Krishnanand

Vs

The State of Madhya Pradesh

Criminal Appeal No. 318 of 1971

(P.N. Bhagwati, A.C. Gupta, P.N. Shinghal JJ)

17.12.1976

JUDGMENT

BHAGWATI, J. –

1. The principal question which arises for determination in this appeal is whether in the facts of the present case the prosecution was justified in invoking the applicability of the presumption contained in sub-section (3) of Section 5 of the Prevention of Corruption Act, 1947. That sub-section provides that in any trial of an office punishable under sub-section (2) of Section 5, namely, the offence of criminal misconduct committed by a public servant in the discharge of his duty, the fact that the accused is in possession, for which he cannot satisfactorily account, of pecuniary resources of property disproportionate to his known sources of income may be proved and on such proof, it is presumed unless contrary is proved that the accused is guilty of criminal misconduct in discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption. The sub-section consists of two parts. The first part sets out the facts which if proved give rise to a rebuttable presumption. It requires, in order to the raising of this presumption, that the accused must be shown to be in possession of pecuniary resources or property disproportionate to his known sources of income and he should be unable to satisfactorily account for such pecuniary resources or property. If these facts are shown to exist a presumption would be raised by the court tying the offence that the accused was guilty of criminal misconduct in the discharge of his official duty. This presumption would of course be a rebuttable presumption and it would be open to the accused to establish that despite the disproportion of his pecuniary resources or property to his known sources of income, he is not guilty of criminal misconduct in the discharge of his official duty. The burden of displacing the presumption would be on the accused and if he fails to discharge the burden, he would be liable to be convicted for the offence under sub-section (2). Both the Special Judge as well as the High Court convicted the appellant with the aid of this presumption though the specific charges levelled against the appellant under clauses (a) to (f) of the charge were held not established by the High Court. It was contended on behalf of the appellant that since the specific charges preferred against the appellant failed, it was competent to the Special Judge and the High Court to convict the appellant merely on the basis of presumption. The argument was that the presumption could be invoked by the prosecution only by reference to a charge under any one or more of clauses (a) to (d) of sub-section (1) of Section 5 and for the purpose of establishing such charge, but if the charge under one or more of clauses (a) to (d) of sub-section (1) of Section 5 failed, the presumption could not be invoked because it could be applied only in aid of the charge under the main provision in sub-section (1) of Section 5 which defines the offence of criminal misconduct in discharge of official duty and did not operate in vacuum. Prima facie we do not think there is any substance in this contention urged on behalf of the appellant but in the view we are taking on the facts we do not think it necessary to pronounce any final opinion upon

it. Let us consider the facts and see whether they at all attack the applicability of the presumption in sub-section (3) of Section 5.

2. The first question which must be considered in order to determine the applicability of the presumption in sub-section (3) of Section 5 is as to what was the total income of the appellant during the period between November 29, 1949, when he joined service as Income Tax Officer and January 1, 1962, being the date with reference to which the prosecution sought to establish the disproportion of the pecuniary resources or assets of the appellant qua his known sources of income.

3. It was conceded on behalf of the prosecution that the aggregate income of the appellant during this period was Rs. 1,12,515.43 as per the following particulars :

Sl. No. Items Income as conceded by the prosecution Rs.1. Pay and allowances .. 90,712.002. House Rent allowance .. 984.003. Interest from Banks .. 1,903.604. Insurance claim .. 891.445. Income Tax Refund .. 181.896. Interest from Sridhar Gopal .. 4,875.007. Sale of Zamindari Bond .. 622.508. Money received from father through bank drafts .. 10,345.009. National Savings Certificate received from father .. 2,000.00 ---------- Total .. 1,12,515.43 ----------##

and we need not, therefore, dwell on the items of income enumerated in these particulars,

4. The appellant, however, sought to add certain other items of income to this list and since these were disputed on behalf of the prosecution, we shall deal with them in seriatim. The first item of income related to profit on sale of gun. The appellant claimed that he had purchased gun No. DBL 1004-49 for Rs. 600 and this gun which was held by him under Licence No. 502/1 was sold on September 18 or 19, 1952 for Rs. 900 and that resulted in a profit of Rs. 300 which was liable to be included in determining the total income received by him. The Trial Court did not accept this claim of the appellant on the ground that he had not examined Ram Ratan to whom the gun was sold. Moreover, 30 cartridges had been purchased by him on March 7, 1953 for a 12-bore gun bearing licence No. 502/1 which showed that he still had his gun No. DBL 1004-49 and he had not sold it on September 18 or 19, 1952. This conclusion of the Trial Court is patently erroneous since it overlooks the fact that when one gun is sold and anther is purchased, the licence which is issued in the name of the holder of the gun remains the same and it is only the number of the new gun which is substituted for the number of the old gun in the licence. The appellant sold gun No. DBL 1004-49 on September 18 or 19, 1952 for Rs. 900 and immediately thereafter on the next day purchased another gun of WW Greener make for the same amount, namely Rs. 900 and, therefore, licence No. 502/1 continued to stand in his name with WW Greener gun being substituted for gun No. DBL 1004-49. Both these guns were 12-bore guns and, therefore, the purchase by the appellant of 30 cartridges on March 7, 1953 for a 12-bore gun under licence No. 502/1 did not contradict the claim of the appellant that he had sold him gun No. DBL 1004-49 for Rs. 900 on September 18 or 19, 1952. There is, in the circumstances, no reason to reject the claim of the appellant in regard to this item and a sum of Rs. 300 being profit arising on the sale of gun No. DBL 1004-49 must be added to his income.

5. The second item of income claimed by the appellant related to was a sum of Rs. 5300 said to have been received by him from his father for purchase of an Austin car in 1948. The trial Court disbelieved the case of the appellant in regard to this item and held that the appellant had failed to satisfy the court that this sum of Rs. 5300 was received by him from his father in 1948. We do not think the Trial Court was right in rejecting the claim of the appellant. The conclusion of the Trial Court proceeded more on distrust and suspicion than on appreciation of evidence. Not only did the

appellant state on oath that he received the sum of Rs. 5300 from his father for purchase of an Austin car but this statement was supported by the evidence given by the father in the departmental enquiry held against the appellant where the father clearly stated that a sum of Rs. 5300 was given by him to the appellant in cash after withdrawing it from the bank for purchase of car vide answer to question No. 5 in Ex. D-104. Sachidanand, brother of the appellant, also stated in his evidence as DW 31 that in 1948 the appellant had purchased a car and at that time his father had withdrawn a sum of Rs. 5700 from his banking account and out of that, he had given a sum of Rs. 5300 to the appellant. There was no serious cross-examination of Sachidanand on this point and there is no reason why this statement of his should not be accepted, particularly when it is supported by a debit they of Rs. 5700 under date September 25, 1948 in the account of the father of the appellant with the State Bank of India, Lucknow Branch Ex. D-126. The entire evidence in regard to payment of the sum of Rs. 5300 by the father of the appellant to him (the appellant) in 1948 for purchase of an Austin car is in favor of the appellant and there is absolutely no evidence on the side of the prosecution which would disprove this claim of the appellant. The only circumstances on which reliance was placed by the Trial Court for the purpose of disbelieving the evidence led on behalf of the appellant was that the father of the appellant was a man of poor means who had about eleven children and he could not possibly have given the sum of Rs. 5300 to the appellant. But there is absolutely no evidence to show that the father of the appellant was in poor circumstances. It is true that the father of the appellant was an ordinary clerk and after his retirement he was earning a small pension, but the evidence of Dr. Sudama Prasad Gupta DW 20 clearly shows that the father of the appellant owned two villages and he had also about seven houses belonging to his Hindu Undivided Family in addition to two shops and a plot of land in Shahjehanpur City. Moreover, according to the case of the appellant, the sum of Rs. 5300 given to him by his father came out of a sum of Rs. 5700 withdrawn from the banking account of his father and the statement of account Ex. D-126 clearly showed that his father had sufficient monies in his banking account and the sum of Rs. 5700 was in fact withdrawn from that account. We do not, therefore, see any valid reason why the trial Court should have disbelieved the case of the appellant that a sum of Rs. 5300 was given to him by his father in 1948 for purchase of an Austin car. The High Court was wrong in disallowing this claim of the appellant.

6. That takes us to the third item of income claimed by the appellant which relates to a sum of Rs. 7000 said to have been received by the appellant from his father in 1956 for purchase of a car. The case of the appellant was that in 1954 he sold his Austin car for Rs. 2500 to his brother-in-law S. M. Pandey and with the help of this amount of Rs. 2500 and a further sum of Rs. 7000 received from his father in the end of June 1956, he purchased a new car in August 1956 from M/s. Premier Automobiles, Lucknow for Rs. 9200 after obtaining the permission of the then Commissioner of Income Tax, Lucknow. This claim of the appellant was not accepted by the Trial Court which refused to believe that a sum of Rs. 7000 was given to the appellant by his father. Here also we find that the trial Court proceeded entirely on distrust and suspicion and brushed aside the evidence led on behalf of the appellant without any valid justification. The evidence led on the side of the appellant for the purpose of proving the receipt of Rs. 7000 from his father was indeed overwhelming. Not only did the father of the appellant affirm in his statement Ex. D-104 that he had given a sum of Rs. 7000 to the appellant for the purchase of a new car after withdrawing the amount from the bank, but his brother Sachidanand DW 31 also stated in his evidence :

> When he purchased a car in 1956 Rs. 7000 were paid - I had gone to withdraw Rs. 7000 from the Post Office Savings Bank, which were given to K. M. Agnihotri. Arts. M and N are the Savings Bank Pass Books. Art. M is in the name of my younger brother Ramanand. This is a Minor Account. In 1953 Ramanand's age was about 8-9

years. The account of Art. N is in the name of my father. My father used to deposit money in Ramanand's account. On June 26, 1956 Rs. 2000 was withdrawn in Art. N and the entry is at A to A. Rs. 5000 were withdrawn from the Pass Book Art. N, its entry is at A to A. After withdrawing these amounts I had handed it over to my father. Afterwards my father had given this money to K. Agnihotri in my presence.

Article M, which was the Pass Book in respect of the account in the name of Ramanand, showed a withdrawal of Rs. 2000 on June 26, 1956 and so also Article N, which was the Pass Book in respect of the account of the appellant's father, showed a withdrawal of Rs. 5000 on the same day. These entries clearly supported the oral evidence given by Sachidanand DW 31. But the story of the appellant does not rest merely on this oral evidence. The same story was put forward by the appellant as far back as October 1960 long before any departmental enquiry was contemplated against the appellant, when in reply to a letter addressed by the Inspecting Assistant Commissioner demanding information in regard to the purchase of the car in August 1956, the appellant stated in his letter Ex. P-730 that he had purchased the car for a sum of Rs. 9200 which was made up of Rs. 7000 received from his father and Rs. 2500 representing the sale proceeds of the Austin car. We fail to see how in the face of this overwhelming evidence the Trial Court could hold that the sum of Rs. 7000 was not received by the appellant from his father. It is difficult to understand on what material the Trial Court could disbelieve this claim of the appellant, particularly when there is no evidence at all on the side of the prosecution to disprove it. We must accordingly hold that a sum of Rs. 7000 was received by the appellant from his father for purchase of car and that must be added to his total income.

7. The last two items of income which were sought to be added by the appellant were Rs. 3200 in respect of tuition done by the appellant during the period from 1943 to 1947 and Rs. 1240 representing the scholarships and fellowship earned by the appellant during his college days. Now, the evidence of Ram Vijay Singh DW 26 and the appellant DW 40 does show that the appellant gave tuition to Saraswati Chauhan from 1943 to 1947 and he earned on aggregate sum of Rs. 3200 by giving such tuition. But it is not possible to believe that the entire sum of Rs. 3200 earned by him during the four years from 1943 to 1947 remained with him at the time when he joined service on November 29, 1949. So also the certificates Exs. D-115 to D-117 do bear out the claim of the appellant that he earned scholarships and Fellowship amounting to Rs. 1240 but again this amount could not possibly have remained in its entirely with him upto the time he joined service. Some part of these amounts must have been spent by him as his pocket money or for his personal requirements and we think it would be fair and just if we add to the income of the appellant Rs. 2000 out of Rs. 3200 and Rs. 600 out of Rs. 1240 as amounts which must have remained unspent with him at the time when he joined service on November 29, 1949. We would accordingly add the sums of Rs. 2000 and Rs. 600 to the total income of the appellant and reject his claim for inclusion of the balance.

8. The result of this discussion is that the total income of the appellant during the period November 29, 1949 to January 1, 1962 must be taken to be Rs. 1,12,515.43 plus Rs. 300, plus Rs. 5300 plus Rs. 7000 plus Rs. 2000 plus Rs. 600 totalling in the aggregate Rs. 1,27,715.43.

9. We must then go on to consider the expenditure which must have been incurred by the appellant during the period November 29, 1949 to January 1, 1962. Here also certain items of expenditure were not disputed on behalf of the appellant and they were as follows :

#Sl. Items Admitted amountNos. of expenditure Rs.1. Income tax deductions .. 1,560.002.

Provident Fund deductions .. 5,690.003. Interest and Bank charges .. 729.004. Children Education .. 8,252.715. Club expenses .. 79.786. Maintenance of car .. 6,919.007. Smoking and drinking .. 229.35 ---------- Total .. 23,459.84 ----------##

But there was serious controversy between the parties in regard to certain other items and we shall have to deal with them.

10. The first item of expenditure relates to insurance premia paid by the appellant. The case of the appellant was that he had paid insurance premia amounting only to Rs. 21,565 and that was, therefore, the only amount which was liable to be taken as his expenditure on this account. The prosecution, however, contended that a sum of Rs. 4850 paid by the first wife of the appellant, namely, Sheela Devi as premia on her own policy of insurance must also be treated as expenditure incurred by the appellant. This contention of the prosecution was accepted by the trial Court and the High Court did not choose to interfere with the view taken by the trial Court on this point. But if we examine the facts a little more closely, it will be apparent that the view taken by the trial Court and confirmed by the High Court is not well founded. It was common ground between the parties that the sum of Rs. 4850 was paid by way of premia on the policy of insurance of Sheela Devi and since Sheela Devi admittedly had her own source of income - she was a teacher and was also working as an insurance agent - and was possessed of sufficient monies to pay the sum of Rs. 4850, it would be a reasonable inference to draw that she paid the sum of Rs. 4850 representing premia on her policy of insurance out of her own monies. The burden would be on the prosecution to show that the sum of Rs. 4850 in respect of the premia on the policy of insurance of Sheela Devi was paid not by her but by the appellant. This, we are afraid, the prosecution has failed to established by leading any cogent and satisfactory evidence. The argument of the prosecution that the sum of Rs. 4850 must have been paid by the appellant and not by Sheela Devi proceeds on surmises and conjectures and has no basis in evidence. There is absolutely no reason why the statement of the appellant in his evidence that the sum of Rs. 4850 was paid by Sheela Devi should be disbelieved. We are, therefore, of the view that the expenditure on account of payment of insurance premia incurred by the appellant should be taken to be Rs. 21,565 and not Rs. 26,450 as claimed by the prosecution.

11. The next item of expenditure in dispute relates to the house rent. According to the prosecution, during the period in question, an aggregate sum of Rs. 8660 was paid by the appellant as and by way of house rent. The appellant did not dispute the quantum of the amount of house rent for the period in question, but he contended that during the time from June 1, 1953 to July 31, 1957 when he was at Satna, the house rent was paid by his maternal aunt who was staying with him and, therefore, an aggregate sum of Rs. 2500 being the house rent for the period of Satna stay should be deducted in computing his expenditure on this account. There is great force in this submission of the appellant. There is, apart from the statement of the appellant himself on oath, the evidence of Vishnu Narain DW 32 who was Mukhtiar Aam of the aunt, which clearly shows that the aunt was living with the appellant during the period when he was at Satna and show was meeting the household expenses of the appellant. The High Court also accepted this claim of the appellant and it must, therefore, follow that the sum of Rs. 2500 representing the house rent of the appellant during his stay in Satna was expended by the aunt and it must be deducted from the sum of Rs. 8660 claimed by the prosecution on have been spend by the appellant on account of house rent. On this view, a sum of Rs. 6160 only would be deductible as expenditure incurred by the appellant on account of house rent. Similarly in regard to electricity charges also, the amount spent at Satna would have to be deducted, since that was paid by the aunt of the appellant and on this basis, after deducting a sum of Rs. 1250 out of Rs. 2000 claimed by the prosecution to have been spent on electricity charges, only a sum of Rs. 1550 would remain as expenditure in respect of electricity

charges.

12. So far as the item of expenditure on telephone charges is concerned, the High Court accepted the figure of Rs. 327 and though, according to the prosecution, a sum of Rs. 727 represented the expenditure incurred by the appellant under this head, we think there is no sufficient reason to disturb the figure taken by the High Court, since it is common knowledge that when there is a telephone in the house, neighbours always come and use it and therefore the claim made by the appellant that he received an aggregate sum of Rs. 400 from the neighbours for using the telephone on different occasions cannot be regarded as unreasonable.

13. Then there was an item of legal expenses amounting to Rs. 400 said to have been incurred by the appellant in defending a criminal prosecution launched against him in Nagpur. The High Court referred to the evidence of Saranjame PW 66 who was the counsel engaged on behalf of the appellant and his brother Sachidanand to defend them in the criminal prosecution and, pointing out that according to this evidence Saranjame has charged only a sum of Rs. 400 as his fee for defending the appellant and Sachidanand, the High Court held that the appellant must be taken to have spent Rs. 400 on this account. But this conclusion of the High Court is plainly erroneous, since it is clear from the evidence the Saranjame PW 66 that his fee of Rs. 400 was paid to him by Sachidanand and not by the appellant. Moreover, Sachidanand DW 31 also stated in categorical terms that the fee of Rs. 400 was paid to Saranjame by him and not by the appellant. It is difficult to see how in the face of this positive evidence of Saranjame PW 66 and Sachidanand DW 31, it could be held by the High Court that a sum of Rs. 400 was expended by the appellant on account of legal expenses. This amount must, therefore, be excluded in computing the expenditure incurred by the appellant.

14. The next item of expenditure claimed by the prosecution was a sum of Rs. 3350 representing losses suffered by the appellant in the sales of cars. The claim of the prosecution was that the appellant purchased an Austin car in 1948 for Rs. 5300 and sold it in 1954 for Rs. 2500, thus incurring a loss of Rs. 2800 and thereafter he purchased a Fiat car for Rs. 9200 in 1956 and sold it in 1959 for Rs. 8650 at a loss of Rs. 550 and thus he incurred a total loss of Rs. 3350 in the sales of these two cars which was liable to be deducted from his total income for determining the proportion of income with the assets. Now it was common ground that the appellant did suffer of loss of Rs. 2800 in the sale of the Austin car and a loss of Rs. 550 in the sale of the Fiat car. The appellant got a sum of Rs. 5300 from his father for the purchase of the Austin car and when the Austin car was sold for Rs. 2500 he invested the sum of Rs. 2500 along with a further sum of Rs. 7000 received by him from his father in the purchase of the Fiat car and the sum of Rs. 8650 representing the sale proceeds of the Fiat car together with a further sum of Rs. 5500 received by him from his father by means of draft Ex. P-1120 was invested by him in the purchase of an Ambassador car in August 1960 and this Ambassador car purchased for the sum of Rs. 14,150 was shown by him as his asset. It will thus be seen that the appellant received from his father from time to time an aggregate sum of Rs. 17,850 made up of Rs. 5300, Rs. 7000 and Rs. 5500 for purchase of cars and since the Austin car and the Fiat car purchased with the help of Rs. 5300 and Rs. 7000 respectively depreciated in value and the ultimate asset obtained out of the three amounts of Rs. 5300, Rs. 7000 and Rs. 5500 was represented by the Ambassador car worth Rs. 14,150 it must be held that the total loss of Rs. 3350 on sales of the Austin and Fiat cars which represented the depreciation in value of those cars was liable to be deducted, because to that extent the agreement sum of Rs. 17,850 received from the father was depleted without any corresponding gain of asset. The High Court was, therefore, in our opinion, right in deducting the sum of Rs. 3350 (wrongly mentioned as Rs. 3000) from the total income of the appellant for determining the proportion of his assets vis-a-vis his known sources of

income.

15. That takes us to the item of expenditure under the heading "Miscellaneous Payments through Cheques". The prosecution contended that an aggregate sum of Rs. 6688 was expended by the appellant under this head and that was liable to be deducted from his total income for the purpose of making the required comparison. The Court substantially upheld this contention and accepted a slightly higher figure, namely, Rs. 7095 as the amount of expenditure on this account. The appellant conceded that out of the amount of Rs. 6688 a sum of Rs. 3000 sent of S. M. Tiwari, a sum of Rs. 111 paid to Anandanand Dwivedi and a sum of Rs. 61 paid to one Chaudhury, aggregating in all to Rs. 3172 represented expenditure incurred by him under this head, but challenged the other items which went to make up the balance. The first item challenged on behalf of the appellant was Rs. 486 which was made up of three sums of Rs. 210, Rs. 116 and Rs. 160 paid to Sheela Devi. The explanation of the appellant in his evidence was that these three amounts had been paid by him to Sheela Devi in repayment of small loans taken from her. It is no doubt true that there is no documentary evidence to support this story of small loans having been taken by the appellant from Sheela Devi, but in the absence of any positive evidence on the side of the prosecution which would disprove the claim of the appellant, we do not see any reason to disbelieve the evidence of the appellant on this point. Moreover, if this explanation were not to be accepted, we fail to see any other reason why such small amounts should have been paid by the appellant to Sheela Devi by cheques out of his banking account. We may, therefore, safely accept the explanation offered by the appellant and exclude the sum of Rs. 486 from the expenditure of the appellant under this head. The next item of Rs. 500 represented monies paid by the appellant to his father Babu Ram. The explanation of the appellant was that this amount represented the sale proceeds of Zamindari Abolition Bonds of his father sold by him, but this explanation does not appear to be genuine, because if Zamindari Abolition Bonds of his father were sold by the appellant, the sale proceeds should have gone into his bank account, but no credit entry in regard to this amount could be pointed out on behalf of the appellant and the sum of Rs. 500 must, therefore, be treated as expenditure incurred by the appellant. The item of Rs. 180 paid to Miss C. Anand, however, stands on a different footing and it must be excluded, since, according to the statement of the appellant in his evidence - which statement does not appear to have been seriously challenged in cross-examination - Miss C. Anand was a lecturer in Kanya Pathshala in Mirzapur and was a colleague of Sheela Devi and Sheela Devi had collected the salary of Miss C. Anand and given it to the appellant and so the appellant sent this amount to Miss C. Anand by cheque. The next amount of Rs. 360 represented monies withdrawn by the appellant by cashing a self-bearer cheque on his bank account and this amount was utilised by him for his household expenses and since household expenses were treated separately as a distinct item of expenditure, this amount could not be included twice over as part of his expenditure and was hence liable to be excluded in computing the expenditure incurred by him. Then there was an item of Rs. 200 paid by the appellant to his brother Sachidanand. The case of the appellant was that Sachidanand needed money and he, therefore, gave this amount to him as a loan which was repaid by Sachidanand after about three months. We find that this case is supported not only by the statement of the appellant (vide paragraph 72) but also by the evidence of Sachidanand DW 31 (vide paragraph 8). We see no reason to reject the testimony of the appellant and Sachidanand DW 31, particularly when there is no evidence to the contrary led on behalf of the prosecution. Lastly, there were two items of Rs. 900 and Rs. 200 representing monies withdrawn by the appellant by self-bearer cheques from his banking account. The argument of the appellant was that these two amounts were utilised by him for household expenses and since household expenses were treated as a separate item of expenditure, they could not be deducted twice over again as part of his expenditure. This argument of the appellant may be quite valid with regard to the sum of Rs.

200, because according to the estimate made by Shri Roberts, monthly expenditure of the appellant might be taken to be Rs. 163 and, therefore, it is quite possible that Rs. 200 might have been withdrawn by the appellant from his bank account for meeting the household expenses. But this argument does not appear to be valid so far as the sum of Rs. 900 is concerned, because it is difficult to believe that the appellant should have withdrawn a sum of Rs. 900 from his bank account for household expenses when the household expenses did not exceed Rs. 163 per month. We would, therefore, reject the contention of the appellant with regard to the sum of Rs. 900 and add that as part of his expenditure. The result is that under the head "Miscellaneous Payments through Cheques" an aggregate sum of Rs. 4572 must be treated as expenditure incurred by the appellant.

16. Then we come to two other items of expenditure, namely, Rs. 856 on holiday trips and Rs. 550 on family illness. There two items of expenses could not be disputed on behalf of the appellant and the learned counsel appearing on behalf of the appellant fairly conceded that they may be added in computing the total amount of expenditure incurred by the appellant.

17. The next item of expenditure related to expenses on kitchen, servants, milk etc. and under this head, the prosecution claimed that an aggregate sum of Rs. 20,000 must be taken to have been spent by the appellant. Though the High Court upheld this claim of the prosecution, we do not think it can be accepted in its entirely. Shri Roberts deposing on behalf to the prosecution estimated the household expenses of the appellant at Rs. 163 per month and on this basis, the total expenditure for the period of twelve years from November 29, 1949 to January 1, 1962 on account of household expenses would come to Rs. 23,472, but the High Court rounded it off by taking a figure of Rs. 20,000. Now, the household expensed of the appellant at Satna were met by his aunt as already discussed above and, therefore, a sum of Rs. 7150 representing household expenses at the rate of Rs. 143 per month (Rs. 20 in respect of clothing being deducted from the estimated figure of Rs. 163 per month) for a period of 50 months from June 1, 1953 to July 31, 1957 would have to be deducted in calculating the household expenses incurred by the appellant. The result is that only a sum of Rs. 16,322 would be liable to be taken as expenditure incurred by the appellant on household expenses.

18. That takes us to the next item of expenditure which relates to clothing. Now, so far as this item of expenditure is concerned, the appellant clearly admitted in his evidence that he had spend an aggregate sum of Rs. 7500 on clothing during the relevant period (vide paragraphs 346 and 347 of his deposition). But the estimate of Rs. 163 per month given by Shri Roberts on behalf of the prosecution included Rs. 20 per month in respect of clothing and since that has been taken into account in the figure of household expenses determined by us, a sum of Rs. 2880 calculated at the rate of Rs. 20 per month for 12 years would have to be deducted from the amount of Rs. 7500 admitted to have been spent by the appellant on clothing, since the sum of Rs. 2888 cannot be taken into account twice over. This means that a sum of Rs. 4620 would be deductible on account of expenditure on clothing.

19. The last item of expenditure was in connection with the marriage of the sister of the appellant and under this head, the prosecution claimed that the appellant had incurred an expenditure of Rs. 7895.75, but there is absolutely no evidence to establish that the appellant had incurred any expenditure in connection with the marriage of his sister. The only circumstances on which reliance was placed on behalf of the prosecution in this connection was that a not book containing an account of the marriage expenses was found from the residence of the appellant when a search of his premises was carried out in 1962. But that by itself cannot possibly lead to an inference that the expenditure shows in the account must have been incurred by the appellant. The appellant stated in his evidence that he did not incur any expenditure on account of the marriage of his sister and that

the entire expenditure was incurred by his father and the father also in his statement Ex. D-104 stated that the expenditure in connection with the marriage of his daughter was incurred by him. Moreover, it stand to reason that the expenses in connection with the marriage of a girl in a Hindu family would be incurred by the father and not by the brother. The High Court was, therefore, right in coming to the conclusion that the expenses in connection with the marriage of the sister of the appellant were incurred by his father and no part of the expenditure was incurred by him.

20. The next result of the above discussion is that the total expenditure incurred by the appellant during the relevant period must be taken to be an aggregate sum of Rs. 83,331.84 as per the following particulars :

#Sl. No. Items Amount Rs.1. Admitted items as particularised above .. 23,459.842. Insurance Premia .. 21,565.003. House Rent .. 6,160.004. Electricity charges .. 1,550.005. Telephone charges .. 327.006. Losses suffered in sales of cars .. 3,350.007. Miscellaneous payment through cheques .. 4,572.008. Holiday trips .. 856.009. Family illness .. 550.0010. Expenses on kitchen, servants, milk, etc. .. 16,322.0011. Clothing .. 4,620.00 ---------- Total .. 83,331.84 ----------##

This would show that after deducting the total expenditure incurred by the appellant during the relevant period from the total income received by him, an aggregate sum of Rs. 44,383.59 was available with him and it is with reference to this amount that we shall have to determine whether the assets found in the possession of the appellant were disproportionate so as to give rise to the presumption contained in sub-section (3) of Section 5.

21. Now, we must proceed to consider what were the assets of the appellant on January 1, 1962 and whether they were disproportionate to his known sources of income. Here again it was common grounds between the parties at the hearing of the appeal that the following assets belonged to the appellant :

#Sl. No. Items Amount or value Rs.1. Bank balances in State Bank of India : (a) Current Account .. 2,231.75 (b) Savings Account .. 3,564.002. Chartered Bank Account .. 1,721.713. National Saving Certificates .. 4,500.004. Investments in Vidarbha Board Mills .. 9,000.005. Loan to Singhal .. 2,000.006. Loan to Srivastava .. 100.007. Ambassador Car .. 14,115.008. Fire Arms .. 1,340.00 ---------- Total .. 38,572.46 ----------##

Besides these assets which admittedly belonged to the appellant, there were also certain other assets claimed by the prosecution to belong to the appellant and this claim of the prosecution we shall now proceed to consider.

22. The first item of assets which must be considered by us relates to an amount of Rs. 1000 in the joint account of the appellant and his second wife Shanti Devi with the Allahabad Bank, Nagpur. There was a credit balance of Rs. 1194 in this joint account as on January 1, 1962 and out of this amount, a sum of Rs. 194 admittedly belonged to the appellant. So far as the balance of Rs. 1000 was concerned, the case of the appellant was that it belonged to Shanti Devi. The appellant stated in his evidence that on May 21, 1958 Shanti Devi disposed of some gold bangles and silver ornaments which she used to put on whilst she was a widow and she obtained a sum of Rs. 1051.10 as sale proceeds of these ornaments out of which she deposited a sum of Rs. 1000 in this joint account. This story of the appellant did not rest merely on his oral testimony but it was also supported by the sale voucher Ex. D-91 as also the oral evidence of Shambhu Prasad DW 33, an employee of M/s. Kanhyalal Damodardas of Banaras to whom the ornaments were sold. Vishwanath Avashti DW 16

who was a cousion of the first husband of Shanti Devi, also identified the signature of his father Ramadhin Avashti on the sale voucher Ex. D-91. This evidence is clearly sufficient to establish that the sum of Rs. 1000 deposited in the joint account of the appellant and Shanti Devi belonged to Shanti Devi and not to the appellant, particular when there is no evidence at all on the side of the prosecution to show that this amount really belonged to the appellant.

23. We then proceed to consider the second item of assets consisting of a sum of Rs. 2000 in the GPO Savings Account in Indore. This account admittedly stood in the name of the appellant and hence it would be a legitimate inference to make that the amount standing to the credit of this account belonged to the appellant, unless he can show that it belonged to someone else. The appellant claimed that though this account was opened in his name, it really belonged to his sister Urmila and it was opened in his name as far back as 1948 at the instance of his father, since his father wanted to make provision for Urmila. But his claim of the appellant fails to carry conviction and cannot be accepted. If this account really belonged to Urmila, it is difficult to understand why it was not transferred to her name when she got married in 1961. Admittedly this account continued to stand in the name of the appellant and though, according to him, the sum of Rs. 2000 standing to the credit of this account was handed over by him personally to Urmila in 1962, there is not a shred of documentary evidence in support of the same. The appellant did not produce any entry in his bank account showing withdrawal of the sum of Rs. 2000 for the purpose of payment to Urmila. We find it difficult to believe that instead of transferring this account to the name of Urmila, the appellant paid her a sum of Rs. 2000 in cash. The sum of Rs. 2000 standing to the credit of this account must, therefore, be treated as asset belonging to the appellant.

24. That takes us to the next item of assets, namely Rs. 9000 supposed to be lying in cash with Shanti Devi. Now it may be pointed out straightway that this cash amount of Rs. 9000 alleged to be lying with Shanti Devi was not included as one of the assets of the appellant in the sanction dated August 26, 1963, granted by the Commissioner of Income Tax, Nagpur for prosecution of the appellant. It was not even suggested to the appellant in his examination under Section 342 that there was a cash amount of Rs. 9000 lying with Shanti Devi which formed part of his assets and no opportunity was afforded to him to give his explanation in regard to this time. Moreover, this cash amount of Rs. 9000 was not found in the possession of the appellant nor was it found in the possession of Shanti Devi and it is difficult to see how and on the basis of what evidence to could be said that the assets of the appellant included a cash amount of Rs. 9000. In fact, what happened was - and that is clear from the evidence of Vishwanath Avasthi DW 16, Narain Sevak Tiwari DW 17, Vikram Dutt Tripathi DW 19, Rama Kant Tripathi DW 21 and Ramadhar Avasthi DW 22 - that an aggregate sum of Rs. 9000 collected from these various persons was given to Shanti Devi as a dowry at the time of her re-marriage with the appellant. The High Court also accepted this case of the appellant and observed in its judgment that : "There is evidence to show that at the time of the marriage he was required to raise money from his relations". It is, therefore, clear that there was no cash amount of Rs. 9000 with Shanti Devi which could be said to form part of the assets of the appellant and on the contrary there was a sum of Rs. 9000 received by Shanti Devi at the time of her re-marriage with the appellant which accounted for some of the assets standing in her name.

25. The next item of assets to which we must refer is the land at Varanasi which was purchased for Rs. 2500 in 1956. The sale deed of this land was in the name of Shanti Devi and hence it must be presumed, unless the contrary is shown by the prosecution that the land belonged to Shanti Devi in whose name it was purchased and it stood in the records of the Municipal authorities. The case of the appellant was that this land was purchased by the father of Shanti Devi for her benefit and the consideration for the sale was also provided by the father of Shanti Devi. Ramadhar Avasthi DW 22,

the father of the first husband of Shanti Devi, clearly stated in his evidence that Anand Ram, the father of Shanti Devi had purchased a plot of land for Shanti Devi for Rs. 2500 and this was supported by Bachhalal DW 11 who was one of the attesting witnesses to the sale deed. It is indeed difficult to see how this evidence led on behalf of the appellant could be brushed aside the without any evidence whatsoever led on behalf of the prosecution, it could be concluded that the purchase price of the land was paid by the appellant and that the land was purchased by the appellant in the name of Shanti Devi. We must, therefore, exclude this land in computing the total assets belonging to the appellant.

26. Then we must consider whether the sum of Rs. 11,180 lying in safe deposit with Allahabad Bank, Varanasi in the name of Shanti Devi belonged to the appellant or to Shanti Devi. The case of the appellant in regard to this amount was as follows. The mother of the first husband of Shanti Devi died in 1945 after a brief illness. She loved Shanti Devi very much, particularly since Shanti Devi's life was ruined by reason of being married to her son who was suffering from tuberculosis. She, therefore, gave away to Shanti Devi during her illness cash amounting to Rs. 2500, ornaments and some gold. Subsequently, Shanti Devi sold these ornaments and gold along with some of her own ornaments and got an agreement sum of Rs. 5500 which she invested in the hosiery factory of the father of her first husband, namely, Ramadhar Avasthi on interest at the rate of 12 per cent per annum. This amount together with interest was gradually returned by Ramadhar Avasthi to Shanti Devi and as and when the monies were returned, they were deposited by Shanti Devi in a Savings Bank Account opened with Allahabad Bank, Varanasi. Since the interest in the Savings Bank account was small, Shanti Devi, under the advice of Ramadhin Avasthi DW 90, the uncle of her first husband, deposited the monies in fixed deposit with the Allahabad Bank, Varanasi and these accumulated to Rs. 11,180 as on January 1, 1962. This case of the appellant was supported by the evidence of Ramadhar Avasthi DW 22 and Ramadhin Avasthi DW 90. Vishwanath Avasthi DW 16 also corroborated the testimony of these two witnesses on the point. It is difficult to see how in the face of this overwhelming evidence it could be concluded that the sum of Rs. 11,180 lying in fixed deposit in Shanti Devi's name was an asset belonging to the appellant. It must be remembered that the fixed deposit stood in the name of Shanti Devi and the burden, therefore, lay on the prosecution to show that Shanti Devi was a benamidar of the appellant. 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. (Vide Jayadayal Poddar v. Mst. Sibi Hazra [(1974) 2 SCR 90 : (1974) 1 SCC 3]). It is not enough merely to show circumstances which might create suspicion, because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence. Here in the present case, no evidence at all was led on the side of the prosecution to show that the monies lying in fixed deposit in Shanti Devi's name were provided by the appellant and howsoever strong may be the suspicion of the court in this connection it cannot take the place of proof. It must, therefore, be held that the prosecution has failed to show that the sum of Rs. 11,180 lying in fixed deposit in Shanti Devi's name belonged to the appellant.

27. That takes us to the next item of assets represented by the fixed deposit of Rs. 2000 in the name of Sheela Devi and A.G., U.P. Cooperative Society. This fixed deposit stood in the name of Sheela Devi, and, therefore, in accordance with the principle which we have discussed above, the burden of

showing that the among of the fixed deposit belonged to the appellant and not to Sheela Devi rested on the prosecution. Now, the prosecution not only did not lead any evidence to show that the amount of the fixed deposit in the name of Sheela Devi was provided by the appellant but the evidence on record clearly established that from 1950 to 1953 Sheela Devi was teaching in the Arya Kanya Inter College, Mirzapur and she was also giving tuitions and in addition, carrying on insurance agency business and she had, therefore, the necessary means to make the fixed deposit of Rs. 2000. It is, in the circumstances, not possible to hold that the fixed deposit of Rs. 2000 in the name of Sheela Devi was an asset belonging to the appellant.

28. The next item of assets to which we must refer is the sum of Rs. 10,000 lying in deposit in the name of Sheela Devi with Sharda and Co. So far as this sum of Rs. 10,000 is concerned, the claim of the appellant was that it represented an amount received by Sheela Devi from her father at the time of her marriage in 1945. The appellant's case was that out of the monies received by Sheela Devi from her father at the time of her marriage she deposited a sum of Rs. 10,000 with one Adiya Dutt Thakur in 1946 and this amount was returned to her by Adiya Dutta Thakur in 1958 by means of a cheque and this very cheque was deposited by her with Sharda & Co. and hence this amount belonged to her and not to the appellant. This case of the appellant was amply supported by the statement D-105 given by Adiya Dutta Thakur before the Income-tax Officer on March 30, 1960 where he clearly stated that Sheela Devi gave him Rs. 10,000 in June 1946 for safe custody and this amount was returned by him to Sheela Devi in April 1958 by means of a cheque drawn by his son on his bank account with the Central Bank of India, Allahabad Branch. This statement of Adiya Dutt Thakur was corroborated by the evidence of his son Gaya Dutt Thakur DW 29. B. P. Khare PW 10, a partner of Sharda & Co. also in his evidence supported this story of the appellant. We must, therefore, hold that the deposit of Rs. 10,000 with Sharda & Co. belonged to Sheela Devi and not to the appellant. That is the reason why the High Court rightly gave credit for Rs. 10,000 while including the assets standing in the name of Sheela Devi as part of the assets of the appellant.

29. There is also one further asset of Rs. 6688 representing the credit balance in the bank account standing in the name of Sheela Devi to which we must refer. This bank account stood in the name of Sheela Devi and hence the burden of proving that the movies in this bank account belonged to the appellant and Sheela Devi was merely his benamidar would be on the prosecution. When we turn to the evidence, we find that the prosecution has failed to discharge this burden. Beyond raising suspicion and doubt in the mind of the court, the prosecution has not been able to adduce any legal evidence of a definite character which would establish the benami character of this bank account. On the contrary, the evidence led on behalf of the appellant shows that Sheela Devi had means of her own. We have already pointed out above that from 1950 to 1953 Sheela Devi was a teacher in Arya Kanya Inter College, Mirzapur and she was also giving tuitions which brought her an income of about Rs. 3900 (vide the evidence of Tilak Raj DW 3 and Kali Prasad Srivastava DW 4) and she was also carrying on insurance agency business. She could, therefore, very well have the sum of Rs. 6688 in her bank account. Moreover, it may be noted that even after Sheela Devi went away to reside separately from the appellant, this bank account continued to stand in her name. We do not, therefore, think that the prosecution can be said to have established that the sum of Rs. 6688 standing to the credit of this bank account belonged to the appellant. And on the same reasoning we must hold that the National Savings Certificates for Rs. 65 standing in the name of Sheela Devi also could not be said to be an asset belonging to the appellant, since there was no legal evidence led on behalf of the prosecution which would establish definitely that the consideration for the purchase of these National Savings Certificates was provided by the appellant.

30. That leaves, from amongst the major items, two sums of Rs. 14,000 and Rs. 3980 claimed by

the prosecution to have been deposited by the appellant with M/s. Shridhar Gopal & Co. in the name of Sheela Devi. Now, so far as the sum of Rs. 14,000 lying deposited with M/s Shridhar Gopal & Co. is concerned, it was at one time seriously contended on behalf of the appellant that this amount was deposited by Sheela Devi with M/s Shridhar Gopal & Co. by taking a loan from the appellant and the appellant in his turn had borrowed an identical amount by taking an overdraft from the Allahabad Bank, Akola and, therefore, if the sum of Rs. 14,000 with M/s. Shridhar Gopal & Co. was considered as his asset, the liability of Rs. 14,000 in the overdraft account with the Allahabad Bank, Akola should be set off against this asset and hence nothing should be added to his assets in respect of the deposit with M/s Sridhar Gopal & Co. But when it was pointed out to the appellant in the course of the arguments that the overdraft of Rs. 14,000 was taken by him from the Allahabad Bank, Akola against his fixed deposit receipt of Rs. 15,757.93 and the amount of this fixed deposit receipt together with interest aggregating to Rs. 16,065.68 was credited in the overdraft account on June 4, 1959 as a result of which the debit balance in the overdraft account was converted into a credit balance and there was accordingly no liability in the overdraft account on January 1, 1962 which could be set-off against the deposit of Rs. 14,000 with M/s Shridhar Gopal & Co., the appellant rightly gave up this contention and agreed that the sum of Rs. 14,000 lying deposited with M/s Shridhar Gopal & Co. may be treated as his asset. But so far as the sum of Rs. 3980 is concerned which, according to the prosecution, was lying deposited with M/s Shridhar Gopal & Co., the appellant pointed out that no such amount remained in deposit with M/s Shridhar Gopal & Co. on January 1, 1962. The appellant explained that he had paid Rs. 2000 to M/s Shridhar Gopal & Co. by means of a cheque dated October 12, 1958 Ex. P-973 and this amount had been returned by M/s Shridhar Gopal & Co. to him a few days later and it was duly deposited by him in his account with the State Bank of India, Nagpur on October 17, 1958. The balance of Rs. 1980 was paid by the appellant to M/s Shridhar Gopal & Co. by means of a cheque dated October 23, 1958 Ex. P-976 and this amount was also returned to him by M/s Shridhar Gopal & Co. after a few days. Thus, according to the appellant, no part of this amount of Rs. 3980 remained unpaid by M/s Shridhar Gopal & Co. to the appellant. This claim of the appellant was not only supported by his own evidence but Shridhar Gopal PW 78 also corroborated the evidence of the appellant in this respect. We must, therefore, hold that, barring the sum of Rs. 14,000, no other amount was lying in deposit with M/s Shridhar Gopal & Co. on January 1, 1962.

31. Then, we come to the last two items, namely, radio and furniture of the value of Rs. 965 and typewriter, camera, Godrej almirah and electric shaver, etc. of the value of Rs. 1798. The articles were found in the course of the house search made on September 29, 1962 and barring the radio which the appellant admitted to be his own asset, none of the other articles were admitted by him to be his property. The appellant stated on oath that the camera was presented to Shanti Devi by her brother Dr. Mohan Lal Tiwari when he returned to India from Vienna and the electric shaver was given to him as a gift by his friend Dr. Ramesh of Allahabad. The typewriter and the Godrej Almirah, according to the evidence of the appellant, belonged to B. P. Khare in whose house he was temperately living at the time of the search. There is no evidence led on behalf of the prosecution to show that, barring the radio, any of these other parties were purchased by the appellant, and in the absence of such evidence, the statement made by the appellant on oath has to be accepted. We accordingly add to the assets of the appellant Rs. 565 in respect of radio and Rs. 400 in respect of other furniture.

32. We find as a result of the aforesaid discussion that the total assets of the appellant as on January 1, 1962 amounted to Rs. 55,732.25 as per the following particulars :

#Sl. No. Items Amount or value Rs.1. Admitted items as particularised above .. 38,572.462. Joint

account of the appellant and Sheela Devi .. 194.793. G.P.O. Savings Account, Indore .. 2,000.004. Investment in Shridhar Gopal & Co. .. 14,000.005. Radio and furniture .. 965.00 ---------- Total .. 55,732.25 ----------##

33. It will, therefore, be seen that as against an aggregate surplus income of Rs. 44,383.59 which was available to the appellant during the period in question, the appellant possessed total assets worth Rs. 55,732.25. The assets possessed by the appellant were thus in excess of the surplus income available to him, but since the excess is comparatively small - it is less than ten per cent of the total income of Rs. 1,27,715.43 - we do not think it would be right to hold that the assets found in the possession of the appellant were disproportionate to his known sources of income so as to justify the raising of the presumption under sub-section (3) of Section 5. We are of the view that, on the facts of the present case, the High Court as well as the Special Judge were in error in raising the presumption contained in sub-section (3) of Section 5 and convicting the appellant on the basis of such presumption.

34. We accordingly allow the appeal, set aside the order of conviction and sentence recorded against the appellant and acquit him of the offences charged against him. Since the appellant is on bail, the bail bonds will stand discharged.

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