



THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 15-07-2013

CORAM

**HON'BLE THE CHIEF JUSTICE
MR. JUSTICE PIUS C. KURIAKOSE**

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

Crl.A. No. 02 of 2013

Dhan Subba,
Son of Late Laxuman Subba,
Resident of Sichey Busty,
East Sikkim. ... **Appellant**

Versus

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

For Appellant : Mr. A. Moulik, Senior Advocate
with Ms. K. D. Bhutia, Mr. Manish
Kumar Jain, Mr. Zangpo Sherpa,
Mr. Ranjit Prasad and Mr. Pujan
Kharka, Advocates.

For Respondent : Mr. J. B. Pradhan, Public
Prosecutor with Mr. Karma
Thinlay Namgyal, Additional
Public Prosecutor and Mr. S. K.
Chettri, Assistant Public
Prosecutor.

J U D G M E N T

Wangdi, J.

The Appellant was sent up for trial before the
Special Judge, Prevention of Corruption Act, 1988, East



and North Sikkim at Gangtok, for having allegedly committed offences under Sections 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 (in short "PC Act, 1988") corresponding to Section 5(1)(e) read with Section 5(2) of the Prevention of Corruption Act, 1947 (in short "PC Act, 1947").

2. Based on an information, Sikkim Vigilance Police Station registered a Regular Case No.RC-11/2004 under the aforesaid Sections *suo moto* and investigation taken up.

3. At the end of the investigation, the Appellant was found to have accumulated assets worth Rs.40,04,753.87 by misusing his official position during the check period being January, 1978 to December, 2004, which was found to be disproportionate to his known sources of income. The assets were either in the form of multi-storeyed RCC buildings or landed properties or movable properties, etc., the details of which are provided in "Statement B" to the charge-sheet against his income at the beginning of the check period, i.e., January, 1978, as set out in "Statement A", considered in the light of the income earned by the Appellant during the check



period contained in "Statement C" and the expenditure during that period as described in "Statement D".

4. Later, a supplementary charge-sheet was filed by which the Statements A, B, C and D, were revised modifying the disproportionate assets to a reduced value of Rs.28,39,204.00 This, of course, was again revised to Rs.30,54,328.05 during the final arguments, on account of the corrections carried out on the calculation error detected in the charge-sheet.

5. Charge having been framed under the above provisions to which the Appellant pleaded not guilty, trial commenced against him before the Special Court, during which 69 witnesses including the Investigating Officer (in short "I.O.") were examined, apart from the prosecution exhibiting a large number of documents in support of their case. On the conclusion of the trial, the Special Judge by the impugned judgment dated 31-12-2012, found the Appellant guilty and accordingly sentenced him to undergo simple imprisonment for 2 years and a fine of Rs.10,000/- under the aforesaid Sections and to undergo further simple imprisonment of 6 months in default of payment of



the fine. It is against this that the present Appeal is preferred.

6. Before proceeding to consider on the merits of the Appeal, it would be convenient to reproduce Statements A, B, C and D, i.e., (i) assets of the Appellant at the beginning of the check period; (ii) assets at the end of the check period; (iii) income during the check period; and (iv) expenditure during the check period respectively, contained in the supplementary charge-sheet in *verbatim*. The original charge sheet is not being referred to as being redundant having been replaced by the supplementary charge sheet that refers to the earlier values under various heads under the column "Previous Amount". The statements as referred to are as under: -

Supplementary charge-sheet

**"ASSETS AT THE BEGINNING OF CHECK PERIOD
STATEMENT – A**

	Revised Amount	Previous Amount
(1) Land in the name of late Laxuman Subba F/O accused, Dhan Subba bearing plot No.137 measuring 1.36 acre situated at Singithang, Namchi, south Sikkim	Inherited	Inherited
(2) Income earned from a portion measuring 0.60 acre of the above land bearing plot No. 137 in the name of late Laxuman Subba F/o Dhan Subba. This amount, being income prior to the check period, is to be excluded, as all income prior to the starting date of check period, is held on the first day of check period as asset or cash in hand.	.....	Rs. 6,900/-
(3) Salary for the period of March 1973 to Dec. 1977 (58 month) @ Rs.1107/- per month	Rs. 64,206/-

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(Rs.1107/-(x) 58= Rs.64,206/-) Details of salary of the period were not received. So, salary for the period is calculated at the rate for the month of august, 1980 vide letter No. 361/A/S/Bldgs. dt. 30.08.06. This income, being income prior to the check period, is to be excluded, as all income prior to the starting date of check period, is held on the first day of check period as asset or cash in hand.		
(4) Assumed cash in hand (salary of 5 months @ Rs.1107/- per month as cash held in hand. The net monthly salary was Rs. 1107/- per month at the beginning of this check period.)	Rs.5,535/-	.....
	Rs.5,535/-	Rs. 71,106/-

ASSETS AT THE END OF CHECK PERIOD
STATEMENT – B

	Revised Amount	Previous Amount
(1) Land in the name of Shri Dhan Subba bearing plot Nos. 938 & 939 (old plot no. 137 area 1.36 acre measuring .2590 hecets. situated at Singithang Block, Namchi, South Sikkim vide Letter No. 181/DCS dt. 28/11/2006 & Parcha Khatian in the name of Dhan Subba (inherited)	Inherited	Inherited
(2) Cost of land purchased in the name of Mrs. Dikkila Subba w/o Dhan Subba bearing Khatian plot No. 737 measuring 1.3880 hect. under Barbing, Ranka Block, East Sikkim as per Sale Deed Document dt. 3/2/95 (Rs.55000/- cost of the Land (+) Rs.2750/- Registration fee of the Land = Rs.57,750/-) vide letter no. 121/DCE dt. 19/5/06	Rs. 57,750/-	Rs.57,750/-
(3) Cost of land purchased in the name of Mrs. Dikkila Subba w/o Dhan Subba bearing Khatian plot No.110/753 & 111/752 measuring .0920 hect. Under Tadong Block as per Sale Deed Documents dt. 14.4.86.	Rs.28,000/-	Rs. 28,000/-
(4) Cost of Land purchased in the name of Mrs. Dikkila Subba W/o Dhan Subba Bearing Khatian plot No,. 523 measuring 2320 hect. under Barbing Block, East Sikkim as per Sale Deed Document dt. 01.4.95.	Rs.10,000/-	Rs.10,000/-
(5) Cost of land purchased in the name of Mrs. Dikkila Subba w/o Dhan Subba bearing Khatian plot No. 181 under Sripatam Block, South Sikkim as per Sale Deed Documents dt. 12/8/80	Rs.25,000/-	Rs.25,000/-
(6) Cost of land purchased in the name of Mrs. Dikkila Subba w/o Dhan Subba measuring 1.10 acre under Simkharka Block, South Sikkim as per Sale Deed Document dt. 18.4.78	Rs.1,750/-	Rs.1,750/-
(7) Cost of Land purchased in the name of Mrs. Dikkila Subba W/o Dhan Subba bearing Khatian	Rs.76,500/-	Rs.76,500/-

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plot No. 236 measuring .2080 hect. Under Sichey Block, East Sikkim as per Sale Deed Document dt.4.1.96 (Rs. 75,000/- cost of the land (+) Rs.1500/- Registration fee of the Land = Rs. 76,500/- vide letter No. 121/DCE dt. 19.5.06		
(8) Valuation of a 3 storied R.C.C. building at Sichey Busty, Gangtok with black top approach road, grill gate and fencing etc.	Rs.13,47,783/-	Rs.13,47,783/-
(9) Valuation of internal wiring and electrical fittings of the above 3 storied R.C.C. building at Sichey Busty, Gangtok as per letter No. 73/Gen/C/P/99-2000/364 dt. 17.04.06.	Rs.99,490/-	Rs.99,490/-
(10) Cost of house site at Deorali (Pani House), East Sikkim purchased in the name of Mrs. Dikkila Subba w/o Dhan Subba as per the Sale Deed Document dt. 29.11.78	Rs.11,000/-	Rs.11,000/-
(11) Valuation of a 6 storied R.C.C. building at Pani House, 13-A National Highway, Gangtok in the name of Son & daughter of Mr. Dhan Subba.	Rs.4,54,607/-	Rs.4,54,607/-
(12) Valuation of internal wiring and electrical fittings of a 6 storied R.C.C. building at Pani House, Gangtok as per letter No. 7/C/W-II/III/MISC/04-05/371 dt. 19.04.06.	Rs.80,083/-	Rs.80,083/-
(13) Payment of site salami for the site allotted by the Govt. of Sikkim at Development Area, Gangtok made by Mrs. Dikkila Subba w/o Dhan Subba as per the records vide file No. 427(17) L.S.G. H.D./1981 (N.S. page No.24)	Rs.5,120/-	Rs.5,120/-
(14) Valuation of a 5 storied R.C.C. Building at Development Area, Gangtok near T.N.S.S. School (Hotel Mandar) with fencing of brick wall, Black top & C.C.C. yard etc.in the name of Mrs. Dikkila Subba w/o Dhan Subba	Rs.12,08,015/-	Rs.12,08,015/-
(15) Valuation of internal wiring and electrical fittings of a 5 storied R.C.C. building at Development Area, Gangtok as per letter No. 7/C/W-II/III/MISC/04-05/394 dt. 17.04.06	Rs.1,17,309/-	Rs.1,17,309/-
(16) House site measuring 50x45 fts. at Arithang Gangtok donated to Mrs. Dikkila Subba by her father as free Gift as per the Sale Deed document dt. 15.1.1989	.....	Free gift
(17) Valuation of a 3 storied R.C.C. building at Arithang, Gangtok in the name of Mrs. Dikkila Subba, w/o Dhan Subba after deducting the cost of construction of ground floor, vide Building deptt. letter no. 2(18)B/05-06/VII PT (II) dtd. 9/4/09 and para 5 of this chargesheet	Rs. 2,30,281/-	Rs.4,48,323/-
(18) Valuation of internal wiring and electrical fittings of a 3 storied R.C.C. building at Arithang, Gangtok as per letter No. 7/C/W-II/III/MISC/04-05/394 dt. 17.04.06	Rs. 27,761/-	Rs.27,761/-

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(19) Cost of house site purchased in the name of Mrs. Dikkila Subba w/o Dhan Subba from late Padam Bdr. Rai at Masjid Line, Jorethang, South Sikkim as per the personal site file No. 383(54) UD & HD/94 and other amount paid by Mrs. Dikkila Subba in connection with the site as per Bank Receipt No. PR/A 221700 dt. 10/01/02 & BR No. R 790369 dt. 8.1.99	Rs. 17,420/-	Rs.17,420/-
(20) Cost of a single storied R.C.C. building at Jorthang, near Masjid, South Sikkim purchased in the name of Mrs. Dikkila Subba w/o Dhan Subba as per the file No. 383(54)UD & HD/94	Rs. 90.000/-	Rs.90.000/-
(21) Cost of a flat purchased in the name of Mrs. Dikkila Subba w/o Dhan Subba measuring 1450 Sq.fts. at Gokul Apartment, Shiv Mandir Road, Punjabi Para, Siliguri, West Bengal, Distt. of Jalpaiguri as per letter No. 30(2)A.D.SR/Raj/Jal. Dt. 19.2.07	Rs.5,89,715/-	Rs.5,89,715/-
(22) Purchase of a vehicle bearing private registration No.SK-02/8028 (ZEN) in the name of Ms. Yashmin Y. Subba d/o Dhan Subba (Rs. 4,26,358.00 cost of the vehicle (+) BR Rs. 740.00 (+) trade Certificate Rs.200.00) as per letter No. 362/MV dt. 9.6.05	Rs. 4,27,298/-	Rs.4,27,298/-
(23) Purchase of a vehicle bearing private registration No.SK-02/0169 (Hyundai Santro Xing) in the name of Master Vivek Karma Subba s/o Dhan Subba (Rs. 2,44,434/- Receipt no. 33 dt. 16/12/03 (+) Rs. 26,500/- monthly installments paid (+) Rs. 14,700/- Insurance Premium (+) Rs. 940/- BR No. 870211 dt. 24/3/04 & (+) Rs. 200/- Trade certificate) as per letter No. BM/276 dt. 17.2.05 and letter No. 362/MV. Dt. 9.6.05	Rs. 2,86,774/-	Rs.2,86,774/-
(24) Purchase of a vehicle bearing registration No.SK-02/2661 (Maruti Gypsy) in the name of Mr. Vivek Karma Subba s/o Dhan Subba	Rs. 3,75,000/-	Rs.3,75,000/-
(25) Deposits in recurring deposit account No. 36/1460 U.C.O. Bank, Gangtok Branch in the name of Mrs. Dikkila Subba w/o Dhan Subba vide letter dt. 10.12.04	Rs. 5,10,000/-	Rs.5,10,000/-
(26) Deposits in recurring deposit account No. 24/882, U.C.O. Bank, Gangtok Branch in the name of Mr. Vivek K. Subba s/o Dhan Subba vide letter dt. 10.12.04	Rs. 1,000/-	Rs.1,000/-
(27) Value of items found during house search as per inventory memo dt. 1/12/04	Rs.10,85,551/-	Rs.10,85,551/-
(28) Bank balance (SBI, Gangtok) in the name of Mrs. Dikkila D. Subba/Dickey D. Subba w/o Dhan Subba bearing A/c No. 01292/006724 as per the statement vide letter Cm/PBD/320 dt. 14.12.04	Rs. 4,61,890/-	Rs.4,61,890/-

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(29) Bank balance (SBI, Gangtok) in the name of Mrs. Dikkila Subba w/o Dhan Subba bearing savings A/c No. 01190/006724 vide letter Cm/PBD/320 dt. 14.12.04.	Rs.40,522/-	Rs.40,522/-
(30) Bank balance (UCO bank, Gangtok) in the name of Mr. Dhan Subba bearing A/c SB No. 6547 vide letter dt. 10.12.04.	Rs.5,057/-	Rs.5,057/-
(31) Bank balance (UCO bank, Gangtok) in the name of Mrs. Dikkila Subba w/o Dhan Subba bearing A/c No. SB. 2083 vide letter dt. 10.12.04	Rs.4,220/-	Rs.4,220/-
(32) Bank balance (UCO bank, Gangtok) in the name of Mr. Vivek Karma Subba s/o Dhan Subba bearing A/c No. SB 6713 as per the statement vide letter dt. 10.12.04	Rs.860/-	Rs.860/-
(33) Bank balance (Canara Bank, Siliguri) in the name of Mr. Dhan Subba bearing A/c No. 661 as per the statement vide letter No. SB/MIS/661/2007 dt. 21.02.07.	Rs.9,151.49/-	Rs.9,151.49/-
(34) Amount invested under Magnum Multiplier Plus 93 Scheme by Mrs. Dikkila Subba w/o Dhan Subba as per Letter SBIMF/CSP/Vigilance/ Interim/29612/2006-2007	Rs.19,000/-	Rs.19,000/-
(35) Valuation of two floor (1 st and top floor) of a three storeyed building situated at Arithang as per letter no.2(18)B/05-06/VII Pt.(II) dated : 9/4/09	Rs.2,30,281/-	.....
	Rs.77,03,937/-	Rs.79,21,949.49

INCOME DURING THE CHECK PERIOD
STATEMENT – C

	Revised Amount	Previous Amount
(1) Salary received by Shri Dhan Subba for the period of January 1978 to 5 th Aug. 1980 (31 months & 5 days) @ Rs.1107/- per month (Due to non availability of records in the Deptt. this calculation has been made on the basis of the Salary of August 1980 vide letter No. 361/A/Bldgs. dt. 30.8.06 and no. 106/Sr.AO/WSR/PHE dtd: 12.5.08 (ref. para 2(I) ,(2) of this chargesheet) Rs.34,495.50 plus Rs.2,60,553/- plus 1,36,815/-	Rs.4,31,863.50	Rs.34,495.50
(2) Salary received by Shri Dhan Subba for the period of 6 th August 1980 to Oct. 1988 from Building & Housing Deptt. govt. of Sikkim as per detailed statement vide letter No. 361/A/S/Bldgs. Dt. 30.8.06.	Rs. 2,16,484/-	Rs.2,16,484/-
(3) Salary received by Shri Dhan Subba for the month of Nov. 1988 (Based on Salary for the month of Dec. 1988 vide	Rs.3,083.90	Rs.3,083.90

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statement as per with letter No.222/R.M.D.D. dt. 12.1.05)		
(4) Salary received by Shri Dhan Subba for the month of Dec. 1988 to August 1991 from R.M.D.D. Govt. of Sikkim as per statement vide letter No.222/RMDD dt. 12.1.05)	Rs. 82,418.22	Rs.82,418.22
(5) Salary received by Shri Dhan Subba for the period of Sept. 1991 to June 1996 (sic) from Roads & Bridges deptt. as per statement vide letter No.4025/Acctt/R&B dt. 19.1.05.	Rs. 2,77,839/-	Rs. 2,77,839/-
(6) Salary for the period of July 1996 to Feb. 1997(8 months)@ Rs. 6509/- per month (Based on salary for the month of March 1997)	Rs.52,072/-	Rs.52,072/-
(7) Salary received by Shri Dhan Subba for the period of March 1997 to Oct. 2004 from Water Security & P.H.E. Deptt., Govt. of Sikkim as per statement vide letter No. 222/A/C/W.S./PHE/06.07 dt. 14/7/06.	Rs. 10,20,584/-	Rs. 10,20,584/-
(8) Salary received by Shri Vivek Karma Subba s/o Dhan Subba for the period of March 2002 to Nov. 2004 from Roads & Bridges Deptt. Govt. of Sikkim as per statement vide letter No.237/Acctt/R&B dt. 3/8/06.	Rs.2,11,682/-	Rs.2,11,682/-
(9) Salary received by Ms. Yashmin Y. Subba d/o Dhan Subba for the period of June 2004 to Nov. 2004 from the Deptt. Of Health Care Human Services & Family Welfare, Distt. Hospital, Singtam, E. Sikkim as per letter No. 15/DHS dt. 17.4.06.	Rs.43,406/-	Rs. 43,406/-
(10) Scholarship drawn by master Vivek Karma Subba, B.E. student from the Deptt. Of Human Resource Development, Govt. of Sikkim @ Rs.800/- per month w.e.f. 4/7/97 to April 2000 and reimbursement claims as per letter No. 616/SCH/HRDD dt. 27.3.06.	Rs.60,123/-	Rs. 60,123/-
(11) Scholarship drawn by Ms. Yashmin Y. Subba B.D.S. Student from the Deptt. of HR D.D. govt. of Sikkim @ Rs.800/- per month w.e.f. 1.5.2000 to March 2003 as per letter No. 616/SCH/HRDD dt. 27.3.06	Rs.28,000/-	Rs.28,000/-
(12) Income earned from land (Paddy field) purchased in 1995 in the name of Mrs. Dikkila Subba w/o Dhan Subba Situated at Barbing, E. Sikkim as per letter No.2045 D.C.E. dt. 22.6.06	Rs.1,59,894/-	Rs.1,59,894/-
(13) Income earned from land (D.F. & P.F.) purchased in 1989 in the name of Mr.	Rs.1,47,240/-

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Dhan Subba's wife situated at Sripatam as per letter No. 720/SDO/M (R) dt. 22/9/06 (Revised income is given at sl.no.39/40 below)		
(14) Income earned from land (cardamom field) purchased in 1978 in the name of Mr. Dhan Subba's wife as per the letter No. 720/SDO/M(R) dt. 22.9.06. (Revised income is given at sl.no.39/40 below)	.....	Rs.8, 89,616/-
(15) Income earned from land (DF) purchased in 1986 in the name of Mr. Dhan Subba's wife situated at Tadong, E. Sikkim as per letter No.2045.DCE dt.22.6.06	Rs. 36,936/-	Rs. 36,936/-
(16) Income earned from land (PF) purchased in 1995 in the name of Mr. Dhan Subba's wife situated at Berbing, East Sikkim as per letter No. 2045/DCE dt. 22.6.06	Rs.1,77,660/-	Rs.1,77,660/-
(17) Income earned from land (inherited) bearing plot no. 938 & 939 area .2290 hect. situated at Singithang Block, Namchi in the name of Shri Dhan Subba from 1985 to 2004 as per letter no. 181/DCS/dt. 28/11/2006.	Rs. 59,800/-	Rs. 59,800/-
(18) Income earned from land (inherited) bearing plot no. 938 & 939 area .2290 hect. situated at Singithang Block, Namchi in the name of late Laxuman Subba F/o Dhan Subba for the period of 1978 to 1984. This calculation has been made on the basis of the statement for the year 1985 – 86 vide letter No. 181/DCS dt. 28/11/06.	Rs. 9,660/-	Rs. 9,660/-
(19) Income earned from house rent of two rooms of 3 storied R.C.C. building situated at Arithang, paid by Mr. Kapil Mani Adhikary from Nov. 2001 to Nov. 2004 (37 months) @ Rs. 1400/- per month as per statement of the said tenant	Rs. 51,800/-	Rs. 51,800/-
(20) Income earned from house rent of two rooms of 3 storied R.C.C. building at Arithang, paid by Mr. Deepak Rai from Dec. 2001 to Sept. 2003 (22 months) @ Rs. 1400/- per month and Oct. 2003 to Nov. 2004 (14 months) @ Rs.1700/- per month as per statement of the said tenant.	Rs. 54,600/-	Rs. 54,600/-
(21) Income earned from house rent of two rooms of 3 storied R.C.C. building at Arithang, paid by Mr. S. B. Pradhan from May 1996 to Nov. 2004 (103 months) @ Rs. 1500/- per month as per statement of the said tenant.	Rs. 1,54,500/-	Rs. 1,54,500/-
(22) Income earned from house rent of	Rs. 14,150/-	Rs. 14,150/-

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two rooms of 3 storied R.C.C. building at Arithang, paid by Mr. T. B. Chandra Subba from Feb. 2004 to Nov. 2004 (10 months) @ Rs. 1415/- per month as per statement of the said tenant.		
(23) Income earned from house rent of two rooms of 3 storied R.C.C. building at Arithang, paid by Mr. Roshan Lall Rajaliwal/Agarwal from Feb. 2004 to Nov. 2004 (10 months) @ Rs. 1400/- per month as per statement of the said tenant.	Rs. 14,000/-	Rs. 14,000/-
(24) Income earned from house rent of two room of 3 storied R.C.C. building situated at Arithang, paid by Ms. Bharaty Pradhan from Sept. 2001 to Nov. 2004 (39 months) @ Rs. 1700/- per month as per statement of the said tenant.	Rs.66,300/-	Rs.66,300/-
(25) Income earned from house rent of two rooms of 3 storied R.C.C. building at Arithang, paid by Mr. Hemand Rai from Feb. 1999 to Nov. 2001 (34 months) @ Rs. 1500/- per month and Dec. 2001 to Sept. 2003 (22 months) @ Rs.1700/- per month as per statement of Mr. Deepak Rai S/o Ranjit Rai, O.S. SNT. Div., Govt. of Sikkim, Gangtok.	Rs. 88,400/-	Rs. 88,400/-
(26) Income earned from house rent of Single storied R.C.C. building situated at Jorethang, paid by Mr. Basudeo Agarwal from July 2001 to Nov. 2004 (41 months) @ Rs. 1000/- per month as per statement of the said tenant.	Rs. 41,000/-	Rs.41,000/-
(27) Turnover of business income from M/s Hotel Reverie, Pani House, 31-A National Highway, Gangtok as per the records of the concerned file received from IT&ST Division, Finance Dept. vide letter No. 03(77) IT/448 dt. 31.12.04.	Rs.9,58,333/-	Rs.9,58,333/-
(28) Income from M/S Mandar Lodge, Development Area, Gangtok vide para 2(6) of this chargesheet	Rs.13,92,300/-	Rs.6,41,000/-
(29) Term loan for purchase a new Car from State Bank of India, Jorethang Branch received by Mr. Vivek Karma Subba s/o Dhan Subba as per letter No. BM/276 dt. 17/02/05.	Rs.1,50,000/-	Rs.1,50,000/-
(30) Amount received from the investment made by Mrs. Dikkila Subba w/o Dhan Subba under Magnum Multiplier Plus 93 Scheme as per letter No. SBIMF/CSP/Vigilance/Interin/29612/2006—07.	Rs.83,638/-	Rs.83,638/-
(31) Interest from SBI saving account No.01191/023184 in the name of name of	Rs. 143.89	Rs. 143.89



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Mr. Vivek Karma Subba s/o Dhan Subba		
(32) Interest from SBI saving account No.01192/006724 in the name of Mrs. Dikkila Subba w/o Dhan Subba as per the statement vide letter No. CM/PBD/320 dt. 14.12.04.	Rs. 11,890/-	Rs. 11,890/-
(33) Interest from SBI Saving account No.11190/006724 in the name of Mrs. Dikkila Subba as per the statement vide letter No. CM/PBD/320 dt. 14.12.04.	Rs. 3,321.44	Rs. 3,321.44
(34) Interest from Saving account No. SB. 6713, SB. 6547 and SB. 2083 in the names of Mr. Vivek K. Subba, Mr. Dhan Subba and Mrs. Dikkila Subba as per statement vide letter No. – dt. 10.12.04.	Rs. 2,410/-	Rs. 2,410/-
(35) Interest from Saving account No. 661 in the name of Mr. Dhan Subba as per statement vide letter No. SB/MIS/661/2007 dt. 21.02.07.	Rs.3,228/-	Rs.3,228/-
(36) Income from L.I.C. Policy No.34972116 in the name of Mr. Dhan Subba as per letter dt. 3.01.2007 of the Administrative Officer, LIC. Gangtok Branch.	Rs.1,32,040/-	Rs.1,32,040/-
(37) Income from L.I.C. Policy No. 451103211 in the name of Mr. Dhan Subba as per the letter dt. 3.01.2007 of the Administrative Officer, L.I.C., Gangtok Branch.	Rs. 1,50,000/-	Rs. 1,50,000/-
(38) Non Refundable GPF withdrawal of Shri Dhan Subba as per the letter No.167/Fin/PGIPF dtd: 10/7/08	Rs.1,62,100/-	.....
(39) Income earned from land situated at Sripatam & Deo for the period 1980 to 1984 as per the letter No. 639/DCS dtd: 30/6/08	Rs. 64,525/-	.....
(40) Income earned from land situated at Sripatam & Deo for the period 1980 to 1984 as per the letter No. 320/SDO/M(R) dtd: 10/6/08	Rs.3,65,208/-	.....
(41) Payment/Reimbursement on account of electricity charges of Mandar Lodge made by WBTDC Ltd. during the period of Lease. The charge for the month of Sept. 1993 to Feb. 1994 has been on the basis of average (Bill amount of March 1994 to Feb. 1995 i.e. $\text{Rs.}21,472.00/12 = \text{Rs.}1,789.33 \times 6 = \text{Rs.}10,735.98$) Say 10,736/- vide sl.no.2(7) of this chargesheet	Rs.1,25,585/-

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(42) Payment/Reimbursement of Water Supply bill of Mandar Lodge made by WBTDC Ltd. vide para 2(8) Of this chargesheet.	Rs. 6,262/-
(43) Maturity value of LIC Policy no. 35099139 as maturity value in the name of Smt. Dikila D. Subba as per the letter dtd: 12/5/08 vide para 2(9) of this chargesheet	Rs.53,675/-	.....
(44) Turnover of Business income from Mandar Lodge after expiry of lease with WBTDC Ltd. for eight months i.e. april to Nov. 04. because the check period was only upto 01/12/04 his (sic) has been calculated as per the letter no.3365//IT dtd: 14/8/08	Rs.2,53,500/-	.....
	Rs.72,74,414.95	Rs.61,31,747.95

EXPENDITURE DURING THE CHECK PERIOD
STATEMENT - D

	Revised Amount	Previous Amount
(1) Payment of water supply charges by Shri Dhan Subba in respect of his R.C.C. buildings situated at Pani House, Development Area, Arithang and Sichey Busty as per the Statement vide letter No. 93/WS/PHE/98-99/68 dt. 22.04.06.	Rs. 17,465/-	Rs. 17,465/-
(2) Payment of electricity bill in respect of residential building at Sichey Busty, Gangtok made by Shri Dhan Subba as per Statement vide letter No. 73 (gen)C/P/99-2003/394 dt. 17.05.06.	Rs.49,594/-	Rs. 49,594/-
(3) Payment of electricity bill in respect of R.C.C. building at Pani House, Gangtok by Mrs. Dikkila Subba w/o Dhan Subba as per statement vide letter No. 48/Rev./SD-II/P/2004-05/491 dt. 01/04/05.	Rs.62,069/-	Rs. 62,069/-
(4) Payment of electricity bills in respect of R.C.C. building of Development Area, Gangtok by Shri Dhan Subba & Mrs. Dikkila Subba as per the detailed statement vide letter No.1(122)Cor/Rev. SD-III/P/03-04/471 dt. 01/04/06.	Rs. 1,10,370/-	Rs. 1,10,370/-
(5) Payment of electricity bills in respect of R.C.C. building of Arithang, Gangtok by Mrs. Dikkila Subba w/o Dhan Subba as per the detailed statement vide letter No. 1(12) Cor/Rev.SD-III/P/03-04/471 dt. 01/04/06.	Rs.81,708/-	Rs. 81,708/-
(6) Expenditure on education of Master Vivek Karma Subba s/o Dhan Subba as per	Rs.21,501/-	Rs. 21,501/-

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letter No. 65/TNA/05 dt. 16/03/05.		
(7) Expenditure on education of Ms. Yashmin Yanchen Subba as per letter no. 65/TNA/05 dt. 16.03.05.	Rs.23,950/-	Rs. 23,950/-
(8) Fees etc paid by Miss. Yashmin Y. Subba, BDS Student to the college of Dental Surgery, Manipal, A constituent college of Manipal Academy of Higher Education (Deemed University) Karnataka, India as per letter dt. 254/04/2006 (sic).	Rs.8,04,186/-	Rs. 8,04,186/-
(9) Fees paid by Mr. Vivek Karma Subba, B.E. Student to the Arulmigu Meenakshi Amman College of Engineering, Vadamavandal Tamil Nadu, India as per letter No.11071/2006 dt. 25/04/06.	Rs.1,35,820/-	Rs. 1,35,820/-
(10) Share amount paid by Mrs. Dikkila Subba w/o Dhan Subba to the Citizen Urban Co-operative Bank Ltd. 6 th mile, Tadong, Gangtok as per letter No. CUCB/03/418 dt. 14.12.04	Rs.2,15,000/-	Rs. 2,15,000/-
(11) L.P.G. connection/installation charges paid by Mr. Dhan Subba and his family member as per letter No.S.T.C.S/7 (Gas)66(63)99-2000/4938 dt. 8/2/05 & Domestic Gas Consumer Card bearing S.V. Nos.83527,62849,65839,435353, 060674, 129165, 435471 & 65840.	Rs. 9,380/-	Rs. 9,380/-
(12) Income Tax paid to the State Govt. against the gross turnover of business income in respect of M/s Hotel Reveria of Pani House, 31-A National Highway, Gangtok as per the records vide file no. 623(30)IT/NE received vide letter No. 03(77)IT/448 dt. 31/12/04.	Rs. 21,020/-	Rs. 21,020/-
(13) Income Tax paid to the State Govt. against the gross turnover of business income in respect of M/s Mandar Lodge, Dev. Area, Gangtok as per the records vide file no. 748(30)623(30)IT/NE vide letter No. 03(77)IT/448 dt. 31/12/04.	Rs.4,850/-	Rs.4,850/-
(14) Fare of airways & Heli Services paid by Shri Dhan Subba and his family members as per tickets recovered from his residential house during house search.	Rs.2,01,171/-	Rs.2,01,171/-
(15) Bill paid at New Sikkim House, New Delhi by Shri Dhan Subba as per bills recovered during house search.	Rs.1,990/-	Rs.1,990/-
(16) Payment of Pheno membership made to Phenomenal Health Care Services Ltd. by Mrs. Dikkila Subba w/o Dhan Subba as per receipt recovered during house search	Rs.24,840/-	Rs.24,840/-
(17) Payment made to the M/s Amber	Rs. 4,000/-	Rs. 4,000/-






Electronics by Mrs. Dikkila Subba w/o Dhan Subba as per receipt recovered during house search		
(18) Amount towards donation given by Shri Dhan Subba for felicitation function as per a statement of donation/collection recovered during house search	Rs. 1000/-	Rs. 1000/-
(19) 30% household expenses (30% of net salary refceived (sic) by Shri Dhan Subba being Rs.20,84,345/-	Rs. 6,25,303	Rs. 4,95,744.33
	Rs.24,15,217/-	Rs.22,85,658.33


7. The summary of the Statements A, B, C and D revised in the supplementary charge sheet are as under: -

(1)	Assets at the end of check period i.e. year 1978 to 1 st Dec. 2004 (Statement –B)	- - - -	=	Rs.77,03,937/-
(2)	Assets at the beginning of Check period (Statement –A)	- - - -	=	(-) Rs. 5,535/-
(3)	Assets acquired during check period i.e. 1978 to 1/12/04 ((1) - (2))	- - - -	=	Rs.76,98,402/-
(4)	Expenditure during the check period (Statement –D)	- - - -	=	(+) Rs.24,15,217/-
(5)	Total assets acquired & Expenditure during the check period ((3) + (4))	- - - -	=	Rs. 1,01,13,619/-
(6)	Income during the check period (Statement C)	- - - -	=	(-) Rs.72,74,415/-
(7)	Extent of disproportionate assets (5) - (6)	- - - -	=	Rs.28,39,204/-
(8)	Percentage of disproportionate assets.	- - - -	=	39.03%

8. The impugned judgment has been challenged, *inter alia*, on the following grounds: -

- (i) That Statement ‘A’ in the charge-sheet and the findings on that in the impugned judgment are erroneous as the Appellant’s income at the commencement of the check period was not fully taken into account.

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- (ii) The onus of proof was wrongly shifted on the Appellant on facts that stood admitted by the prosecution.
 - (iii) Due account of the income of the Appellant not disputed by the prosecution and of those revealed during the further investigation under Section 173(8) of the Code of Criminal Procedure, 1973 (in short "Cr.P.C.") were not taken.
 - (iv) The Appellant was denied the benefit of his GPF withdrawal and the arrears of salary received by him in calculating his income.
 - (v) No investigation was conducted in respect of the independent income of the wife of the Appellant, the Appellant's employed son and his daughter.
 - (vi) The Special Judge has misconstrued and wrongly interpreted the provisions of Section 13(1)(e) and 13(2) of the Act.
 - (vii) The Special Judge overlooked the evidence of some of the prosecution witnesses by which they had admitted the case of the defence.
 - (viii) The Special Court had committed an error in discarding the uncontradicted and uncontroverted evidence of the defence witnesses.
 - (ix) The Special Judge had committed an error in discarding the oral and documentary evidence produced by the Appellant on the ground that they were not produced during the investigation.

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- (x) That there were grave errors in the method of assessment and valuation of the buildings.
 - (xi) That there were errors in the application of the Schedule of Rates (in short "SORs") in valuing the buildings and of the electrifications carried out in those buildings and the valuation could not be believed for failure on the part of the prosecution to bring on record the SORs said to have been applied for the purpose of the valuations.
 - (xii) That while arriving at the value of the buildings application of the "depreciation" method was erroneous and that this vital aspect was not considered by the Learned Trial Court with the seriousness it deserved as would appear from the paragraphs 35 and 39 of the impugned judgment.
 - (xiii) That the benefit of 10% allowed as a notional profit to a contractor in all cases of valuation as well as 4% against sales tax were not given to the Appellant and that this aspect has been dealt with most casually in paragraph 31 of the judgment.
 - (xiv) That when admittedly the measurement of the buildings were taken in the year 2005 the extent of construction of those buildings at the end of the check period, i.e., 01-12-2004, ought to have been verified and due weightage given therefor but, the Learned Trial Court has failed to do so.

- (xv) That it ought to have been noticed that the underground items were valued on assumption by the Engineers, which is impermissible in law.
- (xvi) That the "SORs" applied for arriving at the valuation were neither seized nor filed with the charge-sheet thereby depriving the Appellant as well as the Learned Special Judge in verifying the correctness of the valuations arrived at by the valuers.
- (xvii) The appellant has been deprived of the turnover of Rs.20,12,333/- for the years 1997-98 to 2003-04 by allowing only for the years 2000-01 to 2003-04 solely based on Exhibit 44 over-looking completely Exhibit D1 proved by Vivek Karma Subba, PW-15.

9. Before us, Mr. A. Moulik, Learned Senior Advocate, in support of the Appeal, submitted that the bulk of the Statement B of the supplementary charge-sheet giving the details of assets at the end of the check period, valued at Rs.77,03,997/-, consists of four buildings that stand in the name of Smt. Dikila Subba, the wife of the Appellant, details of which were provided hereunder: -

Sl.No.(8)	3 storeyed RCC building at Sichey Busty (Ext.129, Page 370, Vol.I constructed in 1994)	Rs.13,47,783/-
Sl.No.(11)	6 storeyed RCC building at Pani House (Ext.156, Page 34, Vol.III constructed in 1978)	Rs. 4,52,607/-
Sl.No.(14)	5 storeyed RCC building at Development Area	Rs.12,08,015/-

	(Ext.126, Page 353, Vol.II constructed in 1988-89)		
Sl.No.(17)	3 storeyed RCC building at Arithang (Ext.129, Page 363, Vol.II constructed in 1981-82)		Rs. 2,30,287/-
	Total		Rs.32,40,686/-

10. Relying upon the decision of this Court in **Padam Lall Gurung vs. State of Sikkim : 2011 Sikkim Law Journal Part II 69**, it was his submission that the very valuations of these buildings said to have been assessed by P.Ws 3, 31, 55, 62 and 68 were unreliable, firstly for the reason that the SORs alleged to have been applied for the purpose carried out, were neither filed by the prosecution nor produced before the Court, resulting in the Appellant being deprived of an opportunity of finding out the correctness of the valuations and also of being assured of the existence of such SORs which was in dispute. Secondly, when admittedly the four buildings were constructed in different years, i.e., 1978, 1981, 1988 and 1994, then either the SORs of those years had to be applied or resort had to be taken on the “depreciation” method in order to arrive at their valuations. But, the prosecution has failed to prove its assertion that they had applied the “depreciation” method for valuation of those buildings.



11. The valuation of the four buildings were also unreliable as admittedly the blue print plans of those buildings were not seized and applied for the valuations and that many of the items were assessed based on 'assumption' which is impermissible in fixing criminal liability against the Appellant.

12. The prosecution has failed to disclose as to who during the investigation had prepared the plans and specification based upon which the valuation of the buildings were arrived at, thereby rendering unreliable.

13. That the Appellant having been deprived of the benefit of notional profit of 10% suffered consequential deprivation of reduction of Rs.3,24,068/- against the total valuation of the four buildings assessed at Rs.32,40,686/-.

14. It was next contended that a sum of Rs.17,169/- ought to have been deducted against the electricity bills, Exhibit 138, as it relates to May, 1994 to March, 2005 which is beyond the check period. Seizure of the items valued at Rs.10,85,551/- vide Exhibit 1 was also seriously contested, there being contradictions and inconsistencies in the evidence of PW-1 as regards the



basis of valuation, in as much as, it was not clear as to whether those articles were valued as per the cash memos which were seized or at the whims of the Police Officer and that there was doubt as to the correctness of the valuations, as the Police Officers who had valued the items were not trained valuers and also that the year of acquisition of each of those items were not known. These, as per the Learned Senior Counsel, were also corroborated by PW-2 who did not know the correctness of the entries in Exhibits 1 and 2. Quite to the contrary, as per Mr. Moulik, it is in the evidence of the I.O., PW-69 that except for a few, value of most of the articles were provided by the Appellant and of the rest, it was fixed in consultation with the witnesses during the search. Apart from these, there are conflicting evidence on the question as to whether much of those items were purchased by Appellant's son PW-15, or by his sister or his mother, DW-2.

15. Referring to and relying upon **State Inspector of Police, Vishakkapatnam vs. Surya Sankaram Karri : (2006) 7 SCC 172**, it was submitted that the prosecution has withheld the cash memos admittedly seized during the



investigation, giving rise to a reasonable suspicion as regards its correctness which also called for an adverse presumption being drawn against them. That in any case, the inventory prepared on the basis of the statement of witnesses and the Appellant, would be hit by Section 162 Cr.P.C. as laid down in **State (Delhi Administration) vs. Laxman Kumar and Others : (1985) 4 SCC 476** (paragraph 41). The value inventory estimated at Rs.10,85,551/-, therefore, cannot be taken as reliable and was liable to be rejected as such.

16. The search memo pertaining to the inventory was also assailed, as P.W.2 in his evidence has denied that it was prepared in his presence as claimed by the prosecution and that he had signed on it without knowing the correctness of the entries made therein.

17. With regard to income from house rent, relying upon the evidence of P.Ws 40, 41, 43, 44, 45 and 56, it was submitted that it stood established that Mrs. Dikila Subba, the wife of the Appellant, had generated a total income of Rs.32,27,540/- from her building at Arithang, Gangtok during the check period. Similarly, from her building at Jorethang, West Sikkim also she had earned



Rs.36,000/- for the period January, 2002 to December, 2004, i.e., 36 months @ Rs.1000/- per month thereby earning Rs.32,63,540/- as total rental income from those buildings.

18. It was next contended that three tenants in the Arithang building by affidavits duly sworn by them had declared that they had paid to Mrs. Dikila Subba, the wife of the Appellant, rental of Rs.1,29,600/-, Rs.2,24,400/- and Rs.1,44,000/- respectively amounting to Rs.4,98,000/- in total. Although the affidavits were handed over to the I.O., he did not take those into account on the untenable ground that those were just orally sworn documents.

19. The denial of the benefit of rental income from Mandaar Lodge at Development Area, Gangtok, for the period 01-09-2001 to 31-08-2004 was uncalled for in view of the evidence of Nirmal Dutta, D.W.4, that he had made the payment on the basis of a lease deed dated 01-09-2001, Exhibit D10, executed between him and Mrs. Dikila Subba, wife of the Appellant, thus being denied of the benefit of Rs.10,33,333.33.



20. The next was the rental income earned by Smt. Subba from the very building at Development Area housing Mandaar Lodge, which had been taken over on lease by the West Bengal Tourism Development Corporation Limited (in short "WBTDCL") against a lease deed dated 10-09-1993, Exhibit 217, for the period between September, 1993 to August, 2001, on payment of additional charge of Rs.1,800/- per month as maintenance expenditure and Rs.1,200/- per month for satellite receiver system in addition to the lease rent. Although the total rental income of Rs.13,92,300/- as per Exhibit 217 was allowed by the Court, it fell in error in refusing to accept an additional rent of Rs.2,31,000/- towards provision of satellite receiver system and its maintenance which taken together would have amounted to Rs.16,23,300/-.

21. It was then submitted that, as would be evident from Exhibit D6 which is a letter dated 06-12-2012 received from the Demonstration Officer, C.F.N.E.U. under the Ministry of Women & Child Development, Food and Nutrition Board, Community Food & Nutrition Extension



Unit, Arithang Road, Gangtok, the wife of the Appellant had earned the following rental incomes: -

(i)	From 01-07-1986 to 30-06-1991, i.e., 5 years @ Rs.610/-		Rs. 36,600/-
(ii)	From 01-07-1991 to 30-11-1996, i.e., 65 months @ Rs.1,040/-		Rs. 67,600/-
	Total		Rs.1,04,200/-

Although the above is an admitted position as would appear in the cross-examination of the I.O., it was not accepted by the Learned Special Judge.

22. Referring to the Annual Property Report, Exhibit 37 comprising of Exhibits 32, 33, 34, 35 and 36 and the deposition of the I.O., it was submitted that it was an admitted position that the Annual Property Reports from the inception of service of the Appellant to the year 1997-98 had not been seized. As per the Learned Senior Counsel, the Annual Property Reports commencing from the year 1998 to 2002-03, which again was admitted to be correct, clearly reflect at serial no.3 that the wife of the Appellant had been earning monthly rental income of Rs.17,000/- from that property at Development Area occupied by the WBTDC for the entire period commencing from the year 1989 being the year of its construction. In support of this contention, reliance was placed upon Exhibit 217 and the lease agreement appended thereto, as



per which the rental income between the period 01-01-1989 to 31-08-1993, i.e., 57 months @ 17,000/- per month amounted to Rs.9,69,000/-.

23. The Learned Senior Counsel went on to sum up the total rental income as under: -

Sl. No.	Particulars of payment made by tenants	Amount
(i)	From the tenants of Arithang building from 1985 onwards after duly adjusting rent received from P.Ws 40, 41, 43, 44, 45 and 56 including rent received from P.W.47 of Jorethang building.	Rs.32,63,540/-
(ii)	From D.W.4 Nirmal Dutta, lessee of Mandaar Lodge from 01-10-2001 to 2004 vide Lease Deeds [Ext.D10 and D11]	Rs.10,33,333/-
(iii)	From 01-04-1995 to 31-08-2001 towards rent for maintenance and satellite system.	Rs.2,31,000/-
(iv)	Rent from September 1993 to August 2001 for which benefit has been given.	Rs.13,92,300/-
(v)	Rent from C.E.N.U., Government of India vide Ext.D6 from 01-07-1986 to 30-06-1991 and 01-07-1991 to 30-11-1996.	Rs.1,04,200/-
(vi)	Rent from Mandaar Lodge from 01-01-1989 to 31-08-1993 as per property return file contained in Ext.37.	Rs.9,69,000/-
(vii)	Rent from Arithang building from 01-01-1981 to 31-12-1984 @ mentioned in property return file contained in Ext.37.	Rs.3,36,000/-
(viii)	Rent from Pani House from 1978 to 01-12-2004 duly adjusting Rs.4,98,000/- received from B. Banerjee, Safiullah and Abdul Khalik	Rs.43,62,000/-



	(Ext.D3)		
	Total rent		Rs.1,16,91,373/-

24. Next was the component of income from agriculture with regard to which it was submitted that against an income of Rs.8,73,623/- allowed in the supplementary charge-sheet, the Learned Special Judge in the impugned judgment had allowed an enhanced sum of Rs.13,49,633/-. However, as per the Learned Senior Counsel, the Appellant in fact was entitled to get Rs.25,10,600/- and they are as follows: -

(i)	Tadong Barbing Land, Exhibit 190	Rs. 8,60,000/-
(ii)	Sripatam-Deo Land, Exhibit 72	Rs.11,00,800/-
(iii)	Singhithang Land, Exhibit 47	Rs. 59,800/-
(iv)	Sripatam Land against income for ginger	Rs. 5,00,000/-
	Total	Rs.25,10,600/-

25. Next was as regards the income of the wife of the Appellant, Smt. Dikila Subba, who claimed that she had independent income of her own from her business. This, as per the Learned Senior Counsel, stands established when it has come in the evidence of PW-3 and PW-15 that the wife of the Appellant was engaged in the business of supply of milk, contract works



and hotel business and that she belonged to a well to do family and that she also used to run business of hotel, namely, Asia Lodge, Meridian at Zero Point, Hotel Reverie at Pani House, Hotel Mandaar at Development Area and was a producer of "Tshangu" film.

26. Relying upon the case of **DSP, Chennai vs. K. Inbasakaran : (2006) 1 SCC 420**, it was submitted that where independent income of the wife stands established, it is not permissible to tag it with the income of her husband to hold him guilty.

27. It is urged on the strength of both the prosecution as well as the defence witnesses, it stands established that the four buildings situated at Pani House, Development Area, Arithang and Sichey, are the self acquired properties of the wife of the Appellant that stand recorded in her name. The Pani House building constructed in 1978, in which Hotel Reverie is being run, was purchased by the wife of the Appellant through a registered deed of Sale for a consideration value of Rs.11,000/- paid by the brother of the wife, D.W.1. That it has come in the evidence of D.W.1 that by Exhibit D7 which is a 'daijo' (gift in marriage) document, the wife of



the Appellant had received Rs.17,500/- in cash, jewellery and 240 mounds of cardamom valued at Rs.1,20,000/- and also Rs.5,00,000/- against her share of property in the family partition. Apart from this, she also had earned income from her business of running Asia Lodge and Hotel Meridian. That she had sufficient fund of her own to construct the buildings and had no need to seek financial assistance from her husband. That she is an income tax assessee and held trade licences for Hotel Reverie, Exhibit 44 and Hotel Mandaar Lodge, Exhibit 45 as proprietor and assessed as proprietorship business that stands substantiated by her tax returns proved by the prosecution witnesses. The site at Development Area upon which the building housing the Hotel Mandaar Lodge was constructed was allotted to her by the government in the year 1988 vide Allotment Order, Exhibit 40, thereby clearly establishing that the property is her self-acquired property. The land upon which the Arithang building and Sichey building are constructed, were also purchased by her as would be evident from the Sale Deed documents, Exhibits 60 and 71 respectively.



28. Additionally, it is urged that it is in the evidence of Topden Phintso Bhutia, D.W.3 that vide Exhibit D9 Smt. Dikila Subba had received Rs.5,00,000/- from him as loan in two instalments, a fact which has been confirmed by her in her evidence as D.W.2.

29. The factum of Smt. Dikila Subba being in possession of the aforesaid properties was in the knowledge of the I.O., P.W.69, as is evident from Exhibit D2 consisting of 9 pages which he admittedly received from the Appellant. It was, thus submitted that in addition to her rental income the wife of the Appellant had the following income: -

(i)	Against her 'daljo' Exhibit D7	Rs. 8,07,000/-
(ii)	Against loan document Exhibit D9 taken from Topden Phintso Bhutia, D.W.3	Rs. 5,00,000/-
	Total	Rs.13,07,000/-

30. Mr. Moulik further went on to submit that there were other incomes earned by the wife of the Appellant, Smt. Dikila Subba, the major portion of which were from her business. It is stated that in the charge-sheet the turnover in respect of Hotel Reverie at Pani House has been indicated as Rs.9,58,333/- for the period falling



within the check period, for which, as per the I.O., P.W.69, records were available in the form of Exhibits 43 and 44. However, Mr. Moulik submits that these Exhibits only pertain to the turnover of the hotel for the Accounting Years 2000-01 to 2003-04 amounting to Rs.9,34,500/- and contrary to the evidence of the I.O., records were available for the other years, as is evident from Exhibit 5, which in fact showed the turnover for the period 1997-98 to 2004-05.

31. The Learned Senior Counsel, further submits that, Exhibit D5 which is a certificate issued by the Joint Secretary – II, Income Tax under the Income and Commercial Tax Division, Government of Sikkim, reflects the turnover of the hotel for the accounting years 1997-98 to 2004-05 as Rs.20,12,333/- which includes the turnover for the accounting year 2000-01 to 2003-04 amounting to Rs.9,34,500/- set out by the I.O., thereby depriving Smt. Dikila Subba of an income of Rs.10,77,833/- (Rs.20,12,333.00 – Rs.9,34,500.00).


32. It was then contended that the prosecution has committed an error in discarding the entire amount of the GPF withdrawn by the Appellant and the arrear of salary



received by him during his service tenure. By referring to the evidence of PW-34, it was submitted that he has been deprived of an additional amount of Rs.7,80,282/- against the GPF withdrawal which has been wrongly indicated as only Rs.1,62,100/- when it ought to have been Rs.9,42,282/-.

33. Similarly, the arrears of salary of Rs.2,60,553/- drawn by the Appellant ought to have been considered as an additional income instead of being disallowed by the Learned Special Judge. A bare look at Exhibit 224, which is a certificate issued by the PHE Department, under which the Appellant had served, as per the Learned Counsel, would show that arrears of salary was not included as a component of the monthly salary drawn by him and, therefore, the Learned Special Judge had fallen in error in holding so. It is then submitted that the charge-sheet and impugned judgment overlook certain other incomes of the Appellant which are briefly set out below: -

- (a) Rs.50,000/- as the value of land inherited by the Appellant situated at Singhithang the existence of which stand established by the documentary



evidence, Exhibit 32, Exhibit 46 and Exhibit 235. Exhibit 235 dated 18-08-1975 indicates that the father of the Appellant was not living when he inherited this land before the check period, a fact which adds credence to the case of the Appellant of him having inherited the land before the check period.

- (b) It is further the submission of the Learned Senior Counsel, that the Appellant having inherited the land in 1975, he ought to have been given the benefit of the income earned therefrom, for the period 1975 to 1983, falling before the check period @ Rs.1,380/- as assessed by the prosecution which would amount to Rs.12,420/- (Rs.1,380/- x 9 years).
- (c) He also ought to have been given the benefit of the income earned by his wife Smt. Dikila Subba from the assets vide Exhibit D7 amounting to Rs.8,07,000/- and Rs.5,00,000/- vide Exhibit D9 which in total would amount to Rs.13,07,000/- and also two additional amounts of Rs.1,32,000/- and Rs.1,75,000/-. Resultantly the value of the assets

held by the Appellant at the beginning of the check period ought to have been Rs.16,76,420/- (Rs.50,000/- + Rs.12,420/- + Rs.13,07,000/- + Rs.1,32,000/- + Rs.1,75,000/-).

34. As regards the assets at the close of check period, Mr. Moulik submits that the valuation of the buildings and electrical fittings accepted by the Learned Special Judge, amounting to Rs.35,65,329/-, are liable to be discarded and expunged from the record, in view of the inadequacies in the procedure followed in arriving at those valuation as already pointed out.

35. Next, it was submitted that the prosecution having failed to prove the inventory Exhibit 1, the value of household items at serial no.26 at page 117 of the judgment amounting to Rs.10,85,551/- ought to have been discarded from the statement of assets at the close of the check period.

36. Thus, the total amount liable to be omitted from the list of assets at the close of check period would work out to Rs.35,65,329/- + Rs.10,85,551/-, i.e., Rs.46,50,880/-, thereby reducing it to Rs.27,86,373.73 from the original Rs.74,37,253.73.



37. It was then submitted that the Learned Trial Court in its impugned judgment under the head ‘income’ of the Appellant did not give the following benefits:

(i)	Income from house rent [Item nos.18 and 20 of Judgment (page 122-123) where court allowed only Rs.4,06,160/- + Rs.13,92,300/- =Rs.17,98,460/- i.e. Rs.1,16,91,373 - Rs.17,98,460 = Rs.98,92,918]		Rs.1,16,91,373/-
(ii)	Income from agriculture (Item nos.12 to 17 at Pg 122 of Judgment) Court granted Rs.13,49,533/- Hence benefit to get is Rs.11,61,067/-		Rs. 25,10,600/-
(iii)	Additional income of the wife of accused		Rs. 13,07,000/-
(iv)	Turnover business income		Rs. 20,12,333/-
(v)	GPF withdrawal		Rs. 9,42,282/-
(vi)	Arrears of salary		Rs. 2,60,553/-
	Total		Rs. 1,87,24,141/-
	Court granted Rs.17,98,460/-Plus Rs.13,49,533/- in item Nos. (i) and (ii) above i.e. Rs.31,47,993/-	(-)	Rs. 31,47,993/-
	Grand Total		Rs. 1,55,76,148/-

38. A number of decisions were cited by Mr. Moulik in support of the contentions raised by him which we may set out hereunder.

- (a) On the question of non-production of the SORs of 1986 and 1991 which as per the prosecution were applied for arriving at the valuation of the buildings and the electrifications carried out on



those, a decision of this Court in the case of **Padam Lall Gurung (supra)** was referred to *in extenso*, more particularly, paragraph 11 and sub-paragraphs thereunder.

- (b) This decision also was relied upon on his contentions that (i) in law it was permissible for an accused to produce evidence in his defence during the proceedings of the trial under Section 233(3) Cr.P.C.; (ii) an accused can prove his case by the principle of balance of probability by relying upon the evidence of both the prosecution as well as the defence; and (iii) that it is impermissible in law for a Court to reject documents produced by an accused in his defence unreasonably and in an arbitrary manner.

On the aforesaid contentions reliance was also placed upon the decisions of this Court in **Criminal Appeal No.4 of 2007 : Central Bureau of Investigation vs. Nar Bahadur Bhandari and O. T. Bhutia vs. State of Sikkim : 2011 CRI.L.J. 2860 (Sikkim)**.

(c) It is also the case of the Appellant that the prosecution has unreasonably clubbed his income with the income of the wife of the Appellant, Smt. Dikila Subba, and has proceeded under an erroneous presumption that it constituted the income of the Appellant alone thereby vitiating the very foundation of the prosecution case. The case of **K. Inbasagaran (supra)** (paragraphs 10, 13 and 14) was referred to and relied upon in support of this contention.

(d) It was also the case of the Appellant that his wife whose income had been clubbed with that of his was an important witness for the prosecution and ought to have been examined by the prosecution. This having not been done and rather left for the defence to produce her as its witness, further renders the case of the prosecution questionable and doubtful. Reliance on this was placed in the case of **Surya Sankaram Karri (supra)**.

39. Mr. J. B. Pradhan, the Learned Public Prosecutor, on the other hand, submitted that the Learned




Trial Court was fully justified in arriving at its findings contained in the impugned judgment and the grounds raised by the Appellant seeking to assail those were not sustainable. The contentions placed by him as are considered relevant for disposal of this Appeal are set out below in brief.

- (i) That the family of the Appellant consisting of his wife Smt. Dikila Subba, son Vivek Karma Subba and daughter Yashmin Y. Subba were the dependents of the Appellant during the check period sharing common kitchen and living under the same roof as would appear from the evidence of D. S. Rai, I.O., P.W.69 and Smt. Dikila Subba, D.W.2.
- (ii) That the period between 1978 and December, 2004 was taken as the check period for the case as most of the assets and wealth were found to have been acquired by the Appellant during that period as would be evident from the deposition of PI D. S. Rai, I.O., P.W.69 and the various documentary exhibits.



- (iii) That in the supplementary charge-sheet filed as a consequence of further investigation under Section 173(8) Cr.P.C., the quantum of disproportionate assets in possession of the Appellant was reduced to Rs.28,39,204/- from Rs.40,04,753.87 as contained in the original charge-sheet.
- (iv) Mr. Pradhan then went on to refer to the various portions of the judgment to emphasise how the prosecution had proved the extent of possession of assets of the Appellant and his dependent family members at the close of the check period, at the beginning of the check period, their income and expenditure during the check period.
- (v) It is then submitted that deduction of the value of the assets in possession of the accused at the beginning of the check period from the value of the assets found in the possession of the accused at the close of the check period, would reflect the value of the assets acquired by the accused during the check period which works up to Rs.85,38,829/.
- (vi) That the value of assets acquired by the Appellant during the check period added to the total




expenditure incurred by the Appellant during that period works out to Rs.10,32,864/- which is the gross value of the assets and wealth acquired by the Appellant during the check period.

(vii) Deduction of the total income of the Appellant during the check period from the total value of the assets and wealth acquired by the accused during the check period will result in the value of the disproportionate assets found in the possession of the Appellant at the end of the check period which works out to Rs.30,63,989/-.

(viii) That during the investigation, the Investigating Agency had afforded ample opportunities to the Appellant to explain such disproportionate assets in his possession which is evident from the deposition of the I.O., P.W.69, in his examination-in-chief. The Appellant instead of chose to adopt evading tactics to slow down the investigation and to find fault with the investigation.



- (ix) That the valuation of the four buildings of the Appellant as in Exhibits 126, 156, 127 and 129 are based upon the respective years of its construction furnished by the Appellant in his Annual Property Reports, Exhibits 32 to 37, proved by P.Ws 4 and 5. That the Engineers have applied the SORs of the period proximate to the year of construction of each building and, therefore, barring a few discrepancies, the valuation reports are correct. That the buildings of the Appellant and his family members cannot be without a valuation and since the Appellant in his defence has not proved the alternative valuation of the buildings as per his version, the valuation reports by the Government Engineers has to be considered as correct in the facts and circumstances of the case. The prosecution has given due benefits of incomes and expenditure to the Appellant wherever he was reasonably found entitled to.
- (x) That the efforts of the Appellant to prove through defence evidence that he had more income than



the ones listed in Statement C of the supplementary charge-sheet in the form of personal loans, help and assistance from relatives did not inspire confidence as those were not disclosed to the I.O. during the investigation.

- (xi) That the attempt on the part of the Appellant to prove by examining his wife as D.W.2, that she had income from 'Tshangu' film business, business of supply and running Hotel Asia, could not be believed for his failure to produce documentary evidence to substantiate such claim and the proof that she was being assessed to income tax on such business.
- (xii) Replying on the question of unreliability of the valuations of the buildings and the electrifications, for failure on the part of the prosecution to produce the SORs for the relevant years, it was submitted that the existence of the SORs was to be presumed having come in the deposition of engineers who are responsible Government Officers and that since the SORs are published in the Official Gazette, there is a presumption that

those are genuine documents by application of Section 81 of the Indian Evidence Act, 1872. Therefore, the valuation cannot be questioned simply because the SORs were not produced and proved. In support of this contention, the Learned Public Prosecution referred to the cases of –

- (a) **Bala Shankar Bhattjee vs. Charity Commission, Gujarat State : (1995) Suppl. (1) 485** (paragraph 22);
- (b) **ITC Bhadrachalam Paper Boards vs. Mandal Revenue Officer : (1996) 6 SCC 634**; and
- (c) **Union of India vs. Ganesh Das Bhojraj : (2000) 9 SCC 461.**

- (xiii) On the principle of burden of proof governing offence under Section 5(1)(e) of the Act of 1947 corresponding to Section 13(1)(e) of the Act of 1988, reliance was placed upon **State of Maharashtra vs. Wasudeo Ram Ramchandra Kaidalwar : (1981) 3 SCC 199** (paragraph 13) and most extensibly a decision of the Orissa High Court in **State, Prosecution vs. Bharat Chandra Roul : 1995 CRI.L.J. 2417**. Relying, *inter alia*, upon **Khandu Sonu Dhobi and Another vs. The State of Maharashtra : AIR 1972 SC 958** it was submitted



that all forms of irregularities do not vitiate the trial unless the defect in the investigation is such as would result in miscarriage of justice. The other cases relied upon on the above principle were **Krishna Pillai Sree Kumar and Another vs. State of Kerala : AIR 1981 SC 1237** (paragraph 11), **Sohrab vs. The State of Madhya Pradesh : (1972) 3 SCC 751** (paragraph 8), **Chand Khan and Another vs. State of U.P. : (1995) 5 SCC 448** (paragraph 19).

40. We have considered the respective submissions placed on behalf of the parties, examined the evidence and the records. Before embarking upon the merits of the case, we feel it essential to lay down the principle and scope governing Sections 5(1)(e) of the PC Act, 1947 that corresponds to Section 13(1)(e) of the PC Act, 1988. For convenience, we may at the first instance reproduce Section 13(1)(e) of the PC Act, 1988 which is in *verbatim* the provisions of Section 5(1)(e) of the PC Act, 1947.

"13. Criminal misconduct by a public servant.—(1) A public servant is said to commit the offence of criminal misconduct,—

.....
(e) if he 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."

41. The scope of the aforesaid provision has been found well expounded in **Wasudeo Ramchandra Kaidalwar (supra)** referred to by the learned Public Prosecutor in the following: -

"13.The ingredients of the offence of criminal misconduct under Section 5(2) read with Section 5(1)(e) are the possession of pecuniary resources or property disproportionate to the known sources of income for which the public servant cannot satisfactorily account. To substantiate the charge, the prosecution must prove the following facts before it can bring a case under Section 5(1)(e), namely, (1) it must establish that the accused is a public servant, (2) the nature and extent of the pecuniary resources or property which were found in his possession, (3) it must be proved as to what were his known sources of income i.e. known to the prosecution, and (4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once these four ingredients are 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. The burden then shifts to the accused to satisfactorily account for his possession of disproportionate assets. The extent and nature of burden of proof resting upon the public servant to be found in possession of disproportionate assets under Section 5(1)(e) cannot be higher than the test laid by the court in **Jhangan** case [AIR 1966 SC 1762], i.e. to establish his case by a preponderance of probability....."

42. This principle has been consistently followed in the subsequent decisions of the Hon'ble Supreme Court one of which is **K. Veeraswamy vs. Union of India and**



Others : (1991) 3 SCC 655 where the principle has been better explained as would be apparent from the following: -

"72. 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."

43. In the backdrop of the parameter of law set out, it is, thus, essential for us to consider as to whether in the facts and circumstances of the case, the prosecution has been able to discharge its initial burden and, if so, as to whether the appellant has been able to satisfactorily account therefor by discharging the burden of proof on the balance of probabilities. In furtherance to achieving that object, we may examine the facts of the case, as application of the law would certainly depend upon that.



44. From the charge-sheet as set out in the earlier part of this judgment and considering the stand taken by the prosecution during the trial it goes without saying that the entire assets set out in Statement B and the income during the check period contained in Statement C have been construed and presumed as the assets of the Appellant. This is a fact which shall be relevant for discussions that will follow later at an appropriate stage. But to begin with, we have found, as is the case of both the prosecution and the Appellant, that the bulk of the assets at the end of the check period and the income during the check period is constituted by 7 plots of landed properties, the agricultural income earned from those, 4 RCC buildings and the rental income earned from those buildings. It is, therefore, necessary for us to examine as to whether the prosecution has been able to discharge its initial burden that the Appellant has been in possession of the pecuniary resources or properties disproportionate to his known sources of income.

45. It is the consistent case of the Appellant at the trial and before this Court that except for one plot of land situated at Singhithang block, South Sikkim, rest of the



properties including the buildings are in fact the properties of his wife, Smt. Dikila Subba. The other landed properties said to be owned by his wife are Plot No.737 measuring 1.3880 hectares under Barbing, Ranka Block, East Sikkim, Plots No.110/753 and 111/752 measuring .0920 hectares under Tadong Block, Plot No.523 measuring .2320 hectares under Barbing Block, East Sikkim, Plot No.181 under Sripatam Block, South Sikkim, Plot No.Nil measuring 1.10 acres under Simkharka Block, South Sikkim and Plot No.236 measuring .2080 hectates under Sichey Block, East Sikkim. In so far as RCC buildings are concerned, they are (1) a three storied RCC building at Sichey Busty, Gangtok, (2) a six storied RCC building at Pani House in the 31A-NH, Gangtok, (3) a five storied RCC building at Development Area, Gangtok and (4) a three storied RCC building at Arithang, Gangtok.

46. In a case of the present kind, the foundation for arriving at a finding of disproportionate assets is the valuation of the properties making it vital for us to consider the correctness or the reliability of the valuation. The relevant prosecution witnesses on the valuation of the four buildings are P.Ws 31, 55, 62 and 68. These are the



persons who had inspected the four buildings, measured them and prepared the valuation reports. We may reproduce the relevant extracts of their evidence individually below: -

Kamal Gurung, P.W.31

"

All the four buildings of the accused and his wife inspected and measured by us were done floor wise, room wise and the valuation reports in respect of such buildings was prepared by duly applying the schedule of rates of the respective rates prevalent in the years of their constructions.

Cross-examination by Ld.Sr.counsel Shri A.Moulik assisted by Ld.counsel Mrs.K.D.Bhutia for the accused

.....

It is true that the calculation sheets prepared at the spot by us relating to valuation reports Exbt.126 to Exbt.129 are not available in the case records. Police had however seized the said calculation reports taken at the spot. The valuation reports Exbt.126 to Exbt.129 were typed out by the office clerk.

While preparing Exbt.126 to Exbt.129 and Exbt.5 to Exbt.12 we did not refer to the approved blue print plan of the respective buildings as the same were not before us. The measurements shown in the various exhibits pertaining to the foundation of the buildings referred (sic) to above were not taken but the measurements were based on assumptions and the reports also reflects the same. It is true that had we referred (sic) to the various Blue Print Plans of the buildings then the measurements relating to the foundations of the respective buildings would have been accurate. It is true that the the (sic) respective valuation reports for foundations items are not accurate.

We did not ascertain the extent of the total number of floors constructed up to 1.12.2004 of the various buildings of the accused since we valued the entire buildings on 8.9.2005.

It is true that when assessment of a building constructed in a particular year is valued the assessment is based on the schedule of rates of raw materials of that particular year. In the event that the

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schedule of rates for that particular year is not available then the assessment is based on the rates closest to the year of completion of the construction. Witness volunteers to say that if assessment of the year 1989 is made on the basis of the schedule of rates of 1994 the valuation is appropriately depreciated.

It is true that the valuation of the building at Dev.Area Exbt.126 was done as per schedule of rates of 1994 although year of construction was 1988-89.

It is true that in the year 1989 there was a schedule of rates of the Buildings and Housing Department, Govt. of Sikkim. Witness volunteers to say that the said schedule of rates is incomplete.

There is also schedule of rates in the PWD for the years 1991,1986 which are close to the year 1988-89.

It is true that the prices of cement and rod for the year 1989-90 are available in the schedule of rates of 1989-90.

"Depreciation" in the engineering parlance means decline in value of the building due to wear and tear from its useful life.

Assessment value is however different from depreciation value. Assessment value is the value of a building calculated at the time of construction by assessment method as per schedule of rates of a particular year.

While assessing the buildings in question the depreciation was made on the basis of a formula which is applied by the Buildings and Housing Department.

.....

The schedule of rates(SOR) for the year 1994 were not seized by the police but we handed it over to the police. It is true that the said SOR of 1994 is not in the records of the case shown to me today. It is not a fact that there was no SOR for the year 1994 maintained by the Buildings and Housing Department.

.....

It is true that the SOR maintained by the Government includes a 10% margin for the contractor however in private building this 10% margin is not required to be included in the SOR.

It is true that items at Sl.Nos. 1 to 5 of Exbt.126 pertains to foundation works of the building. It is true that there is no basis of assuming that 90% torsteel was utilized in constructing the building and 10% mild steel was utilized for the same purpose as such Sl.No. 8 of Exbt.126 is not an accurate valuation. Witness volunteers to say that the assumption was made on



the basis of standard assumption of materials used and size of the column and depth of the foundation. It is true that I have not specified in Exbt.126 that the assumption was made on standard assumption.

I cannot say whether the calculation shown to me in the Court room prepared by the accused as per SOR 1989 in respect of various items of Exbt.126 the total costs of construction of the building would be Rs: 6,67,650.89 only in respect of the building at Development Area.

I cannot say whether the document marked 'X' for identification shown to me in the Court room is the SOR for 1989.

It is true that the building at Pani House was constructed in 1978 and the schedule of rates used for assessment was of the year 1985. It is true that in this building also the depreciation method as above was followed and the depreciated costs of the building was fixed at Rs: 4,54,607/-. It is true that the SPWD has their SOR for the years 1978 and 1976. It is true that there are corrections both in measurements and rates of particular items in respect of Pani House's building, Gangtok.

I cannot say if the construction costs of the Pani House's building as per SOR 1976 is Rs: 1,99,321/- only.

It is true that as per Exbt.127 the year of construction of Arithang's building 1981-82 whereas SOR used is 1985." [emphasis supplied]

Mrs. Tenzing Dolma Bhutia (Rana), P.W.55

"Cross-examination by Ld.Sr.counsel Shri A. Moulik assisted by Ld.counsel Mrs.K.D.Bhutia for the accused

It is true that the valuations as well as the plans of the respective buildings were prepared (sic) as per specifications of each building. Measurement shown in Exbt.5 was taken in the year 2005. It is true that while preparing (sic) Exbt.5 we did not know the numbers of floor of the building constructed up to the end of the check period.

.....
I cannot say who had prepared the plan Exbt.6. This plan was also made as per the specification Exbt.7. It is true that Exbt.7 also does not reflect the numbers of each item found in the respective floors as well as the measurement thereof.
In preparing Exbt.7 and Exbt.6 the assistance of the

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blue print plan of the building was not taken into account. The underground items of each building were noted on assumption.

.....

It is true that the meaning of depreciation and costs of construction are different. It is true that the SOR were not seized by the police and the same are not available in the case records. It is true that valuations of some of the items found in the buildings were taken as per market price of the respective items because the same were not available in the SOR. It is true that while fixing or ascertaining the market price we had not called for any quotation from the market. Measurements of the four buildings were taken in the year 2005. It is not a fact that we had never taken measurements of the four buildings after visiting the spot. We did not ascertain the numbers of floors of respective buildings constructed and completed till 1.12.04. We had taken measurement of each completed building in the year 2006.”

[emphasis supplied]

Sangay Diki Bhutia, P.W.62

“Cross-examination by Ld.Sr.Counsels Shri A.Moulik and Shri N.B.Khatiwada assisted by Ld.counsel Mrs.K.D.Bhutia for the accused

Exbt.194 was not prepared by me. The Vigilance Department had sent Exbt.194 to our Department and it was placed before me. Accordingly I had checked the same. I have forgotten the reasons as to why Sl.No.1 of Exbt.194 was scored out. It was not scored out by me. The corrections made in Exbt.194 are not in my hand. It is true that there is no initial or signature of any officer on the corrections made in Exbt.194. It is true that valuation of Exbt.194 was done as per the SOR of 1985 and 2002. As I was not on the spot where the building is located therefore I cannot say as to who had valued the building as per SOR 1985 and 2002. I cannot say as to whether the valuation was done as per the SOR 1985 or 2002. It is true that Exbt.194 is a carbon copy. I cannot say as to where the the original of Exbt.194 was placed.

It is true that some calculations in Exbt.194 was assumed calculations. I cannot say as to whether the entries in Exbt.194 so far as quantities and amount are concerned are correct of (sic) not. Because I had just received the Exbt.194 and did not visit the location therefore I cannot say whether it was prepared at the spot upon verification or not.”

[emphasis supplied]

Mangat Ram Marwah, P.W.68



"During the year 2005 I was posted as Divisional Engineer in the Buildings and Housing Department (Planning), Govt. of Sikkim. As far as I recollect now I was directed by my Department to visit and inspect (sic) our buildings of Shri Dhan Subba and his family members located in four different locations at Gangtok Town.

.....

Based on the information collected by us as per the specification Exbt.19 we prepared the valuation of the said building(Mandhar lodge) on the basis the SOR of 1994 worked to Rs: 12,83,102/- and its valuation as per the year of its construction 1988-89 worked out at Rs: 12,08,015/-. Most probably we took the SOR 1994 for the year 1988-89 because the SOR for 1988-89 may not have been available.

The over writings and the addition by ink in Exbt.126 has not been effected by me. It may have been effected by the Planning cell before whom such valuations are placed for perusal.

Cross-examination by Ld.Sr.counsels Shri A.Moulik and Shri N.B.Khatiwada assisted by Ld.counsel Mrs.K.D.Bhutia for the accused

It is true that the assessment of item No.13 at page 4 of Exbt.128 relating to Arithang Building the valuation has been assessed as per the rate of 2002. It is true that had we calculated the valuation of the building at Arithang as per SOR of 1981 then the valuation would have been accurate and we could have arrived at a correct valuation of the said building.

I cannot now say if we had valued the item Nos. 6, 9 and 14 of Exbt.128 as per the SOR 1994. It is not a fact that there was no SOR 1995. It is not a fact that the valuation assessed by us in Exbt.128 is highly inflated and are not according to any SOR of the government. It is true that the SOR for the year 1985, 1994 were not seized by the Police nor the same are before me.

As per Exbt.156 the year of construction of the building at Pani House is 1978 and the SOR used is 1985 though the SOR for the years 1980 and 1982 proximate to the year of construction was available. Had the valuation been done as per 1978 schedule then the (sic) valuation would have been perfect. The corrections in Exbt.158 were not done by me.

.....

It is true that the valuations of item Nos.15,16 and 17 in Exbt.156 has been done as per the SOR 1994. It is not a fact that there was no SOR for the years 1985 and 1994. At the relevant time there was

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SOR for the year 1984-85 in the SPWD. It is true that SOR are prepared by the SPWD.

.....

I cannot say as to who had prepared the sketch plan and the specifications of the buildings at Pani House, Arithang, Development Area and Sichey.

.....

I cannot say as to whether market price was considered while valuing the four buildings for which SOR were not available for the respective years.

It is true that I cannot say as to whether the valuations of the items at Sl.Nos. 3, 5, 7, 9, 18 and Sl.Nos.4, 5, and 3 in respect of boundary fencing and yard fencing we done as per SOR 1998. It is true that if the valuations would have been done as per the SOR proximate to the year of constructions of each building then we could have arrived at correct valuations of the buildings.

It is true that I cannot say the year of commencement and completion of the construction of each building assessed by us. I cannot also say how many floors were constructed in respect of each building assessed by us till 1.12.04. It is not a fact that I am deposing falsely." [emphasis supplied]

47. From the evidence of the witnesses extracted above, we find that it is an admitted position that –

- (a) the calculation sheets prepared at the spot relating to valuation reports, Exhibits 126 to 129, were not available although seized by the Police;
- (b) the approved blue print plans of those buildings were not before them at the time of the valuation;
- (c) the measurement of the foundation of the buildings were not taken but were on the basis assumptions and that if it had been taken on the basis of the approved blue print plans the valuations would have been accurate;



- (d) the buildings were measured on 08-09-2005 but to what extent the building had been constructed till 01-12-2004 (end of the check period) was not ascertained;
- (e) the building at Development Area was measured as per the SOR of 1994 although its construction was completed in the year 1988-89 as would appear from the valuation report, Exhibit 126;
- (f) the SOR for the year 1989 of the Buildings and Housing Department, Government of Sikkim did exist but was incomplete;
- (g) there were no SORs in the SPWD for the years 1991 and 1996 or for such years which are close to the year 1988-89;
- (h) the SOR for the year 1994 was neither in the records nor exhibited in Court;
- (i) the valuation of some of the items found in the buildings were taken as per market price as they were not available in the SORs but no quotation was called for from the market for fixing or ascertaining the market price;
- (j) the building at Pani House, Gangtok although admittedly constructed in 1978, the SOR applied for its assessment was of the year 1985 as would appear from the valuation report, Exhibit 156. While arriving at the valuation report Exhibit 156, some of the items were valued as per SOR of 1994 while rest are based upon SOR of 1985; and



- (k) for assessment of the building at Arithang, Gangtok, Exhibit 194, SORs for both 1985 and 2002 were applied when admittedly the building had been constructed in the year 1981-82 as is apparent on the face of the valuation report, Exhibit 127.
- (l) PW-62 is unable to state as to whether it was the SOR of 1985 or 2002 that was applied for valuation of Arithang building and that some of them were assumed calculations.
- (m) That none of the engineers, who valued, was an approved valuer.

48. On careful examination of the valuations, we find that there are two reports pertaining to the building at Arithang, namely, Exhibit 128 reflecting Rs.4,48,322/- and Exhibit 194 as Rs.2,30,281/-. The latter appears to be a depreciated value and, therefore, presumably accepted by the Trial Court.

49. We have also noticed a large number of corrections in the valuation reports which P.Ws 31, 55, 62 and 68 have not been able to explain although they were the ones who prepared them.



50. We find the same deficiencies in the valuation of internal wirings of the aforesaid buildings, namely, Exhibit 140 for the Sichey building, Exhibit 159 for the Pani House building, Exhibit 164 in respect of the building at Development Area, Gangtok (Mandaar Lodge) and Exhibit 165 in respect of building at Arithang. It was stated that for all these valuations SOR for the year 1989 had been applied when, except for the house at Development Area which was said to have been constructed in 1988-89, concededly were constructed much earlier. From the evidence we find that the buildings at Sichey and Pani House were constructed in the year 1978 and the one at Arithang in the year 1981-82. It is an admitted case that no depreciation was allowed on the valuation of any of those buildings. It is also in the evidence of P.W.49, an Engineer in the Power Department, Government of Sikkim, who had conducted the valuation in the building at Pani House, that the rates of certain materials in the 1989 SOR which had been applied by them were higher than the market rates. It is also in the evidence of P.W.49 that there were concealed wirings as well as baton wirings, casing and capping wirings and that they had not consulted the concerned person who had fitted the electric



lines. It is, therefore, difficult to understand as to how the valuation as reflected in Exhibit 159 was arrived at when the wirings were not visible. It is also in the evidence of this witness that Exhibit 159 was prepared in 2006 when the check period was only till 01-12-2004 and admittedly the number of storeys added to the building after 01-12-2004 was not verified. The SOR of 1989 was also concededly not produced. P.W.50, Assistant Engineer in the Power Department who prepared the reports of the buildings Exhibit 160 also conceded that the year of construction of the buildings were not ascertained and the SORs vary as per market price of the respective items.

51. As regards the building housing the Mandaar Lodge at Development Area and Hotel Reverie at Panihouse, SORs of 1989 that was said to have been applied, was not produced. It is an admitted position in the evidence of P.W.54, Executive Engineer, Power Department, that the valuation of Mandaar Lodge was on the higher side and were not accurate since the SOR of 1989 was applied in respect of wirings and fittings that were laid and installed long before that. It is also



admitted that valuation in respect of Hotel Reverie at Panihouse was incorrect.

52. With regard to the internal wiring of the building at Arithang, PW-50, the Assistant Engineer, Power Department who prepared the valuation, Exhibit 165, has admitted in his evidence that the valuation was done in the year 2006 without ascertaining the year of its construction and the number of floors that were added to those building after 01-12-2004. That the rough sheets upon which notes were taken down while taking the measurements to arrive at the valuation were not seized by the Police. Admittedly also SORs vary as per market price of respective items and that rates are prepared maintaining a margin of 10% as contractors' profit maintaining additional margin of 4% for the purpose of sales tax. It is seen that the nature of the wirings are the same in all the buildings as the one at Sichey.

53. Similarly, PW-60, who was also involved in the valuation of electrical fittings conceded that there were vast differences in rates of some of the items quoted in the valuations of the buildings. For instance, it is admitted that the price of MCB with box 16 Amps has



been taken as Rs.108/- in case of Arithang building but for the same item it has been shown as Rs.330/- per piece, i.e., more than 300%, in case of the building at Panihouse. Similarly, in the Arithang building the rate of wire in item 20 is quoted as Rs.11/- per piece of 6 sq.ml.meter of copper wire, while for a lesser power of 1.5 sq.ml.meter at item 7 statement it is quoted as Rs.33.50. The rates of 'bus-bar' of Panihouse building constructed in 1978 and the one at Development Area constructed in 1994, i.e., sixteen years later, are identical at Rs.1372/-.

For all the aforesaid reasons, the valuations of the internal wirings of the buildings also do not inspire our confidence.

54. Mr. J. B. Pradhan, Learned Public Prosecutor has no doubt submitted that the Engineers have applied the SOR of the period proximate to the year of construction of each of the buildings and that barring few discrepancies the valuation reports are correct. It is further his submission that the buildings of the Appellant and the members of his family cannot be without a valuation and since the Appellant has not proved any alternative valuation the one submitted by the Government Engineer



have to be accepted as correct. We also find that the Learned Special Judge in the impugned judgment has accepted the valuations as those having been assessed by persons who had been doing this regularly.

55. In our view, the submission of the Learned Public Prosecutor and the approach of the Learned Trial Court do not appear to be sound. We have already dealt with in detail as to why it was essential for the prosecution to have produced the SORs said to have been applied for the purpose of the valuation. We have held that withholding the SORs firstly deprives not only the Appellant but also the Court to examine the correctness of the valuations and secondly, renders the very existence of those SORs suspect. We have also pointed out the serious discrepancies noticed in the method adopted while valuing the buildings. These, in our view, are not minor discrepancies but rather fatal for the prosecution case. The discrepancy casts a serious doubt on the valuations which is the sole ingredient for assessing the disproportionateness of the Appellant's assets.

56. As per Mr. J. B. Pradhan the SORs having been published in the Official Gazette there is a presumption of



its genuineness under Section 81 of the Evidence Act. He submits that the SORs are admissible in evidence being Official record evidencing public affairs and that the Court can presume its contents as genuine also under Sections 35 and 38 read with 81 of the Evidence Act unless the contrary is proved. In support of his contention, reliance was placed in **Bala Shankar Bhattjee (supra)**, **ITC Bhadrachalam Paper Boards (supra)** and **Ganesh Das Bhojraj (supra)**.

57. We are not impressed by the submission of Mr. Pradhan as he has clearly misconstrued the provision of Section 81 and other cognate provisions of the Evidence Act referred to by him. For better appreciation, Section 81 is reproduced below: -

"81. Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.— The Court shall presume the genuineness of every document purporting to be the London Gazette, or [any Official Gazette, or the Government Gazette] of any colony, dependency of possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament [of the United Kingdom] printed by the Queen's Printer and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody."

[emphasis supplied]



58. On a bare reading of the provision it will be apparent that the genuineness of any Official Gazette or a Government Gazette will be presumed by a Court "if such document is kept substantially in the form required by law and is produced from proper custody". In other words, in order for the Court to presume the genuineness of anything published in the Official Gazette it is mandatory in law to produce such Gazette before the Court by a person having its lawful custody. In all the three cases referred to by Mr. Pradhan the concerned documents that were published in the Gazette had been produced and it was under such facts and circumstance that the decisions were rendered. As already noted by us, in the present case the prosecution has failed to produce the SORs. The contention, therefore, appears to be clearly misconceived.

59. In **G. M. Tank vs. State of Gujarat & Another** : **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]



60. From the mass of confusion emerging from the evidence of the prosecution witnesses analyzed above, it is difficult for us to accept that the prosecution has discharged its burden of establishing the charge beyond reasonable doubt. A number of SORs have been referred to but those were neither produced nor tendered in evidence. Had it been brought on record it would have assured us of the existence of such SORs, facilitating us in verifying the correctness of the valuations and of those SORs having been applied. It has also been revealed from the evidence that although the SORs of the years proximate to the years of construction of the buildings were available, the valuers preferred to apply the SORs of distant periods. We do not find the method of "depreciation" having been applied except for the building at Pani House with regard to which we have already discussed. The other aspect which is the cause of our grave concern, is the application of market rates admittedly without verifying and ascertaining its correctness. We have also noticed in the evidence of P.W.68 that in the Pani House building while arriving at the valuation, Exhibit 156, SORs of 1994 had been applied



when admittedly the building was constructed in 1985. It baffles us as to why SORs of the year 1982 at least were not applied, when admittedly it was available as per this witness. Apart from all these, there are conflicting versions appearing in the evidence of PWs 31, 55, 62 and 68 as to which of the SORs would apply.

61. Non-production of the SORs said to have been applied would certainly amount to concealment of evidence and by application of Section 114(g) of the Evidence Act an adverse presumption would arise against the prosecution. The conflicting, confused and rather vague nature of evidence alluded to in detail further confounds the matter, rendering the case of the prosecution on this aspect gravely suspect. The prosecution most certainly has failed to pass the test laid down in the case of **Wasudeo Ramchandra Kaidalwar (supra)** and **G. M. Tank (Supra)** and consequently has failed to discharge the initial burden cast upon it under Section 5(1)(e) of the PC Act, 1947 corresponding to Section 13(1)(e) of the PC Act, 1988. Under similar circumstances this Court, in **Crl.Appeal No.4/2008** in **Padam Lal Gurung vs. State of Sikkim; Crl. Appeal**



No.4/2010; Central Bureau of Investigation vs. N. B. Bhandari; in O. T. Bhutia vs. State of Sikkim (2010) 4 Crimes 446 and in Crl.Appeal No.05 of 2007 : Shri Nar Bahadur Bhandari vs. State of Sikkim, had quashed the prosecution cases as the valuation of the assets which formed the basis of the alleged disproportionate assets were found to be unreliable for the same inadequacies found in the present case.

It has been observed by a Single Bench of this Court in **O.T.Bhutia vs. State of Sikkim (supra)** that -

“As has been held in the **State of Maharashtra v. Wasudeo Ramchandra Kaidalwar** (supra), the burden shifts only when those four ingredients are established. In the instant case, for the reason already indicated above, the burden did not shift. Then again the extent and nature of burden of proof resting upon public servant found in possession of disproportionate assets under Section 5(1)(e), as held in the said decision, cannot be higher than the test laid down by the Hon’ble Supreme Court in Jhagan’s case (AIR 1966 SC 1762), i.e. to establish the case by preponderance of probability.”

62. Next is the rental income earned from the four buildings some of which were either rejected or partially allowed by the Learned Special Court.

I. Rental income from Pani House Building

(a) The claim of the Appellant’s wife having received rental income from this building from the following tenants :-

Crl.A. No. 02 of 2013(i) Brajeshwar Banerjee

From 1983 to 1991, i.e., 9 years (108 months) @
Rs.1,200/- per month = Rs.1,29,600/-

(ii) Safiullah


From 1984 to 1994, i.e., 11 years (132 months) @
Rs.500/- per month for one flat = Rs.66,000/-
From 1984 to 1994, i.e., 11 years (132 months) @
Rs.1,200/- per month for another flat =
Rs.1,58,400/-

Total Rs.2,24,400/-

(iii) Abdul Khalik

From 1985 to 1995, i.e., 10 years (120 months)
@ Rs.1,200/- per month = Rs.1,44,000/-.

(b) On the above, we find that the I.O., PW-69, in his cross-examination has admitted affidavits having been filed by them during the investigation affirming payment of varying sums by them against rent to the wife of the Appellant and, that he did not take those into account during the investigation. Had the situation remained only thus, we may have considered granting the benefit of this unfair investigation to the Appellant, apart from the erroneous rejection of the affidavits by the learned Trial Court filed before it as Exhibit D3 by the Appellant, on the ground of those being only photocopies, when admittedly the originals had been submitted to the I.O. at the stage of investigation. But then, this did not absolve



the Appellant from the burden of proof of his claim by producing the three as witnesses. This having not been done, we find it difficult to accept the claims on this account and uphold the finding the Learned Trial Court.

(c) We also find from the records a letter (Exbt.D6) bearing No.9/CFNEU/ER/Gtk/2012/301 dated 06-12-2012 written to Mrs. Dikila Subba wife of the Appellant by the Demonstration Officer of the Ministry of Women & Child Development, Food and Nutrition Board, Community Food & Nutrition Extension Unit, Arithang Road, Gangtok, which states that a monthly rental of Rs.610/- from 01-07-1986 to 30-06-1991, i.e., 5 years and an enhanced rate of Rs.1,040/- per month for the period with effect from 01-07-1991 to 30-11-1996 were paid in respect of the Pani House Building. We may reproduce below the letter in *verbatim*:

**"Government of India
Ministry of Women & Child Development
Food & Nutrition Board
Community Food & Nutrition Extension Unit
Arithang Road, Gangtok.
Ph.:03592 – 203304
E-mail: cfneumwcdgtk@gmail.com**

Crl.A. No. 02 of 2013

To,
Mrs. Dikkila Subba
Pani House, Gangtok
Sikkim.

Madam,

With reference to your letter bearing no Nil & dt Nil received by this office, from you regarding the rent received for the portion of your building occupied by this office from 1st July 1986 to till vacation 30th November 1996.

It is to intimate you that the available records at this office revealed that, as per the CPWD rent assessment and agreed upon by you under lease contract the monthly rent payment was Rs 610/- (Rupees Six Hundred Ten) only for the period w.e.f. 01.07.1986 to 30.06.1991(five years) & the next renewal of rent @ Rs1040/- (Rupees One Thousand Forth) only per month for the period w.e.f. 1st July 1991 to 30.11.1996, the vacation date upon lease expiry termination of contract. All the payments were done through demand draft drawn in your name directly by our Hqr Kolkata office.

Thanking you,

Yours faithfully,

Sd/-
06/12/12

Demonstration Officer, Gangtok

(seal) Demonstration Officer
C.F.N.E.U. Ministry of W&CD
Govt. of India
Gangtok-Sikkim"
[emphasis supplied]

(d) This fact has been admitted by the I.O.,
P.W.69 in his evidence as would appear from the
following: -

"

It is true that as per letter dated: 6.12.12 the rent income of the wife of the accused has been shown at the rate of Rs: 610/- per month for the period 1.7.86 to 30.6.91 and at the rate of Rs. 1040/- per month for the period 1.7.91 to 30.11.96. Exbt.D-6 in one page is the said letter issued by the Demonstration Officer, C.F.N.E.U, Ministry of W & CD, Govt. of India, Gangtok- Sikkim.



....."

(e) As per the above, the details of payment would thus be as under: -


- (i) From 01-07-1986 to 30-06-1991, i.e., 5 years @ Rs.610/- p.m. = Rs.36,600/-
- (ii) From 01-07-1991 to 30-11-1996, i.e., 65 months @ Rs.1,040/- p.m. = Rs.67,600/-

Therefore, the total amount received from his Rs.36,600/- + Rs.67,600/- = Rs.1,04,200/-.

We do not see any reason as to why the claim should not be allowed as we find that such payment stands confirmed by a letter from a responsible officer of the Ministry under his official letter-head and signed under his official seal. Surprisingly, we do not find any discussion regarding this and appears to have been completely overlooked by the learned Special Judge.

II. Mandaar Lodge, Development Area

(a) We are inclined not to interfere with the rejection of rental income from Nirmal Dutta, D.W.4 on the strength of Lease Agreements, Exhibit D-10 and D-11, as we find the claim in conflict with the contents of the Income Tax file of M/s. Mandaar Lodge, Exhibit 45 which is an official record that



contains a letter dated 27-05-2003 written to the Joint Income Tax Officer by the Appellant's wife conveying that the "hotel, MANDAAR TOURIST LODGE has been closed since the last THREE YEARS. That is, from the year 2000 onwards, (after the lease with W.B Tourism got over)." We find this duly recorded in the note addressed to the ITO at note sheet page 3 of the file, Exhibit 45.

(b) The Learned Trial Court is found to have accepted the claim of rental income of Rs.13,92,300/- received by the wife of the Appellant from WBTDC on the strength of Lease Agreement, Exhibit 217 but rejected the claim of Rs.2,31,000/- against maintenance charges and for Satellite receiver System.

(c) The claim on additional charges was rejected on the ground that the Appellant was unable to prove it by any supporting documents and also having failed to establish that such payments were made by him. This finding, in our view, appears to be quite perverse to the very document, Exhibit 217, in which we find Clauses providing for the maintenance contract, marked Exhibit 217(n) and

Exhibit 217(o). The I.O., P.W.69 in his evidence has also conceded that "Exb. 217 dated: 10.9.93 is the said Lease Deed and the enclosure thereof is the maintenance contract agreement which is an agreement in addition to the Lease Agreement. It is not a fact that I have not taken into account the sum of Rs: 3000/- per month payable to the owner of the Mandhar Lodge by the West Bengal Tourism Department for the entire period of Lease."


(d) We have examined the maintenance contract agreement and find that it contains two additional components for which charges were paid to the owner. We may, for convenience, reproduce the following: -

"11. The Second Party shall also provide a fully maintenance System and Satellite receiver System for which the First party will pay Rs. 1,200=00 (Rupees one thousand two hundred only per month.

.....
A SUM OF Rs. 1,800=00 (RUPEES ONE THOUSAND EIGHT HUNDRED) ONLY PER MONTH WILL BE PAID TO THE SECOND PARTY BY THE FIRST PARTY FOR CARRYING OUT ABOVE STATED MAINTENANCE WORKS.

THIS AGREEMENT TAKES EFFECT FROM 01-04-95."

(e) Considering the fact that the WBTDC had been in occupation of the Mandaar Lodge building at Development Area from September, 1993 to August,



2001 and that the maintenance agreement commenced from 01-04-1995 to the end of the period of lease, i.e., August, 2001, the Appellant's wife was entitled to the additional charges for 77 months @ Rs.3,000/- per month which comes to Rs.2,31,000/-. We find it difficult to understand as to why the Learned Special Judge rejected this in the impugned judgment when the rental income in terms of the very Lease Deed, Exhibit 217 was found legitimate. We, therefore, allow an additional income of Rs.2,31,000/- against the special charges in terms of the maintenance contract agreement forming part of the Lease Deed, Exhibit 217. The total amount of rental income received from Mandaar Lodge would thus work out to Rs.16,23,000/-. (i.e. Rs.13,92,300/- + Rs.2,31,000/-)

III. Rental income from Arithang and Jorethang buildings

(a) It is revealed from the records that six persons who were the tenants of the Arithang building have appeared as prosecution witnesses being PWs 40, 41, 43, 44, 45 and 56 who have categorically deposed that they were residing as



tenants in the house of the Appellant at Arithang. As per the evidence the position indicated in the chart below emerge as undisputed facts:-


Name	Period occupied	Number of months	Average monthly rent	Amount
Kapil Mani Adhikari, P.W.40	01-11-2001 To 2004	38	Rs.1,500/-	Rs.57,000/-
Deepak Kumar Rai, P.W.41	1999 To 2000	24	Rs.1,500/-	Rs.36,000/-
	December, 2001 To December, 2004	37	Rs.1,700/-	Rs.62,900/-
Bharati Pradhan, P.W.43	September, 2001 To August, 2004	36	Rs.1,700/-	Rs.61,200/-
Roshanlal Agarwal, P.W.44	February, 2004 To December, 2004	11	Rs.1,400/-	Rs.15,400/-
L.B. Chandra Subba, P.W.45	February, 2004 To December, 2004	11	Rs.1,400/-	Rs.15,400/-
			Total	Rs.2,47,900/-
Shyam Bhushan Pradhan, P.W.56 Rent enhanced by 20% in every three years	1985 To 1987	36	Rs.900/-	Rs.32,400/-
	1998 To 1990	36	Rs.1,080/-	Rs.38,880/-
	1991 To 1993	36	Rs.1,296/-	Rs.46,656/-
	1994 To 1996	36	Rs.1,555/-	Rs.55,980/-
	1997 To 1999	36	Rs.1,866/-	Rs.67,176/-
	2000 To 2002	36	Rs.2,239/-	Rs.80,604/-

	2003 To 2004	24	Rs.2,686/-	Rs.64,464/-
			Total	Rs.3,86,160/-

(b) It is not understood as to why the learned Special Judge did not allow the rental income arising out of the five tenants, namely, PWs 40, 41, 43, 44 and 45 amounting to Rs.2,47,900.00 while allowing the one accruing from PW56, the sixth tenant, amounting to Rs.3,86,160.00.

Thus, the total rent accruing from the six tenants, namely, PWs 40, 41, 43, 44, 45 and 56 would amount to Rs. 2,47,900.00 + Rs.3,86,160.00 = Rs.6,34,060.00.

(c) Out of the nine tenants occupying the Arithang building, we have noted that only six have entered the witness box, i.e., PWs 40, 41, 43, 44, 45 and 56. The three others were not examined by the prosecution when it is in the evidence of PW56 that all the nine units in that building were fully occupied by tenants from the year 1985 to 2004 at an average monthly rent of Rs.900.00 per month. This having come in the evidence of a prosecution witness, we



have no hesitation in accepting that the remaining three tenants also occupied the premises and paid Rs.900.00 per month as rental. The evidence of PW56 assumes greater force, as it is undisputed that he was also the caretaker of the house and used to collect the monthly rents from the other tenants on behalf of the Appellant's wife.

For the sake of clarity on this, we may reproduce below the evidence of PW-56, PW-40, PW-41 and PW-44 :-

PW-56

"I know the accused standing in the dock. I was residing in a rented room in the house of Dhan Subba between 1985 to 1991 and again between May 1996 to December 2004. My premises was on the first floor of the said building.

Initially I was paying monthly rent of Rs: 1500/- later it was raised to Rs: 1700/-. The enhancement of the rent could have been in the year 1998 but I am not able to recollect the exact period now. The building was three storied which had nine units all of which were occupied by the tenants.

Cross-examination by Ld.Sr.counsel Shri A. Moulik assisted by Ld.counsel Mrs.K.D.Bhutia for the accused.

I used to collect rents from all the tenants since the year 1985 till the year 2004 and rent per month in average used to be paid by each tenant at the rate of Rs: 900/- per month. All the nine rooms in the three floors were fully occupied by the tenants right from 1985 till 2004."

PW-40

"I do not know the accused standing in the dock, however during November 2001 to end of 2004 I was residing in rent in the house of Dhan Subba at Arithang at a monthly rent of Rs.1400/- initially later it was



increased to Rs.1600/- per month but I do not now recollect the month from which the rent was increased.

One Shyam Bdr. Pradhan who was the caretaker of the house of the accused used to collect the monthly rent from me....."

PW-41

"I am seeing the accused standing in the dock for the first time today. During the year 1999 I was residing on rent in a building by the name of Dikila Building at Arithang at a monthly rent of Rs: 1500/- initially later after two years it was increased to Rs. 1700/- per month.

One old tenant in the said building used to collect the rents on behalf of the building owner from me....."

Cross-examination by Ld.Sr.counsels Shri A. Moulik and Shri N. B. Khatiwada assisted by Ld. Counsel Mrs. K. D. Bhutia for the accused

"


The old person of Pradhan community was the caretaker of the said building who was also a tenant in the same and used to collect rents from all the tenants of the building....."

PW-44

"I have been residing on rent at Arithang in the RCC building of one D.B.Subba on rent. I do not kow the accused standing in the dock. However I have not met the owner of the building personally. The rents in respect of the premises occupied by me in the said building used to be collected by one Shyam Pradhan who was also a tenant in the same building....."
(emphasis supplied)

(d) We may thus calculate the rent paid by the three other tenants as under: -

Number of tenants	Rental income per month	Total number of years	Gross Total
03	Rs.900/-	20	Rs.6,48,000/-



Thus, the total rent collected by the Appellant's wife from the Arithang building for a period of 20 years would be, Rs.6,70,060/- (from six tenants) + Rs.6,48,000/- (from three tenants) = Rs.13,18,060/-.

(e) As regards the Jorethang building, PW-47, as would appear from his evidence, was a tenant in it from January, 2002 to December, 2004 i.e., 36 months, on payment of a monthly rent of Rs.1000.00 thereby making Rs.36,000.00 as the total amount of rent paid by him against Rs.20,000.00 accepted by the Special Court.

(f) We find that the trial Court has allowed only Rs.4,06,160.00 as total rental income for both the buildings at Arithang and Jorethang, which obviously appear to be the total rent of Rs.3,86,160.00 paid only by PW56 at Arithang building overlooking the payment made by the 5 other tenants, PWs 40, 41, 43, 44 and 45 and, Rs.20,000.00 by PW47 for the Jorethang building. From what we have discussed, this obviously is erroneous as the total amount for the two buildings



would infact be Rs. 13,54,060.00 i.e., Rs. 13,18,060.00 for the Arithang building plus Rs. 36,000.00 from the Jorethang building.

(g) From the aforesaid discussions, the total amount of rental income would thus be as follows: -

Sl.No.	Buildings	Total Amount	Additional Rent
(i)	Mandaar Lodge, Development Area Building	16,23,000.00	(+Rs.12,31,000.00)
(ii)	Pani House Building	Rs.1,04,200.0	(+Rs.1,04,200.00)
(iii)	Arithang Building	Rs.13,18,060	(+Rs.1,04,900.00)
(iv)	Jorethang Building	Rs.36,000.00	(+Rs.16,000.00)
	Total	Rs.30,75,260.00	(Rs.12,63,100)

63. Following the principle laid down in **K. Veeraswamy (supra)** it is permissible for the Appellant to rely upon the prosecution witnesses to explain and prove his case. The rental income pertaining to Arithang and Jorethang buildings in particular have been calculated solely on the basis of the evidence of prosecution witnesses and, therefore, as held in **In Re K. V. Ayyaswamy : AIR 1965 AP 105** it is not necessary for the Appellant to adduce evidence *aliunde* to prove those



very facts. It is also pertinent to note that none of the prosecution witnesses were declared hostile.

IV. Income from agriculture

64.(a) Referring to items no.12 to 18 under Statement C of the charge sheet, it was submitted by Mr. Moulik that the Appellant had been given the benefit of the income of Rs.14,80,806/- which was reduced in the supplementary charge sheet to Rs.8,73,623/-. This was later enhanced to Rs.13,49,633/- by the Learned Trial Court in the impugned judgment for the reasons given in paragraphs 86 to 91. Mr. Moulik, however, submits that the amount ought to have been Rs.25,10,600/- for the reasons stated briefly as under: -

- (i) The agriculture income against Singithang land for the period 1985 to 2004 vide Exhibit 47 at Rs.59,800/- was accepted by the Learned Trial Court and also conceded on behalf of the Appellant;
- (ii) The total income of Rs. 10,36,856.00 conceded by the prosecution in respect of the land at Sripatam and Dew at Rs.1,47,240/- and Rs.8,89,616/- respectively, was incorrect when it ought to have



been Rs.11,00,800/- which as per the learned Counsel is the correct value of the annual income of both the lands taken together assessed at Rs.44,032/- per annum multiplied by 25 years, i.e., 1980 to 2004. The amount being on the higher side, it ought to have been granted to the Appellant.

(b) In our view, the argument as regards (ii) above does not appear to be sound. The rate estimated at Rs.44,032/- per annum was fixed in terms of a notification dated 18-05-2001, Exhibit 72 and, therefore, would be applicable only after that date and not before. We do not find any criteria to assess the rates prior to the one fixed by the notification dated May, 2001 as referred to in Exhibit 72.

(c) We also find in the records, Exhibit 170, another certificate of income issued by the Sub-Divisional Magistrate, Rabongla in respect of the land at Dew Block at Rs,3,65,208/- and Rs.64,525/- for the Sripatam land. In the first instance, it is not understood as to how there can be two different


assessments for the same land and secondly, we find that Exhibit 170, the second assessment which is on the lower side, does not appear to cover the entire check period but only from the year 1985 onwards. Moreover, the statements Exhibit 72 and Exhibit 170 are found to be mutually conflicting particularly with regard to the income commencing from the month of May, 2001. The evidence on this is bereft of clarity. Under the circumstances, we are inclined to uphold the income conceded by the learned Special Court at Rs.13,49,633.00 in its impugned Judgment.

(d) Similarly, we do not find any reason to interfere with the agriculture income accepted by the Learned Trial Court in respect of the other landed properties. The details of agricultural income will thus remain undisturbed as under: -

(i)	Sripatam Dew land	: Rs.10,36,856.00
(ii)	Barbing–Tadong land	: Rs. 8,60,000.00
(iii)	Sripatam land purchased in 1989	: Rs. 64,525.00
(iv)	Tadong field at Dew Block vide Exbt.170	: Rs. 3,65,208.00
(v)	Income from Singithang land at Singithang, Namchi between 1978–2004	: <u>Rs. 59,800.00</u>
Total		: <u>Rs.23,86,389.00</u>

65. Income from Business Turnover of business of the wife of the Appellant


Against the business turnover of Hotel Reverie at Pani House, the Learned Trial Court has granted Rs.9,34,500/- based on the evidence of PW-12 and Assessment Order dated 12-05-2004 contained in the Income Tax file, Exhibit 44, pertaining to the hotel. The case of the wife of the Appellant on the other hand had been that during the period 1997-98 to 2003-04 falling within the check period, she had a gross turnover of business of Rs.20,12,333/-. In support of this, reliance was placed upon Exhibit D5, a Certificate issued by the Income Tax Department vide Letter No.383/IT dated 30-06-2007. Upon examination of these two documents, we find that the Assessment Order dated 12-05-2004 contained in Exhibit 44 relied upon by the Learned Special Court, pertain only to the assessment years 2000-01 to 2003-04, the gross turnover for which period was Rs.9,34,500/. On the other hand, the Certificate dated 30-06-2007 issued by the Joint Secretary-II, Income Tax, Income and Commercial Tax Division, Finance Department, Government of Sikkim, marked Exhibit D5 upon which the Appellant relies, reflects the turnover for



the assessment years 1997-98 to 2005-06. We also find from Exhibit D5 that the business turnover of the Appellant's wife during the period 1997-98 to 2003-04 falling within the check period is Rs.16,32,000/- against Rs.20,12,333/- claimed by her which obviously appears to be on account of the erroneous inclusion of the turnover for the year 2004-05. Therefore, in our view, Smt. Dikila Subba, the wife of the Appellant, would be entitled to the benefit of gross turnover of Rs.16,32,000/- against Rs.9,34,500/- allowed by the Learned Special Judge, i.e., additional amount of Rs.6,97,500.00. We accordingly direct so.

66. Income of the wife of the Appellant, Smt. Dikila D. Subba

(a) As observed in the earlier part of this judgment, the prosecution has proceeded on the premise that the entire assets and income set out in "Statement B" and "Statement C" of the charge-sheet as acquired and owned by the Appellant. On the other hand, the assertion on behalf of the Appellant has been that much of those are the properties of his wife, Smt. Dikila D. Subba, who had sufficient earnings of her own from different sources. On



examination of the records and the evidence and upon consideration of the oral submissions, we find considerable force in the case being urged on his behalf.

(b) It is in the evidence of PW-3 that the wife of the Appellant used to do various kinds of business, a fact that finds corroboration in the evidence of PW-15. The relevant portions of their evidence are reproduced below for convenience: -

PW-3

".....It is true that I know the wife of the accused who used to do various business like supply of milk, contract works, and hotel business and they are well to do person in the village. I also know that the wife of the accused come from well to do family."

PW-15

".....My mother used to do her separate business of hotel and also was a producer of Tschangu films. She runs a hotel namely Asia Lodge owned by Shri N. K. Pradhan, a Minister of the present government and a hotel named Meridian at Zero Point owned by the present MLA, Shri Panth. She also owns two other hotels namely hotel Reverie at Pani House and Hotel Mandar at Development Area. The hotels were constructed by my mother with her own funds....."

(c) As per the Appellant, his wife Dikila Subba, had acquired the following landed properties : -



- (i) Land at Barbing, Ranka purchased by her at a consideration value of Rs.55,000/- on payment of Registration fee of Rs.2750/- vide Sale Deed Document, dated 3rd February, 1999, Exbt.69 ;
- (ii) Land at Tadong purchased at a consideration value of Rs.28,000/- vide Sale Deed Document Exhibit 62 ;
- (iii) Another plot of land purchased at Barbing Block for a consideration value of Rs.10,000/- vide registered Sale Deed dated 01.04.1995, Exhibit 54 ;
- (iv) Another plot purchased at Sripatam, South Sikkim at a consideration value of Rs.25,000/- vide Registered Sale Deed dated 12th August, 1980 ;
- (v) Land at Simkharka Block, South Sikkim purchased at a consideration value of Rs.1750/- vide Registered Sale Deed dated 18.4.1978.

67. Apart from the above, we also find from the evidence that Dikila Subba additionally acquired the following: -



- (i) One small piece of land with one storeyed RCC building at Arithang vide Sale Deed dated 15.1.1989, Ext.60 ;
- (ii) Site measuring 30' x 30' at Pani House, Deorali, vide Sale Deed dated 29.11.1978, Ext. 67 ;
- (iii) Site allotted at Development Area vide allotment order dated 19.7.1989 under Ext.40 ;
- (iv) At Sichey Block for a consideration value of Rs.76,500/- vide Sale Deed Document dated 04.01.1996, Ext. 71 ;
- (v) House site measuring 30' x 20' purchased from one Padam Bahadur Rai and transferred in her name by the Department vide lease deed dated 5.1.1999.

68. We had also noted earlier, that the buildings situated at Arithang, Pani House, Development Area, Sichey and Jorethang, constructed on the land in the foregoing paragraph, all stand recorded in the name of the wife of the Appellant and that being the owner she had been dealing with those properties independently, as



revealed from the documentary and the oral evidence of both the prosecution and the defence witnesses.

69. The purchase of the landed properties at different places by Smt. Dikila Subba was disbelieved by the learned Special Judge on the ground that the Appellant had failed to furnish any document to substantiate the claim. The learned Special Judge obviously appears to have adopted a wrong approach as the findings are perverse to the various registered Sale Deeds pertaining to those lands exhibited by the prosecution as Exhibits 69, 62, 54 and 71. The Sale Deeds clearly indicate the name of the purchaser as Dikila in whose favour the right of the sale would pass over by the Sale Deed Documents, so that she may possess and enjoy the said properties without any claim or objection. The entries are identical in all the Sale Deeds by which the different properties were purchased. Therefore, the very Sale Deed documents are testimony of the lands having been purchased by Dikila Subba.

70. It is relevant to note that it is not the case of the prosecution that the landed properties were purchased



by the Appellant *Benami* in the name of his wife, and, therefore, the question of him requiring to furnish evidence of his wife having income of her own at the relevant time for such purchase, in our view, would not at all arise. It is for the prosecution to first prove beyond reasonable doubt that it was the Appellant who had put in the money for purchase of those from his own sources and, then only the burden would shift on the Appellant. The prosecution has totally failed to discharge this initial burden. It is also relevant to note that the prosecution did not consider it necessary to examine Dikila Subba neither during investigation nor at the trial as a prosecution witness.

71. Similarly, we find nothing on record that belie the claim of the Appellant. It has been asserted that the plot of land upon which the building at Pani House, Deorali was constructed was purchased by Dikila Subba and the consideration value for that amounting to Rs.11,000/- was paid by her brother Tsering Phintso Bhutia who appeared as DW1. This witness not only deposed on these facts but also stated that his sister Dikila Subba had constructed the building in August, 1978 cost of which was paid by her from her own funds received in the form of 'Daijo'. That



he had also helped her with building materials as he was a construction contractor at the relevant time. By the 'Daijo' document dated 22.03.1975, marked Exhibit D7, she had been gifted with cardamom weighing 240 mounds, jewellery and cash of Rs.1,75,000.00 That he had sold the 240 mounds of cardamom for Rs.500.00 or Rs.600.00 per mound and handed over the sale proceeds to his sister Dikila Subba. In 1973, during the family partition, she had also got 5 acres each of cardamom field and paddy and dry field and when she wanted to dispose of those in 1977, the family had retained it on payment of Rs.5,00,000.00 to her.

72. Dikila Subba also appeared as DW-2 and, inter alia, corroborated the evidence of DW-1 on all material particulars. She further went on to state that she had borrowed Rs.5,00,000.00 in two instalments from her cousin Topden Phintso Bhutia, DW-3, by executing a loan document Exhibit D9 in the year 1978. This amount was repaid by her in two instalments of Rs.25,000.00 and Rs.4,75,000.00. That she also constructed on her own all the four buildings with her own funds, loan taken from others by depositing her ornaments and from the rent she received from the tenants. Topden Phintso Bhutia, DW-3,



in his deposition corroborated the fact of him having extended the loan of Rs.5,00,000.00 to Dikila Subba vide Exhibit D9. He also confirmed of her having received assets as 'Daijo' vide Exhibit D7 which as per him was prepared in his presence and identified his signature Exhibit D7(a) and the signature of Gyamtso Bhutia, brother of Dikila Subba, Exhibit D7(b) and the thumb impressions Exhibit D7(c) and Exhibit D7(d) of the parents of Dikila Subba. He asserted that he also had helped her in constructing the buildings by giving cement, rods, etc., out of his contract business on loan basis.

73. In their cross-examination, the evidence of these witnesses have remained un-demolished, firm and unshaken on all material particulars. The learned Special Court appears to have rejected this document having found it to be a carbon copy, unregistered and illegible and that the endorsement of repayments made on the reverse page have been found written in the same colored ink for the year 1984, 1986 and 1988 and further that the endorsement appears to have been made at random on one date.



74. On careful scrutiny and meticulous examination of the documentary exhibits, we do not find anything for us to suspect the genuineness of Exhibit D7 and D9. Although Exhibit D9 is a carbon copy, the signatures appended thereto are in original. The learned Special Judge appears to have overlooked the provisions of Sections 61 and 62 of the Evidence Act while coming to the conclusion.

75. Section 61 provides that the contents of documents may be proved either by primary or by secondary evidence and Section 62 defines primary evidence to mean "The document itself produced or the inspection of the Court" and, in Explanation 1 thereto it provides that where a document is executed in sufficient parts, each part is primary evidence of the document. In Sarkar's Law of Evidence, Thirteenth Edition Explanation 1 has been analysed as under: -

"Explanation 1 : (Document Executed in Counterpart). The meaning of "counterpart" is "duplicate"; when a deed is prepared in two or more identical forms, the part signed by the grantor is the original, the other parts are counterparts [Aiyar's Law Lexicon, quoted in *Jayarama v S. Ramanatha*, A1976 M 147]. Where an instrument is executed by all the parties in duplicate or triplicate and each keeps one, each instrument is treated as an original and each is primary evidence of all the others."
 "The rule which determines under what head of evidence deeds executed in duplicates are to be classed, appears to be this : - When two or



more parts are sealed and delivered by each party, they are denominated as duplicate or triplicate original, and each copy is considered primary evidence [Colling v. Treweek, 6 B & C 398; Brown v Woodman, 6 C & P 206].

....."Where there are duplicate originals, ie two documents both fully executed by each party – both are considered primary evidence; in the case of counterparts – ie where each document is fully executed by one party only – they are primary evidence against the executing party and his privies, but secondary evidence only against the non-executing party or his privies, except in cases of ancient possession."

.....
"Carbon-copies produced by type-writers may for all practical purposes be regarded as equivalent, though the impressions on the lower sheets are likely to be imperfect. They are produced by the same stroke which makes the surface impression. In Federal U S Co v Indian L & M Co. 176 Ind 328. in the case of a machine carbon-copy in triplicate each one was held as original....."

(emphasis supplied)

76. In the present case, Exhibit D-9 as already observed by us is a carbon-copy that contains the original signatures of all the parties. Moreover, the document is proved by DW-1, Tsering Phintso Bhutia and DW-2, Dikila Subba who are the parties who executed the document, and are firmly supported by DW-3, Topden Phintso Bhutia in his evidence who is admittedly a witness to the execution of that document. It, therefore, leaves us with no room to doubt the authenticity of the document Exhibit D-9.

77. All the three witnesses, namely, Tsering Phintso Bhutia, DW-1, Dikila Subba, DW-2 and Topden Phintso



Bhutia, DW-3 have most unequivocally stated that they had been subjected to investigation on the documents Exhibits D7 and D9 and interrogated by the Investigating Officer but admittedly those were not sent for examination by handwriting experts. Under these circumstances, we have no hesitation in accepting these documents as valid and to reasonably conclude by application of the principal of preponderance of possibilities that the building at Pani House, Deorali was indeed constructed by Smt. Dikila Subba, the wife of the Appellant with her own resources. Although the learned Special Judge in the impugned judgment has expressed doubt as regards the genuineness of Exhibit D9, no steps were taken for getting it examined by expert even at the stage of the trial.

78. Deducing from what have been revealed in the evidence, we have no hesitation to hold that the building at Development Area also was constructed by Dikila Subba, wife of the Appellant over a site allotted to her by the Government in 1988 vide allotment order Exhibit 40. We have already noticed that the land at Sichey and Arithang were purchased by her. Her assertion that she herself had raised the four buildings in her evidence has gone uncontroverted and nothing has been brought out in



her cross-examination to give rise to any doubt on these facts.

79. We have also noticed that the learned Special Judge has not accepted the document produced by the Appellant through the defence witnesses on the ground that those had not been produced by him at the stage of the investigation. Firstly, this finding of the learned special Judge appears to be factually erroneous as will be revealed from the facts stated hereafter and secondly, 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.

80. We find that at the very stage of investigation, the Appellant had submitted an application dated 26.03.2007, Exhibit D2 to the Inspector of Police, Vigilance Department, informing him that the properties and earnings under the heads a, b, c, d and e to Sl.No.4



were his wife’s. We may reproduce below the relevant portion of the said application:

“To

The Inspector Of Police
Vigilance Department
Government Of Sikkim, gangtok

26-03-07

Sir,

As desired I have submitted herewith 6 nos. forms of “Assets & Liabilities”. Briefly, I would like to state the following source of incomes. Mostly, asset creation was done by my wife through various business and income avenues she had followed through out the 30 years of span.

SOURCES OF INCOME :

1. SELF EARNINGS :

.....

2. GIFT AND HELP FROM FAMILY MEMBERS :

.....

3. EARNINGS FROM SALARIES :

.....

4. WIFE BUSINESS :

My wife, Mrs. Dikkila Subba carried out various types of business through out the last 30 years period. These businesses were briefly :

a. CONSTRUCTION OF PANI HOUSE HOTEL REVERIE :

- The Building sites was acquired in 1978.
- The Building initially was rented out till 1994 with :
 - 2 small flat at GF.
 - 8 Family Flats in 1st, 2nd, 4th and 5th Floor.
 - 3 shops at Road Level.
- The Building was later converted into 13 rooms Hotel and leased out to various parties.
- Hence the Building provided earning through out the last 25 years plus.

b. MANDAR LODGE BUILDING AT DEV.AREA :

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- The Building sites was Govt. allotted site in 1989.
- Initially for a short period it was rented out to Private Parties and later it was leased out as a full hotel.
- Hence through out last 15 years it provided earnings.

c. ARITHANG BUILDING :

- The Building sites was registered in her name.
- The Building has 9 family units in three floors.
- Since its completion it provided rental earnings.

d. EARNINGS FROM OTHER SMALLER BUSINESSES :

- My wife also carried out numerous smaller business and contract works, including retail business, collection of milk, running hotels on partnerships and on lease, 'dadani' on agricultural produce, etc. These accrued her good profit.
- Therefore continuously endeavoured to improve life standard by entrepreneurship and hard works.

e. EARNINGS FROM AGRICULTURAL LAND AND PERSONAL LOANS :

- All the lands with Mrs. Dikkila Subba, yielded agricultural produce and yielded some earning in terms of cash or kind.
- During the span of 30 years personal loans were taken from friends and relatives.

The above statements are true to the best of knowledge.

Sd/-

Dhan Subba, Ex.Secy. Govt. Of Sikkim."

81. In the last page of Exhibit D2, under the head

"STATEMENT OF IMMOVABLE PROPERTIES BY THE UNDERSIGNED AND

HIS DEPENDANTS EITHER IN THEIR OWN NAMES OR OTHERS AS ON :



31ST OF AUGUST, 2004", we find an endorsement which reads as –

"PASS BOOKS AND OTHER BANK DOCUMENTS ARE NOW WITH THE VIGILANCE DEPARTMENT

TRUE COPIES OF LAND DAIJO ANCESTRAL PROPERTIES DOCUMENTS ARE ENCLOSED"

(emphasis supplied)

82. The receipt of the original of Exhibit D2 stands admitted by the Investigating Officer, PW-69, who did not seek any explanation from the Appellant, as will appear from the following extract of this deposition :-

"It is true that I had received the original of Exbt.D-2 dated: 26.3.07. in nine pages. I have seen my signature acknowledging receipt of Exbt.D-2 in the office copy of Exbt.D-2. Exbt.D-2(a) is my signature. It is true that in Exbt.D-2 it has been written that the accused is submitting along with said exhibit six number of forms of assets and liabilities however the said six number of forms of assets and liabilities were not received by me at any point of time. It is not a fact that I had received all those formats but I am now concealing the truth in order to frustrate the genuine claim of the accused. It is true that after receipt of Exbt. D-2 dated: 26.3.2007 I had not issued any notice or showcause to the accused informing him that the enclosures namely six nos. of forms were not received by me nor any explanation as to why he did not hand over the said six nos. of formats to me even after mentioning the same in Exbt.D-2."

(emphasis supplied)

83. We, therefore, are in no doubt that at the stage of investigation, the Appellant had informed the



Investigating Officer in most categorical terms that the properties belonged to his wife, Smt. Dikila Subba, and that the Investigating Officer did not care to enquire into that aspect. It is quite obvious that he chose to ignore all that and insisted on fixing the ownership of those properties on the Appellant. When the I.O. on his own admission had received the document Exhibit D2 from the Appellant containing nine pages, it is not understood as to why it was not filed along with his report under Section 173 Cr.P.C. This, in our view, surely amounts to suppression and concealment of material facts and withholding evidence, leading us to draw an adverse presumption against the prosecution. This also holds good in respect of the document Exhibit D7, i.e., the "Daijo" Document and Exhibit D8 i.e., the partition document pertaining to the Appellant. The finding of the learned trial Court which apparently is very cryptic on this does not appear to be convincing.

84. It is in the evidence of Smt. Dikila Subba, DW2 that she used to run a lodge named "Asia Lodge" on lease from Shri N. K. Pradhan, who is a Minister at present, a Hotel Meridian under Mr. Panth, presently an MLA, a garment shop at supermarket, a milk supply business and



a hotel in Orissa. That she was an income tax assessee as Proprietor of Mandaar Lodge at Development Area and Hotel Reverie at Panihouse under valid trade licences under Exhibits 45 and 44 respectively. That she had also done film production named "Tshango Film" of which the document had been seized by the police. We find that the Investigating Officer has admitted having seized vide seizure memo Exhibit 2 a register containing 64 pages of which pages 1 to 5 pertain to "Tshango" income, a register with a title "Film" containing 9 written pages and Exhibit D-2 as has already been referred to earlier. But curiously the prosecution has also chosen not to file those documents along with the charge sheet and failed to conduct investigation on those. It is also an admitted fact that the I.O. had seized receipt of Rs.25,000.00 against lease of Asia Lodge vide item No.38 under seizure memo Exhibit 2 which also was not filed with the charge sheet and no investigation conducted towards those. We may reproduce below the relevant portion of the evidence of the I.O., PW69 :-

PW-69, Dhan Singh Rai

"It is true that I had received the original of Exbt.D-2 dated 26.3.07 in nine pages. I have seen my signature acknowledging receipt of



Exbt.D-2 in the office copy of Exbt.D-2, Exbt.D-2(a) is my signature. It is true that in Exbt. D-2 it has been written that the accused is submitting along with said exhibit six number of forms of assets and liabilities however the said six number of forms of assets and liabilities were not received by me at any point of time. It is not a fact that I had received all those formats but I am now concealing the truth in order to frustrate the genuine claim of the accused. It is true that after receipt of Exbt.D-2 dated : 26.3.2007 I had not issued any notice or showcause to the accused informing him that the enclosures namely six nos. of forms were not received by me nor any explanation was asked for them from the accused asking the reasons as to why he did not hand over the said six nos. of formats to me even after mentioning the same in Exbt.D-2."

(emphasis supplied)

85. It is re-emphasised that despite such multitudes of evidence indicating the income and assets of Smt. Dikila Subba, she was not at all examined under Section 161 Cr.P.C. during the investigation, let alone she being made a co-accused or even charge for abatement under Section 109 IPC registered against her. All these, in our view, additionally convince us of the genuineness of the claim of the wife, Smt. Dikila Subba and severely corrodes the credibility of the prosecution case.

86. In the case of **Chittaranjan Chouhury vs. State of Bihar : (1987) 2 SCC 104**, it has been held as follows: -

"6.This evidence is noticed only to be rejected. In our opinion where, as in the instant case, the defence is founded on a relevant and vital document seized from the custody of the accused and not deliberately produced, it is difficult to sustain the conviction of the accused....."



(emphasis supplied)

87. Therefore, the finding of the learned trial Court that there was no proof of the wife of the Appellant having business of her own from which she had earned income does not appear to be sound. Adverse inference ought to have been drawn against the prosecution for having failed to produce the seized documents pertaining to her business and to investigate into those aspects on their own admission. This is apart from what we have already held in respect of documents Exhibit D-2, Exhibit D-7 and Exhibit D-8.

88. We may in this regard refer to **State Inspector of Police Vishakhapatnam vs. Surya Sankaram Karri : (2006) 7 SCC 172** where it has been held as under :-

"18. It is now well settled that when a document being in possession of a public functionary, who is under a statutory obligation to produce the same before the court of law, fails and/or neglects to produce the same, an adverse inference may be drawn against him. The learned Special Judge in the aforesaid situation was enjoined with a duty to draw an adverse inference. He did not consider the question from the point of view of statutory requirements, but took into consideration factors, which were not germane.

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 a later stage. The evidence of PW41 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 DW3 and Dw4 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 DW1, 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 respondent, namely, DW 3 and DW 4 might not have been ignored by the learned Special Judge."

(emphasis supplied)

89. On an analysis of the discussions on the 'daijo' document, Exhibit D7, we are convinced that the wife of the Appellant, Smt. Dikila Subba, did have the following income: -

- (a) Cost of 240 mounds of cardamom at the average rate of Rs.550/- per mound i.e. Rs.1,32,000/- (i.e.240 mounds x Rs.550/-)
- (b) Cost of the land of her share retained by the family Rs.5,00,000/-.
- (c) Ornament cash etc. valued at Rs.1,75,000/-
- (d) Loan of Rs.5,00,000/- received from Topden Phintso Bhutia by Loan Agreement, Exhibit D9.



90. The Additional income of the wife will, therefore, amount to Rs.8,07,000/- (+) Rs.5,00,000/- (from her share of paternal property) = Rs.13,07,000/-. This is in addition to the income from her business and from rent already discussed.

91. Although not specifically stated in the charge sheet and no such charge having been framed, it is quite clear from the list of assets set out in the charge sheet that the prosecution has proceeded under the presumption that the income and assets of the wife are the income and assets of the Appellant, i.e., their incomes have been clubbed together and the *Benami* nature of the holdings of the wife and her income was inherent. This in our view is impermissible in law particularly in view of what have been discussed earlier. In **DSP. Chennai vs. K. Inbasagaran : (2006)1 SCC 420** it has been held as follows: -

"17.The question is, when the accused has provided satisfactory explanation that all the money belonged to his wife and she has owned it and the Income Tax Department has assessed it in her hand, then, in that case, whether he could be charged under the Prevention of Corruption Act. It is true that when there is joint possession between the wife and husband, or father and son and if some of the members of the family are involved in amassing illegal wealth, then unless there is categorical evidence to believe, that this can be read in the hands of the husband as the case may be, it cannot be fastened on the husband or the head of the family. It is true that the prosecution in the present case has tried its best to lead evidence to show that all these monies belonged



to the accused but when the wife has fully owned the entire money and the other wealth earned by her by not showing in the income tax returns and she has accepted the whole responsibility, in that case, it is very difficult to hold the accused guilty of the charge. It is very difficult to segregate that how much of the wealth belonged to the husband and how much belonged to the wife. The prosecution has not been able to lead evidence to establish that some of the money could be held in the hands of the accused. In case of joint possession it is very difficult when one of the persons accepted the entire responsibility. The wife of the accused has not been prosecuted and it is only the husband who has been charged being a public servant. In view of the explanation given by the husband and when it has been substantiated by the evidence of the wife, the other witnesses who have been produced on behalf of the accused, coupled with the fact that the entire money has been treated in the hands of the wife and she has owned it and she has been assessed by the Income Tax Department, it will not be proper to hold the accused guilty under the Prevention of Corruption Act as his explanation appears to be plausible and justifiable. The burden is on the accused to offer plausible explanation and in the present case, he has satisfactorily explained that the whole money which has been recovered from his house does not belong to him and that it belonged to his wife. Therefore, he has satisfactorily accounted for the recovery of the unaccounted money. Since the crucial question in this case was of possession and the premises in question were jointly share by the wife and the husband and the wife having accepted the entire recovery at her hand, it will be proper to hold the husband guilty....."

(emphasis supplied)

92. We may also refer to **KrishnaNand Agnihotri vs.**

The State of Madhya Pradesh : (1977) 1 SCC 816 where facts

involved are *pari materia* as the case at hand. It has been

held as follows: -

"25. The next item of assets to which we must refer is the land at Varanasi which was purchased for Rs.2500 in 1956. The sale deed of this land was in the name of Shanti Devi and hence it must be presumed unless the contrary is shown by the prosecution that the land belonged to Shanti Devi in whose name it was purchased and it stood in the records of the Municipal



authorities. The case of the appellant was that this land was purchased by the father of Shanti Devi for her benefit and the consideration for the sale was also provided by the father of Shanti Devi. Ramadhar Avasthi DW 22, the father of the first husband of Shanti Devi, clearly stated in his evidence that Anant Ram, the father of Shanti Devi had purchased a plot of land for Shanti Devi for Rs.2500 and this was supported by Bachhalal DW 11 who was one of the attesting witnesses to the sale deed. It is indeed difficult to see how this evidence led on behalf of the appellant could be brushed aside and without any evidence whatsoever led on behalf of the prosecution, it could be concluded that the purchase price of the land was paid by the appellant and that the land was purchased by the appellant in the name of Shanti Devi. We must, therefore, exclude this land in computing the total assets belonging to the appellant.

.....

29. There is also one further asset of Rs.6688 representing the credit balance in the bank account standing in the name of Sheela Devi to which we must refer. This bank account stood in the name of Sheela Devi and hence the burden of proving that the monies in this bank account belonged to the appellant and Sheela Devi was merely his benamidar would be on the prosecution. When we turn to the evidence, we find that the prosecution has failed to discharge this burden. Beyond raising suspicion and doubt in the mind of the court, the prosecution has not been able to adduce any legal evidence of a definite character which would establish the benami character of this bank account. On the contrary, the evidence led on behalf of the appellant shows that Sheela Devi had means of her own. We do not, therefore, think that the prosecution can be said to have established that the sum of Rs.6688 standing to the credit of this bank account belonged to the appellant. And on the same reasoning we must hold that the National Savings Certificates for Rs.65 standing in the name of Sheela Devi also could not be said to be an asset belonging to the appellant, since there was no legal evidence led on behalf of the prosecution which would establish definitely that the consideration for the purchase of these National Savings Certificates was provided by the appellant."

[emphasis supplied]

93. Considering the legal position set out above, we are firmly of the view that the prosecution has failed to



establish that the entire property including those standing in the name of the wife, Dikila Subba, DW-2 is the *Benami* property of the Appellant. Under such circumstances, the very basis of the prosecution case against the Appellant would not sustain.

In **State of M.P. vs. Awadh Kishore Gupta and others**, reported in **(2004) 1 SCC 691**, while explaining the explanation appended to Clause (e) of sub-section (1) of Section 13, P.C. Act, 1988, it has been held that the explanation has relieved the prosecution 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" means 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 and that the expression "known sources of income" has reference to sources known to the prosecution after thorough investigation of the case. The evidence on record does not suggest that in accordance with provisions of any law, rules, orders applicable to the appellant or to his wife, they or any of them was required to give any intimation. In any event, no reliance was placed on any such

intimation. It was only in course of search and seizure, documents suggesting receipt by appellant and his wife had come to light.

94. In any case, the valuation of the four buildings which together constitute Rs.36,60,449.00 ought to be deleted from the value of the Appellant's assets considering the serious flaw in the evidence of the prosecution in arriving at those as discussed in extenso earlier.

95. Consequently, Rs. 36,60,449.00 which is the value of all the buildings shall stand deleted from the head "Assets during the close of the Check Period" thereby reducing its total value from Rs. 74,37,253.73 as worked out by the learned Special Judge, to Rs.37,76,804.73.

96. The rest of the calculations on the value of the assets at the beginning of the check period, expenditure and income during the check period remaining the same, the detailed calculations would then read as under: -

1. Assets at the close of the
Check Period : Rs. 36,60,449.00
2. Less assets at the beginning
of the Check Period : (-) Rs. 64,000.00

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3.	Assets acquired during the Check Period	: =	Rs. 35,96,449.00
4.	Add Expenditure during the Check Period	: (+)	Rs. 13,37,341.00
			<u>Rs. 49,33,790.00</u>
5.	Less income from known sources	:	Rs. 66,11,113.22
		(-)	<u>Rs. 49,33,790.00</u>
	Surplus	:	<u>Rs. 16,77,323.22</u>

Thus, on this account also the case of disproportionate assets against the Appellant quite obviously fails.

97. Notwithstanding the above position, more particularly the unreliability of the valuations of the buildings, even if we proceed under the assumption that the valuations are valid and acceptable, we have found that the Appellant has been denied of a large number of incomes. They are as under: -

1.	Rental income from CFNEU, Ministry of Women and Child Development, Govt. of India	:	Rs. 1,04,200.00
2.	Additional rental from West Bengal Tourism Development Corporation In terms of Lease Deed Exbt.217	:	Rs. 2,31,000.00
3.	Rent drawn against buildings at Arithang and Jorethang	:	Rs.13,54,060.00
		:	<u>Rs. 9,47,900.00</u> (13,54,060 – 4,06,160)
		=	<u>Rs.12,83,100.00</u>

**Income of the wife of the Appellant
against 'Daijo'**

- (a) Cost of 240 mounds of
Cardamom at the average
Rate of Rs.550/- per mound : Rs. 1,32,000.00
- (b) Against share in family
Partition : Rs. 5,00,000.00
- (c) Ornament cash etc. : Rs. 1,75,000.00
- (d) Loan received from Topden
Phintso Bhutia by Loan
Agreement, Exhibit D9 : Rs. 5,00,000.00
- = Rs.13,07,700.00**
- (e) Total additional income : Rs.13,07,700.00
- (+) Rs.12,83,100.00
- = Rs.25,90,800.00**

Income from Business Turnover : Rs. 6,97,500.00

98. In view of the above, the final tabulation and/or
summary of the statement as worked out by the Special
Court stands modified as under: -

- (a) Assets at the Close of the : Rs. 74,37,253.73
Check Period
- (b) Less Assets at the beginning
of the Check Period : (-) Rs. 64,206.00
- (c) Assets acquired during
Check Period : = Rs. 73,73,047.73
- (d) Add Expenditure during
the Check Period : (+) Rs. 13,37,341.00
- = Rs. 87,10,388.73**
- (e) Income from known
Sources : Rs. 66,11,113.22
- (+) Rs. 25,94,100.00
- (+) Rs. 6,97,500.00



= Rs. 99,02,713.22

(f) Less (c) + (d) _____ (-) Rs .87,10,388.73

Surplus Assets _____ = **Rs. 11,02,324.49 (+)**

Therefore, the Appellant being obviously in surplus by Rs.11,02,324.49 against his known sources of income, the case of disproportionate assets against him shall naturally fail and the impugned judgment of the learned Special Judge liable to be set aside.

99. So far as findings on the other items that have been questioned on behalf of the Appellant, namely, GPF withdrawal, arrears of salary, assets at the beginning of the check period, we do not see any substantial reason to interfere with those.

100. Having come to this finding, we do not feel it necessary to go into other aspects raised on behalf of the Appellant.

101. Therefore, considering the prosecution case on all accounts, we have no hesitation to hold that they have failed to prove the case as required under law.



102. For the reasons stated above, the Appeal succeeds and is hereby allowed. The impugned judgment and sentence are hereby quashed.

103. Consequently, the Appellant is acquitted of the charges and is released from bail.

104. No order as to costs.

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

Sd/-
(S. P. Wangdi)
Judge
15.07.2013

Sd/-
(Pius C. Kuriakose)
Chief Justice
15.07.2013