

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On: 26.05.2016
Judgment Pronounced On: 30.09.2016

CRL.A. 285/2007

ANUP SINGH DAHIYA

..... Appellant

Through Mr. Vikram Singh, Advocate

versus

STATE THR. C.B.I.

.... Respondent

Through Ms. Sonia Mathur, SPP with
Mr. Abhishek Chauhan for CBI

CORAM:

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

SIDDHARTH MRIDUL, J.

1. The present is an appeal under section 374 of the Code of Criminal Procedure, 1973 (in short 'the code') read with section 482 of the Code

against the judgment and order of conviction dated 28.04.2007 and order on sentence dated 30.04.2007 passed by the Learned Special Judge (CBI), Delhi in CC No. 157/01 in RC No. 72 (A)/1995 titled '*CBI vs. Anoop Singh Dahiya*', whereby the appellant has been convicted for an offence under section 13(1)(e) of the Prevention of Corruption Act, 1988 (PC Act). The appellant has been sentenced to undergo three and a half years of rigorous imprisonment for an offence punishable under section 13(2) read with section 13(1)(e) of the PC Act along with payment of a fine of Rs. 1,20,000/- (Rs. One Lakh Twenty Thousand only), with the stipulation that in default of payment of fine, the appellant shall further undergo simple imprisonment for a period of 60 days.

2. In substratum, the case against the appellant is that he, during his service in National Industrial Development Corporation as an Assistant Engineer and during his service in the Transport Department as a Motor Vehicle Inspector from 1989 to 21.08.1995, accumulated assets disproportionate to his known sources of income to the extent of Rs. 1,19,236/-.

3. The brief facts as are relevant for the determination of the present appeal are as under:

- i. A search was conducted in connection with the trap case bearing RC No. 71(A)/95-ACB-I against the appellant, by Shri Rajesh Kumar, Inspector, CBI (PW1) at premises no. 10834, Gali No. 18, Pratap Nagar, Delhi belonging to Shri. Mahavir Singh Dahiya, the father of the appellant from 7 PM on 21.08.1995 to 1 AM on 22.08.1995 in the presence of an independent witness namely, Sh. Raj Kumar. Various articles/documents were seized on 22.08.1995 vide observation-cum-search memo and list of articles /documents dated 22.08.1995 (Ex. PW1/A).
- ii. After the search was conducted of the aforementioned premises, an FIR bearing RC No. 72(A)/95-DLI under section 13(1)(e) of the PC Act was registered against the appellant on 22.08.1995, on the basis of a complaint by Sh. Rajesh Kumar, Inspector, CBI (PW1).
- iii. On the basis of the recoveries made during the search at the afore-stated premises further investigations were conducted and it came to light that the appellant, after completing Engineering from Delhi College of Engineering in 1989, joined National Industrial Development Corporation Ltd. (NIDC), on contract

basis as Assistant Engineer, on a monthly consolidated salary of Rs. 2500/- per month. The appellant worked with the NIDC from 17.07.1989 to 27.02.1991, and the salary received by the appellant from this contract used to be deposited to A/c No. 17012 of Bank of Baroda, Chanakyapuri Branch. The last withdrawal from this account was made in June, 1991 and thereafter, no deposits or withdrawals were made from this account. At the time of the last withdrawal, the balance available in A/C No. 17012 of Bank of Baroda was Rs. 119.30p.

- iv. The appellant joined the Transport Department on 04.06.1993, as a Motor Vehicle Inspector. However, during the period from 27.02.1991 to 04.06.1993 he was without a job. Meanwhile, the appellant was also maintaining saving account No. 19747 in Punjab National Bank (PNB), Kishan Ganj, Delhi. He was depositing money in this account since the time of his employment with NIDC but no major contributions were made in this account during the period of his unemployment, i.e. from March 1991 to June 1993. At the time of receipt of the first salary from the Transport department the appellant was having a balance

of Rs. 80/- only in this account. Further, the appellant used to deposit almost similar amount in this account as he used to get by way of his salary from the Transport Department. As per the record made available by the Transport Department (vide Ex. PW7/A, Ex. PW7/B and PW7/C1-C3) the appellant had drawn a total salary of Rs. 1,05, 172/- from June, 1993 to July, 1995, and in the corresponding period he had deposited Rs. 1,02,064/- in this account. During this period he also earned an interest of Rs. 1773/- on the savings in this account.

- v. The appellant had also opened another account No. Sugam 508, in Punjab National Bank, Kishan Ganj, Delhi in the name of self and Smt. Renu Dahiya, wife of the appellant. This was a Fixed Deposit account wherein the appellant had deposited Rs. 30,000/- on 06.04.1994 vide FDR No. 117/94 for a period of 1 year, after withdrawing the same amount from the account No. 19747 in PNB, Kishan Ganj, Delhi. This FDR was renewed on 09.04.1995 vide FDR No. 139/95 for a period of three years. The appellant also deposited Rs. 50,000/- in this account vide FDR No. 141/95 dated 09.04.1995 for a period of three years. This amount was

also transferred from the account No. 19747 in PNB, Kishan Ganj, Delhi. A search was conducted at 307, Pkt. B, DDA Flats, Hastal, a property that belonged to the father of the appellant (DW-2), and where Smt. Sarita Dahiya, wife of the appellant resided. After this search, it was noted that the appellant had made purchases worth Rs. 4,250/- for house hold items from June, 1993 to August, 1995. As per investigation, the other bank savings instruments, Post Office saving instruments, shares and immovable properties were acquired prior to the joining of service by the appellant in the Transport Department and were acquired by his father and mother in the name of self and their family members. The other properties and saving instruments acquired during the period of the appellant's employment with the Transport department were not done by the appellant.

- vi. Therefore, in light of the above investigation, it was concluded as under:

Income During the Check Period (June '93-Aug '95)

Income from Salary	Rs. 1,05,172.00
Income from Interest on bank savings a/c 19747	Rs. 1,773.00
Income during check period	Rs. 1, 06, 945.00

Expenditure During the Check Period

Kitchen Expenses (33% of take home salary) Rs. 34, 707.00

Assets acquired during check period

Two FDs in A/c No.Sugam 508, PNB, Kishanganj	Rs. 80, 000.00
Balance in A/C No. 19747, PNB, Kishan Ganj, Delhi On 22.08.1995 minus balance at the time of receipt of Salary from transport Dpt.	Rs. 23, 837.00
Movable Assets as per Observation Memo	Rs. 4, 250.00
Total Assets	Rs. 1, 08, 087.00

- vii. Therefore, as per the preliminary investigation, the total disproportionate assets acquired by the appellant during the check period from June, 1993 to August, 1995 came out to be (2+3-1) Rs. 35,849/- which amounts to approximately 33.5% of the income of the appellant during the check period.
- viii. Thereafter, sanction for prosecution was obtained from the authority competent to remove the appellant from the post of Motor Vehicle Inspector, Transport Department vide sanction order dated 02.03.2000 (Ex. PW4/A).
- ix. A charge-sheet into the subject case was filed by the CBI before the Special Judge, CBI on 18.07.2000. The Special Judge took cognizance of the subject case and framed charges against the

appellant under section 13(1)(e) of the PC Act punishable under section 13(2) of the PC Act, on the ground that during the period from 1989 - 21.08.1995 the appellant had acquired assets which were disproportionate to his known source of income to the extent of Rs. 35, 849/- which was approximately 33.5% of the income during the said period and the appellant was unable to satisfactorily account for, vide order on charge dated 11.01.2002. The appellant pleaded not guilty and claimed trial. The Special Judge, thereby, in the order on charge dated 11.01.2002 enlarged the check period from June 1993-August 1995 to 1989-21.08.1995, however, the disproportionate income in the latter check period remained same as that under the former check period.

x. At the stage of evidence, the prosecution examined a total of 11 witnesses, namely:

- PW1, Sh. Rajesh Kumar, Inspector, (Under Suspension), North East District, Seelampur, Delhi, was the officer who conducted the search at House No. 10834, Pratap Nagar, New Delhi in connection with the subject case. He testified that the

search was conducted in the presence of independent witnesses. He prepared the observation memo cum seizure memo (Ex. PW1/A) qua the search conducted. He gave a complaint (Ex. PW1/B) to the SP, CBI against the appellant for having disproportionate assets beyond his known source of income. On the basis of his complaint the subject FIR (Ex. PW1/C) was registered.

- PW2, P.K. Gupta, Manager, Bank of Baroda, Chanakyapuri, New Delhi, who verified the account statement pertaining to account No. 17012 in Bank of Baroda, Chanakyapuri, Delhi (Ex. PW-2/A) in the name of the appellant. He confirmed that according to the account statement, there was a balance of Rs. 150.30/- as on July, 1999 and interest of Rs. 68.90/- was posted in the account till 21.08.1995.
- PW3, Sh. O.P. Yadav, Manager, Punjab National Bank, Kishan Ganj, Delhi, verified the account No. 508 vide Ex. PW-3/A, out of which two FDRs were issued to the tune of Rs. 30,000/- and Rs. 50,000/-. He also verified the account No. 19747 in Punjab National Bank, Kishan Ganj, in the

name of the appellant, and confirmed that the last balance as on 22.05.1995 on calculation come out to be Rs. 23, 837/- vide Ex. PW-3/B.

- PW4, Sh. Virender Singh, Secretary, OBC Commission, NCT of Delhi, was the sanctioning authority who granted sanction for prosecution of the appellant vide Order No. F.3A(216)Tpt./Vig./95/32 dated 2.3.2000 (Ex. PW-4/A). He testified that before granting sanction he had perused documents as well as statements of witnesses in respect of the subject case and the sanction was granted after due application of mind, in accordance with law.
- PW5, Sh. Raj Kumar, Messenger, FCI, HQ, New Delhi accompanied Inspector Rajesh Kumar (PW1) for the search conducted at the residence of the father of the appellant.
- PW6, Sh. A.K. Mahitra (Retd.), Chief General Manager, (HRD & Personnel), NIDC, verified that the salary earned by the appellant for the period 17.07.1989 to 27.02.1991 was a consolidated salary of Rs. 2500/- per month vide his letter Ex. PW-6/A.

- PW7, Ms. Rashmi Singh, Joint Director, Social Welfare Department, Govt of NCT, Delhi, was working as Dy. Director in Transport Department, Govt of NCT of Delhi and verified the pay particulars of the appellant while he was working at the Transport Department vide Ex. PW-7/A and Ex. PW7/C-1 to 3.
- PW8, Sh. Ramnish, Addl. SP, CBI/CCIC, New Delhi, was the officer who conducted further investigations into the subject case and collected documents from the banks where the appellant was having accounts, as well as collected the salary details of the appellant.
- PW9, Sh. D.K. Barik, DSP, CBI, Bhubaneswar, Orissa, who took over investigation into the subject case from Sh. Ramnish, ASP (PW8), and after receiving sanction from the sanctioning authority (PW4) prepared the chargesheet and filed it in the Court of Special Judge, CBI.
- PW10, Ms. Shobha Dutta, Inspector, Special Unit, CBI, also joined the search conducted at House No. 10834, Pratap

Nagar, New Delhi, the residence of the father of the appellant.

- PW11, Sh. D.M. Sharma, Inspector, SCB, CBI, Delhi, conducted the search at Q. No. 307, Pocket – B, Hastal, belonging to the father of the appellant in possession of Smt. Sarita Dahiya, wife of the appellant and her brother Sh. Vinod Kumar, and prepared the search memo (Ex. PW5/A) qua the said search.

xi. Thereafter, the appellant in his statement under section 313 of the Code admitted that during the period from June, 1993 to August, 1995, he was working as Motor Vehicle Inspector in Transport Department, Government of NCT of Delhi. He stated that it was a matter of record when asked that after completion of Engineering in 1989, he joined NIDC as Assistant Engineer at a salary of Rs. 2500/- per month (consolidated) from 17.07.1989 to 27.02.1991. To the question that he remained without job from 27.02.1991 to 04.06.1993, he stated that he was doing a private job and imparting tuitions. He also stated it to be a matter of record when he was asked that he deposited his salary in his SB account No. 17012 in Bank of Baroda,

Chanakyapuri and made withdrawal in June, 1991 leaving a balance of Rs. 119.30/-. He also stated it to be a matter of record when he was asked that he received Rs. 1, 05, 172/- as salary from June, 1993 to August, 1995 from Transport Department. He further stated it to be a matter of record when he was asked about the FDR of Rs. 50, 000/- and Rs. 30, 000/-- in PNB and balance of Rs. 23, 837/- in SB Account No. 19747 in PNB, Kishan Ganj, Delhi. He also stated that the search was conducted at the house of his father and that he was not present at the time of the search. He stated that he had been falsely implicated in the subject case and no public witness has deposed against him. He stated that there were no disproportionate assets and his kitchen expenses were borne by his father out of the agricultural income and he had not spent any money on kitchen expenses during the check period. He also added that he used to receive financial assistance from his *Nani*, and that he was innocent.

xii. The appellant examined two witnesses in his defence, namely:

- DW1, Sh. Mahavir Singh Dahiya, his father, who deposed that he has income from a milk dairy and that he used to bear the kitchen expenses of his son, the appellant, however, in

his cross-examination he stated that he had no knowledge that his son had two wives; and

- DW2, Sh. Anand Singh, Sub Post Master, Padam Nagar, Post Office, Delhi, deposed that an RD Account No. 418867 was opened by the appellant on 03.11.1989 and was closed on 08.11.1994, and that the maturity value of this account was Rs. 1,60,060/-, which were paid to the appellant on 08.11.1994.

xiii. After going through the material on record the Ld. Special Judge convicted the appellant for an offence under section 13(1)(e) of the PC Act punishable under section 13(1) of the PC Act. The grounds on which the Ld. Special Judge convicted the appellant are as under:

- The Ld. Special Judge came to a conclusion that the prosecution has proved that the appellant had worked as an Assistant Engineer, drawing a salary of Rs. 2500/- per month from 17.07.1989 to 27.02.1991 with NIDC and thus earned Rs. 48,750/- as a public servant. Further, the Ld. Special Judge observed that the appellant earned a salary of Rs. 1,05,172/- while working as a Motor Vehicle Inspector in the

Transport Department of NCT of Delhi from 04.06.1993 till August, 1995. Therefore, the total salary income of the appellant was calculated to be 1,53,922/- during the period from July, 1989 to August, 1995. As per the statement of account (Ex.PW3/B), the appellant had also earned an interest of Rs. 2066/-. The Ld. Trial Court found the total income of the appellant as Rs. 1,55,988/-.

- The Ld. Special Judge, took into account the submission of the counsel for the appellant that the appellant deposited Rs. 2000/- per month from 03.11.1989 to 08.11.1994 in a RD Account No. 418867. Considering this submission, the Ld. Special Judge concluded that the appellant must have deposited Rs. 1,20,000/- during the afore-stated period. Further, while the appellant was a public servant from November, 1989 till February, 1991 and June, 1993 to November, 1995 (33 months), he must have deposited Rs. 66,000/-, and while he was without a job from 27.02.1991 to 04.06.1993 (27 months) he deposited Rs. 54,000/-. Since the appellant did not lead any evidence to prove his other source

of income during the period 27.02.1991 to 04.06.1993, a fact which was specially within his knowledge under section 106 of the Indian Evidence Act, the Ld. Special Judge drew an adverse inference against the appellant. It was presumed that the appellant was depositing his ill-gotten money at the rate of Rs. 2000/- per month from November, 1989 to February, 1991 and June, 1993 to November, 1994, while he was working as a public servant and also during the period when he remained unemployed at the rate of Rs. 2000/- per month in the RD Account No. 418867.

- To calculate the total assets of the appellant the Ld. Special Judge took into account the following:

Two FDRs in PNB worth Rs. 80,000/-

Saving Bank Account, PNB Balance worth Rs. 23,917/-

Principal Amount in RD Account worth Rs. 1,20,000/-

- Thus, the Ld. Special Judge calculated the total assets to be Rs. 2, 23,917/-.

- It was observed by the Ld. Special Judge that the Observation-cum-Search Memo states that at the time of search Smt. Saroj Devi (mother of the accused) and Smt. Renu Devi (wife of the accused) were present in House No. 10834, Gali No. 18, Pratap Nagar, the premises where the search was conducted. Here, the appellant did not dispute that Smt. Renu, was his wife as he did not cross-examine the witness (PW-1) who proved the observation-cum-search memo. On the other hand, PW-11 deposed that he conducted search at House No. 307, Pocket-B, Hastal, New Delhi belonging to Sh. Mahavir Singh Dahiya, and the house was in possession of Smt. Sarita Dahiya, wife of the appellant. The appellant did not challenge PW-11 that Smt. Sarita Dahiya was not his wife. Therefore, it was concluded by the Ld. Special Judge that the appellant has two wives. Thus, the appellant was bearing expenses of living with both his wives at different addresses. Even if the argument that the father of the appellant was bearing the kitchen expenses with regard to one of the house, the Ld. Special

Judge considered the fact that the appellant must be bearing the kitchen expenses for his second house with Smt. Sarita Devi. On the basis of the decision of the Hon'ble Supreme Court in *Sajjan Singh vs. State of Punjab*, reported as AIR 1964 SC 464, the Ld. Special Judge observed that the appellant must have spent at least one third of his total income as living expenses. Therefore, calculating the living expense of one household of the appellant the Ld. Special Judge came to the figure of Rs. 51, 307/- i.e. one third of Rs. 1,55,988/- (his total income).

- Even though the prosecution had claimed that Sh. Rajesh Kumar, Inspector (PW-1) had found moveable articles worth Rs. 4250/- during the search conducted at House No. 10834, Pratap Nagar, New Delhi, the Ld. Special Judge observed that the prosecution had failed to prove as to which article found during the said search belonged to the appellant. Therefore, the Ld. Special Judge observed that the prosecution had failed to prove that the appellant was in possession of moveable articles worth Rs. 4250/-.

- Accordingly, the Ld. Special Judge, arrived at the conclusion that total savings of the appellant as per the income earned by the appellant as a public servant (Rs. 1,53,922/- + Rs. 2066(as interest), after deducting the living expenses (Rs. 51,307/-), should be Rs. 1,04,685/- but against it, the appellant was found to possess movable assets worth Rs. 2,23,917/-. The excess income of Rs. 1,19,232 was not explained by the appellant.
- The disproportionate assets calculated by the Ld. Special Judge can be summarized as under:

Income during the Check Period

Income from employment at	
NIDC (17.07.1989-27.02.1991)	Rs. 48,750/-
Income from Transport	
Dept (04.06.1993-August, 1995)	Rs. 1,05,172/-
Total salary	Rs. 1,53,922/-
Interest	Rs. 2066/-
Total Income	Rs. 1,55,988/-

Assets during check period

Two FDRs in PNB	Rs. 80,000/-
Balance in PNB A/c	Rs. 23,917/-

Principal Deposit in RD A/c	Rs. 1,20,000/-
Total Assets	Rs. 2,23,917/-
Kitchen/Living Expenses	Rs. 51,307/-
Disproportionate Assets	1,19,232/-

4. Mr. Vikram Singh, learned counsel appearing on behalf of the appellant would urge that in the order framing charges against the appellant dated 11.01.2002, the check period was enlarged from an initial period of *June 1993 to August 1995* to the period of *July, 1989 to August, 1995*, however the court, did not consider the income amounting to Rs. 48,750/- during the period 1989-1991. It was contended that the total income that was taken into account by the trial court while framing of charges was Rs. 1,06,945/- (for the period June, 1993 to August, 1995), meanwhile the kitchen expenses calculated were Rs. 34,707/-, and the total assets were calculated as Rs. 1,08,087/-. In view of this data the trial court calculated the total disproportional assets as Rs. 35, 849/- (Rs. 1,08,087+Rs. 34,707 - Rs. 1,06,945) i.e. 33.5% of the appellant's total income. Mr. Singh urged that the income of the enlarged period was not included in the total income of the appellant, and if the income would have been included the disproportionate asset would have amounted to only 1.85% of his income. Thus, it was urged

that if the income during the period 1989-1991 was included, no case would have been made out against the appellant under the PC Act and the appellant should have been acquitted by the Trial Court under section 232 of the Code.

5. Mr. Singh, would further urge that the sanction for prosecution obtained against the appellant was for the check period of June, 1993-August, 1995 and not for the enlarged period.

6. It has been further urged by the counsel appearing on behalf of the appellant that the latter was only asked to explain an amount of Rs. 35,849/- as disproportionate assets, however, the extra income of Rs. 1,20,000/- was produced by way of defence evidence. Thus, the appellant was convicted on the basis of the evidence provided by him, however, he was not given an opportunity to explain this income.

7. Lastly, it has been urged by the counsel for the appellant that the latter was only asked to explain disproportionate assets amounting to Rs. 35,849/- in his statement under section 313 of the Code. However, the appellant was convicted for having disproportionate assets amounting to Rs. 1,19,232/-. It was submitted that evidence against the appellant, if not put up to him for eliciting answers against queries under section 313 of the Code, cannot be used to convict the appellant. To buttress this submission, learned counsel

appearing on behalf of the appellant would place reliance on Sharad Birdichand Sarda vs. State of Maharashtra, reported as AIR 1984 SC 1622.

8. On the other hand, Ms. Sonia Mathur, learned SPP appearing on behalf of the CBI would urge that the total income of the appellant can be calculated as under:

Income during 17.07.1989 to 27.02.1991 (At NIDC)	Rs. 48, 750/-
Income during 04.06.1993 – June, 1995 (At Transport Department)	Rs. 1, 05, 172/-
Total Salary +interest	Rs. 1, 53, 172/- Rs. 2, 066/-
Total Income	Rs. 1, 55, 988/-
However, the assets were found to be as under:	
2 FDRs in PNB	Rs. 80, 000/-
Balance in savings A/c	Rs. 23, 917/-
Principal Amount deposited in RD A/c	Rs. 1, 20, 000/-
Total Assets	Rs. 2, 23, 917/-

9. Ms. Sonia Mathur, learned SPP appearing on behalf of the CBI would further urge that the learned trial court has correctly relied on the judgment of Sajjan Singh vs. State of Punjab, reported as AIR 1964 SC 464, and

calculated the kitchen expenditure of the appellant as $\frac{1}{3}^{\text{rd}}$ of his total income of Rs. 1,53,822/-, which amounted to Rs. 51,307/-. Further, it has been urged that on the basis of this data, the trial court has correctly assessed the disproportional asset of the appellant amounting to Rs. 1,19,232/- (Total Assets – (Total income – kitchen expenses)).

10. It has been urged on behalf of the CBI that the appellant was depositing a sum of Rs. 2000/- per month for a period of 03.11.1989-08.11.1994 in the RD Account. An amount of Rs. 66, 000/- was deposited in the RD Account during the period when the appellant was a public servant, i.e. November, 1989 to February, 1991 and June, 1993 to November, 1994. An amount of Rs. 54, 000/- was deposited in the RD Account during the period when he was unemployed, i.e. from 27.02.1991 to 04.06.1993. It was urged that the appellant was unable to substantiate any source of income during the period when he was unemployed, thus, the said income during the period when he was unemployed can only be construed as his ill gotten money earned while working as public servant.

11. It was further argued that the burden of proving that he was doing a private job and imparting tuitions during 27.02.1991-04.06.1993 was on the appellant, since this fact was in the exclusive knowledge of the appellant

within the meaning of section 106 Evidence Act, and thus was required to establish this fact. It was further argued that the burden of proof in this regard was not discharged by the appellant, thus, a presumption under section 114 Evidence Act was drawn against him. (*State of Maharashtra vs. Wasudeo Ramchandra Kaidalwar*, reported as (1981) 3 SCC 199).

12. Ms. Sonia Mathur, learned SPP canvassed that the order on charge inadvertently mentioned the amount of disproportionate income to be Rs. 35,849/- which was the same as given in the chargesheet. It was submitted that the inadvertent error with regard to the total disproportionate asset in the order framing charge has not caused any prejudice to the appellant. In this regard Ms. Mathur would rely on the landmark decision of the Supreme Court in the case of *Willie (William) Slaney vs. State of Madhya Pradesh*, reported as 1956 Cri LJ 291, and the decision of the Bombay High Court in *Sudhakar Bhaskar Pore vs. The State of Maharashtra*, reported as 1993 (3) BomCR 482.

13. On the question of validity of sanction for prosecution, Ms. Mathur, learned SPP has urged that the sanction was duly granted by the sanctioning authority (PW4) after going through the relevant papers including the complaint, FIR, seizure-cum-observation memo, documents and statement of

witnesses pertaining to the subject investigation. Thus, it has been submitted that the sanctioning authority has applied its mind.

14. I have heard counsel on behalf of the parties and perused the evidence on record. In my view, the issues that arise for consideration in the present appeal are as under:

- **Issue 1: Whether the error/omission in the order framing charges has caused prejudice to the appellant?**
- **Issue 2: Whether the sanction for prosecution dated 2.03.2000 was vitiated in view of the circumstance that the check period was enhanced from 1993-1995 to 1989-1995 at the stage of framing of charge?**
- **Issue 3: Whether there was an omission on part of the Ld. Special Judge to put relevant/material questions to the appellant while recording his statement under section 313 of the Code?**
- **Issue 4: Whether the appellant was able to satisfactorily account for the assets found disproportionate to his known sources of income?**

Issue No.1: Whether the error/omission in the order framing charges has caused prejudice to the appellant?

15. At this juncture, it is necessary to collate the facts as are relevant to examine the issue at hand. It is an admitted position that the subject FIR was registered against the appellant for possessing assets disproportionate to his known sources of income during his tenure as a Motor Vehicle Inspector with the Transport Department (from June 1993 to August 1995) and as an Assistant Engineer with the NIDC (from 1989 to 1991). The sanction for prosecution vide sanction order dated 02.03.2000, however, was obtained for the check period from June, 1993 to August, 1995 from the sanctioning authority, i.e., the authority competent to remove the appellant from his post at the Transport Department. The chargesheet filed after investigation gave details of income expenditure and assets for the check period of June 1993 to August 1995, and stated that the disproportionate assets acquired by the appellant during the afore-stated check period amounted to Rs. 35,849/-, which is 33.5% of the income during the check period. However, the order on charge dated 11.01.2002, enlarged the check period to 1989 to August 1995, but without taking into consideration the income for the period 1989 to May, 1993. Therefore, the order on charge dated 11.01.2002, erroneously

mentioned the disproportionate assets acquired during the enlarged check period as Rs, 35, 849/-, which is 33.5% of the income during the previous check period.

16. A plain reading of the chargesheet in the subject FIR and the order on charge dated 11.01.2002 brings to light the fact that there is an error in the order framing charges dated 11.01.2002. The order on charge enlarges the check period for calculation of disproportionate assets, without taking into account the income for the enlarged period. This has led to a miscalculation in the amount of assets disproportionate to the known sources of income of the appellant.

17. The effect of an error or omission in the framing of a charge has been specifically dealt with under sections 225, 464 and 465 of the Code.

Section 225 of the Code reads as under:

"no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice".

Section 464 of the Code reads as under:

"464. Effect of omission to frame, or absence of, or error in, charge.-

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

Section 465 of the Code reads as under:

“465.Finding or sentence when reversible by reason of error, omission or irregularity.-

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could not should have been raised at an earlier stage in the proceedings.”

(Emphasis Supplied)

18. The provisions of the Code of Criminal Procedure are to the effect that errors in charge or even the complete absence of charge do not vitiate a trial, so long as there is no failure of justice/prejudice caused to the accused. This position has been confirmed by the Supreme Court in Willie (William) Slaney vs. The State of Madhya Pradesh, (*supra*) as under:

"24. Next, Sections 226 and 227 show that errors in a charge, *and even the total absence of a charge*, do not vitiate a trial from the start so as to render it no trial at all as would the absence of sanction under Section 197. This is evident because these errors and omissions can be remedied at any time during the course of the trial in the Sessions Court (Section 226) or even at the very end of the trial (Section 227), and when this is done the trial need not proceed de novo but can go on from the stage at which the alteration was made provided neither side is prejudiced (Section 228). That is conclusive to show that no error or omission in the charge, and not even a total absence of a charge, cuts at the root of the trial. The proceedings up to the stage of the alteration, which, as we have seen, can be at the very end of the trial, are not vitiated unless there is prejudice; they are good despite these imperfections. That is impossible when the error is so vital as to cut at the root of the trial. It follows that errors in the charge, and even a total absence of a charge, are not placed in the non-curable class."

(Emphasis Supplied)

19. Following its earlier decisions, the Supreme Court in *Pal Singh vs. State of Punjab*, reported as (2014) 11 SCC 508, has held that a mere technical defect in the framing would not vitiate a trial unless the appellant is able to show prejudice caused to him. The court observed as follows:

"12. As there were doubts about the conflict/correctness of these two judgments, the matter was decided by a Constitution Bench in *Willie(William) Slaney v. State of M.P.* [AIR 1956 SC 116 : 1956 Cri LJ 291] and the Court came to the following conclusions: (AIR pp. 137-38, paras 86 & 88)

"86. Sections 34, 114 and 149 of the Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; 'and the charge is a rolled-up one involving the direct liability and the constructive liability' without specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.

88. This judgment should not be understood by the subordinate courts as sanctioning a deliberate disobedience to the mandatory requirements of the Code, or as giving any licence to proceed with trials without an appropriate charge. The omission to frame a charge is a grave defect and should be vigilantly

guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted.

In the main, the provisions of Section 535 would apply to cases of inadvertence to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specification, and where the facts proved by the prosecution constitute a separate and distinct offence but closely relevant to and springing out of the same set of facts connected with the one charged.”

13. In *Dahari v. State of U.P.* [(2012) 10 SCC 256 : (2013) 1 SCC (Cri) 22] , this Court reconsidered the issue whether the appellants therein could be convicted under Section 302 r/w Section 149 IPC, in the event that the High Court had convicted three persons among the accused and the number of convicts has thus remained less than 5 which is in fact necessary to form an unlawful assembly as described under Section 141 IPC. This Court considered the earlier judgments in *Amar Singh v. State of Punjab* [(1987) 1 SCC 679 : 1987 SCC (Cri) 232] , *Nagamalleswara Rao (K.) v. State of A.P.* [(1991) 2 SCC 532 : 1991 SCC (Cri) 564] , *Nethala Pothuraju v. State of A.P.* [(1992) 1 SCC 49 : 1992 SCC (Cri) 20 : AIR 1991 SC 2214] and *Mohd. Ankoos v. Public Prosecutor* [(2010) 1 SCC 94 : (2010) 1 SCC (Cri) 460 : AIR 2010 SC 566] , and came to the conclusion that in a case where the prosecution fails to prove that the number of members of an unlawful assembly are 5 or more, the court can simply convict the guilty person with the aid of Section 34 IPC, provided that there is adequate evidence on record to show that such accused shared a common intention to commit the crime in question. (See also *Jivan Lal v. State of M.P.* [(1997) 9 SCC 119 : 1997 SCC (Cri) 521] , *Hamlet v. State of Kerala* [(2003) 10 SCC 108 : (2006) 2 SCC (Cri) 518] , *Fakhruddin v. State of M.P.* [AIR 1967 SC 1326 : 1967 Cri LJ 1197] , *Gurpreet Singh v. State of Punjab* [(2005) 12 SCC 615 : (2006) 1 SCC (Cri) 191 : AIR 2006 SC 191] and *S. Ganesan v. Rama Raghuraman* [(2011) 2 SCC 83 : (2011) 1 SCC (Cri) 607] .)

14. In *Sanichar Sahni v. State of Bihar* [(2009) 7 SCC 198 : (2009) 3 SCC (Cri) 347 : AIR 2010 SC 3786] , this Court considered the issue and held: (SCC p. 204, para 27)

“27. Therefore ... unless the convict is able to establish that defect in framing the charges has caused real prejudice to him

and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory.”

(Emphasis Supplied)

20. In the instant case, it is observed that the order on charge does contain wrong particulars. In light of the facts of present case, and the settled legal position, what needs to be examined is whether due to the said error, any failure of justice has been occasioned or prejudice caused to the appellant in the instant case.

21. The test of prejudice has been elaborately discussed in the decision of the Constitution Bench of the Supreme Court in **Willie (William) Slaney (Supra)**. The Hon'ble Supreme Court by a majority of 3:2 held as under:

" 5. Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him

is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is *substantial* compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.

23. The marginal note to Section 225 is headed “Effect of errors” and the section states that:

“No error in stating either the offence or the particulars required to be stated in the charge, and *no* omission to state the offence or those particulars, shall be regarded *at any stage* of the case as material, unless the accused was *in fact* misled by such error or omission, *and* it has occasioned a failure of justice.”

Therefore, when there is a charge and there is either error or omission in it or both, and whatever its nature, it is not to be regarded as material unless two conditions are fulfilled both of which are matters of fact: (1) the accused has *in fact* been misled by it *and* (2) it has occasioned a failure of justice. That, in our opinion, is reasonably plain language.

56. Now what is an accused person entitled to know from the charge and in what way does the charge in this case fall short of that? All he is entitled to get from the charge is:

(1) the offence with which he is charged, Section 221(1), Criminal Procedure Code,

(2) the law and section of the law against which the offence is said to have been committed, Section 221(4),

(3) particulars of the time, Section 222(1), and

(4) of the place, Section 222(1), and

(5) of the person against whom the offence is said to have been committed, Section 222(1), and

(6) when the nature of the case is such that those particulars do not give him sufficient notice of the matter with which he is charged, such particulars of the manner in which the alleged

offence was committed as will be sufficient for that purpose, Section 223.

He is not entitled to any further information in the charge: see Illustration (e) to Section 223 of the Code:

“A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.”

57. It is clear from this that when the case is one of murder, the accused is not entitled to be told in the charge how it was committed, whether with a pistol or a lathi or a sword. He is not entitled to know from the charge simpliciter any further circumstance. How then is he expected to defend himself? He has the police challan, he has the evidence recorded in the committal court, he hears the prosecution witnesses and he is examined under Section 342 of the Code. It is these proceedings that furnish him with all the necessary, and indeed vital information, and it is his duty to look into them and defend himself. It will be seen that if the logic of the appellant's contention is carried to its fullest extent, the accused could complain of prejudice because he was not told in the charge whether a pistol was used for the crime or a sword and if a pistol, its calibre and bore and the type of cartridge."

22. Similarly, in *State of W.B. v. Laisal Haque*, reported as (1989) 3 SCC 166, the Supreme Court relied on the decision of the Supreme Court in *Willie Slaney* (Supra) and observed as under:

“8. Next, Section 464 of the Code provides that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has, in fact, been occasioned thereby.

9. In the celebrated case of *Willie (William) Slaney v. State of Madhya Pradesh* [AIR 1956 SC 116 : (1955) 2 SCR 1140 : 1956 Cri LJ 291] , Vivian Bose, J. speaking for the court after an elaborate discussion observed that in judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself. That test is clearly fulfilled in the facts and circumstances of the present case. The principles laid down by that very eminent Judge in *Slaney case* [AIR 1956 SC 116 : (1955) 2 SCR 1140 : 1956 Cri LJ 291] have throughout been followed by this Court. See: *K.C. Mathew v. State of Travancore-Cochin* [AIR 1956 SC 241 : (1955) 2 SCR 1057 : 1956 Cri LJ 444] , *Gurbachan Singh v. State of Punjab* [AIR 1957 SC 623 : 1957 Cri LJ 1009] , *Birichh Bhuian v. State of Bihar* [AIR 1963 SC 1120 : 1963 Supp 2 SCR 328, 336-37 : (1963) 2 Cri LJ 190] and *State of Maharashtra v. Ramdas Shrinivas Nayak* [(1982) 2 SCC 463 : 1982 SCC (Cri) 478 : (1983) 1 SCR 8] .”

(Emphasis Supplied)

23. In the case of *Nani Gopal Mitra v. State of Bihar*, reported as (1969) **2 SCR 411**, the Supreme Court while dealing with a bribery case, rejected the argument on defect in charge by observing as under:

“9. It was argued that the charge did not disclose the amounts the appellant took as bribes, and the persons from whom he had taken such bribes and the appellant had therefore no opportunity to prove his innocence. But, in our view, this circumstance does not invalidate the charge, through it may be a ground for asking for better particulars. The charge, as framed, clearly stated that the appellant accepted gratification other than legal remuneration and obtained pecuniary advantage by corrupt and illegal means. The charge, no doubt, should have contained better particulars, so as to enable the appellant to prove his case. But the appellant never complained in the trial court or the High Court that the charge did not contain the necessary particulars. The record on the other hand disclosed that the appellant understood the case against him and adduced all the evidence which he wanted to place before the Court. Section 225 of the Criminal Procedure Code says “that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice”. It also appears that the appellant never raised any objection either before the Special Judge or in the High Court on the score that the charge was defective and that he was misled in his defence on the ground that no particulars of the persons from whom the bribes were taken were mentioned. We accordingly reject the argument of the appellant on this point.”

(Emphasis Supplied)

24. The meaning and scope of failure of justice and prejudice was again discussed by the Hon'ble Supreme Court in **Darbara Singh vs. State of Punjab**, reported as (2012) 10 SCC 476, wherein it was held as under:

“19. In *Sanichar Sahni v. State of Bihar* [(2009) 7 SCC 198 : (2009) 3 SCC (Cri) 347 : AIR 2010 SC 3786] this Court dealt with the aforementioned issue elaborately, and upon consideration of a large number of earlier judgments, held as under: (SCC p. 204, para 27)

“27. Therefore, ... unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory.”

20. The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 CrPC, which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a *failure of justice*. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

21. “Failure of justice” is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be “failure of justice”; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered

some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. “Prejudice” is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek benefit under the orders of the court. (Vide *Rafiq Ahmed v. State of U.P.* [(2011) 8 SCC 300 : (2011) 3 SCC (Cri) 498 : AIR 2011 SC 3114] , SCC p. 320, para 36; *Rattiram v. State of M.P.* [(2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481] and *Bhimanna v. State of Karnataka* [(2012) 9 SCC 650] .)”

(Emphasis Supplied)

25. In view of the above discussion, the legal proposition that emerges is that in order to ascertain whether any prejudice has been caused due to an error or omission in the framing of a charge, the court must consider the following factors:

- a) whether the accused has had a fair trial, i.e.
 - i) whether he was aware of what he was being tried for; and
 - ii) whether he had knowledge of the facts sought to be established against him clearly; and

iii) whether he was given a full and fair chance to defend himself against the charge.

b) whether an objection could have been raised at an earlier stage during the proceedings or not.

26. In the instant case, the order on charge dated 11.01.2002 clearly mentioned the offence that is sought to be proved against the appellant, i.e. the offence of possessing assets disproportionate to his known sources of income. The order on charge dated 11.01.2002 also clearly and unambiguously mentioned the check period which was being used to calculate the income and disproportionate assets of the appellant. The appellant was thus given a fair opportunity to defend the case against him, as he was aware of the period for which he was being alleged of having disproportionate assets. It is also pertinent to note that the objection of error in the charge was not raised by the appellant at any previous occasion at the stage of trial.

27. In light of the aforesaid factual matrix and the settled legal position, in my view, no prejudice was caused to the appellant due to the erroneous framing of charge.

28. The mere miscalculation of the amount of disproportionate assets, in my opinion, falls in the category of a technical error and does not vitiate the trial by way of which the appellant has been convicted, as no prejudice has been caused to him.

29. In view of the foregoing, issue no. 1 has been decided against the appellant.

Issue No. 2: Whether the sanction for prosecution dated 2.03.2000 was vitiated in view of the circumstance that the check period was enhanced from 1993-1995 to 1989-1995 at the stage of framing of charge?

30. Insofar as the issue whether sanction for prosecution is vitiated because of enlargement of the check period is concerned, it has been argued on behalf of the appellant that since the sanction for prosecution was accorded only for the check period of 1993-1995, the appellant could not have been tried for an extended check period i.e. 1989-1995 without obtaining a fresh sanction for prosecution.

31. In this regard, learned counsel appearing on behalf of CBI would place reliance on the decision of the Bombay High Court in **Sudhakar Bhaskar Pore v. State of Maharashtra** (*supra*) where a single judge bench of the Bombay High Court extended the scope of a sanction for prosecution

obtained to try the appellant therein for an offence, to try the latter with two earlier instances of the same offence, on the ground that no prejudice was caused to the appellant. In furtherance thereof, learned counsel appearing on behalf of the CBI would urge that in the instance case, although the sanction for prosecution dated 2.3.2000 was only obtained for the check period of 1993-1995, the appellant could have been tried for an enlarged check period under the same sanction for prosecution if there was no prejudice caused to the appellant in doing so.

32. The Supreme Court in **Ashok Tshering Bhutia v. State of Sikkim** reported as (2011) 4 SCC 402, has confirmed its earlier decisions holding that in order to vitiate a sanction order for prosecution of an accused on the basis of an error defect or irregularity, the accused has to demonstrate that failure of justice has been occasioned. In para 25 of the report the Hon'ble Supreme Court has observed as under:

“25. Same remained the position regarding sanction. In the absence of anything to show that any defect or irregularity therein caused a failure of justice, the plea is without substance. A failure of justice is relatable to error, omission or irregularity in the sanction. Therefore, a mere error, omission or irregularity in sanction is not considered to be fatal unless it has resulted in a failure of justice or has been occasioned thereby. Section 19(1) of the PC Act, 1988 is a matter of procedure and does not go to the root of the jurisdiction and once the cognizance has been taken by the Court under CrPC, it cannot be said that an invalid

police report is the foundation of jurisdiction of the court to take cognizance. [Vide *Kalp Nath Rai* [(1997) 8 SCC 732 : 1998 SCC (Cri) 134 : AIR 1998 SC 201] , *State of Orissa v. Mrutunjaya Panda* [(1998) 2 SCC 414 : 1998 SCC (Cri) 644 : AIR 1998 SC 715] , *State v. T. Venkatesh Murthy*[(2004) 7 SCC 763 : 2004 SCC (Cri) 2140] , *Shankerbhai Laljibhai Rot v. State of Gujarat* [(2004) 13 SCC 487 : (2006) 1 SCC (Cri) 346] , *Parkash Singh Badal v. State of Punjab* [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193 : AIR 2007 SC 1274] and *M.C. Mehta (Taj Corridor Scam) v. Union of India* [(2007) 1 SCC 110 : (2007) 1 SCC (Cri) 264 : AIR 2007 SC 1087] .J”

33. I agree with the submissions made on behalf of CBI insofar as it relates to the argument, that the appellant could have been tried for an extended check period, without obtaining a fresh sanction for prosecution for such extended check period, if no prejudice was caused to him. In view of the settled legal position that the purpose of a sanction is to give jurisdiction to the Court to take cognizance of the offence and further that the appellant has been tried for the very same offence for which sanction for prosecution has been accorded and it is only the check period that has been enhanced, the sanction for prosecution is not vitiated.

34. In my view, in terms of the observations made by the Hon’ble Supreme Court of India in *Ashok Tshering Bhutia* (*Supra*), with regard to sanction for prosecution, the appellant has failed to demonstrate any failure

of justice caused to him due to the enlargement of check period and therefore his contention in this regard is devoid of any merit.

35. In light of the above discussion, issue no. 2 is decided against the appellant.

Issue No.3: Whether there was an omission on part of the Ld. Special Judge to put relevant/material questions to the appellant while recording his statement under section 313 of the Code?

36. In order to determine the issue at hand, it is relevant to look at the object and purpose of section 313 of the Code. The Hon'ble Supreme Court in Nar Singh v. State of Haryana, reported as **(2015) 1 SCC 496**, while following its numerous previous decisions, discussed the scope, purpose and object of section 313 of the Code as under:

“10. There are two kinds of examination under Section 313 CrPC. The first under Section 313(1)(a) CrPC relates to any stage of the inquiry or trial; while the second under Section 313(1)(b) CrPC takes place after the prosecution witnesses are examined and before the accused is called upon to enter upon his defence. The former is particular and optional; but the latter is general and mandatory. In *Usha K. Pillai v. Raj K. Srinivas* [(1993) 3 SCC 208 : 1993 SCC (Cri) 824] , this Court held that: (SCC p. 212, para 3)

3. ... the court is empowered by [Section 313(1)] clause (a) to question the accused at any stage of the inquiry or trial; while [Section 313(1)] clause (b) obligates the Court to question the accused before he enters his defence on any circumstance appearing in prosecution evidence against him.

11. The object of Section 313(1)(b) CrPC is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him. The examination of the accused under Section 313(1)(b) CrPC is not a mere formality. Section 313 CrPC prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. The real importance of Section 313 CrPC lies in that, it imposes a duty on the court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point.

12. Elaborating upon the importance of a statement under Section 313 CrPC, in *Paramjeet Singh v. State of Uttarakhand* [(2010) 10 SCC 439 : (2011) 1 SCC (Cri) 98] , this Court has held as under: (SCC p. 449, para 22)

“22. Section 313 CrPC is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 CrPC cannot be used against him and have to be excluded from consideration. (Vide *Sharad BirdhichandSarda v. State of Maharashtra* [(1984) 4 SCC 116 : 1984 SCC (Cri) 487] and *State of Maharashtra v. Sukhdev Singh* [(1992) 3 SCC 700 : 1992 SCC (Cri) 705] .)”

13. In *Basavaraj R. Patil v. State of Karnataka* [(2000) 8 SCC 740 : 2001 SCC (Cri) 87] , this Court considered the scope of Section 313 CrPC and in paras 18 to 20 held as under: (SCC pp. 752-53)

“18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is ‘for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him’. In *Jai Dev v. State of Punjab* [AIR 1963 SC 612 : (1963) 1 Cri LJ 495] Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus: (AIR p. 620, para 21)

‘21. ... The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.’

19. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

20. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim *audi alteram partem*. The word ‘may’ in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him.”

16. Undoubtedly, the importance of a statement under Section 313 CrPC, insofar as the accused is concerned, can hardly be minimised. The statutory provision is based on the rules of natural justice for an accused, who must be made aware of the circumstances being put against him so that he can give a proper explanation to meet that case. If an objection as to Section 313 CrPC statement is taken at the earliest stage, the court can make good the defect and record additional statement of the accused as that would be in the interest of all. When objections as to

defective Section 313 CrPC statement is raised in the appellate court, then difficulty arises for the prosecution as well as the accused. When the trial court is required to act in accordance with the mandatory provisions of Section 313 CrPC, failure on the part of the trial court to comply with the mandate of the law, in our view, cannot automatically enure to the benefit of the accused. Any omission on the part of the court to question the accused on any incriminating circumstance would not ipso facto vitiate the trial, unless some material prejudice is shown to have been caused to the accused. Insofar as non-compliance with mandatory provisions of Section 313 CrPC is concerned it is an error essentially committed by the learned Sessions Judge. Since justice suffers in the hands of the court, the same has to be corrected or rectified in the appeal.

17. So far as Section 313 CrPC is concerned, undoubtedly, the attention of the accused must specifically be brought to inculpable pieces of evidence to give him an opportunity to offer an explanation, if he chooses to do so. A three-Judge Bench of this Court in *Wasim Khan v. State of U.P.* [AIR 1956 SC 400 : 1956 Cri LJ 790] and *Bhoor Singh v. State of Punjab* [(1974) 4 SCC 754 : 1974 SCC (Cri) 664 : AIR 1974 SC 1256] held that every error or omission in compliance with the provisions of Section 342 of the old CrPC does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.

18. Observing that omission to put any material circumstance to the accused does not ipso facto vitiate the trial and that the accused must show prejudice and that miscarriage of justice had been sustained by him, this Court in *Santosh Kumar Singh v. State* [*Santosh Kumar Singh v. State*, (2010) 9 SCC 747 : (2010) 3 SCC (Cri) 1469] , has held as under: (SCC p. 779, para 92)

“92. ... the facts of each case have to be examined but the broad principle is that all incriminating material circumstances must be put to an accused while recording his statement under Section 313 of the Code, but if any material circumstance has been left out that would not ipso facto result in the exclusion of that evidence from consideration unless it could further be shown by the accused that prejudice and miscarriage of justice had been sustained by him.”

19. In *Paramjeet Singh v. State of Uttarakhand* [(2010) 10 SCC 439 : (2011) 1 SCC (Cri) 98] , this Court has held as under: (SCC p. 451, para 30)

“30. Thus, it is evident from the above that the provisions of Section 313 CrPC make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court.”

20. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance with Section 313 CrPC has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under Section 313 CrPC, it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 CrPC. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. The facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.

21. We may refer to few judgments of this Court where this Court has held that omission to put the question under Section 313 CrPC has caused prejudice to the accused vitiating the conviction. In *State of Punjab v. Hari Singh* [(2009) 4 SCC 200 : (2009) 2 SCC (Cri) 243] , question regarding conscious possession of narcotics was not put to the accused when he was

examined under Section 313 CrPC. Finding that question relating to conscious possession of contraband was not put to the accused, this Court held that the effect of such omission vitally affected the prosecution case and this Court affirmed the acquittal. In *Kuldip Singh v. State of Delhi* [(2003) 12 SCC 528 : 2004 SCC (Cri) Supp 480] , this Court held that when important incriminating circumstance was not put to the accused during his examination under Section 313 CrPC, prosecution cannot place reliance on the said piece of evidence.

22. We may also refer to other set of decisions where in the facts and circumstances of the case, this Court held that no prejudice or miscarriage of justice has been occasioned to the accused. In *Santosh Kumar Singh v. State* [*Santosh Kumar Singh v. State*, (2010) 9 SCC 747 : (2010) 3 SCC (Cri) 1469] , it was held that on the core issues pertaining to the helmet and the ligature marks on the neck which were put to the doctor, the defence counsel had raised comprehensive arguments before the trial court and also before the High Court and the defence was, therefore, alive to the circumstances against the appellant and that no prejudice or miscarriage of justice had been occasioned. In *Alister Anthony Pareira v. State of Maharashtra* [(2012) 2 SCC 648 : (2012) 1 SCC (Civ) 848 : (2012) 1 SCC (Cri) 953] , in the facts and circumstances, it was held that by not putting to the appellant expressly the chemical analyser's report and the evidence of the doctor, no prejudice can be said to have been caused to the appellant and he had full opportunity to say what he wanted to say with regard to the prosecution evidence and that the High Court rightly rejected the contention of the appellant-accused in that regard.

23. When such objection as to omission to put the question under Section 313 CrPC is raised by the accused in the appellate court and prejudice is also shown to have been caused to the accused, then what are the courses available to the appellate court? The appellate court may examine the convict or call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him under Section 313 CrPC and the said answer can be taken into consideration.

24. In *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033] , this Court considered the

fallout of the omission to put a question to the accused on vital circumstance appearing against him and this Court has held that the appellate court can question the counsel for the accused as regards the circumstance omitted to be put to the accused and in para 16 it was held as under: (SCC p. 806)

“16. ... It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. *It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction. In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342 CrPC, the omission has not been shown to have caused prejudice to the accused.*”

25. The same view was reiterated by this Court in *State (Delhi Admn.) v. Dharampal* [(2001) 10 SCC 372 : 2003 SCC (Cri) 1012] , wherein this Court has held as under: (SCC pp. 376-77, paras 13-14)

“13. Thus it is to be seen that where an omission, to bring the attention of the accused to an inculpatory material has occurred that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellate court can always make good that lapse by calling upon the counsel for the accused

to show what explanation the accused has as regards the circumstances established against the accused but not put to him.

14. This being the law, in our view, both the Sessions Judge and the High Court were wrong in concluding that the omission to put the contents of the certificate of the Director, Central Food Laboratory, could only result in the accused being acquitted. The accused had to show that some prejudice was caused to him by the report not being put to him. Even otherwise, it was the duty of the Sessions Judge and/or the High Court, if they found that some vital circumstance had not been put to the accused, to put those questions to the counsel for the accused and get the answers of the accused. If the accused could not give any plausible or reasonable explanation it would have to be assumed that there was no explanation. Both the Sessions Judge and the High Court have overlooked this position of law and failed to perform their duties and thereby wrongly acquitted the accused.”

27. The point then arising for our consideration is, if all relevant questions were not put to the accused by the trial court as mandated under Section 313 CrPC and where the accused has also shown that prejudice has been caused to him or where prejudice is implicit, whether the appellate court is having the power to remand the case for redecision from the stage of recording of statement under Section 313 CrPC. Section 386 CrPC deals with power of the appellate court. As per sub-clause (b)(i) of Section 386 CrPC, the appellate court is having power to order retrial of the case by a court of competent jurisdiction subordinate to such appellate court. Hence, if all the relevant questions were not put to the accused by the trial court and when the accused has shown that prejudice was caused to him, the appellate court is having power to remand the case to examine the accused again under Section 313 CrPC and may direct remanding the case again for retrial of the case from that stage of recording of statement under Section 313 CrPC and the same cannot be said to be amounting to filling up lacuna in the prosecution case.

30. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:

30.1. Whenever a plea of non-compliance with Section 313 CrPC is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer.

30.2. In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.

30.3. If the appellate court is of the opinion that non-compliance with the provisions of Section 313 CrPC has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 CrPC and the trial Judge may be directed to examine the accused afresh and defence witness, if any, and dispose of the matter afresh.

30.4. The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.”

(Emphasis Supplied)

37. The settled position of law that can be discerned from *Nar Singh* (*supra*), is that the object of Section 313 of the Code is to bring the substance of accusation to the latter to enable the accused to explain each and every circumstance appearing in evidence against him. The attention of the accused

must specifically be brought to inculpatory pieces of evidence, to give him an opportunity to offer an explanation if he chooses to do so.

38. The Supreme Court, since time immemorial, has held that a mere omission to question the accused with regard to certain incriminatory circumstances would not result in automatic exclusion of such evidence and the accused must demonstrate prejudice. It has also been held that when such an objection is not raised before the trial court which could have easily cured the defect, and such objection is belatedly raised for the first time before the appellant court, that itself demonstrates that the appellants did not feel any prejudice. Furthermore, the Apex Court has also held that, all which an accused is entitled to in such cases is that, his explanation, if any, be considered by the Appellate Court while evaluating the prosecution evidence and no more. (Ref: **Rekha Sharma v. C.B.I.** reported as (2015) 218 DLT 1)

39. In **Rekha Sharma** (*supra*), rendering observations on the object of section 313 of the CrPC, this Court held as under:

“343. The sublime philosophy behind Section 313 is to ensure that the accused has opportunity to explain the evidence in support of the charge against him at trial. The court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. The Supreme Court in the case reported as *Jai Dev v. The State of Punjab* AIR 1963 SC 612 has elaborated on the test of this procedural compliance:

“21. In support of his contention that the failure to put the relevant point against the appellant Hari Singh would affect the final conclusion of the High Court, Mr. Anthony has relied on a decision of this Court in *Hate Sigh Bhagat Singh v. State of Madhya Bharat* AIR 1953 SC 468. In that case, this Court has no doubt referred to the fact that it was important to put to the accused each material fact which is intended to be used against him and to afford him a chance of explaining it if he can. But these observations must be read in the light of the other conclusions reached by this Court in that case. It would, we think, be incorrect to suggest that these observations are intended to lay down a general and inexorable rule that wherever it is found that one of the point used against the accused person has not been put to him, either the trial is vitiated or his conviction is rendered bad. The examination of the accused person under s. 342 is undoubtedly intended to give him an opportunity to explain any circumstances appearing in the evidence against him. In exercising its powers under s. 342, the Court must take care to put all relevant circumstances appearing in the evidence to the accused person. It would not be enough to put a few general and broad questions to the accused, for by adopting such a course the accused may not get opportunity of explaining all the relevant circumstances. On the other hand, it would not be fair or right that the Court should put to the accused person detailed questions which may amount to his cross-examination. The ultimate test in determining whether or not the accused has been fairly examined under s. 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity. It is obvious that no

general rule can be laid down in regard to the manner in which the accused person should be examined under s. 342. Broadly stated, however, the true position appears to be that passion for brevity which may be content with asking a few omnibus general questions is as much inconsistent with the requirements of s. 342 as anxiety for thoroughness which may dictate and unduly detailed and large number of questions which may amount to the cross-examination of the accused person. Besides, in the present case, as we have already shown, failure to put the specific point of distance is really not very material.”

344. It bears no reiteration that any omission on the part of the trial judge to put all incriminating evidence to the accused would not ipso facto vitiate the trial. The omission, if any, has to be judged through the scale of corresponding prejudice caused that results in miscarriage of justice...”

(Emphasis supplied)

40. In order to ascertain whether the relevant questions were put to the appellant in his statement under section 313 of the Code, the said statement is reproduced hereinbelow:

“Qus.1 It is in evidence against you that during the period June, 1993 to August, 1995 you were working as Motor Vehicle Inspector in Transport Department, Govt. of NCT of Delhi. What have you to say?

Ans. It is correct.

Qus. 2 It is also in evidence against you that you after completion of Engineering Course in 1989 joined National Industrial Development Corporation Ltd. On contract basis as Assistant Engineer on consolidated salary of Rs. 2500/- per month and you worked there from 17.7.89 to 27.2.91 and a

letter Ex. PW6/A in this regard has been issued by PW6 Sh. A.K. Mahitra. What have you to say?

Ans. It is a matter of record.

Qus. 3 It is further in evidence against you that you remained without any job during the period 27.2.91 to 4.6.93. What have you to say?

Ans. It is incorrect. I was doing private job and also imparting tuitions.

Qus. 4 It is further in evidence against you that on the basis of complaint Ex. PW1/B of Sh. Rajesh Kumar Inspector, CBI/ACB, FIR Ex PW1/C was registered under the signature of the then SP. What have you to say?

Ans. I do not know.

Qus. 5 It is further in evidence against you that on 22.8.95 Sh. Rajesh Kumar, Inspector, CBI/ACB, Delhi conducted searches at your residence in presence of independent witness Sh. Raj Kumar (PW5) and search-cum-observation memo Ex. PW1/A was prepared. What have you to say?

Ans. It is incorrect. The search was conducted at the house of my father. I was not residing with my father and I was not present at the time of search.

Qus. 6 It is further in evidence against you that you deposited the salary amount in your saving bank account No. 17012 in Bank of Baroda, Chanakya Puri Branch and you made last withdrawal from this account in June, 1991 leaving the balance of Rs.119.30p and statement of account is Mark-A. What have you to say?

Ans. It is a matter of record.

Qus. 7 It is further in evidence against you that you received Rs. 1,05,172/- as salary for the period June, 1993 to August, 1995 from the Transport Department and the salary statements are Ex. PW7/C-1 to C-3 which were sent to CBI by PW-7 Ms. Rashmi Singh vide letter Ex. PW7/A alongwith Ex. PW7/B which is statement 1 to 6 signed by you. What have you to say?

Ans. It is a matter of record. However Ex. PW7/B was got filled during investigation at the direction of CBI.

Qus. 8 It is further in evidence against you that you also received an amount of Rs. 1773/- as interest in saving bank account No. 19747 in PNB, Kishan Ganj, Delhi. What have you to say?

Ans. It is a matter of record.

Qus. 9 It is further in evidence against you that during the check period i.e. June, 1993 to August, 1995 your expenditure was Rs. 34707/-. What have you to say?

Ans. It is incorrect.

Qus. 10 It is further in evidence against you that during the check period, you deposited Rs. 80,000/- in account No. Sugam 508, PNB, Kishan Ganj, Delhi and statement of accounts are Ex. PW3/A and B and out of this account FDRs of Rs. 50,000/- and Rs. 30,000/- were issued which have been taken back by you with the orders of the Court. What have you to say?

Ans. It is a matter of record.

Qus. 11 It is further in evidence against you that on 22.8.95 an amount of Rs.23,837/- was found as cash balance in your account No. 19747, PNB, Kishan Ganj, Delhi. What have you to say?

Ans. It is a matter of record.

Qus. 12 It is further in evidence against you that during the check period, you acquired moveable assets worth Rs. 4250/- as per observation memo. What have you to say?

Ans. It is incorrect. Observation memos contained all wrong details.

Qus. 13 It is further in evidence against you that during the check period, you were found in disproportionate assets to the tune of Rs. 35849/- for which you have not satisfactorily account for. What have you to say?

Ans. It is incorrect. I have fully explained to CBI.

Qus. 14 It is further in evidence against you that PW-4 Sh. Virender Singh has accorded sanction for your prosecution vide sanction order Ex. PW4/A bearing his signature at point-A. What have you to say?

Ans. I have no knowledge.

Qus. 15 Why this case against you?

Ans. I have been falsely implicated in this case.

Qus. 16 Why have the PWs deposed against you?

Ans. No public witness has deposed against me. Rest were police officials.

Qus. 17 Will you lead any defence evidence?

Ans. Yes.

Qus. Have you to say anything else?

Ans. I have been falsely implicated in the instant case by CBI without investigating the case. There is no disproportionate assets. My kitchen expenses used to be borne by my father out of the agricultural income. I have not spent any money on kitchen expenses during the check period. I used to receive financial assistance from my 'Nani'. I am innocent."

41. In the instant case, the appellant was asked questions regarding his employment, salary, balance and interest in saving bank accounts (in PNB and Bank of Baroda), his FDRs, moveable assets and expenditure, pertaining to the period 17.07.1989 to August, 1995. The appellant was asked to explain the disproportionate assets amounting to Rs. 35,849/-. It is therefore,

observed that the appellant was in fact asked to explain the circumstance of him possessing assets disproportionate to his known source of income during a definite period from 17.7.1989 to August, 1995. Further, it is observed that all evidence brought on record by the prosecution viz the proof of employment during the said check period (Ex PW6/A), the complaint (Ex. PW1/B); the subject FIR (Ex. PW1/C); the search-cum-observation memo (Ex. PW1/A); statement of saving bank account No. 17012 in Bank of Baroda, Chanakya Puri Branch (Mark A); Salary statement during employment with the Transport Department (Ex. PW7/C-1 to C-3); expenditure of the appellant during the check period; FDR deposits in PNB, Kishan Ganj; Cash balance in account No. 19747 in PNB, Kishan Ganj; moveable assets; were all put to the appellant, in order to enable him to explain any incriminating circumstances that may appear from the evidence led against him. The appellant was also specifically asked to explain his income during the check period of 1989-August 1995, which included the period when he was unemployed. Thus, the appellant was asked to explain all incriminating circumstances that were brought forward by the prosecution to prove its case against the appellant. The appellant before this Court has

failed to prove or substantiate any prejudice and has only highlighted the alleged omission of inclusion of all incriminating circumstances against him.

42. It is further observed that the appellant himself led evidence by examining DW2 Sh. Anand Singh, Sub Post Master, Padam Nagar, P.O. Delhi to establish his RD Account and the fact that he had deposited an amount of Rs. 1,20,000/- during the check period. Further, after perusing the defence evidence led by the appellant, specifically the statement of DW2, it comes to light that the appellant was having a RD Account Number 418867 which was opened on 3.11.89 and was closed on 8.11.94. The maturity value of this account was Rs. 1,60,060/-. The Learned Special Judge in the impugned judgment has observed as under:

“The accused has examined DW-2 Sh. Anand Singh, Sub Post Master, Padam Nagar, P.O. Delhi, who stated that the accused had a RD Account No. 418867, which was opned on 3.11.1989 and closed on 8.11.1994 and the maturity value of Rs. 1,60,060/- was paid to accused on 8.11.1994 and he proved certificate Ex. DW2/A. During the course of argument, the accused as well as his defence counsel Sh. M.P. Singh submitted that the accused deposited Rs. 2000/- p.m. from 3.11.1989 to 8.11.1999 in the said RD account. So, the accused had deposited Rs. 1,20,000/- during these five years from 3.11.1989 to 8.11.1999 @ Rs. 2000/- p.m. The accused while working as a public servant from November, 1989 till February, 1991 and June 1993 to November 1995 he must have deposited Rs. 66000/- during these 33 months @ Rs. 2000/- p.m. and he deposited Rs. 54,000/- during 27 months from 27.2.1991 to 4.6.1993 when he was without job @ Rs. 2000/- p.m.”

43. The assertion made on behalf of the appellant that the Ld. Special Judge did not provide the appellant any opportunity to explain the extra income of Rs. 1,20,000/- does not hold water in view of the circumstance that the appellant himself led evidence to prove that he maintained the RD Account No. 418867 which was opened on 3.11.89 and was closed on 8.11.94 and deposited a sum of Rs. 1,20,000/- in the said account.

44. In view of the foregoing issue no. 3 is decided against the appellant.

Issue No.4: Whether the appellant was able to satisfactorily account for the assets found disproportionate to his known sources of income?

45. The appellant, in the instant case was charged for the offence under section 13(1)(e) read with section 13(2) of the PC Act. Section 13(1)(e) of the PC Act reads as under:

“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. Explanation.—For the purposes of this section, “known sources of income” means income received from any lawful source and such receipt has been intimated in

accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.”

46. With respect to the essentials to be proved to convict a person for possessing disproportionate assets under the afore-stated provision under section 13(1)(e) of the PC Act, the Hon’ble Supreme Court in **V.K. Puri vs. CBI**, reported as **(2007) 6 SCC 21**, held as under:

“**13.** Ingredients of the offence under Section 13(1)(e) of the 1988 Act are:

- (i) the accused is a public servant;
- (ii) the nature and extent of the pecuniary resources of property found in his possession;
- (iii) his known sources of income i.e. known to the prosecution;
- (iv) such resources or properties found in possession of the accused were disproportionate to his known sources of income.”

47. In the cases involving allegations of possession of disproportionate assets, the law regarding the burden of proof is well settled. Initially, the prosecution has to discharge the burden to establish the culpability of the accused by leading positive evidence, to establish the essential ingredients of the offence of criminal misconduct. Thereafter, the burden of proof shifts to the accused to account for the possession of the disproportionate assets. In this regard, the Supreme Court in **State of Maharashtra vs. Pollonji**

Darabshaw Daruwalla, reported as **1987 (Supp) SCC 379**, has held as under:

“18. The assumptions implicit in the above observation of the High Court suffer from a basic fallacy. It is for the prosecution to choose what, according to it, is the period which having regard to the acquisitive activities of the public servant in amassing wealth, characterize and isolate that period for special scrutiny. It is always open to the public servant to satisfactorily account for the apparently disproportionate nature of his possession. Once the prosecution establishes the essential ingredients of the offence of criminal misconduct by proving, by the standard of criminal evidence, that the public servant is, or was at any time during the period of his offence, is in possession of pecuniary resources or property disproportionate to his sources of income known to the prosecution, the prosecution discharges its burden of proof and the burden of proof is lifted from the shoulders of the prosecution and descends upon the shoulders of the defence. It then becomes necessary for the public servant to satisfactorily account for the possession of such properties and pecuniary resources. It then becomes necessary for the possession of such properties and pecuniary resources. It is erroneous to predicate that the prosecution should also disprove the existence of the possible sources of income of the public servant. Indeed in *State of Maharashtra v. Wasudeo Ramchandra* [(1981) 3 SCC 199 : 1981 SCC (Cri) 690 : AIR 1981 SC 1186] this Court characterised the approach of that kind made by the High Court as erroneous. It was observed: [SCC p. 204, SCC (Cri) p. 695, para 12]

“The High Court, therefore, was in error in holding that a public servant charged for having disproportionate assets in his possession for which he cannot satisfactorily account, cannot be convicted of an offence under Section 5(2) read with Section 5(1)(e) of the Act unless the prosecution disproves all possible sources of income.”

In the present case, the selection of a ten year period between April 1, 1958 and 31-12-1968 cannot, by reason alone of the

choice of the period, be said to detract from the maintainability of the prosecution.”

48. In V.K. Puri (*Supra*), the Hon’ble Supreme Court observed as under:

“14. Once, however, the aforementioned ingredients are established by the prosecution, the burden of proof would shift on the accused to show that the prosecution case is not correct. (See *M. Krishna Reddy* [(1992) 4 SCC 45 : 1992 SCC (Cri) 801] , para 7.)

15. One of the ingredients of offences, therefore, is known sources of income. What is material therefor is that the criminal misconduct had been committed during the period the accused held office and not the places where he had held offices. The fact that the appellant had bank accounts within the jurisdiction of the Delhi Courts as also immovable properties is not in dispute. The respondent in the charge-sheet has clearly pointed out that one of his known sources of income was the rental received by him from his Delhi flat. The same had been given due credit for the purpose of arriving at a prima facie satisfaction that the assets possessed by him are disproportionate to his known sources of income.”

49. In the instant case, the prosecution argued that the appellant was in possession of assets disproportionate to his known sources of income to the extent of Rs. 35,849/- while he was working as a public servant with the NIDC and Transport Department during the check period of 1989-1995 and that the known sources of income of the appellant were his salary from NIDC during 1989-1991 and his salary from the transport department along with the interest accrued on his saving bank accounts. As per the settled legal position, the burden of proof then shifted to the appellant to disprove this

charge and to prove that the said amount of Rs. 35,849/- was not disproportionate to his known sources of income.

50. It has been further settled that the onus is on the accused to prove that the assets found were not disproportionate to the known sources of income.

While giving context to the term ‘known sources of income’ in cases involving allegations of possession of disproportionate assets the Supreme

Court in **CSD Swami vs. State** reported as **(1960) 1 SCR 461** held as under:

“6...Now, the expression “known sources of income” must have reference to sources known to the prosecution on a thorough investigation of the case. It was not, and it could not be, contended that “known sources of income” means sources known to the accused. The prosecution cannot, in the very nature of things, be expected to know the affairs of an accused person. Those will be matters “specially within the knowledge” of the accused, within the meaning of Section 106 of the Evidence Act. The prosecution can only lead evidence, as it has done in the instant case, to show that the accused was known to earn his living by service under the Government during the material period. The prosecution would not be justified in concluding that travelling allowance was also a source of income when such allowance is ordinarily meant to compensate an officer concerned for his out-of-pocket expenses incidental to journeys performed by him for his official tours. That could not possibly be alleged to be a very substantial source of income. The source of income of a particular individual will depend upon his position in life with particular reference to his occupation or avocation in life. In the case of a government servant, the prosecution would, naturally, infer that his known source of income would be the salary earned by him during his active service. His pension or his provident fund would come into calculation only after his retirement, unless he had a justification for borrowing from his provident fund. We are

not, therefore, impressed by the argument that the prosecution has failed to lead proper evidence as to the appellant's known sources of income. It may be that the accused may have made statements to the investigating officers as to his alleged sources of income, but the same, strictly, would not be evidence in the case, and if the prosecution has failed to disclose all the sources of income of an accused person, it is always open to him to prove those other sources of income which have not been taken into account or brought into evidence by the prosecution. In the present case, the prosecution has adduced the best evidence as to the pecuniary resources of the accused person, namely, his bank accounts. They show that during the years 1947 and 1948, he had credit at the banks, amounting to a little over Rs 91,000. His average salary per mensem, during the relevant period, would be a little over Rs 1100. His salary, during the period of the two years, assuming that the whole amount was put into the banks, would be less than one-third of the total amount aforesaid, to his credit. It cannot, therefore, be said that he was not in possession of pecuniary resources disproportionate to his known sources of income.”

51. Similarly, in *Hindustan Petroleum Corpn. Ltd. v. Sarvesh Berry*,

reported as (2005) 10 SCC 471, the Supreme Court held as under:

“13. It is to be noted that in cases involving Section 13(1)(e) of the PC Act, the onus is on the accused to prove that the assets found were not disproportionate to the known sources of income. The expression “known sources of income” is related to the sources known to the authorities and not the accused. The Explanation to Section 13(1) of the PC Act provides that for the purposes of the section, “known sources of income” means income derived from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant. How the assets were acquired and from what source of income is within the special knowledge of the accused. Therefore, there is no question of any disclosure of defence in the departmental proceedings. In the criminal case, the accused has to prove the source of

acquisition. He has to satisfactorily account for the same. Additionally, issues covered by Charges 2 and 3 cannot be the subject-matter of adjudication in the criminal case.”

52. While defending the charge of possession of disproportionate assets amounting to Rs. 35,849/-, the appellant, himself led evidence to the effect that he had deposited a sum of Rs. 1,20,000/- during the check period 1989-1993. It is a well settled proposition of law, commencing from the decision of the Hon’ble Supreme Court in **State of Bombay vs. Kathi Kalu Oghad** reported as **(1962) 3 SCR 10**, that the protection from self incrimination under Article 20(3) of the Constitution of India, does not extend to an accused who produces documents/material against himself in absence of any duress or coercion. It is further a settled legal position that even the statement of the accused under section 313 of the Code can be used as evidence against him, insofar as it supports the case of the prosecution. Thus, where the evidence produced by the appellant is in line with the case of the prosecution, it can be used against him for rendering conviction. (Ref: **Brajendra Singh vs. State of M.P.** reported as **(2012) 4 SCC 289**).

53. Therefore that left the appellant to prove with cogent evidence that the amount of Rs. 2000/- deposited every month from 3.11.1989 to 8.11.1994, which period also included the period when he remained unemployed,

formed part of his known sources of income. However, it is observed that except for the bald assertion in his statement under section 313 of the Code that the appellant was doing a private job and was imparting tuitions, no evidence has been brought on record by the appellant to substantiate this assertion. The appellant did not furnish any evidence to show that he was working anywhere from 27.02.1991-04.06.1993. This fact was in his exclusive knowledge, within the meaning of the provisions of section 106 of the Evidence Act, thus, it was to be established by him. Therefore, the burden of proof in this regard was not satisfactorily discharged by the appellant with positive evidence in support of his defence, and thus the Ld. Special Judge was correct in drawing a presumption under section 114 of the Evidence Act against the appellant while holding as under:

“ 36. In the present case, the prosecution has established that the accused had earned income of Rs. 1,53,922/- as public servant and Rs. 2066/- as interest and after deducting one third living expenses of Rs. 51,307/- savings should have been Rs. 1,04,685/- but against it, the accused was found to possess moveable assets worth Rs. 2,23,917/- which was in excess by 1,19,232/-. Now u/s 13(1)(e) and explanation attached thereto and as per judgment of the Hon'ble Supreme Court in Avadh Kishore Gupta and Pollonji Case (Supra), the burden shifted upon the accused to explain his source of income as how he was in excess of assets/savings by Rs. 1,19,232/-. The accused has merely stated in his statement u/s 313 CrPC while replying question No. 3 that he was without job from 27.2.1991 to 4.6.1993 to which he replied that he was in

private job and also imparting tuitions. The accused did not come in the defence to depose about his income. His father DW-1 also did not say that accused had any other source of income. He had also not examined any witness to prove his income. The accused did not lead evidence as to from what source of income, he was depositing Rs. 2000/- p.m. in RD Account. The accused did not lead any evidence to the effect that he was also working somewhere from 27.2.1991 to 4.6.1993 and this fact was specially within the knowledge of the accused within the meaning of Section 106 of Indian Evidence Act 1872 and as such an adverse inference is to be drawn against the accused u/s 114 of the Indian Evidence Act. In the circumstances it has to be presumed that the accused was depositing his ill-gotten money at the rate of Rs. 2000/- per month from November, 1989 to February, 1991 and June, 1993 to November, 1994 while he was working as a public servant and also during the period when he remained unemployed at the rate of Rs. 2000/- per month in the said recurring deposit account with the post office. As such it has to be held that the accused who was working as a public servant has committed the offence of criminal misconduct as he was in possession of the moveable property of Rs. 1,19,232/- disproportionate to his known source of income to which the accused could not satisfactorily account. Hence, he is held guilty for the offence punishable u/s 13(1)(e) of Prevention of Corruption Act, 1988.”

54. In view of the foregoing, since the appellant has failed to explain his being in possession of assets disproportionate to his known sources of income, I see no reason to differ from the findings arrived at by the Ld. Special Judge.

55. It is observed that the following is proved beyond reasonable doubt in the instant case:

Income during the Check Period

Income from employment at

NIDC (17.07.1989-27.02.1991) Rs. 48,750/-

Income from Transport

Dept (04.06.1993-August, 1995) Rs. 1,05,172/-

Total salary Rs. 1,53,922/-

Interest Rs. 2066/-

Total Income Rs. 1,55,988/-

Assets during check period

Two FDRs in PNB Rs. 80,000/-

Balance in PNB A/c Rs. 23,917/-

Principal Deposit in RD A/c Rs. 1,20,000/-

Total Assets Rs. 2,23,917/-

Kitchen/Living Expenses Rs. 51,307/-

Disproportionate Assets 1,19,236/-

56. Thus, during the check period between 1989 to 21.08.1995 the appellant's known income has been established to be Rs. 1,53,922/- as public servant and Rs. 2066/- as interest and after deducting 1/3rd living expenses of Rs. 51,307/-, the savings of the appellant should have been Rs.1,04,681/-. However, the appellant was found in possession of moveable assets worth Rs. 2,23,917/-. Therefore, the appellant was found in possession of assets

disproportionate to his known sources of income to the tune of Rs. 1,19,236/- and the appellant has failed to account for the said disproportionate income.

57. In view of the foregoing, issue no. 4 is also decided against the appellant.

58. Keeping in view the foregoing discussion, I am of the view that the appellant has not been able to satisfactorily account for possessing assets disproportionate to his known sources of income. I find no reason to differ with the findings of the Ld. Special Judge with respect to the conviction of the appellant under section 13(1)(e) of the Prevention of Corruption Act.

On Sentence:

59. The provisions under section 27 of the PC Act stipulate that the High Court, while adjudicating an appeal assailing the order of a Court of the Special Judge under the PC Act, may exercise all powers of appeal conferred by the Code on the High Court, as if the court of the Special Judge were a Court of Session trying cases within the local limits of the High Court. The provisions under Section 27 of the PC Act are reproduced hereinbelow:

“27. Appeal and revision.—Subject to the provisions of this Act, the High Court may exercise, so far as they may be applicable, all the powers of appeal and revision conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a High Court as if the court of the special Judge were a Court of Session trying cases within the local limits of the High Court.”

60. This Court while exercising its powers under section 386 of the Code, has on earlier occasions modified the sentence imposed on the accused persons under the PC Act. [Ref: **Rekha Sharma v. CBI** (*supra*), **Sri Sharma v. State** reported as (2008) 102 DRJ 274.] The High Courts have been vested, with the power, *inter alia*, to alter the extent of the sentence in an appeal from conviction. The statutory provisions under section 386 of the Code are reproduced hereinbelow:

“386. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(b) In an appeal from a conviction-

(iii) With or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

****”

61. This court, in its decision in **Rekha Sharma** (*supra*), while dealing with the question of modification of sentence awarded to the appellants convicted under the PC act therein, made the following observations:

“**488.** The Supreme Court in its decision reported as (2013) 11 SCC 401, Jasvir Kaur v. State of Punjab expressed concern on the absence of a sentencing policy in the country and, therefore

cautioned the Courts to callibrate the punishment with due care and upon taking into account the relevant attending circumstances. The Supreme Court quoted with approval the luminous observations of English Judge Henry Alfred McCardie which are reproduced hitherto-fore:

“...Trying a man is easy, as easy as falling off a log, compared with deciding what to do with him when he has been found guilty.”

495. I am conscious of the fact that these appellants (A-6 to A-62) were under immense pressure to commit these crimes. The investigating officer has deposed regarding the same and the trial Judge has also mentioned his observations in this regard. I am in agreement with the same. However, I disagree with his observations with regard to appellants A-32, A-37, A-38, A-39, A-40 and A-41. Barring A-37, Pushkar Mal Verma they have not pleaded that they were under pressure owing to the fact that their defense was that they have not abetted in creating the second set of lists. This defense has been proven to be false but I am of the opinion that they cannot be penalized for taking a false defense as regards sentencing. The false defense has been used as an additional circumstance to prove their guilt, however, I feel they were similarly situated as the remaining teachers in the preparation of these lists.

496. L.N Rangarajan in his book “*Kautilya-The Arthashastra*” has indicated the obligations which are placed upon a Ruler. It would be apt to quote what stands reproduced in Part VIII Law and Justice (Penguin Edition, first published in the year 1992) “It is the power of punishment alone, when exercised impartially in proportion to the guilt, and irrespective of whether the person punished is the King's son or an enemy, that protects this world and the next.”

(Emphasis supplied.)

62. In view of the facts and circumstances of the instant case and the foregoing discussion on the abovementioned issue numbers 1-4, in my view, it would have served the ends of justice in the present case, to have sentenced the appellant to the minimum punishment prescribed under section 13(2) of the PC Act for having committed the offence under section 13(1)(e) of the PC Act.

63. At this juncture, it would be relevant to note that the provisions under section 13(2) of the PC Act, stood amended vide the Lokpal and Lokayuktas Act, 2013 (Schedule, Part III, Clause 2) which came into force with effect from 16.01.2014. Vide the said amendment, *inter alia*, the minimum sentence of imprisonment stipulated under section 13(2) of the PC Act is a term of four years. The said provision, as it stood prior to the amendment which was enforced with effect from 16.01.2014, prescribed a minimum sentence of imprisonment for a term of one year for the offence committed under section 13(1)(e) of the PC Act. Section 13(2) of the PC Act, as it stood prior to the amendment enforced with effect from 16.01.2014, is reproduced hereinbelow:

“13(2). Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.”

64. It is a rule of ancient English vintage that there can be no *ex post facto* infliction of a penalty heavier than what had prevailed at the time of commission of the offence. (Ref: **Maru Ram v. Union of India: (1981) 1 SCC 107**) This well-established principle of law, would find application in the present case in keeping with Article 20(1) of the Constitution of India which interdicts subjecting any person to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. At the time of the commission of the offence in the present case, i.e. the check period from 1989-1995, the provisions under the PC Act as it stood prior to the amendment in 2014, prescribed a minimum sentence of imprisonment for a term of one year.

65. In my view, in keeping with the foregoing discussion, whilst upholding the conviction of the appellant, the sentence awarded by the trial court ought to be modified. I, therefore, sentence the appellant to rigorous imprisonment for a period of one year under section 13(2) of the PC Act for the offence punishable under section 13(1)(e) of the PC Act.

66. Accordingly, the appeal stands dismissed. The conviction of the appellant is upheld. The sentence imposed is modified as above. The bail

bond stands cancelled, surety discharged accordingly. The appellant shall surrender forthwith to undergo the remaining portion of his sentence.

67. A copy of this judgment be sent to the Superintendent, Central Jail, Tihar by Express Messenger for necessary information and compliance.

68. The trial court record be sent back.

SEPTEMBER 30, 2016
dn/rr

SIDDHARTH MRIDUL, J

