IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.A 95 of 2018

Nand Kishore Rai

Vs.

Central Bureau of Investigation

For the appellant:	Mr. Milon Mukherjee, Sr. Adv., Mr. Santanu Talukdar, Adv.
For the Respondent:	Mr. Pulakesh Bajpayee, Adv.

C.R.A 96 of 2018

Smt. Bandana Rai
Vs.
Central Bureau of Investigation

For the appellant:	Mr. Milon Mukherjee, Sr. Adv., Mr. Santanu Talukdar, Ad.
For the Respondent:	Mr. Pulakesh Bajpayee, Adv.

Heard on: 23 March, 2022.
Judgment on: 10 June, 2022.

BIBEK CHAUDHURI, J. : –

1. By filing two appeals against the same judgment and order of conviction and sentence, appellants Nand Kishore Rai and Smt. Bandana Rai have assailed the judgment passed by the court below in Special Case

no. 12 of 2013. Both the appeals were heard analogously and are being disposed of by the following composite judgment.

2. In Special Case No.12 of 2015 arising out of RC Case No.3A of 2013 both the appellants were found guilty to the charge under Section 13(1)(e) of the Prevention of Corruption Act read with Section 109 of the IPC and appellant Nand Kishore Rai was sentenced to suffer imprisonment for six years and with fine and default clause. Appellant Smt. Bandana Rai is sentenced to suffer imprisonment for two years for committing offence under Section 109 of the IPC with fine and default clause.

3. Undisputedly, appellant Nand Kishore Rai was a superintendent of Customs (preventive), Nepal and Bhutan unit. He was posted at Customs House, Kolkata. It is the allegation of CBI that the said Nand Kishore Rai amassed assets disproportionate to his known source of income. The defacto complainant gathered information that a case being RC-01(A)/2013/AC-III CBI/New Delhi was registered against the said Nand Kishore Rai, Superintendent of Customs under various penal provisions of the Prevention of Corruption Act, 1988 (hereafter described as the said Act for short) and searches were conducted on 9th January, 2013 at various places in the states of West Bengal, Punjab, Delhi, Mumbai etc. During investigation in the aforesaid case it was disclosed that the appellant acquired assets worth Rs.67,55,776/- during the period between 31st March, 2005 and 9th January, 2013. It is also ascertained that appellant and his wife Smt. Bandana Rai accumulated assets in the form of huge bank balances, mutual funds and fixed deposits. They are

also in possession of a car, costly jewellery items and modern electronic gadgets. During search huge amount of cash money amounting to Rs.36,42,000/- was recovered from different locations of their master bedroom in Kolkata and they could not give any satisfactory reply. However, Smt. Bandana Rai pleaded that out of the said amount of money, some part of the cash was earned by him from sale of paintings. In the complaint it was also stated that the appellant accumulated a sum of Rs.67,27,191/- approximately during the period between 31st March, 2005 to 9th January, 2013, while his income from salary was Rs.30,37,334/-, agricultural income was Rs.2,98,600/-. He had incurred expenditure of Rs.57,35,777/- towards his household expenses, payment of LIC premium/medi claim policy, repayment of loan, education of children and other expenses. The value of assets of the appellant is Rs.82,27,232/- at the end of the check period, i.e., 9th January, 2013. He had also assets worth Rs.14,71,456/- at the beginning of the check period, i.e., on 31st March, 2005. Thus, he accumulated assets worth Rs.67,55,776/- and also incurred expenditure of Rs.57,35,777/- which is disproportionate to his known source of income.

4. On the basis of the said information submitted by the Deputy Inspector General of Police, CBI/AC(III)/New Delhi RC Case No.3A of 2013 was registered against the accused persons for committing offence under Section 13(2) read with Section 13(1)(e) and under Section 7/12/13(1)(d) of the said Act together with Section 120B of the IPC for acquisition of disproportionate assets against the known source of income.

5. PW15 Suryakant Prasad took up the case for investigation. He collected the documents seized in RC 1(A)/2013 in order to implicate the accused persons in this case after obtaining an order from the learned Special Judge, Patiala Court, Delhi. During investigation of RC Case No.1(A)/2013 a sum of Rs.36,42,000/- was recovered. On completion of investigation he submitted charge-sheet against the accused persons.

6. It appears from the lower court record that the learned trial judge framed charge against the appellant under Section 13(2) read with Section 13(1)(e) of the said Act and charge was also framed against Smt. Bandana Rai under Section 13(2) read with Section 13(1)(e) of the said Act with Section 109 of the IPC. As the accused persons pleaded not guilty, the learned Judge, Special Court CBI took up the case for trial.

7. During trial, prosecution examined 15 witnesses. Amongst them PW1 Sri Brojen Thamar was posted as the Principal Commissioner of Customs, airport and administration at Kolkata Customs House. Being the competent authority he accorded sanction for prosecution against Mr. Nand Kishore Rai, Superintendent of Customs. PW2 Omprakash Singh was the Secretary of a multistoried flat owners association under the name and style of Asha Tower Welfare Resident Association. He submitted a report to the Superintendent of Police, CBI, New Delhi on 18th October, 2013 stating, inter alia, that on 31st March, 2005 the appellant paid a sum of Rs.5,790/- towards security and on 9th January, 2013 he deposited a sum of Rs.1930/- for the same purpose to the above named welfare association. PW2 Barun Agarwal, an employee of M/s Dewars

Garage Ltd confirmed that the appellant purchased one Swift VXI car on 18th April, 2006. PW4 Sanjay Kajaria confirmed purchase of bathroom fittings worth Rs.8595/- from the shop of PW4 on 7th December, 2011. PW5 Nihar Ranjan Ganguly is the proprietor of M/s Ganguly. He confirmed two cash memos dated 26th July, 2012 and 17th July, 2012 wherefrom it was learnt that the appellant purchased some electrical fittings from the said shop. PW6 Amir Hussain is the proprietor of M/s Mobile Kitchen on 14th November, 2011 Smt. Bandana Rai, wife of the appellant purchased one chimney and cook top from his shop at Rs.22,300/-. PW7 Abhijit Dalal is a witness to search and seizure of some documents from the house of the appellant at Bondelgate near Park Circus. His signatures on eight pages of the seizure list were marked as exhibits. PW8 Jiten Chawla is the proprietor of an electronic business under the name and style of Cams Corner. On 25th August, 2011, 2nd November, 2012 and 16th May, 2012 Smt. Bandana Rai purchased some electronic items from his shop at a consideration price of Rs.21,100/-. PW9 Mr. Jyoti Bagga is a chartered accountant by profession. Under the instruction of CBI he examined the books of accounts and income tax return of M/s Sherpur Cold Storage Pvt. Ltd and Smt. Keshori Devi. On examination he submitted his report in writing to the investigating officer through email. Mr. Lolit Mohan Joshi and Mr. Manik Roy PW10 and PW11 respectively are the witnesses to the search and seizure in respect of the ancestral house of Nand Kishore Rai at Gazipur. PW12 and PW13 Rakesh Tiwari and Krishna Kant Rai are the witnesses to the search and seizure in respect of the houses of a person by a team of CBI Officers near Benaras Hindu University, Benaras. PW14 Ajit Kumar Pandey is an Inspector of CBI who conducted search in connection with RC1(A)/2013/CBI/AC(III)/New Delhi. PW15 is the Investigating Officer of the case.

8. Mr. Milan Mukherjee, learned Senior Counsel on behalf of the appellants at the outset submits the background of the case. It is submitted that in connection with RC1(A)/2013/CBI/AC(III)/New Delhi, house of the appellants at Bondelgate was searched by the CBI. CBI filed closure-report in RC Case NO.1(A)/2013 at Patiala Court, Delhi for disproportionate asset of the appellants amounting to Rs.36 lacks approximately under the penal provision of Section 13(1) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. In the case under appeal, CBI filed charge-sheet under Section 13(1)(e) of the Prevention of Corruption Act, 1988. Section 13(1)(e) runs thus:-

> "Section 13(1)(e) A public servant is said to commit the offence of criminal misconduct:-
>
> (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 source of income."

9. Thus, it is contended by Mr. Mukherjee that the appellants were allegedly found in possession of the pecuniary resources or property disproportionate to their known sources of income and the accused could not satisfactorily account for the said account of pecuniary resources.

10. Mr. Mukherjee has urged that in RC 1(A)/2013 CBI gave final report at the end of the check period i.e 9th January, 2013. Against the instant case another charge-sheet was filed by CBI for the same period.

11. Mr. Mukherjee next submits before me that the appellant joined his service on 17th November, 1988. His income from November, 1988-2005 was not taken into consideration. Asset statement of the appellant was also not seized. It is ascertained during investigation that the appellant No.1 has ancestral family business in Uttar Pradesh. There is a cold storage in the name of mother of the accused. He and his wife gets share of profits from the said business. Under such circumstances, had the asset statement been seized, it might have been found that the appellants do not possess any asset amount disproportionate to their income. Under such circumstances, the appellants are entitled to have the benefit of Section 114(e) of the Evidence Act.

12. It is further submitted by Mr. Mukherjee that the penal provision under Section 13(1)(e) of the said Act will attract only when the "public servant cannot satisfactorily account of pecuniary resources or property disproportionate to his known sources of income." However in the instant

case the accused No.1 deposed as a defence witness. He stated on oath how he received money from his mother and brother. It is specifically stated by him that his wife received Rs.19 lakhs by cash from his mother. Out of Rs.19 lakhs the brother of Nand Kishore Rai brought a sum of Rs.8 lakhs on 19th December, 2012 and his wife received a sum of Rs.11 lakhs from the mother of accused Nand Kishore Rai during puja vacation of 2012. The wife of accused No.1, namely Bandana Rai earned a sum of Rs.1 lakh by selling her paintings during the financial year 2012-2013. On 19th December, 2012 the brother of accused Nand Kishore Rai handed over a sum of Rs.16 lakhs as advance of sale price of a piece of land belonging to his wife. Furthermore, the accused in his deposition gave detailed account of purchase of household goods and electronic items.

13. Mr. Mukherjee next draws my attention to the evidence of DW2 Sandeep Kumar Singh who is a Chartered Accountant by profession. As per direction of the Investigating Officer he submitted a copy of the audit report of Sherpur Cold Storage Pvt. Ltd. for the financial year 2012-2013 to the Investigating Officer. The said audit report was marked as Exhibit-97. He also deposed that the said Sherpur Cold Storage Pvt. Ltd. was owned by one Kaushal Kishore Rai and another Mr. Rai together with the widow of their deceased brother and Smt. Bandana Rai, the appellant of criminal appeal NO.CRA 96 of 2018. From the audit report (Exhibit-97) it appears that Bandana Rai executed an agreement with other directors of Sherpur Cold Storage Pvt. Ltd. to sale a portion of land in favour of said cold storage and the entire amount of consideration price was paid to her

in advance. The learned trial judge failed to consider such aspect. He also failed to consider the specific evidence of the DW1 Nand Kishore Rai that he and his wife had kept the said money in their house because of the fact that they could not decide as to whether they would purchase a studio for Bandana Rai or a piece of land which he wanted to purchase. It is also submitted by Mr. Mukherjee that the said amount of money was not seized by the Investigating Officer in this case. Under such circumstances, the court cannot come to a conclusion that the appellant have acquired money disproportionate to known sources of income. The learned trial judge recorded an order of conviction against the appellants on the basis of the evidence adduced by the witnesses on behalf of the defence. However, defence is under obligation to prove its case on the basis of preponderance of probabilities. It is the primary duty of the prosecution to prove charge beyond any shadow of doubt. When the accused persons claimed that they received substantial amount of money from Sherpur Cold Storage Pvt. Ltd and also as advance for the sale of a piece of property belonging to his wife in favour of the said Sherpur Cold Storage Pvt. Ltd, the audit report, books of account, IT return and other relevant documents of Sherpur Cold Storage Pvt. Ltd. ought to be considered by the trial court to come to a decision as to whether the case of the prosecution was proved beyond any shadow of doubt or not. In the absence of such documents being considered, the judgment of trial court is perverse.

14. Learned P.P-in-Charge, on the other hand, submits that the argument made by the learned Senior Counsel on behalf of the appellants is hyper-technical. The case of the prosecution is that a sum of Rs.36,42,000/- was recovered from the residential flat of the appellants. The appellants could not satisfactorily account for the source of the said money. The recovered amount was disproportionate to the known source of income of the appellants. The appellants were examined under Section 313 of the Cr.P.C where they flatly admitted the recovery of the said sum of Rs.36,42,000/-. It is the duty of the defence to show as to why said huge amount of money was kept in the bed room of the appellants. It is also submitted by the learned P.P-in-Charge that the explanation offered by DW1 as to the legal source of money was also not proved satisfactorily by the defence. Therefore, there is no reason to interfere with the judgment and order of conviction and sentence passed by the trial court against the appellants.

15. Having heard the learned Counsels for the appellants and the respondent and on perusal of the evidence on record, it appears that recovery of a sum of Rs.36,42,000/- is not denied by the accused persons. The said amount was recovered from the master bed room of the appellant and his wife. It is the case of the prosecution that the appellant No.1 who was the Superintendent of Customs (Preventive) disclosed that his income during the period between 31st March, 2005 and 9th January, 2013 was Rs.67,27,191/- which includes income from his salary to the tune of Rs.30,37,334/-. He incurred expenditure during the said period

approximately of Rs.57,35,777/-. According to the prosecution the appellant was found in possession of assets to the tune of Rs.82,27,232/- at the end of the check period, i.e., 9th January, 2013. He had also assets worth Rs.14,71,456/- at the beginning of the check period, i.e., on 31st March, 2005. Thus, during the check period he amassed assets disproportionate to his known source of income to the tune of Rs.57,64,362/-. Out of the said amount a sum of Rs.36,42,000/- was recovered from the master bed room of Nand Kishore Rai. The said amount is the subject matter of the RC No.3(A)/13 out of which Special Case 12/2015 was registered.

16. I have already discussed the evidence adduced by the witnesses on behalf of the prosecution during the trial of the case. It is pertinent to mention that the officers and members or staff of CBI who conducted search and recovered a sum of Rs.36,42,000/-, the Officers who seizes the said amount, the witnesses to such seizure etc. were not examined in the instant case. From the evidence on record it is ascertained that the said amount was seized in RC 1(A)/2013 by the CBI Officials. Since the said sum of Rs.36,42,000/- was recovered from the Kolkata residence of the appellants, they were separately booked for committing offence under Section 13(1)(e) of the said Act in Kolkata. In the instant case the prosecution did not care to examine the witnesses who recovered the said money or under what circumstances the said money was recovered. The Investigating Officer only seized certain documents procured by CBI in connection with RC1(A)/2013.

17. The said documents were also not proved in accordance with law in this case. Therefore, I do not have any hesitation to hold that the prosecution has failed to prove in the instant case that a sum of Rs.36,42,000/- was recovered from the master bed room of the appellants.

18. The appellants came up with an explanation that a sum of Rs.30 lakhs in two installments were received by them from Sherpur Cold Storage Pvt. Ltd. Amongst the said money, the wife of Nand Kishore Rai received Rs.19 lakhs as advance towards sale of her immovable property in favour of Sherpur Cold Storage Pvt. Ltd. She also received a sum of Rs.11 lakhs from her brother-in-law during puja vacation of 2012. During the check period Bandana Rai earned Rs.1 lakh by selling her paintings. Her mother-in-law paid some amount towards gift to the children of Nand Kishore Rai. In order to ascertain the veracity or truthfulness of the evidence adduced by DW1, it was absolutely necessary for trial court to consider books of accounts, audit report and IT return of M/s Sherpur Cold Storage Ptv. Ltd. The prosecution has failed to produce those documents during trial of the case.

19. For the reasons stated above this Court is not in a position to concur with the findings arrived at by the learned trial judge.

20. The accused persons, therefore, are entitled to get benefit of doubt.

21. For the reasons stated above, the impugned judgment and order of conviction and sentence is liable to be set aside.

22. Accordingly, the instant appeal is allowed on contest.

23. The judgment and order of conviction and sentence passed by ld. Trial Judge in Special Case No. 12/15 against the appellant is set aside.

24. The appellant Nand Kishore Rai and Smt. Bandana Rai are acquitted of the charge and discharged from his bail bond.

25. Both the appeals are thus, disposed of, on contest.

(Bibek Chaudhuri, J.)