

(1950) 04 BOM CK 0008

In the Bombay High Court

Case No : Criminal Appeal No. 128 and Review No. 209 of 1950

Mulshankar Maganlal Vyas and Another

APPELLANT

Vs

Government of Bombay

RESPONDENT

Date of Decision : 20-04-1950

Acts Referred:

Bombay Civil Services (Conduct, Discipline and Appeal) Rules, 1932 — Rule 48(2)
Civil Services (Classification, Control and Appeal) Rules — Rule 14, 21, 49
Criminal Procedure Code, 1898 (CrPC) — Section 439(3)
Government of India Act, 1935 — Section 96B(2)
Penal Code, 1860 (IPC) — Section 168
Prevention of Corruption Act, 1947 — Section 5(1), 5(2)

Citation : AIR 1951 Bom 233 : (1950) 52 BOMLR 648 : (1950) ILR (Bom) 706

Hon'ble Judges : Vyas, J;Gajendragadkar, J

Bench : Division Bench

Advocate : M.P. Amin, M.R. Parpia, J. Dias, D.J. Ganatra and R.H. Shahani, for the Appellant; H.M. Choksi, Government Pleader, for the Respondent

Final Decision : Partly Allowed

Judgement

Vyas, J.—This is an appeal in which the judgment of the learned Second Additional Sessions Judge, Poona has been challenged. Appellant 1 has been convicted under s. 168, Penal Code, and Section 6, Sub-section (2), Prevention of Corruption Act (II [2] of 1947) read with Section 5, Sub-section (1), Clause (d) of the said Act. Appellant 2 has been convicted of the abovementioned offences read with Section 109, Penal Code. On the first count appellant 1 has been sentenced to pay a fine of RS. 1,000 or in default to suffer 3 months' simple imprisonment; and on the second count he has been sentenced to suffer 1 year's simple imprisonment and to pay a fine of Rs. 2,000 or in default to suffer 1 year's further simple imprisonment. Appellant 2 has been sentenced on the first count to pay a fine of Rs. 200 or in default to suffer 1 month's simple imprisonment; and he has been sentenced on the second count to pay a fine of Rs. 300 or in default to suffer 3 month's simple imprisonment. This is an appeal

by the appellants against this order of convictions and sentences. The matter has come up to us also in review on this Court issuing a notice suo motu to the appellants for the enhancement of the sentences passed on them.

2. It is the case of the prosecution that appellant 1, being a public servant, was prohibited from trading under Rule 21 Bombay Civil Services, Conduct, Discipline and Appeal Rules framed by the Government of Bombay under Clause (2) of Rules 48 and Rule 54, Civil Services (Classification, Control and Appeal) Rules, and that yet he engaged himself in trade under the name, of "Vinod & Co." and thereby committed an offence punishable u/s 168, Penal Code. It is also the contention of the prosecution that appellant 1 by abusing his position as a public servant, obtained for himself and also for his son, appellant 2, valuable consideration and thereby committed an offence u/s 6(2) read with Section Section (1) (d) of India Act No. (11) [2] of 1947.

3. Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules is in the following terms :

"21. A Government servant shall not without the previous sanction of Government, engage in any trade or undertake any employment while on duty or on leave, other than his public duties;....."

4. Section 168, Penal Code, lays down as follows:

"Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both." The expression "legally bound to do" is defined in Section 43 of the Code, which says:

"The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be legally bound to do" whatever it is illegal in him to omit."

As Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules, prohibits a public servant from engaging in any trade, without the previous sanction of Government, and as no such previous sanction of Government was obtained in this case by appellant 1, the case of the prosecution is that he committed an offence u/s 168, Penal Code, by engaging in trade under the name of Vinod & Co.

5. Section 5, Sub-section (1), Clause (d), Prevention of Corruption Act, 1947, is in the following terms:

"5. (1) 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 a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage."

Sub-section (2) of Section 6 of the said Act lays down as follows:

"(2) Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both."

6. The first charge against appellant 1 is that he, while holding (1) the office of the lecturer in the Government College of Engineering, Poona, from 12-1-1944, to 3-4-1946, and (2) the office of the Deputy Engineer and Assistant to the Public Health Engineer to the Government of Bombay from 4-4-1940, to 30-1-1947, and as such being a public servant legally bound not to engage in trade under the provisions of Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules, 1932, without the previous sanction of the Government of Bombay, old engage in trade from March 1944 onwards by setting up and operating a firm of Consulting Sanitary Engineers and Contractors under the trade name of "Vinod & Co." at Poona, and prepared plans and estimates of water and drainage schemes for (1) Kaira (2) Nadiad, (3) Bagalkot, (4) Kapadvanj, (5) Umreth and (6) Broach Municipalities, and of the town planning scheme of Gandhinagar near Pashan Camp., Poona, and thereby committed an offence punishable u/s 168, Penal Code.

7. The second charge against appellant 1 is that he, being a public servant, i. e., a lecturer in the College of Engineering at Poona and a Deputy Engineer and Assistant to the Public Health Engineer to the Government of Bombay, by illegal means, obtained, through the said Vinod & Co. of Poona, for himself and his son (appellant 2) a pecuniary advantage to the tune of Rs. 28,103-140 from 11-3-1947, onwards as charges for preparation of the plans and estimates of the water and drainage schemes of (1) Bagalkot, (2) Kapadvanj, (3) Umreth and (4) Broach Municipalities and of the town planning scheme of Gandhinagar near Pashan Camp at Poona, and thereby committed an offence of criminal misconduct in the discharge of his duties as a public servant punishable u/s 6 (2) read with Section 6 (1) (d), Prevention of Corruption Act, 1947.

8. The charges against appellant 2 are that he abetted the commission of the above mention. ed offences by his father (appellant 1). In other words, the first charge against appellant 2 is u/s 168 read with Section 109, Penal Code; and the second charge against him is u/s 5 (2) read with Section 5 (1) (d), Prevention of Corruption Act, 1947 read with Section 109, Penal Code.

9. The prosecution story in so far as is relevant to this appeal is as follows. Appellant 1 was a public servant within the meaning of Section 21, Penal Code. He joined the Bombay Engineering service in the year 1922, was a Deputy Engineer in the office of the Public Health Engineer, Poona, from September, 1940, to 11-1-1944, was thereafter a lecturer in the Government Engineering College, Poona, from 12-1-1944 to 3-4-1946 and was then Assisant to the Public Health Engineer to the Government of Bombay from 4-4-1946 to 30-1-1947. On 31-1-1947, he was suspended from Government service. It is to be noted that

appellant 2 is the eldest son of appellant 1. This appellant 2 studied up to matriculation, but does not appear to have passed the matriculation examination. Apparently, he does not possess any technical skill or knowledge in engineering. Both the appellants were living together at least till October 1946 in house no. 1170/11 at Shivaji-nagar, Poona. The said house belonged to one Murlidhar Narayaa Kulkarni. Appellant 2 did not apparently have any independent source of income. The firm Vinood & Co. was started in about April or May 1944. Prior to that appellant 2, was not doing any business or following any profession. He was a student. In his statement Ex. 59, he has given his age as twenty-six, which means that in the year 1944 he was barely twenty one years of age. In April 1944, he appeared for the last time at the matriculation examination, although appellant 1, has said that it was in 1945 that he had his last trial at the matriculation examination. Appellant 1 had another son who was younger than appellant 2. His name was Madhusudhan, who also studied up to matriculation but did not pass the examination. It is alleged that he is not heard of for the last three years or so. In the year 1944, this boy Madhusudan was scarcely eighteen or nineteen years of age. It has become necessary to state these details about the sons of appellant 1, since these are relevant on the question whether the concern Vinod & Co. which was started in about April 1944, was mainly or substantially, if not absolutely, the concern of appellant 1, or whether it was a business which was conducted essentially by appellant 2 a person without any special intellectual qualifications or technical skill or knowledge regarding engineering. In the years 1942 and 1943, several local bodies in the Province of Bombay wanted to undertake works on water supply and drainage in their respective cities or towns. Most of them approached the Public Health Engineer with the request for the preparation of plans and estimates. The technical staff at the disposal of the Government of Bombay not being adequate, the demands of all the local authorities who had approached Government in the abovementioned matter could not be met. Previous to 1942-43 it was the practice of the Municipalities to approach the Public Health Engineer with a request to prepare the schemes of water supply and drainage. But as the demand in that direction grew in number and as the work could not be undertaken or finished within reasonable time by the office of the Public Health Engineer, the said officer allowed the engineering and technical staff at the disposal of the Municipalities to undertake the work themselves. Of course the Public Health Engineer promised assistance and help of his own staff to them. However, as this arrangement did not produce satisfactory results, the local authorities were subsequently asked to get the schemes prepared by private engineering firms and then submit them for scrutiny and approval by the office of the Public Health Engineer. It is in this connection that it becomes particularly relevant to observe that in the years 1942-1943 appellant 1 was holding the post of the Deputy Engineer in the office of the Public Health Engineer. In that capacity he used to come into contact with the Chief Officers and Engineers of several local bodies and also the Presidents of those local authorities. It may be interesting to know in passing what exactly the duties of appellant 1, as Assistant to the Public Health Engineer, were. These are

briefly described by one Mr. Ramachandra Shriniwas Iyyer, the head clerk in the office of the Public Health Engineer since 1941. He has said that the duties were : (1) whenever any projects were received from the local authorities, he, i. e , appellant 1, used to scrutinize them from the technical points of view and put them up for the approval of the Public Health Engineer. (2) He (appellant 1) was also a touring officer. He used to inspect the works in progress or draw up preliminary reports of water supply or drainage schemes when called upon to do so by the Public Health Engineer at the instance of the local authorities and submit them to the Public Health Engineer. And (3) he (appellant 1) used to scrutinize the reports submitted to the Public Health Engineer by the local authorities. If the Public Health Engineer was satisfied about the soundness of the schemes of drainage and water supply from the technical points of view, those schemes were placed before the Board of Public Health Works, which is now known by the designation of the Board of Health. It was in about April or May 1944 that the concern under the name of Vinod & Co., Consulting Sanitary Engineers and Contractors, was formed. The name "Vinod" admittedly refers to appellant 2. The company's offices were located in house no. 1170/11 Shivajinagar, Poona, which was the place of residence of appellant 1. By this time appellant 1 had left the office of the Public Health Engineer and was working as a lecturer in the Engineering College at Poona. All the same he was keeping in close touch with the office of the Public Health Engineer, and especially with Mr. Collect, the Public Health Engineer himself. It is to be noted that appellants I returned to the office of the Public Health Engineer in April 1946 as Assistant to the Public Health Engineer Mr. Collect. He remained in that office in that capacity until he was suspended on 31-1-1947.

10. The principal ingredients of the charges against appellant 1 are : (1) being a public servant who was legally debarred from engaging in private trade under Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules, 1932, he started and financed the concern known as Vinod & Co., and conducted it from behind the curtain; (2) by abusing his position as a public servant, he secured the work of preparing plans and estimates of water supply and drainage schemes of various Municipalities and the town planning scheme of Gandhinagar near Pashan Camp, Poona; (3) he employed mostly students of the Engineering College of Poona, where he was working as a lecturer, as servants for the company Vinod & Co., and he paid their salaries, supervised their work and actively and frequently guided them; (4) it was he (appellant 1) who carried on most of the important correspond, once for Vinod & Co.; and (5) by abusing his position as a public servant, he obtained for himself pecuniary advantage which he was not entitled to. Exhibit 49-E is the statement showing the names of the local bodies for whom Vinod & Co., prepared plans and estimates and the amounts received by the company from the local bodies, with the dates of receipt of the amounts. It would be obvious from this statement that between 11-3-1947, and March 1948, this company (Vinod & Co.) received the following amounts from the undermentioned local bodies and town planning :

Serial No. Local Bodies Amounts Dates

Rs. a. p.

1. Bagalkot Municipality.. 5250 0 0 30-3-1948.
2. Kapadwanj Municipality.. 10,402 10 6 21-3, 21-5 and 30-7-1947,
3. Umreth Municipality.. 5,000 0 0 11-4 and 15-9-1947 and 7-1-1948.
4. Broach Municipality.. 5,000 0 0 24- 4 and 24-9-1947.
5. Gandhi Nagar Town Planning.. 2,100 0 0 21-4-1947

11. It is on these facts that the prosecution has contended that both the appellants committed the offences with which they have been charged in this case.

12. The appellants have pleaded not guilty to the charges against them, Appellant 1 says in his statement at Ex.. 58 that he did not start or finance or conduct the company (Vinod & Co.). It is contended by him that the real owner of the company was not himself, that he did not obtain business for it by using his official position, and that he never engaged himself in trade in order to obtain any pecuniary advantage for himself or his son (appellant 2). It is admitted, however, by him that he did occasionally help his son with monies when he was in need of the same for his business. But it is contended by him that appellant 2 always used to repay him when he could do so conveniently. It is also admitted by appellant 1 that he used to give technical advice and guidance to some of the employees of the company, but he says that it was not done as employer but merely as tutor, as these employees were once his students in the Poona Engineering College. It is further admitted by appellant 1 that the company's office was situated at his residential quarters till October 1946, but he contends that he merely permitted appellant 2 to hold the office in his own residence as appellant 2 could not get suitable accommodation elsewhere. Appellant 2 contends in his statement at Ex. 59 that it was he who had started the company, that appellant 1 did not have any concern with it, that it was he himself who was financing the company with the monies received by him from his maternal grandfather and uncle, that it was he who was employing the servants of the company, and that if on any occasion any direction or advice was given to the employees by his father (appellant 1) it was merely done gratuitously and out of paternal affection for him.

13. Mr. Amin for the appellants has contended that the charge against appellant 1 u/s 168, Penal Code must fail, since it is not established from the evidence in the case that he had engaged himself in trade. It is argued by Mr. Amin that the expression "trade" must be given its technical meaning, must not be construed loosely or vaguely, and must be taken to mean mercantile operations or commercial transactions .It is then contended by him that in this case there is no evidence to show that appellant 1, while holding a position in the office of the

Public Health Engineer, Poona, engaged himself in any mercantile operations or commercial transactions. It is also contended by him that as the statutory Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules has been framed by the Government of Bombay pursuant to the rule-making power conferred upon the Government by Clause (2) of Rule 48, Civil Services (Classification, Control and Appeal) Rules framed by the Secretary of State under Sub-section (2) of Section 96B, Government of India Act, 1935, and as Rule 49, Bombay Civil Services Conduct, Discipline and Appeal Rules, while laying down the various penalties to be imposed upon members of the various services which are comprised in Clauses (1) to (5) specified in Rule 14, Civil Services (Classification, Control and Appeal) Rules, does not lay down in terms that a proceeding or prosecution u/s 163, Penal Code is also one of the penalties which could be imposed upon the members of the services, no proceeding or prosecution can lie against appellant 1 u/s 168, Penal Code. Finally, it is argued by Mr. Amin that as the new offence of criminal misconduct by a public servant in the discharge of his duty was created for the first time by legislation on 11-3-1947, its provisions cannot be applied with retrospective effect, and therefore appellant 1 cannot be prosecuted u/s 5 (2) read with Section 5 (1)(d) of India Act No. II [2] of 1947. The contention is that as the offence of criminal misconduct by a public servant in the discharge of his duty was created for the first time on 11-3-1947, none of the essential ingredients which constitute the said offence can be made applicable with retrospective effect. It is argued for appellant 1 that since he was put under suspension from 8-1-1947, it was impossible thereafter for him to abuse his position which he occupied previously in the office of the Public Health Engineer, and that therefore, unless the provisions of Section 5 (1) (d) of India Act 11 [2] of 1947 were made applicable with retrospective effect, he could not be deemed to have committed an offence u/s 5 (2) of the Act.

14. Before considering the various points of law which arise in this case, it would be convenient to deal first with the question whether the company (Vinod & Co.) was mainly or substantially the concern of appellant 1 himself or appellant 2. It may be noted at this stage that for the purpose of the present case it is immaterial whether the interest of appellant 1 in this company was exclusive or joint with appellant 2. Having carefully examined the voluminous evidence which has been recorded in this case and having thoroughly considered the various contentions and arguments advanced by the appellants' learned advocate Mr. Amin, we have no hesitation in coming to the conclusion that the concern Vinod & Co. was principally the concern of appellant 1. Appellant 2's name was associated with this company for the sake of show, as obviously appellant 1 could not suffer himself to be connected with it openly in view of the official position he occupied in the office of the Public Health Engineer, Poona. Although the record discloses many facts and circumstances from which the irresistible conclusion would arise about the interest and concern of appellant 1 in this particular company Vinod & Co., we have decided to refer only to a few outstanding instances out of those. [After dealing in detail with those facts, the

judgment proceeded :]

15. The facts, circumstances and evidence, to which we have referred in detail, would show that this was not a case of appellant 1 merely offering his advice, guidance or instructions, but was a case in which the interests of himself (appellant 1) and of the company were identical. The company was his creature. At any rate, he was the driving power behind it and effectively managed its affairs. This conclusion gains further support when we turn to Ex. 49-F, which is a statement of the cheques issued by appellant 1 from his personal account with the Bank of India for making payments to the employees of the company. We see that the statements refer to as many as sixteen cheques issued to the various employees of the company for paying off their salaries. Unless appellant 1 were really and truly concerned in the affairs of the company, one finds it difficult to account satisfactorily for such conduct on his part.

16. There is, therefore, no doubt left in our minds that the company in question belonged to appellant 1 who carried on the correspondence on its behalf with the principal officials of the various local bodies, e. g., the Presidents of the Municipalities, soliciting custom i.e , contracts for preparing plans and estimates for water works, drainage, etc. It was he who employed his one-time students of the Engineering College on the staff of the company. He took an active interest in the work of the company and was doing his best to see that it prospered. Even if appellant 2 was concerned with the affairs of the company, it would be a case of joint interest of both the appellants, and even then the substance of the case against appellant 1 would not be affected. As a public servant, he was legally bound not to identify himself with the interests of Vinod & Co., to the extent to which he did, no matter whether his interest in it was joint with appellant 2 or exclusive.

17. Having dealt with this important question of fact, which was raised and argued in this appeal, we proceed next to several points of law which have been raised by Mr. Amin for appellant 1. It is argued by Mr. Amin that the conduct of appellant 1 such as is attributed to him by the prosecution in this case did not amount to trading, that, therefore, no breach of Rule 21 Bombay Civil Services Conduct, Discipline and Appeal Rules was committed by appellant 1, and that therefore, no charge u/s 168, Penal Code could be sustained against him. It is contended that the term "trade" must be construed in its technical sense and must not be interpreted loosely or too widely. It is argued that the term must mean mercantile operations or commercial transactions, and that in that sense appellant 1 could not be deemed to have engaged in trade. Our attention is drawn to Wharton's Law Lexicon, in which the expression "trade" has been referred to as meaning "exchange of goods for other goods, or for money." The other meanings which have been assigned by Wharton to this word "trade" are "traffic; intercourse ; commerce." It is then argued by Mr. Amin that in this particular case it has not been established by the prosecution that appellant 1 had engaged in any such exchange of goods for other goods, or for money, or in

any traffic or commerce, and that in those circumstances he could not be deemed to have resorted to any trade. Our attention was also invited to the meaning assigned to the term "trade" in Webster's Dictionary. We find several meanings assigned to it, some of which are

"to sell or exchange, to buy and sell; to barter; to traffic as a business; to be engaged in the exchange, purchase, or sale of goods, wares merchandise, or anything else."

It is contended by Mr. Amin that appellant I did not engage in any of these things and could not, therefore, be deemed to have traded and thereby violated the provisions of Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules. Our attention was drawn to Aiyar's Law Lexicon of British India, in which it is pointed out that the word "trade" in its ordinary sense means "exchange of goods for money or goods for goods with the object of making a profits." It is then said that in general signification the term means "traffic or merchandise, or a private art, or a way of living." "Trade", according to Aiyar, means "the craft, or business which a person has learned and which he carries on as a means of livelihood." It is urged by Mr. Amin that the work of making planer and estimates for water works and drainage schemes was not a craft, that appellant 1 had not learnt that particular work and was not himself doing it, and that, therefore, even according to this meaning of the word "trade" he could not be deemed to have engaged himself in trade. Lastly, our attention was invited to Article 487 of Halsbury's Laws of England (Edn. 3, Vol. XXXII, p. 303), which says that "'trade" in its primary meaning is the exchanging of goods for goods or goods for money." We have given careful and anxious consideration to these submissions of Mr. Amin regarding the meaning to be assigned to the term "trade" as it occurs in Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules, and Section 168, Penal Code, but have found ourselves unable to agree with him.

18. On the other hand, it is argued by the learned Government Pleader, Mr. Choksi, for the prosecution that, having regard to the context in which the word "trade" occurs both in Section 168, Penal Code and in Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules, it must be construed in a wider sense, though not too wide, or too general, or too loose. Section 168, Penal Code, applies to a large category of public servants, and so does Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules. We must, therefore, accept the contention of Mr. Choksi that the meaning of this word "trade" should not be narrowed down so as to include only an extremely limited class of public servants in the operation of Section 168, Penal Code and Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules. We do not feel any doubt that if we accept the view of Mr. Amin, a very large category of public servants will be excluded from the application of Section 168, Penal Code and Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules, and we do not think that that could have been the intention of the Legislature in framing Section 168, Penal

Code. The learned Government Pleader has also referred to Article 487 of Halsbury's Laws of England (vol. XXXII), in which it is said that the secondary meaning of the term "trade" is "any business carried on with a view to profit." It is also pointed out that "the word is one of very general application, and must always be considered with the context with which it is used." In its wide sense the word is used "to cover every kind of trade business, profession, or occupation."

19. It is to be remembered in this case that this was a company which was known as Consulting Sanitary Engineers and Contractors, and in one case they actually got the work of digging a well done through Talati Brothers. We have got it in the evidence of Chimanal Narayandas Saraya (Ex. 28) that the work of preparing plans and estimates for the water works and drainage schemes of the Municipality of Nadiad was entrusted to Vinod & Co. The said work was done by the company which was paid a sum of Rs. 33,993-5-0 as its fees. The said sum included an item of Rs. 265 which was paid to Talati Brothers. Talati Brothers are boring contractors and had actually done the work of boring a well on behalf of Vinod & Co. The bill of Talati Brothers was paid directly by the Municipality to them, and that much amount was deducted from the bill of Vinod & Co. which the Municipality had to pay. The point to be noted is that this company (Vinod & Co.), who had undertaken the work of preparing plans and estimates for water work and drainage schemes of the Nadiad Municipality, actually got the work of boring a well i. e. a water work, of the Nadiad Municipality done through Talati Brothers. This would be a piece of evidence to show that they really did the work as contractors, and there is no doubt that a contractor's work would fall within the purview of the term "trade." Even apart from this one example of Talati Brothers, we are satisfied from the record of this case, which is voluminous, that the work which Vinod & Co. did on behalf of the various Municipalities and local bodies was a function which really pertained to the province of sanitary contractors. Virtually they contracted to make plans and estimates for the schemes of water work and drainage of the various Municipalities. They did that work and received their remuneration, fees or payments for it from the various local bodies. We are satisfied that this would come within the meaning of the word "trade".

20. Our attention was next invited by Mr. Choksi to Webster's Dictionary in which the word "trade" is shown to mean :

"Occupation, employment, or activity; business of any kind; any occupation or employment pursued as a calling, business; the business which a man has learned and by which he earns his livelihood."

It is submitted by Mr. Choksi that since appellant 1 obviously resorted to the work of making plans and estimates for the schemes of water works and drainage for the purpose of earning his livelihood, by supplementing his income from salary, he must be deemed to have been engaged in trade.

21. Our attention was next drawn by Mr. Choksi to Words and Phrases Judicially Defined (Vol. V), where it is said at p. 317 that although "in a great many contexts the word "trade" indicates a process of buying and selling, that is by no means an exhaustive definition of its meaning. It may also mean a calling or industry or class of skilled labour." Surely the work of preparing plans and estimates requires a certain amount of skill, and, looking at it from that point of view there is no reason why we should not construe it as "trade". On the whole, on a careful examination of the various authorities which have been cited before us, we are of the opinion that the work which appellant 1 did for Vinod & Co. amounted to "trade".

22. As the result of the examination of the meanings and shades of meanings of the term "trade" in the context in which it occurs in Rule 168, Penal Code and Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules, we feel that it is established from the evidence that appellant 1 engaged himself in trade. After setting up the company (Vinod & Co.) he corresponded in the name of the said company with the various local bodies and solicited and executed the work of preparing plans and estimates for the schemes of drainage and water works of those local bodies, which work he did for money. The statement (Ex. 49 E) would show that between 11-3-1947, and March 1948 the company, which, as we have seen, was the concern of appellant 1, received monies to the tune of Rs. 27,762-10-6, and we feel no doubt that some portion of this amount at least must have been retained by appellant 1 as his profit. It was a company of Consulting Sanitary Engineers and Contractors, and in one case at least, as we have pointed out above, it gave a sub-contract to Talati Brothers for digging a well for the Municipality of Nadiad and got the said work done by Talati Brothers for Rs. 265. It is doubtless from the documentary evidence that under the cloak of Vinod & Co. appellant 1 carried on the activity or occupation or business of making plans and estimates for profits which supplemented his income from other sources. It is obvious that this company, which was his creation and could not conceivably have been the creation of appellant 2, adopted as its calling the making of plans and estimates for money and therefore, if we do not, as we should not, strictly limit ourselves to the technical meaning of the term "trade", but extend it to a certain justifiable extent, without unduly stretching it, there is no doubt that appellant 1 did engage himself in trade under the name of this company.

23. Mr. Amin for the appellants has contended next that it is not shown that appellant 1 was legally bound as a public servant not to engage in trade, and that therefore the charge u/s 168, Penal Code, should fail. This submission of his, we feel, must fail. It is conceded by Mr. Amin that Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules is a statutory rule having been framed by the Government of Bombay under the rule-making power conferred upon them by Clause (2) of Rule 48, Civil Services (Classification, Control and Appeal) Rules, framed by the Secretary of State under Sub-section (2) of Section 96(B), Government of India Act, 1935. It is also conceded by him that a

statutory rule has the force of law. It is clear therefore that under Rule 21, Bombay Civil Services Conduct Discipline and Appeal Rules appellant 1 was legally bound not to engage himself in trade. There is no dispute that appellant 1 had not obtained the previous sanction of the Government of Bombay for the purpose of engaging in trade. In these circumstances this particular objection of Mr. Amin to the maintainability of the charge u/s 168, Penal Code, appears to as to be without substance.

24. The next contention of Mr. Amin, which also is a point of law, is that even assuming that appellant 1 engaged himself in trade, which he was legally bound not to do, a proceeding or prosecution u/s 168, Penal Code is not sustainable, as Rule 49, Civil Services (Classification, Control and Appeal) Rules, which deals with penalties which may be imposed, for good and sufficient reason, upon members of the services comprised in Clauses (1) to (5) specified in Rule 14 of the said Rules (appellant 1 belongs to Clause (4)), does not include prosecution u/s 168, Penal Code, as one of the penalties which can be passed upon the members of the services concerned, and does not specifically enact that a public servant guilty of breach of Rule 21, Bombay Civil Services Conduct, Discipline and Appeal Rules will be liable to prosecution u/s 168, Penal Code. We are not impressed by this contention. Rule 49, Civil Services (Classification, Control and Appeal) Rules does not say that the penalties provided by it are the only penalties which can be passed upon the members of the services comprised in Clauses (1) to (5) specified in Rule 14 of the said Rules, and does not specifically exclude the application or operation of Section 168, Penal Code. It is a wrong hypothesis to say that, if a public servant is guilty of a wrongful deed which falls under two distinct Acts, penalty can be passed on him only under one Act. For instance, there is no doubt that, if a public servant is guilty of a crime under the Penal Code, he can be prosecuted, convicted and sentenced under the said Code, Also, there is no doubt that, after the conviction, or even irrespective of the result of the prosecution, he can be dismissed under Rule 49, Civil Services (Classification, Control and Appeal) Rules. This is clear enough and requires no elaboration. No prosecution under Penal Code is admissible if it appears on the whole frame of some other special Act that the said Act is intended to be complete in itself, and to be enforced only by the penalties created by it. (See High Court Proceedings, dated 22-2-1876, 1 Mad, 55) wherein it was held that the ordinary criminal law was not excluded by Regulation VII [7] of 1817 or Act (XX [20] of 1863). But in the absence of anything in the special Act to exclude the operation of the Code, an intention on the part of the Legislature to exclude it should not be inferred (see Segu Baliah v. Ramasamiah, 18 Cri. L. J. 992 : A. I. R. 1918 Mad. 460. Clearly, therefore, in the absence of anything in the Civil Services (Classification, Control and Appeal) Rules to exclude the operation of the Penal Code, we cannot presume an intention on the part of the framers of the rules to exclude the said operation. It was also decided in Emperor v. Bhakhandra Raznadvie 31 Bom. L. R. 1151 : A. I. R. 1929 Bom. 433 : 31 Cri. L. J. 495, that the disobedience of an order duly promulgated by a public servant

under certain prescribed conditions being an offence u/s 168, Penal Code, and Section 23(3), Bombay City Police Act having enlarged the ambit of the existing offence u/s 183 of the Code by including an act prohibited by Section 23(3) within it, though the disobedience of the order was punishable u/s 127 of the Act, it was equally punishable u/s 188 of the Code if all the conditions laid down by that section were fulfilled. The gist of the decision was that for the act of disobedience of the order which was duly promulgated by a public servant, a person could be prosecuted and sentenced both u/s 127, Bombay City Police Act, and Section 188, Penal Code. Therefore, in our opinion, there is no doubt that although Section 49, Civil Services (Classification, Control and Appeal) Rules does not lay down that one of the penalties which could be imposed upon members of the services comprised in Clauses (1) to (5) specified in Rule 14 of the said rules is a prosecution u/s 168, Penal Code, a public servant who engages himself in trade, although he is legally bound not to do so, can be prosecuted u/s 168, Penal Code. In these circumstances, we do not see any substance in this particular point of law raised by Mr. Amin for appellant 1.

25. The next point urged by Mr. Amin is that so far the charge u/s 5, Sub-section (2) of India Act II [2] of 1947 is concerned, it must fail on the ground that India Act II [2] of 1947 came into existence on 11-3-1947, and cannot have a retrospective effect. It is urged that an entirely new offence of criminal-misconduct by a public servant in the discharge of his duty was created on 11-3-1947, and, as no penal statute can be applied retrospectively, the prosecution must fail, unless it is proved that both the essential ingredients of the offence u/s 5 (2) of India Act II [2] of 1947, were committed by the person concerned after 11-3-1947. There is no doubt that the offence of criminal misconduct by a public servant in the discharge of his duty was created for the first time on 11-3-1947. The previous law on the subject of the offence of acceptance of illegal gratification by a public servant is contained in Sections 161, 162, 163, etc., Penal Code. It is to be noticed that in none of these sections abuse of his position by a public servant is an essential ingredient of the offence. It is also to be noticed that as far as the offences under Sections 161, 162 and 163, Penal Code, are concerned, the alleged illegal gratification has to be shown to have been accepted for a particular purpose, whereas the purpose for the abuse of position by a public servant is entirely immaterial as far as the charge u/s 5 (2) of India Act (II [2] of 1947) is concerned. In other words, the two essential ingredients of an offence u/s 5, Sub-section (2) of India Act II [2] of 1947, were not the ingredients of any of the offences under Sections 161, 162 and 163, Penal Code. Therefore there is no doubt that it was for the first time that the abuse of his position by a public servant was made an essential ingredient of a penal offence, and it was also for the first time that the said abuse of his position was rendered punishable irrespective of the purpose for which the abuse was resorted to. It is argued by Mr. Amin that as appellant 1 was suspended with effect from 31-1-1947, and as he did not hold any official position after that date, he could not have abused his position as a public servant

after 31-1-1947, and therefore the first essential ingredient of the offence u/s 5, Sub-section (2) of India Act II [2] of 1947, could not be committed by him after 11-3-1947, the date on which India Act II [2] of 1947 was promulgated, and therefore the prosecution must fail on this account. Mr. Choksi for the prosecution has rejoined by saying that; whatever correspondence was carried on by appellant 1 and whatever he did till 31-1-1947, it was all by way of preparation for the offence, that the offence itself u/s 5 (2) of India Act II [2] of 1947 was consummated by his accepting the monies between 11-3-1947, and March 1948, and that therefore the offence could be deemed to have been committed after 11-3-1947. We are not impressed by this argument. It is quite clear that if we construe that all that appellant 1 did till 31-1-1947, was a mere preparation for an offence, as distinguished from the essential (?) of the offence, then the prosecution cannot establish in this case that the first essential ingredient of the offence u/s 5, Sub-section (2) of India Act II [2] of 1947, was committed by him after 11-3-1947. It is scarcely necessary to point out that in a criminal charge all the essential ingredients of the offence have to be brought home to the accused person before he could be convicted. Therefore in this particular case, in respect of the charge u/s 5, Sub-section (2) of India Act II [2] of 1947, it has got to be established by the prosecution that both the essential ingredients of the offence were committed by appellant 1 after 11-3-1947, and if the abuse of his position as a public servant was done by him only up to 31-1-1947, clearly, the first essential ingredient of the charge u/s 5, Sub-section (2), of India Act II [2] of 1947, would be wanting in this case, and in those circumstances this particular charge must fail. We must therefore accept Mr. Amin's argument that since the abuse of his position as a public servant by appellant 1 by means of the correspondence which he carried on with the officials of the various Municipalities for the purpose of making plans and estimates for the schemes of water works and drainage and by his other conduct which would constitute an essential ingredient of an offence u/s 5, Sub-section (2) of India Act II [2] of 1947, did not and could not occur after 31-1-1947, the charge u/s 5, Sub-section (2) of India Act II [2] of 1947, must fail.

26. The last submission of Mr. Amin for the appellants is that if the charge u/s 5, Sub-section (2) of India Act II [2] of 1947, is held to be unsustainable, the only remaining charge would be u/s 168, Penal Code, which is a charge exclusively triable by a Magistrate's Court. It is then contended that if the case had been tried by a Magistrate, he could not have imposed a heavier fine than Rs. 1,000, and therefore this Court on a notice for enhancement of the sentence could not enhance the sentence of fine to a higher amount than Rs. 1,000. For this argument reliance was put on Section 439, Sub-section (3), Criminal P. C. We have considered this contention carefully, but feel that it must be rejected. What is relevant u/s 439, Sub-section (3), Criminal P. C., is the tribunal trying the case and not the nature of the offence, i.e., whether it is triable by a Magistrate's Court or some other Court. It is not denied by Mr. Amin that the tribunal which tried this particular case, namely, the Second Additional Sessions Judge, Poona,

could have imposed an unlimited fine on the appellants. That being so, there is no doubt that we have got jurisdiction in this case to enhance the sentence of fine up to any extent.

27. The result therefore is that the conviction of appellant 1 u/s 168, Penal Code, and that of appellant 2 u/s 168 read with Section 109, Penal Code stand, whereas the conviction of appellant 1 u/s 6, Sub-section (2), read with Section 5, Sub-section (1), Clause (d) of India Act II [2] of 1947, and that of appellant 2 under that section read with Section 109, Penal Code, have to be set aside. On the point of sentence, as far as appellant 2 is concerned, the sentence passed on him u/s 168 read with Section 109 by the learned Second Additional Sessions Judge, Poona, is a fine of Rs. 200, and we do not propose to interfere with it. We do not propose to enhance it since, in our opinion, appellant 2 was merely a figurehead as far as the affairs of the company (Vinod & Co.) were concerned. As far as appellant 1 is concerned, we feel no doubt that the sentence imposed upon him u/s 168, Penal Code, by the learned Second Additional Sessions Judge, Poona, is thoroughly inadequate. This is a case of gross abuse of an official position by a public servant extending over a fairly long time, and calls for deterrent punishment. Accordingly in his case we enhance the sentence passed on him by the learned Second Additional Sessions Judge, Poona, and direct that he shall suffer simple imprisonment for a term of 9 months and pay a fine of Rs. 5,000, or in default suffer further simple imprisonment for 3 months u/s 168, Penal Code.

28. The result therefore is that the appeal of both the appellants, in so far as the conviction of appellant 1 u/s 168, Penal Code, and that of appellant 2 u/s 163 read with Section 109 of the Code are concerned, fails and is dismissed, and the appeal of both the appellants on the other count succeeds and is allowed. In review the sentence on appellant 1 is enhanced as stated above. The fine, if paid by appellant 1, in respect of his conviction u/s 5 (2) read with Section 5 (1) (d) of India Act II [2] of 1947, and the fine, if paid by appellant 3, in respect of his conviction u/s 5 (2) read with Section 5 (1) (d) of India Act II [2] of 1947, read with Section 109 Penal Code, should be refunded to them.