

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:- 24.05.2017

CORAM

THE HON'BLE MR. JUSTICE T. MATHIVANAN

Criminal Revision Petitions in CrI.R.C. Nos.457 & 458 of 2017

Against

CrI.M.P. Nos. 456 & 338 of 2008

in

Special Calendar Case No. 1 of 2008

[On the file of Special Judge/ Chief Judicial Magistrate at Tiruvallur]

1. Mr. K. Velusamy,
1 S/o.Karuppiyah,
2017)
No.4/172,Kakkanji Street,

... Petitioner/ Accused
(CrI. R.C. No.457 of

Mondiamman Nagar,
Redhills,
Chennai – 600 052.

2. Tmt. P. Mariammal
Accused 4
W/o. Ponnusamy (Late),
of 2017)
No.2/495,
A, Tiruvalluvar Salai,
Redhills,
Chennai 600 052.

... Petitioner/
(CrI. R.C. No.458

Versus

State by Inspector of Police,
Respondent/Complainant
Vigilance and Anti-Corruption,
Petitions)
City Special Unit,
Chennai – 600 028.

...

(in both CrI. Revision

Prayer:

Criminal Revision Petitions are filed challenging the common order dated 6.3.2017 and made in Crl. M.P. No. 456 & 388 of 2008 in Special Case No. 1 of 2008 on the file of the Learned Special Judge/ Chief Judicial Magistrate, Tiruvallur.

Appearance for Petitioners : 1. Mr. N. Jothi, Learned Counsel Assisted
by
Mr. S. Jayakumar, Learned Counsel
who is on record for the petitioner/ A1
(Crl. Rev. No.457 of 2017)
2. Mr. A. Ramesh, Learned Senior
Counsel
Assisted by Mr. C. Arunkumar,
Learned Counsel on record for the petitioner/ A4 who is
(Crl. Rev. No.458 of 2017)

For Respondent : Mr. E. Raja, Learned Additional Public
Prosecutor (V & AC)

Invoking the provisions of Sections 397 & 401 of the Code of Criminal Procedure these memorandum of Criminal Revisions have been directed against the common orders dated 6.3.2017 and made in Crl. M.P. Nos. 456 & 388 of 2008 in Special Case No.1 of 2008, on the file of the Learned Special Judge/ Chief Judicial Magistrate at Tiruvallur, dismissing the petitions in Crl. M.P. Nos. 456 & 388 of 2008

COMMON ORDER

With the issues involved in both the Criminal Revision Petitions are one and the same and the parties to the Criminal Revision Petitions are also one and the same, both the Petitions have been consolidated together heard simultaneously and disposed of in this Common Order.

2. For easy reference and also for the sake of convenience the petitioner in Crl. R.C. No. 457 of 2017 Mr. Velusamy may hereinafter be

referred to as 1st accused ; the petitioner in CrI. R.C. No. 458 of 2017 Mrs. Mariammal be referred to as the 4th accused and the respondent hereinafter be referred to as the complainant, wherever the context so require.

3. The 1st accused had filed a petition in CrI. M.P. No. 456 of 2008 under Section 239 of the Code of Criminal Procedure with the prayer to discharge him from the clutches of the charges. Similarly, the 4th accused Mrs. Mariammal had also filed another petition in CrI. M.P. No.388 of 2008 along with A2 and A3 in Special Case No.1 of 2008 to discharge them from the charges.

4. During the pendency of these petitions A2 Mr. M.G. swaminathan and A3 Mr. P. Ponnusamy had died. Hence, the 4th accused Mariammal had alone been prosecuting the petition in CrI.M.P. No.388 of 2008, while the 1st accused K. Velusamy prosecuting his petition in CrI.M.P. No.456 of 2008. Both the petitions were contested by the complainant police (V & AC) by filing their counter statement.

5. After hearing both sides the Learned Special Judge had proceeded to dismiss both the petitions on the following two grounds:

(a) that the genuineness of the documents as well as the statements of the witnesses cannot be assessed at this stage, but it can be seen only at the time of trial.

(b) that on perusal of the sanction order it is revealed, that it is a self explanatory and the same is acceptable one to make out a prima facie case against the accused, and that the validity and genuineness of the sanction order cannot be assessed at this stage.

6. Having been aggrieved by the impugned common order dated 6.3.2017, the 1st accused as well as the 4th accused (since A2 & A3 had passed away) stand before this court with their respective Criminal Revision Petitions.

7. Heard Mr. N. Jothi, Learned Counsel assisted by Mr. S. Jayakumar, Learned Counsel who is on record for the 1st accused (CrI. Rev. No.457 of 2017) and Mr. A. Ramesh, Learned Senior Counsel

assisted by Mr. C. Arunkumar, Learned Counsel who is on record for the 4th accused (Crl. Rev. No.458 of 2017) and Mr. E. Raja, learned Additional Public Prosecutor (V & AC) appearing for the complainant

8. Mr. N.Jothi has projected his arguments mainly on the following two grounds:

(i) The Inspector of Police who took up the investigation was not empowered to take up the investigation in so far as the Chennai city is concerned, where the offence was said to have taken place, because it is a metropolitan area;

(ii) The order of sanction accorded by L.W.1 Mr. K. Bharathan, Additional Registrar of Co-operative Societies, Chennai Region to launch prosecution against the first accused is not proper as he had not gone through the entire records which he ought to have been done and that he had violated and willfully disobeyed the order of this Court, dated 21.08.2007 and made in W.P.No.27266 of 2007.

9.Ground No.1

Competency to take up the investigation:- It is known fact, in criminal cases, that the incompetency in taking up the investigation would definitely vitiate the entire proceedings

9A. Chapter IV of the Prevention of Corruption Act 1988 encompasses Sections 17 and 18. Section 17 of the Act contemplates Persons authorized to investigate, whereas Section 18 of the Act enacts the Power to inspect bankers' books. This Court is concerned about the provisions of Section 17 of the Act with reference to the persons authorized to investigate. Sub Section (1) says Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2) of 1974 no police officer below the rank,-

(a) in the case of the Delhi Special Police Establishment)- of an Inspector of Police;

(b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973,(2) of

1974, of an Assistant Commissioner of Police;

(c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank, shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant: Provided further that an offence referred to in clause (e) of sub-section (1) of section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.

10. In so far as this case is concerned, the FIR bearing No.17/2013 appears to have been registered by one Mr. G.Elango Inspector of Police attached to Vigilance and Anti Corruption, Special Wing III, No.18 First Canal Street, Gandhi Nagar, Adyar, Chennai 600 020 as against Mr. K. Velusamy (A-1) Thiru. M.G. Swaminathan (A-2), Thiru. P. Ponnusamy (A-3) and Tmt. P. Mariammal (A-4).

11. He says that he happened to register the case on the order of the Government letter No.6254/VC-I/2002-03, dated 20-11-2012. According to him, the above said Government letter is dated back to 20.11.2002. But he did not say on whose authorization he had registered the case as against the accused persons. Be it as it may, the First Information Report in Crime No.17/2003 seems to have been registered by him on 15.10.2003 at about 12.30 p.m. Even if it is presumed that there was a Government letter No.6254/VC-I/2002-03, dated 20-11-2012, what prompted him or what made him to register this case belatedly on 15.10.2003 i.e after passing of nearly one year ? It could therefore be presumed that there was abnormal delay in registering the case. Secondly, the Government letter No.6254/VC-I/2002-03, dated 20-11-2012 has not been produced. If it is produced, then this Court as well as the trial Court would have had an occasion to know the reason for registering the case as against the accused persons.

12. No authorization letter, authorizing Mr. G.Elango, Inspector of Police to register the case as against the accused persons, has been produced. A crucial question has therefore arisen as to under what authority L.W.58 had registered the case? Based on the authorization

letter, dated 15.10.2008, issued by one Mr. Manjunathan, Superintendent of Police/Central Wing/V/A1, L.W.58, Mr. G.Elango, Inspector of Police, soon after the registration of the case had handed over the FIR to L.W.59, Mr. S.Bharanikumar, Inspector of Police for investigation. The letter, dated 15.10.2003 in R.C.No.213/13 (Co-op./CSV-I has been tagged along with the typed set of papers. Thereafter, Mr. S.Bharanikumar (L.W.59) had entrusted the case records with L.W.60 Mr.C.Sudarsan, Inspector of Police, as he was transferred to other station. However, there is no authorization letter authorizing L.W.60 Mr. C.Sudarsan, Inspector of Police to take up the further investigation and file the final report. Here, the adverse inference is that L.W.58 Mr. G.Elango Inspector of Police was not authorized to register the case. The aforesaid Government letter has not been produced. There is an abnormal delay in registering the case. Lastly L.W.60 was not authorized to take up the investigation and to file the final report. There was also delay in according order of sanction to launch prosecution against the first accused.

13. In this connection Mr. N.Jothi learned counsel for the first accused has contended that since Chennai city, where the offence was said to have been taken place is a metropolitan area, the investigation, or further investigation whatever might be the case, ought to have been taken up by an officer not below the rank of an Assistant Commissioner of Police, as provided under clause (b) of sub section (1) to Section 17 of the Act. With the case has been registered against the accused persons under Section 13(1)(e) of the Act, there must have been an order from a police Officer not below the rank of a Superintendent of Police as contemplated under Section 17(1) of the Act, authorizing L.W.60 Mr. C.Sudarsan to take up the investigation. Since the procedure envisaged under clause (b) of sub section (1) to Section 17 of the Act as well as the second proviso to Section 17(1) of the Act have not been followed in this case, Mr. N.Jothi has urged that the investigation done in the given case on hand could not be said to be a valid one.

14. In support of his contention he has placed reliance upon the

<http://www.judis.nic.in> decision made in **Suresh Chandra Gupta Vs State of U.P.** (1995 (2))

Judicial Interpretation on Crimes 1450 (All), In this case it has been observed that

"There was no order of the Superintendent of Police or a police officer higher in rank to the Superintendent of Police, granting permission to the Inspector to investigate the offences against the petitioner. For want of permission, as required by Section 5-A (1) of the Prevention of Corruption Act (new Section 17 of the Prevention of Corruption Act, 1988), the investigation done in the present case cannot be said to be a valid one. Before investigation the permission of a police officer not below the rank of a Superintendent of Police was must under the above said provisions."

15. Originally the First Information Report was registered in crime No.17 of 2003 as against the **accused persons** under Sections 120B and 409 of IPC and under Sections 13(2) r/w 13(1)(c) and 13(1)(e) of the Act. Section 13 of the Act contemplates Criminal Misconduct by a public servant.

Sub section (1) of the Act enacts ;

A public servant is said to commit the offence of criminal misconduct,-

(a).....

(b).....

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d)

(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.

Sub Section (2) envisages:

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.

16. As it is seen from the contents of the FIR it is alleged that the accused persons 1 to 4 had committed the offence punishable under Sections 120B and 409 of IPC and under Sections 13(2) r/w 13(1)(c) and Section 13(1)(e) of the Act. Hence it is thus made clear that Section 13 of the Act is with reference to criminal misconduct by a public servant and the word misconduct literary means wrong conduct or improper conduct that must be established by the prosecution.

17. For proving an offence of criminal misconduct the following four ingredients are very much essential:

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

Once the above said four ingredients of criminal misconduct under Section 13(1) and 13(2) of the Act are established the offence of criminal misconduct under Section 13(1) of the Act is complete. Unless the accused is able to account for such resources or property the burden then shifts to the accused to satisfactorily account for his possession of disproportionate assets. The nature and extent of the burden of proof resting upon the public servant found in possession of disproportionate assets under Section 13(1) of the Act cannot be higher than to establish his case by preponderance of probability. The prosecution cannot, in the very nature of things be expected to know the affairs of a public servant found in possession of resources or property disproportionate to his known source of income i.e. his salary. Those will be matters specially within the knowledge of the public servant within the meaning of Section 106 of the Indian Evidence Act, 1872. The accused is not bound to prove his innocence beyond all reasonable doubt. All that he has to do is to bring

out a preponderance of probability. This principle is laid down in **State of Maharashtra v Wasudeo (AIR 1981 SC 1186: 1981 (3) SCC 199)**.

18. As per the First Information Report, the check period is from 1.1.1996 to 31.12.2001. It is manifested from the First Information Report that the first accused was working as a Co-operative sub-Registrar/Special Officer at Chennai from 5.9.1994 onwards. He is a public servant within the meaning of Section 2(c) of the Act.

19. It is alleged that on credible information and on preliminary verification it is found that the second accused M.G. Swaminathan is the benami of the first accused. The second accused did not have any ancestral property or any independent source of income. On perusal of the suspected documents, it is understood that the first accused had misused his official position by doing real estate business in the name of his father-in-law Thiru. P. Ponnusamy (A3) under the name and style of "Ponwari Real Estate". It is also alleged that the first accused was running a company in the name of Ponwari Enterprises Private Ltd., in which Thiru. P. Ponnusamy (A3) and his wife Tmt. P. Mariammal (A-4) were working partners. The first accused had violated the bye laws of the Society by purchasing the lands willfully and intentionally by diverting the society's funds to the tune of Rs.3 crores approximately in violation of the instructions of the Registrar (Housing), Chennai and caused loss to the society.

20. On perusal of the records, it is revealed that the first accused had purchased so many lands in the name of Thiru.M.G.Swaminathan (A2) as benami transactor by conspiring themselves. It is further alleged that after 1.1.1996 the first accused was found to have acquired properties in the name of his father-in-law and mother in law as benamidars.

21. The FIR further reads that during the check period, the total income and expenditure of the accused and his family members were roughly around Rs.12,42,000/-, the likely savings during the check period was roughly calculated at Rs.7,87,040/-. Hence, it is alleged that the first accused Mr. K.Velusamy in the capacity of Sub Registrar/Special Officer of

properties and pecuniary resources to the extent of Rs.94,09,115/- which was disproportionate to his known source of income as on 31.12.2001, which was estimated at 756.5%.

22. L.W.60 Mr. C.Sudarsan, Inspector of Police after completion of investigation had laid a final report on 30.11.2007, on the file of the learned Special Judge/Chief Judicial Magistrate, Thiruvallore under Section 13(2) r/w with Section 13(1)(e) of the Act and under Section 109 IPC r/w Section 13(2) r/w Section 13(1)(e) of the Act. This Court finds from the final report that the Investigating Officer (L.W.60) had dropped Sections 120B and 409 IPC and Section 13(1)(c) of the Act. While laying the final report, the Investigating Officer had maintained the charge under Section 13(2) read with Section 13(1)(e) of the Act and inserted the charge under Section 109 IPC read with Section 13(2) read with Section 13(1)(e) of the Act.

23. Ground No.2

In so far as this case is concerned Mr. N.Jothi has raised a serious question as to "whether the order of sanction, dated 4.10.2007 accorded by L.W.1 Mr. K. Bharathan, Additional Registrar of Co-operative Societies, Chennai Region under Section 19(1) of the Act, without granting an order of sanction under Section 197 of Code of Criminal Procedure is valid?"

24. This Court has perused the proceedings of the Additional Registrar of Co-operative Societies, Chennai Region. Paragraphs 1 to 15 of the order of sanction commence with the words either 'whereas it is reported' or 'whereas it is further reported'. At page No.23 of the typed set of papers in the last paragraph L.W.1 has stated that he was informed by the Advocate of the first accused that the first accused had filed a Writ Petition in W.P. No.27266 of 2007, on the file of this Court to issue a direction to the Inspector of Vigilance and Anti-Corruption to place certain documents before the sanctioning authority for his perusal prior to accord sanction order. He has also stated that he was also informed that the accused Tvl. M.G.Swaminathan (A2) P.Ponnusamy (A3) and Tmt. Mariammal (A4) were doing business on their own, keeping the accounts

properly and audited by qualified Chartered Accountant and filed their I.T. return showing their assets and liabilities thereon etc., and that the investigation was done on the basis of books of accounts maintained in the ordinary course of business evidencing the nature of transactions and based on which the above I.T. returns were filed by A2 to A4. He was also informed that there was no connection between the first accused and the accused 2 to 4.

25. At page No.24 of the typed set of papers, in the last six line (bottom) L.W.1 has stated that the investigating officer has also stated that on the basis of evidence collected in the course of investigation it is not a condition precedent to establish that an accused for an offence under Section 13(1)(e) r/w 13(1)(c) of the P.C. Act, 1988 should have misappropriated or committed malpractices, acquired the properties found in his possession far beyond his known sources of income and that the report said to have been submitted, after conducting an enquiry under Section 81 of the Tamil Nadu Co-operative Societies Act, is in no way relevant with regard to the acquisition and possession of properties by the petitioner/accused disproportionate to his known source of income.

26. At page No.25 L.W.1 has stated that however it is open to the petitioner to give satisfactory account about his assets and resources before the Court during the course of trial and not at an earlier stage as observed by the Supreme Court in the cases of **Thiru. K.Veerasingh V Union of India** reported in (1991) 3 SCC 655: 1991 SCC (Cri) 734). He has further added that according to the said Judgments, which were subsequently followed by the Supreme Court in the case **Ishwar Piraji Kalpatri & others Vs State of Maharashtra** reported in 1996 SCC (Cri) 159) the issuance of notice by the Investigating Officer asking to give satisfactory account is not at all required and the question of offering explanation to the Investigating Officer is not at all relevant. In the same page, in the last paragraph L.W.1 has also stated as under:

"Whereas the Inspector, Vigilance and Anti Corruption on

<http://www.judis.nic.in> 21.09.2007 and on 24.09.2007 has produced the copy of

FIR and statements given by all the accused persons and also the statements of income shown by the other accused persons and the orders passed by the Income tax authorities and whereas the Inspector of Police, Vigilance and Anti Corruption has not produced the enquiry report under Section 81 of the Tamil Nadu Co- operative Societies Act, 1983."

His admission itself would go to show that he had not gone through the entire records, including the enquiry report under Section 81 of the Tamil Nadu Co-operative Societies Act, 1982.

At page No.26, in the first paragraph he has stated that

" Whereas the statements of income shown by the other accused persons and

Orders passed by the income tax authorities have been perused by this authority and this authority feels that the statements of income shown by the other accused persons and the income tax returns filed by the assesseees are accepted by the Income Tax Authorities based on the declaration made by the assesseees without verification by the Income Tax Authorities, as the verification is being done by the Investigating Officer on the basis of the books of accounts maintained in the ordinary course of business.....

He has also stated in paragraph 2 at page No.26 of the typed set of papers that ;

"Whereas the reasons stated by the Inspector of Police for not producing the enquiry report under Section 81 of the TNCS Act, 1983, that on the basis of the evidence collected in the course of investigation it is not a condition precedent to establish that an accused for an offence under Section 13(1)(e) r/w 13(1)(a) of Prevention of Corruption Act should have misappropriated or committed malpractices and that therefore, the report said to have been submitted after conducting an enquiry under Section 81 of the TNCS Act, 1983 is no way relevant with regard to acquisition and possession of properties by the accused, disproportionate

to the known source of income, is accepted by this authority and that this

authority feels that it is open to the accused to give satisfactory account about his assets and resources before the appropriate court during the course of trial and not at an earlier stage. "

27. With reference to the Sanction Order (relevant portions of which have been extracted above), Mr. N.Jothi learned counsel for the first accused has submitted that at the first instance, the order of sanction accorded by L.W.1 Mr. K.Bharathan was suffered from:

- (a) non- application of mind;
- (b) non- perusal of the enquiry report under Section 81 of the TNCS Act, 1983.

28. He has also added that, had L.W.1 gone through the enquiry report under Section 81 of the TNCS Act, 1983, he would not have granted such an order of sanction to launch prosecution against the first accused. Secondly, he would submit that, since the section of law i.e. Section 190 IPC, to rope the accused 2 to 4 into the criminality had also been included, the order of sanction under Section 19(1) of the Act alone was not sufficient, but an order of sanction under Section 197(1) of Code of Criminal Procedure was also very much essential. Since no order of sanction under Section 197(1) of Code of Criminal Procedure was accorded, the entire order of sanction had become vitiated and invalid.

29. Prior to coming to the discussion on the issue of non application of mind, in granting the order of sanction this Court finds it relevant to make reference to the orders of this Court dated 21.08.2007 and made in W.P.No.27266 of 2007 as well as to the order dated 20.03.2014 and made in W.P.No.32143 of 2013,

30. On perusal of the order of this Court dated 20.03.2014 and made in W.P.No.32143 of 2013, it is revealed that the first accused Mr. K.Velusamy had filed the said writ petition under Article 226 of the Constitution of India as against the (1) The Registrar of Co-operative Societies, No.170, Periyar EVR Road, Kilpauk, Chennai -10 and (2) The Secretary to Government, Co-operation Food and Consumer Protection Department, Secretariat, Chennai -9 to issue a writ of mandamus to direct

further proceedings in respect of the impugned charge memo in R.C.No.1023 o 2002/PAI (4), dated 04.05.2009, on the basis of an order passed by this Court in the case of State of Tamil Nadu V T.Renganathan (in W.A.No.1478 of 2008, dated 05.03.2010), wherein this Court by keeping note of the lapse committed by the respondent department in not complying with a direction to complete the enquiry within the stipulated time, found that no useful purpose would be served in continuing with the proceedings against the petitioner therein and on that basis, the Hon'ble Division Bench of this Court had quashed the impugned charge memo therein.

31. From the perusal of the order, it is manifested that the first accused Mr. K.Velusamy while functioning as the Sub Registrar of the Tamil Nadu Co-operative Societies was issued with a charge memo on 04.05.2009 containing three allegations and all of them are relating to only irregularities and certain lapses said to have been committed by him during the check period from 05.09.1994 to 31.08.1999 and from 07.06.2001 to 27.07.2001. In this connection the first accused had filed a Writ Petition in W.P. No.14503 of 2009 challenging the issuance of the charge memo dated 04.05.2009 and the said writ petition was dismissed by this Court on 18.07.2011 with a direction to the respondents to complete the disciplinary proceedings within a period of six months. Challenging the said order, the first accused herein had filed a Writ Appeal No.1981 of 2011 before a Division Bench of this Court, which was also dismissed, confirming the order of the learned single Judge of this Court reiterating the time limit for the completion of the enquiry and the said order has become final. The grievance of the first accused is that despite the time limit was fixed by this Court for the completion of the disciplinary proceedings, the authorities concerned had not complied with the directions of this Court.

32. After hearing both sides, this Court in W.P. No.32143 of 2013 has observed that

" Having regard to the nature of the allegations levelled against the petitioner as well as the non-compliance of the order of this

Court by the Department; the mental agony and hardships faced by the petitioner in this case from the year 2001; having regard to the fact that the petitioner is due to retire from service on 30.04.2010 on attaining the age of superannuation; taking into consideration of the dropping of similar charge framed against one R.Indirani Naidu, Section Officer, Municipal Administration and Water Supply Department, on the same day, for the same lapse under Rule 17(b), by the first respondent by issuing G.O.(3D) No.15, P & Admn; AR Department, dated 21.11.2005; and in view of the fact that against some of the higher officials the charges having been disposed of by issuing censure, we hold no useful purpose will be served in continuing with the proceedings against the petitioner alone. Therefore, we are constrained to quash the impugned charge memo and allow W.P.No.32143 of 2013.

The learned single Judge of this Court has also observed in the same paragraph as under:

"In fact, the proceedings under Section 81 of the Act initiated against the petitioner for the lapses that have been repeated in the present charge memo dated 04.05.2009, also show that the officer, namely, the Deputy Registrar of Co-operative Societies, who has conducted the enquiry proceedings has given a clean chit to the petitioner. In this context, it is useful to extract the relevant portion of the proceedings passed by the Deputy Registrar of Co-operative Societies (Housing), Chennai, dated 30.05.2006, in RC.No.1699/2005/A."

"The explanation of Thiru.K.Velusami Co-operative Sub Registrar, has been examined and accepted. Hence, Thiru.K.Velusami, Co-operative Sub Registrar, is relieved from all the charges."

With the above said observations, the writ petition filed by the first accused to drop the further proceedings in respect of the impugned

charge memo in RC No.1023 of 2002/PA1 (4), dated 04.05.2009 was allowed.

33. The other Writ Petition in W.P.No.27266 of 2007 which has been referred to by the Sanctioning Authority (LW1) seems to have been filed by the petitioner under Article 226 of the Constitution of India against (1) The Inspector of Police V & AC, City Special Unit, R.A.Puram, Chennai-28. (2) The Joint Registrar of Co-operative Societies, Chennai Region, R.A.Puram, Chennai-28 and (3) the Registrar of Co-operative Societies, Kilpauk, Chennai-10, seeking a direction against the first respondent therein viz., the Inspector of Police, Vigilance and Anti Corruption to place the following documents viz., (i) FIR, (2) Statements given by all the accused persons, (iii) copies of income tax returns and orders of all the accused persons; (iv) the statement of income shown by the other accused persons; (v) orders passed by the Income Tax Authorities (vi) enquiry report under Section 81 of the Tamil Nadu Co-operative Societies Act and other connected documents before the second respondent viz., the Joint Registrar of Co-operative Societies, Chennai Region for according sanction and pass further orders.

34. This Court after hearing both sides has allowed the said Writ Petition with the following direction:

"I direct the second respondent to send a communication to the first respondent

(the Inspector of Police, Vigilance and Anti Corruption) directing him to produce

all the documents enlisted above within a period of two weeks from the date of

receipt of a copy of this order and the first respondent is directed to place all

the documents before the second respondent within a period of two weeks there

after."

35. Pursuant to the order of this Court dated 21.08.2007 and made

in W.P.No.27266 of 2007 while placing all the documents referred to above in serial numbers 1 to 5 before the Sanctioning Authority, the document enlisted in serial number 65 i.e. the enquiry report under Section 81 of the Tamil Nadu Co-operative Societies Act, 1983 and the other connected documents were not placed before the Sanctioning Authority. L.W.1 Mr. K.Bharathan has also admitted this fact in his Order of Sanction that the Inspector of Police had not produced Section 81 Enquiry Report before him.

36. The candid admission of the Sanctioning Authority, viz., L.W.1 Mr. K. Bharathan, Additional Registrar of Co-operative Societies, Chennai Region amounts to willful disobedience of the order of this Court. Not only he, but the act of the Investigating Officer viz., L.W.60 Mr. C.Sudarsan had also committed willful disobedience of the order of this Court as afore stated, in not placing the enquiry report under Section 81 of the Tamil Nadu Co-operative Societies Act, 1983 before the Sanctioning Authority as directed by this Court in the order referred to above. The act of the Sanctioning Authority in non perusal of the enquiry report amounts to non-application of mind, because the enquiry under Section 81 of Tamil Nadu Co-operative Societies Act, 1983 which was initiated as against the first accused Mr. K.Velusamy was ended in his favour, wherein it was specifically found that no pecuniary loss was caused to the Society by the first accused and therefore, he was relieved of all the charges. It is also specifically stated in the enquiry report under Section 81 of the Tamil Nadu Co-operative Societies Act, 1983 that since there was no misappropriation, malpractices and falsification of records, there is no necessity to initiate criminal proceedings against the first accused Mr. K.Velusamy.

37. From the admission of L.W.1 Mr. K. Bharathan, Additional Registrar of Co-operative Societies, Chennai Region it is understood that had he gone through the entire enquiry report under Section 81 of the TNCS Act, 1983 definitely he would not have accorded sanction to launch criminal prosecution against the first accused. Ultimately, as observed in

the preceding paragraphs LW.1 has not accorded sanction as required under Section 197(1) of Code of Criminal Procedure.

38. In this connection this court would like to place reliance upon the decisions of the Apex Court in **State of Madhya Pradesh V Sheetla Sahai & others** (2009 (8) SCC 617) cited supra, wherein Hon'ble Mr Justice S.B.Sinha while speaking on behalf of the Division Bench in paragraph 55 and 56 has held as follows:

"55. This leaves us with the question as to whether an order of sanction was required to be obtained. There exists a distinction between a sanction for prosecution under Section 19 of the Act and Section 197 of the Code of Criminal Procedure. Whereas in terms of section 19, it would not be necessary to obtain sanction in respect of those who had ceased to be a public servant, Section 197 of the Code of Criminal Procedure requires sanction both for those who were or are public servants.

56. Strong reliance has been placed by Mr. Tulsi on a Judgment of this Court in **Centre for Public Interest Litigation V Union of India** (2005) 8 SCC 202: (2006) 1 SCC (Cri) 23). In that case, it was held (SCC pp.208-09), paras-9-11)

" 9. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection

between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant but whether it was committed by a public servant acting or purporting to act as such to the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in the dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on the institution of the complaint case.

10. Use of the expression 'official duty' implies that the act or omission must have been done by the public servant in

the course of his service and that it should have been done in discharge of his duty. The Section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

11. If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty, it must be held to be official to which applicability of Section 197 of the Code cannot be disputed."

39. Hon'ble Mr Justice V.Gopala Gowda, while speaking for the Division Bench of the Hon'ble Supreme Court of India in **N.K.Ganguly Vs Central Bureau of Investigation** ((2016) 2 SCC 143) has observed that for the purpose of obtaining previous sanction from the appropriate Government under Section 197 of the Code of Criminal Procedure Code, it is imperative that the alleged offence is committed in discharge of official duty by the accused. It is also important for the Court to examine the allegations made against the accused, to decide whether previous sanction is required to be obtained from the appropriate Government before taking cognizance of the alleged offence against the accused.

40. In this case (cited supra) the appellant Mr. N.K.Ganguly had filed a petition before the High Court under Section 482 to quash the criminal proceedings as well as the summoning order passed by the Special Judge, Anti-Corruption, CBI against them. Since the allegations made against the appellant made against the appellants in the final report filed by the respondent under Section 173(2) of Cr.P.C. that the alleged offences were committed by them in discharge of their official duty, therefore it was essential for the Special Judge to correctly decide as to whether previous sanction from the Central Government under Section 197 of the Code of Criminal Procedure was required to be taken by the respondent before taking cognizance and passing order issuing summons to appellants for their presence. It was alleged in the charge sheet that

the appellants had entered into an agreement to commit illegal act which was an offence punishable under Section 120-B IPC. Therefore, the provisions of Section 197 of the Code of Criminal Procedure were squarely applicable to the facts of the case and that prior sanction of Central Government was required to be taken by the respondent before the Special Judge took cognizance of the offence once final report was filed under Section 173(2) of the Code of Criminal Procedure.

41. On coming to the case on hand, it is also alleged in the final report that the first accused Mr. K.Velusamy had acquired properties and pecuniary resources during the check period in the name of the accused 2 to 4 as benami and therefore, the accused 2 to 4 are said to have committed an offence punishable under Section 109 of IPC r/w 13(2) r/w 13(1)(e) of the Act. Admittedly, there was no prior sanction under Section 197 of the Code of Criminal Procedure to launch prosecution against the 1st accused.

42. Chapter V of the Prevention of Corruption contemplates sanction for prosecution and other miscellaneous provisions. Section 19 of the Act envisages **Previous sanction necessary for prosecution**. Sub Section (1) of Section 19 of the Act enacts that no court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction-

a).....

b).....

c) in the case of any other person, of the authority competent to remove him from his office.

Sub Section (1) of Section 197 of the Code of Criminal Procedure enacts that when any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with

the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013—

Clause (b) of sub section 1 of Section 197 Cr.P.C. reads as under:

“(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government: ...”.

43. As observed by the Supreme Court in *Srivastava V Misra* (1970 SC 166): (1970) 2 SCC 56: 1970 Cr.LJ 1401) this section is designed to facilitate an effective and unhampered performance of their official duty by public servants, by providing for security into the allegations against them by their superior authorities and prior sanction for their prosecution as a condition precedent to the cognizance of the cases against them by Courts, so that they may be protected from frivolous, vexatious or false prosecutions for offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duty.

44. Thus it is clear that in order to prevent frivolous, vexatious or false prosecutions for the offences alleged to have been committed by the public servants, their superior authorities who are competent to grant order of sanction must be very vigilant while granting such order of sanction for launching the prosecution against the delinquent officers. They have to necessarily scrutinise and analyse the allegations which are made against them with the help of material records, prior to granting of sanction, which is a condition precedent to take cognizance of the offences by Courts.

45. On coming to the present case on hand Mr. N.Jothi has indicated that L.W.1 the Sanctioning Authority had not applied his mind while granting the order of sanction.

46. L.W.1 has, in his order of sanction has lamented that “normally the contents of the I.T. returns submitted by the Income tax assesseees are accepted by the I.T. authorities, as the verification is being done only at random”.

47. In this regard Mr. Jothi has contended that the above lines in the order of sanction was on wrong information and lack application of the provisions of the Income Tax Act. It was a self contained code and that the Income Tax Act empowers the officials of I.T. Department to check, enquire and if not satisfied with the return submitted by the assessee it would be scrutinized deeply by various wings working in the department including the Investigation Wing, Auditing Wing etc., He has also added that neither the Investigation Officer nor the Sanctioning Authority could impeach the genuineness of the acceptance of the I.T. returns by the Income Tax Department

48. Mr. Jothi has also canvassed that Article 215 of the Constitution of India clearly demarcated the separation of powers between the State and the Union. In exercise of the powers conferred under Entry 87 of the VII Schedule of the Constitution of India the Income Tax Act was passed by the Parliament, and as such, an Officer serving with the State Government (Sanctioning Authority) could not question their action.

49. Mr. Jothi has further indicated that the Investigating Officer had mainly collected evidences on the basis of hearsay in respect of the major portion of the properties mentioned in Statement No.2 which are alleged to have been acquired during the check period.

50. It appears from the records that a Writ Petition was filed by the 1st accused before this Court in W.P.No.27266 of 2007 and an order was passed on 21.08.2007 directing the Sanctioning Authority (L.W.1) to send communication to the Inspector of Police Vigilance and Anti Corruption to produce all the documents viz., FIR, Statements recorded from the witnesses under Section 161(3) of the Code of Criminal Procedure , documents during search and seizure, I.T. returns and the adjudication passed by the Income Tax Authorities, Statements given by the other accused persons and the enquiry report under Section 81 of the Tamil Nadu Co-operative Societies Act. The Investigation Officer was also directed to produce all the documents before the Sanctioning Authority.

51. In this connection Mr. Jothi would submit that the Sanctioning

<http://www.judis.nic.in> Authority had categorically stated in his order of sanction (see page 25 of

the typed sets of papers) that the Investigation Officer had not produced the enquiry report under Section 81 of the Tamil Nadu Co-operative Societies Act. Instead of condemning the somnolent attitude of the Investigation Officer for his failure to produce the report and willfully disobeyed the order passed by the High Court in W.P.No.27266 of 2007, the Sanctioning Authority had justified by accepting the reasons given by the Investigating Officer for his failure to comply with the directions issued by the High Court which amounts to Contempt of Court.

52. L.W.58 Mr. G.Elango, Inspector of Police says that he happened to register the case on the order of the Government letter No.6254/VC-I/2002-03, dated 20-11-2012. According to him, the above said Government letter is dated back to 20.11.2002. But he did not say on whose authorization he had registered the case as against the accused persons. Be it as it may, the First Information Report in Crime No.17/2003 seems to have been registered by him on 15.10.2003 at about 12.03 p.m. Even if it is presumed that there was a Government letter No.6254/VC-I/2002-03, dated 20-11-2012, what prompted him or what made him to register this case belatedly on 15.10.2003 and that after passing of nearly one year? It could therefore be presumed that there was abnormal delay in registering the case. Secondly, the Government letter No.6254/VC-I/2002-03, dated 20-11-2012 has not been produced. If it is produced, then this Court as well as the trial Court would have had an occasion to know the reason for registering the case as against the accused persons.

53. In the instant case on hand, as adumbrated supra, the Investigating Officer, viz., L.W.60 C.Sundarsan had filed a final report on the file of the learned Special Judge/Chief Judicial Magistrate, Thiruvallore on 30.11.2007. The last two paragraphs of the final report are very much relevant which are extracted as under:

"Thus, between 01.01.1996 and 16.10.2003, at Chennai Tr. K.Velusamy being a public servant committed the offence of criminal misconduct by public servant by acquiring and being in possession of

pecuniary resources and properties in the name of his close relatives namely, Tr. P.Ponnusamy, Tmt. Mariammal and his associate Tr. M.G.Swaminathan, which were disproportionate to his known sources of income to the tune of Rs.1,17,66,656.55 p. as on 16.10.2003 for which Tr. K.Velusamy could not account satisfactorily.

In the course of the same transaction, during the period between 01.01.1996 and 16.10.2003 at Chennai, Thiruvallur District and other places A2 to A-4 had abetted A1 in the commission by him of the above said offence of criminal misconduct by public servant by A-2 to A-4 aiding A-1 and holding on behalf of A1 the properties worth Rs.1,17,06,655.55 in their names and thereby committed the offence punishable under Section 109 IPC r/w 13(2) r/w 13(1)(e) of Prevention of Corruption Act 1988. "

54. Here, the accusation made in the previous paragraph is in respect of the first accused Mr. K.Veluswamy. On a bare perusal of this paragraph one can easily understand that no specific charges are leveled against the first accused. The Investigating Officer alone is having the responsibility to explain as to what is the specific charge under which the final report is laid against the first accused.

55. No doubt the next paragraph is relating to accused 2 to 4 alleging that they had abetted the first accused in the commission of the offence of criminal misconduct and also for acquiring properties in their names and thereby it is alleged that they had rendered their active assistance to the first accused to hold properties on his behalf. The Investigating Officer has therefore failed to make specific indictment or specific charge against the first accused.

56. Secondly, as argued by Mr. N.Jothi, there is no proper sanction under Section 197 of the Code of Criminal Procedure, as the accused 2 to 4 have been brought under the amplitude of the offence under Section 109 IPC r/w Section 13(2) r/w 13(1)(e) of the Act. Since Section 109 IPC has also been added or included, necessarily a sanction under Section 197

of the Code of Criminal Procedure is essential and in the absence of the order of sanction under Section 197 of the Code of Criminal Procedure, the learned Special Judge/Chief Judicial Magistrate, Thiruvallore does not have jurisdiction either to entertain the final report or to take cognizance of the offence under Section 13(2) r/w 13(1)(e) of the Act and under Section 109 IPC r/w 13(2) r/w 13(1)(e) of the Act, 1988.

57. Further, Mr. N.Jothi, has articulated his arguments on the following three points:

- (i) Delay in granting order of sanction for launching the prosecution against the first accused;
- (ii) Explanation under Section 13(1)(e) of the Act-meaning of;
- (iii) Prohibition of Benami Property Transaction

58. Point No.I

As it is revealed from the statement of L.W.1 which was recorded by the Investigating Officer under Section 161(3) of the Code of Criminal Procedure on 05.10.2007, he had received the file containing the documents/files in RC No.213/2003/Co-op./CSU/I, dated 15.05.2006 through the Registrar of Co-operative Societies, Chennai- 10 requesting him to accord sanction to prosecute the first accused. It is also revealed from the order of sanction dated 04.10.2007 in RC.No.7042/2007/A1 that he had accorded sanction on 04.10.2007 after the lapse of 17 months. As a duty bound officer he must have accorded sanction within a least period of two months and not more than that. In so far as this case is concerned, there is an abnormal delay of 17 months in according sanction and therefore, as observed by this Court in **A.S.Kannan V State by Inspector of Police, Vigilance & Anti Corruption, Chennai City II Detachment, Chennai 20** (2011 4 MLJ (CrI) 950) Once the proposal to grant sanction under Section 19 of the Corruption Act is forwarded by the Investigating Agency to the competent authorities then, the delay in passing appropriate order beyond the period of two months amounts to

lack of devotion to duty on his part in the absence of just and proper

explanation for which he is liable not only departmentally proceeded with, but also for the contempt of Court for disregarding the directions of this Court. (See- **State of Gujarat v M.M. Damor**, (1996) 37 Guj. LR 620). This Court while observing the above proposition has made reference to **K.V.Joseph v State of Gujarat** (1997) 3 CrL.J.2896).

Therefore, as argued by Mr.N.Jothi, absolutely there is an abnormal delay much less 17 months to accord sanction for which L.W.1, not only should be blamed and departmentally proceed with, besides the action for contempt of Court.

Point No.2

The first accused appears to have been charged with Section 13(2) r/w Section 13(1)(e) of the Act. As discussed in the opening paragraph of this Judgment Section 13 of the Act deals with Criminal misconduct by a Public Servant. Sub Section (1) of the Act enacts: A public servant is said to commit the offence of criminal misconduct,-

Clause (a).....

(b).....

(c).....

(d).....

(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.

On a pragmatic approach of the languages coined in the Explanation to clause(e) of sub section (1) to Section 13 of the Act, we can understand the meaning of the phraseology "known sources of income". It has two limbs:- (i) Income received from any lawful source; (ii) such receipt has been intimated in accordance with the provisions of any law,

59. It is implied that the income received from any lawful source must be intimated in accordance with the provisions of any law, rules, orders for the time being applicable to a public servant. The Explanation does not say to whom it is to be intimated. In accordance with the provisions of any law means, in our land, the 'law of Income Tax' alone is in existence for the time being which is applicable to a public servant. The Income Tax Authority is the appropriate authority to intimate the lawful source of income and it is for them to scrutinize, check and then decide whether the income is lawful or not.

60. On coming to the present case on hand, as argued by the learned counsel for the petitioners, the receipt of income or the purchase of properties and the source of income were informed to the income tax authorities by the assesseees and it was scrutinized, examined analyzed and accepted by them as correct. The Investigating Officer is not the authority to decide as to whether it is illegal or legal. Such power is not vested with him. Of course, it is correct to say that a person who is indicted is having the obligation to explain the lawful source of income satisfactorily to the authorities concerned. Clause (e) of Sub Section (1) to Section 13 of the Act comes into play when the public servant cannot satisfactorily account the pecuniary resources or properties which is described as disproportionate to his known source of income.

61. As contemplated under clause (e) of sub section 1 to Section 13 of the Act, the burden then shifts to the accused to satisfactorily account for his possession of disproportionate assets. The nature and extent of the burden of proof resting upon the public servant found in possession of disproportionate assets under Section 13(1)(e) of the Act cannot be higher than to establish his case by preponderance of probability. The prosecution cannot, in the very nature of things, be expected to know the affairs of a public servant found in possession of resources or property disproportionate to his known source of income i.e. his salary. Those will be matters specially within the knowledge of the public servant within the meaning of Section 106 of the Indian Evidence Act, 1872. This proposition

(83) Bom. LR 530).

62. As argued by Mr. N.Jothi, a crucial question is arisen as to where the individual has to account for his income. Obviously once the income tax return is filed, the Income Tax Department may take atleast ten years time to question about the source. Keeping in view the above fact, let us step into the next point No.3.

63. Point No.3

In the First Information Report L.W.58, G.Elango, Inspector of Police has stated that the credible information and preliminary verification revealed that M.G.Swaminathan (A2), Papanasam, Tanjore District is the benami of the first accused K.Velusamy. Perusal of all the suspected documents and proposals submitted by the first accused reveal that he had misused his official position by doing real estate business in the name of his father-in-law Thiru.P. Ponnusamy in the name and style of 'Ponwari Real Estate'. He is running a Company in the name and style of "Ponwari Enterprises Private Limited" in which Thru.P. Ponnusamy (A3) and his wife Tmt. Mariammal (A4) are the working partners. He had violated the bye laws of the Society by purchasing lands willfully and intentionally by diverting the Society funds to the tune of Rs.3 crores approximately in violation of the instructions of the Registrar (Housing) Chennai and caused loss to the Society. He has further stated that after 01.01.1996, the first accused is found to have acquired properties in the name of his father-in-law, mother-in-law and benami Mr. M.G.Swaminathan (A2). Hence, it is reasonably believed that K.Velusamy (A1) had acquired and is in possession of the properties and pecuniary resources disproportionate to his known source of income as on 31.12.2001 to the extent of Rs.94,09,115 which is estimated at 757.5%.

64. In the final report laid by L.W.60 Mr. C.Sudarsan, dated 30.11.2007, he has carefully restricted himself from employing the word 'benami' because he has stated that A2 to A4 Thiru. P.Ponnusamy, Tmt. Mariammal and their associates Mr. M.G.Swaminathan did never had

any independent source of income commensurate with the properties or pecuniary resources found to have acquired in their name. He has simply stated that Mr. K.Velusamy had acquired pecuniary resources and properties in his name and in the name of his associates Mr. M.G.Swaminathan and his close relatives viz., Thiru. P.Ponnusamy, his father-in-law and Tmt. Mariammal, his mother-in-law. In the charge sheet, he has never stated that the properties were acquired by him (A1) in the names of A2 to A4 as his benami. In Statement II from item Nos.3 to 20, it is stated that those items were purchased by the first accused in the name of benami Thiru.P.Ponnusami, his father- in- law. According to the petitioners item Nos.1, 48 and 49 are belonged to the first accused Mr. K.Velusamy, whereas item Nos.2 to 31 are belonged to the third accused Thiru.P.Ponnusamy and item Nos. 32 to 46 are belonged to the fourth accused Tmt. Mariammal, while item Nos. 50 to 54 are belonged to the second accused Mr. M.G.Swaminathan.

65. L.W.17 speaks about the sale of the property in the name of his father and receipt of money from K.Velusamy. His statement reveals that he was informed by his father Angu that after selling the property, he had received money from K.Velusamy and on the instructions given by K.Velusamy, power was taken in the name of the second accused M.G.Swaminathan and subsequently, the document was registered. It is pertinent to note here that his statement seems to be hearsay in nature. As contemplated under Section 60 of Indian Evidence Act 1872, even if it is an oral evidence, it must be direct one and it shall not be an hearsay to prove the guilt of the accused persons.

66. It may be relevant to note here that till to-day no charge has been framed against the accused persons. As adumbrated supra the final report was filed by L.W.60 on 30.11.2007. Till the date of pronouncement of the Judgment i.e. till 24.05.2017 i.e. even after passing of ten years, no charge has been framed against the accused persons. According to Mr.K.Velusamy, he did not have any property excepting only one house constructed in his name which is shown in item No.1 of Statement II with

Mondiyamman Nagar, Kakkanji Street, Padiyanallur Village, Ponneri Taluk. This housing property has been shown as item No.1 in Statement No. II which is valued at Rs.2,23,300/-. He would further contend that this house property was constructed by him with prior permission of the department even prior to the check period i.e. prior to 01.01.1996. From his explanation to the notice of final opportunity he has stated that he had completed the first floor construction before April, 1994 as revealed from G.O. Ms. (Valayam) No.257 (Co-operation, Food and Consumer Protection (CL) Department, dated 20.05.2004. He would, in his explanation submit that excepting serial nos.48 and 49 of Statement Nos. I and II all other properties and bank balances are not related to him in any way. With reference to serial no.48, he would state that his Savings Bank Account Number is 2932/7 which is maintained by him with ICICI Bank, Padiyanallur Branch Chennai. As per the statement of account for the period from 01.04.2003 to 11.11.2003 as on 16.10.2003, the balance maintained by him was Rs.29,325.13 alone and not Rs.66,490/-, as stated by the Investigating Officer as against item No.48. With reference to serial number 49 of Statement No.II, he has stated that he had deposited Rs.5000/- with Repco Bank, Redhills, Chennai from his salary savings and with interest accrued thereon it was grown to Rs.10,788/- and that this amount was maintained in his account from his earnings.

67. While advancing his arguments, Mr. N.Jothi has drawn the attention of this Court to the Statements of Listed Witnesses which were recorded by the Investigating Officer under Section 161 (3) of the Code of Criminal Procedure. According to L.W.3A, Mr. R.Jaganathan, Sub-Registrar, Sembium, Chennai, A.Kumaran, A.Narayanan, A.Suri alias Suriya Narayanan, A.Radhakrshnan and A.Srinivasan, who are the sons of one Angu cited as L.Ws.17 to 21 had executed a General Power of Attorney in favour of the second accused Mr. M.G.Swaminathan (since deceased) which was registered as Document No.681 of 2000 on the file of the Sub Registrar, Sembium, Chennai. According to him the second accused had executed three sale deeds in favour of M/s.Ponmari Enterprises registered as document No.1165 of 2003 to 1167/2003, dated

06.03.2003 represented by its Directors, accused 3 and 4 and R.Priechiyappan, who has been cited as L.W.4 in the memo of evidence. Even though the land to the extent of 28.61 acres was conveyed and covered in the above said sale deeds, it was conveyed to only a Private Limited Company, but the Investigating Officer has miserably failed to array the said company viz., M/s.Ponmari Enterprises as one of the accused as contemplated under Section 3(42) of the General Clauses Act, 1987, which defines the term "person" shall include any company or association or body of individuals, whether incorporated or not.

68. Thus, Mr. N.Jothi, learned counsel has made stress on this point saying that without arraying M/s.Ponmari Enterprises as an accused in the charge sheet, the entire charge sheet would become vitiated.

69. In **Rekha Nambiar Vs CBI** (2015 SCC Online Del 13255: (2015) 224 DLT 379) the prosecution had alleged that the husband of the petitioner had obtained unlawful commission through the petitioner Bhojraj Telli by routing the same through M/s.Archana Traders Private Ltd., But the fact remains that the CBI could not establish the complicity of M/s.Archana Traders Pvt Ltd., consequently, the charge sheet has not been filed against the company. In this manner, the CBI has filed the half baked report before the learned trial Court and the learned trial Court instead of rejecting the same, at the outset, has chosen to frame charges against the petitioners.

70. From the above context, it is thus made clear that having been alleged that the landed property to an extent of 28.61 acres was conveyed to a private limited company namely M/s.Ponmari Enterprises. But this private limited company should have been added as an accused in this case. But it is not done in this case.

71. As observed in the preceding paragraphs, in Statement No.II it is stated that from Item Nos.3 to 21 were purchased by the first accused in the name of his benami Mr. P.Ponnusamy (A3) his father in law.

72. As per the provisions of 2(a) of The Benami Transactions (Prohibition) Act, 1988 (Act 45 of 1988) the term 'Benami transaction'

means any transaction in which property is transferred to one person for a consideration paid or provided by another person.

73. The Income Tax Department has notified that the Benami Transaction (Prohibition) Amendment Act, 2016 (BTP Amendment Act) will come into force from 1st November, 2016. The new law seeks to give more teeth to the authorities to curb benami transaction. Benami Transaction Prohibition Bill 2015 says, the proposed amendment in Section 2(9)(iv) of the Bill provides that a property held by any person in the name of his brother or sister or lineal ascendant or descendant, has been kept out of the definition of benami property only if his/her name also appears as joint owner in such property. This definition or exception is not only confusing since such a transaction will, even otherwise, not be benami due to appearance of name of the real owner as joint owner, but will also be of no help to such elderly members of the family who had contributed fully or substantially for purchase of property in the names of their son, daughter, brother and sister in the past without inclusion of their names as joint owners in the property documents. Such transactions even though done even prior to coming into force of the 1988 Act, will still be termed as Benami and such elderly persons and blood relations will still be deprived from not only claiming or enforcing their rights in such property but also from contesting any claim in a suit or legal proceedings as sub sections (1) and (2) of Section 4 have been retained in their original shape. This is not only self-contradictory in itself but also contrary to laws like the Senior Citizen Act, 2007. So, the legislators felt that Section 2(9)(iv) needs redrafting making the specific exception for such genuine transactions even in the case of non-HUF families and where the name of the elder member of the family who has partly or fully paid for the property, does not occur as a joint owner. Motive should be the parameter, and where the motive is genuine there is no reason as to bring elderly citizens in the ambit of the act. As stated in the Benami Transaction Prohibition Bill 2015 now the transactions are difficult to detect.

74. It is pertinent to note here that in his explanation to the final

notice, the first accused has stated that excepting the properties shown in

serial numbers 1,48, and 49 of Statement II all the other properties and bank balances shown are not related to him and not at all possessed by him in any way. It is therefore clear that he never maintained any claim or right over the properties specifically in item Nos. 2 to 47 and 52 to 56 of Statement II ,then from where the question of possessing or acquiring the properties in the name of his benami viz., accused 2 to 4 will arise?

75. As argued by Mr. N.Jothi, Prohibition of Benami Property Transactions Act, 1988 (as amended by Act 43 of 2016) envisages three kinds of categories of persons to deal with the benami transactions viz., (a) approving authority, (b) adjudicating authority and (c) appellate authority. The said Act deals with two different form of enquiry viz., (1) Adopting Civil Procedure Code at the initial stage to find out the nature of the transactions as benami and (2) Finalization of transactions by adopting the provisions of Criminal Procedure Code. Further Appeal will lie before the High Court.

76. Chapter VI of the Prohibition of Benami Property Transactions Act, 1988 (as amended by Act 43 of 2016) deals with Special Courts. Sub section (1) of Section 50 of the said Act says that "the Central Government, in consultation with the Chief Justice of the High Court, shall, for trial of an offence punishable under this Act, by notification, designate one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification.

77. Hence, as afore stated, there is a specific procedure to find out whether it is a benami property or not. The Investigating Officer cannot or he is not empowered to decide it.

78. It is significant to note here that no explanation was sought for from accused 2 to accused 4. It was only sought for from the first accused. Again this Court is taking the risk of repetition that the first accused, excepting item nos.1, 48 and 49 does not claim any right or interest over the remaining items as shown in Statement II.

79. With reference to the allegation that the first accused Mr.

<http://www.judis.nic.in> K.Velusamy had purchased properties in the names of accused 2 to

accused 4 Mr. N.Jothi has maintained that it might be important to note here that accused 2 to accused 4 must first be adjudicated and then prosecuted under the relevant provisions of the Prohibition of Benami Property Transactions Act, 1988 (as amended by Act 43 of 2016), otherwise the public servant as well as the other accused could not be proceeded with merely on the basis of accusation made by the Investigating Officer. He has also made reference to Article 21 of the Constitution of India which says that no person shall be deprived of life and liberty except under the procedure established by law. Unless the accused are indicted under the Act 43 of 2016, it cannot be specifically held that the accused 2 to 4 are the benamies of the first accused and they could not be proceeded with under Section 13(1)(e) of the Act.

80. As already discussed the second accused and the third accused viz., Thiru. M.G.Swaminathan and Thiru.P.Ponnusamy had passed away. Now the case is pending against the first accused Thiru. K.Velusamy and his mother in law the fourth accused. The value of the property which has been identified against the fourth accused is only Rs.2 lakhs. Apparently, the third accused Thiru. P.Ponnuswamy (since deceased), who is the husband of the fourth accused Tmt. Mariammal was an income tax assessee. Item Nos.32 to 46 in Statement II are said to have been the assets that were in the possession of Thiru. K.Velusamy at the end of the check period i.e. as on 16.10.2003. Item Nos. 32 to 46 are said to have been purchased by Thiru.K.Veluswamy in the name of his mother in law accused-4 as his benami. The total value of the property described in item nos. 32 to 46 is Rs. 2,00,750/- only. On a perusal of the statements of the listed witnesses 28 to 36, it is understood that all the witnesses have spoken to that Tmt. Mariammal (A4) had not signed in the document. They have stated that after receiving money from Thiru.K.Velusamy, the documents were executed on his instructions in favour of Tmt. Mariammal, wife of Thiru. P.Ponnuswamy.

81. Mr. A.Ramesh, learned senior counsel appearing for the fourth accused while advancing his arguments has made reference to the decision of the Apex Court and made in Crl. Appeal No.176 of 2001 **Seeta**

Hemchandra Shashittal and another Vs State of Maharashtra and others with Crl.Appeal No.177 of 2001 **Niranjan Hemchandra Shashittal Vs State of Maharashtra and other** with Crl.Appeal No.178 of 2001 **Anuradha Niranjan Shahittal Vs State of Maharashtra and others** (2001) 4 SCC 525). With reference to this decision, Mr. A.Ramesh, learned senior counsel has contended that no criminal case could be kept alive as against an old lady i.e. as against an Octogenarian. He has further stated that already the second accused Mr. M.G.Swaminathan had passed away and the third accused Mr. P.Ponnuswamy had also passed away due to his old age. Now the first accused Mr. K.Veluswamy, and his mother in law Tmt. Mariammal alone have been facing the charges. Like Mr. N.Jothi, Mr. A.Ramesh, learned senior counsel has also submitted that the First Information Report was registered in the year 2003. So far, no charge is framed and that without even knowing the fate and the end of the trial journey, still the fourth accused being an old lady has been facing the criminal proceedings and on that ground alone, he has urged, to discharge her from the clutches of the charges.

82. In the above cited decision two lady octogenarians aged about 80 and 81 years respectively felt that there was not much time ahead of them to complete a trial which was yet to begin, and counting the number of years which the investigation consumed for finalizing the charge sheet, the trial would not be anything less than a long drawn out one. At the first instance, the two ladies had approached the High Court of Bombay along with their kinsfolk, who too were arrayed in the same case, one of them as the Kingpin to get the criminal case axed down at the threshold of the trial stage, mainly on the ground of long delay in completing the investigation. But the High Court, instead of snipping down the case charge sheeted, dismissed the writ petition solely on the ground that in a similar case the High Court refused to countenance similar contentions.

83. The appellant Seeta Hemchandra Shashittal, who was aged about 83 and Shanta Subarao Shirali, who was aged about 81 years were the mother and the mother in law of the appellant, public servant, respectively. His wife Anuradha was also an appellant as she too was

arrayed as an accused. The offence alleged against the appellant/public servant was under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988. The offences alleged against the lady appellants was abetment of the main offence pitted against the appellant public servant. The main ground urged in the writ petition was that there was a gross delay of 11 years in filing the charge sheet and that such delay violates Article 21 of the Constitution.

84. Hon'ble Mr Justice K.T.Thomas while penning down the Judgment on behalf of the Division Bench of the Apex Court has observed that this Court has emphasized time and again the need for speeding up the trial as undue delay in culminating the criminal proceedings is antithesis to the constitutional protection enshrined in Article 21 of the Constitution. Nonetheless the Court has to view it from pragmatic perspectives and the question of delay cannot be considered entirely from an academic angle. In other words, the High Court and this Court, when approached by the accused to quash proceedings on the ground of delay, must consider each case on its own facts. Unfortunately the delay has so permeated our legal system that at all levels tardiness has become the leitmotif. Such a malady has been judicially reprobated and efforts have been made to curtail the delay which has developed as a systematic cancer.

His Lordship has also clearly observed in paragraph 22, which is extracted as under:

"22. Nonetheless, we are told that the only offence alleged against the two appellant senescent ladies is that they abetted the public servant to commit the offence under Section 13(2) of the PC Act. For two reasons we are disposed to quash the criminal proceedings as against those two ladies. First is the materials are too insufficient to prove that those two ladies intentionally abetted the public servant in acquiring assets which are disproportionate to his known sources of income. If that is the position, why should those two old ladies be compelled to embark upon a trial which, in all probability cannot end in conviction against them, even assuming

that the octogenarian ladies would be able to survive till the end of the trial. Second is, the trial is not likely to end within one or two years. Even if the Special Court would strictly adhere to the directions issued by this Court in Raj Deo Sharma case, we reasonably foresee that the prosecution would be able to complete the evidence only within the farthest time permitted in Raj Deo Sharma as we can have a glimpse of the volume of documents and of the evidence to be adduced by the prosecution. We feel that it would be unfair and unreasonable to compel the two ladies, who by the advancement of old age would possibly have already crossed into the geriatric stage, to stand the long trial having no reasonable prospect of ultimate conviction against them. We are therefore inclined to delink them from the array of accused and quash the criminal prosecution so far as those two ladies are concerned. We do so.

85. As indicated by Mr.A.Ramesh learned senior counsel item Nos.32 to 46, which are said to have been purchased in the name of Tmt. Mariammal (4th accused) by the first accused which are valued at Rs.2,00,750/- it is only negligible and feeble in nature. As spoken to by the listed witnesses 28 to 36, Tmt. Mariammal (4th accused) had not signed in any of the documents. Since she being an old lady and being the mother in law of the first accused, she could not be prosecuted. Mr. A.Ramesh, learned senior counsel in support of his contention has placed reliance upon the following two decisions:

- 1) **Rekha Nambiar Vs CBI** (2015 SCC Online Del 13255: (2015) 224 DLT 379) and
- 2) (i) **Prakash Ramaji Ambagade & (ii) Smt. Nalini rakish Ambagade Vs The State of Maharashtra, through Anti Corruption Bureau, Nagpur** (2015 SCC Online Bom 3086)

86. In the case cited first supra, a petition was filed under Section 482 of the Code of Criminal Procedure 1973 challenging the order of charge dated 01.05.2014 and order dated 26.05.2014 whereby charges were framed against the petitioners. The case against the petitioners was

<http://www.judis.nic.in> registered on 22.02.2010, on the basis of a source information under

Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988 and under Section 109 IPC on the allegations that the accused Ramesh Nambiar while posted and functioning as AGM (Sport) Air India at New Delhi and at other places being a public servant, amassed assets worth about Rs.2,39,21,165/- during the period from 14.10.1991 to 30.06.1999 in his name and in the name of his family members which were disproportionate to his known source of income. The further case of the CBI was that the accused Ramesh Nambiar had obtained unlawful commission through the petitioner Bhojraj Teli of M/s. HYT Group of Companies in the name of consultancy fee for his wife and routed the same through M/s.Archana Traders Private Ltd., wherein Naveen Patil and the father of the petitioner Ramesh Nambiar were the major shareholders/Directors.

87. A learned single Judge of Bombay High Court while writing the Judgment in paragraph 47 has made reference to the case of P.Nallammal, wherein the Apex Court has held that a non-public servant is also liable to be tried along with the public servant before the Court of Special Judge having jurisdiction over the matter for commission of the offence punishable under Section 109 IPC read with Sections 13(1)(e) and read with Section 13(2) of the PC Act, when the material on record per se sufficient for the Court to form an opinion that the accused person has committed the offence alleged against him. It has been observed that the legislature has advisedly used the expression 'satisfactorily account', the emphasis must be on the word 'satisfactorily'. That means the accused has to satisfy the Court that his explanation is worthy of acceptance.

In paragraph 48 the learned Special Judge has observed as under: "It is settled law that the property in the name of income tax assessee cannot be a ground to hold that it actually belongs to such assessee. However, the Court would interfere only if uncontroverted allegations on their face value show that no evidence is on record to make out the case and there is an abuse of the process of the Court. The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large,

however, if two views are equally possible and the judge is satisfied that the evidence adduced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.

In paragraphs 52 and 53, the learned single Judge has also observed as follows:

"52. Thus, once the very basis and genesis of the allegation stood disappeared, then could still the petitioners be prosecuted, is a question to be considered.

53. In order to bring home of the guilt, either the prosecution was bound to establish that the amount of income shown in the name of the petitioner was bribe amount being paid to her husband or that it was the unaccounted money of her, which was being converted to the accounted one. The prosecution, however, did not allege either of the two, but had alleged that husband of the petitioner did obtain unlawful commission through petitioner Bhojraj Tell by routing the same through M/s.Archana Traders Pvt. Ltd., But the fact remains that CBI could not establish the complicity of M/s.Archana Traders Pvt. Ltd., consequently, the charge sheet has not been filed against the company. In this manner, the CBI has filed the half baked report before the learned trial Court and the learned trial Court instead of rejecting the same, at the outset, has chosen to frame charges against the petitioners. "

88. In the decision second cited supra, the applicant No.1 had passed away. His wife the second applicant as well as the second accused had been roped in the charge sheet on the allegations that she being the wife of the first accused had abetted her husband during the period from the year 1973 to 2001, to amass huge wealth which was disproportionate

to his known source of income. In this connection, the learned single Judge of Bombay High Court has observed that the second accused had been filing her income tax returns since the year 1983 onwards continuously. Even though the prosecution had not produced on record copies of previous income tax returns, the applicant had filed on record the copies of the previous income tax returns, which would show that the applicant had been earning consistently substantial income so as to enable her to acquire various assets in her own name without depending on anybody's income.

In this connection in paragraph 13, the learned Judge has observed as under:

"13. I have perused these income tax returns filed on record by the applicant which are for the previous years, and which start from the assessment year 1983-1984. These are public documents, and, therefore, as held in cases of Rukmini Narvekar (v) Vijaya Satardekar and Harshendra Kumar D. VS Rebatilata Koley, they can be looked into by the High Court in exercise of its power under Section 482 of Code of Criminal Procedure for doing justice in the matter. These income tax returns although demanded by Deputy Commissioner of Police as per his letter, dated 21.03.2002, have not been produced on record by the prosecution and no explanation has been given by the prosecution as to why they were not forming part of charge sheet. It could have certainly explained in the charge sheet the reason for their non production. But the fact that no such explanation has been given by the prosecution, it would be appropriate to infer that the prosecution has not produced copies of these income tax returns only because they do not support the allegations against the present applicant No.2 or original accused No.2 and this will provide a reason for this Court to look into the income tax returns filed on record by applicant no.2 to satisfy itself as to whether the inference being so drawn is correct or not."

drawn the attention of this Court to page No.305 of the typed set of papers. Page Nos.305, 306, 313, 321 and 339 contain the income tax return form for non-corporate assessee other than persons claiming exemption under Section 11 of the Income tax Act.

90. From page No.305 it is understood that the income tax return was filed in the name of Mr. P.Ponnuswamy (A3).

90A. Page No.306 contains the balance sheet as on 31st March 1989, wherein it is stated that the land at Erumaivetti Palayam in name of spouse Mariammal is valued at Rs.91,770/-. On various heads both in the name of Thiru.P.Ponnuswamy(A3) as well as in the name of Tmt. Mariammal (A4), it has been shown as that the total income was Rs.1115695/-

90B. Page No.313 contains the balance sheet in the name of Thiru.P.Ponnuswamy as on 31st March, 2001. The land in Padiyanallur in the name of Mariammal (A4) and the land in Erumaivettipalayam have been shown here. The sources for purchasing these lands have also been shown here. Assets as on 31.03.2001 had been shown as Rs.28,78,223/-.

90C. Page No.321 is also the balance sheet stands in the name of Thiru.P.Ponnuswamy as on 31st March, 2002. The name of his wife, Tmt. Mariammal (A4) has also been shown in this balance sheet and the total value of the assets shown as on 31.03.2002 to the Income Tax Authorities was Rs.59,94,729.40 p

90D. Page No.339 contains the trial balance as on 31st March, 2004 in the name of Thiru.P.Ponnuswamy and the total income was Rs.1,04,27,692.67 p.

91. As observed by the Bombay High Court in **Prakash Ramaji Ambagade & (ii) Smt. Nalini Prakash Ambagade Vs The State of**

Maharashtra, through Anti Corruption Bureau, Nagpur (2015 SCC Online Bom 3086) cited supra, the income tax returns are the public documents and as held in the cases of **Rukmini Narvekar V Vijaya Satardekar** and **Harshendra Kumar D V. Rebeatilata Koley**, they can be looked into by the High Court in exercise of its power under

<http://www.judis.nic.in> Section 482 of Code of Criminal Procedure for doing complete justice in

this matter.

92. But, in the case on hand, these documents viz., the income tax returns for the relevant assessment years have not been produced by the prosecuting agencies along with the final report.

93. On the other hand, Mr. E.Raja, learned Additional Public Prosecutor (Vigilance and Anti Corruption has contended that Mr. M.G.Swaminathan (A2), Mr. P.Ponnuswamy (A3) and Tmt. P.Mariamammal (A4) were examined in detail during the course of investigation. While so, Mr. P.Ponnuswamy (A3) and Mr. M.G.Swaminathan (A2) had stated that they were doing real estate business and they were having enough source of income to purchase the properties in their names and they had further added that they had huge bank deposits. But they did not produce any documents such as copies of income tax returns, savings bank accounts' transactions etc., to prove their claim and contention. He would also contend that the witnesses 16 to 32 being the sellers of the properties, during the course of their examination had stated that they had received the sale proceeds only from Thiru.K.Veluswamy and on his instructions, they had transferred the power of attorney in the name of Mr. M.G.Swaminathan (A2). He has also argued that the antecedents of Mr. M.G.Swaminathan would reveal that he hailed from an ordinary family and he was working on daily wages at his native place. He owned only a small hut (Gramanatham) and gave his power of attorney in favour of L.W.12 towards the money borrowed by him. He would further contend that the second accused Mr. M.G.Swaminathan and his wife Tmt. Kumudavali came to Chennai during the year 1991 and started their career as coolie and later as house broker in Red hills area in Chennai and that he was financially poor, helpless and a man of no known means of livelihood.

94. Mr. E.Raja, learned Additional Public Prosecutor has further added that excepting the first accused all the other accused persons were independent non-public servant and they were the income tax assesseees. They had filed their income tax returns with the Income tax authorities and that they were not duty bound to see that each and every kind of

assessee do not avoid the tax and further they would not pay any attention to see as to whether an assessee is deciding to pay more income tax in his returns than that of his real income with a view to escape each and every assessment and the check, if at all done it is done in random. He would further submit that mere receipt of the income tax returns by the income tax department do not confer any immunity for the petitioners from being proceeded with against them under the provisions of the Act.

95. The arguments advanced by Mr. E.Raja, learned Additional Public Prosecutor is not able to be countenanced because he cannot blame or find fault with the income tax authorities. As already discussed by this Court in the opening paragraphs of this Judgment, even if it is wrong the income tax authorities would question the assessee concerned, at any point of time in case any suspicion is arisen in the income tax returns filed by the income tax assesses.

96. Mr. E.Raja learned Additional Public Prosecutor has also submitted that the accused 2 to 4 had been charged with criminal liability and the final report was filed on the basis of adequate materials and in accordance with law. He has also argued that instead of challenging the final report, the first accused had filed a petition under Section 239 of the Code of Criminal Procedure before the trial Court and had also filed a petition under Section 482 of the Code of Criminal Procedure in CrI.O.P.No.10609 of 2014 before this Court and that the quash petition was dismissed by this Court as withdrawn. The petition filed by the first accused in CrI.M.P.No.456 of 2008 was dismissed and the first accused, challenging the order of dismissal had filed the Revision Petition in CrI.R.C.No.457 of 2017. He has also added that the petitioners 2 to 4 had also filed another petition in CrI.M.P.No.388 of 2008 under Section 239 of the Code of Criminal Procedure to discharge them from the clutches of the charges, but during the pendency of that petition the accused 2 and 3 had passed away. Ultimately that petition was also dismissed and challenging the order of dismissal of that petition, Tmt. P.Mariamammal the fourth accused had preferred another CrI.R.C. No.458 of 2017 before this Court.

97. Mr. E.Raja, learned Additional Public Prosecutor has also maintained that the prosecution need not give any explanation for fixing a party during the check period, as public servant, acquiring assets should be in proportionate to his known sources of income, and it is his duty to explain satisfactorily based upon the lawful source of his income and failure to do so it would be an offence as enshrined in Section 13(1) (e) of the Act.

98. This piece of argument is not discernable because once the check period is fixed and during which a public servant is alleged to have acquired properties which is said to be disproportionate to his known sources of income, it is for the prosecution to stick on to their case and prove that the party as a public servant had acquired or amassed wealth disproportionate to his known source of income. If the prosecution fails in its part to prove the case, then the total edifice of the case would be collapsed.

99. Mr. E.Raja learned Additional Public Prosecutor in support of his contention has placed reliance upon the decisions of the Apex Court in **K.Veerawamy V Union of India** 1991 SCC (CrL.) 734 as well as the **State of Tamil Nadu Vs Suresh Rajan and others** and **The State of Tamil Nadu V K.Ponmudi & others** (CrL.Appeal No.2223 of 2014, wherein it is held that clubbing of assets of individuals with that of a public servant is proper and in consonance of law and the question of ownership of property can be determined only during trial. He would further submit that only the public servant is expected to explain satisfactorily about the disproportionate assets possessed by him or by any one else on his behalf. With reference to this he has added that accused 2 to 4 were examined and their explanations were considered by the Investigating Officer and it was satisfied that the law as laid down by the Apex Court in **K.Veerawamy V Union of India** 1991 SCC (CrL.) 734, was fully complied with.

100. It is significant to note here that no explanation was sought for from the accused 2 to 4 and in this connection, obviously, the learned

advanced his arguments on his own accord, which could not be digested.

101. Mr. E.Raja, learned Additional Public Prosecutor has also made reference to **Suresh Rajan's** case, cited supra, wherein the Apex Court has observed that :

"While perusing the order of discharge the fact that the accused other than the two ministers have been assessed to income tax and paid income tax cannot be relied upon to discharge the accused persons particularly in view of the allegation made by the prosecution that there was no separate income to amass such huge properties. The property in the name of the income tax assessee cannot be a ground to hold that it actually belong to such an assessee. In case this proposition is accepted in our opinion, it will lead to disastrous consequences. It will give an opportunity to the concerned public servants to amass property in the name of known persons, pay income tax on their behalf and there be out from the mischief of law. While passing the impugned orders, the Court has not satisfied with the materials for the purpose of finding out whether or not there is sufficient ground for proceeding against, but whether that would warrant a conviction. We are of opinion that this was not the stage where the Court should have apprised the evidence and discharged the accused as if it was passing an order of acquittal. Further, defect in investigation itself cannot be a ground for discharge. In our opinion, the order impugned suffers from grave error and calls for rectification. "

102. He would further submit that at the stage of framing of charge the Court exercises only a limited jurisdiction. It will see whether a prima facie case has been made out. It will not dwell deep into the matter for the purpose of the appreciation of the evidence. It is beyond any doubt or dispute that at the stage of framing of charge, the Court shall not weigh the evidence. The stage for appreciating the evidence for the purpose of arriving at a conclusion as to whether the prosecution was able to bring home the charge against the accused or not would arise only after all the evidences are brought on record at the trial.

103. In support of his contention, the learned Additional Public Prosecutor has made reference to the decision of the Apex Court made in **Sajjan Kumar Vs CBI** reported in (2010) 9 SCC 368) wherein the Apex Court has explained the scope and ambit of the provisions of Sections 227 and 228 of the Code of Criminal Procedure. It was held that the Judge while considering the question of framing the charges under Section 227 of the Code of Criminal Procedure has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine the prima facie case would depend upon the facts of each case. It is also held that at the time of framing of charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the materials placed on record and must be satisfied that the commission of offence by the accused was possible.

104. With regard to the benami transactions, learned Additional Public Prosecutor (Vigilance and Anti Corruption) has submitted that the prosecution was duty bound to prove the offence as given in the charge sheet viz., Section 13(2) read with Section 13(1)(e) read with Section 109 of IPC and not any other offence and the concept of benami transaction as defined in the Prohibition of Benami Property Transactions Act, 1988 (as amended by Act 43 of 2016) has no relevancy as the fourth accused was not charged with any offence other than the offence of abettor of the offence under the Act. Hence the petitioner's arguments was nothing but to divert the issue which was not an issue before this Court and the attempt to get mileage of and so it is not sustainable in law.

105. He would further submit that as per the principles laid down by the Supreme Court in **Superintendent and Remembrancer, Legal Affairs Vs Anil Kumar** (1980 SC 52: (1979) CrL.J. 1390) and in **P.Nallammal Vs State-** the Magistrate had therefore, to consider the question as to framing of charge on a general consideration of the materials placed before him by the Investigating Police Officer. The

finding the accused guilty or otherwise is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charges against the accused in respect of the commission of that offence. He would therefore submit that the existence of strong suspicion or a grave suspicion is enough to frame charge against the accused persons, whereas in this case, the prosecution had produced enough material evidence both in the form of documentary and oral evidences more than that required by law.

106. He therefore he would submit that the revision petitions filed by the petitioners might be dismissed, confirming the order of the trial Court. Apart from this, he has also placed reliance upon the decisions of the Apex Court in **Union of India Vs P.K.Samal and another** reported in (1979 3 SCC-4) and **M.S.Kuppuswamy Vs State** (1990 L.W.Crl. 394), and **Niranjan Singh Karan Singh Vs Jitendra Bhimraj Bijjaya & Others** ((1990) 4 SCs 76) In all the afore said decisions, the Hon'ble Supreme Court of India has in general discussed the scope and ambit of Section 227 of the Code of Criminal Procedure and it was also held therein that a duty is cast on the Judge to apply his mind to the material on record and if on examination of the record, he does not find sufficient ground for proceeding against the accused,, he must discharge him. On the other hand, if after such consideration and hearing he is satisfied that a prima facie case is made out against the accused, he must proceed to frame a charge as required by Section 228 of the Code of Criminal Procedure.

107. As per the final report, the disproportionate assets acquired by the first accused during the check period between 01.01.1996 and 16.10.2003 is Rs.1,17,6,656.55 p. The details based on Statements I to VII are given in the following tabular form.

BASIC STATEMENTS

Assets that stood to the credit of the accused at the beginning of the check period (STATEMENT - I)	157094.83
Assets that stood to the credit of the accused at the end of the check period (STATEMENT - II)	10681810.38
Statement showing income of the accused between the check period (STATEMENT - III)	1063316.00
Statement showing expenditure incurred by accused between the check period (STATEMENT - IV)	2245257.00
STATEMENT V	
Value of the Assets as they stood to the credit of the accused as on 31.07.2000 (STATEMENT II)	10681810.38
Value of the Assets as they stood to the credit of the accused as on 1.1.1991 (STATEMENT I)	157094.83
Assets acquired during the check period (Statement II - Statement I)	10524715.55
STATEMENT VI	
Income of the Accused during the check period (Statement III)	1063316.00
Expenditure incurred by the Accused during the check period (Statement IV)	2245257.00

Excess expenditure incurred by the accused during the check period (Statement III - Statement IV)	-1181941.00
STATEMENT VII	
Assets acquired during the check period Statement – V	10524715.55
Likely savings of the accused that would have accumulated during the check period Statement – VI	-1181941.00
Disproportionate Assets acquired by the accused during the check period from 1.1.1996 to 16.10.2003 (Statement V - Statement VI)	11706656.55

In precise and for easy understanding it is described as under:

Sl. No.	Statement No.	Description	Value
1.	I	Assets at beginning of the check period 1.1.1996 STATEMENT – I	157094.83
2.	II	Assets at the end of the Check period 16.10.2003 STATEMENT – II	10681810.38
3.	III	Total Income during the check period STATEMENT – III	1063316.00
4.	IV	Expenditure during the check period STATEMENT – IV	2245257.00
5.	V	Assets acquired during the check period (Statement II - statement I)	10524715.55

6.	VI	Excess Expenditure incurred (Statement III - statement IV)	-1181941.00
7.	VII	Disproportionate Assets from (1.1.1996 to 16.10.2003) i.e., Statement (II-I) - Statement (III-IV)	11706656.55

108. As per the arguments of Mr. N.Jothi, learned counsel appearing for the first accused and Mr. A.Ramesh, learned Additional senior counsel appearing for the fourth accused there is no disproportionate assets possessed by the first accused, as alleged by the prosecuting agency.

109. As per the first information report in Crime No.17 of 2003, the prosecuting agency has stated that the first accused Mr. K.Veluswamy had acquired and was in possession of properties and pecuniary resources to the extent of Rs.94,09,115/- as on 31.12.2001 which is said to be disproportionate to his known sources of income, and estimated at 757.5% (as per the FIR the check period is from 1.1.1996 to 31.12.2001).

As per the final report, the check period is redefined between 01.01.1996 and 16.10.2003.

As per Statement No.I, at the beginning of the check period i.e. as on 01.01.1996 the value of the assets that stood to the credit of the first accused Mr. K.Veluswamy was Rs.1,57,054.83p

The first accused claims that he is concerned with item Nos.1,48 and 49 only and that the total value of item Nos.1,48 and 49 as per statement No.II is Rs.1,59,278.00.

As per statement No.III, the total income of the first accused was calculated at Rs.10,63,316/-(during the check period from 01.01.1996 to 16.10.2003)

As it is seen from statement No.IV, i.e. the expenditure during the check period from 1.1.1996 to 16.10.2003 is as follows (according to the first accused he is concerned with sl.Nos.1,2,4 and 9 only)

Sl.No.1 the family consumption expenditure for the period from 1996 to 2003 is Rs.7,39,486/-

As per sl.No.2 the house tax paid by the first accused for the period from 1.1.1996 to 31.12.2003 in respect of the house at No4/172, Mondiyamman Nagar,Padiyanallur Village is 840/-

As per sl.No.4 in respect of repayment of housing loan to Caranodai Co-operative Building Society by the first accused Mr. K.Velusamy is Rs.1,13,164/-

As per sl.No.9 the expenditure incurred towards the education of Selvi Shobana and Master Vigneswar Children of the first accused is Rs. 97,930/-

Total Rs.9,51,420/-

As per statement No.III, the total Income of the first accused during the check period from 1.1.1996 to 16.10.2003 Rs. 10,63,316/-

As per statement No.IV the total expenditure in so far as the first accused is concerned is Rs. 9,51,420/-

The remaining balance of the Income is Rs.1,11,896.00

Hence it is proved that there is no disproportionate assets on the part of the first accused Mr. K.Veluswamy.

110. In so far as the third accused Mr.P.Ponnuswamy and the fourth accused Tmt. Mariammal (father-in-law & mother-in-law of A1) are concerned, according to Mr. A.Ramesh, learned Senior counsel, the total value of the assets specified in item No.2, 21 to 31,55 and 56 has been calculated at Rs.30,88,880/-.

assets as per statement No.II has been calculated at Rs.2,00,750/-. The value of the assets of accused-3 and accused-4 being husband and wife has been calculated at Rs.32,89,630/-.

The income declared as per the income tax returns of Mr. P.Ponnuswamy (A3) for the check period from 1.1.1996 to 16.10.2003 is Rs.39,97,721/-

As per statement No.2, item Nos.3 to 20 were said to have been purchased by A-1 in the name of his benami Mr.P.Ponnuswamy.

Even as per the calculation of the prosecution it is disproved that those properties were not the properties of the first accused.

111. This Court has thoroughly verified the income tax returns filed by Mr. P.Ponnuswamy (A3) for the period from 1998-1999 to 2003-2004. As it is seen from the income tax returns for the above said period Mr.P.Ponnuswamy (A3) had declared his income at Rs.39,97,721/-. As per the prosecution, the total value of the assets of accused 3 and accused 4 is Rs.32,89,630/-. Deducting this amount from the income of Rs.39,97,720 which was declared by A-3 to the Income Tax Department, the balance would be Rs.7,08,091/-. Therefore, it is proved that even as per the prosecution case Mr. P.Ponnuswamy (A3) had declared his excess income to the tune of Rs.7,08,081/- to the Income tax Department. Therefore, there is no disproportionate assets on the part of accused 3 and 4.

112. In so far as the second accused Mr. M.G.Swaminathan is concerned, it is alleged that the first accused Mr. K.Veluswamy had purchased properties specified in Sl.Nos.50 to 54 (as per statement NoII) in the name of Mr. M.G.Swaminathan (A2). The total value of the assets specified is Rs.26,32,299/-.

On verification of the records as well as the income tax returns submitted by Mr. M.G.Swaminathan (A2), he had declared his income to the Income tax Department to the extent of Rs.55,84,571/- i.e. for the year 1997-1998 to 2000-2003.

Even as per the prosecution the value of the assets from sl.nos.50 to 54 is Rs.26,32,299/-. The income declared by Mr. M.G.Swaminathan (A2) in the IT returns to the Income tax Department is Rs. Rs.55,84,571/- . It is proved that he had declared the excess income at Rs.29,52,272/- over the value of the assets shown by the prosecution. Hence, there is no disproportionate assets over the income on his part also.

113. This Court has perused the impugned order of the learned Special Judge/Chief Judicial Magistrate, Thiruvallur as well as the grounds of revision petitions filed by the 1st and 4th accused . As observed by this Court at the opening paragraphs of this order, the learned Special Judge had dismissed the petitions of the first accused and the fourth accused viz., CrI.M.P.Nos.456 and 388 of 2008 on the following two grounds:

- (i) the genuineness of the documents as well as the statement of the witnesses cannot be assessed at this stage, but it can be seen only at the time of trial.
- (ii) a perusal of the sanction order it is revealed, that it is a self-explanatory and the same is acceptable one to make out a prima facie case against the accused, and that the validity and genuineness of the sanction order cannot be assessed at this stage.

114. As demonstrated by this Court in the preceding paragraphs, even as per the final report, the prosecuting agency is not able to make out a prima facie case as against the accused 1 and 4 to proceed against them under Section 13(2) r/w 13(1)(e) of the PC Act,1988 and Section 109 IPC read with Section 13(2) r/w 13(1)(e) of the PC Act,1988.

115. Even if this case is allowed to go for trial the chance of conviction is bleak. The fourth accused is an Octogenarian. Even though the case was registered as early as on 15.10.2003 and the final report filed on 30.11.2007, so far no charge is framed against the accused persons.

116. Under this circumstance, this Court finds that the learned Special Judge/Chief Judicial Magistrate, Thiruvallur has miserably failed to

approach the grounds of petitions with proper perspective Since no prima facie is made out as against the petitioners, this Court feels that no fruitful result is going to be gained by keeping the prosecution case alive. Having regard to all the relevant facts and circumstances it is the firm view of this Court that the interference of this Court is required to the impugned order.

117. In the result, Criminal Revision Petitions in Crl.R.C. Nos.457 & 458 of 2017 are allowed and the impugned common order, dated 06.03.2017 and made in Crl.M.P. Nos. 456 & 338 of 2008 in Special Calendar Case No. 1 of 2008 is set aside and the Crl.M.P. Nos. 456 & 338 of 2008 are allowed. The first accused and the fourth accused are discharged from the clutches of the charge, as the charges levelled against A-2 & A-3 are abated, as they had passed away.

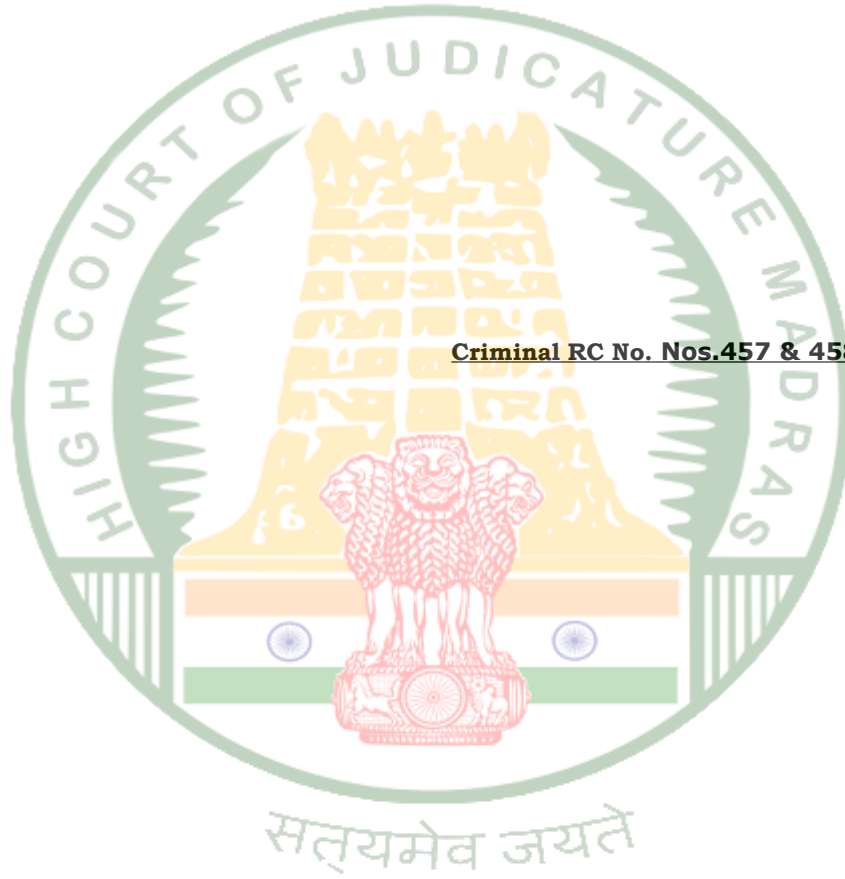
24.05.2017

Index : Yes/ No
Internet: Yes/No

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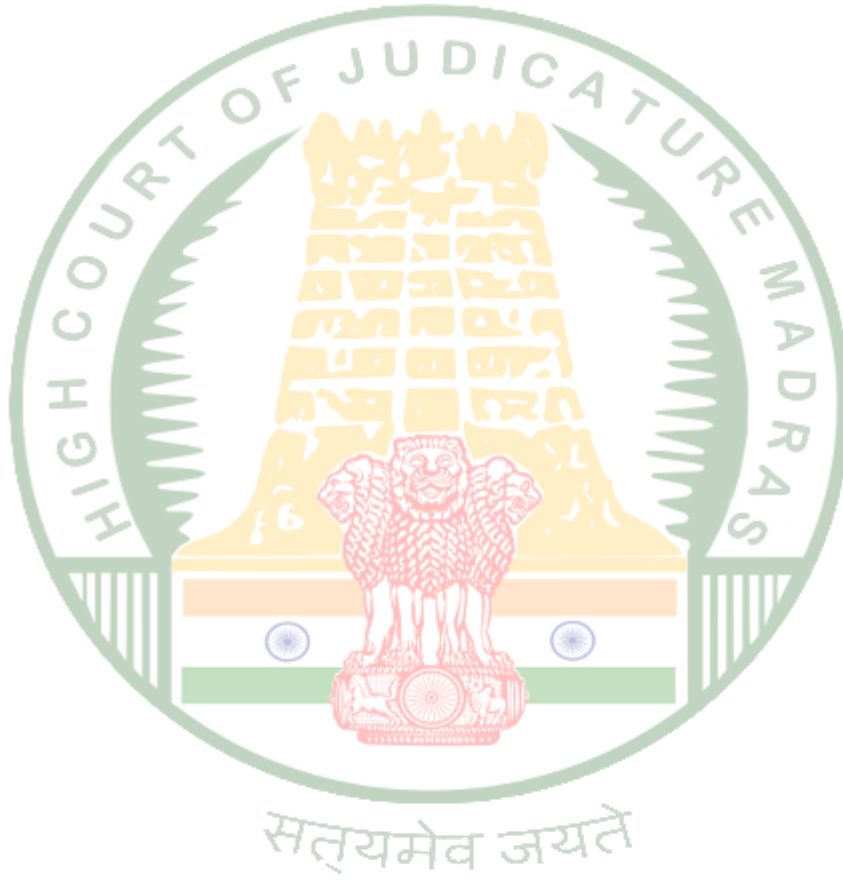
T. MATHIVANAN, J



Criminal RC No. Nos.457 & 458 of 2017

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