**IN THE HIGH COURT OF SIKKIM AT GANGTOK**
(Criminal Appellate Jurisdiction)

DATED : 21-06-2011

**CORAM**

**HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE**

Crl. A. No.04 of 2008

Shri Padam Lall Gurung,
S/o Shri Damber Dhoj Gurung,
R/o Uttarey, Maneybong,
West Sikkim ... **Appellant**

versus

The State of Sikkim
(Vigilance Department) ... **Respondent**

For appellant : Mr. A. Moulik, Senior Advocate with Mr. N. G. Sherpa, Ms. K. D. Bhutia and Mr. Leonard Gurung, Advocates.

Mr. P. L. Gurung in person.

For Respondent : Mr. J. B. Pradhan, Public Prosecutor with Mr. Karma Thinlay Namgyal, Additional Public Prosecutor and Mr. S. K. Chettri, Assistant Public Prosecutor, Mr. D. K. Siwakoti, Advocate and Ms. Prathana Ghataney, Advocates for the State.

## J U D G M E N T

Wangdi, J.

This appeal is directed against the judgment of the Special Judge, P. C. Act, East and North Sikkim at Gangtok dated 22-10-2008 in S.T. (Vigilance) Case No.1 of 2004 by which the appellant has been convicted under Section 13(1)(e) read with Section 13(2) of the Prevention of

Corruption Act, 1988, (hereinafter referred to as the 'P. C. Act, 1988') and sentenced to undergo simple imprisonment of one year with a fine of Rs.5,000/- (Rupees five thousand) which if not paid to undergo further imprisonment for three months.

***2.*** The facts of this case briefly are as follows:-

***(a)*** As per the charge sheet submitted by the Sikkim Vigilance Police Force, the genesis of the case against the appellant was a first information report based on source information which disclosed that the appellant while holding the post of Chairman, Sikkim Khadi and Village Industries Board and a Minister of the Government of Sikkim from 1983 to 1994, acquired assets disproportionate to his known sources of income by misusing his position as a public servant. It was alleged that he had acquired as many as 8 (eight) RCC buildings individually worth lacs of rupees thereby disclosing commission of offence punishable under Section 13(1)(e) read with Section 13(2) of the P.C. Act, 1988 resulting in registration of Case No.RC-10/95 against the appellant and the charge of its investigation was made over to Shri Hemraj Cintury, Inspector of Police, Vigilance Department. During the course of investigation, it was revealed that the families of both the appellant and his wife were farmers by profession. Later, the appellant joined in

the SIB, Gangtok as a Cook on 01-04-1961 and resigned from service on 17-02-1979 when he held the rank of a Field Assistant (Constable). In October, 1979, he was elected to the Sikkim Legislative Assembly for the first time and re-elected in the next two General Elections held in March, 1985, and November, 1989. He resigned from Sikkim Legislative Assembly on 18-06-1994. During his tenure as MLA, he held the following positions as a public servant as defined under Section 2(c) of the P.C. Act, 1988:-

| | | | |
|---|---|---|---|
| 24.6.83 | to | 21.5.84 | Chairman, Sikkim Khadi and Village Industries Board |
| 8.3.85 | to | 17.5.94 | Minister of Power and Labour/ Panchayat, R.D.D., Ecclesiastical Affairs/Industries and Ecclesiastical Affairs together or separately |

***(b)*** The above two periods were taken as the check period by the investigating agency and upon registration of the case searches were carried out on 01-11-1995 and 02-11-1995 in the residences of the appellant at 6$^{th}$ Mile, Tadong, Gangtok, and Uttarey, West Sikkim, respectively. During the search, inventories of various articles found in the two residences were prepared and a number of incriminating documents seized. Efforts were thereafter made to find out and compute (a) the assets of the appellant and his family members at the commencement of the check period, i.e., 24-06-1983 being the date on which he was appointed

Chairman, Sikkim Khadi and Village Industries Board; (b) total income from the known sources of income of the appellant and his family members during the check period, i.e., 24-06-1983 to 18-06-1994 being the date on which he resigned from the Sikkim Legislative Assembly; (c) assets owned by the appellant and his family members at the close of the check period, i.e., 18-06-1994; (d) expenditure incurred by the appellant and his family members during the check period. Details of these were appended to the charge sheet at "Statement A, B, C and D" respectively. It is stated that 'Statement B' was prepared based on the explanation on 'known sources of income' given by the appellant under Section 13(1)(e) of the P. C. Act, 1988. As such, rent received from various tenants in respect of the building situated at Gangtok was calculated as per returns filed by the appellant with the Income Tax Department, Government of Sikkim, and where such returns had not been filed, the appellant was not given the benefit of receipt of rent. The statement also did not include any income from benami transactions which the appellant and his family members may have entered into during the check period. A summary of the statements reflected the following facts:-

| | | | |
|---|---|---|---|
| 1. | Assets on the last day of check period i.e. 18.6.94 vide statement-C | Rs.76,71,273-77 | (Rs.76,71,273-77) |

| | | | |
|---|---|---|---|
| 2. | Assets at the beginning of check period i.e. 24.6.83 vide statement-A | Rs. 11,687-70 | (Rs. 11,687-70) |
| 3. | Assets acquired during the check period i.e. 24.6.83 to 18.6.94 (statement-C minus statement-A) | Rs.76,59,586-07 | (Rs.76,59,586-07) |
| 4. | Expenses during the check period (statement-D) | Rs.14,49,595-12 | (Rs.14,49,595-12) |
| 5. | Total assets acquired and expenses incurred during the check period vide sl. no.3 and 4 above. | Rs.91,09,181-19 | (Rs.91,09,181-19) |
| 6. | Income during the check period (statement-B) | Rs.17,40,332-04 | (Rs.17,40,332-04) |
| 7. | Extent of assets disproportionate to known source of income (serial No.5 minus 6) | Rs.73,68,849-15 | (Rs.73,68,849-15) |

***(c)*** It is stated that the above facts disclosed that the appellant during his tenure as a public servant between 24-06-1983 to 18-06-1994 amassed wealth disproportionate to his known sources of income to the tune of Rs.73,68,849.15 by misusing his position as public servant which he could not satisfactorily account for. It is stated that during the course of investigation, the appellant was given an opportunity to explain his position as regards his various income and expenditure during the check period but he either failed to account for the disproportionate assets or refused to give any explanation culminating in the filing of a charge sheet under Section 13(1)(e) read with Section 13(2) of the P. C. Act, 1988, corresponding to Section 5(1)(e) read with Section 5(2) of the Prevention of Corruption Act, 1947,

(hereinafter referred to as the "P. C. Act, 1947") against the appellant for trial in the Court of Special Judge, P. C. Act, East and North Sikkim at Gangtok.

***3.*** The Special Judge upon consideration of the materials on record and being satisfied that a *prima facie* case was made out framed a formal charge under Section 13(1)(e) read with Section 13(2) of the P. C. Act, 1988, against the appellant to which he pleaded not guilty and preferred to go to trial.

***4.*** During course of the trial, the prosecution examined as many as 126 (one twenty six) witnesses and exhibited 458 documents and the appellant in his defence examined 9 (nine) witnesses and exhibited 82 documents and, upon consideration of the materials and evidence on record, the Special Judge found the appellant guilty of the charges under Section 13(1)(e) read with Section 13(2) of the P. C. Act, 1988 and convicted and sentenced him by the impugned judgment and order.

***5.*** In the appeal, the appellant has questioned the legality and correctness of every finding of the trial Court in the impugned judgment.

***6(a).*** At the commencement of his arguments, Mr. A. Moulik, learned Senior Advocate, by filing a detailed

synopsis of arguments on behalf the appellant submitted that the disproportionate assets case against the appellant has to fail as the prosecution did not take into account a large number of income of the appellant from various sources, namely, income from landed properties, rental income, income from execution of contract works by him and his wife, property, cash, gold and silver received by the appellant in his family partition in the year 1964 and also income from sale of livestock which taken together amounted to Rs.1,06,59,585/-. It was submitted that appellant had revealed of such income and assets to the Investigating Officer (in short "I.O.") when his statement was being recorded on 27-09-1996 and 28-09-1996, a fact which has been admitted by the I.O. in his deposition in Court as PW126. Those as per the learned counsel, were the sources of income and the assets which the appellant was in possession of at the beginning of the check period but the I.O. admittedly did not take any steps to enquire into them causing him grave prejudice. Therefore, the finding of the prosecution that the assets in the hands of the appellant at the beginning of the check period was only Rs.11,687.70 was erroneous. It was submitted that during the course of the trial the appellant had established the existence of such assets being with him from the deposition of the prosecution witnesses and defence witnesses and also through

documentary evidence exhibited by both the prosecution and the appellant. It was further submitted that although the I.O., during the course of the investigation, accepted the income of the appellant as being Rs.17,40,332/- with regard to the properties at 'Statement B' pertaining to rental income received by him during the check period, it has been established during the course of the trial that his income from such properties was in fact Rs. 1,89,81,837/-. He submits that the investigation of the case was done unfairly as the statements of as many as 14 tenants of the appellants recorded by the I.O., PW126, under Section 161 of the Code of Criminal Procedure, 1973 (in short "CrPC") were suppressed and deliberately not submitted by him with the final report under Section 173 CrPC depriving the appellant of the benefit of rental income of Rs.12,90,700/-. The statements had to be exhibited by the appellant as Exhibits D36 to D49 as those revealed the rental income claimed by him. It was next contended that the conclusion of the I.O. with regard to the 'Statement C' pertaining to the valuation of the buildings was highly inflated to Rs.76,71,273.77 which ultimately was reduced to 71,16,070.19. As per Mr. Moulik in the deposition of the prosecution witnesses being the Engineers who had carried out the valuation of the buildings situated at 6th Mile, Tadong, East Sikkim, Tibet Road, Gangtok, East Sikkim, Majhigaon, Jorethang, South Sikkim,

Circular Road, Jorethang, South Sikkim, Uttarey, West Sikkim and Dentam, West Sikkim, there are gross contradictions with regard to the schedule of rates (in short "SoR") and admitted errors in calculations. It was stated that the valuation arrived at by the Engineers are not correct for the following reasons:-

(i) Although in their examination-in-chief, PWs 64, 65 and 66 have deposed that they had valued the buildings of the accused at Tadong as per SoR, 1986 and Tibet Road as per SoR, 1991, but in their cross-examination they have admitted that the calculations done by them were not as per the respective SoR of 1986 and 1991 but at some other rates not at all tallying with the SoR of 1986 and 1991.

(ii) The relevant SoR of the respective years were not tendered in evidence as a result neither the Court nor the accused had opportunity to cross check/properly cross-examine on the rates at which the assessments were made.

(iii) Assistance of Blue Print Plans were not taken in assessing the valuation.

(iv) The Engineers who had done the valuation were not the experts in the line nor were they recognized valuers.

(v) Years of construction and years of completion of the respective buildings were not ascertained. Years of construction of the buildings at

Jorethang, Majigaon, two buildings of Uttarey, Dentam and at 6th Mile, Tadong were not ascertained properly. Although the prosecution has attempted to prove that those buildings were constructed during the check period, their own witnesses and the defence witnesses have conclusively proved that it was done before commencement of the check period.

(vi) Extent of constructions up to the end of check period i.e. 18-06-1994 were not ascertained.

(vii) Whether the Engineers had visited the spot was doubtful.

***(b)*** It was next submitted that the check period taken by the prosecution which is 24-06-1983 to 18-06-1994 are covered by both the P. C. Act, 1947 and P. C. Act, 1988. The P. C. Act, 1988, having come into force w.e.f. 09-09-1988, the period between 24-06-1983 to 08-09-1988 would obviously be governed by the provisions of the P. C. Act, 1947 and between 09-09-1988 to 18-06-1994 by the P. C. Act, 1988. It was submitted, therefore, that the prosecution has committed an error by combining both the periods as being investigated under the P. C. Act, 1988, when the scope of Section 5(1)(e) under the P. C. Act, 1947 and Section 13(1)(e) under the P. C. Act, 1988, are quite different in view of the explanation that was inserted in the later Act.

***(c)*** It was next submitted that denying the appellant of the benefit of the rental income in respect of buildings at Gangtok on the ground of non-payment of tax on such income is grossly illegal as the prosecution has not all been able to establish that the accused was under any law, rules or order bound to intimate any authority regarding his income. The appellant is a Sikkimese and I.T. Act, 1961 is not applicable to him. Manual of 1948 deals with Income Tax payable based on annual turnover of a business. It does not anywhere require a person to inform the Authority or to pay tax on several types of income.

***(d)*** Referring to the provisions of Sikkim State Income Tax Manual, 1948, the learned senior counsel submitted that the Manual does not provide for payment of tax on income house property but on incomes on salary, business, agricultural produce and patta estate and, that even on these there is no provision for voluntary submission of returns of income. By placing the following provisions of the Manual, it was submitted that returns were required to be submitted by an assessee only on receipt of notice of demand from the Income Tax Officer:-

> "11. **RETURN OF INCOME STATEMENT OF AGRICULTURE.**
>
> (i) At the commencement of each financial year the income tax Officer shall issue notice with prescribed form enclosed to all those person, who are in his opinion liable to assessment of

agricultural income tax, calling upon them to submit return in the prescribed form duly signed within the time specified in the notice (which shall not be less than 60 days from the date of the notice). Failure to submit return within the prescribed time will entail summary assessment at the discretion of the Income Tax Officer.

.....

12. **SALARY**

The tax shall be payable by all the Sikkim State employees drawing salary of Rs.200/- and above per month. Such amount of income shall be deemed to be salary due on the date when payment is received by the employees.

.....

14(i) Working on the annual basis of the rate only such amount forming part of the tex *(sic)* payable on the monthly salary of the assessee shall be deducted and adjusted towards Incoam *(sic)* Tax accounts from out of his salary bill at the end of such month by the financial Secretary on intimation from the Income Tax Department.

.....

18. **TAX WHEN PAYABLE–GENERAL RULE.**

Any amount specified as payable in a notice of demand, shall be paid into the State Bank delete within the time given thereunder, and any assessee failing so to pay shall be deemed to be default provided that, when an assessee has presented an appeal, the appellate authority may in his discretion pass stay order when the assessee will not default in respect of such tax so long the stay order remains in force." **[emphasis supplied]**

***(e)*** It was next submitted by him that the appellant was not a public servant from 22-05-1984 to 07-03-1985, i.e, for more than 9 months which fell within the check period as he did not hold any public office during that time but the I.O. has erroneously taken the entire check period

commencing from 24-06-1983 to 18-06-1994 as the appellant being a public servant. Although the I.O. when being examined in Court had conceded that the income and assets acquired and held during that period should be excluded, the very fact that it was included caused the appellant grave prejudice.

***(f)*** It was next contended that the prosecution had committed grave illegality in including the income and assets of the wife of the appellant also as the income of the appellant which is not permissible in law.

***7(a).*** A large number of decisions were cited by Mr. Moulik during the course of his arguments in support of his submissions on the legal principles governing various aspects of cases under Sections 5(1)(e) and 13(1)(e) of the P.C. Act, 1947, and P.C. Act, 1988, respectively. I may refer to some of them which are considered relevant for disposal of this appeal.

***(b)*** In ***C. S. D. Swami*** vs. ***The State*** : ***AIR 1960 SC 7***, the following has been held while interpreting the term "satisfactorily account" appearing Section 5(1)(e) of the P. C. Act, 1947:-

> **"(5)** ..... Ordinarily, an accused person is entitled to acquittal if he can account for honest possession of property which has been proved to have been recently stolen (see illustration (a) to S.114 of the Indian

> Evidence Act, 1872). The rule of law is that if there is a prima facie explanation of the accused that he came by the stolen goods in an honest way, the inference of guilty knowledge is displaced. This is based upon the well-established principle that if there is a doubt in the mind of the court as to a necessary ingredient of an offence, the benefit of that doubt must go to the accused. But the Legislature has advisedly used the expression "satisfactorily account". The emphasis must be on the word "satisfactorily", and the Legislature has, thus, deliberately cast a burden on the accused not only to offer a plausible explanation as to how he came by his large wealth, but also to satisfy the court that his explanation was worthy of acceptance."

***(c)*** Similarly, in ***State of M. P.*** vs. ***Awadh Kishore Gupta and Ors.*** : ***(2004) 1 SCC 691***, it has been held as under:

> **"5.** ..... The expression "known sources of income" has reference to sources known to the prosecution after thorough investigation of the case. It is not, and cannot be contended that "known sources of income" means sources known to the accused. The prosecution cannot, in the very nature of things, be expected to know the affairs of an accused person. Those will be matters "specially within the knowledge" of the accused, within the meaning of Section 106 of the Indian Evidence Act, 1872 (in short "the Evidence Act")."

***(d)*** To support his contention that the investigation by the I.O. in the case had been unfair as the I.O. had failed to inquire into the assets and income disclosed by the appellant and his suppression of the statements under Section 161 CrPC of a number of witnesses who had revealed his rental income, Mr. Moulik referred to the following passage in the case of ***State Inspector of Police,***

***Vishakhapatnam*** vs. ***Surya Sankaram Karri*** : ***(2006) 7 SCC 172***:

> "**19.** Illegality apart, the manner in which the investigation was conducted, is condemnable. The least that a court of law would expect from the prosecution is that the investigation would be a fair one. It would not only be carried out from the stand of the prosecution, but also the defence, particularly, in view of the fact that the onus of proof may shift to the accused at later stage. The evidence of PW 41 raises doubts about his *bona fides*. Why he did not examine important witnesses and as to why he had not taken into consideration the relevant documentary evidence has not been explained. He did not even care to ascertain the correctness or otherwise of the status of both the respondent and his wife before the Income Tax Department. Above all, he did not produce before the court the statements made by the respondent, his wife and those of his sons, although they were relevant. Had the statements of DW 3 and DW 4 been produced before, the learned Special Judge might not have opined that the sons of the respondent, other than DW 2, did not make any contribution to their parents at all. If such statements were made by the said witnesses before the investigating officer, omission on the part of DW 1, the wife of the respondent, to state the same before the Special Judge might have taken a back seat and the statements of other sons of the respondents, namely, DW 3 and DW 4 might not have been ignored by the learned Special Judge."

***(e)*** In support of his assertion that the duration of the check period which fell before the enforcement of P. C. Act, 1988, i.e., brought into effect from 08-09-1988 the provisions of the P. C. Act, 1947, would apply and the rigors of the explanation appended to Section 13(1)(e) of the former Act shall have no application for that period, the following portion of the judgment of the case in ***P. Nallammal & Anr.*** vs. ***State represented by Inspector of Police*** : ***(1999) 6 SCC 559*** was placed:-

> **"19.** Shri K. K. Venugopal endeavoured to establish that the offence under Section 13(1)(*e*) of the PC Act is to be understood as an offshoot of the different facets of misconduct of a public servant enumerated in clauses (*a*) to (*d*) of the sub-section which a public servant might commit. According to him, unless the ill-gotten wealth has a nexus with the sources contemplated in the preceding clauses the public servant cannot be held guilty under clause )e) of Section 13(1). Learned Senior Counsel elaborated his contention like this: If a servant is able to account for the excess wealth by showing some clear sources, though not legally permissible, but not falling under any of the preceding clauses of the sub-section, he would be discharging the burden cast on him. He cited an example like this:
>
> If the public servant satisfies the court that the excess wealth possessed by him is attributable to the dowry amount which he received from the father-in-law of his son, the public servant is not liable to be convicted under the aforesaid clause.
>
> **20.** The above contention perhaps could have been advanced before the enactment of the PC Act, 1988 because Section 5(1)(*e*) of the old PC Act did not contain an "Explanation" as Section 13(1)(*e*) now contains. ....."

***(f)*** In the above context, reference was also made to the case of ***Jagan M. Seshadri*** vs. ***State of T. N.*** : ***(2002) 9 SCC 639***:-

> **"7.** A bare reading of Section 30(2) of the 1988 Act shows that any act done or any action taken or purported to have been done or taken under or in pursuance of the repealed Act, shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under or in pursuance of the corresponding provisions of the Act. It does not substitute Section 13 in place of Section 5 of the 1947 Act. Section 30(2) is applicable "without prejudice to the application of Section 6 of the General Clauses Act, 1897". In our opinion, the application of Section 13 of the 1988 Act to the fact situation of the present case would offend Section 6 of the General Clauses Act, which, inter alia provides that repeal shall not (*i*) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder, or (*ii*) affect any investigation, legal proceedings or remedy in respect of any such rights, privilege, obligation, penalty, forfeiture or punishment. Section 13, both in the matter of

punishment as also by the addition of the Explanation to Section 13(1)(*e*) is materially different from Section 5 of the 1947 Act. The presumption permitted to be raised under the Explanation to Section 13(1)(*e*) was not available to be raised under Section 5(1)(*e*) of the 1947 Act. This difference can have a material bearing on the case."

***(g)*** The case of ***State of Maharashtra*** vs. ***Kaliar Koil Subramaniam Ramaswamy*** : ***(1977) 3 SCC 525*** was also cited to emphasise the following:-

**"6.** .....

So when there was no law in force at the time when the accused was found in possession of disproportionate, assets by the search which was made on May 17, 1964, under which his possession could be said to constitute an offence, he was entitled to the protection of clause (1) of Article 20 and it was not permissible for the trial Court to convict him of an offence under clause (e) of sub-section (1) of Section 5 as no such clause was in existence at the relevant time. ....."

***(h)*** Referring to the scope of Section 5(2) of the P.C. Act, 1947, reliance was placed in the case of ***Sajjan Singh*** vs. ***State of Punjab*** : ***AIR 1964 SC 464*** wherein it has been laid down as follows:-

**"10.** This sub-section thus provides an additional mode of proving an offence punishable under sub-s. (2) for which any accused person is being tried. This additional mode is by proving the extent of the pecuniary resources or property in the possession of the accused or any other person on his behalf and thereafter showing that this is disproportionate to his known sources of income and that the accused person cannot satisfactorily account for such possession. If these facts are proved the section makes it obligatory on the Courts to presume that the accused person is guilty of criminal misconduct in the discharge of his official duty, unless the contrary, i.e., that he was not so guilty is proved by the accused. The section goes on to say that the conviction for an offence of criminal misconduct shall not be invalid by reason only that it is based solely on such presumption.

> **12.** Mr. Lall contends that when the section speaks of the accused being in possession of pecuniary resources or property disproportionate to his known sources of income only pecuniary resources or property acquired after the date of the Act is meant. To think otherwise, says the learned Counsel, would be to give the Act retrospective operation and for this there is no justification. We agree with the learned Counsel that the Act has no retrospective operation. We are unable to agree however that to take into consideration the pecuniary recourses or property in the possession of the accused or any other person on his behalf which are acquired before the date of the Act is in any way giving the Act a retrospective operation."

***(i)*** On the burden of proof under the P. C. Act, 1947, reference was made to the case of ***V. D. Jhingan*** vs. ***State of Uttar Pradesh*** : ***AIR 1966 SC 1762***, the relevant portion of which is reproduced below:-

> **"(4)** The next question arising in this case is as to what is the burden of proof placed upon the accused person against whom the presumption is drawn under S. 4 (1) of the Prevention of Corruption Act. It is well established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether the prosecution has discharged its onus to prove the guilt of the accused, but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under S.4 (1) of the Prevention of Corruption Act. It is sufficient it the accused person succeeds in proving a preponderance of probability in favour of his case; It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden is shifted to the prosecution which still has to discharge its original onus that never shifts, i.e., that of establishing on the whole case the guilt of the accused beyond a reasonable doubt. ....."

***8.*** Mr. Moulik took us through entire length and breadth of the memo of appeal, synopsis of arguments and evidence on record. In my view, it would not be necessary to deal with all of them for disposal of this appeal for the reasons that shall appear hereinafter.

***9(a).*** Mr. J. B. Pradhan, learned Public Prosecutor, on the other hand appearing on behalf of the State, staunchly supporting the impugned judgment submitted that the prosecution has been successful in discharging the onus of proving that the appellant was in possession of assets which were disproportionate to his known sources of income which the appellant had failed to explain satisfactorily. It was submitted by him that the allegation of the I.O. failing to investigate into the assets and income of the appellant in his possession during the investigation despite him bringing them to the knowledge of the I.O. was false and the documents filed by the appellant in proof of such income and assets during the trial was obviously false and concocted. The appellant's claim that his income before the check period should also be included as assets in his possession at the beginning or during the check period was not permissible and would lead to arithmetically wrong result because as per him the assets of a person on a particular day is never the total of all the income which he had earned till then. Moreover, as the appellant had the habit of utilising bank

services, his claim of being in possession of huge liquid cash would be improbable and could not be accepted. On the claim on rental income, it was submitted that since the trial Court in the impugned judgment had allowed 25% of such income claimed by him which amounted to Rs.3,97,275/- by discounting the period before the beginning of the check period, for the appellant to expect the entire amount claimed by him was unjustified and impermissible. The claim of the appellant of having received cash of Rs.12,50,000/-, livestock, gold, raw gold and silver from his step mother (Jethi Ama) was based on a false document of will dated 14-01-1985 being Exhibit D7 as it had not been produced during the investigation in spite of the I.O. having given him an opportunity and that the rejection of this document by the trial Court as being unbelievable as regards its content was unassailable and perfectly valid.

***(b)*** Further that Exhibit D14, a document dated 18-11-1964 regarding movable assets received by the appellant in 1964 at the time of partition of his paternal property was rightly rejected by the trial Court as false because the witness PW34 who proved the document in his cross-examination, could not be believed as he had facilitated illegal transfer of land in favour of the appellant and that the witness to the partition document were from far-flung areas instead of being from the same locality.

***(c)*** That the trial Court had rightly held that the valuation by the Engineers of the buildings were acceptable as the Engineers who deal with such matters in the day to day work gain knowledge about the cost of such minor items and, the appellant had failed to prove that the cost of such minor items reflected by the Engineers in the valuation report were on the higher side.

***(d)*** Regarding the rental income Rs.7,01,950/- from the building at Majhigaon, Jorethang, South Sikkim claimed by the appellant it was submitted that the appellant had been allowed to claim a sum of Rs.2,31,000/- by the trial Court and the rejection of the rest of the appellant's claim on that account amounting to Rs.1,74,230/- was perfectly valid as PWs 13 and 30 who had deposed supporting the claim of the appellant had been declared as hostile.

***(e)*** Regarding the rental income from the building at Dentam, West Sikkim it was submitted that the statements of DW2 Samsul Haque that he and four others were tenants since the year 1977 and that he used to collected rent on behalf of the appellant were highly unreliable as none of the four tenants were examined by the appellant. There was no error on the part of the trial Court in rejecting the claim on rental income from Tadong building also as the defence witnesses DW4 and DW6 were unreliable as DW6 was a

'Baidar' of the appellant and DW4, a relative (cousin brother) of the appellant.

***(f)*** Similarly, the learned trial Court had allowed Rs.1,74,200/- and rejecting the rest of the claim disbelieving DW9 as his statement not being supported by any cogent evidence and, therefore, unassailable. No fault could also be found on the appellant being allowed Rs.2,76,780/- against the claim of Rs.9,95,568/- as rental income from the building at Circular Road, Jorethang, South Sikkim, not being supported by any tangible evidence.

***(g)*** As regards the claim of the appellant with regard to the rental income from properties at Gangtok are concerned, it was submitted that such income were liable to be taxed under the Sikkim Income Tax Manual, 1948, and the fact that the appellant did not pay any Income Tax under the Manual of 1948 as revealed from the evidence, the appellant had failed to satisfy the requirement of Section 13(1)(e) of the P. C. Act, 1988, and the explanation appended thereto.

***(h)*** In substance the submission of Mr. J. B. Pradhan was that the judgment of the learned trial Court could not be assailed on the grounds set out by the appellant and, that the explanation given by the appellant being not plausible and not worthy of acceptance, the trial Court had rightly

rejected them. It may be noted that Mr. Pradhan also placed on record a detailed synopsis of arguments on behalf of the respondent.

***10(a).*** Although the principle of law regarding the burden of proof is well-established, it would be in fairness to refer to some of the judgments governing the principle cited by Mr. J. B. Pradhan, learned Public Prosecutor, which are as follows:-

***(b)*** In the case of ***M. Krishna Reddy*** vs. ***State Deputy Superintendent of Police, Hyderabad*** : ***(1992) 4 SCC 45*** the Hon'ble Supreme Court has held as follows:-

> **"6.** An analysis of Section 5(1)(*e*) of the Act, 1947 which corresponds to Section 13(1)(*e*) of the new Act of 1988 shows that it is not the mere acquisition of property that constitutes an offence under the provisions of the Act but it is the failure to satisfactorily account for such possession that makes the possession objectionable as offending the law.
>
> **7.** To substantiate a charge under Section 5(1)(e) of the Act, the prosecution must prove the following ingredients, namely, (1) the prosecution 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 disproportionate to his known sources of income. Once the above ingredients are satisfactorily established, the offence of criminal misconduct under Section 5(1)(*e*) is complete, unless the accused is able to account for such resources or property. In other words, only after the prosecution has proved the required ingredients, the burden of satisfactorily accounting for the possession of such resources or property shifts to the accused."

***(c)*** In the case of ***V. K. Puri*** vs. ***Central Bureau of Investigation*** : ***(2007) 6 SCC 91*** the Hon'ble Supreme Court has held as follows:-

> **"13.** Ingredients of the offence under Section 13(1)(*e*) of the 1988 Act are:
>
> (*i*) the accused is a public servant;
>
> (*ii*) the nature and extent of the pecuniary resources of property found in his possession;
>
> (*iii*) his known sources of income, i.e., known to the prosecution.
>
> (*iv*) such resources or properties found in possession of the accused were disproportionate to his known sources of income;
>
> **14.** Once, however, the aforementioned ingredients are established by the prosecution, the burden of proof would shift on the accused to show that the prosecution case is not correct. (see *M. Krishna Reddy*, para 7)
>
> **16.** From a perusal of the charge-sheet, it furthermore appears that the appellant is said to have acquired large properties including several bank accounts. For the purpose of proving the offence, therefore, on the one hand, known sources of income must be ascertained vis-à-vis the possession of property or resources which were disproportionate to the known sources of income of public servant and the inability of the public servant to account for it, on the other. Whereas the burden to prove the first part of the offence is on the prosecution, in the event the same is proved, it would shift to the public servant concerned. (see *P. Nallammal*)"

***(d)*** In the case of ***P. Nallammal (supra)*** the Hon'ble Supreme Court has held as follows:-

> **"15.** Thus, the two postulates must combine together for crystallization into the offence, namely, possession of property or resources disproportionate to the known sources of income of public servant and the inability of the public servant to account for it. Burden of proof regarding the first limb is on the

prosecution whereas the onus is on the public servant to prove the second limb. So it is contended that a non-public servant has no role in the trial of the said offence and hence he cannot conceivably be tagged with the public servant for the offence under Section 13(1)(*e*) of the PC Act.

**20.** The above contention perhaps could have been advanced before the enactment of the PC Act 1988 because Section 5(1)(*e*) of the old PC Act did not contain an "Explanation" as Section 13(1)(*e*) now contains. As per the Explanation the "known sources of income" of the public servant, for the purpose of satisfying the court, should be "any lawful source". Besides being the lawful source the Explanation further enjoins that receipt of such income should have been intimated by the public servant in accordance with the provisions of any law applicable to such public servant at the relevant time. So a public servant cannot now escape from the tentacles of Section 13(1)(*e*) of the PC Act by showing other legally forbidden sources, albeit such sources are outside the purview of clauses (*a*) to (*d*) of the sub-section."

***(e)*** In the case of ***Hindustan Petroleum Corporation Ltd. & Ors.*** vs. ***Sarvesh Berry*** : ***(2005) 10 SCC 471*** the Hon'ble Supreme Court has held as follows:-

**"13.** It is to be noted that in cases involving Section 13(1)(*e*) of the PC Act, the onus is on the accused to prove that the assets found were not disproportionate to the known sources of income. The expression 'known sources of income' is related to the sources known to the authorities and not the accused. The Explanation to Section 13(1) of the PC Act provides that for the purposes of the Section, "known sources of income" means income derived from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant. How the assets were acquired and from what source of income is within the special knowledge of the accused. Therefore, there is no question of any disclosure of defence in the departmental proceedings. In the criminal case, the accused has to prove the source of acquisition. He has to satisfactorily account for the same. Additionally, issues covered by Charges 2 and 3 cannot be the subject-matter of adjudication in the criminal case."

***(f)*** In the case of ***Awadh Kishore Gupta (supra)*** the Hon'ble Supreme Court has held as follows:-

> **"5.** Section 13 deals with various situations when a public servant can be said to have committed criminal misconduct. Clause (*e*) of sub-section (1) of the section is pressed into service against the accused. The same is applicable when the public servant or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession, for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income. Clause (*e*) of sub-section (1) of section 13 corresponds to clause (*e*) of sub-section (i) of section 5 of the Prevention of Corruption Act, 1947 (referred to as "the old Act"). But there have been drastical amendments. Under the new clause, the earlier concept of "known sources of income" has undergone a radical change. As per the Explanation appended, the prosecution is relieved of the burden of investigating into "source of income" of an accused to a large extent, as it is stated in the Explanation that "known sources of income" mean income received from any lawful source, the receipt of which has been intimated in accordance with the provisions of any law, rules, orders for the time being applicable to a public servant. The expression "known sources of income" has reference to sources known to the prosecution after thorough investigation of the case. It is not, and cannot be contended that "known sources of income" means sources known to the accused. The prosecution cannot, in the very nature of things, be expected to know the affairs of an accused person. Those will be matters "specially within the knowledge" of the accused, within the meaning of Section 106 of the Indian Evidence Act, 1872 (in short "the Evidence Act").
>
> **7.** The legislature has advisedly used the expression "satisfactorily account". The emphasis must be on the word "satisfactorily" and the legislature has, thus, deliberately cast a burden on the accused not only to offer a plausible explanation as to how he came by his large wealth, but also to satisfy the court that his explanation was worthy of acceptance."

***(g)*** On the question of inconsistencies appearing in the prosecution evidence it was submitted the approach that a Court should adopt has been laid down in the case of

***Krishna Pillai Sree Kumar & Anr.*** vs. ***State of Kerala*** : ***AIR 1981 SC 1237*** the relevant portion where of relied on by him is extracted below:-

> **"11.** It is no doubt true that the prosecution evidence does suffer from inconsistencies here and discrepancies there but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies, etc., go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking ad vantage of the incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. That is a salutary method of appreciation of evidence in criminal cases which does not appear to have been followed by the learned Sessions Judge; and that is the reason why he landed himself into wrong conclusions, as has been pointed out by the High Court."

***(h)*** Reference was also made to the case of ***Sohrab*** vs. ***The State of Madhya Pradesh*** : ***(1972) 3 SCC 751***, the relevant portion of which is reproduced below:-

> **"8.** ..... It appears to us that merely because there have been discrepancies and contradictions in the evidence of some or all of the witnesses does not mean that the entire evidence of the prosecution has to be discarded. It is only after exercising caution and care and sifting the evidence to separate the truth from untruth, exaggeration, embellishments and improvement, the Court comes to the conclusion that what can be accepted implicates the appellants it will convict them. This Court has held that falsus in uno falsus in omnibus is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered though where the substratum of the prosecution case or material part of the evidence is disbelievable it will not be permissible for the Court to reconstruct a story of its own out of the rest. It is also urged that

in an appeal against acquittal, the Appellate Court must consider the reasons which impelled the Trial Court to acquit the accused but whereas in this case the High Court having agreed with most of the conclusions arrived at by the Sessions Judge it could not reverse the order of acquittal. The Privy Council case in *Shoe Swarup and Ors.* v. *King Emperor*, and the judgment of this Court adopting the view enunciated therein have been referred to us. It is now well established that under Sections 417, 418 and 423 of the Code of Criminal Procedure, the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. This principle was adopted in *Sanwant Singh* v. *State of Rajasthan*, in *Agarwal* v. *State of Maharashtra*, and it was pointed out that the different phraseology used in the earlier judgment of this Court such as "substantial and compelling reasons", "good and sufficiently cogent reasons" and "strong reasons" are not intended to curtail the powers of the Appellate Court in an appeal against the acquittal to review the entire evidence and to come to its own conclusion but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the Court below in support of its order of acquittal in arriving at a conclusion on those facts but should express the reasons in its judgment, which led it to hold that the acquittal was not justified. In those cases it was pointed out by this Court that the principles laid down by the Judicial Committee in *Sheo Swarup case* (supra) afford a correct guide of the court's approach to a case disposing of such appeal. ....."

***(i)*** On this question reference also was made to the case of ***Chand Khan & Anr.*** vs. ***State of U.P.*** : ***(1995) 5***

***SCC 448***, the relevant portion of which is reproduced below:-

> **"19.** The next reason canvassed by the trial court for disbelieving the prosecution case was that the evidence of PWs Kaisher Khan (PW 2) and Mardan Mian (PW 4) only established that some of the accused persons had assaulted Shah Alam and not all. Having recorded the above finding it was imperative for the trial court to consider the case of the individual accused on their respective merits in the light of other evidence on record and not to reject outright the evidence of the two witnesses in its entirety for it is trite that the principle *"falsus in uno, falsus in omnibus"* does not apply to criminal trials and it is the duty of the court to disengage the truth from falsehood."

***(j)*** It was urged by Mr. Pradhan that the discrepancies in the investigation pointed out on behalf of the appellant, particularly the allegation of the I.O. not having investigated into the assets and income disclosed by him, were not such as to vitiate the entire investigation. The defect in the investigation ought to be such as would result in mis-carriage of justice. To support this submission of his, he relied upon the decision of ***H. N. Rishbud & Anr.*** vs. ***State of Delhi*** : ***AIR 1955 SC 196*** and ***Munnalal*** vs. ***State of Uttar Pradesh*** : ***AIR 1964 SC 28***.

***(k)*** On the interpretation of the term "known sources of income" appearing in Section 13(1)(e) of the P.C. Act, 1988, reliance was placed by him in the decision of ***Awadh Kishore Gupta (supra)*** which has already alluded to earlier.

***11(a).*** I have carefully examined and considered the statements of the relevant witnesses who are the Engineers involved in the survey and assessment of the properties in question. It is an admitted position of both the parties that bulk of the alleged disproportionate assets is constituted by eight RCC buildings situated at Tibet Road, Gangtok, East Sikkim; 6th Mile, Tadong, East Sikkim; Opposite Bansilal Petrol Pump, Gangtok, East Sikkim; Majhigaon, Jorethang, South Sikkim; Circular Road, Jorethang, South Sikkim; Uttarey, West Sikkim and at Dentam, West Sikkim. It would, therefore, be essential to examine the correctness of the valuation of these properties before it can be concluded that the appellant possessed assets disproportionate to his known sources of income. This is vital because the valuation is the direct index to the disproportionateness of the assets allegedly held by the appellant as per the prosecution in the case. The building opposite Bansilall Petrol Pump has been left out of the purview of this discussion as in all fairness it has been conceded by the prosecution that the evidence on record clearly established that it was the property of the wife of the appellant.

***(b)*** The buildings at Tibet Road, Gangtok, 6th Mile, Tadong and the one opposite to Bansilal Petrol Pump,

Gangtok, were surveyed and assessed by PWs 64, 65 and 66. PW 64 is a Divisional Engineer in the Buildings and Housing Department of the Government of Sikkim. PWs 65 and 66 are serving Assistant Engineers in the Roads and Bridges Department and Buildings and Housing Department, Government of Sikkim, respectively.

***(c)*** Regarding the building at 6th Mile, Tadong, they have, *inter alia*, stated that the year of construction of the building was taken as 1986 and, therefore, the SoR for in the year 1986 was taken for computing the valuation but in respect of items of construction and materials not mentioned in the SoR of 1986, those prescribed in the SoR of 1991 were adopted. On the other hand, PW66 stated that in respect of certain items for which rates were not provided in the 1986 SoR the SoR of the other projects completed in the year 1986 were applied for calculating the valuation but was silent as to the identities, locations of those projects and the rates adopted as a result the correctness of the valuation arrived at by them remains suspect. PW64 in his cross-examination admits that they neither took the help of Blue Print Plan of the building nor did they ask the appellant to produce it. It is also admitted that the building at 6th Mile, Tadong was found complete in the year 1986. The following statements also appear in his cross-examination:-

" .....

..... In case of the report Ext.P.90 relating to the valuation of the building at Tadong. Similarly the Plinth area has been shown at 15,115.25 Sqft. and cost of construction per Sq.ft. has been shown at Rs.163/-. There is no mention or the basis as to how the plinth area was calculated at 15,115.25 Sq.ft. and the cost of construction per Sq.ft. @ Rs.163/-.

.....

It is true that Item No.1 of the valuation report of Tadong building shows the rate @ 61 per 10 Cubic Metre and Rs.66 per 10 cubic Metre. However I have seen the schedule now relating to 1986 wherein such rate has not been mentioned for item No.1. It is true that calculation regarding Item No.1 as per schedule of Rate 1986.

It is true that the rate shown in Item No.2 of analysis regarding Tadong building the rate calculated is not found in the schedule of rates of schedule of rate 1986. It is true that similarly the rate shown in Item No.4 relating to Tadong building is also not calculated as per schedule of rate 1986.

It is true that the rates shown against item Nos.6, 7, 11, 12, 13, are not available in the schedule of rate 1986. Similarly Schedule of rate at Item no.9 is also not available in the schedule of rate 1986.

**It is true that the item Nos.14 the calculation is not correct. It had to be at the rate of Rs.24 per Sq. M. Similar is the case at Item No.15 where the rate has been shown at Rs.301 per Sq. M. instead of Rs.28 per Sq. M.**

**It is true that the rate shown at Item Nos.17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32 of Ext.P.90 are not correct.** The same are not calculated as per schedule of rates 1986. Rates shown in Item Nos.29, 30, 31 and 32 are not at all available in the schecule 1986.

It true that calculation for Item Nos.33 to 59 has not been made as per schedule of rates 1986 relating to Ext.P.90 i.e. Tadong Building.

**It is true that the calculation done relating to the valuation of Tadong building are not as per schedule of rate 1986.**

**It is true that the calculation in Ext.P.90 is a mistaken calculation and therefore the valuation shown therein in Ext.P.90 is not correct.** It is not a fact that Ext.P.92 does not relate to the building of P. L. Gurung at Tadong.

It is true that the schedule of rates relating to Tibet road building Ext.P.87 shows of 1991 rate. However, Item Nos.6, 7, 8, 11, 12, 13, 16, 32, 34, 35, 36 to 42 noted at page 10 and the items 43 to 47 noted at page 11 of the Ext.P.87 are not calculated as per schedule of rates 1991. Some of the rates mentioned in these items are not even available in 1991 schedule of rates. It is true that the calculation made in the aforesaid items are not done or found in the schedule of rates 1991. **As such it cannot be said that Ext.P.87 is correct or not.** ....." [emphasis supplied]

***(d)*** Similarly, PW65 has, *inter alia*, stated the following in his cross-examination:-

"

It is true that due to inflation in price the schedule of rate prepared by the Government at the later point of time increases from the earlier schedule of rates, therefore, the valuation ascertain in 1991 schedule of rate is more that what was the rate in the 1986 government schedule of rates.

**It is true that because we have valued some of the items of Tadong Building as per 1991 schedule of rates therefore the said rates was at a higher level and therefore could not be correct because the building of Tadong was completed in 1986.**

**It is true that in respect of item No.24 of Ext.P.90 relating to Tadong building the rate calculated does not tally with the rate of mosaic** in the 1991 schedule of rate. It is true that in calculating the rates of items in respect of Tadong building and Tibet road building though we have based the schedule of rates for the year 1986 and 1991 **in some cases there are mistakes in rates and also in calculation.**

It is true that the sketch plan relating to Tadong building and Tibet Road building were not prepared by me.

....." [emphasis supplied]

***(e)*** In his deposition, PW 66 has, *inter alia*, made the following statements in his cross-examination:-

"

..... As regard the building of accused situated at 6th Mile Tadong we took the

year of construction of the year 1986 as per the information received by us from the Vigilance Department. However, in respect of certain items whose schedyle *(sic)* of rates were not available then we also took the schedule of rates of the other projects completed in the year 1986 for calculating the valuation. .....

..... We did not take the assistance of Blue (sic) print plan of the building of the accused while preparing Ext.P-92. .....

..... **It is true that in our report Ext.P-91 relating to valuation of building located at 6th Mile Tadong and at Tibet Road no where it has been mentioned that we had adopted rates, for some items which were not covered by the schedule, as per the rates of some buildings completed at that time. It is also a fact that there is no mentioned** *(sic)* **of a particular building completed at the relevant time and showing that we had adopted any rate relating to non-scheduled items or special items as per the rates of such particular building completed by then. Simelerly** *(sic)* **though we have in our report Ext.P-91 we have stated that market rate had been adopted for non schedule or the special items of such market rates adopted by us not there is anything to show that at the relevant time market rate on the non schedule items and special items was of a particulars rates or value.** .....

....." **[emphasis supplied]**

***(f)*** We may now examine the evidence of the above witnesses with regard to the building at Tibet Road, Gangtok. The deposition of the witnesses PWs 64, 65 and 66 have been set out below, which in my view, are not consistent with each other with respect to all material facts. In their cross-examination, inconsistent and grossly contradictory statements appear in the deposition of the prosecution witnesses the relevant portions of which are reproduced below:-

**PW 64**

".....

It is true that at the time of taking measurement of the said two buildings of P.L. Gurung situated at Tadong and at Tibet road we did not take help of the blue-print plan of the said two buildings of P.L. Gurung approved by L.S.G. and H.D nor the same were asked to be produced by us to Shri P.L. Gurung.

.....

It is true that Ext.P.89 the report relating to the building at Tibet road, it has been mentioned that the Plinth area of the building is 6090.95 sq.ft. **The report also mentions the cost per square feet of construction was considered to be reasonable. However in the report I have not told any basis for the cost of construction at the rate of Rs.239/ sq. ft.** and also for the plinth area at Rs. 6090.95/ sq.ft.

.....

It is true that in respect of the building at Tibet road my report shows that the year of construction supplied by the Vigilance Department was 1991. Similarly in respect of the building at Tadong, the report of the Vigilance Department is 1986 being the year of construction. We acted as per the information given by the Vigilance Deptt. in calculating the valuation of the two buildings. However as any expart *(sic)* we did not try to find out/ascertain the actual year of construction of the said two buildings at Tibet road and at 6th Mile Tadong.

.....

**It is true that the schedule of rates relating to Tibet road building Ext.P.87 shows of 1991 rate. However, Item Nos.6, 7, 8, 11, 12, 13, 16, 32, 34, 35, 36 to 42 noted at page 10 and the items 43 to 47 noted at page 11 of the Ext.P.87 are not calculated as per schedule of rates 1991. Some of the rates mentioned in these items are not even available in 1991 schedule of rates. It is true that the calculation made in the aforesaid items are not done or found in the schedule of rates 1991.** As such it cannot be said that Ext.P.87 is correct or not.

....." [emphasis supplied]

**PW 65**

".....

**It is true that in respect of item No.24 of Ext.P.90 relating to Tadong building the rate calculated does not tally with the rate of mosaic in the 1991 schedule of rate.** It is true that in calculating the rates of items in respect of Tadong building and **Tibet road building though we have based the schedule of rates for the year 1986 and**

**1991 in some cases there are mistakes in rates and also in calculation.**

It is true that the sketch plan relating to Tadong building and Tibet Road building were not prepared by me.

....." **[emphasis supplied]**

**PW 66**

"....

..... While calculating the valuation of the building of the accused situated at Tibet Road, Gangtok we took the year 1991 as the year of construction as informed by the Vigilance department. However, in cases of those items which were not included in the schedule of rates of 1991 we also adopted market rates in respect of few items and also the rates as per the projects completed in the year 1991. .....

..... It is true that in our report Ext.P-91 relating to valuation of building located at 6th Mile Tadong and at Tibet Road no where it has been mentioned that we had adopted rates, for some items which were not covered by the schedule; as per the rates of some buildings completed at that time. **It is also a fact that there is no mentioned** *(sic)* **of a particular building completed at the relevant time and showing that we had adopted any rate relating to non-scheduled items or special items as per the rates of such particular building completed by then. Simelerly** *(sic)* **though we have in our report Ext.P-91 we have stated that market rate had been adopted for non schedule or the special items of such market rates adopted by us nor there is anything to show that at the relevant time market rate on the non schedule items and special items was of a particulars rates or value.** .....

....." **[emphasis supplied]**

***(g)*** From the evidence alluded to above and the admitted position of the prosecution, the basis of assessment of the buildings at Tibet Road and 6th Mile, Tadong are the SoRs of 1986 and 1991 respectively. PWs

64, 65 and 66 did not make efforts to find out the actual year of construction of the buildings and have accepted 1986 for the building at 6th Mile, Tadong and 1991 for the one at Tibet Road 'as informed' by the Vigilance Department. They did not have the Blue Print Plan of the buildings but had relied on building plans prepared by them after taking measurements. In a large number of items in the building at 6th Mile, Tadong, they had applied the SoR of 1991, when rates on such items were not found in the 1986 SoR. In some of the other items they have purportedly applied the SoR of nearby projects, particulars of which have neither been stated nor filed at all and, in others they have adopted the market rates particulars of which have also neither been stated nor placed on record. It is also evident that the witnesses are not clear as to on what basis the cost of construction of the building at 6th Mile, Tadong, was fixed at Rs.163/- per sq. ft. Similarly, as per witnesses the same building was assessed at Rs.61/- per cubic metre and Rs.66/- per cubic metre purportedly as per the 1986 SoR but no such rate has been mentioned under item no.1 of the SoR of 1986 exhibited as Exhibit D20 by the appellant. In item no.4 of Exhibit 90 which is the valuation report relating to the 6th Mile, Tadong, building it has been admitted that the rate of mosaic taken by the witnesses did not tally with the rate of mosaic in the 1991 SoR. It has, therefore, been

stated by all the 3 witnesses being PWs 64, 65 and 66, that the report is filled with mistakes. In fact, PW 64 who is the Divisional Engineer and the leader of the surveying party has categorically stated that "the calculation in the valuation report is a mistaken calculation and the valuation is incorrect".

***(h)*** Apart from the above deficiencies, it is found that the prosecution failed to produce the SoR of 1986 and 1991 compelling the appellant to produce the 1986 SoR exhibited as Exhibit D20 and, admittedly the said SoR of 1986 did not contain rates of a large number of items. It is also found that although these witnesses have stated that while assessing the value of some of the items they had relied upon the rates in the nearby projects and also on the prevailing market rates, neither the rates nor the particulars of such rates were not placed and, therefore, the correctness of the valuations could not tested in Court to inspire the confidence of this Court on such valuation.

***(i)*** There is another aspect of the matter which needs consideration. The prosecution has taken the year 1986 as the year of completion of the building at 6$^{th}$ Mile, Tadong, but for assessing the value of major portion of the items of the building of which rates were not prescribed in the 1986 SoR, they applied either the rates provided in the 1991 SoR

or the rate applied in the nearby projects or the rates prevailing in the market. It is pertinent to note that the assessment was done by the witnesses in the month of November, 1996, which means that the market rates and the SoR applied to the nearby projects would be the rate prevailing in the year 1996. It would, therefore, mean that to assess the value of the building which was completed in the year 1986 SoR that were prevailing either 5 years or 10 years after its completion were taken as the basis for valuing the property. In my view, this would not be a fair and reasonable basis for assessing disproportionate assets of the year 1986 because the value thus assessed would be considerably higher than its actual value or its approximate value. It was essential on the part of the assessors to have adopted a reasonable criteria to arrive at a reasonable value which could have been relatable to the cost of construction in the year 1986. This having not been done the serious doubt arises on the reliability of the valuation.

***(j)*** Similar is the case of Tibet Road building which is evident from the deposition of witnesses reproduced above.

***(k)*** In so far as the assessment of the electrical fittings are concerned from the evidence of PWs 45 and 46 the SoR of 1989 had been adopted, but the relevant SoR were never produced in Court. On examination of Exhibit

P65 which is the letter forwarding the assessment statements of electrical installation in respect of the buildings at 6th Mile, Tadong and Tibet Road, Gangtok by the Assistant Engineer (Wiring), Power Department, the basis of assessment has been mentioned as 'departmental rates'. On careful scrutiny of the details of the assessment in respect of the 6th Mile, Tadong building marked Exhibits P.61, P.62 and P.63 and, in respect of Tibet Road, Gangtok marked Exhibit P-64 there is no mention as to which SoR was applied. I only find items and calculations. There is incoherence on this aspect in the depositions of the two witnesses in as much as on the one hand they say that they had applied the 1989 SoR but on the other hand PW45 also states that the calculation was done after inviting quotations from suppliers of electrical goods and, as per PW46 the calculations Exhibits P61 and P64 were based on the 1986 rates. Since the quotations and the SoRs were not tendered in evidence it is difficult for this Court to accept their statements. Correctness of the valuations could not be tested as in the case of the civil works discussed above.

***(l)*** The next set of properties are – (i) one three storeyed RCC building at Majhigaon, Jorethang, South Sikkim; (ii) a five and half storeyed building at Circular Road also at Jorethang, South Sikkim; (iii) one two storeyed Ekra-cum-masonry structure at Uttarey, West Sikkim; (iv) a three

storeyed RCC building also at Uttarey, West Sikkim; and (v) one four storeyed RCC building at Dentam, West Sikkim. We may take these properties and deal with the evidence in respect of the assessment of the civil engineer works which are set out below:-

***(i)*** **Majhigaon and Circular Road buildings, Jorethang, South Sikkim**

The survey of the building at Majhigaon was done on 10-08-1996 taking the construction period for the ground floor as 1979-82 assessed at Rs.1,21,000/-. The period of construction for the first floor was taken as 1983-85 at the cost of Rs.74,179/- and the year 1985-87 for the top floor at Rs.93,016/- cumulatively taken together at an estimated cost of Rs.2,89,126/-. There are some controversies with regard to the period of construction but evidence sufficiently indicate that it was constructed prior to the check period but it is not necessary to deal with this aspect for the moment as firstly Mr. J. B. Pradhan fairly conceded that the evidence on record indicated that the building was indeed constructed prior to the check period and, secondly I am presently concerned with the reliability of the valuation of the buildings even assuming that those buildings are considered to be falling within the check period.

***(ii)*** Upon examination of the deposition of one K. K. Pradhan, PW49, Assistant Engineer under the RMDD,

Government of Sikkim, and D. K. Pradhan, PW50, Junior Engineer in the Buildings and Housing Department, Government of Sikkim, who conducted the survey and assessment of the civil works of all the above buildings, we find that the position is not better, if not worse, than those connected with the two Gangtok buildings already dealt with. It would be convenient to reproduce the relevant portions of the depositions of the witnesses which are extracted below:-

**PW49**

"....

I had prepared the assessment and valuation of the ground floor of Majigaon building based on the schedule of rate of 1979 to 1982.

It is true that Ext.D.20 (collectively) do not bear the schedule of rates for the years 1979 to 1982. **It is true that in the years 1979, 1980, 1981 and 1982 the PWD of the Govt. of Sikkim did not make any schedule of rate for construction during those years.** It is true that the schedule of rate for construction during those years. It is true that the schedule of rate for the year 1976 was applicable for the years 1979 to 1982. As there was no separate schedule of rates for the years 1979 to 1982 I had applied the schedule of rates for 1976 while making valuation of the buildings of the accused.

In the valuation report relating to the ground floor of the Majigaon building of the accused Item No.1 is site leveling in which I have put Rs.500/- as the amount **on my assumption.** I did not measure the lift and lead from work site in the building of accused at Majigaon relating to excavation works as shown by me at item No.2 of the valuation report of the building of the accused. (Ext.P.75). As per schedule of rates 1976 rate for excavation in foundation trances in mixed soil including throwing of spoil within 1.5 mt. lift and 30 mt. lead from work site is at the rate of Rs.84/- per 1000 cft. i.e. Rs.8.40 per 100 cft. **However, my calculation relating to the excavation in foundation trances in mixed soil at item No.2 has been made @ of Rs.158/- per 100 cft. As per schedule of rates for the year 1976 rate for 100 cft. of providing and laying handpacked stone soling in building works with clean hard selected stones all complet *(sic)* is**

**@ Rs.86/- per 100 cft. whereas Item No.3 of my valuation report relating to the same matter in respect of Majigaon building has been calculated by me at the rate of Rs.116/- per 100 cft.** It is a fact that in calculating the valuation of the Majigaon building Item No.4 is 'providing and laying 1:4:8 cc. in foundation'. **Valuation of this item has been calculated by me at the Rate of Rs.1005/- per 100 cft. whereas as per page 2 Item No.V of schedule of rates for the year 1976 i.e. Ext. D.20 the rate for 100 cft. of mixed 1:4:8 cc is Rs.407/- per 100 cft. Thus my calculation is not as per the schedule of rates of 1976. It is true that none of the items relating to the valuation of all the floors of Majigaon building as well as building situated at Circular road, Jorethang were done as per the schedule rate of 1985 and not as per the rate of 1976 schedule.** It is true that the schedule of rates for 1976 (Ext.D.20) does not bear signature of any concerned officer.

It is true that the valuation assessed for all the floors of Circular road at Jorethang are not according to 1976 or 1985 schedule of rates (Ext.D.20).

**It is a fact that calculation of valuation done by me in respect of the two buildings at Majigaon and Circular road, Jorethang were not as per the schedules of rate."** **[emphasis supplied]**

## PW 50

"……

It is not a fact that measurement were not taken room to room and floor to floor. It is true that the valuation report Ext. P.75 relating to Circular road building and Majigaon building do not contain signature of the A.E and D.E on each page it is also true that there are some erases and the corrections in the said report but such correction and erases do not bear the signature of any official. It is true that the proportion of sixtures *(sic)* of cement, sand, stone etc. as mentioned in our report were based **on assumption** and the schedules. It is true that Ext.D.20 reflects the schedule of rates issued by S.P.W.D. Govt. of Sikkim for the year 1976. **Valuation of the said two buildings at Jorethang were done as per the schedule of 1980. It is true that there is no schedule of rates of the S.P.W.D. for the year 1980. It is true that some of the rates calculated for different items of works in the said two buildings at Majigaon and Circular road, Jorethang are not as per schedule of rates fixed by the S.P.W.D. It is true that chemical test in respect of concrete structures were not done."**

**[emphasis supplied]**

***(ii)*** **Uttarey and Dentam buildings, West Sikkim**

As per the evidence the survey and assessment of the three buildings were done on 12-08-1996 in respect of the civil works by Mohd. Sahid, Divisional Engineer, Health and Family Welfare Department as PW51 and Vijay Kumar Tewari, Junior Engineer, Buildings Department, Government of Sikkim as PW52. The relevant portions of the depositions of the witnesses are extracted below:-

**PW 51**

"

..... In Exbt P.73 and P.74 the facts pertaining to year of construction and schedule of rate which are handwritten on the top of the paper were not written by me or by my Junior Engineer. Exbt. P.73 and 74 collectively were prepared by me and by my J.E. The corrections in Exbt P.73 and P.74 collectively were not done by me or by my J.E. The valuation reports and the blue print plans in respect of the two buildings of the accused at Utteray and one building at Dentam being Exbts P.73 and P.74 collectively including blue print plans were prepared by us within two three days after 12.8.96 and the said valuation report Exbt. P.73 and P.74 collectively relating to the three building were submitted by us within a week after 12.8.96 and was duly signed by me at that time along with the D.E. In respect of the two buildings at Utteray valuation was assessed as per the schedule of rates 1984 of the SPWD. However, in respect of the assessment of valuation for the building of Dentam the schedule of rate was of the year 1987. It is not a fact that in the year 1984 and 1987 the SPWD had not notified any schedule of rates. I am not sure which schedule of rates was taken while assessing the valuation of the three storeyed RCC building at Utteray and four storeyed RCC building at Dentam. It is true that there are mistakes in calculation of rates for different itmes in respect of the buildings situated at Utteray and Dentam like item No.1, 4, 6, 11, and 19 in the building of Utteray namely the three storeyed R.C.C. building in Exbt P.73. Similar other mistakes are also there in Exbt P.74 and also in P.73 itself relating to the three buildings of Utteray and Dentam.

It is true that the valuation assessed by us in respect of the three buildings of Utteray and Dentam

are not perfect and there are mistakes in calculating the valuation of the three buildings. ....."

[emphasis supplied]

**PW52**

"....

It is true that the valuation report Ext.P.73 collectively and Ext.P.74 do not show the measurement of the respective house of the accused either floor wise or room-wise.

It is true that I do not know anything about the contains of the valuation report Ext.P.73 collectively and Ext.P.72 relating to the Utterey houses and the house at Dentam belonging to the accused as the same were finally prepared at the office of D.E. (Bigs) at Jorethang.

It is true that report Ext.P.73 relating to the valuation of the two storeyed Egra-stone house does not mention anywhere about the valuation of any sanitary fittings.

....."

***(iv)*** Analysis of the above evidence clearly shows that it is riddled with confusion and contradictions. The witnesses do not appear to be certain as to which of the SoRs had been adopted for the different buildings, and some of them admittedly were taken on assumptions, in others as per the SoR for a particular year when admittedly no such SoR for the year existed. PW50 who conducted the valuation of the two Jorethang buildings has stated that SoR 1980 was applied when admittedly no SoR for the year 1980 existed. The statement of PW49 is apparently a mass of confusion and has categorically admitted the erroneous and inflated application of rates on different items.

***(v)*** With regard to the Uttarey and Dentam buildings there is a clear admission on the part of PW51 who is a Divisional Engineer heading the team of assessors, that there are mistakes in calculation of rates for different items while assessing their valuation. As per him for the two buildings at Uttarey they had applied the rates of 1984 and the SoR of 1987 for the one at Dentam. There are conflicts and contradictions in the deposition of PW52 as to which of the SoRs that was applied. He states that 1985 Government rates were applied for the two buildings at Uttarey but it was the 1987 rates as per PW51 and, of the year 1996 in respect of the Dentam building. There are also contradictions with regard to the buildings at Uttarey amongst the witnesses as to whether it was the 1984 SoR or 1985 SoR. There is utter confusion as to the rates that have been applied for assessing the various items in the different buildings. Exhibits P73 and P74 which are the detailed valuations of the two buildings of Uttarey are also bereft of any particulars as regards the SoR applied for the valuation. Regarding the hand-written entries in Exhibit P73 and P74 indicating the SoRs, PW51 who led the team of assessors states those were not written by him or by his Junior Engineer PW 52 which is apparent from the following statement appearing his deposition:-

"……

> ..... Exbt. P.73 and P.74 the facts pertaining to year of construction and schedule of rate which are handwritten on the top of the paper were not written by me or by my Junior Engineer. ....."

***(vi)*** As regards PW52, he states that he knows nothing about the contents of Exhibits P73 and P74. As in the case of Gangtok building, none of the SoRs were produced and tendered in evidence in Court.

***(m)*** The above being the quality of evidence pertaining to the valuation of the buildings which is the basis for assessing the bulk of the alleged disproportionate assets of the appellant serious doubt arises as to the veracity of the prosecution case. When apart from then serious discrepancies and contradictions appearing in the evidence, the valuation reports which admittedly are based upon erroneous and inflated rates on different items of the building and others based upon assumptions or upon rates said to be under the schedule of a particular year when no such SoR was prescribed and the fact that the SoRs were never produced, the very basis of the case of the prosecution of the appellant being in possession of disproportionate assets is rendered unreliable. We may refer to the decision of this Court in the case of ***Central Bureau of Investigation*** vs. ***Nar Bahadur Bhandari*** in Criminal Appeal No.4 of 2007 decided on 03-08-2010 where, in a similar circumstance, it has been held as follows:-

"11. The trial court reduced the value of construction from the Rs.78,99,840/- to Rs.59,75,000/-. In order to prove that the valuation of the construction was of Rs.78,99,840/-, PW 8, Executive Engineer (Civil) attached to CBI on deputation since 1st June, 1998, had deposed. ..... He stated that valuation was made on the basis of Delhi Plinth Area Rates and Delhi Schedule Rates. Neither Delhi Plinth Area Rates, nor Delhi Schedule Rates was tendered in evidence. He accepted that Delhi Plinth Area rates and Delhi Schedule Rates are applicable to Delhi. ..... He stated that the valuation was made by way of approximation. .....

12. ..... Further, assuming the measurements taken by PW 8 are correct, in the absence of Delhi Plinth Area Rates and Delhi Schedule Rates, even if they were applicable, the Court had no means to gather what would be the appropriate value of the said construction."

**[emphasis supplied]**

***(n)*** In the case of ***O. T. Bhutia*** vs. ***State of Sikkim*** : ***2010 (4) Crimes 166 (Sik.)*** it was similarly observed as under:-

"2.(e) In order to prove that the value of the building was Rs. 35,58,873, reliance was placed on a valuation report prepared by two engineers, one of them Paulose D. deposed. Paulose D. deposed in his examination-in-chief that he, Mr. Suresh Chand and Mr. M. K. Pradhan were detailed for assessing the valuation of the building of appellant. They, accordingly, visited the building, measured the same, prepared drawing and valued the construction cost according to SPWD norms and regulations. As per assessment, the cost of construction came to Rs.35,58,873 and the same was reported by the valuation report (Ex.P.7) to the Vigilance Department. He stated in cross-examination that the valuation of the building was done as per G.S.R.91. He stated that the period of completion of construction of the building could be two years or more, but not less than two years. He stated that in 1988, there was a G.S.R.1988. He accepted that the valuation report does not give the floor-wise valuation. He denied the suggestion that items No.14, 15, 18, 20, 21, 22 and 23 of the report were not covered by G.S.R.91 and again said, he has to find out from the schedule and to see whether the said items are covered by

G.S.R.1991. He stated that it may be true that in the building torsed steel was not used. He stated that some of the items, particularly, non-scheduled items were assessed as per the market rate. He stated that as per schedule of rate 1991 shown to him from the Court record, the schedule of rate of 1991 had been made applicable or enforceable in respect of all construction work commencing on and after 1st November, 1991. He stated that the valuation was worked out as per schedule of rate 1991 because the owner had stated that the building was competed in 1991. He stated that he calculated the valuation as per schedule of 1991 on the order of his superior. He then stated that the valuation of the building had to be done as per the schedule of 1988 or 1989 and if the valuation of the building is calculated as per schedule of 1989 then 1he *(sic)* valuation of the building is bound to be lesser than the valuation calculated as per 1991 schedule and if the valuation of the building is calculated on the basis of schedule of rate of 1988, the total valuation of the building will be lesser than the valuation worked out as per schedule of 1989. He stated that he did not ascertain the year of construction of each floor of the building. He stated that the particulars of materials used in the building can be found out from the approved Blue Print Plan of the building issued by L.S.G. and H.D. and that for valuing and assessing the building the Blue Print Plan approved by L.S.G. was not before the team of valuers."

.....

5. The extent of the building found in possession of appellant was estimated at Rs.35,58,873. This estimate is based on G.S.R.1991 in relation to some items and based on market value in relation to others. G.S.R.1991 was not produced as a piece of evidence Similarly, no document was produced to suggest market value. It was accepted that the valuation ought to have been done either as per the schedule of 1988 or 1989 and that if valuation was made on the basis of 1988, schedule, the value would be lesser than the valuation made on the basis of 1989 schedule and even lesser than the valuation made as per the schedule of 1991. The valuation, as was made, was not by any acknowledged or approved valuer. While the valuation was made, the Blue Print Plan of the building was not looked at. It was no *(sic)* ascertained what kind of steel was used in construction. The said state of affairs clearly

> indicates that the valuation of the building, in question( *(s/c)* cannot be Rs.35,58,873 and the evidence on record, at the same time, suggests that the valuation of building would be less than Rs.35,58,873. No effort has been made to help the Court to ascertain what would be the lesser value of the building. It should be apt to recall at this stage that the Investigating Officer, in his cross-examination, stated that though he filed supplementary charge-sheet with list of additional documents containing the scheduled of rate of SPWD for the year 1991 and schedule of rate of Power Department for the year 1989, he did not seize the said documents from SPWD or from the Power Department and was unable to show anything that the same were handed over to him by SPWD authority or by the official of the Power Department. ....."
>
> **[emphasis supplied]**

***(o)*** On a careful perusal of the judgment of the trial Court, we find that the question regarding the valuation of the buildings have been dealt with in paragraph 32 which is set out below:-

> "32. Further, defence plea that the Valuation Report concerning buildings of the accused based on different Schedule of Rates of relevant period as admitted by PWs in cross-examination holds no water. Few admission made by the witnesses, here and there, is not going to help the accused. In the examination-in-chief they have fully supported Prosecution case. So far as non-mention of rates of certain building materials in the Schedule is concerned and further that for many construction items, Schedule of Rates do not contain the standard price, it can be said that the witnesses being Engineers dealing with such matter in their day-to-day works certainly have gained required knowledge. Their assessment based on their experience and knowledge is thus proper and cannot be ignored. It has also come on record that valuation in relation to such items was based on Market Survey. If the accused knew actual valuation of the buildings he should have furnished the necessary information on time for scrutiny of the Investigating Agency. Unlike in other criminal cases, cases falling under the P.C. Act cases some burden is on the accused to furnish details to explain how he came to acquire his properties."

***(p)*** Considering the quality of the evidence discussed above on the question, the findings of the learned trial Court extracted above do not appear to be sound. The learned trial Court appears to have completely overlooked the glaring discrepancies in the evidence with regard to the valuation and accepted them simply because – (a) in the examination-in-chief the Engineers had fully supported the prosecution case; (b) where the rates of certain building materials and the standard price of many construction items did not find mention in the schedule, it was held that the assessments made by the Engineers had to be accepted as they were dealing with such matters in their day-to-day works and in the process have certainly gained the required knowledge and, that assessment based on their experience and knowledge is proper and cannot be ignored; (c) that valuation in relation to such items was based on market survey; and (d) if the accused knew the actual valuation of the building he should have furnished at the time of the investigation because unlike other criminal cases, in cases falling under the P.C. Act, some burden is on the accused to furnish details to explain how he came to acquire his properties.

***(q)*** With all due respects to the learned Special Judge, in my view, the above findings and the reasoning

upholding the valuation of the buildings is grossly erroneous, cryptic and opposed to the principle of appreciation of evidence. It is well-settled principle of law of evidence that the evidence has to be appreciated by considering in its entirety and not by relying upon its selective portions. If the approach of the learned trial Court is to be accepted, to rely solely upon the examination-in-chief of a witness the necessity of cross-examination would be an unnecessary formality. On the question of the rates of building material and standard price of construction items as held by the learned trial Court is to be accepted, the least that can be said is that the finding is preposterous when contradictions, inconsistencies and confusion is writ large on the face of the record as have been set out above. As regards the finding that the valuation in relation to such items was based on market survey, I find that it is quite perverse as it is in evidence that the Engineers have also relied upon various SoRs and the rates applied in nearby projects. Secondly, what the market value has not been specified or tendered in evidence. It is, therefore, difficult to accept the finding of the learned trial Court on such vague premises. Lastly, I find that the observation of the learned trial Court that it was for the accused to have furnished the actual valuation at the time of investigation on the reasoning that the accused persons under the P. C. Act has the burden to explain, is a

gross mis-construction of the law. It is no doubt true that the accused persons under the P.C. Act has certainly the burden to explain but, the explanation would be required to be given during the course of the trial on the prosecution discharging its initial burden and not mandatorily during the course of investigation.

***(r)*** The valuation of the assets consisting of the RCC buildings which formed the basis of the alleged disproportionate assets held against the appellant having thus being found to be unreliable, the prosecution case ought to be quashed on this ground alone since the offence evidently has not been made out.

***(s)*** Notwithstanding such position, I have also examined the case of the prosecution and the finding of the learned trial Court on other matters. On such examination, it is found that even on the other aspects of the case the prosecution has not been able to establish a clear case against the appellant and the findings of the learned trial Court on those do not appear to be founded on sound principles. The appreciation of the evidence by the learned trial Court appears to be quite perverse, cursory and bereft of any acceptable reasons. What follows hereafter are samples of findings on some of the items held against the appellant as assets disproportionate to his known sources of

income and which will illustrate the remarkability of errors in the finding. We may examine the finding of the trial Court on those.

***12.*** On the assets mentioned in Table B pertaining to the bank deposits, we find that the prosecution has proceeded on the assumption that the bank deposits standing in the name of the wife of the appellant, Smt. Kamla Kumari Gurung, are also that of the appellant. This obviously is an erroneous approach as the clubbing of the income and assets of the husband and wife are not permissible unless benami transaction is alleged and proved. In the present case, no such allegation has been made, a position also fairly conceded by the learned Public Prosecutor. Therefor, items no.7, 8, 10, 12, 17, 18, 19, 23, 24, 26, 27 and 30 in 'Table B' require to be deleted from the list of assets which taken together amounts to Rs.1,30,109.39. Similarly, in 'Table D' assets at serials no.4, 24, 26, 30 and 48 amounting to Rs.1,37,574.50 require deletion as it is established from the very Table that those are the assets of Smt. Kamala Kumari Gurung, wife of the appellant.

***13.*** We also find from the evidence that the appellant has claimed that he was in possession of certain assets before the check period of which he had informed the I. O.,

PW126 which is admitted by him in his cross-examination. We may specifically refer to a few of them which appear to be quite glaring on the face of the record but disallowed by the learned Special Judge on grounds which in my view are opposed to the law of evidence. They are –

(a) Rental income received from Majhigaon building amounting to Rs.7,01,950.00 and Rs.9,95,568.00 from Circular Road building;

(b) Income from the sale of livestock amounting to Rs.3,47,500.00 (Gross);

(c) Income from the business of truck operation amounting to Rs.10,16,825.00 and from taxi operation amounting to Rs.16,83,000; and

(d) Income from will received from his step mother (Jethi Ama) of the appellant amounting to Rs.12,50,000.00; Raw Gold, Gold and Silver ornaments, etc.

I may deal with the above in *seriatim* as under:-

**(a) Rental income received from Majhigaon building amounting to Rs.7,01,950.00 and Rs.9,95,568.00 from Circular Road building.**

***(i)*** The fact that the appellant had earned rental income from his building at Majhigaon has been amply proved by PW13 and PW30. It transpires from their depositions that the Majhigaon house was in existence prior to the check period and that there were several tenants

residing in it. PW13 is one of the tenants who occupied the building during the period 1982-83 at an initial rent of Rs.3,000/- per month with the agreement to increase by one thousand every year for the purpose of setting up a business in the name and style of "Sikkim Jarda Company" and had vacated the premises at the end of 1983 when he closed the business as a consequence of the Central Excise Act being enforced in the State of Sikkim. PW30 on the other hand was the person who supervised the construction of the building at Circular Road, Jorethang up to two floors in the year 1975 during which time he stayed in the building of the appellant at Majhigaon, Jorethang, with his family and that he had collected the rents from different tenants in that building for the years 1976 to 1981 @ Rs.3,500/- per month and also from four tenants in the building in the Circular Road, Jorethang, for the year 1980-81 as the rate of Rs.4,000/- each.

***(ii)*** We may examine the findings of the trial Court on the above which are set out below:-

> "**Schedule 'B'**
>
> **From Mazigaon Building** - Rs.7,01,950.00
>
> The defence mainly relied on the statement of PW 30 Michael Lepcha. However, Michael Lepcha is not trustworthy. He was declared hostile by the Prosecution. Therefore statement of such a witness cannot be believed. PW 13 who also deposed about rental income of accused from his Mazigaon building, was also

declared hostile. His statement under cross-examination by the defence, in absence of authentic documents cannot be believed. Therefore, rent income of accused from Mazigaon building would be taken at Rs.2,31,000.00 as assessed by the Prosecution."

**"Schedule 'C'**

**From Circular Road Building (Jorethang)** – Rs.9,95,568.00

"As against the benefit of Rs.2,76,780.00 on account of rent from Circular Road building given by the Prosecution, the accused claims to have received Rs.9,95,568.00 in total as house rent from his tenants in the said building. Considering the market rate then existing in areas like Jorethang, which was and is still a small Bazar in farflung areas of South District of State, the claim of the accused sounds quite unreasonable. In absence of any tangible evidence, I am unable to accept defence version."

***(iii)*** As evident from the above while the statements of PWs 13 and 30 were rejected solely on the ground they were declared hostile, the claim for rent of the building at Circular Road, Jorethang, has been rejected simply on the ground that the claim sounded quite unreasonable and devoid of tangible evidence in spite of the fact that there was direct evidence given by a person who in fact collected the rent on behalf of the appellants, a fact which could not be demolished in his cross-examination by the prosecution.

***(iv)*** I find no reason to disbelieve the witnesses. They have not been re-examined by the prosecution on these crucial facts and have remained uncontroverted. On such

finding the trial Court has not accepted the rental income of Rs.7,01,950/- received from the Majhigaon building and was reduced to Rs.2,31,000/- as assessed by the prosecution against the claim of Rs.7,01,950/-. As regards the rental income of Circular Road building, the claim of Rs.9,95,568/- has been reduced to Rs.2,76,780/- as assessed by the prosecution obviously on pure conjectures and assumptions without there being a shred of evidence on record as regards the market rate existing in areas like Jorethang. The reduction of the claim established by direct oral evidence of the person who in fact collected the rents on behalf of the appellant on such presumptuous conclusion is not sustainable.

***(v)*** The other witnesses who have corroborated the statements of PWs 13 and 30 regarding the receipt of rental income by the appellant are PWs 2, 4, 6, 8 and also PW126 who is the I.O. of the case. When we consider the evidence of these witnesses the cumulative amount of rental income claimed by the appellant by him do not appear to be unbelievable. The trial Court has only dealt with the evidence of PWs 13 and 30 and have completely overlooked the uncontroverted evidence of the other witnesses.

***(vi)*** Similarly, in the case of the building at Circular Road, PW30 has been corroborated by PWs 1, 2, 3, 9, 43

and one Mohd. Safi. The trial Court, as it appears from the impugned judgment, has not at all taken into consideration and completely overlooked the evidence of these witnesses and has summarily rejected the claim on pure presumptions and conjectures of the prevailing market rate in the area without there being any cogent and tangible evidence on that. The rejection and reduction of the claim is, therefore, found to be quite erroneous.

**(b) Income from the sale of livestock amounting to Rs.3,47,500.00 (Gross).**

***(i)*** Income from livestock has been rejected by the trial Court on the ground that Exhibit D13, proved by the appellant through PW30 to show that he earned that income, was not available during the investigation period and that PW30 had been declared as hostile.

The following are the statements of PW30 and DW8 appearing in their depositions:-

**PW30**

"……

I know that the accused had a 'gote' (where cows, goat etc. were kept by the accused). The said 'gote' and the animals therein were sold by the accused to one Ram Bahadur Subba at Rs.3,47,500/- Said Ram Bahadur Subba had paid the sum of Rs.3,47,500/- to the accused vide Ext.D.13. D.13(a) is my signature on 25.11.1978 while D.13(b) is the signature of the accused receiving the money from Ram Bahadur Subba, dated 25.11.1978."

**DW8**

"I know the accused present in the Court. He is my second elder brother. I am a cultivator by occupation. I have also the business of 'goth' meaning thereby I run the business of sheep, buffalo, cows, yaks etc. The business of 'goth' is being run from the time of my forefathers. The accused has also the business of 'goth' since the year 1964 while we had separated. The said business of 'goth' is being run till now. I had taken care of the business of 'goth' of the accused for 15 years from 1964. Out of the business of 'goth' the accused used to earn a sum of Rs.90,000/- to Rs.1,00,000/- in a year by selling the animals, milk products, wool etc. Exbt. D-74 is a Certificate of Award issued by Animal Husbandry Department, Government of Sikkim in an animal show wherein the animals of the accused got first prize in the show. Exbt. D-75 is another Certificate by the same Department by which I was given second prize in the show of the animals from my 'goth' both in the year 1983. ....."

***(ii)*** It is the case on behalf of the appellant that I.O. had been informed of the existence of the above assets and income during the investigation of the case but the I.O. did not bother to make enquiries into those. On examination of the deposition of the I.O. as PW126 the following statements appear in the cross-examination:-

"....

..... It is true that as stated by the accused that they had sheep rearing business; I did not make any investigation to find out about such business. I also did not noted down the statement of Kamala Kumari Gurung; the wife of the accused. ..... It is true that the accused in his statement before me on 27.9.96 has stated that in a partition between four brothers in 1964 the accused had got movable assets as follows: raw gold : 200 tolas, silver ek betta - 10000 numbers, duy bettay -15,000/- number, milching cow – 10 nos., calf – 10 nos, bull – 3 nos, buffalo – 6 nos. calf – 10 nos, bull – 4 nos, sheep – 200 nos. However I did not investigate into such statement and also did not interrogate the other brothers of the accused regarding truthfulness of such partition (Witness volunters to say that although accused was asked to produce the documents in support to

substantiate the divisions of properties but he could not produce any such documents. More over during the house search of the accused residences at Tadong and Uttaray on 1st and 2nd November 1995 no documents in support of such partition was recovered.) It is true that in my case diary I had not made any mention regarding ask-ing the accused to produce document in support of such partition except that in my case diary dated : 28.9.96 I have clearly mentioned that I interrogated the accused and recorded his statement. .....

....."

**[emphasis supplied]**

***(iii)*** From the above, it can also be safely stated that the consistent stand of the appellant that the I.O. refused to enquire into many of the assets including the ones indicated above in spite of having brought them to his knowledge appear to be true. The statements of the appellant in reply to the questions put in him under Section 313 CrPC also substantiates this fact. The portion of the statements which are relevant are as follows:-

"Q.169. It is in his further evidence that the Police recovered some documents relating to lands from your house at Tadong and the same were seized vide Ext.P 313 collectively, containing signature of the witness. What have you to say?

Ans. All documents recovered were not seized.

Q.171. It is in his further evidence that during the search some 30 to 32 documents consisting of sale deed, money receipts etc. were recovered from a wooden almirah on the upper floor of your house and the same were seized vide seizure Memo Ext.P.312 a copy of which was made over to you by the Police. What have you to say?

Ans. No copy of seizure memo was made over to me. All documents recovered were not seized by the Police. Only a portion of it were seized.

Q.181. The witness further deposed that on the basis of search warrants (Ext.P.310) and P.313 he conducted search of your residence at 6th Mile Tadong and Uttarey in presence of independent witnesses. What have you to say?

Ans. My house was searched but documents found were not seized."

***(iv)*** On the above, the finding of the learned trial Court is as set out below:-

> **"SCHEDULE 'I'**
>
> **Income from livestock** – Rs.3,47,500.00
>
> The defence have relied on PW 30 to establish his case who under cross-examination by the ld. defence counsel have said that accused had cows, goats etc. in his farm which was sold to one Ram Bahadur Subba at Rs.3,47,500.00 vide Exbt. D-31.
>
> This document which was not available during investigation period had cropped up during trial only. Such a document exhibited by witness who was declared hostile, cannot be considered. The defence plea thus stands rejected." **[emphasis supplied]**

***(v)*** As can be seen, the manner in which the claim has been rejected is quite cryptic and cursory. It is a settled law that the evidence of a hostile witness need not be totally rejected but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of either of the parties may be accepted. The evidence of PW30 is consistent with the case of the appellant and I find no reason to disbelieve him.

***(vi)*** Apart from this, documentary evidence produced by an accused during the course of a trial cannot be

disbelieved simply because it was not available during the investigation. There is no bar under the law for an accused to produce evidence in defence at the appropriate stage during the proceeding of the trial when Section 233(3) CrPC enables an accused to do so. It cannot be said that because the I.O. did not find any document or that the appellant did not produce them during the investigation, it would be impermissible for the appellant to produce them when entering into his defence. The law is well-settled that it is permissible for an accused to give his explanation during the trial. The rejection of the document by the trial Court on such ground is quite erroneous. As such, I am of the view that a large part of the income and assets of the appellant was not at all taken into consideration by the I.O. who, despite the appellant having brought the existence of such assets to his knowledge, admittedly did not make enquiries into those.

**(c) Income from the business of truck operation amounting to Rs.10,16,825.00 and from taxi operation amounting to Rs.16,83,000;**

***(i)*** DW8 has made uncontroverted statement in his deposition that the appellant used to run a taxi business and proved documents Exhibits D10 and D11 which are Statement of Accounts dated 01-05-1986 between the wife of the appellant and one Mahesh Pradhan. PW26 is the attesting witness of both the documents. The documents

clearly reflect that the appellant's wife used to run transport business and had earned substantial sums as claimed by the appellant. The relevant portions of the two witnesses may be reproduced below for convenience:-

**PW26**

"..... We had also the partnership business of Taxi. Although as per Ext.P.38 the consideration value of the building has been shown as Rs.1,25,000/-, in fact the real consideration value was Rs.11,25,000/- and I had paid the entire amount of Rs.11,25,000/-. Ext.D.9 is a document dated 11.4.1994 which shows that I had purchased the three storeyed building of the accused recorded in the name of his son for Rs.11,25,000/- and I had paid the total money of Rs.11,25,000/- to the accused. Ext.D.9(a) is the signature of the accused and Ext.D.9(b) is the signature of myself. D.9(c) and D.9(d) are the signatures of 2 witnesses Rudramani Basnet and Kedar Kumar Pradhan. Ext.D.9 was prepared in my presence and I know its contents and the contents are true. Ext.D.10 and D.11 are the two documents which show that agreements were entered into between Smt. Kamala Kumari Gurung the wife of the accused and Shri Mahesh Pradhan in respect of a Tata truck No.SKN-2507 with which they had done partnership business and the profit of Kamala Gurung was 75% of the income while that of Mahesh Pradhan was 25% of the income. The Tata was purchased in the name of Mahesh Kumar Pradhan. Ext. P.D.11 shows that after accounting Smt. Kamal Gurung had got Rs.9,15,600/- towards income out of the said Tata Truck business. I was an attesting witness to both the documents. Ext.D.10(a) and D.11(a) are my signatures in the two documents as witness. Ext.D.10(b) and D.10(c) are the signatures of Kamala Kumari Gurung and Mahesh Kumar Pradhan in Ext.D.10. Ext.D.11(b) and (c) are the signatures of Kamala Kamari and Mahesh Pradhan in Ext.D.11. In *(sic)* know the contents of both the documents which are true. These documents were made in my presence." **[emphasis supplied]**

**DW8**

"..... Similarly a taxi jeep bearing no.SKM/1061 which was in my name actually belonged to my said brother Padam Lal. Earnings out of the business and that of the taxi was the earning of my brother. I was just a name lender as

> because at the relevant time the accused was a government servant and therefore he had obtained the Trade Licence and the taxi number in my name being his real brother. These documents was scribed by one teacher Arun Kumar Karki, it bears my signature Exbt.D-76 (a). Signature of Arun Kumar Karki is Exbt.D-76(b). while the signature of witness Padam Singh Subba is Exbt.D-76(c). The contents of the documents was read over the explained to me by the scribe and the same are correct. My brother P.L. Gurung ran the business of taxi for a period of 15 years. Initially I had also done the business of said taxi but because it did not suit me, I had to leave the said business. My brother used to earn Rs.500/- to Rs.600/- per day out of the said taxi business as at the relevant time numbers of taxis were very less. I had also run the business of grocery, manihari etc. under the above licence for a short period but being unable to run it I had handed over the same to my sister-in-law. Initially income out of the business was about Rs.6000/- to Rs.7000/- per month. Thereafter the income of the business stood enhanced."
>
> **[emphasis supplied]**

***(ii)*** The evidence of these witnesses have not been demolished in respect of the material facts in their cross-examination by the prosecution. Moreover, the I.O. in his deposition has admitted the following:-

> " ..... It is true that in his statement dated: 27.9.96 the accused has stated that he had purchased a second hand Mahander Jeep number SKM-298 in 1969 from Shri Hari Man Pradhan of Kalimpong for Rs:10,000/- in the name of his third brother Rith Bdr. Gurung. In 1971 he obtained a taxi number SKM 1061 and registered the said vehicle and started plying it from Jorethang to Utteray as a taxi service. He has further stated that he had received about Rs: 4000/- to 6000/- as insurance benefit from New India Insurance Co. and the cheque in favour of his brother Rith Bdr. Gurung as per the documents of ownership of the vehicle was encashed from State Bank of Sikkim, New Market, Gangtok some time in 1975 and in the same year he had sold the said jeep to one Shri Panna Lall Sarafi of Naya Bazar, West Sikkim for Rs:6000/-. It is true that my case diary does not show any thing regarding any enquiry / investigation made by me regarding the above stated statement made by the accused in respect of the vehicle. It is true that in his statement the accused has further state that he had earned carriage charges at the rate of 34 paise

per quintal per Kilometer and later at the rate of Rs:1.25 per quintal per kilometer and the bill was paid to him in the name of his third brother Rith Bdr. Gurung and the officer who made such payment were Shri S. Lama, AEO of the West District and Dr. Basnett the Farm Manager and such payment was made during the period 1969 to 1981. (Witness volunters to say that though Rith Bdr. Gurung is the brother of the accused he is an independent person having his own personal business, affairs etc hence the investigation was not conducted in this matter.) It is true that I have not interrogated Rith Bdr. Gurung as such whatever I stated above regarding his status is my presumption which is based in fact on the statement of accused person himself who had during the interrogation stated that the third brother Rith Bdr. Gurung and Lall Bdr. Gurung are both farmers having settled at Serdung Busty, West Sikkim. I did not enquired *(sic)* in the matter because I found that the brothers were settled in different places. (Witness volunters to say that the brothers of the accused as stated above were settled independently.) It is true that in my case diary I have not stated that the brothers were settled independently. ....."

***(iii)*** The trial Court dealt with this claim mentioned under 'Schedule J' and rejected them in the following manner:-

"(b) That DW 8 is a partisan witness being real brother of the accused. His statement cannot be taken as gospel truth. So far as PW 26 is concerned, the witness appears to be too good to accused so much so that in examination-in chief, he stated that vide Exbt.38 he had purchased three storeyed building of accused situated at Mazigaon, Jorethang at Rs.1,25,000.00 but in cross-examination admits the defence suggestion that actual consideration value of the said building was Rs.11,25,000.00 and he had paid the said amount of Rs.11,25,000.00 as price of the building.

It may be stated herein that accused had bought a four storeyed RCC building opposite Bansilal Petrol Pump situated at heart of Gangtok town at Rs.3,17,645.00. How to believe PW 26 had purchased a three storeyed building that too at Mazigaon, which is not even a Bazar Area at Rs.11,25,000.00. For the above stated reasons, defence contention on this count is rejected."

**[emphasis supplied]**

***(iv)*** As is evident from the finding of the trial Court while the evidence of DW8 has been rejected only because he is the brother of the appellant and presumed to be partisan, that of PW26 has been rejected because he had given varying consideration values of a Majhigaon building purchased by him from the appellant when he had clearly stated that although in the sale deed Ext.P38 the value was shown Rs.1,25,000/-, he had actually paid Rs.11,25,000/- against a receipt Ext.D9. When this part of the evidence was held firm on him being re-examined by the prosecution and, in fact, the document Ext.D9 was not all questioned, it is difficult to understand as to how the witness could be discredited and be declared unreliable.

The rejection of this claim by the trial Court, therefore, in my view, is erroneous.

**(d) Income from will received from his step mother (Jethi Ama) of the appellant amounting to Rs.12,50,000.00; and Raw Gold, Gold and Silver ornaments, etc.**

***(i)*** In his evidence PW24 has proved Exhibit D7 which is a will executed by the said Jethi Ama whereby a sum of Rs.12,50,000/-, livestock and substantial gold and silver in raw forms were received by the appellant. PW24 also proved Exhibit D8 by which the appellant received a sum of Rs.8,00,000/- from one Hemlata Gurung. This witness is also an attesting witness to will Exhibits D7 and

D8 and in their re-examination by the prosecution the material parts of the evidence have remained un-demolished. We find from the evidence of PW36 that the step mother (Jethi Ama) had inherited entire properties of the father by her on his death which was bequeathed by her to the appellant thereby corroborating PW24. For better appreciation, the relevant portions of the depositions of these two witnesses are reproduced below:-

**PW24**

"It is a fact that the accused comes a very well to do family. The accused have got two mothers, Laxmi Maya Gurung was the 'Jethi Amma'. Said Smt. Laxmi Maya Gurung is dead. Before her death Smt. Laxmi Maya Gurung had made an will on 14.1.1985. It is a fact that as per the will Smt. Laxmi Maya Gurung had given cash worth Rs.12.50 lakhs and gold, worth 50 tolas including other things to the accused. It is true that the will was acted upon and all the properties mentioned in the will has been taken over by the accused person. I was one of the attesting witnesses in that will. Ext.D.7 is the said will where Ext.D.7(a) is my signature. It is true that Ext.D.7 (b) is the thumb impression put by Smt. Laxmi Maya Gurung and D.7(c) and D.7(d) are the signatures of the two brothers of the accused viz. Chabilall Gurung and Rit Bahadur Gurung respectively. Ext. Ext. *(sic)* D.7(e) is the thumb impression put by the another brother Lall Bahadur Gurung. It is trhe *(sic)* that Ext.D.7(f) is the signature of another witness Kedar Pradhan. It is true that one R. M. Basnett was the scribe of the document. It is true that the same was prepared in my presence.

It is fact that from time to time the accused had taken loan from my wife Hemlala Gurung. It is true that finally the loan amount stood at Rs.8 lakhs and in connection therein the accused had executed a money receipt on 10.2.1994. Ext.D.8 is the copy of the receipt, in which I and one K. B. Subedi are the two witnesses. Ext.D.8(a) is the signature of the accused and Ext.D.8(b) is the signature of K. B. Subedi and Ext.D.8(c) is my signature as witness. It is true that the accused has not returned the money with interest. It is true that I have not filed any any *(sic)* case against the accused because the accused in one hand is my relative and on the other hand the

accused has executed fresh agreement in my wife's favour. It is true that Ext.D.8 was made in two copies original whereof is with my wife. ....."

**PW36**

"..... I know Padamlall who is my 'Barabadu' and is the father of Smt. Laximi Maya. It is true that Laximi Maya was the 'JethiAmma' of the accused. Padamlall was a very rich man of Chengthapu who had only one daughter i.e., Late Laximi Maya. It is true that Laximi Maya had got the entire properties of Padamlall on his death. It is true that in turn Laximi Maya had given all her properties to the accused. ....."

***(ii)*** We find from the deposition of the I.O. that the appellant in his statement on 27-09-1996 had stated that his step mother had given him some properties in 1985. This admittedly was the property mentioned in the will, Exhibit D7 and apparently was not enquired into by the I.O. The single sentence statement is to the effect that "it is a fact that in the statement dated : 27.9.96 the accused has stated that his step mother had given him some properties in 1985."

***(iii)*** The learned trial Court has rejected the claims simply on the finding that the evidence of PW24 and PW36 were unbelievable. The summary rejection without any cogent reason and in total disregard to the glaring evidence set out above is, in my view, grossly erroneous.

***14.*** The above are the instances of substantial income of the appellant not considered by the trial Court on an erroneous appreciation of evidence and rather perverse which ought to have been allowed but were not.

***15(a).*** In ***C. S. D. Swami (Supra)***, it has been held by the Hon'ble Supreme Court that in Section 5(3) of the P.C. Act, 1947, a complete departure has been made from criminal jurisprudence still the initial burden lies on the prosecution and in that context it has been observed as follows:-

> **"(4)** It is true that S. 5(3) of the Act, does not create a new offence but only lays down a rule of evidence, enabling the court to raise a presumption of guilt in certain circumstances – a rule which is a complete departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charge framed against him. ....."

***(b)*** We may refer to the case of ***DSP, Chennai*** vs. ***Inbasagaran*** : ***(2006) 1 SCC 420***

> **"15.** ..... There are no two opinions in the matter that the initial burden lies on the prosecution. In the case of *C.S.D. Swami* v. *State* this Court has taken the view that in Section 5(3) of the Prevention of Corruption Act, 1947 a complete departure has been made from the criminal jurisprudence, still the initial burden lies on the prosecution and in that context it has been observed as follows: (SCR p.466)
>
> > "..... Section 5(3) of the Act, does not create a new offence but only lays down a rule of evidence, enabling the court to raise a presumption of guilt in certain circumstances – a rule which is a complete departure from

> the established principles of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charge framed against him."
>
> **16.** Therefore, the initial burden was on the prosecution to establish whether the accused has acquired the property disproportionate to his known source of income or not. But at the same time, it has been held in a case of *State of M.P.* v. *Awadh Kishore Gupta* that the accused has to account satisfactorily for the money received in his hand and satisfy the court that his explanation was worthy of acceptance. ....."

***(c)*** Thus, it is now a settled principle that the initial burden is on the prosecution to establish whether the accused has acquired the property disproportionate to his known sources of income or not and the burden shifts upon the accused only thereafter when the accused has to account satisfactorily the money received in his hand and satisfy the Court that his explanation was worthy of acceptance.

***(d)*** Similarly, in the case of ***M. Krishna Reddy (supra)*** which was cited by the learned Public Prosecutor that it is not the mere acquisition of property that constitutes an offence under Section 5(1)(e) of P.C. Act, 1947, which correspondence to Section 13(1)(e) of the P. C. Act, 1988, but it is the failure to satisfactorily account for such possession that makes the possession objectionable as offending the law. Although, we have extracted the relevant paragraphs while dealing with the submission of Mr. Pradhan it is felt essential to reproduce again the law laid down in

paragraph 7 of the judgment of the Hon'ble Supreme Court which is as under:-

> **"7.** To substantiate a charge under Section 5(1)(e) of the Act, the prosecution must prove the following ingredients, namely, (1) the prosecution 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 disproportionate to his known sources of income. Once the above ingredients are satisfactorily established, the offence of criminal misconduct under Section 5(1)(e) is complete, unless the accused is able to account for such resources or property. In other words, only after the prosecution has proved the required ingredients, the burden of satisfactorily accounting for the possession of such resources or property shifts to the accused."

***(e)*** The above has been the consistent view expressed by the Hon'ble Supreme Court and in the case of ***G. M. Tank*** vs. ***State of Gujarat & Anr.*** : ***AIR 2006 SC 2129*** it has been held that:-

> **"20.** The provisions contained in Section 5(1)(e) is self-contained provision. The first part of the Section casts a burden on the prosecution and the second on the accused as stated above. From the words used in clause (e) of Section 5(1) of the P.C. Act it is implied that the burden is on the accused to account for the sources for the acquisition of disproportionate assets. As in all other criminal cases wherein the accused is charged with an offence, the prosecution is required to discharge the burden of establishing the charge beyond reasonable doubt. ....." **[emphasis supplied]**

***(f)*** Therefore, the law that has been postulated as regards the burden of proof of the accused being in possession of property disproportionate to his known sources of income, is upon the prosecution initially. There is no

change in this position in Section 13(1)(e) of the P. C. Act, 1988, which is the replacement of 5(1)(e) of the P.C. Act, 1947, and the burden of proof of the guilt of accused is like any other criminal cases, i.e., proof beyond reasonable doubt.

***(g)*** In the backdrop of the position of law set out above, we may consider the facts and circumstances of the present case and see as to whether the prosecution has been successful in passing the test laid down in discharging the initial burden cast upon it.

***(h)*** While considering the evidence earlier, we have seen that as regards the valuation of buildings, admittedly forming bulk of the assets of appellant said to be disproportionate to his known sources of income, there are gross contradictions, discrepancies and total confusion as to the basis upon which the assessments were done. The evidence discussed above on this account is found riddled with inconsistencies. We find that the Engineers who assessed the buildings have most categorically stated that the valuations were incorrect as the SoR adopted and the rates applied to most of the items in the buildings in question were incorrect. As regards the other assets, we find that the position is no better. We find from 'Table B' that at least 12 of the banks accounts are ones held by the

wife of the appellant. The assets of the appellant have been enumerated in the Table purely on assumptions. There is neither allegation whatsoever that the accounts are held benami by the wife of the appellant nor has the prosecution led any evidence to prove that those accounts are held benami by the appellant.

***(i)*** Similarly, in Table 'C' the properties at items no.12, 33, 43, 47, 48, 53, 56 and 64, are the assets and properties of Smt. Kamala Kumari Gurung, wife of the appellant, which apparently have been included in the list of assets as belonging to the appellant. It is found from the statement of the I.O. examined as PW126 that he has admitted that documents listed at serial nos. 1 to 8 of the 'Statement C' have not been valued or taken into account for assessing the value of the assets of the accused. The following statement clearly establishes this:-

> "..... While calculating the value of the assets in the possession of the accused and his family members as in statement – C I have not valued or taken into account the value of such assets as listed at Serial No.1 to 8 of the statement – C. ....."

**(j)** As regards these properties also there is neither allegation of the appellant holding them benami nor any evidence led to prove such prosecution as has already stated above. Same position prevails with respect to the properties in 'Table D' standing in the name of the wife. Rental income

in respect of Majhigaon building claimed by him has been rejected by the trial Court solely on the ground that the witnesses PWs 13 and 30 have been declared hostile although in their re-examination nothing could be brought out by the prosecution to discard their statements-in-chief supporting the appellant of his claim. The trial Court has accepted the claim to some extent by reducing the claim of Rs.7,01,950/- to Rs.2,31,000/-. Similar is the case of Circular Road building at Jorethang which has been reduced to Rs.9,95,568/- to Rs.2,76,780/-. Full claim of the appellant was rejected purely on conjectures and surmises without any evidence on record as regards the market rate existing in areas like Jorethang. In fact, we find from the statement of the I.O. that such income was indeed earned by the appellant and the witnesses PWs 13 and 30 were also corroborated by PWs 2, 4, 6, 8 and 126, in respect of Majhigaon building land by PWs 1, 2, 3, 9, 43 and one Mohd. Safi, in respect of Circular Road building. Income from livestock amounting Rs.3,47,500/- was rejected on untenable grounds, i.e., the document Exhibit D13 produced by the appellant during the course of the trial was not produced during the investigation and that PW13 who proved the document was declared hostile. It is an admitted position on the part of the I.O. in his deposition that he was informed by the appellant that he had such livestock as will

appear from the relevant portion of his statement extracted above.

***(k)*** Similarly, when the income from the appellant of business of truck operation amounting to Rs.10,16,825/- and from taxi operation amounting to Rs.16,83,000/- were proved by DW8 and PW26 whose statements remained uncontroverted by exhibiting documents proof, namely, Exhibits D10 and D11, I find no reason to disbelieve these witnesses particularly when PW26 had signed as an attesting witness in both the documents. Another substantial part of the income of the appellant, namely, the inheritance that he received from his step mother (Jethi Ama) inherited by him vide will Exhibit D7. This fact stands established by the deposition of PW24 who also proved Exhibit D7, the will. A sum of Rs.8,00,000/- received by the appellant from one Hemlata Gurung has been established by PW24 by proving Exhibit D8. PW24 is the attesting witness to both the documents, i.e., Exhibits D7 and D8 and in his re-examination on being declared hostile, the prosecution was unable to demolish any part of his evidence. This evidence appearing in favour of the appellant from the prosecution witnesses have been rejected by the learned trial Court simply because it was found to be unbelievable without giving a valid reason.

***(I)*** Even assuming that the burden has been discharged by the prosecution that the appellant was indeed in possession of assets disproportionate to his known sources of income, it is now a settled position of law that the appellant can discharge the burden of satisfactorily accounting for such disproportionate assets on the balance of probabilities either from the evidence of the prosecution and or evidence from the defence. On this we may refer to the case of ***K. Veeraswami*** vs. ***Union of India & Ors.*** : ***(1991) 3 SCC 655*** the relevant portion of which is reproduced below:-

> **"72.** The soundness of the reasoning in *Wasudeo Ramachandra Kaidalwar case* has been doubted. Counsel for the appellant urged that the view taken on Section 5(3) cannot be imported to clause (*e*) of Section 5(1) and the decision, therefore, requires reconsideration. But we do not think that the decision requires reconsideration. It is significant to note that there is useful parallel found in section 5(3) and clause (*e*) of section 5(1). Clause (*e*) creates a statutory offence which must be proved by the prosecution. It is for the prosecution to prove that the accused or any person on his behalf, has been in possession of pecuniary resources or property disproportionate to his known sources of income. When that onus is discharged by the prosecution, it is for the accused to account satisfactorily for the disproportionality of the properties possessed by him. The section makes available statutory defence which must be proved by the accused. It is a restricted defence that is accorded to the accused to account for the disproportionality of the assets over the income. But the legal burden of proof placed on the accused is not so onerous as that of the prosecution. However, it is just not throwing some doubt on the prosecution version. The legislature has advisedly used the expression "satisfactorily account". The emphasis must be on the word "satisfactorily". That means the accused has to satisfy the court that his explanation is worthy of acceptance. The burden of proof placed on the accused is an evidential burden though not a persuasive burden. The accused however, could discharge that burden of proof "on

the balance of probabilities" either from the evidence of the prosecution and/or evidence from the defence." **[emphasis supplied]**

***(m)*** Similarly, in the case of ***Jagan M. Shesadri (Supra)*** the Hon'ble Supreme Court accepted the statements made by the prosecution witnesses supporting the accused having certain income which had been rejected by the Courts below on the ground that the witnesses could not be believed.

***16(a).*** Another aspect of the matter is that the documents proved by the appellant through defence witnesses were not accepted by the trial Court as genuine and, in fact, it was observed that they were fake. However, no efforts had been made either by the prosecution or by the learned trial Court to get those documents examined by the handwriting expert which ought to have done in the event of any doubt arising as to its genuineness. They were simply rejected on the ground that they were not produced at the time of investigation by completely brushing aside the overwhelming evidence to the contrary. We have already seen that the prosecution had been informed of the existence of the assets and income claimed by the appellant but the I.O. did not investigate into those. Moreover, the 'explanation' by an accused contemplated under Sections 5(1)(e) of the P. C. Act, 1947, or 13(1)(e) of the P. C. Act,

1988, is an explanation required to be given by him during the trial and not necessarily at the stage of investigation in the light of Section 233(3) CrPC when he enters into the defence. The manner in which the evidence of the defence have been rejected, in my view, is against all canons of law. From the statements of the I.O. it is found that statements of a number of witnesses were withheld on untenable grounds which is evidence from the following extract of his depositions:-

> "..... It is true that exbt. D-36 to exbt. D-49 are the statements of the following witnesses respectively namely Md. Nandu, Manilall Subba, Pramod Kumar Periwal, Durga Dutt Lakhotiya, Ashok Rathi, Binod Kumar, Piragchand Periwal, S/o Shri Satyanarayan Periwal, Shri Balbir Agarwal, Shri Hanuman Prasad Agarwal, Shri Mohan Lall Agarwal, Shri Shivanandan Sharma, Shri Indra Bhusan Goyal, Shri Manoj Agarwal and Shri Dayal Nath. It is true that I have not mentioned the names of the above persons in the charge sheet as witnesses because persons namely Pramod Kumar Periwal, Durga Dutta Lakhotiya, Ashok Rahti, Binod Kumar and Piragchand Periwal are found to be tenents *(sic)* under the accused and further from my enquiry form IT and ST Department it was revealed that the RCC building situated at Tibet Road, Gangtok in the name of Kusang Diki held by accused benami property, the accused was not paying house property tax as such income from the said building was not considered as known source of income of the accused. AS such the above said persons were examined by me. Further Shri Balbir Agarwal, Hanuman Pd. Agarwal, Mohan Lall Agarwal, Shri Shivanandan Sharma, Indrabhusan Goyal and Manoj Agarwal were the tenents *(sic)* of the accused in respect of the building on 31A National High way opposite Bansilall Petrol pump, Gangtok. On enquiry from I. T. department it was revealed that accused was paying house property tax as such the income out of the said building was considered as per the returns filed. The said building was found recorded in the name of Smt. Kamala Kumari Gurung and Deependra Gurung wife and son respectively of the accused person. Further Md. Naidu *(sic)* and Manillal Subba were tenants *(sic)* of the accused in respect of his building situated at 6th mile Tadong

> but inadvertently the income derived from the tenency *(sic)* was not considered. It is true that in the charge sheet I have not mentioned that the accused did not pay house property tax and therefore the income derived by him from the tenents *(sic)* of Tibet road house were not considered by me and therefore their names were not in corroporated *(sic)* in the charge sheet. ....." **[emphasis supplied]**

***(b)*** The admitted suppression of the evidence of at least 14 witnesses, i.e., PWs 36 to 49 also cast a serious doubt on the fairness of the investigation. In cases of the present kind fairness in investigation is all the more necessary in view of the fact that the onus of proof may shift to the accused at a later stage. I may in this regard refer to the case of ***Surya Sankaram Karri (supra)***.

***(c)*** In a similar circumstance in which benami properties were involved in the case of ***Arjun Dev Kohli*** vs. ***State of J. & K. & Anr.*** : ***1999 CRI.L.J. 4967*** it has been observed that as follows:-

> **"29.** There is no evidence of conspiracy hatched by the petitioner to hide the property of Hem Raj Gupta. On the contrary, in the evidence on record submitted by Hem Raj Gupta in reply to the questionaire issued by the prosecution, in Paras C and C1 thereof, it has been specifically stated that out of the property in question, two shops have been given by the petitioner to Charu Gupta, his daughter-in-law, in April, 1994 and the petitioner is the owner of remaining building. Copy of the judgment dated 10-12-1997 of Special Tribunal is also on record, wherein the petitioner has been found defaulter in raising the construction of the property in dispute and imposed compounding fee of Rs. 88,656/- by the Tribunal. The evidences such as sale deed and memorandum of partition, referred in the judgment of the Special Tribunal is also on record of the respondent No. 2 and being such evidence in his possession, it was obligatory on the part of the respondent No. 2 to know the status of

> the property and collect evidence with regard to the benami transaction. No evidence to that effect has been found on record, as prima facie proof of the property is benami transaction. The ingredients of prima facie commission of offence of criminal conspiracy have not been found on perusal of evidence collected by the prosecution."
>
> **[emphasis supplied]**

***(d)*** When it had been disclosed to the I.O. that the appellant had certain income and assets, a fact admitted by him in his deposition, it was obligatory on his part to collect the evidence with regard to such properties. No doubt the I.O. has also stated that the appellant had been given an opportunity to disclose his income and explanation called for in respect of the assets in his possession by filling up a form which allegedly had been refused by him. But the categorical statement of the I.O. to the contrary appearing in his cross-examination extracted above casts serious doubts on this, particularly when the alleged forms were not tendered in evidence.

***(e)*** The rejection of evidence of the prosecution witnesses solely on the ground they were declared hostile cannot be countenanced in law as the statements of interested or hostile witnesses need not necessarily be discarded on those grounds, it only requires the Court to scrutinize such evidence with care and caution. This is a well-settled proposition of law but we may cite the case of ***Balu Sonba Shinde*** vs. ***State of Maharashtra*** : ***(2002) 7***

***SCC 543*** in paragraph 15 of which it has been held as follows:-

> **"14.** It is at this juncture the prosecutor declared her a hostile witness and prayed for permission to cross-examine the witness – upon, however, the leave being granted, PW 5 totally decried the factual aspect as contained in the complaint lodged, though, however, the thumb impression was admitted – while it is true declaration of a witness to be hostile does not ipso facto reject the evidence – and it is now well settled that the portion of evidence being advantageous to the parties may be taken advantage of – but the court before whom such a reliance is placed shall have to be extremely cautious and circumspect in such acceptance. Reference in this context may be made to the decision of this Court in *State of U.P.* v. *Ramesh Prasad Misra* wherein this Court stated: (SCC p.363, para7)
>
> > "It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted." **[emphasis supplied]**

***(f)*** It is noticed that most of the witnesses of the prosecution were declared hostile and permission of the Court sought for by the prosecution for their cross-examination. Section 154 of the Indian Evidence Act, 1872, provides for the exercise of such power by the Courts which essentially is discretionary. The principle governing the exercise of such discretion has been laid down in the case of ***Rabindra Kumar Dey*** vs. ***State of Orissa*** : ***AIR 1977 SC 170*** where it has been held that the section confers a judicial discretion upon the Court to permit cross-examination and does not contain any conditions, or

principles which may govern the exercise of such discretion. However, the discretion must be judiciously and properly exercised in the interests of justice and one of the glaring instances in which an order permitting cross-examination is where a witness resiles from a very material statement regarding the manner in which the accused committed an offence. The Court before permitting the party calling the witness to cross-examine him must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner. On examination, in the present case, save in respect of some of the prosecution witnesses, in others the casualness and the routine manner in which the permissions to cross-examine were granted is manifest on the face of the record. In any case, it has been held that such witnesses need not necessarily be an unreliable witness. We may refer to the following passage in the very same case:-

> "**12.** It is also clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether. In Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389, 391-92 = (AIR 1976 SC 202 at p. 203), Bhagwati, J., speaking for this Court observed as follows :
>
> "The prosecution could have been avoided requesting for permission to cross-examine the witness under Section 154 of the Evidence Act. But the fact that the court gave permission to the prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and

there is no-legal bar to base a conviction upon his testimony if corroborated by other reliable evidence." **[emphasis supplied]**

***(g)*** In the above facts and circumstances, it is difficult for this Court to conclude and accept that the prosecution has been able to discharge the initial burden cast upon it under Section 5(1)(e) or Section 13(1)(e) of P. C. Act, 1947 and 1988, respectively because as it has been found that the valuation of the buildings which formed the bulk of the alleged disproportionate assets of the appellant are completely uncertain and unreliable. So far as the other incomes claimed by the appellant, only glaring instances of which have been dealt with as samples, the summary rejections and unwarranted reductions of the incomes claimed by the appellant on obviously unsustainable grounds, is grossly erroneous and, on both the accounts the prosecution having failed to pass the test laid down in the cases of ***M. Krishna Reddy (supra)*** and ***G. M. Tank (supra)***, the very foundation of the prosecution case of disproportionate assets against the appellant must fail rendering the other issues raised quite redundant and, therefore, not necessary to be dealt with.

***17(a).*** For the reasons stated above, the appeal succeeds and is hereby allowed. The impugned judgment

and sentence passed by the learned Special Judge, P.C. Act, East and North Sikkim at Gangtok, is hereby quashed.

***(b)*** No order as to costs.

***(c)*** The appellant is acquitted of the charges framed against him and is released from bail and consequently his bail-bond stands cancelled.

***18.*** A copy of this judgment be transmitted to the learned Special Judge, P.C. Act, East and North Sikkim at Gangtok for its due compliance.

***19.*** Records of the learned Court below also be returned forthwith.

***( S. P. Wangdi )***
***Judge***
21-06-2011

Index : Yes/No

Internet : Yes/No

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