IN THE HIGH COURT OF SIKKIM AT GANGTOK
(CRIMINAL APPELLATE JURISDICTION)

Criminal Appeal No. 6 of 2007

Shri O. T. Bhutia,
S/o. Late Norbu Bhutia,
R/o. Diesel Power House Area,
Gangtok,
East Sikkim. ... **APPELLANT.**

- Versus -

The State of Sikkim
(Vigilance Department).

... **RESPONDENT.**

For the Appellant : Mr. A. Moulik, Sr. Advocate with Mr. N. G. Sherpa, Mr. Manish Kr. Jain and Mr. Leonard Gurung, Advocates.

For the Respondent : Mr. J. B. Pradhan, Public Prosecutor with Mr. Karma Thinlay Namgyal, Addl. Public Prosecutor and Mr. Santosh Kr. Chettri, Assistant Public Prosecutor.

BEFORE : HON'BLE MR. JUSTICE BARIN GHOSH, CHIEF JUSTICE.

Last Date of Hearing: 06.07.2010.

Date of Judgment: 09.07.2010.

JUDGMENT

Ghosh, CJ.

By the judgment and sentence under appeal, the Special Judge, P.C. Act, Sikkim at Gangtok has convicted the appellant under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 and sentenced him to undergo simple imprisonment for a term of three years with a fine of Rs.10,000/- and

in default of payment of fine, to undergo further simple imprisonment for a period of six months.

2. The facts of this case briefly are as follows: -

(a) On information from an undisclosed source, a First Information Report, registered as RC.11/95, was registered on 13th November, 1995 by the Sikkim Vigilance Police Force. In the F.I.R., the appellant was accused of having committed offences punishable under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988. It was stated in the FIR that during the period from 1984 to 1994, when the appellant was an elected MLA and Minister of State of Sikkim, in the capacity of a public servant, he amassed huge amounts of assets disproportionate to his known sources of income. For instance, it was indicated that the appellant had constructed two six storeyed buildings at Gangtok, one two storeyed building at Deorali near Forest Secretariat, purchased a land at Tadong and is in possession of other properties, the total value of which is estimated to be very high.

(b) Investigation pursuant to the said F.I.R. led to filing of a charge sheet. In that, it was indicated that the appellant belongs to a middle class family. He joined Sikkim Police as Sub-Inspector in 1974. He was promoted to the rank of Inspector in 1983. In 1984, he resigned. In 1985, he was elected to Sikkim Legislative Assembly. In early part of 1988, he applied for a Government site at Gangtok and at the end of 1988, when he was Chairman of S.N.T., he was allotted a site. On 22nd November, 1988, he received the construction order and immediately on receipt of the construction order, he started construction of the house. He was re-elected in 1989 to Sikkim

Legislative Assembly and became a Minister holding portfolios of Health and Family Welfare, Social Welfare and Tourism for various period till 1994. He lost in the Assembly election held in December, 1994. He started earning money through dubious means by misusing his official position as Chairman and Minister from 1988 onwards till he remained Minister. Therefore, the period of check has been taken from 1st November, 1988 to 11th December, 1994. It was stated that the appellant got married to Smt. Pema Choki in the year 1979, who is an employee of the Forest Department, Government of Sikkim and that the father of appellant died in 1973, while his mother is still alive. It was also stated that after death of his father, appellant inherited 1/4th share of the ancestral house at Ravang, South Sikkim. It was stated that at the beginning of check period, without taking into account the value of the share of appellant in his ancestral house at Ravang, appellant was in possession of assets worth Rs.1,60,000.00, of which household goods were worth Rs.1,10,000.00 and presumed cash in hand was Rs.50,000.00. It was stated that during the check period, the total income of appellant and his wife was Rs.10,01,997.88 and during the said period, his expenditure was Rs.8,18,658.19 and, accordingly, during that period, he had a saving of Rs.1,83,338.97 but acquired assets worth Rs.43,81,175.20. Of those assets, it was indicated that the value of household effects was Rs.5,30,840.00 and value of the building was Rs.35,58,873.00, aggregating to Rs.40,89,713.00. Apart from these two items, the aggregate value of other assets amounted to Rs.2,91,462.00

(c) After cognizance was taken and charge was framed, prosecution examined 53 witnesses to prove the charge. Of the 53

witnesses, except the Investigating Officer, none said a word pertaining to appellant having assets worth Rs.1,60,000.00 at the beginning of check period. In his examination-in-chief, the Investigating Officer did not say a word about appellant and his wife having assets worth Rs.1,60,000.00 at the beginning of check period. In his re-examination, the Investigating Officer stated in chief that on the basis of information contained in Ext. p.101 and on the basis of inventory of household effects shown in Ext. p.89, he valued the household effects of appellant at the beginning of check period as Rs.1,10,000.00 and as regards presumed cash in hand, he quoted Rs.50,000.00 after going through the Bank account of appellant and his family members prior to check period. Ext. p.101 is a list of household articles submitted by appellant to the Deputy Superintendent of Police, Vigilance under cover of a latter, which letter was exhibited as Ext. p.100. The said list prepared by appellant suggests that appellant had acquired 60 different types of household articles upto 30th October, 1989, worth in aggregate Rs.1,10,000.00. Therefore, the appellant had assets in the form of household articles worth Rs.1,10,000.00 immediately before the check period, can not at all be said to be unreasonable or without any basis. However, the presumed cash in hand of Rs.50,000.00 as was indicated in the charge sheet remained a presumption. No effort was made independently to suggest that the presumption in the background of the case was tenable. In the cross examination of Investigating Officer in course of his re-examination, the Investigating Officer stated that he did not take into account the income of the appellant from his landed property, salary income, rent income or any other income while

ascertaining the assets in hand of appellant at the commencement of check period, which he had assessed at Rs.1,60,000.00. He also stated that he did not check as to what amount the appellant was having in his Bank account, but on presumption he held that appellant must be having Rs.50,000.00 in his Bank account. He also stated that he did not enquire from any other family member of the appellant with regard to cash amount. The Court below accepted that the appellant had agricultural income, which amounted to Rs.36,000/- during the check period, but the same was not taken note of. Such income was from land inherited, therefore, appellant had such income before the check period, which was not taken note of, while presuming cash in hand. Similarly, rent income at the rate of Rs.700 during 1978 to 1984 and at the rate of Rs.800 during 1985 to 1988 accepted by the Court below was also not taken note of, while presuming cash in hand.

(d) As regards acquisition of household effects worth Rs.5,30,840.00, prosecution relied upon Ext. p.89. The same is the list of articles found during house search of the residence of appellant on 13th November, 1995. The same contained 110 items of different value. The same was signed, apart from two witnesses, by the Investigating Officer and also by appellant. The total value of those 110 items had not been added up. Despite my request, neither learned counsel appearing on behalf of appellant, nor Public Prosecutor added up the value of those 110 items. Assuming the total value of those 110 items is Rs.5,30,840.00, 109th item thereof was shown as a Gypsy vehicle (SK-02/3756), in the name of Mr. Sonam Loden Bhutia worth Rs.3,15,000.00. In his cross examination, the Investigating Officer stated that the valuation in Ext. p.89 was not based on any

document, but the same was discretionary and the Gypsy vehicle shown in Ext. p.89 was not in the name of appellant.

(e) In order to prove that the value of the building was Rs.35,58,873.00, reliance was placed on a valuation report prepared by two engineers, one of them Paulose D. deposed. Poulose D. deposed in his examination -in-chief that he, Mr. Suresh Chand and Mr. M. K. Pradhan were detailed for assessing the valuation of the building of appellant. They, accordingly, visited the building, measured the same, prepared drawing and valued the construction cost according to S.P.W.D. norms and regulations. As per assessment, the cost of construction came to Rs.35,58,873.00 and the same was reported by the valuation report (Ext. p.7) to the Vigilance Department. He stated in cross examination that the valuation of the building was done as per G.S.R.-91. He stated that the period of completion of construction of the building could be two years or more, but not less than two years. He stated that in 1988, there was a G.S.R.-1988. He accepted that the valuation report does not give the floor-wise valuation. He denied the suggestion that items no.14, 15,18, 20, 21, 22 and 23 of the report were not covered by G.S.R.-91 and again said, he has to find out from the schedule and to see whether the said items are covered by G.S.R.-1991. He stated that it may be true that in the building torsed steel was not used. He stated that some of the items, particularly, non-scheduled items were assessed as per the market rate. He stated that as per schedule of rate 1991 shown to him from the Court record, the schedule of rate of 1991 had been made applicable or enforceable in respect of all construction work commencing on and after 1st November, 1991. He

stated that the valuation was worked out as per schedule of rate 1991 because the owner had stated that the building was completed in 1991. He stated that he calculated the valuation as per schedule of 1991 on the order of his superior. He then stated that the valuation of the building had to be done as per the schedule of 1988 or 1989 and if the valuation of the building is calculated as per schedule of 1989 then the valuation of the building is bound to be lesser than the valuation calculated as per 1991 schedule and if the valuation of the building is calculated on the basis of schedule of rateof 1988, the total valuation of the building will be lesser than the valuation worked out as per schedule of 1989. He stated that he did not ascertain the year of construction of each floor of the building. He stated that the particulars of materials used in the building can be found out from the approved Blue Print Plan of the building issued by L.S.G. and H.D. and that for valuing and assessing the building the Blue Print Plan approved by L.S.G. was not before the team of valuers.

(f) In his examination-in-chief, Mr. Suresh Chand stated that in the year 1995, he was assigned to assess the valuation of the building. He further stated that while evaluating the building, the valuation team based their assessment on the schedule prevailing in the year 1991 where 10% contractors' profit was also provided. In the cross examination, he stated that he did not hand over the records, on the basis whereof the report was prepared, to the Investigating Agency. He stated that he did not verify at the spot to find out the correctness of the report submitted by his juniors. He accepted that sl. nos. 30, 37, 38, 39, 40, 41, 42, 43, 44 to 49 and 51, 53 to 56 are non-scheduled items. He accepted that none of the engineers, who

valued, was an approved valuer. He also accepted that the valuation report does not bear the official seal and signature of the officers making the same including the typist, who prepared the same, on each page. He accepted that there is difference of rate in individual items in case of schedule of rates of 1988, 1989 and 1991. He accepted that the schedule of rate of 1989 has not specifically shown rates of mild steel and torsed steel separately. It was suggested to him that the schedule of rate for 1988, 1989 and 1991 are not correct and the same were manufactured for this case, which suggestion was denied.

(g) Apart from assertions in course of giving evidence, there is no independent evidence to suggest visit by the valuers of the building in question. In his examination under Section 313 of the Code, the appellant asserted no visit by the valuers ever.

(h) Fact remains that the schedule of rate for 1988, 1989 and 1991 were not tendered in evidence, although unauthenticated copies thereof were brought on record of the Court below by filing a supplementary charge sheet.

3. The Hon'ble Supreme Court in the case of ***State of Maharashtra v. Wasudeo Ramchandra Kaidalwar,*** reported in **AIR 1981 SC 1186,** has stated that the ingredients of the offence of criminal misconduct under Section 5(2) read with Section 5(1)(e) of the Act are the possession of pecuniary resources or property disproportionate to the known sources of income for which the public servant cannot satisfactorily account. It held that to substantiate the charge, the prosecution must prove the following facts before it can bring a case under Section 5(1)(e), namely;-

(1) it 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.

It was, therefore, a requirement of law for the prosecution to prove the extent of the property found in possession of appellant.

4. Of the household effects worth Rs.5,30,840.00, the value of the Gypsy worth Rs.3,15,000.00, standing in the name of Mr. Sonam Loden Bhutia, according to the own showing of the prosecution, was not the property of appellant.

5. The extent of the building found in possession of appellant was estimated at Rs.35, 58,873.00. This estimate is based on G.S.R.-1991 in relation to some items and based on market value in relation to others. G.S.R.-1991 was not produced as a piece of evidence. Similarly, no document was produced to suggest market value. It was accepted that the valuation ought to have been done either as per the schedule of 1988 or 1989 and that if valuation was made on the basis of 1988 schedule, the value would be lesser than the valuation made on the basis of 1989 schedule and even lesser than the valuation made as per the schedule of 1991. The valuation, as was made, was not by any acknowledged or approved valuer. While the valuation was made, the Blue Print Plan of the building was not looked at. It was not ascertained what kind of steel was used in construction. The said

state of affairs clearly indicates that the valuation of the building, in question, cannot be Rs.35,58,873.00 and the evidence on record, at the same time, suggests that the valuation of building would be less then Rs.35,58,873.00. No effort has been made to help the Court to ascertain what would be the lesser value of the building. It should be apt to recall at this stage that the Investigating Officer, in his cross examination, stated that though he filed supplementary charge sheet with list of additional documents containing the schedule of rate of S.P.W.D. for the year 1991 and schedule of rate of Power Department for the year 1989, he did not seize the said documents from S.P.W.D. or from the Power Department and was unable to show anything that the same were handed over to him by S.P.W.D. authority or by the official of the Power Department. It is also not free from doubt whether the valuers visited the building at or in course of valuation.

6. In course of investigation, a search and seizure was conducted when many a things were seized. The seizure list was Ext. p.92, which suggests that a Diary Book of 1992 containing list of persons, who had contributed to the house opening ceremony of appellant in March, 1992 aggregating Rs.1,85,384.00, was seized. The Investigating Officer, in his cross examination, accepted that house opening ceremony is a customary ceremony in the Sikkimese community. The Court below also accepted the same. This Diary Book was not produced before the Court. Ext. p.92 also suggests seizure of a gift document of 1981 containing six pages and as per the said document, the parents of the wife of appellant gifted Rs.1,93,317.00 to appellant. The said document was filed in Court and was proved by the witness giving evidence on behalf of appellant.

The said seizure list suggests seizure of a document dated 25th February, 1989, in terms whereof the accused received a loan of Rs.2,50,000.00 from T. Wangdi. Further, the said seizure list suggests seizure of a letter dated 17th September, 1992, which, in turn, suggests receipt of loan of Rs.1,50,000.00 by the wife of appellant from T. Wangdi. Ext. p.23 is a production memo, which, in turn, suggests production of copy of a letter written by D. D. Bhutia to Shri O. T. Bhutia acknowledging grant of loan of Rs.3,00,000.00 dated 8th August, 1986. As per the seizure list, copies of the aforementioned letters were seized. The Investigating Officer stated in the cross examination that the originals were returned to appellant after retaining Xerox copies. The Court below has not accepted the entries in the Diary only because the same were not corroborated by independent evidence. The gift document was not accepted by Court below because such a document is not normally prepared and also that the same was not corroborated by independent evidence or was sought to be corroborated by interested witnesses. The letters were not accepted by the trial Court because the originals were not produced and that the alleged loaners did not disclose grant of loan to Income Tax Department. Fact remains that loaners were all Sikkim Subjects, who, in turn, did not pay income tax leviable under Income Tax Act, 1961 and according to the State Income Tax law, there is no obligation to inform the Income Tax authority as regards grant of loan. Fact remains that each of these documents, except the letter dated 8th August, 1986, was seized at the time when search and seizure was conducted. The fact further remains that the Investigating Officer had stated that all those seized documents were sent to expert for opinion

and the report of the expert has not been filed as per the discussion with the superior. It was, therefore, a clear case of drawing adverse inference for suppressing the expert report. Taking all these into account and taking into account that the learned Court below has itself found that the income of appellant and his wife during the relevant period was somewhat more than what had been projected in the charge sheet, i.e., the agricultural income and rental income referred to above, and also receipt of further loan of Rs.2,96,500.00 from Kundanmull Sarda, as well as receipts of rent of Rs.41,400.00, Rs.35,600.00 and Rs.88,600.00 during the check period, as accepted by the Court below, I think, appellant had brought on record that assets at the beginning of the check period and his resources during the check period were more than what were projected by the prosecution. As against that, the value of the household assets stands reduced by Rs.3,15,000.00 admittedly and the value of the construction of the building stands admittedly reduced to some extent, but to what extent is not decipherable in the facts and circumstances of the case.

7. As has been held in the ***State of Maharashtra v. Wasudeo Ramchandra Kaidalwar*** (supra), the burden shifts only when those four ingredients are established. In the instant case, for the reason already indicated above, the burden did not shift. Then again the extent and nature of burden of proof resting upon public servant found in possession of disproportionate assets under Section 5(1)(e), as held in the said decision, cannot be higher than the test laid down by the Hon'ble Supreme Court in Jhagan's case (AIR 1966 SC 1762), i.e. to establish the case by preponderance of probability.

8. While explaining the explanation appended to Clause (e) of sub-section (1) of Section 13, the Hon'ble Supreme Court, in the case of State ***of M.P. v. Awadh Kishore Gupta and others,*** reported in (2204) 1 SCC 691, has held that as per the explanation, the prosecution is relieved of the burden of investigating into "source of income" of an accused to a large extent, as it is stated in the explanation that "known sources of income" means income received from any lawful source, the receipt of which has been intimated in accordance with the provisions of any law, rules, orders for the time being applicable to a public servant and that the expression "known sources of income" has reference to sources known to the prosecution after thorough investigation of the case. The evidence on record does not suggest that in accordance with provisions of any law, rules, orders applicable to the appellant or to his wife, they or any of them was required to give any intimation. On the contrary it has come on record that the employees such as appellant and his wife in the State of Sikkim are not required to furnish any intimation. In any event, no reliance was placed on any such intimation. In course of search and seizure, documents suggesting receipt by appellant and his wife came to light. Those were sent for examination, but the outcome of examination, though known to the prosecution, was not disclosed.

9. Thus concluding, I allowed the appeal and set aside the judgment and sentence. There shall be no order as to costs.

Chief Justice
09.07.2010

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