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RECENT SUPREME COURT DECISIONS AND THE INDIAN PREVENTION OF CORRUPTION ACT

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Key Takeaways

- Officers and executives of private banks to fall within the ambit of 'public servants' under the Prevention of Corruption Act.
- While commercial bribery is not a substantive offence in India, this judgement will have the effect of deeming it as such in the context of private bankers.
- Private banks should consider strengthening their compliance programs to ensure compliance with the Prevention of Corruption Act.

The Supreme Court of India, in a landmark judgment, held officers of private banks to be public servants under the country's principal anti-corruption legislation – the Prevention of Corruption Act (PCA), 1988. The bench, comprising Justices Ranjan Gogoi and PC Pant delivered their judgement on 23rd February 2016 in the matter of *Central Bureau of Investigation, Bank Securities & Fraud Cell versus Ramesh Gelli and Others*[1]. It is imperative to mention that the Supreme Court's judgement comes against the backdrop of India battling a major non-performing asset crisis, where several banks have been accused of sanctioning loans without following due process. It is highly likely that law enforcement will explore the 'quid pro quo' angle more seriously, in cases where loans have been sanctioned without due process, now that private bank officers can be charged with the PCA.

Why is this judgement significant?

The PCA essentially focuses on public bribery wherein the acceptor of the bribe is a public servant. The PCA was not envisaged to combat commercial bribery or private sector bribery, which is where the acceptor of the bribe is a not a public servant/government employee (directly or indirectly). Thus, where an employee of a private company is bribed to obtain a benefit, the PCA would not be applicable, however other legal remedies would still hold. This judgment however, by classifying private bankers as public servants, widens the scope of the PCA and makes private bankers liable under its stringent provisions.

Brief facts of the case

In August 2004, Global Trust Bank, a private bank in India merged with the Oriental Bank of Commerce which is a public sector bank. Allegations were levelled against

1 Criminal Appeal Nos. 1077-1081 OF 2013 with Central Bureau of Investigation through Superintendent of Police, BS & FC & Anr. Versus Ramesh Gelli, Writ Petition (CRL.) NO. 167 OF 2015.

Mr Ramesh Gelli (Chairman & Managing Director) and Mr Sridhar Subasri (Executive Director) of the Global Trust Bank that at their request, loans were sanctioned and disbursed '*throwing all prudent banking norms to winds*', which resulted in the creation of a large quantum of non performing assets, thereby compromising the interests of the bank's depositors. These allegations related to the pre-amalgamation period but were brought to light as a result of an audit after the merger.

India's premiere investigation agency – the Central Bureau of Investigation (CBI) investigated the matter and accordingly filed a charge sheet before the Special Judge (CBI), against the accused persons charging them with the commission of offences under the Indian Penal Code[2] and the PCA (Section 13[3] – Criminal misconduct by a public servant).

Despite both the Special Judge (CBI) and, on appeal, the Bombay High Court, declining to take on the cases against Mr Ramesh Gelli and Mr Sridhar Subasri on the grounds that they were not public servants at the time of the alleged transactions, the case was subsequently referred to the Supreme Court of India where the court held otherwise.

Provisions of law in question

The Supreme Court was focused on the following provisions of law:

A. Section 2 (b) of the PCA – '*public duty' means a duty in the discharge of which the State, the public or the community at large has an interest*
B. Section 2 (c) (viii) of the PCA – *'any person who holds an office by virtue of which he is authorised or required to perform any public duty'*
C. Section 46A of the Banking Regulation Act (BRA), 1949

This provision is at the heart of the matter, as it provides for officers of a bank to be deemed as public servants for the purposes of Chapter IX of the Indian Penal Code. The section reads as follows:

> **'Every chairman who is appointed on a whole-time basis, managing director, director, auditor, liquidator, manager and any other employee of a banking company shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code (45 of 1860).'**

What the Supreme Court held

The Supreme Court thus was required to adjudicate on '*whether the Chairman, Directors and Officers of Global Trust Bank Ltd. (a private bank before its amalgamation with the Oriental Bank of Commerce), can be said to be public servants for the purposes of their prosecution in respect of offences punishable under Prevention of Corruption Act, 1988 or not?"*

The court reasoned that the objectives of the PCA clearly specified that the statute was to '*make the anti-corruption law more effective and widen its coverage.*' After conjointly reading the provisions of the PCA with Section 46A of the BRA, the court harmoniously constructed them to determine in the affirmative that officers of a private banking company would fall under the definition of a public servant as defined in the PCA. Therefore, the matter was remanded back to the trial court to take cognisance of the offences punishable under the PCA.

Impact

The judgment has provided law enforcement authorities with considerable clarity on the conflict between the provisions of the PCA and BRA, thus now enabling them to charge private bankers under the country's anti-corruption laws. This judgment, in the context of private bankers, therefore fills the void in the statute books of a substantive offence of commercial bribery. Thus, prosecution of private bankers moves to the more stringent PCA in the event of bribery.

Private banks should consider risk mapping the potential for criminal misconduct with respect to the sanction of loans to non-performing assets, and of course strengthen their compliance programs to incorporate elements of

2 Section 120B read with Sections 409 and 420.
3 Section 13(2) read with Section 13(1)(d) of the PCA.

the PCA. Officers of private banks must understand the nuances of criminal liability that the PCA would cast on them, which would be a considerable departure from the earlier substantive position of the law.

This judgement therefore sets the tone with regards to commercial bribery, even before it formally makes its way to the statute books. It is worth mentioning that the Ministry of Home Affairs has also initiated a proposal to introduce commercial bribery as an offence in the Indian Penal Code.

Conclusion

To conclude, corporations must bear in mind that **law enforcement and public awareness in India is not what it was two decades ago**. Business is not as it was, and companies that continue to engage in unethical practices under the garb of this being an 'Indian business culture' are likely to be adversely impacted. With all the shortcomings and challenges of the Indian legal system, India remains a rule of law upholding democracy and if one is on the wrong side of the anti-bribery law when it is being upheld, the consequences will follow.

For an organisation to respond to these changing times, it simply needs to take **'ownership of its compliance function' and 'do the right thing'**. The compliance function thus needs to depart from a 'tick the box' liability reduction model to one that builds a dynamic and determined **culture of integrity**.

By Sherbir Panag