PETITIONER:
P. NALLAMMAL

Vs.

RESPONDENT:
STATE REP. BY INSPECTOR OF POLICE

DATE OF JUDGMENT: 09/08/1999

BENCH:
K.T. Thomas, M.B. Shah.

JUDGMENT:

THOMAS, J.

Leave granted.

Some of the former Ministers of the Tamil Nadu Government in the Ministry headed by the erstwhile Chief Minister Smt. Jayalalitha are being prosecuted before certain Special Courts for the offence, inter alia, under Section 13(1)(e) of the Prevention of Corruption Act, 1988 (for short "the P.C. Act"). The former speaker of the Tamil Nadu Legislative Assembly (when Smt. Jayalalitha was the Chief Minister) is also facing a similar charge. They are indicted on the premise that they were public servants during the relevant time and that each one has amassed wealth disproportionate to his/her known sources of income, for which he/she is unable to account.

But in all such cases, some of their kith and kin are also being arraigned as co-accused to face the said offence read with Section 109 of the Indian Penal Code (for short "the Penal Code"). Appellants herein are all those kith and kin who are now being proceeded against for the said offences in conjunction with the public servant concerned. They raised preliminary objections before the Special Courts on various grounds for pre-charge exoneration, but the Court repelled all such objections. They moved the High Court of Madras against such orders, but a learned Single Judge who heard the motions together, along with certain other petitions arising from the same prosecution proceedings, dismissed all the petitions by a common order, which is now being challenged in these appeals.

Appellants have restricted their contentions, in these appeals, to the question whether they are liable to be prosecuted along with public servants for the offence under Section 109 of the Penal Code read with Section 13(1)(e) of the P.C. Act. Shri K.K. Venugopal, learned senior counsel arguing for the appellants submitted his point broadly that the offence under Section 13(1)(e) of the P.C. Act is unabettable, since the nub of the offence is the failure of the public servant to account for the excess wealth which none else can possibly do.

Respondent - State of Tamil Nadu has produced a copy of the decision rendered by a learned Single Judge of the

Madras High Court dated 17-6-1988, in which the identical question was considered when it arose under Section 5(1) of the Prevention of Corruption Act, 1947 (for short "the old P.C. Act") wherein it was held that "the offence of acquiring and being in possession of disproportionate assets can be abetted by another including one who is not a public servant". It was pointed out by the respondent that the aforesaid decision was challenged before this Court through a special leave petition and on 14-12-1988 this Court has dismissed the said petition. Shri K.K. Venugopal has rightly contended that dismissal of the special leave petition will not amount to upholding of the law propounded in the decision challenged through that special leave petition. The aforesaid legal position seems to be well nigh settled. [vide Indian Oil Corporation Ltd. vs. State of Bihar {1986 (4) SCC 146}]; Union of India vs. All India Services Pensioners Association {1988 (2) SCC 580}; Supreme Court Employees Welfare Association vs. Union of India {1989 (4) SCC 187].

Shri Shanti Bhushan, learned counsel appearing for the respondent - State submitted that it would be a dangerous proposition that the offence under Section 13(1)(e) of the P.C. Act is unabettable because a non public servant who actively aids and facilitates the perpetration of the said offence would move at large with immunity. Learned counsel pointed out a few illustrations to drive the point home that such offence is clearly abettable by others and the abettors cannot be insulated from the reach of law.

Union of India was made a respondent before the Madras High Court and one Under Secretary to the Government of India had filed a counter affidavit therein on 1-12-1998 conceding to the legal position espoused by the appellants. But Shri V.R. Reddy, learned senior counsel now appearing for the Union of India strongly supported the stand adopted by the State of Tamil Nadu. The volte-face of the Union of India cannot be frowned at, for, it is open to the State or Union of India or even a private party to retrace or even resile from a concession once made in the court on a legal proposition. Firstly, because the party concerned, on a reconsideration of the proposition could comprehend a different construction as more appropriate. Secondly, the construction of statutory provision cannot rest entirely on the stand adopted by any party in the lis. Thirdly, the parties must be left free to aid the court in reaching the correct construction to be placed on a statutory provision. They cannot be nailed to a position on the legal interpretation which they adopted at a particular point of time because saner thoughts can throw more light on the same subject at later stage.

Before dealing with the contention advanced by the appellants we may point out that Section 4 of the P.C. Act confers exclusive jurisdiction to Special Judges appointed under the P.C. Act to try the offences specified in Section 3(1) of the P.C. Act. To understand the exclusivity of such jurisdiction it is advantageous to extract Section 4(1) of the P.C. Act as under:

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> "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the

offences specified in sub-section (1) of section 3 shall be tried by special Judges only."

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The placement of the monosyllable "only" in the sub-section is such that the very object of the sub-section can be discerned as to emphasize the exclusivity of the jurisdiction of the Special Judges to try all offences enveloped in Section 3(1). That can be further noticed while reading that sub-section. It is as follows:

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"The Central Government or the State Government may, by notification in the Official Gazette, appoint as many special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely:-

(a) any offence punishable under this Act; and

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause(a)."

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Thus, clause (b) of the sub-section encompasses the offences committed in conspiracy with others or by abetment of "any of the offences" punishable under the P.C. Act. If such conspiracy or abetment of "any of the offences" punishable under the P.C. Act can be tried "only" by the Special Judge, it is inconceivable that the abettor or the conspirator can be delinked from the delinquent public servant for the purpose of trial of the offence. If a non-public servant is also a member of the criminal conspiracy for a public servant to commit any offence under the P.C. Act, or if such non-public servant has abetted any of the offences which the public servant commits, such non-public servant is also liable to be tried along with the public servant before the court of a Special Judge having jurisdiction in the matter.

Shri K.K. Venugopal, learned senior counsel contended that P.C. Act, being a special enactment has taken into its fold specific cases of abetment of offences. Vide Sections 10 and 12 of the P.C. Act. Those sections are extracted below:

"10. Punishment for abetment by public servant of offences defined in section 8 or 9.- Whoever, being a public servant, in respect of whom either of the offences defined in section 8 or section 9 is committed, abets the offence, whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine."

"12. Punishment for abetment of offences defined in section 7 or 11.- Whoever abets any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of

> that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine."

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According to the learned counsel since no other type of abetment is made specifically punishable under the P.C. Act there cannot be any question of a non-public servant abetting the offence under Section 13(1)(e) of the P.C. Act.

It is true that Section 11 deals with a case of abetment of offences defined under Section 8 and section 9, and it is also true that Section 12 specifically deals with the case of abetment of offences under Sections 7 and 11. But that is no ground to hold that the P.C. Act does not contemplate abetment of any of the offences specified in Section 13 of the P.C. Act. Learned counsel focussed on Section 13(1)(e) to elaborate that by the very nature of that offence it pertains entirely to the public servant concerned as there is no role for the co-accused for discharging the burden of proof.

Section 13(1)(e) reads thus:

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> "A public servant is said to commit the offence of criminal misconduct,- (e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income. Explanation.- For the purposes of this section, 'known sources of income' means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant."

It may be remembered that this Court has held in M. Krishna Reddy v. State Deputy Superintendent of Police, Hyderabad {1992 (4) SCC 45} thus:

> "An analysis of Section 5(1)(e) of the Act, 1947 which corresponds to Section 13(1)(e) of the new Act of 1988 shows that it is not the mere acquisition of property that constitutes an offence under the provisions of the Act but it is the failure to satisfactorily account for such possession that makes the possession objectionable as offending the law."

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Thus, the two postulates must combine together for crystallization into the offence, namely, possession of property or resources disproportionate to the known sources of income of public servant and the inability of the public servant to account for it. Burden of proof regarding the first limb is on the prosecution whereas the onus is on the

public servant to prove the second limb. So it is contended that a non-public servant has no role in the trial of the said offence and hence he cannot conceivably be tagged with the public servant for the offence under Section 13(1)(e) of the P.C. Act.

Section 13 of the P.C. Act is enacted as a substitute for Sections 161 to 165-A of the Penal Code which were part of Chapter IX of that Code under the title "All offences by or relating to public servants". Those sections were deleted from the Penal Code contemporaneous with the enactment of Section 31 of the P.C. Act (vide Section 31 of the P.C. Act). It is appropriate to point out here that in the original old P.C. Act there was no provision analogous to Section 13(1)e), but on the recommendation of Santhanam Committee the said Act was amended in 1964 by incorporating Section 5(1)(e) in the old P.C. Act. Parliament later proceeded to "consolidate and amend the law relating to prevention of corruption" and in the Bill introduced for that purpose the following was declared as per the Statement of Objects and Reasons thereof:

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> "The prevention of Corruption Act, 1947, was amended in 1964 based on the recommendations of the Santhanam Committee. There are provisions in Chapter IX of the Indian Penal Code to deal with public servants and those who abet them by way of the criminal misconduct, there are also provisions in the Criminal Law Amendment Ordinance, 1944, to enable attachment of ill-gotten wealth. The Bill seeks to incorporate all these provision with modifications so as to make the provisions more effective in combating corruption among public servants."

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Thus, one of the objects of the new Act was to incorporate all the provisions to make them more effective. Section 165-A of the Penal Code read like this:

> "Punishment for abetment of offences defined in section 161 or section 165.- Whoever abets any offence punishable under section 161 or section 165, whether or not that offence is committed in consequence of the abetment, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

Therefore, the legislative intent is manifest that abettors of all the different offences under Section 13(1)(e) of the P.C. Act should also be dealt with along with the public servant in the same trial held by the Special Judge.

Shri K.K. Venugopal endeavoured to establish that the offence under Section 13(1)(e) of the P.C. Act is to be understood as an offshoot of the different facets of misconduct of a public servant enumerated in clauses (a) to (d) of the sub-section which a public servant might commit. According to him, unless the ill-gotten wealth has a nexus with the sources contemplated in the preceding clauses the public servant cannot be held guilty under clause (e) of Section 13(1). Learned senior counsel elaborated his

contention like this: If a public servant is able to account for the excess wealth by showing some clear sources, though not legally permissible, but not falling under any of the preceding clauses of the sub-section, he would be discharging the burden cast on him. He cited an example like this:

If the public servant satisfies the court that the excess wealth possessed by him is attributable to the dowry amount which he received from the father-in-law of his son, the public servant is not liable to be convicted under the aforesaid clause.

The above contention perhaps could have been advanced before the enactment of the P.C. Act 1988 because Section 5(1)(e) of the old P.C. Act did not contain an "Explanation" as Section 13(1)(e) now contains. As per the Explanation the "known sources of income" of the public servant, for the purpose of satisfying the court, should be "any lawful source". Besides being the lawful source the Explanation further enjoins that receipt of such income should have been intimated by the public servant in accordance with the provisions of any law applicable to such public servant at the relevant time. So a public servant cannot now escape from the tentacles of Section 13(1)(e) of the P.C. Act by showing other legally forbidden sources, albeit such sources are outside the purview of clauses (a) to (d) of the sub-section.

There is no force in the contention that the offences under Section 13(1)(e) cannot be abetted by another person. "Abetment" is defined in Section 107 of the Penal Code as under:

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> "107. Abetment of a thing.- A person abets the doing of a thing, who-
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> First.- Instigates any person to do that thing; or
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> Secondly,- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that thing."

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For the "First" clause (i.e. instigation) the following Explanation is added to the section:

> "Explanation 1.- A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."

For the "Thirdly" clause (i.e. intentionally aids) the following Explanation is added:

> "Explanation 2.- Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

Shri Shanti Bhushan cited certain illustrations which, according to us, would amplify the cases of abetments fitting with each of the three clauses in Section 107 of the Penal Code vis-a-vis Section 13(1)(e) of the P.C. Act.

The first illustration cited is this:

> If A, a close relative of the public servant tells him of how other public servants have become more wealthy by receiving bribes and A persuades the public servant to do the same in order to become rich and the public servant acts accordingly. If it is a proved position there cannot be any doubt that A has abetted the offence by instigation.

> Next illustration is this:

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> Four persons including the public servant decide to raise a bulk amount through bribery and the remaining persons prompt the public servant to keep such money in their names. If this is a proved position then all the said persons are guilty of abetment through conspiracy. The last illustration is this:

> If a public servant tells A, a close friend of him, that he has acquired considerable wealth through bribery but he cannot keep them as he has no known source of income to account, he requests A to keep the said wealth in A's name, and A obliges the public servant in doing so. If it is a proved position A is guilty of abetment falling under the "Thirdly" clause of Section 107 of the Penal Code.

Such illustrations are apt examples of how the offence under Section 13(1)(e) of the P.C. Act can be abetted by non-public servants. The only mode of prosecuting such offender is through the trial envisaged in the P.C. Act.

For the aforesaid reasons we are unable to appreciate the contentions of the appellants that they are not liable to be proceeded against under the P.C. Act. Accordingly we dismiss these appeals.