

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEALS NO. 59 & 63/2014

CRIMINAL APPEAL NO. 59/2014

Suresh Vinayak Morajkar alias Suresh
Vinayak Azgaonkar, s/o. Late Vinayak
Azgaonkar, aged 47 years, Sepoy Custom
House, Panaji, Goa, r/o. H.S. No.258,
Belabai, Vasco Goa and presently in Central
Jail, Aguada, Bardez, Goa.

...Appellant.

Versus

Union of India, represented by
CBI/ACB/GOA
through PP.

... Respondent.

CRIMINAL APPEAL NO. 63/2014

Smt. Sushma Suresh Morajkar @Azgaonkar,
d/o. Late Sonu Kajari,
age : 40 years, Occupation : Private person.
R/o. Flat No.5/B, Lotus Apartment,
Fr. Gomes Road, Vasco – Goa.
Permanent Address ;
H.S. No.258,Belabai, Vasco Goa

...Appellant.

Versus

Union of India, represented by
CBI/ACB/GOA
through PP.

.. Respondents.

Mr. P.P. Singh and Mr. Devendra Bharadwaj, Advocates for the
Appellants.

Mr. Mahesh Amonkar, Special Public Prosecutor for the Respondent.

Coram : M.S. Sonak, J.

Reserved on : 22.10.2020.

Pronounced on : 27.10.2020

JUDGMENT:

Heard Mr. P. P. Singh, learned Counsel for the Appellants in both these Appeals and Mr. Mahesh Amonkar, learned Special Public Prosecutor for the Respondents in both these Appeals.

2. Both these Appeals are directed against the Judgment and Order dated 24th September, 2014 in Special Case No.35/2013/D (Special Case No.2/2011 (old)) made by the Special Court for CBI in Goa at Mapusa. By the impugned Judgment and Order, the Appellant in Criminal Appeal No.59/2014 (Suresh Morajkar) was convicted for an offence punishable under Section 13(2), read with Section 13(1)(e) of the Prevention of Corruption Act, 1988 and sentenced to undergo rigorous imprisonment for four years and to pay a fine of ₹1,00,00,000/-, in default, to undergo six months simple imprisonment. Similarly, the Appellant in Criminal Appeal No.63/2014 (Smt. Sushma Morajkar) was convicted for an offence of aiding her husband Suresh Morajkar in acquiring assets disproportionate to his known sources of income, which is punishable under Section 109 of the Indian Penal Code, 1860 (IPC), read with Sections 13(2) and 13(1)(e) of the Prevention of Corruption Act, 1988 (said Act) and sentenced to undergo simple

imprisonment for one year and to pay a fine of ₹10,000/- and in default, to undergo simple imprisonment for three months.

3. The learned Counsel for the parties agree that both these Appeals can be disposed of by a common judgment and order since both these Appeals challenge the same impugned Judgment and Order.

4. The Special Court framed a charge alleging that Suresh (A1) during the period from 01.05.2008 to 06.01.2011 being a public servant posted as Sepoy in the Customs & Central Excise Department, Mormugao, Goa, was found in possession of disproportionate assets to the tune of ₹1,15,96,792/- to his known sources of income which he could not satisfactorily account for and thereby committed offence punishable under section 13 (2) r/with section 13 (1)(e) of the Prevention of Corruption Act, 1988 (said Act). Similarly, Sushma (A2) was charged for aiding and abetting her husband Suresh (A1) to commit offence of acquiring assets disproportionate to his known sources of income thereby committed offence punishable under section 109 of Indian Penal Code(IPC) r/w. 13 (2)(e) of the said Act.

5. Since, both A1 and A2 refused to plead guilty, the trial ensued in which prosecution examined 15 witnesses. Thereafter, both A1 and A2 neither examined themselves nor led any defence evidence

in the matter. By the impugned judgment and other, both, A1 and A2 were sentenced as aforesaid, and hence, these appeals by A1 and A2.

6. Mr. P. P. Singh, the learned Counsel for the appellants, at the outset pointed out that there is a breach of Section 17 of the said Act, since investigations, in this case, were carried out by Police Sub Inspector (PSI) and not Inspector of Police (PI) who alone was competent to investigate offences under Section 13 (1)(e) of the said Act. He submits that for this reason itself the entire investigation into the matter was without jurisdiction and the consequent conviction and sentence is also without jurisdiction. Mr. Singh relies on ***Inspector of Police, Visakhapatnam v/s. Surya Sankaram Karri¹*** in support of his contention.

7. Mr. Singh submits that in this case there was no sanction under section 197 CrPC and this is an additional ground for which the learned Special Court could not even have taken cognizance of the offence, much less convicted the appellants for the offences.

8. Mr. Singh submitted that in this case, the prosecution, failed to examine the investigating officer and even that is fatal to the prosecution case. He submits that the various charts based on which the learned Special Court concluded that A1 was found in possession

¹ 2006 7 SCC 172

of assets disproportionate to his known sources of income were never proved in the absence of the examination of the investigating officer. He submits that material prejudice occasioned the appellants on account of the non-examination of the investigating officer. The appellants were unable to cross-examine the investigating officer on the aspect of competence to undertake an investigation in the matter of this nature and, further, were unable to demonstrate that the explanation offered by the appellants was never considered or investigated by this investigating officer. Mr. Singh submits that for want of the examination of the investigating officer, the appellants, ought to have been acquitted. Mr. Singh relies on ***Ram Dev v/s State of U.P.***², ***Bihari Prasad v/s State of Bihar***,³ ***Damodar Mishra v/s State of Jharkand***⁴ by the Jharkhand High Court, ***Sarwan Nath v/s State of Punjab***⁵- by the Punjab & Haryana High Court in support of his contention.

9. Mr. P P. Singh submits that in this case, the learned Special Court has not taken into consideration the defence raised by the appellants in their Section 313 Cr.PC statement. He relies on ***K. M. Nanavati vs State Of Maharashtra***⁶ to submit that such a statement is not a mere formality and the court has to consider the defence of

² 1995 SUPP (1) SCC 547

³ AIR 1996 SC 2905

⁴ CriA (SJ) No.212 of 2010 decided on 20.10.2011

⁵ Cri.A No. 60/ (SB)/2000 decided on 06.12.2012

⁶ AIR 1962 SC 605

the accused persons. He submits that such non-consideration vitiates the impugned judgment and order.

10. Thereafter, Mr. P.P. Singh submitted tentative charts of Income and Expenditure on 23.10.2020 and submitted that since both these aspects tally, there was no case of any disproportionate assets made out against A1 in this matter. He submitted that in the absence of prosecution proving the various statements and charts relied upon by the learned Special Judge, there was no legal evidence to establish the offences for which the appellants were charged.

11. In addition to the aforesaid, Mr. P.P. Singh had also pointed out that there was absolutely nothing in the testimony of PW1, PW3, PW4, and PW8, which could incriminate any of the appellants in this matter. He pointed out that the evidence of PW4, PW5, PW6, PW7, PW12, and PW15 is beneficial to the case of A1 because these witnesses prove the expenditure incurred by A1 as also they prove the income of A2 in this matter.

12. Mr. P. P. Singh submits that the evidence of PW2 is not at all creditworthy. This witness admitted that there was a bar to acceptance of cash above ₹50,000/- towards payment of premia to LIC. Despite this, the Special Court has taken into account premiums more than ₹50000/- which were allegedly paid in cash to LIC.

13. Mr. P. P. Singh submits that the testimony of PW11 Baliram Nakhawa is not creditworthy and there are inherent contradictions in the documents produced by this witness. He submits that in any case, the evidence of PW11 establishes that A2 was having her own business of transportation for which she obtained loans from the bank.

14. Mr. P.P. Singh submits that the testimony of PW.13 and PW.14, the two employees of Goa Shipyard Ltd, who purportedly acted as Panchas at the time of the raid, is not at all creditworthy and ought not to have been relied upon by the learned Special Judge. He points out that PW.14 speaks about the raid commencing at about 9.15 a.m, however, PW.14 speaks about the raid commencing at about 12.15 noon. Similarly, there are discrepancies about the time by which such a raid was concluded. In any case, Mr. P.P. Singh points out that the testimony of these two witnesses is quite clear. The copies of the inventory lists/search list were never given to the Appellants and, in absence of furnish of such copies, no reliance could have been placed upon the same by the learned Special Judge.

15. Mr. P.P. Singh, without prejudice to the aforesaid contention submits that there is absolutely no evidence on record to establish the complicity of Sushma Morajkar, Appellant in Criminal Appeal No. 63/2014 and, therefore, the learned Special Judge erred in

convicting Sushma for the offence under Section 109 of the IPC, read with Sections 13(2) and 13(1)(e) of the said Act. He points out that merely because Sushma (A.2) was the wife of Suresh (A.1) the Appellant in Criminal Appeal No.59/2014, the inference of abetting could not have been drawn in this matter. He submits that there is hardly any evidence against A.2 and, therefore, the impugned Judgment and Order, convicting A.2 is required to be set aside.

16. Mr. P.P. Singh, without prejudice, further submits that in this case, the learned Special Judge in sentencing A.1 has gone by the amendment to the said Act which came in force only in the year 2014, in terms of which, the minimum punishment prescribed was 4 years, extendable to 10 years. He points out that the check period, in this case, was 1/5/2008 to 6/1/2011 and, therefore, the amendment to the Act which entered into force in 2014 ought not to have been taken into account by the learned Special Judge. Mr. P.P. Singh submits that there can be no retrospective application of criminal laws and the course adopted by the learned Special Judge violates Article 20 of the Constitution of India.

17. Mr. P.P. Singh in the alternate submits that the sentence imposed upon A.1 and A.2 is disproportionately harsh and the circumstance that A.1 was already facing imprisonment on account of conviction under the Negotiable Instruments Act, or that A.1 has

serious health-related issues, were ignored by the learned Special Judge. Mr. P.P. Singh, therefore, submits that even the sentence warrants interference.

18. For all the aforesaid reasons, Mr. Singh submits that the appellants may be acquitted of the offence for which they were charged or, in the alternative, at least A2 may be acquitted and the sentence imposed on A1 be set aside.

19. Mr. Amonkar, the learned Special Public Prosecutor defends the impugned Judgment and Order based upon the reasoning reflected therein. He points out that in this case, there is ample oral, as well as documentary evidence on record, which is sufficient to sustain the conviction of the Appellants in this matter. He points out that since the case of the prosecution is mainly based upon documentary evidence, which was not even challenged in the course of cross-examination or objected at the time of production, there was no necessity to examine the IO in this matter. He points out that there is no violation of Article 20 of the Constitution of India and the sentence imposed is in terms of the law prevalent during the check period from 1/5/2008 to 6/1/2011. He points out that this is a gross case and, therefore, there was no necessity of showing any leniency to the Appellants.

20. Mr. Amonkar, pointed out that the statements referred to in the impugned judgment and order are not documents but they are only tabular representations of the details obtained from the evidence on record which was almost entirely documentary. He points out that such documentary evidence was not even challenged by the defence and was admitted in evidence under Section 294 of Cr.PC. He submits that in this case, there was no explanation whatsoever furnished by the appellants to the investigating officer and, therefore, non-examination of the investigating officer has caused no prejudice whatsoever to the appellants. He submits that even the decisions relied upon by Mr. P. P. Singh, accept that the non-examination of the investigating officer, is not fatal to the prosecution case where no prejudice is demonstrated by the accused persons.

21. Mr. Amonkar submits that the issue of sanction under Section 197 of Cr.PC was never raised in this matter and there is no breach whatsoever of the provisions of Section 17 of the said Act. He submits that the initial FIR was registered by the Superintendent of Police who had, by a reasoned order dated 20.10.2012 handed over the investigations to PSI Surve. Therefore, it is evident that the investigations undertaken by the PSI were under the authority of the Superintendent of Police and not on his own. Mr. Amonkar submitted that in any case, any irregularity in the investigations would have no direct bearing on the competence of the Special Court to take cognizance of the offence. He submits that he relies on

Vinod Kumar Garg v/s. State⁷ ***State v/s. S. Bangarappa***⁸ and ***State of M.P. v/s. Ram Singh***⁹ in support of his contention.

22. Mr. Amonkar submits that there is overwhelming evidence against A1 in this matter and there was virtually no defence raised by the appellants in their statement under Section 313 of Cr.PC, except bare denials. He submits that A1 would never have amassed such disproportionate assets without the knowledge and aid of A2. Therefore, A2 was also rightly convicted under Section 109 of the IPC.

23. Mr. Amonkar submits that the learned Special Court has not sentenced A1 based upon any amended provisions and therefore there is no violation of Article 20 of the Constitution of India as alleged. He submits that in fact, the learned Special Court has been lenient to both the appellants and, therefore, even the sentence warrants no interference. For all the aforesaid reasons, Mr. Amonkar submits that both these appeals may be dismissed.

24. The rival contentions now fall for my determination.

25. Since the appellants' first contention is based on the provisions of Section 17 of the said Act, the same are transcribed

⁷ 2020 2 SCC 88

⁸ 2001 1 SCC 369

⁹ 2000 5 SCC 88

below for the convenience of reference

“17. *Persons authorised to investigate.*—

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 that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make 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.”

26. Now from the perusal of the impugned judgment and order, it does not appear that any contention based upon Section 17 was raised or seriously pressed before the learned Special Judge. Be

that as it may, the record very clearly indicates that the FIR in this matter was registered by S. S. Gavai, Superintendent of Police. Thereafter, the Superintendent of Police, vide a formal order, in the exercise of powers conferred upon him by Section 17 of the said Act, specifically authorized PSI Surve, CBI, ACB, Goa to investigate the matter. Further, authorization under Section 18 of the said Act was also issued in favour of PSI Surve . Accordingly, it is not possible to hold that there was any breach of provisions of Section 17 of the said Act and this is possibly the reason why no such contention was raised or if raised was not seriously pressed before the learned Special Court in this matter.

27. In fact, this contention, was not even raised by Mr. P.P. Singh in the course of his detailed oral submissions in the matter but thereafter, Mr. P.P. Singh included this contention in his written submissions, without even seeking the leave of the Court. However, since the liberty of the appellants was involved, Mr. P.P. Singh was permitted to advance this contention in this matter.

28. The reliance placed by Mr. P.P. Singh on the decision of Surya Sankaram Karri (supra) is quite misplaced. In ***Ashok Tshering Bhutia v/s. State of Sikkim***¹⁰, in para 23, the Hon'ble Supreme Court has held that the decision in Surya Sankaram Karri was per incuriam. Accordingly, Mr. Singh was not justified in citing this

¹⁰ 2011 4 SCC 402

decision without pointing out that the same has been held to be per incuriam in Ashok Bhutia (supra).

29. In Ashok Bhutia(supra), the Hon'ble Apex Court was dealing with the challenge based upon improper authorization and invalid sanction similar to the contention raised in the present matter. The Apex Court held that the defect or irregularity in the investigation has no bearing on the competence of or procedure relating to cognizance or trial of the offences under the PC Act. Further, in the said matter, the Hon'ble Apex Court held that there was an oral order from the Superintendent of Police, authorizing the PSI to investigate the matter.

30. In the present case, there is a written order authorizing PSI Surve. The Apex Court held that a mere error, omission, or irregularity in sanction is not fatal unless prejudice is established. Section 19(1)(c) is a matter of procedure and does not go to the root of jurisdiction and once cognizance has been taken by the Court under Cr.PC, it cannot be said that an invalid police report is the foundation of the jurisdiction of the court to take cognizance. Therefore, after going into the case law on this in great detail, the Hon'ble Apex Court held that the prosecution cannot be faulted on the ground of improper authorization or in error, omission, or irregularity in obtaining sanction. According to me, the decision in Ashok Bhutia is a complete answer to Mr. Singh's contention based

upon authorization to investigate and the so-called absence of sanction. Again, it is necessary to note that these issues, were quite correctly not even raised before the Special Court at any stage.

31. Ashok Bhutia (supra) was followed by the Apex Court in Vinod Kumar Garg (supra) in which it was held that the investigations by any officer lower in rank than the one specified under Section 17 of the said Act is only an irregularity and unless such irregularity results in causing prejudice, the conviction will not be vitiated or bad in law. The Apex Court held that a defect or irregularity in investigation however serious would have no direct bearing on the competence or procedure relating to cognizance or trial. Where the cognizance of the case has already been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result unless a miscarriage of justice has been caused thereby. In the present case, the appellants have not demonstrated any prejudice or any miscarriage of justice, even assuming that there was any irregularity in the investigation.

32. In Ram Singh (supra), the High Court interfered with the conviction on the ground of breach of provisions of Section 17 of the said Act. However, the Hon'ble Apex reversed the High Court relying upon the order of the Dy. Superintendent, who by giving reasons entrusted the investigation to the Inspector. The Hon'ble Apex Court held that in such circumstances, the High Court erred in

concluding that the investigation was conducted by an officer, authorized under Section 17 of the said Act. The Apex Court reiterated that irregularity in the investigation unless shown or brought about a miscarriage of justice will not vitiate the trial.

33. To the same effect are the observations in *S. Bangarappa* (supra). For all the aforesaid reasons, the first two contentions of Mr. P.P. Singh fail, and based thereon, it will not be possible to interfere with the conviction of the appellants.

34. Next, we come to the contention-based upon the non-examination of the investigating officer in the present matter. Again, even the decisions relied upon by Mr. P. P. Singh make it clear that though it would not be desirable for the prosecution to examine the investigating officer, non-examination of the investigating officer does not create any dent in the prosecution case, much less, the credibility or otherwise, trustworthy testimony of the witness (*Ram Singh v/s. State of U.P.*). In *Bihari Prasad* (supra), the Hon'ble Apex Court explained that non-examination of investigating officer is not fatal to the prosecution case. Prejudice is required to be established and that too depends upon facts of each case no universal straight jacket formula can be laid down. It is only in cases where the prosecution depends upon the investigating officer who may be the principal or chief architect of the case, the prosecution would fail for non-examination of the investigating officer.

35. The decision of the Jharkhand High Court in Damodar Mishra(supra) relied upon by Mr. P.P. Singh is distinguishable from the present case. In that case, at para 13, the High Court concluded that it is the Prevention of Corruption Act, 1947, and not the Prevention of Corruption Act, 1988 which was applicable. Further, the High Court relied on ***Vishwanath Singh v/s. State of Jharkhand***¹¹ which had held that under the old law it was not imperative upon the public servant to inform his employer or any other authority regarding his income from any other lawful source. Under the old law, it was enough for the public servant to inform the investigating officer about the acquisition of income from other legal sources, and then it was for the investigating officer to investigate the income from such legal sources. Thus, it was for the investigating officer under the old act to investigate the case and find the truthfulness of the statement made by the accused persons and inform the court about it. In the case before the Jharkhand High Court, the accused persons had explained that gold ornaments and several items articles were given by his wife as Streedhan at the time of his marriage in 1942-43 and therefore, the same could not be treated as income of the accused during his service period. The accused had also pointed out that they had agricultural income and had also entered into an agreement of sale of his ancestral property and taken advance from the Vendee. The record indicated that some investigations were carried out by the investigating officer concerning

¹¹ 2011 (1) JLR 255

these explanations furnished by the accused persons. It is in these circumstances that the Jharkhand High Court concluded that though, the non-investigation of the investigating officer will not be fatal in every case, in this particular case, the same was fatal because the non-examination of the investigating officer had certainly caused prejudice to the accused person, particularly. After all, on account of such non-examination, materials collected during the investigation concerning the defence had not been brought on record.

36. Incidentally, in Damodar Mishra (*supra*), the Jharkhand High Court almost entirely relied upon Surya Sankaram Karri (*supra*), which, as noted earlier, was held as per incuriam in Ashok Bhutia.

37. In Sarwan Nath (*supra*), the accused was charged not with having disproportionate assets but for having demanded and accepted a bribe. That was a trap case, of which, the chief architect, was the investigating officer. It is in these circumstances, that the High Court had held that though the non-examination of investigating officer does not affect the prosecution case, in matters of this nature which stars the active role of the investigating officer, like preparation of entrustment memo, the actual trap and thereafter the preparation of the trap memo, the non-examination of the investigating officer is fatal to the prosecution case. The facts in Sarwan Nath (*supra*) bear no comparison whatsoever to the facts in

the present case where the prosecution has proved the case against A1 almost entirely relying upon the documentary evidence, most of which was admitted without challenge and in any case has been proved to the competent witnesses.

38. In this case, the appellants have demonstrated no prejudice whatsoever on account of the non-examination of the investigating officer. It is not the case of the appellants that they had offered any explanation to the investigating officer, which, the investigating officer, failed to investigate. The charts which Mr. Singh refers to are not documents but they are merely figures culled out by the learned Special Judge from the proven evidence on record, which was mostly documentary in nature. The investigating officer's examination was not required for proving such charts. Besides, in this case, most of the documents were admitted under Section 294 of Cr.P.C. without any objection from the appellants. All this indicates that the appellants suffered no prejudice whatsoever in this matter on account of the non-examination of the investigating officer. Therefore, based upon the decisions relied upon by Mr. P.P. Singh himself, it is not possible to fault the prosecution case on account of the non-examination of the investigating officer in this matter.

39. In Ram Singh (supra), the Hon'ble Apex Court has reiterated that though it may be desirable for the prosecution to produce the investigating officer at the trial even though various

documents were to be proved by the investigating officer were accepted by the defence as genuine documents or were not disputed, the non-examination of the investigating officer does not, in any way, create any dent in the prosecution case much less affect the credibility or otherwise the trustworthiness of the investigating officer's testimony which deserves to be accepted.

40. In ***Bahadur Naik v/s. State of Bihar***¹² the Hon'ble Apex Court once again reiterated that non-examination of the investigating officer, the witness was of no consequence could not be shown as to what prejudice had been caused to the accused by such non-examination. In the present case, Mr. Amonkar pointed out that in the cross-examination of the prosecution witnesses no contradictions or omissions were brought on record. Therefore, there was no occasion for proving any contradictions or omissions through the testimony of the investigating officer. In the absence of any prejudice whatsoever being demonstrated by the appellant, the non-examination of the investigating officer in the present case makes no dent to the prosecution case, which is mostly based upon documentary evidence.

41. In this case, there is clear and unchallenged evidence to hold that the income of A1 from salary during the check period was

¹² 2000 9 SCC 153.

₹2,21,171/-. Neither during the cross-examination of the prosecution witnesses nor in his statement under 313 CrP.C., A1 suggested that he had any legitimate source of income other than salary income or the income from interest on fixed deposits during the check period.

42. There is some evidence, however, to indicate that A2 had a transport vehicle in her name and was carrying on a business of transportation or rather, hiring her vehicle for transportation. From the testimony of PW5, the Manager of M/s. Tomar Roadways, and PW9-Partner of Goa Container & Allied Services, it transpires that this vehicle was engaged by them and for which, they had paid an amount of ₹6,64,195/- to A2. The evidence, suggests that though the transport vehicle was really in the name of A2, the business dealings were undertaken by A1.

43. Though this amount of ₹6,64,195/- may be exclusive of the fuel expenses which were borne by the employers of PW5 and PW9 but from out of this amount, A2 was required to expend towards driver's salary, repairs, maintenance, etc. Even if a liberal view is taken and the sum of ₹6,64,195/- is taken as the income of A1 and A2, the total income of A1 and A2 during the check period would come to ₹8,85,366/-. Even if some additional indulgence is shown, the total income of A1 and A2 during the check period will not exceed ₹10 lakhs.

44. The Special Court, based upon the voluminous documentary evidence on record has quite correctly determined the actual income of the appellants during the check period at ₹1,39,50,142/-. The basis for such determination is set out in a tabular form statement 'C' in para 93 of the impugned judgment and order of the Special Court. The Special Court has taken into account the amount received by A1 from the surrender of various insurance policies, sale of the shop, FDR amount, and interest from FDR overdrafts, demand loans, for which, there was no explanation offered by either A1 or A2. The evidence on record establishes that income of both A1 and A2 from all known sources could not have exceeded ₹10lakhs during the check period. The documentary evidence establishes that mainly A1 was found in possession of income to the extent of ₹1,39,59,142/-.

45. As if this was not sufficient, the evidence on record proves beyond a reasonable doubt that mainly A1 expended the amount of ₹2,03,43,425/- during the check period. This includes expenses towards insurance premia in an amount of ₹29,90,000/-. Deposed to PW2, B. Shirodkar, Senior Branch Manager at LIC at Vasco. PW2 produced on record status reports concerning no less than 42 LIC policies taken out by A1 in his name and the names of his family members. In respect of such policies, A1 paid a premium of ₹29,90,000/- during the check period. Such premium was paid by cheque as well as by cash. PW2 deposed that LIC does not accept

cash above ₹50,000/- towards payment of premium but immediately in the next sentence PW2 clarified that cash above ₹50,000/- is accepted after taking PAN of such persons. There are receipts produced on record and there is absolutely no reason to doubt the testimony of PW2, the Senior Branch Manager of LIC that A1, during the check period expended an amount of ₹29,20,000/- toward insurance premia. Even this finding, without anything further, is sufficient to convict A1 for having assets disproportionate to his known sources of income and for which A1 had no explanation whatsoever.

46. The evidence on record points out to the movable properties purchased during the check period, to the expensive educational institutions which A1's children attended and fees paid. Based upon documents produced by the various witnesses, the learned Special Judge has tabulated the statement on expenditure in para 117 of the impugned judgment and order. There is hardly any case made out by the appellants to dispute such details.

47. Again, there is clear evidence available on record about the assets of A1 and A2 just before the check period, i.e. as on 01.05.2008. This figure is determined at ₹3,41,098/- by the learned Special Court. So also, there is ample evidence to establish the position of assets at the end of the check period, i.e. 06.01.2011 which came to ₹55,03,678.67. Again, this figure is based on actual

documentary evidence and there is no good case made out to modify this figure. If Mr. Singh's contention that routine items should have been excluded from consideration is to be accepted, this figure would at the most, and that too, on liberal construction be reduced by a maximum of ₹ 2lakhs and not further. Incidentally, if the statement 'B' in para 61 of the impugned judgment and order is perused, then most of the routine items, have, in fact, been taken at nil value which means, they must have already been excluded from consideration.

48. Based upon all this, it is apparent that the prosecution has established its case against A1 beyond a reasonable doubt. The discrepancy as to the timing of the raid in the testimony of the 2 Panchas, PW13 and PW14 is quite insignificant. Based upon such discrepancy, the testimony of the two Panch witnesses cannot be excluded. In any case, nothing much turns on the items found during the raid. In this case, the prosecution has established its case beyond reasonable doubt mainly on documentary evidence which is clinching and has gone virtually unchallenged. Even if the items found at the time of the raid are to be excluded, such exclusion, will not exceed, in value, the amount of ₹2 lakhs or thereabout. Even after such exclusion, the extent of disproportionality is too large and unexplained.

49. This is not the case where the learned Special Judge has failed to take into account the statement of the appellants under

Section 313 Cr.P.C. In the statements, no such specific defence as such was taken by A1. A1 simply denied everything and stated that everything was false. The learned Special Judge, by believing the prosecution version, which was mainly based upon documentary evidence that had gone unchallenged, considered but rejected A1's so-called defence that everything was false or that A1 was innocent of the charges leveled against him. Therefore, this is not the case where any specific defence as such was raised by A1 and such defence has not been considered by the learned Special Judge whilst convicting A1.

50. The learned Special Judge has quite correctly marshaled and evaluated the documentary evidence and concluded that the prosecution has proved beyond a reasonable doubt that A1 has committed the offence under Section 13(1)(e) of the said Act. Particularly, there is no case made out to interfere with the impugned judgment and order in so far as the conviction of A1 – Suraj Morajkar is concerned.

51. However, in so far as A.2 *i.e.* Sushma Morajkar is concerned, I am not satisfied that the prosecution has proved the case of her abetment, beyond a reasonable doubt.

52. The learned Special Judge has considered the evidence concerning A.2 in paragraphs 120 to 127 of the impugned Judgment

and Order. The learned Special Judge has firstly found fault with A.2 not filing income tax returns and disclosing the amounts earned by her through her business. Secondly, the learned Special Judge has held that the income from the business of A.2 was something within her knowledge and, therefore, she could have produced documentary or other evidence in support of the same. Thirdly, the learned Special Judge, in paragraph 125 has referred to 5 insurance policies taken out in the name of A.2 for which a premium amount of ₹1,70,000/- came to be paid.

53. The learned Special Judge has then referred to the evidence of PW.11 Baliram Nakhawa. PW.11 had produced an application for the issue of demand draft for ₹2,00,000/- payable to Sadguru Engineering Works. This amount was paid through the account of A.1 for the business of A.2. From this, the learned Special Judge has concluded that A.2 allowed her husband to use the income which he earned illegally for investments in A.2's business. The learned Special Judge referred to the evidence of PW.9 who had testified that A.1 owned a Trailer in the name of A.2 and that his supervisor had contacted A.1 for hiring services of the business of A.2.

54. The learned Special Judge also referred to the evidence of PW.5 in the context of his approaching A.1 concerning the business of A.2. It is for all these reasons, the learned Special Judge concluded that A.2 has abetted with A.1 and deserves to be convicted under

Section 109 of the IPC.

55. According to me, based upon the evidence on record, or for that matter for the aforesaid reasons, it will not be safe to convict A.2 for the offence under Section 109 of the IPC. The circumstance that A.2 may not have filed her income tax returns concerning her transport business, is certainly not a ground to conclude any abetment with A.1.

56. Similarly, even assuming that an amount of ₹2,00,000/- was paid by A.1 for the business of A.2, no inference can be drawn that A.2 abetted with A.1 in amassing its disproportionate assets. It is possible as deposed by PW.5 and PW.9 that the said witnesses had approached A.1 for hiring the transport vehicle held in the name of A.2. However, from this, an inference could be drawn that it was A.1 who was carrying on the business in the name of A.2. However, even this, by itself, is not sufficient to sustain the conviction under Section 109 of IPC. There is no evidence produced on record by the prosecution that A.2 was aware of the implications of purchasing the transport vehicle or that she was aware that purchase of such transport vehicle is from out of any amounts illegally earned by A.1. In any case, from the evidence on record at least, it cannot be said that the ingredients of abetment have been proved by the prosecution in this case beyond a reasonable doubt. At the highest, there may be grounds to suspect the involvement of A.2. Suspicion, howsoever

high, can never take place of proof in criminal matters.

57. Mr. P.P. Singh submits that A.2 was almost illiterate and a housewife. He submits that even this aspect was not even taken into consideration before A.2 could be convicted under Section 109 of the IPC.

58. Taking into consideration the evidence on record in a cumulative manner, it is difficult to hold that the prosecution, in this case, has established the guilt of A.2 beyond a reasonable doubt. Therefore, the benefit of the doubt is due to A.2 in this matter.

59. In so far as the sentence awarded to A.1 is concerned, there is no case made out for interference. There is no merit in the contention that the learned Special Judge has applied the 2014 amendment by which the minimum punishment is enhanced to 4 years. In this case, the learned Special Judge had not imposed minimum punishment upon A.1. The learned Special Judge rejected the contention on behalf of A.1 that some lenient sentences should be imposed upon A.1. In terms of the law as prevalent during the check period, minimum punishment was one-year imprisonment and a maximum of five years imprisonment. In this case, the learned Special Judge, after evaluating the rival contentions, concluded that A.1 deserved to suffer imprisonment for a term of four years which is less than the maximum prescribed at the relevant time. Even the fine

imposed by the learned Special Judge is quite consistent with the parameters under Section 16 of the said Act. Accordingly, there is no case made out to interfere with the sentence imposed upon A.1.

60. Both these Appeals are accordingly disposed of by making the following order :

- (a) Criminal Appeal No.59/2014 is hereby dismissed;
- (b) The Appellant-Suresh Morajkar will have to surrender before the Special Court within 6 weeks from today, failing which the Special Court to take steps to apprehend the Appellant in Criminal Appeal No.59/2014 to serve the balance sentence;
- (c) Criminal Appeal No.63/2014 is, hereby, allowed. The conviction and sentence imposed upon Smt. Sushma Morajkar (A.2), the Appellant in Criminal Appeal No.63/2014 is hereby set aside;
- (d) In the facts and circumstances of the present case, there shall be no order as to costs, in both the Appeals.

M.S. Sonak, J.