Supreme Court of India
R. Janakiraman vs State Represented By Inspector Of ... on 4 January, 2006
Equivalent citations: AIR 2006 SC 1106, 2006 (1) ALD Cri 544, 2006 CriLJ 1232, JT 2006 (1) SC 147, 2006 (1) SCALE 167, (2006) 1 SCC 697
Author: R Raveendran
Bench: S Sinha, R Raveendran
JUDGMENT R.V. Raveendran, J.

Page 0004

1. This appeal is preferred against the judgment dated 21.01.2000 passed by the High Court of Madras dismissing Criminal Appeal No. 127 of 1993 filed by the Appellant thereby confirming the judgment dated 25.01.1993 passed by the Special Judge, Madurai in Calendar Case No. 2 of 1987, convicting and sentencing him under Section 5(1)(e) read with Section 5(2) of the Prevention of Corruption Act, 1947 (for short 'the Act').

2. The case of prosecution, in brief, was as follows:

2.1 The appellant joined the Southern Railway on 5.7.1958. He was promoted as a Permanent Way Inspector and later as Assistant Engineer on 28.5.1981. The appellant's family consisted of himself, his wife and two children. He had six brothers and three sisters and had no ancestral properties.

2.2 On information received that the appellant was corrupt and had amassed assets disproportionate to his income, R.C. No. 33 of 1986 was registered on 28.5.1986 by the Superintendent, Central Bureau of Investigation, Madras. Chelladurai, Inspector CBI [PW- 23] took up the case for investigation and obtained a warrant for inspection of the appellant's house No. 16, North Colony, Railway Quarters, Dindigul, from the Chief Judicial Magistrate, Chennai. On 29.5.1986, PW-23 along with his party and two independent witnesses went to the house of the accused. Appellant was not present but his son was present. The search was commenced at 8 A.M. The appellant came around 11.30 A.M. and his wife came around 2.45 P.M. There were three steel almirahs kept in the house of the appellant and on opening them with the keys provided by the appellant, a sum of Rs. 2,94,615/- in cash was found in ten different containers (biscuit tins, briefcases, etc.,) which was seized. Certain documents were also seized.

2.3 As per the charge-sheet dated 18.5.1987, the check-period was 1.5.1976 to 29.5.1986 and the value of the assets held by the appellant at the beginning of the check period (1.5.1976) was Rs. 13,449/17; and the Page 0005value of the total assets of the appellant at the end of the check period (as on 29.5.1986) was Rs. 6,69,852/- as under:

(i)	Fixed deposits & NSCs	Rs.1,81,688.13
(ii)	Credit balance in three S/B Accounts	Rs. 47,345.90
(iii)	Shares and sundry deposits	Rs. 2,085.00
(iv)	Household articles	Rs. 31,076.00

(v)	House at No.10, Swarnapuram, Salem (with registration expenses of Rs.4302.79)	Rs.1,13,042.75
(vi)	Cash in hand (recovered during search)	Rs.2,94,615.00
	Total	Rs.6,69,852.78

The total income earned by the appellant during the check period was Rs. 2,81,497.93 (salary, interest on FDs, interest on bank balances, house-rent, house rent advance and housing loan) and the total expenditure incurred for the family during that period was Rs. 88,645.92. Thus, the maximum likely savings during that period was Rs. 1,92,852.01. Thus, the value of total assets as on 29.5.1986 could not have exceeded Rs. 192,852.01 (savings) plus Rs. 13,449.17 (assets at the beginning of the check period) in all Rs. 2,06,301.18. By deducting the said amount of Rs. 2,06,301.18 from Rs. 6,69,852/-, the value of the assets acquired by the appellant beyond his known sources of income was found to be Rs. 4,63,551.60. Thus the charge was that the appellant was in possession of assets of the value of Rs. 4,63,551/60 in excess of his known sources of income which he could satisfactorily account and thereby he committed an offence with Section 5(1)(e) of the Act punishable under Section 5(2).

3. The explanation offered by the appellant (as gathered from the statement under Section 313 Cr.P.C., exhibited documents and written arguments) was as follows:

(i)	Loans received from PW-11 and PW-15	=	Rs. 2,50,000/-
(ii)	Loans received from brothers and brothers-in-law	=	Rs. 40,000/-
(iii)	TA received [not taken into account by PW-23]	=	Rs. 25,922/60
(iv)	Bonus received [not taken into account by PW-23]	=	Rs. 8,000/-
(v)	Excess evaluation by PW-23 of the House at Salem [taken as Rs. 1,08,740/- as against the actual cost of construction being Rs.80,000/-]	=	Rs. 28,740/-
(vi)	Difference in value of assets as on 1.5.1976 [Rs.63,198.61 claimed by the appellant less Rs.13,449.17 assessed by PW-23]	=	Rs. 49,749/44
(vii)	Difference in income received during the check period 1.5.1976 to 29.5.1986 (Rs.3,16,076.30 claimed by the appellant and Rs.2,81,497.97 assessed by PW-23) (Note:The said difference relates to difference in receipt of interest on fixed deposits)	=	Rs. 34,578.37
	Total	=	Rs. 4,36,990.41

Page 0006

The appellant submitted that the extent of assets beyond the known sources of income was not, therefore, Rs. 4,63,551/40 as charged, but only Rs. 26,561/-. The appellant contended that a margin of 10% is permitted and as the unexplained assets were only to an extent of Rs. 26,561/- which was less than even 10% of the total income, the courts below committed an error in holding that the assets possessed by the accused were disproportionate to his known sources of income, so as to justify the raising of presumption under Section 5(3).

4. The special court after considering the evidence came to the conclusion that even if all other explanations and contentions of the appellant were accepted, assets to an extent of Rs. 3,05,985.39 remained unaccounted and unexplained. It accepted the claim of the accused that the total of assets as on 29.5.1986 was Rs. 6,41,112.78. It also accepted his claim that the value of assets as on 1.5.1976 was not Rs. 13,449.17 but Rs. 63,198.61 (in calculations, wrongly taken as Rs. 73,759/31 by the Special Court). It also accepted certain other income which had not been taken into account by PW-23, namely, Travelling Allowance (Rs.25,922.60), bonus (Rs.8,000/-), interest on FDs (Rs.91,666.25 as against Rs. 57,583.91 considered by PW-23). It further accepted the claim of the accused that the value of the Salem house was only Rs. 80,000/- (as against Rs. 1,13,042.79 assessed by PW-23). It, however, rejected the explanation relating to loans of Rs. 2,50,000/- allegedly taken from PWs-11 & 15 and the borrowings aggregating to Rs. 40,000/- from relatives. It held that the prosecution had proved that the appellant possessed assets in excess of all known sources of income to an extent of Rs. 3,05,985.39 and by raising the presumption that such assets were procured by illegal means by misusing his official powers and influence, found him guilty and convicted him under Section 5(1)(e) read with Section 5(2) of the Act. The appellant was sentenced to undergo imprisonment for one year and pay a fine of Rs. 1,000/- and, in default, to undergo rigorous imprisonment for four months. The cash recovered (Rs. 2,94,615/-) was ordered to be confiscated.

5. Feeling aggrieved, the appellant filed an appeal before the High Court [Crl. Appeal No. 127 of 1993]. By judgment dated 21.01.2000, the High Court confirmed the conviction and sentence and dismissed the appeal. In fact, the High Court came to the conclusion that the value of Page 0007unaccounted assets was Rs. 4,13,802.16 and not Rs. 3,05,985.39 as determined by the Special Court. It accepted the contention of the appellant that the value of assets as on 1.5.1976 (beginning of check period) was Rs. 63,198.61 and not Rs. 13,449.17. It, however, rejected the appellant's claim for certain additions to the income (which had been accepted by the trial court), namely, Rs. 25,922.60 (travelling allowance), Rs. 8,000/- (bonus), Rs. 34,083/- (being part interest on fixed deposits, that is by taking the interest earned as only Rs. 57,583.91 instead of Rs. 91,666.25 claimed by the appellant) and Rs. 511/- (S.B. Account interest). It did not accept his contention that the value of the Salem house was only Rs. 80,000/- and took it as Rs. 1,13,042/-, thereby increasing the assets by an extent of Rs. 28,740/-. Consequently, out of Rs. 6,69,852.78 (value of assets as on 29.5.1986), the High Court deducted Rs. 63,198.61 (being the value of assets at the beginning of check period as

claimed by the appellant) and Rs. 1,92,852.01 (surplus of income over expenditure during the check period as determined by it) and concluded that assets of the value of Rs. 413,802.16 remained unexplained.

6. The said decision is challenged in this appeal by special leave. The learned Counsel for the appellant contended that the High Court committed a serious error in over-estimating the cost of the Salem house and by refusing to take note of the following five items of income during the check period:

```
  (i)    Rs.2,50,000.00  Loans received from PW-11 and PW-15
(ii)   Rs.  40,000.00  Loans received from brothers and brother-
                       in-law
(iii)  Rs.  34,578.37  Interest on deposits (part)
(iv)   Rs.  22,922.60  Travelling allowance received by appellant
(v)    Rs.   8,000.00  Bonus received by appellant
       --------------
       Rs.3,55,500.97
       Rs.  28,740.00  (Excess in the valuation of Salem House taken
                        as Rs.1,08,740/- instead of Rs.80,000/-)
       --------------
       Rs.3,84,240.97
       --------------
```

The appellant contended that if these amounts had been taken into account by the High Court, it would have found that the unexplained assets or income over expenditure was only Rs. 29,561/-, well within the 10% margin recognized and permitted by this Court. (Reference may be made to Krishnanand Agnihotri v. State of MP wherein this Court held where the value of unexplained portion is less than 10% of the total income, it would not be proper to hold that the assets found in the possession of the accused were disproportionate to his known sources of income, so as to justify the raising of the presumption under Section 5(3) of the Act).The learned Counsel for the appellant further submitted that the findings in favour of the accused cannot be altered in appeal by the accused against conviction. He pointed out that the trial Page 0008court had accepted his claim for additions to income of Rs. 22,922.60 (TA), Rs. 8,000/- (Bonus) and Rs. 34,578.37 (interest on deposits) and also reduction in the total value of assets by Rs. 28,740/- (in all aggregating to Rs. 94,240/97) and these could not have been reversed by the High Court in an appeal by the accused.

7. After the matter was argued for some time, learned Counsel on both sides agreed that the entire matter boiled down to the acceptance of the genuineness of the alleged loan of Rs. 2,50,000/- from PW-11 and PW-15. They agreed that even if the claims of the appellant relating to Travelling Allowance [Rs. 22,922.60/-], Bonus [Rs. 8,000/-], difference in interest on FDs [Rs. 34,578.37], and difference in valuation of the house [Rs. 28,740/-] are accepted, the appeal will fail if the alleged loan of Rs. 2,50,000/- was not accepted. If the explanation for Rs. 2,50,000/- which is the major chunk of the unexplained excess (being part of Rs. 2,94,615/- found in cash in appellant's house) is not accepted, there may be no need to examine the correctness of the other items. We will, therefore,

first deal with the alleged loan of Rs. 2,50,000/-.

8. The appellant's case is that he had taken a loan of Rs. 1,25,000/- from PW-11 and another sum of Rs. 1,25,000/- from PW-15 on 24.5.1986 (five days before the search) and the same was evident from the promissory notes [Ex. P-64 & P-65], guarantee letters [Ex.P-66 & P-67], confidential letter [Ex.P-68], equitable mortgage deed [Ex.P-69] and the entries in the account books of PW-11 and PW-15 [Ex.P-70 to P-81]. He submits that the said documentary evidence proved beyond doubt that he had received Rs. 2,50,000/- as loan from PW-11 and PW-15.

9. We may briefly refer to the evidence of PW-11 and PW-15 who were the alleged creditors.

9.1 Chandiram (PW-11) stated that he was carrying on money- lending business at Salem in partnership with his mother and three brothers, from the year 1984 under the name and style of 'Pahlaprai Sons'; that Satram Das (PW-15) was his paternal uncle and he was also doing money lending business under the name and style of 'Satramdas Mahesh Kumar'; that whenever money was to be lent, he was taking a promissory note, guarantee letter, confidential form etc. from the borrower; and that he maintained a promissory note book, day book, cash book wherein the transactions were entered by one Kattanmal, the common Accountant for himself and PW-15. He further stated that he was a friend and acquaintance of Kasinathan and Ramchandran (brothers of appellant) as he used to play tennis with them for about 15 years; that he knew the appellant and his another brother Narayanaswamy through Kasinathan and Ramchandran; that on 30.5.1986, the appellant's three brothers came to his office and asked him and PW-15 for a loan of Rs. 2 to Rs. 3 lakhs, stating that the loan was required by their brother Janakiraman (appellant) in connection with the purchase of a house at Coimbatore; that he and PW-15 stated that they could not lend such a big amount; that appellant's brothers stated that if they (PW- 11 & PW-15) were not able to lend such amount, they may at least make an 'adjustment entry' in their account books by showing that a loan was given on 24.5.1986; that when PW-11 and PW-15 stated that they had not Page 0009done such a thing before, the appellant's brothers stated that they had come to them with faith and hope and offered to pay a commission of three to four thousand rupees for merely making an entry that the said amount was advanced by them to appellant.

9.2 PW-11 further stated that when he asked them why they wanted such a specific entry for such amount as on 24.5.1986, they stated that appellant had already paid such amount as advance to buy a house at Coimbatore and therefore, they wanted such an entry to show that the said amount was borrowed by the appellant; that as they went on pleading, finally PW-11 and PW-15 agreed to help them; that PW-15 prepared two promissory notes for Rs. 1,25,000/- each showing the dates as 24.5.1986, though the said promissory notes (Ex. P-64 & P-65) were, however, actually written on 30.5.1986. One promissory note [Ex. P-64] was executed in favour of M/s. Satramdas Mahesh Kumar. The other promissory note (Ex. P- 65) was executed in favour of Pahlaprai Sons [partnership firm of PW-11]. Two guarantee letters were also filled up by Kasinathan [Ex. P-66 and P-67]; one in favour of M/s. Satramdas Mahesh Kumar and the other in favour of Pahlaprai Sons. One confidential form [Ex. P- 68] was filled up by Kasinathan. Narayanaswamy signed both promissory notes and the 'confidential form'. All the three brothers of appellant signed the guarantee letters. To create a document to show that the appellant's house at Salem was also given

as security by way of equitable mortgage for such loan, appellant's brother Ramachandran along with PW-11's clerk went to a stamp vendor to obtain an ante-dated stamp paper with the date of 23.5.1986 in the name of the appellant. Thereafter, the appropriate entries were made in the pronote entry book and in the respective day book and cash book, showing Rs. 1,25,000/- was advanced by the firm of PW- 11 and another Rs. 1,25,000/- by the firm of PW-15. After the entries were made, the three brothers of the appellant took the promissory notes, guarantee letters, confidential form, equitable mortgage document stating that they will get the signatures of the appellant and later brought back those documents and delivered them on 1.6.1986 with the signatures of the appellant. Along with the said loan documents, they also gave two alleged 'title deeds', that is, a certificate showing the ownership of the appellant in regard to the house at Salem [Ex. P-82] and two electricity bills [Ex. P-83 series]. PW-11 stated that the aforesaid documents were created to make the lending transaction to appear genuine even though no money was advanced.

9.3 PW-11 also stated that only on 19th & 20th June, 1986, when CBI raided his office and house and seized the said documents [Ex. P-64 to P-83], he and PW-15 came to know about CBI discovering cash of about Rs. 3 lakhs in appellant's house on 29.5.1986 and learnt they were cheated by making them agree to show 'adjustment entries' to create evidence of borrowing by the appellant to explain away the huge cash. He also stated that his statement (Ex. P-91) was recorded by one Ramalingam, Assistant Director, Intelligence Wing of Income Tax Department, Chennai. Subsequently on 01.8.1986, PW-11 and PW-15 were arrested and released on personal bonds. They consulted their lawyer in regard to these transactions and he suggested that they should disclose the real facts relating to the transactions before a Magistrate at Chennai. Accordingly,Page 0010 they applied to the Metropolitan Magistrate, Saidapet, Chennai, to record their statements and they were asked to appear before Saidapet Metropolitan Magistrate No. IV on 11.8.1986. They appeared on that date before the said Magistrate and the Magistrate asked PW-11 whether he was willing to give a voluntary statement and also informed him to think over before giving such statement as such statements might be used against him and gave a day's time to him about it. That next day, he appeared before the Magistrate and Magistrate again gave him a warning and asked whether he was willing to give a voluntary statement. When he reiterated his desire, the Magistrate recorded his statement under Section 164 Cr.P.C. (Ex. P-93). Thereafter, he was asked to appear before C.B.I. Inspector who also recorded his statement. He also stated that he received summons from C.J.M., Coimbatore on 14.5.1987 and he appeared on that day and confirmed his statement and the CJM granted pardon.

9.4 PW-11 admitted in the cross-examination that merely for money or friendship, they would not normally make false entries; that he had sufficient cash balance on 24.5.1986 to advance Rs. 1,25,000/- and that even in his uncle's accounts, there was sufficient cash balance to advance Rs. 1,25,000/-; that normally the execution of promissory notes and lending of the amount was simultaneous; that there was nothing to show that the entries shown as relating to the lending were really made on 30.5.1986 and not on 24.5.1986. He also stated that though appellant's brothers agreed to give commission to him and PW-15, actually no commission was given to either of them. He also denied that he and PW-15 offered to give statements under Section 164 Cr.P.C. before the Magistrate at Chennai only under pressure from the CBI. He admitted that the CBI did not examine them until they gave the statements under Section 164 Cr.P.C.

9.5 To the similar effect is the evidence of PW-15 [J. Chatram Doss]. His sworn statement under Section 131 of Income Tax Act recorded by PW-14 is Ex.P-92 and his statement under Section 164 Cr.P.C. recorded by the Addl. Metropolitan Magistrate, Chennai is Ex.P-96.

10. The evidence of PW-11 and PW-15 are clear and categorical that Rs. 2,50,000/- was not advanced to appellant on 24.5.1986 or any other date and that documents (Ex.P-64 to P-69) and the entries (Ex.P-70 to P-81) were created only on 30.5.1986 to help appellant to explain the huge cash found in his possession. Nothing has been elicited in the cross-examination to disbelieve their evidence. The learned Counsel for the appellant, however, referred to the following factors and contended that the evidence of PW-11 and PW-15 that they had not lent any amount to appellant, should be rejected as not trustworthy in view of the following:

i) Such evidence being contrary to the very documents executed in favour of PW-11 and PW-15 (Ex.P-64 to P- 69) and the entries made in the books of PW-11 and PW- 15 (Ex.P-70 to P-81), should be excluded having regard to Section 92 of the Evidence Act, 1872.

ii) The documents executed by the appellant [Ex.P-64 to P- 69] showed that they were all executed on 24.5.1986 and that Rs. 2,50,000/- in all was advanced by PW-11 and PW-15 to appellant on 24.5.1986. The entries in the account books of PW-11 and PW-15 (Ex.P-70 to P-81) also Page 0011demonstrated this position. Further, a deed creating mortgage by depositing of title deed was also executed on 24.5.1986 (Ex.P-69) on a stamp paper purchased in the name of appellant on 23.5.1986 and this clearly showed that there was a lending transaction on 24.5.1986 itself. PW-11 had also specifically admitted that neither he nor PW-15 will make any adjustment entries only for the sake of money or friendship.

iii) PW-11 and PW-15 have made false statements under Section 164 Cr.P.C. to support the prosecution case at the instance of CBI who apparently applied threats through the officer of the Income Tax Department (PW- 14). As PW-11 and PW-15 were residents of Salem, there was absolutely no need for them to go over to Chennai to make the statement under Section 164 Cr.P.C. before the Magistrate. The fact that they were made at Chennai shows that it was done at the instance of CBI whose main office was situated at Chennai.

iv) PW-11 and PW-15 were granted pardon in view of the statements made under Section 164 Cr.P.C. and such statements by co-accused/accomplices cannot be relied upon to hold the appellant guilty.

11. The contention that evidence of PW-11 and PW-15 are contrary to the documentary evidence [Ex.P-64 to P-81] and therefore, should be excluded under Section 92 of Evidence Act, 1872 is not tenable.

11.1 In Tyagaraja Mudaliyar v. Vedathani AIR 1939 PC 70, the Privy Council observed that oral evidence is admissible to show that a document executed by a person was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence about some other matter.

11.2 In Krishna Bai v. Appasaheb AIR 1979 SC 1880, this Court observed:

...when there is a dispute in regard to the true character of a writing, evidence de hors the document can be led to show that the writing was not the real nature of the transaction, but was only an illusory, fictitious and colourable device which cloaked something else, and that the apparent state of affairs was not the real state of affairs.

11.3 We may next refer to the following observations in Gangabai v. Chhabubai interpreting Section 92:

11...Section 91 of the Evidence Act provides that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, Sub-section (1) of Section 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted,Page 0012 as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. And the first proviso to Section 92 says that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. It is clear to us that the bar imposed by Sub-section (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

(emphasis supplied) 11.4 The above view was reiterated in Ishwar Dass Jain v. Sohan Lal and it was held that the bar under Section 92(1) would arise only when the document is relied upon, but, at the same time, its terms are sought to be varied and contradicted.

11.5 In Parvinder Singh v. Renu Gautam , this Court observed:

The rule as to exclusion of oral by documentary evidence governs the parties to the deed in writing. A stranger to the document is not bound by the terms of the document and is, therefore, not

excluded from demonstrating the untrue or collusive nature of the document or the fraudulent or illegal purpose for which it was brought into being. An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction.

11.6 We may cull out the principles relating to Section 92 of the Evidence Act, thus:

i) Section 92 is supplementary to Section 91 and corollary to the rule contained in Section 91.

ii) The rule contained in Section 92 will apply only to the parties to the instrument or their successors-in-interest. Strangers to the contract Page 0013 (which would include the prosecution in a criminal proceeding) are not barred from establishing a contemporaneous oral agreement contradicting or varying the terms of the instrument. On the other hand, Section 91 may apply to strangers also.

iii) The bar under Section 92 would apply when a party to the instrument, relying on the instrument, seeks to prove that the terms of the transaction covered by the instrument are different from what is contained in the instrument. It will not apply where anyone, including a party to the instrument, seeks to establish that the transaction itself is different from what it purports to be. To put it differently, the bar is to oral evidence to disprove the terms of a contract, and not to disprove the contract itself, or to prove that the document was not intended to be acted upon and that intention was totally different.

Applying the aforesaid principles, it is clear that the bar under Section 92 will apply to a proceeding inter-parties to a document and not to a criminal proceeding, where the prosecution is trying to prove that a particular document or set of documents are fictitious documents created to offer an explanation for disproportionate wealth. Oral evidence can always be led to show that a transaction under a particular document or set of documents is sham or fictitious or nominal, not intended to be acted upon.

12. The contention that a statement under Section 164 Cr.P.C. of an accomplice/co-accused cannot be used as evidence against an accused, on the facts of this case, is rather misleading. It is no doubt well-settled that in dealing with a case against an accused person, the Court cannot start with the confession of a co-accused and it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of such evidence, it is permissible to turn to the confession in order to lend support or assurance to the conclusion of guilt which the court is about to reach on the other evidence, vide Haricharan v. State of Bihar and Dagdu and Ors. v. State of Maharastra . But in this case, the statements made by PW-11 & PW-15 before the Magistrate at Chennai are not the only evidence on which reliance is placed. It is used more as a corroboration. We may also note that PW-11 and PW-15 were not 'co-accused' or 'accomplices' or 'abettors' of the appellant in regard to the charge of disproportionate assets. They came into the picture, only after appellant's house was raided, in an effort by the appellant to explain the cash found to an extent of Rs. 2,50,000/-.

13. The contention that Ex.P-64 to P-69 and the entries in account books (Ex.P-70 to P-81) bear the date 24.5.1986 and therefore, they cannot be relied upon to show that the documents were executed and entries were made on 30.5.1986 is untenable. PW-11 and PW- 15 clearly and categorically explained the circumstances in which those documents came into existence on 30.5.1986. Several circumstances probabilise their statements. We may refer to them briefly:

Page 0014

i) There is no evidence to show that the appellant was negotiating for purchase of any property at Coimbatore or that he wanted money for purchase of such property. Neither the particulars of such property at Coimbatore nor the terms of such sale have been disclosed.

ii) The stamp paper on which the alleged mortgage by deposit of title deeds (Ex. P-69) is of the value of Rs. 7/-. It shows that stamp paper was sold to appellant on 23.5.1986. The case of the appellant is that the said stamp paper was purchased at Salem on 23.5.1986. But the stamp paper shows that it was sold by stamp vendor named P.K. Nagaraja Rao at Karur, which is a town far away from Salem where PW-11 and PW-15 carried on their business, and far away from Dindigul where appellant was residing. It is unimaginable that a person residing in Dindigul and proposing to borrow an amount from persons carrying on business at Salem would go to Karur to purchase a stamp paper of Rs. 7/-. On the other hand, it fully supports the evidence of PW-11 that the appellant's brothers wanted an ante-dated stamp paper on 30.5.1986 and PW-11 sent his clerk along with the appellant's brothers to the Bazar to procure such ante-dated stamp paper from some stamp vendor at Salem who apparently kept a stock of such stamp papers illegally and sold them.

iii) The creation of an equitable mortgage by depositing documents other than title deeds is not valid or permissible. We extract below the contents of Ex.P-69:

"On this day, 24th of May, 1986, I have deposited with you on 23.5.1986, the undermentioned title deeds belonging to my property namely (1) one plot with terraced house - site bearing (S. No. 8/3) Plot No. 10, in Swarnapuri Extention, Salem - 636 004, with intent by it in respect of the amount due to you under the pronote executed by me on for Rs. 2,50,000/- with interest at 24% per annum thereon.

Equitable mortgage in favour of M/s Satramdas Mahesh Kumar and M/s Pahlaprai Sons, 43-D, First Agaharam, Salem.

(R. Janakiraman) Signature Details of title deeds handed over for the purpose of equitable mortgage above said:

Copy of the sale deed in my favour dated....

Copy of the loan sanction from the Railway Board.

Copy of the sale deed given because original is with Railways.

Dated: 24.5.1986 at Salem (R. Janakiraman) Signature 'Sd: Narayana Swamy' Equitable mortgage is created by depositing the original title deeds. But in this case, the original title deeds are not deposited. Not even the two documents referred in Ex. P-69 are deposited. What are deposited (Ex. P-82 and P-83) were Page 0015 not title deeds but only a certificate issued by the Swarnapuri Cooperative House Building Society Ltd., dated 1.2.1984 certifying the appellant is owner of Plot No. 10, Swarnapuri Extension (Ex.P-82) and two receipts issued by Tamil Nadu Electricity Board showing that the appellant had paid some electricity charges (Ex.P-83). PW-11 and PW-15 being experienced money-lenders, if really were lending Rs. 2,50,000/-, would have certainly insisted upon original title deeds or at least the documents mentioned in Ex.P-69 being deposited. This shows that the equitable mortgage was also a 'make-believe' and not real.

14. The recovery of Rs. 2,94,115/- in cash from the steel almirahs of the appellant is not disputed. The appellant does not disown the amount but admits that it belongs to him. His explanation as to how he obtained the said money is clearly unacceptable. The persons from whom he allegedly borrowed the said money, Rs. 2,50,000/-, have denied having lent the said amount. We, therefore, find no error in the concurrent findings of the trial court and the High Court that the appellant had not borrowed the said amount from PW-11 and PW-15 and that the same was part of the ill-gotten money acquired as illegal gratification.

15. The appellant having failed to satisfactorily account for the assets beyond his known sources of income to the said extent of Rs. 2,50,000/-, is guilty of an offence under Section 5(1)(e) of the Act. In view of our said finding, it is really unnecessary to examine the other disputed amounts namely alleged loan from brothers and brothers-in-law (Rs. 40,000/-), travelling allowance [Rs. 22,922/60], bonus [Rs.8,000/-], difference in interest on fixed deposits [Rs.34,578/37]; and difference in cost of construction (Rs.28,740/-). We may, however, refer to two other questions on which arguments were advanced by the learned Counsel for the appellant.

16. The first relates to his argument that finding in his favour recorded by the Trial Judge cannot be altered to his detriment, in his appeal against conviction. He referred to four items (travelling allowance, bonus, difference in interest on Fixed Deposits and difference in cost in valuation of the house) on which the High Court had reversed the findings of the Special Judge in his favour. Reliance is placed on the decision of this Court in the State of Andhra Pradesh v. Thadi Narayana .

16.1 We will refer to the facts as also the principles laid down in Thadi Narayana (supra) to show that they are inapplicable to the case in hand. In that case, the accused was tried for offences under Sections 302 and 392 Indian Penal Code. The Sessions Judge acquitted the accused under Sections 302 and 392 IPC but convicted her under Section 411 IPC. The accused appealed to the High Court against the conviction under Section 411 IPC. The State did not appeal against the acquittal in respect of the charges under Sections 302 and 392 IPC. The High Court while setting aside the order of conviction under Section 411 IPC also set aside the order of acquittal under Sections 302 and 392 IPC and ordered a retrial on the original charges. This Court held that while exercising power Page 0016 under Section 423(1)(b) of the old Code of Criminal Procedure [corresponding to Section 386(b) of the new Code] in an appeal against conviction, the High Court had no jurisdiction to set aside the order of acquittal passed in favour of the accused by the Sessions Judge (in respect of the

offences under Sections 302 and 392 IPC). It was pointed out that as Section 423(1)(b) of Cr.P.C. was confined to appeals against the orders of conviction and sentence, what falls for decision in such appeals is only the conviction and sentence and matters incidental thereto; and if the order of acquittal is not challenged in an appeal and if the High Court does not take action in exercise of its powers of revision, the order of acquittal becomes final and cannot be challenged indirectly in an appeal by the accused against the order of conviction and sentence. It was held:

In a case where several offences are charged against an accused person the trial is no doubt one; but where the accused person is acquitted of some offences and convicted of others the character of the appellate proceedings and their scope and extent is necessarily determined by the nature of the appeal preferred before the Appellate Court. If an appeal is preferred against an order of acquittal by the State and no appeal is filed by the convicted person against his conviction it is only the order of acquittal which falls to be considered by the Appellate Court and not the order of conviction. Similarly, if an order of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State, then it is only the order of conviction that falls to be considered by the Appellate Court and not the order of acquittal. Therefore the assumption that the whole case is before the High Court when it entertains an appeal against conviction is not well-founded and as such it cannot be pressed into service in construing the expression "alter the finding".

It was further held that the expression 'alter the finding' in Section 423(1)(b)(2) [corresponding to Section 386(b)(ii) of the new Code] has only one meaning, and that is alter the finding of conviction and not the finding of acquittal. This Court then proceeded to consider the question as to what are the kinds of cases in which the power to 'alter the finding' can be exercised, thus:

The answer to this question is furnished by the provisions of Section 236, 237 and 238. Section 236 deals with cases where it is doubtful what offence has been committed, Section 237 with cases where a person may be charged with one offence and yet he can be convicted of another, and Section 238 with cases where the offence proved includes the offence charged and another offence not so charged. Where a person is charged with a major offence, such as for instance under Section 407 of the Indian Penal Code, he may be convicted either of that offence or of a minor offence, as for instance under Section 406. That is the result of Section 238 of the Code. Now, if a trial court charges, and convicts an accused person of, an offence under Section 407 and sentences him the Appellate Court may alter the finding of guilt of the accused from Section 407 to Section 406 and in that case it may retain the same sentence or reduce it. It is, however, clear that in exercising the power conferred by Section 423(1)(b)(2) the sentence imposed on an accused person cannot be enhanced, and that may mean that the conviction of a minor offence may not be altered into that of a major offence. In our opinion, therefore, the power conferred by Section Page 0017423(1)(b)(1) is intended to be exercised in cases falling under Sections 236 to 238 of the Code. We would accordingly hold that the power conferred by the expression "alter the finding" does not include the power to alter or modify the finding of acquittal. The finding specified in the context means the finding as to conviction, and the power to alter the finding can be exercised in cases like those which we have just indicated.

16.2 The facts of this case are completely different. The Special Judge convicted and sentenced the appellant under Section 5(1)(e) read with Section 5(2) of the Act. In an appeal by the accused against the said conviction and sentence, the High Court neither modified the finding of guilt under Section 5(1)(e) nor the sentence under Section 5(2). All that it has done is while affirming the finding of guilt recorded by the Special Judge in regard to the disproportionate wealth, to recalculate the exact amount of disproportionate wealth with reference to the evidence, which is permissible under Section 386(b)(ii) which provides that the appellate court may, in an appeal from a conviction, alter the finding, maintaining the sentence. If an appellate court may alter the finding of guilt of the accused from one section to another, while maintaining the sentence, we see no reason why the extent of the offence should not be changed in an appeal against conviction. We are, therefore, of the view that the High Court did not exceed its jurisdiction in exercising the power of appeal under Section 386 Cr.P.C.

17. The second question is in regard to the claim of the appellant that travelling allowance should be treated as income. The appellant submitted that he had received, in all, a sum of Rs. 22,922.60 as travelling allowance during the check period and the said amount should be taken under the head of receipt/income during that period. This Court in C.S.D. Swami v. The State has held that prosecution would not be justified in concluding that travelling allowance was also a source of income (for the purpose of ascertaining the income from known sources during the check period) as such allowance is ordinarily meant to compensate the officer concerned for his out-of pocket expenses incidental to the journeys performed by him for his official tour/s. As traveling allowance is not a source of income to the Government servant but only a compensation to meet his expenses, the prosecution while calculating the sources of income during the check period, need not take it into account as income. However, it is open to the Government servant to let in evidence to show that he had in fact saved something out of the travelling allowance. It is for the court then to accept or not whether there was such actual saving. But the question of automatically considering the entire travelling allowance as a source of income does not arise. In this case, as the appellant did not lead any specific evidence to show that he had made any savings from out of the travelling allowance, the claim for inclusion of TA in income, is untenable.

18. The appeal has no merit and is, accordingly, dismissed.