

(1996) 04 BOM CK 0050
In the Bombay High Court
Case No : Criminal Appeal 172 of 1993

Prakash Vishwasrao Kohok

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-04-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 109
Prevention of Corruption Act, 1988 — Section 13

Citation : (1997) 99 BOMLR 176

Hon'ble Judges : A.D. Mane, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.D. Mane, J.—This is an appeal filed by the original accused No. 1 (for short-the "appellant") who was charged along with his wife Mrs. Kshama Kohak (Original accused No. 2) in Special Case No. 3/90 in the court of Special Judge, Ahmednagar on an accusation that he, in a capacity of a public servant, during the period between March 1967 to November 20th, 1987 had acquired and possessed assets which were dis-proportionate to his known sources of income for which they failed to account satisfactorily and that the co-accused No. 2 aided and abetted the appellant and hence they are liable to be punished u/s 5(1)(e) read with Section 5(2) of the Prevention of Corruption Act, 1947 (for short, the "Act").

2. The learned Special Judge by his judgment and order dated 3.4.1993 acquitted the accused No. 2 but convicted the appellant u/s 5(1)(e) read with Section 5(2) of the Act and sentenced him to suffer rigorous imprisonment for two years and to pay fine of Rs. 4,00,000/- in default to suffer further rigorous imprisonment for twenty months. It was also directed that the cash amount worth Rs 47, 685/- be confiscated to the State. The appellant, therefore, questions correctness, legality and propriety of the judgment and order of

conviction and sentence passed against him as aforesaid.

3. The appellant had joined his services in the Excise Department of the State of Maharashtra as a Superintendent of Prohibition and Excise, in the month of September, 1965. He worked in that capacity at several places till he was suspended in the month of March, 1988. He married co-accused Kshama in December, 1972.

4. While the appellant was working as Excise Superintendent at Ahmednagar, PW 17 Abdulla Irani, who was then Chairman of District Liquor Merchants' Association, Ahmednagar (for short, hereinafter, referred to as the "Liquor Association") on 30.8.1986 lodged a complaint with the Commissioner of Excise against the appellant alleging that the appellant demanded the money from members of the said association for renewal of their CL-III licences, through one Sub-Inspector. It appears that, when the delegation headed by the Chairman along with some members of association went to the Commissioner - Shri Chobey, the Commissioner asked them, whether any of them had paid amount to the appellant. It appears that some of them stated that they had paid money to the appellant. Therefore, Shri Chobey asked them to file affidavits to this effect. Affidavits were accordingly filed. The Commissioner then asked PW 17 Irani to go to Director General of Police., Anti Corruption Bureau, in regard to their grievances. Accordingly on 31.8.1986 PW 17 Irani contacted Director General of Police and submitted copies of the complaint along with copies of affidavits which were initially submitted to the Commissioner of Prohibition and Excise. In consequence, PW 18 Dy. S.P. Joshi, from Anti Corruption Bureau was entrusted with the enquiry on 8.9.1986. PW 18 Joshi made certain enquiries and recorded statements of the appellant and on getting details of property of the appellant, he submitted his report to his superior i.e. to the Director of Anti Corruption on 18.8.1987. On receipt of authorisation, PW 18 Joshi registered an offence on 26.11.1987 by filing first information report (Exh. 185).

5. During the course of investigation Shri Joshi made search of the houses of the appellant, both at Pune and Ahmednagar on 26.11.1987. He also made search of the houses of his relations i.e. his parents and brothers at Nashik. During the course of search at Pune and Ahmednagar, it is alleged that various articles such as casuals, search clothes, refrigerators, electrical gadgets, ornaments and cash worth Rs. 47,685/- were found. Value of the ornaments was assessed with the help of Goldsmith and value of other articles was assessed with the help of panchas. PW 18 Joshi also took search of the Bank Accounts, lockers, both of the appellant and his wife co-accused at various places in different banks. PW 18 Joshi then submitted his report for getting sanction on 18.4.1990 and sanction was accorded to prosecute the appellant on 25.4.1990 and charge sheet was then filed on 30.4.1990.

6. It will be appropriate to mention at this stage that the Government accorded sanction to prosecute as per sanction order Exhibit 152, charging the appellant who appears to have committed offence punishable under Sections 13(1)(e) read

with 13(2) of the Prevention of Corruption Act, 1988 and Section 5(1)(e) read with Section 5(2) of the Prevention of Corruption Act, 1947, as the Government having fully examined the material placed before it and having considered all facts and circumstances disclosed therein, satisfied that there was a prima facie case made out against the appellant for having possessed assets, either in his name or in the name of members of his family, which were disproportionate to his known sources of income to the extent of Rs. 6,27,185.97 Ps. possession of which he could not satisfactorily account. Second part of the sanction is in regard to co-accused which recites that Smt. Kshama Prakash Kohok, wife of the accused person, knowingly aided and abetted the accused person u/s 5(2) read with 5(1)(e) of the Act and Section 109 of the Indian Penal Code, 1860. The sanction order contains various annexures regarding assets of appellant and members of his family as on 28.11.1987, total income derived by the appellant and his family members as on 28.11.1987, total expenditure (Proved and estimated) of the appellant and members of his family as on 28.11.1987, summary of income, expenditure and assets of the appellant and his family members as on 28.11.1987. The sanction order also carries annexure A-1, showing assets of Smt. Kshama Prakash Kohak - co-accused as on 28.11.1987.

7. The learned Special Judge framed the charge at Exhibit 14 (Page 60) against the appellant and co-accused in the very terms of the order of sanction. Therefore, the gravamen of the charge levelled against the appellant is that during the check period i.e. between March 1967 to 28th November, 1987, while he was working as Superintendent of Excise at different places, acquired property, either in his name or in the names of members of his family worth Rs 6,27,185.97 Ps. over and above income, which he has earned by legal means for which he failed to give satisfactory account of pecuniary resources of the property disproportionate to his known sources of income. In other words, in regard to the property he had to annexure "A" in the sanction order as well as the charge framed against the appellant it is evident that the property though stands in separate name of his wife co-accused, it is regarded as property of the appellant. That means, though not expressly stated, it is suggested by the prosecution that the property, both movable and Immovable which stands in the name of the co-accused is benami and real owner is the appellant.

8. Now, in support of the charge, the prosecution examined as many as 18 witnesses. PW 18 is Dy. S.P. Shri Joshi, an Enquiry Officer. PW 6 is M.K. Gandhi, who acted as a panch along with another Shrikant Kulkarni for the search of residential flat of the appellant at Pune and also who valued the moveable articles found in the flat of the appellant and his wife co-accused vide Exhibits 123-A to E with the schedules annexed thereto. PW 7 is Ishwar Bharate, who acted as a panch along with another panch Vishwanath Barolkar for search of the official residence of the appellant at Ahmednagar vide panchanama Exh. 128 with the schedule A to G. PW 1 Khushalchand Munot is examined in order to ascertain value of Ralli fan in the year 1981. PW 2 Ashok Joshi is examined in order to ascertain price of Godrej Refrigerator of 165 litres of the year 1974. PW

3 Dr. Soman is examined to prove receipt of Rs 1340/- from co-accused towards consultation till 12.9.1987. PW 4 Ubale is examined to prove the price of Black and White Crown television in the year 1984. PW 5 Manohar is examined, who is Cashier of State Bank of India, in support of television tax paid by the appellant during 1984-85. There is evidence of PW 8 Nitin Kotecha in whose house the appellant was tenant in 1973-74 to ascertain the amount of rent paid. PW 9 Hari Savkar is examined to refute the allegation of the appellant of having received Rs 30,000/- from him by way of loan. PW 10 Balasaheb Bondre from Kini, District Kolhapur, was also examined, who was to enter into an agreement for cultivation of land for and on behalf of co-accused. PW 11 Ramchandra Indapure is the witness from the office of the appellant to show expenditure on the point of non-supply of official furniture to the official residence of the appellant and phone call charges recovered from the appellant in 1988. There is evidence of PW 12 Arvind Sane, Deputy Secretary to the Government of Maharashtra, Home Department, to prove sanction Exhibit 152. PW 13 is Police Sub-Inspector Mandlik, who has recorded statement of Bondre (PW 10) PW 14 is Inspector Vitakar who recorded statement of PW 9 - Savkar. PW 15 is Police Sub Inspector P.M. Deshmukh, who recorded statement of certain witnesses including Nitin Kotecha. PW 16 is Hariba Jadhav, Dy. Engineer of P.W.D. who was asked to assess the market value of the flat at Pune.

9. The defence of the accused was one of total denial to the charge that was framed against them. They pleaded not guilty. Co-accused pleaded that she has her own resources and she has acquired property by herself in her name. Initially she was doing tuitions and later on she started the Beauty Parlour and that income is assessed to income tax. She has paid income tax, She is, therefore, not liable to give any account of her income or expenditure or the assets as the case may be. She has legitimate means and she thus, is not accountable since the income or assets which she possessed has no concern with the appellant. The appellant supported her defence.

10. On behalf of defence eight witnesses have been examined. DW 1 Dr. Pramod Paigude was examined to show that he has made report about the Beauty Parlour run by the co-accused in the flat at Pune. DW 2 Dr. Keshav Khedkar has paid Rs. 25,000/- to the accused Kshama for paying income tax. DW 3 S.V. Deshpande is the income tax officer, Beed who has proved the income tax returns, assessment and the order. DW 4 is Baburao Javenjal, who has paid Rs 5000/- to the co-accused on 25.4.1984. DW 5 is Madhukar Patole, to whom the appellant handed over charge along with official furniture from his official residence. DW 6 is Mohan Jadhav, brother of the co-accused Kshama who supported gifts, payments of hand loans to his sister from his father and other family members. PW 7 Gajanan Kulkarni is the expert for value of flat and PW 8 is Pradeep Kohak brother of the appellant to prove certain payments and gifts to the accused and co-accused Kshama.

11. In order to appreciate the various contentions raised in this appeal on behalf

of the appellant, it would be convenient to give all assets, income and expenditure, as per initial prosecution version in respect of not only the appellant but his family members as on 28.11.1987. The learned trial Judge in para 22 of his judgment reproduced the statement relied on by the prosecution disclosing the total assets of the appellant and his family members as on 28.11.1987 to be Rs. 11,23,629.48 Ps. In the second statement income of the appellant and family members of the appellants as on 28.11.1987 is stated to be Rs 7,14,644.73 Ps. In the third statement, it is stated that the expenditure of the appellant and his family as on 28.11.1987 was Rs. 2,128,201,22 Ps. Therefore, according to the prosecution appellant was found to be in possession of Rs. 6,27,185.91 Ps. disproportionate to his known sources of income.

12. The learned trial Judge examined the prosecution evidence from point of view of ascertaining whether the statement of assets, income and expenditure relied on by the prosecution could be accepted or not. In para No. 67 of his judgment, he reached a conclusion that assets of the appellant, co-accused and the members of their family as on 28.11.1987 were Rs. 9,98,448.28 Ps. Secondly, in para No. 69 of the judgment, the learned trial Judge on examining the material evidence is of the view that total expenditure made by the appellant and his family members comes to Rs. 1,96,281.87. Therefore, while getting disproportionate assets, the learned trial Judge deducted legal savings of Rs. 5,18,362.86 from total assets of Rs. 9,98,448.28 Ps. According to learned trial Judge, thus the excess assets found, dis-proportionate to the pecuniary resources and property comes to Rs. 4,80,086.37 Ps.

13. On reaching to that conclusion, the learned trial Judge then proceeded to examine the defence version and he dealt with the material evidence in his judgment in para Nos. 71 to 89 in general but in particular of co-accused No. 2 Kshama is concerned, he dealt with the same in para No. 90. It is important to note that the learned trial Judge in express words in para No. 90 of his judgment, stated that the Enquiry officer failed to consider independent income of co-accused Kshama which comes to Rs. 46,275/-. The particulars which were re-produced in para No. 90 of the judgment contains certain amounts received by her from her father by cheque between 16.6.1982 and 12.11.1984 and the amount received towards F.D.R. proceeds on 14.7.1986, Birth-day gifts to her son and amount received from her father on 19.1.1984. The learned trial Judge also found that the amount to the extent of Rs 8,781/- is wrongly not assessed in the account of the appellant from his income side as the same was received by him from his relatives. The learned trial Judge, therefore, noticed that Rs. 55,056/- should be added in income side of both the appellant and co-accused.

14. In this context, it is also relevant to state that dealing with the main defence of the co-accused that she had her own income from Beauty Parlour the learned trial Judge considered some of the circumstances to raise some doubt in accepting that part of defence, with reference to certain deficiencies which he has noticed in accepting the income tax returns filed by her before the authority

having no jurisdiction to entertain. Referring to letter dated 13.3.1987 purported to have been addressed to the income tax officer by the co-accused the learned trial Judge seems to have made much emphasis to find fault with the authority in accepting the income tax return. It appears that according to the learned trial Judge it is doubtful if the co-accused conducts Beauty Parlour at Pune when in the letter referred to above she has clearly mentioned that she carried out her Beauty Parlour at Kolhapur only. The learned trial Judge, however, accepted the fact that no other document on record is produced to show that the co-accused conducts Parlour at Kolhapur only.

15. It is, however, clear from the income tax returns and the order passed by the Income Tax Officer that the co-accused submitted her income tax return under Amnesty Scheme which was valid upto 31.3.1986, by paying not only the past amount of income tax as assessed but also advance tax for the year 1986-87. If regard be had to the returns, it is evident that the co-accused did have income to the extent of Rs. 2,13,000/- from the Parlour. The learned trial Judge, however, hesitated to give account of that income because in his view inference is possible that the appellant had smell about the action being taken against him by Liquor Association and in consequence these income tax returns came to be filed on 31.3.1986 and that has a nexus with the complaint made against the appellant.

16. It may be noted that except examining PW 17 Irani, Chairman of the said Liquor Association, the prosecution did not examine any of those members who alleged to have paid amount to the appellant in their affidavits filed before the Commissioner in matter of renewal of CL-III licences. There is also no independent evidence to show that action for offence charged was under contemplation by the authority against the appellant prior to 31.3.1986. Factually, if regard be had to the dates in the matter of preliminary enquiries or dates of complaint of the Liquor Association, it was inherently improbable that filing of income tax returns had any nexus with subsequent initiation of inquiry against the appellant.

17. It is, however, equally important to mention that while dealing with the defence u/s 313 of the Code of Criminal Procedure, as advanced by co-accused No. 2, as an alternative case, the learned trial Judge is of the view that at the most regard may be had to the returns filed by the co-accused before income tax authority for the year 1984-85, 1985-86 and the amount shown therein comes to only Rs. 57,000/- as against Rs. 2,13,000/- and even giving allowance of Rs. 57,000/- still the assets worth Rs. 3,43,000/- remains and same is disproportionate to the known sources of income of the appellant and members of his family.

18. There is another silent feature which requires mention at this stage when I am giving reference to the finding of the learned trial Judge. In para No. 110 of the judgment it is for the first time while considering the question whether the accused No. 2 can be said to have committed offence of abatement, the learned

trial Judge raises a question for himself for consideration and to quote in his words. "The only point is whether she has possessed any property of the accused No. 1 on his behalf?". The learned trial Judge then again dealt with certain items over which the co-accused claimed exclusive title and according to the learned trial Judge, "While showing income of accused (appellant) and his family members as on 28.11.1987 wife has shown following income in her name....

1. Amount received from Sulochana Virtue on 14.7.82 by Kshama. Rs. 5,000.00
2. Amount received from V.G. Jadhav by Kshama. Rs. 10,000.00
3. Amount received from Sulochana Virtue by Kshama. Rs. 9,967.50
4. Amount received from Suraji Hiraji by Kshama on 3.3.1984 Rs. 10,000.00
5. Income from lottery prizes. Rs. 1,22,000.00
6. Sale proceeds of gold ornaments Rs. 39,220.00
7. Amount received from cultivator and the sale proceeds of the agriculture Rs. 32,000.00
8. Interest earned on savings account. Rs. 8,000.00
Total Rs. 2,36,187.00
19. In para No. 111, the learned Judge further records that I have also discussed that following assets were found in the name of accused Kshama:

1. Plot No. 37 at Parvati, Pune Rs. 35,000.00
2. National Savings Certificates Rs. 60,000.00
3. Purchase of Agricultural land Gut No. 296 at Kini Rs. 75,000.00
4. Servants Quarter at Kini Rs. 35,000.00
5. Amount paid for flat Shangrila Rs. 41,000.00
6. Last balance upto 28.11.87 in the extract of Bank Account of Mrs. Kshama in saving account No. 11593. Rs. 1,281.00
7. Last balance in Account No. 11050 of Kshama Rs. 1,931.00
8. Balance in Account No. 6057 of Kshama. Rs. 39,442.00
9. Amount in respect of the deposits of Maruti Car Rs. 10,000.00
10. Amount in respect of Scooter Auto Car Aurangabad Rs. 500.00
11. Deposits towards telephones Rs. 1,000.00
12. Deposits towards telephone Rs. 8,000.00
13. Amount invested for agricultural development Rs. 20,000.00
14. Amount invested in furniture Rs. 15,000.00
15. Four fans Rs. 1,600.00
Total Rs. 3,44,854.00
In para No. 112, the learned trial Judge records that following expenditure, which is found to have been incurred in the name of Kshama and to quote:

1. Lottery commission Rs. 86.00
2. Quotation of electric pump Rs. 810.00
3. Land Revenue Rs. 230.00
4. Payment of income tax Rs. 20,048.00
5. Stamp duty Rs. 4,725.00
Total Rs. 26,209.00
19. In para No. 120 of the judgment, the learned trial Judge observed that legal savings of Kshama will be calculated by deducting expenses of Rs. 26,209/- from the total income of Rs. 2,36,187 which comes to Rs. 2,09,978. It is observed that the co-accused Kshama however, explained the amount received to the extent of Rs. 46,275/- and after deducting this amount, the expenses comes to Rs. 88,601/- in the name of accused Kshama. The learned Judge, therefore, is of the view that deducting likely savings from assets which comes to the tune of Rs. 1,34,876, in absence of any plausible explanation for this excess amount, the only unrepeatable inference is that, the money is of the appellant. Even then the learned trial Judge records his finding that,

...There is no evidence against the accused No. 2 to show that she look active

part or entered into the conspiracy in obtaining the property of accused No. 1 disproportionate to his known sources of income...only because she was possessing some amount of accused No. 1, that does not amount to an offence of abetment of criminal misconduct, as no participation on her part is brought on record to show that accused No. 1 with her help illegally obtained the property....

20. Lastly, the learned trial Judge did not accede to the contention on behalf of the defence that the prosecution was bad for want of valid sanction. The learned trial Judge did accept the fact that within hardly three days, on receipt of the papers by the Government, the sanction came to be accorded, but according to the learned trial Judge, the sanction was not bad either on the ground that it suffers for non application of mind or for non-consideration of the materials which were on record.

21. That takes me now to the arguments advanced on behalf of the appellant. Shri Karmarkar, learned Counsel for the appellant in the first place, urged that sanction to prosecute is bad in law since it suffers from non application of mind and conviction based upon in valid sanction stands vitiated. I, however, propose to deal with this argument lateron.

22. Shri Karmarkar, learned Counsel next argued that the learned trial Judge has clearly fallen into an error of law in appreciating the prosecution evidence. The learned Counsel took me through the various paragraphs from the judgment of the learned trial Judge with reference to the evidence on record and argued that the findings recorded by the learned trial Judge are mutually destructive and suffer from clear confusion of the mind to the evidence on record with reference to the main points arising out of the charge levelled against the appellant. It is submitted that the findings on various points of income, assets and expenditure, whether that of the appellant and his family members on one hand or that of the appellant's wife on the other also suffers from suspicion surprises and conjectures. It is submitted that the learned trial Judge was not justified in questioning the legality or the correctness of the order of assessment passed upon the valid income tax returns under a lawful scheme, merely on the ground that it was passed by the income tax officer within whose jurisdiction the co-accused had no permanent address. In this context, the learned Counsel invited my attention to certain guiding principles under the Income Tax Act. So long as the order of assessment stands valid, legality thereof cannot be questioned by any authority other than the income tax authority. The learned trial Judge though partly accepted the validity of the order of assessment or payment of income tax by the co-accused for her own income, arising from not only proceeds of agricultural land or assets or sale of ornaments but also from the Beauty Parlour. Rejection of the income of Beauty Parlour for the years 1983-84 to 1986-87 was based on no criteria .If regard be had to the income tax paid by the co-accused in respect of income from Beauty parlour for these years, obviously, it is argued that there would arise no question of any property being found in possession of either of the accused dis-proportionate to the known or legitimate sources of

income of the appellant.

23. The learned Counsel also made a great deal of criticism on the findings recorded by the learned trial Judge in accepting rough estimate of prices of furniture, fixtures, personal wearing apparels and other house hold articles found in search of flat at Pune and official residence of the appellant at Ahmednagar, firstly, because the evidence of panchas cannot be conclusive evidence for valuing such articles by common sense and secondly, in absence of any evidence as to when these articles were purchased, the valuation at the time of panchanama is faulty and cannot be accepted as a guide for proper valuation of the property. The valuation which is based on merely a guess work is no valuation and, therefore, the statement of assets disclosed by the appellant regarding value of such property ought to have been acted upon. It is submitted that it was an error to take into account the value of these articles on the basis of prevailing prices in the market. Regard must be had to several factors such as depreciation, non-user, un-suitability, inflation in the prices etc.

24. The learned Counsel, urged that the value of the property possessed by the appellant's wife as independent of the income of her husband if taken into account together with the income from Beauty Parlour, her total income comes to Rs. 5,56,164.00 and if this is to be considered along with income of the appellant it cannot be said by stretch of any imagination, that the appellant was found in possession of assets dis-proportionate to his known sources of income for which he failed to give satisfactory account.

Dated : April 23.1996.

25. Not only that but Shri Karmarkar, learned Counsel further urged that if regard be had to the averments in the sanction order, as well as the charge that was levelled against the appellant, all the while it was the prosecution case that co-accused held assets as Benamidar. The prosecution indeed failed to adduce any reliable evidence in support of benami transaction, much less the prosecution actually gave up that contention but the learned trial Judge without going into the question of benami transaction also seems to have virtually rejected the contention of benami transaction, but at the same time, the learned trial Judge, the learned Counsel argues, made a new case altogether for prosecution which is contrary to law. Therefore it is argued that the order of conviction and sentences is totally illegal and cannot be sustained.

26. Mrs. Rasal, learned Additional Public Prosecutor submits that though it may appear that there is in-consistency in the findings recorded by the learned trial Judge but these findings on alternative points examined by the learned trial Judge, nevertheless, are properly recorded against the appellant and that finding of dis-proportionality of the assets or the property for which he failed to give satisfactory account, does not require any interference in appeal.

27. The principle question which requires determination is whether the prosecution proves that the appellant or any person on his behalf is in possession

or has, at any time during the check period of his office, been in possession for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

28. In order to determine the aforesaid question, it is necessary to keep in view the guiding principles governing the provisions of Section 5(2) read with Section 5 (1)(e) of the Act. It is suffice to refer to a decision in case of State of Maharashtra Vs. Wasudeo Ramchandra Kaidalwar, . The Supreme Court has examined scope and extent of the aforesaid provision by observing,

The provision contained in Section 5(1)(e) is a self-contained provision. The first part of the section casts a burden on the prosecution and the second on the accused. When Section 5(1)(e) used 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. Thus it cannot be said that a public servant charged for having disproportionate assets in his possession for which he cannot satisfactorily account, cannot be convicted of an offence u/s 5(2) read with Section 5(1)(e) unless the prosecution disproves all possible sources of income.

It is equally important to keep in view other principles; laid down in the case cited supra. The Supreme Court observes,

...The ingredients of the offence of criminal mis-conduct u/s 5(2) read with Section 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 bring a case u/s 5(1)(e), namely, (1) it must establish that the accused is a public servant, (2) the nature and extent 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 resources or property found in possession of the accused were dis-proportionate to his known sources of income. Once these four ingredients are established, the offence of criminal misconduct u/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 nature and extent of the burden cast on the accused is well settled. The accused is not bound to prove his innocence beyond all reasonable doubt. All that he needs to do is to bring out a preponderance of probability.

It will be appropriate to quote, further observations of the Supreme Court with regard to the facts proved in the case; namely:

Where the public servant who was found in possession of property disproportionate to his income, alleged that the said property belonged to his father-in-law and led overwhelming evidence and documents to show the affluence and substantial means of his father-in-law to create a doubt as to his

possession over such property, the accused would be entitled to acquittal....

29. Shri Karmarkar as well as Smt. Rasal, took me through the oral as well as documentary evidence adduced in the case on behalf of the prosecution as well as on behalf of the defence. The oral evidence of prosecution mainly suggests testimony of Investigating Officer PW 18 Joshi and other witnesses, who are panchas to the panchanama drawn during searches of the permanent residential flat at Pune of the appellant and his official residence at Ahmednagar, as well as houses of their relations at Nasik. The documentary evidence consists in the form of panchanama and annexures and the schedules annexed thereto in respect of movables found in possession of the appellant at Pune as well as at Ahmednagar, including cash and ornaments and vouchers, receipts etc. The evidence adduced by the defence consists eight witnesses, partly on the payment made either to the appellant or his wife by way of loan, gifts etc. and disclosing the filing of income tax returns by the appellant's wife Kshama in respect of her independent source of income by way of tuitions, beauty parlour or earning from the agricultural land.

30. I have made a detail reference to the findings recorded by the learned trial Judge with reference to the evidence, particularly that of the defence in respect of assets, income and expenditure of the appellant and his family members, on one hand and the assets and income and expenditure of the appellant's wife alone on the other hand. The learned trial Judge in the first hand accepted the valuation of various household articles, wearing apparels and other articles as estimated by the panchas but with dis-regard to the date of their purchases, nature and their conditions and without taking into account depreciation of valuation of such articles, etc, besides escalation of prices on the date when their valuation was made by panchas.

31. One of the arguments advanced on behalf of the appellant is that the learned trial Judge ought not to have been guided by the valuation done by the panchas at the instances of the investigating officer, in dis-regard to the various factors which are necessary for taking into account while valuing the articles. The resultant factor is that excess amount on assets side came to be shown.

32. Broadly speaking, the nature of articles which were found in possession of the appellant and members of his family can be divided into four heads (i) furnitures, (ii) wearing apparels, (iii) household articles and (vi) cosmetics, shoes, children toys etc. I think, it is not necessary to consider the sundry articles such as cosmetics, toys, books, etc. but I may proceed to consider the valuation of major heads such as furnitures and clothes and house hold articles etc.

33. It is common ground that during the enquiry investigating officer PW 18 Joshi requested superior of the appellant to furnish him with the statement of assets, income and expenditure from the appellant in the required proforma, vide letter dated. 7.2.1987 and the appellant did furnish such information in the required

proforma, through his superior, vide his letter dt. 13.3.1987 (Exch. 40). Statement III makes mention of furniture worth Rs. 20,000/- purchased in the name of the appellant's wife between 1966 and 1985. There is also mention of clothes, corckery, cutlary, etc. worth Rs. 10,000/- Significantly, the investigating officer accepted the value of furnitures worth Rs. 20.000/- as according to him some receipts were found in respect of furnitures brought by the appellant from Nagpur. The learned trial Judge did not, however, accept the defence version as according to him it was for the appellant to produce receipts, vouchers, etc. showing purchase of articles which were found in his possession to show what was the correct purchase price of these articles.

34. I think, the learned trial Judge has clearly fallen into an error in placing such burden on the appellant because it is needless to say that there is no any sound reason for one to maintain record of purchase of such household articles. It is true that the Government servant is to satisfactorily account for the disproportionate assets and not to prove the claim with mathematical exactitude beyond all possibility of doubt. One may might be keeping accounts of expenditure for his satisfaction but why should he procure and preserve supporting bills and vouchers? These are not the Government cash to be audited. Besides why should one keep them from the beginning of his carrier till his superannuation anticipating to be required in a court of law? Even for certain expenditure supporting vouchers are not feasible for which audit accepts a flat rate.

35. Now, on the question whether the learned trial Judge has fallen into an error in accepting what panchas have said in respect of valuation of some of the articles, namely, furnitures, personal apparels, cosmetics, household articles etc., I first tried to see if any assistance can be obtained from the learned Counsel on both the sides to find out whether one can safely rely on valuation of aforesaid items made by the panchas. It is, however, conceded by the learned Counsel for both the sides, that panchas have roughly given account of valuation by clubbing such articles together without valuing major articles separately. This is evident from Exhibits 123/A to E and 128/A to G. To illustrate, a reference can be made to following items. True translation of these documents in from page No. 922 onwards.

Exhibit 123-A/Sr. No. 1:

Rs. 9,500 Dressing table of Sunmaika with mirror 6 ? 11 ? 1 therein 20 colour hairpins, one Kolhapur chappal, two books, cosmetics, coloured plastic table cloth five, total five plastic rain coats and baloon bags, carbolic tin, Mehendi powder approximately 1 kg., two table lamps with glass, 12 hairpins, make up box, hair drier, 17 English Hindi magazines ,hair comb, tube light of firian company, cum model, plastic spray of apco company, combs, three ponds, one lakme, ori company lotions, powders etc. total 45 small and big plastic bottles, etc. approximately price of above articles.

Exhibit 123/B : Sr. No. 8 :

Rs. 1,500/- One Sunmayaka Table having two drawers in that school books of children, China clay flower pot on table, steel pan daba, copper kundi, wall piece, price approximately.

Exhibit 123/C : Sr. No. 5 :

Rs. 2112.50 6 Towel, Sari, one piece, one safari piece, one pant piece, pillow cover 2 dozen, two pieces also regal whisky bottle, warlo scent bottle, two sony cassettes, two dozen spoons, six knives, white lighter ball pen, pen lighter set one.

Sr. No. 14

Rs. 31775 In the above drawer inner side cupboard 15 series, blouses, petticoats etc, in that 8 jari series, 4 costly series, 23 series, 13 books, 8 plastic powder pack, scent, 5 costly series, 4 ladies purse, 12 handkerchiefs, 3 dozens spoons, 3 lux soaps, 2 creams, three scent bottles, some thing of beauty parlour, one gums regulator, two dozen spoons , two pearls necklace 27 series with blouses, 25 series, children's clothes, 6 dozen small napkins cosmetics are of beauty parlour.

Exhibit 123/D : Sr. No. 3:

Rs. 7013 4 Shalu, 11 costly series, two safari dresses, 15 meter polyester cloth, 12 piece frock, 10 series, 10 blouses, 3 napkins, 17 series, 2 costly bed sheets, sweaters, two nighty, 5 cassettes, 2 video cassettes, napkin, 8 scent bottles, nine 3 box, 10 small purse, big napkin 10, 5 keli soap, shirt piece 3, 4 empty bags.

Sr. No. 14:

Rs. 4,000 In lower 25 children's clothes, one rug, steel plates price approximately ,8 steel tray top 3.

36. It is, therefore, clear that since the valuation of each article is not made separately, but they are clubbed together and therefore, it becomes difficult to find out real value as reflected of such articles.

37. In this context, it is relevant to refer to the evidence of Panch PW 6 Gandhi. In course of his cross-examination he has stated at page 234 of the paper book, that,

We have not mentioned separate prices by expert, We have fixed approximate prices of these articles.

Further he has stated that,

...Information of the person who deals in furniture would have been better than our opinion....

In case of wearing apparels, including sarees, he has stated,

We have not discovered whether articles are new or old....

Even in case of sarees and safaris, without distinguishing which sarees of safaris are of high quality, period of purchase, past or recent according to him "...the prices were fixed approximately....

38. PW 18 Joshi, Deputy Superintendent of Police - Investigating Officer, has stated that nothing was seized from possession of the appellant or his wife under panchanama drawn either at Pune or at Ahmednagar. He has stated that,

...The articles were evaluated by panch witnesses and me....

He has admitted that date of acquisition of articles is necessary to evaluate their prices. No date of purchase of any of these articles was disclosed on the articles itself. Significantly, he would also admit that,

I do not enquire with the panchas whether they have knowledge about the market in respect of prices of articles....

He would also admit that he has not taken photographs of some of the articles.

39. It is, therefore, clear that the valuation of some of the articles shown in the schedule annexed to the panchanama drawn by the investigating officer with the aid of panchas is materially vague and cannot be accepted to be true and correct. The appellant, however, estimated the value of such articles to Rs. 1,56,000/- as against Rs. 3,21,574/- assessed by the panchas. This is evident from the statement of appellant u/s 313 of the Code of Criminal Procedure as well as per the statements produced during the statement u/s 313 of the Code of Criminal Procedure.

40. One of the circumstances, which cannot escape notice, in this behalf is that the appellant's wife comes from affluent family and she is the youngest amongst seven daughters from the family of her father. She is also graduate in Arts. Her sisters are also qualified and married in good and well to do families. Being youngest one, it is not un-common that she as well as her husband must have received gilts during marriages of her relations, birthdays etc. The sarees which were seized under these panchanamas, and the valuation of the same made by panchas is indeed not only highly exaggerated but affects the value determined by the panchas in respect of property possessed by the appellant or his family members. It is clear from the evidence of panchas that they have not classified the sarees as per their qualities nor have they considered approximate date of manufacturing of such sarees in valuating prices of these sarees. The same is the case in respect of salaries, clothes and children wears or toys etc. One should not, therefore, be persuaded to believe that part of prosecution version in regard to the valuation of these articles. The learned trial Judge has failed to appreciate that part of prosecution evidence in the light of aforesaid defects. I, therefore, find that part of prosecution evidence which includes the assets in respect of these articles, cannot be safely acted upon and there is no other way but to accept valuation furnished by the appellant especially when no adverse inference

could be drawn against the estimate for want of documents of purchase of such articles. The amount which requires to be deducted from the total assets on this head comes to Rs. 1,66,279.50 Ps. The valuation of such property, therefore, requires to be taken into consideration to Rs. 1,36,000 as against Rs. 3,21,574/-.

41. That takes me to consider the further argument of Shri Karmarkar, learned Counsel for the appellant in regard to the failure of the prosecution to prove that the property held by the appellant's wife was benami property. It is evident from the sanction order Exhibit 152 that the appellant's wife is added as co-accused for abetting the alleged offence solely on the ground that she was found in possession of the property which really belongs to the appellant. The charge framed against the appellant is also on the same footings. In other words, though the investigating officer PW 18 Joshi in his deposition is silent to assert that the co-accused is Benamidar his evidence clearly indicates that whatever found in possession of the co-accused in the property held by the appellant. It is important to note that before according sanction at the instance of the investigating officer, the appellant was called upon to submit his statement of assets, income and expenditure through his superior.

In his statement at Exhibit 40, the appellant has stated clearly the annual agricultural income of his wife and income derived by her from job of Beautician, skin care etc. This aspect known to the investigating officer remains un-disclosed in his evidence and obviously no reference is made in Schedule A, annexed to the sanction order. The appellant has not merely stated in vague terms the income of his wife but he was specific to say that income of his wife ranges to Rs. 10,000 per year from agriculture and Rs 2,000 per month from Beauty Parlour. The investigating officer has stated that he recorded statement of appellant during his enquiry but vaguely asserted that his explanation was not found to be satisfactory. No where in the sanction order the income of wife of the appellant except stridhan though noticed in the inquiry is referred to. Indeed, Shri Karmarkar, learned Counsel argued at one stage that non-consideration of this aspect of the case by the sanctioning authority, vitiates the sanction.

42. Quite apart, the prosecution has given due credit to the Stridhan of wife of appellant and excluded the jewellery from the assets held by the appellant and his family members. There is no explanation in the evidence of the investigating officer why the amount towards ornaments, gold and silver is excluded as Stridhan of wife of the appellant.

43. I have already made a reference to the finding recorded by the learned trial Judge while acquitting wife of the appellant. The learned trial Judge in clear terms found that wife of the appellant did have her independent source of income by way of twice winning lotteries worth Rs. 1,22,000/- and the financial assistance rendered by her father and brother to the extent of Rs. 46,275/- and the handloom which she has received from her friends for which witnesses were examined and they have corroborated that part of her defence. Therefore, total cash which the wife of the appellant had received from other sources than the

appellant comes to Rs. 1,68,275/-. Added to this aspect, there is no dispute that the wife of the appellant with the help of her father purchased an agricultural land at Kini, District Kolhapur for Rs. 75,000/-. She has also contributed her income in purchase of a flat at Pune. It cannot be over looked that the flat was not purchased out rightly but it was booked with the builder when the building was under construction. The appellant has also contributed to the purchase of the flat by raising loan from H.D.F.C. and other sources. The income derived by the wife of the appellant from the agricultural land is also not questioned by the prosecution. There is no dispute that the wife of the appellant received approximately Rs. 20,000/- per year. The investigating officer has given credit of Rs. 20,000/- as if the said amount was received by wife of the appellant at the time when he made search of the flat. It is, however, shown by Shri Karmarkar, learned Counsel that the cash amount found in the purse of the wife of the appellant in the flat at Pune amounting to Rs 20,000/- is the amount which she had received recently as an agricultural income. The fact that cash was found in her purse is significant. Therefore, there would be no hesitation to believe that part of defence of the appellant and co-accused his wife, to reach a conclusion that (i) the agricultural land which stands in her name was acquired by her out of her own assets, (ii) the flat at Pune was purchased jointly and (iii) she invested her cash in National Savings Certificates worth Rs. 78,000 which is her own asset. Not only that but she could have a farm house at Kini. That was constructed spending Rs. 35,000 from her own assets. It is also important to take into account a circumstance which is either admitted or not disputed that she sold certain ornaments and received cash of Rs. 39,000/-.

44. Now, coming to the defence of the wife of the appellant in respect of her earnings from beauty parlour, on closely examining the prosecution evidence, with reference to the defence evidence, I think there are strong circumstances to uphold her version. The first circumstance is that the fact that she was qualified to do the job of Beautician goes un-disputed. It makes no difference if she had a license or not. She obtained her qualification in 1978 while her husband was posted at Kolhapur. The defence version that while she was staying at Beed in addition to her tuitions, she did job of a beautician, is well corroborated by defence witness. It may be stated that children of the appellant are taking education at Pune in Convent Schools and the very fact that they purchased flat at Pune shows that the family stays at Pune for the purpose of education of children and if the wife of the appellant was so sincere and devoted to her job as Beautician it does not appear so strange if she could make her regular source of income from Beauty Parlour on acquisition of flat at Pune.

45. PW 18 Joshi, investigating officer, in his evidence, when pointedly asked about the existence of the Beauty parlour in flat at Pune, conveniently answered that he did not enquire into that fact as he felt that it was not necessary. However, the defence evidence shows that investigating officer enquired into the business of beauty parlour in the name of Pink Beauty Parlour which is run by the wife of the appellant at Pune. Exhibit 235 in the letter, dated 26.7.1987,

addressed to the Municipal Commissioner by the investigating officer in which he has stated that it was confirmed information that wife of the appellant is carrying Beauty parlour in the name of Pink Beauty Parlour but without any licence. Quite apart, pancha PW 6 Gandhi has stated unmistakably that he noticed board of Pink Beauty Parlour when they reached the flat for search. Not only that but in the panchanama Exh. 123/A there is clear mention that the literature of beauty parlour and articles used for the said purpose were found in possession of wife of the appellant. There cannot be any dispute that, had it been the case that there was merely name board of Beauty parlour without actually carrying any business of beauty parlour in the flat, investigating officer would not have failed in his duty to collect the evidence and especially when the appellant has opened his cards of other sources of income from his wife by running a Beauty parlour in the name of Pink Beauty Parlour in the flat at Pune, in his statement of assets (Exh. 40) submitted long before the section order. The only answer which the investigating officer gives is that he felt it not necessary to take into account these things. That cannot be the proper explanation in the eyes of law when initial burden is on the prosecution to prove what was asserted.

46. The appellant has examined DW 3 Deshpande income Tax Officer in support of the income and the assessment made and the order passed for paying of income tax by the appellant's wife. There is clear proof of the fact that wife of the appellant was assessed to income tax under "Amnesty Scheme." which was available upto 31.3.1986. There is also no doubt that wife of the appellant filed her return not only for past years but has paid advance tax for the year 1986-87. The learned trial Judge not clearly but vaguely discarded that part of evidence only on the ground that there are suspicious circumstances to infer that the returns were filed in anticipation of some enquiry on the complaint made by PW 17 Irani, Chairman of the Liquor Association with the department. The learned trial Judge made capital out of the copy of letter dated 13.7.1987 which finds place in the record, though there is no record how that copy was procured and brought on record. It is neither exhibited nor the same is proved in evidence of income tax officer nor it was relied on by the defence. The investigating officer, all the while pretended that he did not probe into the evidence regarding payment of income tax by the wife of the appellant because he felt that it was not necessary.

47. Existence of income is a condition precedent to the chargeability to income tax. The word "source" indicates a thing from which something originates or from which something arises. Source thus is an originating cause. Source is not in the context under discussion, a legal concept but is something which a practical man would regard as a real source of income to be ascertained as hard matter of fact. Hence, source should be a thing having some width in point of duration and some contents in point of quality. Income connotes a periodical monetary return coming with some sort of regularity or expected regularity from definite sources. Essential characteristic of "business" is something which occupies attention and labour by a person for the purposes of profit or earning

an income. If one refers to the fact that wife of the appellant was qualified to do the beautician's job in 1978 and having regard to the status in which she was living it was not un-likely that she would have involved herself in her skill and labour as a regular activity of a beautician. I have also mentioned that the prosecution has absolutely led no evidence to show non-existence of beauty parlour at Pune, nor is there evidence that she was not doing such activities at other places temporarily as and when she resided with the appellant on account of exigency of his services, until the flat at Pune was purchased. As a beautician one can earn his income even at a place where he temporarily stays or resides. It need not be necessary that one may have a fixed place for such purposes. If she would have worked at Beed, when her husband was stationed for some period and made earning, there is nothing to doubt that part of defence that she received income from the beautician's job there.

48. The learned trial Judge suggests from his discussion by keeping in view certain circumstances in his judgment that income which the appellant's wife was assessed in her income tax returns is in the nature of tainted income. The learned trial Judge, however, seems to have over looked the power of Income Tax Officer while making an assessment of the income tax payer. He is called upon to investigate certain facts and the material placed before him by tax payer. He has to exercise his discretion either to accept or to reject on ground of insufficiency in returns. So long as the discretion of the Assessing Officer is fair and is made in an honest attempt to assess the income tax payer's income, exercise of such discretion is fully satisfied and it is not open to challenge that discretion on any ground much less the ground of abuse of power so easily in a case where the offence is being tried. There is substance in the contention of Shri Karmarkar, learned Counsel for the appellant that only authority is the Court or Tribunal under Income Tax Act to quash the assessment or review or set arised it.

49. In this context, it is relevant to mention that the very silence on the part of prosecution is eloquent. Had it been the case of prosecution that there was no income derived by the wife of the appellant from beauty parlour, obviously onus to prove that fact would lay on the prosecution. The onus to prove that fact is on the party who claims to be so. If no evidence is given by the party on whom the burden is cast, the issue must be found against it. This onus is always of a person who asserts position or fact which is not self evident. The courts or Tribunal have to judge the evidence before them by applying the test of human probability. Human mind may differ to the reliability of the position of evidence but in that sphere position of the final fact finding authority is made conclusive by law. It is, therefore, not possible to accept that part of the finding of the learned trial Judge, when he totally brushed aside the defence version to prove the separate income of the wife of the appellant from beauty parlour. In this context, it is necessary to emphasise that there is no presumption in law that relevant authority which has been empowered to exercise discretion will not act honestly, properly and in conformity with the policy and principles laid down by

the Parliament, in the matter of assessment of the income tax. It cannot be ignored that so far as income tax is concerned a very limited question as to whether the amount brought to tax constitutes the income of the assessee, requires consideration. The Income Tax Act does not contain any provision which permits the taxing department to include the income of an assessee with the income of someone else because the assessee had helped that some one else to evade payment of tax on that income. Assuming for a moment that income from illegal means is not excluded from levy of income tax, yet, in the instant case, the prosecution has miserably failed to prove that the assets which the wife of the appellant had held was benami in nature. It was wrong to assume that the assessment income tax returns were a well thought out plan to prevent prosecution which the appellant was apprehending. It is to be noted that the filling of income tax returns by wife of the appellant appears to be in normal course to take advantage of the "Amnesty Scheme", the last date of which was 31.3.1986. Therefore, filing of income tax returns by her must be taken as unrelated to any enquiry subsequently initiated against the appellant.

50. There is, therefore, force in the submission of Shri Karmarkar, learned Counsel that on failure of the prosecution to prove that assets belonging to the appellant was held in benami by his wife, the income derived by the wife of the appellant ought to have been excluded from consideration.

51. Needless to say that the Supreme Court in a series of decisions have laid down the guidelines in finding out the benami nature of a transaction. Though it is not necessary to cite all these decisions, it will suffice to refer to the rule laid down by Bhagwati J. as he then was, in case of Krishnanand Vs. The State of Madhya Pradesh, . In that case it was contended that the: amount lying in fixed deposit in the name of Shantidevi was an asset belonging to the accused and that she was a benamidar of the accused. The learned Judge, speaking for the bench was disposed of that contention holding that,

...The burden of showing that a particular transaction is benami and the owner is not the real owner always rests on the person asserting it to be so and this burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of benami is the intention of the parties and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises as a substitute for proof....

52. I think that the facts emerging from the income tax returns if tested in the light of principles laid down in that case, with reference to what the prosecution version is, the case of benami transaction suggested in the prosecution evidence must fail.

53. The learned trial Judge, therefore, erred in not considering the income derived by the wife of the appellant from the Beauty parlour. That income as shown by her comes to Rs. 2,13,000/-. That amount will have to be given account in the assets held by the appellant and members of his family.

54. Therefore, the resultant factor is that the total estate of the wife of the appellant cannot be held to be in benami or in possession of the appellant as benamider. That income has to be excluded from the assets shown as the assets of the appellant and his family members. Net result is that there cannot be any doubt that there was any dis-proportionality in the assets held by the appellant.

55. In my opinion, therefore, that finding recorded by the learned trial Judge suffers from suspicion, surmises and conjectures on the issue of income from the Beauty parlour, but it cannot be forgotten that the suspicion, surmises and conjectures cannot take place of legal proof. It is thus clear that the appellant has discharged his burden by dependable evidence that the property which is held to be dis-proportionate has been acquired by his wife by honest means.

Dated : April 24. 1996.

56. It would be necessary to emphasis that it is not mere acquisition of property that constitutes an offence under the provisions of the Act, but it is failure to satisfactorily account for which makes the position offensive. It follows from the aforesaid discussion of re-assessing the prosecution evidence that the learned trial Judge failed to consider and evaluate the value of the furnitures etc. and secondly, the income tax returns. The income tax returns clearly establish that the part of the property included in the assets of the appellant is his wife's property, earned by her from her own resources and as such should have been excluded from the assets of the appellant. The income which should have been taken as a saving was taken as an expenditure thereby over looking the actual savings and expenditure, which if calculated, without income of the appellant was proportionate to his known sources of income. Inclusion of the property of the wife, without evaluating the materials on record, which satisfactorily accounted for the assets disproportionate to income, do not establish the ingredients of the offence. The order of conviction and sentence is, in such circumstances, liable to be quashed and set aside.

57. That takes me to consider the arguments advanced on behalf of the appellant in regard to the sanction. The evidence of P.W. Sane shows that on 23.4.90 papers were sent to Mantralaya and sanction was given on 25.4.1990. Shri Karmarkar, learned Counsel has submitted that the sanction is bad in law as it suffers from non-application of mind. In this context, learned Counsel stressed following circumstances to show that sanction was obtained with undue haste and that too without proper application of mind to the material placed before the sanctioning authority. Firstly, it is pointed out that the appellant was under suspension since March 1988. No steps were taken by the Government until the appellant obtained an order from the High Court in Writ Petition filed on

13.4.1990 wherein it was directed that if the charge sheet was not filed by 30.4.1990 in the Special Court, the suspension order would stand revoked and the appellant would be re-instated in service on 1.5.1990. It is, therefore, submitted that in order to avoid reinstatement of the appellant, immediate steps were taken and papers were sent on 23.4.1990 to Mantralaya. Next, it is pointed out that there is no dispute that the papers submitted to Mantralaya consists of more than 1000 pages. The evidence of P.W. Sane shows that after receipt of the papers, with a draft sanction order by him, on 23.4.90 he handed over those papers to Mrs. Phadnis, Desk Officer. She is purported to have submitted the report on the very day after going through the bulky record. It is further evident that the Secretary had discussion with the witness, who has merely perused the papers. He does not disclose what type of discussion could have been there. It is said that on the same day all these papers were examined by the Secretary and were marked to the Additional Secretary (Home). He too is said to have gone through the papers and sent it back to the witness on 23.4.1990 itself. It is his version that he sent file along with draft for scrutiny of the papers to Law Department on 24.4.1990 after he received it from the Additional Chief Secretary (Home). Then the Desk Officer Mrs. Phadnis put up note for getting sanction order and witness received the note on 25.4.1990. It is his evidence that he sent the file to Shri Modi, Secretary of the Department. Shri Modi discussed the matter and then sent the file to the Additional Secretary (General Administration Department). Thereafter, the witness was directed to take the file to Honourable Minister of Prohibition and Excise and lastly to the Honourable Chief Minister. According to the witness, the file was first sent to Shri. P.V. Nayak, Additional Chief Secretary (Gen.) on 25.4.1990, who is said to have put his signature and sent the file to Shri Modi, Secretary. Shri Modi gave it to the witness and witness took it to the Honourable Minister and then to Honourable Chief Minister, both of them have put their signatures as a token of approval. It is his version that both the Ministers had read the papers within a short time and sanction was accorded on the same day. i.e. on 25.4.90. The witness further stated that priority was given to the file in question because there were public holidays between 26.4.1990 to 29.4.1990.

58. The learned Counsel for the appellant points out from the sanction order Exhibit 152 that sanction ought to have been given u/s 5(1)(e) of the Act of 1947, but the sanction order mentions Section 13(1)(e) of the Act of 1988. Annexure "A" is the statement of co-accused No. 2, as per sanction order, as on 26.11.1987 and item No. 5 is the flat at Pune worth Rs. 2,35,000/-. In fact, this flat stands jointly in the name of Mrs. Kshama and not only in the name of appellant. Papers regarding joint ownership of the flat must have been in the record but were not read by the sanctioning authority. Next, Exhibit 40 is the statement of assets forwarded by the appellant in required proforma to the investigating officer on 30.3.1987 giving details of the assets, income and expenditure of the appellant with prior intimation to Government about acquisition. There is a statement that Mrs. Kshama was having a business of

beautician and she was earning Rs, 1,500/- to Rs 2,000/- per month plus agricultural income etc. Mrs. Kshama had submitted her income tax returns under the "Amensty Scheme" on 31.3.1986 long before any complaint was made against the appellant and therein, income from beauty parlour is shown as Rs. 2,30,000/-. Further, it is submitted that prosecution evidence shows that investigating officer carried out preliminary as well as final enquiry. He filed a complaint and at paragraphs Nos. 20 and 21 in his deposition he deposed that he was aware of income tax returns filed by Mrs. Kshama and that he had correspondence with the income tax officer. He had also written a letter to the Municipal Commissioner (Exh. 255) dt. 26.7.1987 that he had reliably learnt that Mrs. Kshama was running a beauty parlour. He received the communication from the corporation that there was a beauty parlour known as Pink Beauty Parlour run by the wife of the appellant co-accused but it is without licence. It is urged that these documents must have been in the papers submitted to the Government for sanction. Thus, the Government had not considered all the documents that were on record and investigating officer did not make proper investigation to put income from wife of the appellant before the sanctioning authority and hence the sanction is bad in law.

59. In support of the aforesaid arguments Shri Karmarkar, learned Counsel for the appellant has relied on the decision reported in Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh, , Raghubir Singh Vs. State of Haryana, .

60. The sanction to prosecute is an important matter. It constitutes condition precedent to the institution of the prosecution and the Government has absolute discretion to grant or withhold the sanction. Government is not concerned merely to see that the evidence disclose a prima facie case against the person sought to be prosecuted. For the sanction to be valid it must be proved that the sanction was given in respect of the facts constituting the offence charged. Where facts constituting offence are not set out in the order sanctioning prosecution and no extraneous evidence is led in to prove that the facts constituting the offence were placed before the sanctioning authority, sanction would be invalid. Therefore, a sanction to prosecute a particular person for an offence implies, first a full knowledge of the facts upon which it is sought to prosecute him and secondly, a deliberate decision of the sanctioning authority that he may be prosecuted. These two things are necessary to be proved before it can be said that a particular order amounts to sanction for prosecution. It is also necessary that sanction should be given after all the facts have been collected against the accused so that the sanctioning authority has before it material upon which the prosecution is to be launched. Annexure to the sanction order indeed consists the material which prima facie disclose a case against person sought to be prosecuted.

61. Evidence of P.W. 12 Sane shows that from the papers prima facie, he was convinced that Annexure A-1 was the assets of Mrs. Kshama Kohak. Next, he has stated that income from lottery amounting to Rs. 1,22,000/- is shown in the

name of the appellant as shown in Annexure "B". Suggestion was made to this witness that papers were not studied and simple report with the annexures was read. The suggestion is, however, denied. In the sanction order, provisions of Section 13(1)(e) of the Act of 1988 are first stated besides provisions of the Act of 1947. It is also clear from his evidence that he did realise that some of the properties were possessed by the appellant's wife who has an independent source. What is then the effect of non-consideration of that material by the sanctioning authority? Had this material been considered, certainly the assets of the wife of the appellant ought to have been deducted from the assets of the appellant.

62. What seems to me is that the evidence of witness Sane is clear to indicate that what was considered is only the details about the assets standing in the name of the appellant and also his wife based on summary drawn by the investigating officer as per Annexures. In other words, the summary of the evidence collected by the investigating officer seems to have been considered and acted upon. It is, however, well settled law that the summary of evidence collected by inquiry officer cannot be termed as an evidence to show that sanctioning authority has knowledge of the facts alleged to constitute the offence. Significantly, the file was to be submitted by Desk Officer first to (i) Shri C.K. Modi, Secretary (Home), (ii) Shri S. Ramurthy Additional Chief Secretary, (iii) Shri P.V. Nayak, Chief Secretary (Gen), (iv) Shri S. Kolhe, Minister for Excise and (v) Shri Sharad Pawar, the Chief Minister, through this witness. If it is to be assumed that on receipt of the papers with draft sanction order in Mantralaya on 23.4.1990, the file was in fact gone into by each and every officer concerning with the matter, it was indeed highly impracticable that these individual officers would have studied the case for sanction within a span of less than an hour at their disposal. The evidence of witness shows that on 23.4.1990 itself the file was moved from Desk Officer to Additional Secretary and then on the next day from Law Department to the Desk Officer, who put up note for according sanction. It was also highly improbable that the witness would have applied his mind to all materials in the file, on receiving the note from Desk Officer on the next day of the receipt of proposal in Mantralaya. It is rather unthinkable that in such a short time for movement of file from one table to another each of the authorities would have gone through all the material documents from the file by applying his independent mind to the facts and figures disclosed in summary drawn by the investigating officer.

63. A mere perusal of the sanction indicates that sanction is accorded u/s 13(1)(e) of the Act of 1988 even though equivalent provision of Section 5(1)(e) of the Act of 1947 is quoted thereafter. No question of application of Section 13(1)(e) of the Act of 1988 arises since the offence alleged was within the purview of Section 5(1)(e) read with Section 5(2) of the Act of 1947 before it was repealed. There is, therefore, much merit in the arguments that these circumstances alone suggests a case of non application of mind.

64. There is no indication in the sanction order that the sanctioning authority had applied its mind to the documents collected by the investigating officer concerning the independent source of income of the wife of the appellant. As a matter of fact, though there is no offence of abetment with reference to Section 5(1)(e) read with 5(2) of the Act, wife of appellant is charged for commission of offence for abetment for possession the property belonging to her husband and the charge of commission of abetment against wife of the appellant was itself on wrong footing and this, further suggests the circumstance of non-application of mind.

65. There is merit in the submission that when the prosecution had come to know of the income of the wife of the accused from lawful source and that she was not accountable to anybody, by adding her as party, she was implicated as accused, which can further suggest non-application of mind to the relevant documents consisting over 1000 pages in file.

66. When source of income of the appellant or his wife was known to the prosecution and the prosecution has failed to take that source in consideration and that income would have vital bearing on the framing of charge, the sanction would indeed be vitiated for non-application of mind. The prosecution cannot be absolved from its liability on the ground that it was not aware of income of the wife of the appellant. I, therefore, find that the objection to the validity of the sanction is well founded. The learned trial Judge, however, does not appear to be correct in his approach to discard the defects in the sanction.

67. In the conclusion, conviction of the appellant is contrary to law and cannot be sustained. The appeal is, therefore, allowed. The conviction and sentence passed against the appellant is quashed and set aside and the appellant is acquitted. The order confiscating an amount of Rs. 47,685/- is also quashed and set aside and the amount be paid to the appellant on his furnishing undertaking to produce the amount as and when required by the Court. Fine, if paid, be refunded. Bail bonds of the appellant stand cancelled.