. Then with reference to Ninth clause of Section 21, Indian Penal Code, the Supreme Court said :-

"According to this clause, every officer in the service or pay of the Government or remunerated by fees or commission for the purpose of any public duty would be a public servant. A person who is directed to investigate into the affairs of an Insurance Company under Section 33(1) of the Insurance Act, does not ipso facto become an officer. There is no office which he holds. He is not employed in service and therefore this definition would not apply to Annadhanam."

² AIR 1962 SC 1821

Reference may also be made to the observations of the Supreme Court in *G. A. Monterio v. State of Ajmer*³, There also the last words of Ninth clause beginning with the words "and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty" were construed. The appellant in that case was a class III servant employed as a metal examiner, also called Chaser, in the Railway Carriage Workshops at Ajmer. It was argued that he was not a public servant. Their Lordships referred to the dictum of West J. in *Reg v. Ramajirao Jivbaji*⁴, where it was stated that "the word 'officer' meant some person employed to exercise to some extent and in certain circumstances a delegated function of Government. He was either himself armed with some authority or representative character or his duties were immediately auxiliary to those of some one who was so armed." They also referred to a Calcutta decision in *Nazamuddin v. Queen Empress*⁵, where it was held that "an officer in the service or pay of Government within the terms of Section 21, Indian Penal Code, is one who is appointed to some office for the performance of some public duty" and their Lordships of the Supreme Court went on to say :-

"The true test, therefore, in order to determine whether a person is an officer of the Government is: (i) whether he is in the service or pay of the Government and (ii) whether he is entrusted with the performance of any public duty. If both these requirements are satisfied it matters not the least what is the nature of his office, whether the duties he is performing are of an exalted character or very humble indeed."

These observations indicate that a person to be an officer must hold some office though it does not matter whether the office is humble or exalted. The holding of an office implies the charge of a duty attached to that office. Now, the person who is remunerated by fees or commission must be an officer. Therefore, the use of the word 'officer' read in the context of the immediately preceding words where Government is referred to as the paying authority would indicate that the remuneration contemplated by the concluding words is remuneration by Government. It will now be convenient to refer what Mr. Choksi rightly calls the legislative interpretation of this part of

the clause. It appears that in December 1964 this clause and clause twelfth were amended. Before referring to these amendments it would be convenient to refer to clause twelfth as it stood before the amendment. That clause read as under :-

"Every officer in the service or pay of a local authority or of a corporation engaged in any trade or industry which is established by a Central, Provincial or State Act or of a Government Company as defined in Section 617 of the Companies Act, 1956".

By the amendments introduced by Act 40/1964, the last words of the Ninth clause namely "every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty" were taken out of that clause and introduced in the new Twelfth clause which after amendment reads as under :-

"Every person –

³ AIR 1957 SC 13

⁵(1901) ILR 28 Cal 344

⁴(1862-63) 12 Bom. HCR 1

- (a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;
- (b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government Company as defined in Section 617 of the Companies Act, 1956 (I of 1956)."

It will be noticed that under clause (a) of the said clause which now corresponds to the last part of the old Ninth clause the expression 'every officer' is changed to 'every person' and the words 'by the Government' are added after the words 'performance of any public duty'. Mr. Choksi argued that this amendment, particularly the addition of the words 'by the Government' shows the legislative interpretation of the clause under consideration. There is considerable substance in that submission. At any rate, the doubt, if any, which could rise in the interpretation of the last words of the Ninth clause as it stood before its amendment in December 1964 must be resolved firstly by reference to the context of the clause as a whole and that context indicates that the connection with the Government is necessary either in respect of the payment of the remuneration or in respect of the performance of a public duty and secondly by application of the rule of construction to which reference is made by Maxwell on Interpretation of Statutes at page 265 to which Mr. Choksi invited our attention. There it is stated that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. This is particularly so in respect of laws which impose criminal liability. We are therefore of the view that the last words of clause Ninth of Section 21 of the Indian Penal Code as it stood before amendment are not attracted in this case.

35. It was, however, argued alternatively by the learned Assistant Government Pleader that the case would at any rate fall under clause Twelfth as it then stood. Clause Twelfth as it stood before

the amendment made in December 1964 has been earlier set out. It covered two categories of persons : (i) an officer in the service or pay of a local authority or (ii) of a corporation engaged in any trade or industry which is established by the Central, Provincial or State Act or of a Government Company as defined in Section 617 of the Companies Act, 1956. It is not the contention of the learned Assistant Government Pleader that accused No. 1 would fall in the second category. His contention is that he would fall under the first category. To fall in that category it must be proved firstly that he is an officer in the service or pay of a local authority. Much argument has been advanced before us whether the Gujarat University is or is not a local authority. It is not necessary to decide that question. We shall assume that it is a local authority. Even so it is difficult to hold that accused No. 1 is an officer in the service or pay of that authority. We have earlier pointed out that to be an officer a person must hold office. But the further question is whether he can be said to be in the service or pay of the Gujarat University which, for the present, is assumed to be a local authority. The word 'service' means according to Concise Oxford Dictionary 'being a servant' and according to Chamber's 20th Century Dictionary 'condition of being servant; working for another'. In Aiyar's Law Lexicon the definition is 'Being employed to serve another'. Bearing these meanings in mind it is obvious that the expression 'in the service of' implies a relationship of master and servant. It is obvious that there was no such relationship between accused No. 1 and the Gujarat University. Explaining the difference between a servant, a contractor and an agent their Lordships of the Supreme Court in *Lakshminarayan Ram Gopal v. Hyderabad Government*⁶, accept as correct the following statement of law in Halsbury's Laws of England-

"An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given him in the course of his work; and independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result. An agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant."

The same principles of law are reiterated in slightly different words by the Supreme Court in *Shivnandan v. Punjab National Bank*⁷, Therefore, the important test whether or not there is a relationship of master and servant is the existence of right of controlling the manner in which the other does the work. The mode of payment for service, the time for which the servant is engaged, the nature of those services or the power of dismissal may have some relevance as pointed out by the Bombay High Court in *Goolbai v. Pestonji*⁸, but the right of control as to the manner in which the other does the work is the conclusive test. On this test it cannot be said that accused No. 1 was in the service of the Gujarat University. It is also not possible to say that he was 'in the pay'

of that University. The word 'pay' here must be construed in the light of the context and would mean wages or money given for service. 'In the pay of' construed in the light of the context of the whole clause would carry the meaning "in the employment of'. If that is so, accused No. 1, who received on agreement remuneration for certain agreed work, cannot fall in that category. In our opinion, the Twelfth clause as it stood before amendment of December 1964 was not attracted.

36. If, therefore accused No. 1 was not a public servant within the meaning of that expression used in Section 161 of the Indian Penal Code with reference to the work in respect of which he accepted the bribe Section 161 would not be attracted. The learned Assistant Government Pleader did argue as a last resort, so far as this Section is concerned, that with respect to the work of examining and assessing the papers on behalf of the Gujarat University accused No. 1 can be said to be doing his official act or discharging his official function as a senior Lecturer in the employ of Government. His contention was that this employment as an Examiner could not have been made except with the permission of the Government and therefore with respect to that work he continues to be subject to Government control and as he continues to be subject to Government control, the work that he does although independent of Government work must be treated as work done in the exercise of his official functions. It is not possible to accept that submission. His being a Government servant is not the necessary qualification for his being appointed as an Examiner. It is not so alleged. It has also not been alleged

⁶ AIR 1954 SC 364

⁸ AIR 1935 Bom 333

⁷ AIR 1955 SC 404

that his being a Government servant confers on him the advantage of his being appointed as an Examiner. Even if that was alleged, that would not make any difference. It is not even alleged that to be an Examiner accused No. 1 should have been a teacher in some institution; though even if that was the necessary qualification it would not make much difference. It is true that under Rule 21 of the Bombay Civil Services Conduct and Discipline Rules to which the learned Assistant Government Pleader invited our attention a Government servant was not without the previous permission of the Government to engage in any work while on duty or on leave other than his public duties. It may, therefore, be assumed that while accepting the work as an Examiner under the Gujarat University the Government had given to accused No. 1 the necessary permission as contemplated by Rule 21. But it does not follow that therefore in respect of that work accused No. 1 continued to be under the control of the Government. Whether in respect of misconduct in that work the Government could institute a departmental proceeding against him is not a matter for consideration here. Assuming that such a departmental proceeding could be instituted, the scope of the departmental inquiry being very wide, it does not follow that therefore the act falls within the four corners of Section 161 of the Indian Penal Code, that is to say, it is in the nature of an official act or has reference to the exercise of official functions. That argument must, therefore, be rejected.

37. That takes us to the question of construction of clause (d) of Section 5(1) of Prevention of

Corruption Act. That clause reads as under. –

"A public servant is said to commit the offence of criminal misconduct in the discharge of his duty -

.....

(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;"

This provision was amended by Act No. 40/64 by omitting the words 'in the discharge of his duty' but the amendment does not make any difference on the question of interpretation of clause (d) having regard to the Supreme Court ruling to which reference will be made presently. The clause lays down two ingredients; (i) the public servant obtains for himself or for any other person any valuable thing or pecuniary advantage and (ii) he does so by corrupt or illegal means or by otherwise abusing his position as public servant. The first ingredient above-mentioned is satisfied in this case. The argument on behalf of accused No. 1 is that the second ingredient is not satisfied. It is conceded that if the prosecution case is held proved the means employed by the accused No. 1 can be said to be corrupt or illegal but it is argued that this is not enough and it is necessary that there must be an abuse of his position as a public servant and here no such abuse was involved as accused No. 1 was at the most abusing his position as an examiner but not as a public servant. The learned Assistant Government Pleader urges that the requirement as to abuse of position as a public servant is attached to the employment of means indicated by the expression 'otherwise' and not means which are corrupt or illegal. If the means are corrupt or illegal, says the learned Assistant Government Pleader, no abuse of position as a public servant is necessary. In the alternative he argues that even if in respect of employment of corrupt and illegal means the abuse of position as a public servant is necessary there has been such abuse in this case.

38. This calls for construction of the first part of the said clause (d) namely the part covered by the words 'by corrupt or illegal means or by otherwise abusing his position as public servant'. Before construing this part it would be worthwhile to set out the broad principles of construction in such cases. The principles are set out in a passage in the decision of the Judicial Committee in *Dyke v. Elliott. The Gauntlet*⁹, quoted by the Supreme Court in *M. Narayanan v. State of Kerala, AIR 1963 Supreme Court 1116*. That passage reads as under :-

"No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged although within the words, is not within the spirit of the

enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument." Earlier the Supreme Court refers to the object of the statute under the Prevention of Corruption Act and the provisions it makes for carrying out that object, and goes on to observe :
"As it is a socially useful measure conceived in public interest, it should be liberally construed 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."

Therefore, the guiding factor for the construction of a clause of this nature is the language used, language being construed according to fair commonsense, keeping in mind the object of the legislature. The construction placed must be such as promotes and not defeats the object of the Act.

39. With these principles in mind we may now have a look at clause (d). It is obvious that the word 'otherwise' is linked with the words 'corrupt or illegal'. In Aiyer's Law Lexicon one of the meanings given to the word 'otherwise, is 'by other like means' and it is in that sense that the expression has been interpreted by the Supreme Court in M. Narayanan's case, AIR 1963 Supreme Court 1116 (supra) where their Lordships said:

"The word 'otherwise' has wide connotation and if no limitation is placed on it the words 'corrupt', 'illegal' and 'otherwise' mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation is that it takes colour from the preceding words alongwith which it appears in the clause, that is to say, something savouring of dishonest act on his part."

⁹(1872-4 PC 184)

Now, bearing this in mind we have to consider whether the words 'abusing his position as a public servant' go only with the words 'by otherwise' or go also with the words 'corrupt or illegal means'. It will be noticed that the second part of the clause namely the one which relates to the obtaining of the valuable thing or pecuniary advantage relates to the object of the public servant namely the obtaining of a bribe. The first part concerns the manner of achieving that object. The manner is the use of means and use of position. As to the use of means the clause expressly mentions corrupt or illegal. But the legislature does not want to limit itself to these means only and so goes on to use the word 'otherwise'. If the meaning to be given to the word 'otherwise' is as earlier stated, the words 'by corrupt or illegal means' or 'by otherwise' form a single clause and do not form two clauses. If that is so the abuse of position as public servant that is referred to is the abuse by corrupt or illegal means or by otherwise. In support of the construction which the learned Assistant Government Pleader seeks to put on the clause he relies on the use of the word

'by' before the word 'otherwise'. He says that thereby the legislature expressed the intention to separate two positions. According to him 'by otherwise' would be another manner and it is only in respect of this second manner that it is necessary to prove the abuse of position as a public servant. While the argument is not wholly divorced from the language of the clause the use of the preposition 'by' on which reliance is placed for deriving support to this argument is explainable even on the construction earlier mentioned. The preposition 'by' obviously indicates the manner of obtaining the bribe. If that is so the expression 'abusing his position' must go with both. This construction is consistent with the scheme of the section. As pointed out by the Supreme Court in *Ram Krishna v. State of Delhi*¹⁰, bribery as defined in Section 161, Indian Penal Code, if it is habitual, falls within clause (a) of Section 5(1). Bribery of the kind specified in Section 165, if it is habitual, is comprised in clause (b). Clause (c) contemplates criminal breach of trust by a public servant and the wording takes us to Section 405 of the Code. Then follows clause (d). Clause (e) concerns the position of pecuniary resources or property disproportionate to his known sources of income for which the public servant cannot satisfactorily account. In clauses (a), (b) and (c) the abuse of position by a public servant is clearly implied. Clause (e) also carries the same implication. It would be reasonable to put on clause (d) a construction which is consistent with the other clauses of the sub-section. Such a construction would also keep the offence within the limitation and within the object of the Act. The object is to prevent and deal with corruption and bribery amongst public servants. It is with reference to this object that the penal provisions must be construed and if so construed the abuse of position would be the necessary ingredient of the offence; the abuse being either by corrupt or illegal means or by otherwise. Such a construction would thus be within the spirit of the enactment.

40. It would not be convenient to refer to some observations made in two Supreme Court decisions to which our attention has been invited. In AIR 1962 Supreme Court 195 (Supra) in which the expression 'in the discharge of his duties' used in Section 5 was interpreted as being mere descriptive of the offence and not forming an ingredient of the offence, their Lordships set out the ingredients of the offence under Clause (d) in these words :-

"The ingredients of the particular offence in Clause (d) of Section 5(1) of the Act are: (1) that he should be a public servant, (2) that he should use some corrupt or

¹⁰ AIR 1956 SC 476

illegal means or otherwise abuse his position as a public servant, (3) that he should have thereby obtained a valuable thing or pecuniary advantage, and (4) for himself or for any other person. In order to bring the charge home to an accused person under Clause (d) aforesaid of the section it is not necessary that the public servant in question, while misconducting himself should have done so in the discharge of his duty".

This is no doubt not a direct authority on the question as to whether the expression 'abusing his

position as public servant' covers the whole of the first part of Clause (d) but it would appear that that was what was assumed by their Lordships of the Supreme Court for earlier in that very para they stated that :

"The legislature advisedly widened the scope of the crime by giving a very wide definition in Section 5 with a view to punish those who, holding public office and taking advantage of their official position, obtain any valuable thing or pecuniary advantage".

The decision which is more to the point, however, is the one in AIR 1963 Supreme Court 1116 (supra). There the Supreme Court was concerned with the meaning and ambit of the word 'otherwise' used in the Clause. They said :-

"Let us look at the clause 'by otherwise abusing the position of a public servant', for the argument mainly turns upon the said clause. The phraseology is very comprehensive. It covers acts done 'otherwise' than by corrupt or illegal means by an officer abusing his position. The gist of the offence under this clause is, that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage."

This is, therefore, the gist of the offence. If that is so it is not possible to divorce the words 'by corrupt or illegal means' from the requirement of abusing the position as a public servant. Later on their Lordships say :

"On a plain reading of the express words used in the clause, we have no doubt that every benefit obtained by a public servant for himself, or for any other person by abusing his position as a public servant falls within the mischief of the said clause."

These observations support the conclusion we have reached.

41. The learned Assistant Government Pleader argues that even if that is the true construction of clause (d) the prosecution has proved that there has been an abuse of position as a public servant on the part of accused No. 1. The argument is similar to the one advanced in respect of Section 161 of the Indian Penal Code. The argument is this. The accused No. 1 did not cease to be a Government servant while he was working as an Examiner. In fact he could not have worked as Examiner but for the permission given to him as a public servant and therefore, there was some connection, however, indirect, between his office as a public servant and his work as Examiner. His abuse of his position as Examiner would be an abuse of the permission given to him by the Government as Examiner, that is to say, it is argued, it would amount to an abuse of permitted use of his office and if that is so he must be said to have abused his position as a public servant. We consider the argument too farfetched. We have dealt with it earlier and do not think it necessary to add to what we have stated.

42. For these reasons although the prosecution case against the accused has been proved on merits, it is not possible to bring the misconduct of either of the accused under any of the offences with which they are charged. They are, accordingly, entitled to an acquittal.

43. The appeals are therefore, allowed. The convictions of and sentences on the appellants are set aside and the appellants are acquitted. Fine, if paid, to be refunded.

Appeals allowed.