IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 750 OF 2003

Madhukar S/o. Baliram Chikhalkar,
since deceased through legal heirs :

1A) Smt. Kamlatai Wd/o. Madhukar Chikhalkar, Aged about 72 years, Occu.: Household, R/o. Ratanlal Plot, Convent Road, Akola, Tq. & Dist. Akola.

1B) Rajesh S/o. Madhukar Chikhalkar, Aged about 50 years, Occ.:Business, R/o. Deep Apartment, Survey No.18/1/4, Vitthal Nagar, Sinhagad Road, Pune-51.

1C) Harish S/o. Madhukar Chikhalkar, Aged about 47 yeas, Occu.: Service, R/o. Ratanlal Plot, Convent Road, Akola, Tq. & Dist. Akola.

.... **APPELLANTS.**

// **VERSUS //**

The State of Maharashtra,
Through Anti-Corruption Bureau,
Akola.

.... **RESPONDENT.**

Shri Adwait Manohar, Adv. a/w. Shri P.R.Agrawal, Adv.for Appellants.
Shri T.A.Mirza, A.P.P. for Respondent/State.

CORAM : ANIL S. KILOR, J.
DATED : JULY 28, 2022.

ORAL JUDGMENT :

1. This appeal takes exception to the judgment and order passed by the Additional Sessions Judge, Akola in Special Case No. 03 of 1989, convicting the Appellant No.1/Accused No.1 for the offence punishable under Sections 5(1)(e) and 5(2) of the Prevention of Corruption Act, 1947 (hereinafter referred to as "the Act of 1947") and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rupees Twenty Thousand, in default to undergo rigorous imprisonment for six months. Whereas, the appellant/accused No.2 is convicted for the offence punishable under Sections 5(1)(e) and 5(2) of the Act of 1947 read with Section 109 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rupees Five Thousand, in default to undergo further rigorous imprisonment for one month. The learned trial Court further confiscated the property of the accused worth Rs.1,90,087.77ps.

2. The prosecution case in brief is as under:

The accused No.1 was the Junior Clerk serving in Maharashtra State Electricity Board, Akola (MSEB). The accused No.2 was the wife of accused No.1. Accused No.3-Shantabai, the mother of the accused No.1 (died during the pendency of the trial and accordingly the proceeding was abated against her).

3. On a complaint received, the Anti-Corruption Bureau made an enquiry and registered the offence against the accused Nos. 1, 2 and 3, under the Act of 1947. Thereupon, during the investigation, search of the house of the accused, was carried out. The valuation of the articles found in the house was Rs.65,620/-. The accused No.1 was asked to give information regarding his income, which he pointed out from salary and other sources.

4. During the investigation, it was revealed that the total income of the accused from 1963 till 1984 was Rs.2,21,119.28ps. On calculation of the expenditure it was found the same as Rs.1,44,498.75ps. The accused were found in possession of the assets, namely plots, house and movables like electric motors, scooters and shares. The cost of the assets calculated was Rs.2,60,890/- and on deducting the expenditure

from the income, the savings of the accused comes to Rs.76,720.53ps. However, the assets were found of the value more than the savings by Rs.1,84,269.47ps. Thus, the accused were found to be in possession of the property more than their known sources of income.

5. It is further the case of the prosecution that the accused was asked to give explanation regarding disproportionate assets which he could not satisfactorily give. Accordingly, on obtaining the sanction from the Superintending Engineer M.S.E.B., Amravati Circle P.W.-18, charge-sheet came to be filed on 07/09/1989.

6. The charge came to be framed under Section 5(1)(e) and 5(2) of the Prevention of Corruption Act against the accused No.1 and under Section 5(1)(e) of the Prevention of Corruption Act read with Section 109 of the Indian Penal Code against the accused No.2. Both the accused pleaded not guilty and claimed to be tried.

7. The prosecution has examined 83 witnesses to bring home the charge against the accused. Thereafter, the statement of the accused under Section 313 of Cr.P.C. was recorded.

8. The learned trial Court, on marshalling the evidence oral as well as documentary, rendered the impugned judgment and order dated 03/11/2003. The validity and correctness of the same is questioned in this appeal.

9. Appellant No.1-Madhukar Baliram Chikhalkar died during pendency of the present appeal and his legal heirs were brought on record as appellant No.1-A to 1-C as per the order of this Court dated 04/09/2018.

10. Heard Shri Adwait Manohar, learned counsel for the appellants and Shri T.A.Mirza, learned A.P.P. for the respondent/State.

11. Shri Adwait Manohar, learned counsel for the appellants submits that the impugned judgment and order dated 03/11/2003 passed by the learned Additional Sessions Judge, Akola, in Special Case No. 3 of 1989, suffers from perversity and non-appreciation of evidence in right perspective.

12. It is submitted that before granting sanction no opportunity to explain satisfactorily the disproportionate assets found, was given to the accused. It is submitted that it is a settled law that no sanction can be

granted in respect of the offence under Section 5(1)(e) of the Prevention of Corruption Act, unless the Sanctioning Authority has accorded an opportunity to the accused to explain satisfactorily the disproportionate assets found, by issuing notice and calling explanation before granting sanction. For this purpose, the learned counsel for the applicant has placed reliance on the judgments of this Court in the case of *State of Mah...vs.. Ramkrishna*[1] and *State of Maharashtra ..vs.. Ramesh Khandu Salve*[2]

13. It is submitted that in this case the sanction granted by the Superintending Engineer M.S.E.B., Amravati Circle, Shri Vinayak Keshav Pawar (P.W. No.80) suffers from non-application of mind. The learned counsel for the appellants for this purpose, has placed reliance on a judgment of the Hon'ble Supreme Court of India in the case of *Mansukhlal Vitthaldas Chauhan ..vs.. State of Gujrat*[3]*,* on the point of validity of sanction.

14. It is further argued that, possession of the disproportionate asset is not sufficient to attract the offence, but cogent and sufficient evidence is required to attract the offence under Section 5(1)(e) of the Prevention of Corruption Act.

1 1995(1) Mh.L.J. 558
2 2021 ALL MR (Cri) 4040
3 (1997) 7 SCC 622

15. It is submitted that the trial Court has not taken into consideration salary for the period from 1st November 1971 to 31st December 1976. Whereas, the calculations and ascertainment of income and expenditure is based on assumption and presumption, which is not permissible. In support of his submission, he has placed reliance on the judgment of this Court in *Smt. Kamlesh Jain ..vs.. Central Bureau of Investigation (Anti-Corruption)*[4], dated 9th March 2010.

16. It is submitted that in absence of any cogent material on record to prove *benami* transactions, the properties jointly owned by the accused, was treated as assets of accused No.1, contrary to settled law. He has placed reliance, for this purpose, upon the judgment of this Court in the case of *Narayan Ramchandra Mante .vs.. State of Maharashtra*[5].

17. Per contra, the learned A.P.P. has strongly opposed the present appeal and he submits that, the prosecution has examined as many as 83 witnesses and produced number of documents to bring home the guilt against the appellants.

4 Cri.Appln.No.52/2006
5 2019(1) ABR (Cri) 36

18. It is submitted that the learned trial Court after marshalling the oral as well as documentary evidence has rightly convicted the accused Nos.1 and 2 and as such no interference is required in this case.

19. It is argued that the learned sanctioning Authority has independently applied his mind to the material placed before him, while granting sanction and as such, it cannot be faulted or termed as invalid.

20. The learned A.P.P. further submits that the learned trial Court while arriving at a conclusion that the accused held disproportionate properties to their known source of income, considered the evidence in detail and recorded the findings accordingly. It is submitted that the trial Court has taken into consideration each item of income and expenditure and thereon arrived at the definite conclusion which is just and proper in the eyes of law. Accordingly, he prays for dismissal of the present appeal.

21. I have perused record and the impugned judgment and order.

22. As the point relating to validity of sanction goes to the root

of competency of the Court to take cognizance of the case, I will take the same first for determination :

23. In the case of *Mansukhlal* (supra) the Hon'ble Supreme Court of India while dealing with the guiding principles for the sanctioning Authority, has observed thus :

> *"16. In Basdeo Agarwalla v. Emperor it was pointed out that sanction under the Act is not intended to be, nor is an automatic formality and it is essential that the provisions in regard to sanction should be observed with complete strictness. This Court in State through Anti-Corruption Bureau, Govt. of Maharashtra v. Krishanchand Khushalchand Jagtiani while considering the provisions of Section 6 of the Act held that one of the guiding principles for sanctioning authority would be the public interest and, therefore, the protection available under Section 6 cannot be said to be absolute.*
>
> *17. Sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to Government Servants against frivolous prosecutions. (See: Mohd. Iqbal Ahmed vs. State of A.P.). Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecutions and is a safeguard for the innocent but not a shield for the guilty.*
>
> *18. The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and*

other material placed before it. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all relevant facts were considered by the sanctioning authority. (See also: Jaswant Singh vs. The State of Punjab and State of Bihar vs. P.P. Sharma).”

24. While dealing with the similar issue about the sanction this Court in the case of *Ramesh Khandu Salve* (supra) has observed thus :

6. ….
6. In State of Karnataka v. Ameerjan, 2007(4) R.C.R. (Criminal) 375 : 2007(5) Recent Apex Judgments (R.A.J.) 202 : (2007) 11 SCC 273, while dealing with the grant of sanction, it has been held thus:-

"9. We agree that an order of sanction should not be construed in a pedantic manner. But, it is also well settled that the purpose for which an order of sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the Act by refusing to accord sanction for his prosecution or not.
10. For the aforementioned purpose, indisputably, application of mind on the part of the sanctioning authority is imperative. The order granting sanction must be demonstrative of the fact that there had been proper application of mind on the part of the sanctioning authority. We have noticed hereinbefore that the sanctioning authority had purported to pass the order of sanction solely on the basis of the report made by the Inspector General of Police, Karnataka Lokayukta. Even the said report has not been brought on record. Thus, whether in the said report, either in the body

thereof or by annexing therewith the relevant documents, IG Police, Karnataka Lokayukta had placed on record the materials collected on investigation of the matter which would prima facie establish existence of evidence in regard to the commission of the offence by the public servant concerned is not evident. Ordinarily, before passing an order of sanction, the entire 82 (2007)11 SCC 273 records containing the materials collected against the accused should be placed before the sanctioning authority. In the event, the order of sanction does not indicate application of mind as (sic to) the materials placed before the said authority before the order of sanction was passed, the same may be produced before the court to show that such materials had in fact been produced."

7. The Apex court in State of Maharashtra Vs. Mahesh Jain (2013) 8 SCC 119: 2014 ALL SCR 177 has held that grant of sanction is a sacrosanct act and is intended to provide safeguard to a public servant against frivolous and vexatious litigation. Grant of sanction is an administrative function and the sanctioning authority is required to prima facie, reach the satisfaction that relevant facts would constitute the offence. Satisfaction of the sanctioning authority is essential to validate an order granting sanction.

8. The Apex court in Mahesh Jain (2014 ALL SCR 177) (supra) has referred to Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh (1979) 4 SCC 172: 1979 ALL MR ONLINE 44 (S.C.) where the Apex court held "it is well settled that any case instituted without a proper sanction must fail because this being a manifest defect in the prosecution, the entire proceedings are rendered void, ab initio.

9. The Apex Court in Nanjappa Vs. State of Karanataka (2015) 14 Supreme Court Cases 186: (2015) ALL MR (Cri) 3318 (S.C.) held that Section 19 of P. C. Act which *provides that no court shall take cognizance of an offence punishable under Sections 7, 11, 13 and 15, alleged to have been committed by a public servant, without the sanction was couched in mandatory terms and acts as complete bar to prosecution without previous sanction. In the absence of valid sanction the court is not competent to take the cognizance of the case and the trial itself will be void-ab-initio. Therefore, the trial based on invalid sanction is null and void and there is no bar on prosecution after obtaining fresh sanction, can pray for re-trial. If the sanction itself is invalid, the Trial Court cannot come to the conclusion of acquitting or convicting accused, as it was not competent to take cognizance of the alleged offence. With an invalid sanction, the trial itself will be nonest in the eyes of law. In that case the Trial Court must discharge accused and parties may be relegated to a position where prosecution can be initiated after obtaining sanction afresh from the competent authority.*

10. The Apex Court in Dinesh Kumar Vs. Airport Authority of India (2012) 1 SCC 532 : 2012 ALL MR (Cri) 321 (S.C.) held that validity of sanction depends on materials placed before the sanctioning authority and consideration thereof implies application of mind by the sanctioning authority. As there is a distinction between absence of sanction and invalidity of sanction, the challenge to sanction as regards invalidity due to non application of mind, has to be raised during the trial.

11. The validity of sanction depends on the application of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation. It necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction, where prosecution has to be sanctioned or not."

25. From the above referred observations of the Hon'ble

Supreme Court of India and the Co-ordinate Bench of this Court, it is evident that grant of sanction is a sacrosanct act and is intended to provide a safeguard to a public servant against frivolous and vexatious litigation. The validity of the sanction would depend upon the material and all the relevant facts placed before the Sanctioning Authority.

26. It is further clear that, the material and evidence have been considered by the Sanctioning Authority which implies application of mind which *ex-facie* must reflect from the sanction order. The discretion to grant or not to grant sanction, based absolutely in the Sanctioning Authority.

27. Thus, where any case instituted without a proper sanction must fail because this being the manifest defect in the prosecution, the entire proceedings are rendered *void ab initio*.

28. In the teeth of the above referred well settled principles of law, the evidence of the Sanctioning Authority, Shri Vinayak Keshavrao Pawar (P.W. No.80), is relevant to refer.

29. P.W. No.80-Vinayak Keshav Pawar, Superintending

Engineer (O & M) Circle, Amravati in his examination-in-chief states that, he had verified income of accused No.1 received from M.S.E.B. during the period from 1963 to 1971.

30. However, it goes contrary to record, as salary of accused No.1 for the period 1st November 1971 to 31st December 1976 for six years was not calculated while determining the income of the accused No.1.

31. In the cross-examination, P.W. No.80 states that without perusing F.I.R. he cannot say that what sources of income were disclosed in the F.I.R. He further states that he did not remember if it was mentioned in the F.I.R. about income from the agricultural land. He states that he cannot say without looking to the record if the income from salary for the period 1971 to 1976 was not mentioned in the investigation papers. He states that he cannot say without verification, if the salary details from 01/11/1971 to 31/12/1976 were not shown to him. He has further shown inability to say without verification, if the bonus Statement from 1971 onwards was not sent to him. He further states that he cannot say if he had seen the dairy documents, run by accused No.2 and Shantabai. He further admits that income from known sources

mentioned in the sanction order is known from the office record and the entries in the service book. He further admits that the figure of expenditure mentioned by the Investigating Officer in the investigation papers, was accepted by him at the time of sanction.

32. Thus, it is clear from the evidence of P.W. No.80 that, except salary income he did not consider the income from other sources and further he was not in a position to state whether he considered the salary details from 01/11/1971 to 31/12/1976 or other income from the known sources.

33. As far as figure of expenditure is concerned, he admits that, he accepted as it is from the papers submitted by the Investigating Officer with investigation papers.

34. Thus, the evidence of P.W. No.80 sufficiently shows that, he has not applied mind to the office record and evidence collected during the investigation. Whereas, it is expected that he shall apply his mind independently for the generation of genuine satisfaction whether the prosecution has to be sanctioned or not.

35. In the circumstances, I have no hesitation to hold that in this

case the sanction suffers from non-application of mind and in absence of the valid sanction, the Court is not competent to take cognizance of the case and the trial itself will be *void ab initio*. Thus, the trial in this case, which is based on invalid sanction, is null and void and in such a case, the trial itself will be non-*est* in the eyes of law.

36. Moving further, the Co-ordinate Bench of this Court in the case of *State of Maharashtra ..vs.. Ramkrishna Dorkar* (supra) has observed thus:

> *"9. In Ishwar Piraj vs. State of Mah. (cited supra), this Court has held that it is incumbent upon the Sanctioning Authority to record and hold that the accused could not satisfactorily account for those disproportionate assets. A necessary corollary is, therefore, that no sanction could be granted in the case of the offence under Section 5(1)(e) of the Prevention of Corruption Act, unless the sanctioning authority accords an opportunity to the concerned accused to explain satisfactorily the disproportionate asset found and then holds and records that prima facie the accused has not been able to satisfy or account for the disproportionate assets. It is not disputed by the learned Additional Public Prosecutor, nor it could be disputed on the face of the sanction order dated 25-3-1987 that Sanctioning Authority did not issue any notice to the accused non-applicant, nor called for any explanation from him about the disproportionate assets which he possessed and which was found. The Additional Public Prosecutor conceded that it has been recorded by the Sanctioning Authority in its sanction order dated 25-3-1987 that the accused has failed to*

explain satisfactory account for disproportionate assets but without giving him a notice. In this view of the factual and legal position, it is apparent that the sanction order dated 25-3-1987 is not proper, valid and legal, and therefore, the proceedings against the accused could not have proceeded and commenced in the absence of valid and legal sanction order, and therefore, it cannot be said that the Special Judge, Akola was unjustified in discharging the accused of the aforesaid offence.

10. Adverting to the argument of Additional Public Prosecutor that certain information in the statements 1 to 7 was sought for by the Investigating Officer from accused, it can be observed that this argument of the learned Additional Public Prosecutor is also not properly placed. It is true that certain information was sought for from the accused applicant by I.O. which is reflected from his statements 1 to 7, but that cannot tantamount to asking the accused non-applicant to explain satisfactorily the disproportionate assets found from the Non-applicant accused. It is not disputed by the Additional Public Prosecutor that no memorandum or show cause notice in terms seeking explanation from the accused applicant to explain disproportionate assets was given and served upon him by the Investigating Officer. In Ishwar Piraj v. State (cited supra), this Court has specifically held that where the accused is charged of the offence under Section 5(1)(e), an opportunity must be given to the accused to explain the disproportionate assets. The opportunity contemplated should be fair, reasonable and sufficient. By seeking information in the statements 1 to 7, it cannot be said that accused while furnishing that information could have also explained the disproportionate assets alleged against him. The way the Investigating Officer has proceeded, naturally has prejudiced the right of the

> *accused of furnishing explanation in the case where he was accused for the offence under Section 5(1)(e) and in this view of the matter also the conclusion arrived at by Special Judge, Akola discharging the accused for the offence under Section 5(1)(e) and 5(2) of Prevention of Corruption Act and Sections 109 and 34 of Indian Penal Code cannot be said to be unjustified."*

37. Thus, it is clear that it is incumbent upon the Sanctioning Authority to record and hold that the accused could not satisfactorily account for those disproportionate assets. A necessary corollary is, therefore, no sanction could be granted in the case of the offence under Section 5(1)(e) of the Act of 1947, unless the Sanctioning Authority accords an opportunity to the concerned accused to explain satisfactorily the disproportionate assets found and then holds and record that *prima-facie* the accused has not been able to satisfy or account for disproportionate assets.

38. In this case, P.W. 80 the Sanctioning Authority in his oral testimony or in the sanction order has not stated about any such opportunity accorded to the accused No.1. Furthermore, the Sanctioning Authority has not recorded in his sanction letter that *prima-facie* the accused No.1 has not been able to satisfy or account for disproportionate

assets, on giving him an opportunity to explain satisfactorily the disproportionate asset found.

39. Thus, I have no hesitation to hold that the sanction order is bad even on the ground that it was granted without giving any opportunity to the accused No.1 to explain satisfactorily the disproportionate asset found. Hence, it can be said that, the right of the accused No.1 of furnishing explanation has been violated.

40. Now, moving to the merits of the case in hand, at this stage, it is necessary to analyze Section 5(1)(e) of the Act of 1947 which corresponds to Section 13(1)(e) of the new Act of 1988. The Hon'ble Supreme Court of India in the case of *M.Krishna Reddy* (supra) has considered and analyzed it and held thus :

> "*7. To substantiate a charge under Section 5(1)(e) of the Act, the prosecution must prove the following ingredients, namely, (1) the prosecution must establish that the accused is a public servant, (2) the nature and extent of the pecuniary resources or property which were found in his possession (3) it must be proved as to what were his known sources of income, i.e. known to the prosecution and (4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once the above ingredients are satisfactorily established, the offence of criminal misconduct under Section 5(1)(e) is complete, unless the accused is able*

> *to account for such resources or property. In other words, only after the prosecution has proved the required ingredients, the burden of satisfactorily accounting for the possession of such resources or property shifts to the accused.*"

41. This Court in the case of *Narayan Ramchandra Mante* (supra) has observed thus:

> "*12. Heard Counsel for the parties. In a case involving charge pertaining to offence of possessing assets disproportionate to the known sources of income, the most crucial aspect is presentation of facts by the prosecution to clearly demonstrate the calculation of figures pertaining to income of the accused, with details of income from various sources, expenditure incurred by the accused, savings projected from such figures of income and expenditure and finally the extent of disproportionate nature of assets to the known sources of income identified by the prosecution. ….*"

42. In the teeth of above referred well settled principles of law, I will scrutinize the oral testimonies of the prosecution witnesses to examine whether the prosecution has established and proved the necessary ingredients as discussed by the Hon'ble Supreme Court of India in the case of *M. Krishna Reddy* (supra).

43. P.W.65-Yunuskha Budankha, who was serving in MSEB till 1999 and was in Rural Division from 1974 till 1999, has deposed that he was maintaining salary roll of accused No.1. He further states that he could not get the income of the salary of accused No.1 from 1971 to 1976. He has stated that the office was having salary record of accused No.1 from 1977 till 1984.

44. In cross-examination, P.W. 65 states that he did not include the income for the year 1984-85 as the said information was not demanded by ACB office. He further admits that accused No.1 was working in Accounts Section and he was getting overtime. He admits that he did not include the amount received by accused No.1 towards overtime, in the Acquaintance Roll. He further states that he cannot say about fixation of pay during 1977 to 1984.

45. P.W.82-Tanaji Vyankatesh Ninave was working as Executive Engineer in the year 1987 at Achalpur, where the accused No.1 was working. The P.W.82 was the Drawing and Disbursing Officer of Achalpur Division at the relevant time, who in his examination-in-chief, has stated that during those days overtime to the Board employees was

permissible. He further states that he did not inform the overtime amount, as it was not inquired with him.

46. Similar is the evidence of P.W.80-Vinayak Pawar, who was working as Superintending Engineer (O & M Circle), Amravati in the year 1989, and granted sanction to prosecute the accused No.1, has stated that he cannot say without looking to the record if the income from 1971 to 1976 is not mentioned in the investigation papers.

47. In this backdrop, if the Chart-A relating to income from salary, given in the impugned judgment and order, is seen, it will be revealed that the income from 1st November 1971 to 31st December 1976, was not taken into consideration, while determining the income of the accused No.1, from salary.

48. Whereas, the learned trial Court while recording the findings on the said issue, has observed that the accused No.1 did not summon the office of MSEB for bringing such record to show that the accused had received Rs.30,422/- for the period from 1st November, 1971 to 31st December 1976.

49. The Court has further observed that if the amount taken by the prosecution as Rs.1,61,712.65ps. is considered, one would lead to the inference that the amount is inclusive of pay during the period from 1971 to 1976.

50. According to the accused, the salary for the period 1st November 1971 to 31st December 1976, comes to Rs.30,422/-.

51. The learned trial Court has not recorded any definite finding that the salary of the above referred period i.e. from 1971 to 1976 is inclusive in the income shown by the prosecution. On the other hand, the learned trial Court is saying that from the amount of salary income, one can draw inference. Thus, on the basis of the inference and without any cogent evidence the Court has held that the salary for the period 1st November, 1971 to 31st December 1976, is inclusive in the amount of Rs.1,61,712.65ps.

52. In the circumstances, it can be safely said that salary amounting to Rs.30,422/- for the period 1st November 1971 to 31st December 1976, has not been calculated as income from salary of the accused No.1 by the prosecution.

53. Moving to the valuation of house property, the evidence of Valuer who carried out the valuation of house of the accused is relevant for this purpose.

54. P.W. 79-Deorao who was the Deputy Engineer at Akola during 1985 to 1987 in B & C Department, Sub-Division No.III, in his cross-examination he has categorically said that he did not go to value the house of the accused persons, as per letter Exh.551. He stated that he valued the house prior to 10/09/1985 i.e. prior to the issuance of letter Exh.551 by Anti-Corruption Bureau. He further admits that, he did not mention the date of valuation in Exh.552 and he could not remember the date of Exh.552. He further admits that he did not mention the length and breadth of the house in the Valuation Certificate and also did not produce rates of construction prevailing at the relevant time.

55. He further admits that, as per valuation he cannot say how much iron and cement was used for that house. He states that, the cement might be of Rs.7/- or Rs.9/- per bag. He further states that, he cannot say price of bricks and whether the construction was load bearing or on pillar. He admits that, there is a difference of load bearing and

construction of columns. He further states that he cannot say whether the valuation made by him was for load bearing or column construction.

56. In light of above referred oral testimony of P.W. 79, it can be said that the valuation report of the house of the accused, is not proved.

57. P.W.81- Ajaykumar Shashimohan Tapdiya, who is the supplier of building material to the accused No.1, has stated in his chief that he supplied building material worth Rs.20,000/- to accused No.1. He further states that the accused No.1 was not having money, therefore, he had executed an agreement of sale of his field in favour of P.W. 81. He further states that he had given Rs.20,000/- to Rs.25,000/- to the accused No.1 as he was in need of money. In cross-examination he states that he received the said amount back in the year 1988.

58. However, the said hand loan of Rs.20,000/- to Rs.25,000/- was not considered by the trial Court, while determining the income of the accused.

59. P.W.83-Kartik Oke, who is the Investigating Officer (IO), has stated in the cross-examination that he recorded the statement of Laxmichand Burad on income of the accused No.1. He further states

that, he got to know that said Laxmichand gave Rs.2,500/- to accused No.1 on 18/03/1983 and on 07/11/1983 as advance for taking the premises on rent. He admitted that, the said witness was not examined. He further states that, Laxmichand took the block on rent from accused No.1 from 1982 and the rent was Rs.250/- per month. He states that, Laxmichand was tenant till 1987 and he paid rent and advance of Rs.19,250/-.

60. However, the said amount of Rs.19,250/- does not reflect in the income chart of the applicant. Thus, it appears that the said income of the applicant though was from known sources, was not included.

61. Furthermore, in the Chart-D given in the impugned judgment at Sr. Nos.12 and 13 the amounts shown are relating to the housing loan and loan from State Bank of India, i.e. Rs.10,788/- and Rs.12,512/-, respectively. The said amount is shown in the chart of expenditure. Whereas, being loan amount, it ought to have considered as income.

62. Hence, it is clear that Rs.23,300/- has not been considered as income but included in the items of expenditure.

63. In the Chart-E, showing assets of the accused, it is shown that the accused No.1 owns Plot No.198. The valuation of the said house as per Exh.552-Valuation Certificate is Rs.2,26,855/-, whereas, in the Chart-E it is shown as Rs.2,44,395/- i.e. higher by Rs.17,540/-, contrary to the valuation certificate Exh.552.

64. Moreover, the said property was owned by the accused jointly. Thus, shares of other two co-owners ought not to have included in the assets of the accused No.1, in absence of any evidence on record that the other two co-owners had no income source and therefore, it was a benami transaction.

65. It is a settled law that, unless there is a strict proof to show that it is a benami transaction, on the basis of the assumption and presumption it cannot be said that it is a benami transaction. For this purpose, the observation of the Hon'ble Supreme in the case of *M. Krishna Reddy ..vs.. State Dy. Supdt. Of Police*[6], will be of great help, which reads thus:

> *"19. Needless to say that this Court in a series of decisions has laid down the guidelines in finding out the benami nature of a transaction. Though it is not*

6 (1992) 4 SCC 45

> *necessary to cite all those decisions, it will suffice to refer to the rule laid down by Bhagwati, J. as he then was in Krishnanand Agnihotri v. State of M.P. . In that case, it was contended that the amounts lying in fixed deposit in the name of one Shanti Devi was an asset belonging to the appellant and that Shanti Devi was a benamidar of the appellant. The learned Judge speaking for the Bench has disposed of that contention holding thus: (SCC pp.830-31, para 26)*
>
> *"It is well settled that the burden of showing that a particular transaction is benami and the appellant owner is not the real owner always rests on the person asserting it to be so and this burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of benami is the intention of the parties and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of the serious onus that rests on him nor justify the acceptance of mere conjectures or surmises as a substitute for proof."*

66. When the facts of the present case are tested in the light of the above observation, the case of benami transaction has to fail.

67. It is thus clear that instead of considering the value of 1/3rd share of the accused No.1, worth Rs.81,464/-, the property was treated as solely owned by the accused No.1 and while considering the valuation of it for the purpose of determining the assets of the accused No.1, the total value Rs.2,44,395/- was taken into consideration. Thus, it can be seen

that Rs.1,62,930/- i.e. the value of 2/3 share of the co-owners has wrongly been taken into consideration as assets.

68. Thus, from the above referred discussion, following facts would emerge :

a) Rs.30,422/- towards salary for the period 1st November, 1971 to 31st December 1976, was not taken into account while calculating the income of the accused No.1 from salary.

b) Though the Valuation Report was not proved, it was relied upon for the purposes of determining expenditure.

c) The hand loan given by P.W.81 of Rs.25,000/- was not taken into consideration while determining the income of the accused.

d) The amount of housing loan i.e. Rs.10,788/- and loan from State Bank of India Rs.12,512/-, total Rs.23,300/- was not included in the income amount, but shown as expenditure.

e) The valuation of the house property though shown Rs.2,26,855/- in the Valuation Certificate, however, it was shown on higher side in Chart-E of the judgment by showing as Rs.2,44,395/-.

f) Rs.1,62,933/- i.e. the value of 2/3 share of the co-owners of the house property, has been added in the Chart of Asset without producing any cogent evidence that the said property is a benami property.

g) In addition to this, the amount of overtime, bonus, medical allowance, surrender/ encashment of leave, arrears of fixation of pay for the period from 1977 to 1984, has not been taken into consideration on the ground that in the statement under Section 313 of Cr.P.C. the accused No.1 has not stated so, though it is a settled law that the statement of the accused under Section 313 of Cr.P.C. is not substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution.

69. In addition to this, the prosecution has not taken into account the income of late Smt. Shantabai Chikhalkar received by her for her house. Further the income of the accused Nos. 2 and 3 from agricultural field, namely the field at Ichhapur and field Survey No. 26/2 at Umari-Umarkhed, District : Akola.

70. In the above backdrop, it would be appropriate to refer to para 50 of the impugned judgment, wherein it has been held that the disproportionate asset is found to the extent of Rs.1,90,087.77ps. Para 50

reads thus :

> "*50. Thus the income from all known sources of the accused is Rs.3,14,654/- as per Chart 'B'. The expenditure is Rs.2,34,691-97 ps. Even if we deduct the amount in the expenditure Chart 'C', believing that, that material is for construction of the house, the expenditure comes to Rs.1,75,813-00ps. If we deduct the expenditure from the income, savings comes to Rs.1,38,841/-. The assets in the name of accused worth Rs.3,28,928-77 as per chart 'E'. So it is disproportionate to the extent of Rs.3,28,928–77–1,38,841-00 = Rs.1,90,087-77ps.*"

71. In the light of the observation made herein above in respect of the amounts which were not taken into consideration while determining the income or how the amount of assets and expenditure was not determined properly, it can be seen that the amount arrived at by the trial Court as disproportionate income, i.e. Rs.1,90,087.77 is improper and if the income, assets and expenditures are properly calculated as observed and referred herein above, there would be no disproportionate income.

72. Thus, in the backdrop of above referred observations, I have no hesitation to observe that the appellants have not only succeeded on the point of validity of sanction in this case but also on merit, as the prosecution has failed to establish the nature and extent of the pecuniary

resources or property which were found in possession of accused No.1 and his known sources of income and, thereby commission of any offence by the appellants under Section 5(1)(e) and 5(2) of the Act of 1947. Accordingly, I pass the following order:

i) The appeal is allowed.

ii) The judgment and order dated 03/11/2003 passed by the Additional Sessions Judge, Akola in Special Case No.3 of 1989 is hereby quashed and set aside.

iii) The accused Nos.1 and 2 are acquitted of the offence punishable under Sections 5(1)(e) read with Section 5(2) of the Prevention of Corruption Act, 1947.

iv) Their Bail Bonds shall stand cancelled.

v) The fine amount as well as confiscated amount shall be refunded back to the appellants.

vi) The Muddemal Property be dealt with as per order of the learned Additional Sessions Judge.

The criminal appeal stands **disposed of** accordingly. The pending applications, if any, shall stand disposed of.

JUDGE

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