

IN THE HIGH COURT FOR THE STATE OF TELANGANA, HYDERABAD

* * * *

WRIT PETITION Nos.14695 of 2021 & BATCH

Between:

Nexus Feeds Limited & Others

Petitioners

VERSUS

The Assistant Commissioner of Income Tax

Respondent

JUDGMENT PRONOUNCED ON: 08.03.2022

THE HON'BLE SRI JUSTICE UJJAL BHUYAN

AND

THE HON'BLE DR. JUSTICE CHILLAKUR SUMALATHA

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? : Yes
3. Whether His Lordship wishes to
see the fair copy of the Judgment? : **Yes**

UJJAL BHUYAN, J

*** THE HON'BLE SRI JUSTICE UJJAL BHUYAN**
AND
THE HON'BLE DR. JUSTICE CHILLAKUR SUMALATHA

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! Counsel for Petitioners

Sri C.V.Narasimham

^ Counsel for the respondents:

Mr.T.Suryakaran Reddy,
 Learned senior counsel and
 Additional Solicitor General
 of India assisted by Mr.
 B.Narasimha Sarma,

<GIST:

> HEAD NOTE:

? Cases referred

¹ (2019) 112 TAXMAN.COM 129 (Chattisgarh)

² (2017) S.C.C. Online Cal. 16142

³ S.L.P. (C) No.2784 of 2020, Order dated 03.02.2020

⁴ Writ Petition No.10280 of 2017, dated 03.08.2017

⁵ Writ Petition Nos.12848, 13160 & 13161 of 2018, dated 02.07.2018

⁶ 2017 (3) T.M.I. 1618 (Bombay High Court)

⁷ 2019 (7) T.M.I. 1001

⁸ 2019 (5) T.M.I. 1086 (S.C.)

⁹ 1995 (2) S.C.C. 630

¹⁰ (2011) 6 SCC 739

¹¹ (1994) 4 SCC 602

¹² (1994) 5 SCC 593

¹³ (1992) 1 SCC 673

¹⁴ (2015) 4 SCC 33

¹⁵ W.P.No.22037 of 2017, decided on 31.08.2021

¹⁶ 2020 (4) ALD 598

¹⁷ (1989) 2 SCC 95

¹⁸ (2007) 6 SCC 100

THE HON'BLE SRI JUSTICE UJJAL BHUYAN

AND

THE HON'BLE DR. JUSTICE CHILLAKUR SUMALATHA

WRIT PETITION Nos.14695, 11680, 11681, 13150, 13156, 13157, 13190, 13769, 13771, 13787, 13804, 13809, 13822, 13823, 14703, 14711, 14713, 14724, 17758, 17761, 17766, 17769, 17770, 17772, 17773, 17775, 17780, 17782, 20469, 20471, 20473, 20476, 20482, 20490, 20492, 20499, 20503, 20523, 23342, 23343, 23351, 23360 AND 23537 of 2021.

COMMON JUDGMENT & ORDER:

(Per Hon'ble Sri Justice Ujjal Bhuyan)

Heard Mr.C.V.Narasimham, learned counsel for the petitioners and Mr.T.Suryakaran Reddy, learned senior counsel and Additional Solicitor General of India assisted by Mr. B.Narasimha Sarma, learned counsel for the respondents.

2. Subject matter of all the writ petitions being identical, those were heard together and are being disposed of by this common judgment and order.

3. W.P.No.11680 of 2021 was argued as the lead case and therefore facts narrated in the said writ petition would be referred to for the sake of convenience.

4. Challenge made in this writ petition is to the legality and validity of the order dated 30.03.2021 passed by the first respondent.

5. Be it stated that order dated 30.03.2021 has been passed by the first respondent under Section 24 (4) (a) (i) of the Prohibition of Benami Property Transactions Act, 1988.

6. By the aforesaid impugned order, first respondent has come to the conclusion that the transaction in question was arranged and executed in a planned manner by M/s.Nexus Feeds Limited, the petitioner, which has been treated as the beneficial owner so that its funds out of unknown sources get parked in the name of the benamidar in the form of shares. Thus it has been held that the consideration has flown through beneficial owner for its immediate or future benefit, direct or indirect; thereby conclusively falling under Section 2 (9) (A) of the Prohibition of Benami Property Transactions Act, 1988. Consequently, in exercise of powers under Sub-Section (2) of Section 18 of the aforesaid Act read with notification No.S.O.1621 (E) dated 18.05.2017 of the Central Board of Direct Taxes r/w Rule 5 of the Prohibition of Benami Property Transactions Rules, 2016 and II Schedule of the Income Tax Act, 1961, respondent No.1, as the Initiating Officer, passed the order dated 30.03.2021 under Section 24 (4) (a) (i) of the aforesaid Act continuing the provisional attachment of the

properties as mentioned in the said order till such time, order is passed by the adjudicating authority under Section 26 (3) of the Prohibition of Benami Property Transactions Act, 1988, further directing that the attached property shall not be transferred, converted, disposed or moved in any manner whatsoever until or unless specifically permitted to do so by the first respondent.

7. Though the impugned order dated 30.03.2021 has been assailed on a number of grounds, the hearing was confined to retrospective applicability of the provisions of the Benami Transactions (Prohibition) Amendment Act, 2016 to the transactions in question. It is the contention of the petitioner that there can be no retrospectivity of the aforesaid Amendment Act of 2016 and hence the impugned order is *ex facie* bad in law being without jurisdiction.

8. At the outset, facts as pleaded by the petitioner may be adverted to.

9. Petitioner M/s. Nexus Feeds Limited is a company and is represented by its managing director Goluguri Ramakrishna Reddy.

10. It is stated that petitioner company had a turnover of Rs.360 crores during the financial year 2019-2020. Authorised share capital of the petitioner company is Rs.62,33,00,000-00. Entire authorised share capital is paid up with promoters holding 1,23,93,000 shares with other individuals and body corporates holding the balance shares.

11. During the years 2011-2012 and 2013-2014 petitioner company went for expansion of manufacturing activities and in order to raise capital, had taken loans from various banks besides raising share capital by issuing shares to interested individuals.

12. Petitioner company had also approached the third respondent for investment since he is in aqua farming and purchases aqua feed from the petitioner company. It is stated that third respondent invested an amount of Rs.45 lakhs and was correspondingly allotted Rs.4,50,000 shares of petitioner company. Respondent No.3 made the above payments through proper banking channel by way of cheques from his bank account held in Union Bank of India.

13. Thus, total shares of 4,50,000 were allotted to the third respondent as on 14.12.2011 which is reflected in the returns filed for the year 2011-2012.

14. There was a search and seizure operation carried out in the premises of the petitioner company by officials of the Income Tax department on 15.03.2017. Though this led to high income tax demand by way of additions in fresh assessment order, most of the additions were set aside in appeal.

15. However, following the above, first respondent issued a show cause notice dated 30.12.2019 to the third respondent as well as to the petitioner under Section 24 (1) of the Prohibition of Benami Property Transactions Act, 1988. Third respondent was termed as the *prima facie* benamidar under Section 2 (10) of the aforesaid Act, whereas petitioner company and its Managing Director Goluguri Ramakrishna Reddy were termed as *prima facie* beneficial owners under Section 2 (12) of the aforesaid Act. Reference was made to the search and seizure operations carried on by the Income Tax department on 15.03.2017 wherefrom, it was stated, certain incriminating materials were found and seized. In this

background, proceedings under the Prohibition of Benami Property Transactions Act, 1988 were initiated in connection with which statement of third respondent was recorded on 19.11.2019. First respondent as the Initiating Officer stated that investments made in the property mentioned in the show cause notice is benami transaction within the meaning of Section 2 (9) (A) of the aforesaid Act, thereby giving rise to the conclusion that third respondent is a benamidar and the property as mentioned is benami property. Thus, third respondent was directed to show cause as to why the entire transaction should not be treated as benami transaction, him as benamidar and petitioner and its directors as beneficial owners.

16. It may be mentioned that first respondent passed an order of provisional attachment under Section 24 (3) of the Prohibition of Benami Property Transactions Act, 1988 (briefly, 'the 1988 Act', hereinafter) on 31.12.2019. By the aforesaid order, properties mentioned thereunder were provisionally attached for a period of 90 days from the last date of the month in which the notice under Section 24 (1) of the 1988 Act was issued i.e. from 31.12.2019 with the further

direction that the attached property should not be transferred, converted, disposed or moved in any manner whatsoever until or unless specifically permitted to do so by the first respondent. The properties in question are as under:

1. The movable property, being 4,50,000 shares of M/s. Nexus Feeds Limited worth Rs.45,00,000/- allotted in FY 2011-12.
2. Proceeds thereof being corresponding "Fixed Asset-Building" to the tune of equivalent amount acquired as against the share capital introduced in the books of M/s. Nexus Feeds Limited during the FY 2011-12 so routed through benami transaction.

17. Petitioner submitted reply to the first respondent on 17.01.2020. It was pointed out that though petitioner and the directors were not specifically asked to submit reply, being aggrieved persons, they had filed reply to the show cause notice. It was further pointed out that the said reply should be treated as an interim reply only as detailed reply would be filed after receipt of documents called for by the petitioner. Though the reply by the petitioner was on various aspects, such as, the notice and provisional attachment order were passed on mere assumptions and presumptions, allegations being baseless, notice being issued with preconceived mind, etc., however, it was specifically urged that the impugned action of the first respondent was on the

basis of Benami Transactions (Prohibition) Amendment Act, 2016 by applying the same retrospectively. It was contended that Benami Transactions (Prohibition) Amendment Act, 2016 ('Amendment Act, 2016', hereinafter) became operative from 01.11.2016. Since the impugned transactions took place in the year 2011, the Amendment Act, 2016 cannot be applied retrospectively to the said transaction. The very foundation for issuance of the show cause notice and the provisional attachment order being flawed, the same is required to be recalled / set aside.

18. However, first respondent passed the impugned order dated 30.03.2021. On the question of retrospectivity, first respondent took the stand that by the Amendment Act, 2016 machinery provisions have been introduced only to plug the loopholes in the 1988 Act. Section 24 of the Amendment Act, 2016 is a machinery provision which is intended to supplement the substantive provisions of the 1988 Act. The provisions of the 1988 Act and the Amendment Act, 2016 would have to be harmonized. Otherwise, beneficial owners would continue to enjoy the fruits of ill-gotten wealth and the society at large would continue to suffer which would run

counter to the very object and purpose of the 1988 Act. Reference has been made to an order dated 03.02.2020 passed by the Supreme Court in SLP (C) No.2784/2020, **Union of India Vs. M/s. Ganpati Dealcom Private Limited**, whereby operation of the related judgment of the Calcutta High Court holding that the 2016 Amendment of the 1988 Act is prospective in nature has been stayed. After discussing the issues raised in the show cause notice and the reply given, first respondent has held that it has clearly come to light that the transaction was arranged and executed in a planned manner by M/s. Nexus Feeds Limited (petitioner), the beneficial owner, so that, its funds out of unknown sources gets parked in the name of the benamidar in the form of shares. Thus, it has been held that it is proved beyond reasonable doubt that the consideration has flown through the beneficial owner for its immediate or future benefit, direct or indirect; thereby conclusively falling within the ambit of Section 2 (9) (A) of the 1988 Act. By the aforesaid order, first respondent has continued with the provisional attachment of the property under Section 24 (4) (a) (i) of the 1988 Act till such time, order is passed by the adjudicating authority under Section 26 (3) of the 1988 Act. First respondent has

further directed that the attached property shall not be transferred, converted, disposed or moved in any manner whatsoever until or unless specifically permitted to do so by him. Though we had extracted the properties attached as per the provisional attachment order, in the impugned order the following properties have been attached :

Benami Property (Subject matter of Benami Transaction)	1. The movable property, being 4,50,000 shares of M/s. Nexus Feeds Limited worth Rs.45,00,000/- allotted in FY 2011-12 on 14.12.2011.			
	2. Proceeds thereof being corresponding "Current & Non-Current Assets" added during the FY 2011-12 in the form of			
	Sl.No.	Asset Head	Added during the year	Outstanding as on 31.03.2012
	1	Buildings	Rs.6,39,45,511/-	Rs.11,21,97,080/-
	2	Plant and machinery	Rs.44,80,99,907/-	Rs.41,71,49,102/-
	3	Other Fixed Assets	Rs.3,60,545/-	Rs.9,40,167/-
	4	Loans and Advances	Rs.1,85,24,614/-	Rs.4,52,62,034/-
	5	Sundry debtors	Rs.3,69,56,390/-	Rs.3,75,99,018/-
	6	Other Current Assets	Rs.72,58,143/-	Rs.72,58,143/-
as per the Balance Sheet of the Company as on 31/03/2012, to the tune of Rs.45,00,000/-equivalent to the share capital routed through benami transaction and introduced in the books of M/s. Nexus Feeds Ltd. during the FY 2011-12.				
3. Lease rent receivable from M/s. Nakshatra Feeds India Private Limited, Vijayawada @ Rs.15 lakhs per month towards leasing of Buildings and Plant & Machinery (fixed Assets) as				

	per the registered lease agreement dated 21/08/2019 with Nexus Feeds Limited.
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19. Aggrieved, the present writ petition has been filed seeking the relief as indicated above.

20. As already mentioned, though the impugned order has been assailed on various grounds, the hearing was confined to the alleged retrospective application of the Amendment Act, 2016 to the transactions in question which took place in the year 2011. According to the petitioner, the Amendment Act, 2016 cannot be applied retrospectively; and therefore the very foundation for issuance of show cause notice and provisional attachment order is absent, thereby rendering the impugned order *non-est* in the eyes of law being without jurisdiction.

21. This Court by order dated 29.11.2021 in Interlocutory Application No.1 of 2021 in Writ Petition No.11680 of 2021 granted interim stay as prayed for by the petitioner subject to the condition that petitioner should not transfer 4,50,000 shares allotted by it in the Financial Year 2011-12 on 14.12.2011 in the name of respondent No.3.

22. Respondent Nos.1, 2 and 5 have filed common counter-affidavit through Mr. N. Srinivasa Rao, serving as respondent No.1 (Initiating Officer).

23. Answering respondents have narrated the background facts in the following manner:

23.1 A search and seizure operation was conducted by the Income Tax department in the case of the petitioner and its group concerns on 15.03.2017. A copy of the appraisal report was shared with the office of respondent No.1 in view of potential benami transactions. After perusal of the confidential appraisal report, approval under Section 23 of the 1988 Act, as amended, was obtained from the approving authority for conducting further enquiries.

23.2 As per the report, petitioner-company and its group concerns have generated unaccounted money by inflating the purchase cost of plant and machinery as well as showing bogus expenditures. The unaccounted money thus generated has been used to acquire properties in the name of benamidars and to introduce the same as share capital in the

books of petitioner-company and its group concerns in the name of the benamidars.

23.3 Original PAN cards of 38 persons, original bank pass books of 18 persons, three digital signature tokens, original voter identity cards of 17 persons who were shareholders of the petitioner-company and its group concerns were found in one of the office premises of the petitioner-company during the course of search and seizure operations, and consequently seized.

23.4 Further enquiries revealed that respondent No.3 was allotted 4,50,000 shares of petitioner-company worth Rs.45,00,000.00 in the Financial Year 2011-12 on 14.12.2011. However, respondent No.3 has not filed income tax returns.

23.5 Sworn statement of respondent No.3 was recorded under Section 19(1)(b) of the 1988 Act on 19.11.2019. In the said statement, respondent No.3 denied having invested in shares. He stated that he was acting as the benamidar of the petitioner-company; his share certificates and PAN card details were with the petitioner-company. According to

respondent No.3, he is a mechanic having annual income of Rs.20,000/- only.

23.6 Therefore, there was reason to believe that the transaction was a benami transaction under Section 2(9)(A) read with 2 (9) (C) of the 1988 Act.

23.7 In this connection, show-cause notice under Section 24(1) of the 1988 Act was issued on 30.12.2019 treating respondent No.3 as *prima facie* benamidar of the petitioner-company which is the beneficial owner in respect of the subject shares. The shares in question along with the proceeds thereof introduced in the books of the petitioner-company during the Financial Year 2011-12 were treated as benami property.

23.8 In response to the show-cause notice, respondent No.3 submitted reply wherein the statements made on 19.11.2019 were retracted and the shares were claimed to have been purchased out of his own funds. Similar replies were received in 21 other cases. On enquiry, four such persons treated as benamidars denied filing reply. Therefore, reply of respondent No.3 was considered to be not acceptable

whereafter bank statements of respondent No.3 were called for and verified. Except the transaction of Rs.45 lakhs, there were no other major transactions.

24. Insofar objection of the petitioner to retrospective application of the Amendment Act of 2016 is concerned, it is stated that by the Amendment Act of 2016 only the machinery provisions have been incorporated. Benami transactions were prohibited even under the un-amended 1988 Act. Reference has been made to the decision of the Chattisgarh High Court in **Tulsiram vs. A.C.I.T.**¹ wherein it has been held that provisions of the Amendment Act, 2016 can be applied in respect of transactions carried out prior to 01.11.2016. Though the Calcutta High Court in the case of **M/s. B.R.C. Construction Company Private Limited vs. Union of India**² had held that the Amendment Act of 2016 is prospective in nature, operation of the said judgment has been stayed by the Supreme Court in **Union of India vs. M/s. Ganpati Dealcom Private Limited**³. Therefore, issue of applicability of the Amendment Act of 2016 retrospectively or otherwise, is pending before the Supreme Court.

¹ (2019) 112 TAXMAN.COM 129 (Chattisgarh)

² (2017) S.C.C. Online Cal. 16142

³ S.L.P. (C) No.2784 of 2020, Order dated 03.02.2020

25. Answering respondents have also denied the allegation of the petitioner that the impugned order is in violation of the principles of natural justice or that it is without any authority of law or that the impugned order has traversed beyond the show-cause notice as attachment of movable and immovable properties is much more than the movable and immovable properties mentioned in the show-cause notice, etc.

26. It is stated that petitioner has approached the High Court prematurely without approaching the adjudicating authority. The competent authority under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 is the adjudicating authority under the 1988 Act. In cases from Andhra Pradesh and Telangana States, the competent authority is at Chennai which had started functioning from 01.07.2021. Reference has been made to decisions of the Madhya Pradesh High Court in **Kailash Assudani vs. Commissioner of Income Tax**⁴ and of the Madras High Court in **Dinesh Chand Surana vs. Deputy Commissioner of Income Tax**⁵ to contend that the

⁴ Writ Petition No.10280 of 2017, dated 03.08.2017

⁵ Writ Petition Nos.12848, 13160 & 13161 of 2018, dated 02.07.2018

impugned order is only provisional in nature, and therefore, the Writ Petition filed is premature.

27. In the circumstances, answering respondents seek vacation of the interim order dated 29.04.2021 passed in Interlocutory Application No.1 of 2021 in Writ Petition No.11680 of 2021 and resultant dismissal of the Writ Petition.

28. Petitioner has filed reply-affidavit to the counter-affidavit filed by respondent Nos.1, 2 and 5 denying the contentions advanced by the answering respondents and reiterating the averments made in the Writ Petition. It is stated that statement of respondent No.3 was extracted under duress which was later on retracted by respondent No.3. A retracted statement cannot be the basis for bringing such a serious charge of benami transaction.

29. It is asserted that Section 2 (9) (A) or Section 2 (9) (C) of the 1988 Act were inserted by way of the Amendment Act of 2016. In the Amendment Act of 2016 itself, it was clearly mentioned that it would be operative w.e.f. 01.11.2016. Therefore, on the date of the transaction or commission of the alleged offence, Section 2 (9) (A) or Section 2 (9) (C) were not

in existence. As such, passing of an attachment order on the basis of non-existent provision would be wholly illegal and unconstitutional, being violative of Article 20(1) of the Constitution of India. It is asserted that respondents had erred in giving retrospective application to the Amendment Act of 2016. The legislative intent is explicit in that it was clarified that provisions of the Amendment Act of 2016 would be applicable from 01.11.2016. By the Amendment Act of 2016, definitions of '*benami property*' or '*benami transaction*' have been enlarged to a large extent, and therefore, retrospective application of such amended / enlarged provisions would infringe upon the rights of parties. Finally, it is contended that since the very jurisdiction of respondent No.1 in issuing the show-cause notice and passing of the impugned order dated 30.03.2021 has been questioned, besides violation of the principles of natural justice, the Writ Petition would be maintainable notwithstanding availability of alternative remedy under the statute.

30. After filing of the reply-affidavit by the petitioner, respondent Nos.1, 2 and 5 have filed additional counter-affidavit. In addition to justifying issuance of the show-cause

notice and passing of the provisional attachment order, a detailed analysis of the 1988 Act as well as of the Amendment Act of 2016 has been provided whereafter it is contended that Sub-Section (2) of Section 3 would be applicable upon any benami transaction made prior to 01.11.2016 and Sub-Section (3) of Section 3 would be applicable to those benami transactions made on or after commencement of the Amendment Act of 2016, i.e., 01.11.2016. Referring to Section 5 of 1988 Act, which was subsequently amended by the Amendment Act of 2016, it is contended that even prior to the amendment, Section 5 provided for acquisition of property by the Government without compensation which is nothing but confiscation of property. Since the amendments were procedural in nature, those would be applicable with retrospective effect. Therefore, the 1988 Act, as it stands today, would apply irrespective of the period of purchase of the alleged benami property. Reference has been made to the speech of the Hon'ble Finance Minister while introducing the related Bill in the Parliament to contend that the Amendment Act of 2016 has been enacted to amend the law of 1988 from the date of inception.

31. While asserting that the impugned order has not traversed beyond the show-cause notice, it is stated that the same is only provisional in nature; reference has been made to the adjudicating authority under Section 24(5) of the 1988 Act who shall pass appropriate order under Section 26(3) of the said Act either confirming or revoking the order of provisional attachment.

32. Mr.C.V.Narasimham, learned counsel for the petitioner, submits that the impugned order is *ex facie* illegal, being without jurisdiction. It is based on the Amendment Act of 2016 whereby the transaction entered into by the petitioner with respondent No.3 in the year 2011 has been alleged to be a benami transaction. He submits that there is no dispute that the transaction which is being targeted by respondent No.1 is a transaction which took place in the year 2011 pertaining to purchase of 4,50,000 shares of the petitioner by respondent No.3. According to him, the same could not have been declared as a benami transaction by applying the Amendment Act, 2016.

32.1 Learned counsel for the petitioner has referred to notification dated 25.10.2016 issued by the Central Board of

Direct Taxes (C.B.D.T.) and submits that as per the said notification which was issued in exercise of the powers conferred by Sub-Section (2) of Section 1 of the Amendment Act, 2016, the Central Government appointed the first day of November, 2016 [01.11.2016] as the date on which provisions of the Amendment Act, 2016 had come into force.

32.2 As per Section 173 of the Finance (No.2) Act, 2019, an Explanation was inserted in Section 23 of the 1988 Act. But it was made clear that the said Explanation would have effect from 01.11.2016 i.e. having retrospective effect. On the other hand, under Section 174 certain amendments were introduced in Section 24 of the 1988 Act w.e.f. 01.09.2019 i.e. prospectively. Similarly, amendments to Sections 26, 30, 46 and 47 of the 1988 Act were given effect to prospectively from 01.09.2019. Again, two new Sections were inserted in the 1988 Act prospectively, viz., 54A and 54B w.e.f. 01.09.2019. From this, he submits that if an Act is to be given effect to from a prior date i.e., retrospectively it is specifically mentioned or provided in the Act itself. Pointing out to amendments to Section 23 of the 1988 Act, he submits that Finance (No.2) Act, 2019 was very clear that the Explanation

inserted by way of the amendment would be deemed to have been inserted with effect from a prior date i.e., retrospectively from 01.11.2016. He has also referred to Chapter VI of Finance (No.2) Act, 2019 whereby certain amendments to the 1988 Act were introduced.

32.3 Learned counsel for the petitioners has made a comparative analysis of the provisions of the 1988 Act as well as the Amendment Act, 2016. He has particularly referred to the definition of benami transaction under the 1988 Act as well as under the Amendment Act, 2016. Referring to Section 2(a) of the 1988 Act, he submits that '*benami transaction*' was defined thereunder to mean, "*any transaction in which property was transferred to one person for a consideration paid or provided by another person*".

32.4 In contra distinction to the above definition, the Amendment Act of 2016 has completely enlarged the meaning of '*benami transaction*'. As a matter of fact, Section 4 of the Amendment Act of 2016 provided that Section 2 of the 1988 Act (in its entirety) stood substituted by the new Section 2 as per Section 4 of the Amendment Act of 2016.

32.5 Learned counsel for the petitioners has referred to Clauses (A), (B), (C) and (D) of Sub-Section (9) of Section 2 as substituted by the Amendment Act, 2016 and contends that the offence of benami transaction as defined under the 1988 Act was enlarged to such an extent by the Amendment Act of 2016 that various transactions hitherto not falling with the definition of '*benami transaction*' under Section 2(a) of the 1988 Act would now fall within the definition of '*benami transaction*' and would be construed to be a penal offence.

32.6 Referring to the stand taken by respondent No.1 in the show-cause notice as well as in the impugned order which has been further supported by the respondents in the two affidavits, he submits that it is the specific case of respondent No.1 that the transaction entered into between the petitioner and respondent No.3 in the year 2011 would be covered by the definition of '*benami transaction*' under Section 2(9)(A) read with Section 2 (9) (C) of the new definition substituted by the Amendment Act of 2016. Sections 2(9)(A) and 2(9)(C) were not in existence when the transaction in question took place. The aforesaid definitions came into the statute book w.e.f. 01.11.2016. Therefore, a transaction which was not an

offence in the year 2011 cannot now be alleged to be an offence by invoking the provisions of Section 2(9)(A) and 2(9)(C) respectively. He further submits that if this is allowed, it would be a clear case of violation of the provisions of Article 20(1) of the Constitution of India which says that no person shall be convicted of any offence except for a violation of a law in force at the time of commission of the act charged as an offence.

32.7 In support of his above submissions, learned counsel for the petitioner has submitted a compilation of judgments from which particular reliance have been placed on the following decisions, viz., **Joseph Ishrat vs. Roxy Nishikant Gaikwad**⁶, **Niharika Jain vs. Union of India**⁷, **Union of India vs. M/s. Ganpati Dealcom Private Limited** (3 supra), **Mangathai Ammal vs. Rajeshwari**⁸ and **R. Rajagopal Reddy vs. Padmini Chandrasekharan**⁹.

32.8 Mr.C.V.Narasimham, learned counsel for the petitioner, submits that the Rajasthan High Court in **Niharika Jain** (7 supra) and the Calcutta High Court in

⁶ 2017 (3) T.M.I. 1618 (Bombay High Court)

⁷ 2019 (7) T.M.I. 1001

⁸ 2019 (5) T.M.I. 1086 (S.C.)

⁹ 1995 (2) S.C.C. 630

M/s. Ganpati Dealcom Private Limited (3 supra), have clearly held that the Amendment Act of 2016 is prospective and cannot be applied retrospectively to transactions which took place prior to 01.11.2016. He therefore submits that on this count alone, this Court may set aside and quash the impugned order. However, he submits that in the event Court is not inclined to accept his submissions on the point of retrospectivity, he may be given an opportunity to urge the other grounds of challenge to the impugned order.

33. On the other hand, Mr.T.Suryakaran Reddy, learned senior counsel and Additional Solicitor General of India, submits that on a comparative analysis of the provisions of the 1988 Act and the Amendment Act of 2016, it is evident that the substitutions brought in by way of the amendment relates back to the original Act, i.e., the 1988 Act. Therefore, the provisions introduced by the Amendment Act of 2016 should be read as part of the 1988 Act having effect from the very beginning.

33.1 Insofar decision of the Calcutta High Court in **M/s. Ganpati Dealcom Private Limited** (3 supra) is concerned, operation of the said judgment has been stayed by

the Supreme Court. Further, Division Bench of the Rajasthan High Court has stayed the judgment of the learned Single Judge in **Niharika Jain** (7 supra), following the above decision of the Supreme Court.

33.2 He has referred to provisions of Section 1(3) of the 1988 Act which says that provisions of Sections 3, 5, and 8 shall come into force at once, and the remaining provisions of the 1988 Act shall be deemed to have come into force on and from 19.05.1988.

33.3 Learned Additional Solicitor General has referred to Section 3 of the 1988 Act as substituted by the Amendment Act of 2016. While Sub-Section (1) of Section 3 of the 1988 Act, which says that no person shall enter into any benami transaction, has been retained, Sub-Section (2) has been omitted, whereafter Sub-Section (3) has been renumbered as Sub-Section (2). As per the renumbered Sub-Section (2), the punishment for entering into benami transaction is imprisonment for a term which may extend to three years or with fine or with both; this provision albeit renumbered has been retained. However, a new Sub-Section (3) has been introduced as per which whoever enters into any benami

transaction on and after commencement of the Amendment Act of 2016 i.e., after 01.11.2016 shall notwithstanding anything contained in Sub-Section (2), be punishable in accordance with the provisions contained in Chapter VII. As per Sub-Section (2) of Section 53 which falls under Chapter VII, whoever is found guilty of the offence of benami transaction shall be punishable with rigorous imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine which may extend to 25% of the fair market value of the property.

33.4 On the above basis, he would like to emphasize that for the offence of benami transaction prior to 01.11.2016 the penalty provided for in the 1988 Act has been retained. But, for the offence of benami transaction post 01.11.2016, the penalty has been enhanced. Therefore, his submission is that provisions of the Amendment Act of 2016 would be applicable to a transaction which took place prior to 01.11.2016. But the offence of benami transaction post 01.11.2016 may invite a stiffer penalty.

33.5 Mr.T.Suryakaran Reddy, learned Senior Counsel, has also drawn the attention of the Court to the provisions of Section 5 of the 1988 Act as well as under the Amendment Act of 2016 and submits that, in substance, both the provisions provide for confiscation of property held benami.

33.6 Learned Additional Solicitor General of India submits that only a provisional attachment order has been passed. Matter is at an interlocutory stage. Adjudicating authority is yet to adjudicate and decide as to whether the transaction was a benami transaction; whether the property in question is a benami property; and whether respondent No.3 is a benamidar of the beneficial owner, i.e., the petitioner, under Section 26 of the Amendment Act of 2016. At the present stage, it is only a complaint. Therefore, at this stage, no interference is called for. In any view of the matter, petitioner would have all the right to contest the adjudication proceedings before the adjudicating authority and the right to prefer appeal if aggrieved by any order passed by the adjudicating authority under Section 26; firstly, before the Appellate Tribunal under Section 30 and thereafter to the High Court under Section 49. He therefore submits that the

Writ Petitions so filed are premature and all the petitioners should be relegated to the forum of the adjudicating authority. Consequently, writ petitions should be dismissed.

34. Submissions made by learned counsel for the parties have received the due consideration of the Court.

35. At the outset, we may advert to the provisions of the 1988 Act. Initially, it was called as Benami Transactions (Prohibition) Act, 1988. It was enacted by the Parliament to prohibit benami transactions and the right to recover property held benami and for matters connected therewith or incidental thereto.

36. Law Commission was requested by the Central Government to examine the subject on benami transactions in all its ramifications. Law Commission submitted its 57th report. To implement the recommendations of the 57th report of the Law Commission on benami transactions, President promulgated the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988. While the Ordinance provided that no suit, claim or action to enforce any right in respect of any property held benami would lie and

no defence based on any right in respect of any property held benami would be allowed in any suit, claim or action, it however, made two exceptions regarding property held by a coparcener in a Hindu undivided family for the benefit of the coparceners and property held by a trustee or other person standing in a fiduciary capacity for the benefit of the other person. Provisions of the Ordinance received a mixed response from the press and the public. A view was expressed that it was a halfhearted measure to tackle the problem effectively and in a comprehensive manner. It was, therefore, felt that a bill to replace the Ordinance should be brought out as a comprehensive law on benami transactions touching all aspects. Accordingly, Law Commission was requested to examine the subject in all its ramifications. Law Commission submitted its 130th report making certain recommendations. Law Commission recommended as follows:

- i. Benami transactions should cover all kinds of property;
- ii. Entering into a benami transaction after the commencement of the new law would be declared as an offence with the exception that transactions entered into by the husband or father for the transfer of properties in the name of the wife or unmarried daughter for their benefit;

iii. Voluntary organizations should be authorized to file complaints against benami transactions and District Judges should be designated as Tribunals;

iv. As both the benamidars and the true owner are equal participants to a criminal transaction, by prohibiting the true owner's right to recover property held benami as was provided in the Ordinance would be construed as undue enrichment to the benamidar. Therefore, it was suggested that such property should be acquired from the benamidar which provisions should also be applied when a benamidar retransfers the property back to the true owner for an apparent or no consideration.

v. In addition to Section 82 of the Indian Trusts Act, 1882, Sections 81 and 94 of that Act should also be omitted;

vi. Appointment of an authority like the Charity Commissioner, for supervising private trusts should be provided for.

37. Recommendations of the Law Commission were examined, whereafter the Benami Transactions (Prohibition) Bill was introduced in the Parliament. The Bill provided for among other things the following and sought to achieve the resultant objective:

(a) entering into *benami* transactions after the commencement of the new law will be an offence, with an exception for the transfer of properties by the husband, or father for the benefit of the wife or unmarried daughters;

(b) all the properties *held benami* will be subject to acquisition by such authority, in such manner and after following such procedure, as may be prescribed by rules under the proposed legislation. As a result of the provisions of the Ordinance and the prohibition of entering into *benami*

transactions, the *benamidar* would be acquiring the rights to the property by the mere lending of his name and without investing any money for the purchase of such property. Accordingly, it is provided that no amount shall be payable for the acquisition of any property held *benami*;

(c) Sections 81 and 94 of the Indian Trusts Act, 1882, shall also be repealed.

38. Subsequently, the Bill led to enactment of The Benami Transactions (Prohibition) Act, 1988.

39. From an analysis of the above, it is evident that the primary objective of the aforesaid Act was to outlaw benami transactions by making it an offence. All properties held benami would be subject to acquisition as the benamidar would be acquiring the rights to the property by mere lending of his name and without investing any money for the purchase of such property. Thus there was no question of payment of any compensation for the acquisition of any property held benami.

40. Sub-Section (3) of Section (1) provided that while provisions of Sections 3, 5 and 8 would come into force at once, the remaining provisions would be deemed to have come into force on the 19th day of May, 1988.

40.1 Section 2 (a) defined '*benami transaction*' to mean any transaction in which property was transferred to one person for a consideration paid or provided by another person.

42. Section 3 prohibited benami transactions. As per Sub-Section (1), no person shall enter into any benami transaction. The exception to benami transaction found place in Sub-Section (2). It clarified that the prohibition under Sub-Section (1) would not apply to purchase of property by any person in the name of his wife or unmarried daughter; and securities held by a depositary. Since benami transaction was declared as an offence with immediate coming into force of the said Act, Sub-Section (3) provided that anyone entering into benami transaction would be punished with imprisonment for a term which may extend to three years or with fine or with both. According to Sub-Section (4), an offence under Section 3 i.e. offence of benami transaction would be non-cognizable and bailable.

43. Thus, Section 3 not only prohibited benami transaction barring the exceptions carved out in Sub-Section (2) but also made it a non-cognizable and bailable offence punishable with

imprisonment for a term which may extend to three years or with fine or with both.

44. Section 4 dealt with prohibition of the right to recover property held benami. As per Sub-Section (1), no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person, shall lie by or on behalf of a person claiming to be the real owner of such property. Sub-Section (2) clarified that no defence based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. However, Sub-Section (3) says that the above prohibition would not apply where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family or where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity and the property is held for the benefit of

another person for whom he is a trustee or towards whom he stands in such capacity.

45. Sub-Section (1) of Section 5 made it clear that all properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedure as may be prescribed. As per Sub-Section (2), no amount shall be payable for the acquisition of any property under Sub-Section (1).

46. Section 6 clarified that provisions of the said Act would not affect provisions of Section 53 of the Transfer of Property Act, 1882 or any law relating to transfer for an illegal purpose. Section 7 provided for repeal of certain provisions of other Acts. While power to make rules by the Central Government was provided for in Section 8, Section 9 dealt with repeal and savings.

47. In the year 2016 Parliament enacted the Benami Transactions (Prohibition) Amendment Act, 2016 (already referred to as 'the Amendment Act of 2016'). As per the preamble to the Amendment Act of 2016, it is an Act to

further amend the Benami Transactions (Prohibition) Act, 1988 (already referred to as 'the 1988 Act').

48. Before we advert to the various provisions of the Amendment Act of 2016, it would be useful to refer to the speech of the Finance Minister in Parliament as to why the Amendment Act of 2016 was enacted to amend the 1988 Act instead of enacting a new law. According to the Finance Minister, the Standing Committee had suggested a new Bill to replace the 1988 Act. 1988 Act, a small Act, provided for acquisition of property. But when there is acquisition of property, compensation has to be paid. That apart, there was no vesting of such acquired property in the Government though it was an acquisition in favour of the Government. But the entire procedure of acquisition was absent. If the Rules provided for such procedure, then it would have been a case of excessive delegation. From 1988 the Rules had not been framed. The 1988 Act also provided for prosecution. Therefore, if the recommendation of the Standing Committee for repealing the 1988 Act and for recreation of a new law in its place would have been accepted, it would have amounted to granting immunity to all people who had acquired benami

properties between 1988 and 2016. This is because the penal provisions of the 1988 Act would have stood repealed. In the event of recreating a new law with such penal provisions, it could only be applied to properties which are benami and entered into after 2016. Since penal laws cannot be made retrospective, the new law would have meant granting immunity to persons carrying out benami transactions during the period from 1988 to 2016, the Amendment Act of 2016 was enacted to amend the 1988 Act.

49. Having noted the above, it may be mentioned that as per Section 3 of the Amendment Act of 2016, Sub-Section (1) of Section (1) of the 1988 Act stood substituted and the 1988 Act is now called “the Prohibition of Benami Property Transactions Act, 1988” (we continue to refer to the same as ‘the 1988 Act’). By Section 4 of the Amendment Act of 2016, Section 2 of the principal Act i.e., the 1988 Act is completely substituted. As per the amended Section 2 (8) of the 1988 Act, ‘benami property’ has been defined to mean any property which is the subject matter of a benami transaction and also includes the proceeds from such property. Section 2 (9)

defines ‘benami transaction’. Since this definition is relevant, the same is extracted hereunder:

- (9) “benami transaction” means,—
 - (A) a transaction or an arrangement—
 - (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
 - (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—
 - (i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;
 - (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;
 - (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;
 - (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint- owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or
 - (B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or
 - (C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;
 - (D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

Explanation.—For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), if, under any law for the time being in force,—

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

(ii) stamp duty on such transaction or arrangement has been paid; and

(iii) the contract has been registered.

50. Thus, we find that there is a qualitative change in the definition of 'benami transaction' from the unamended 1988 Act in the Amendment Act of 2016. In fact, the scope and ambit of the expression 'benami transaction' has been made much wider post the amendment. As per Clause (A), a benami transaction would mean a transaction or an arrangement where a property is transferred to or is held by a person and the consideration for such property has been provided or paid by another person; and the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, barring the four exceptions carved out. Clause (B) says that a transaction or an arrangement in respect of a property carried out or made in a fictitious manner would be construed to be a benami transaction. Clause (C) provides that a benami transaction would mean a transaction or an arrangement in respect of a property where the owner of the property is not aware of or denies knowledge of such ownership. Finally as per Clause

(D), a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious would also be treated as benami transaction.

51. As per Section 2 (10) 'benamidar' has been defined to mean a person or a fictitious person as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name. Likewise, 'beneficial owner' has been defined in Section 2 (12) to mean a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar.

52. Section 6 of the Amendment Act of 2016 provides for amendment of Section 3 of the principal Act. While Sub-Section (1) of Section 3 has been retained, Sub-Section (2) is omitted. Upon such omission, Sub-Section (3) of the principal Act has been renumbered as Sub-Section (2) whereafter a new Sub-Section (3) has been inserted which says that whoever enters into any benami transaction on and after the date of commencement of the Amendment Act of 2016, shall, notwithstanding anything contained in Sub-Section (2), be punishable in accordance with the provisions contained in Chapter VII. While we are on the new Sub-

Section (3), we may mention that Chapter VII deals with offences and prosecution and includes three sections i.e. 53, 54 and 55. Sub-Section (2) of Section 53 provides for a stiffer penalty with imposition of fine not being an optional penalty. Sub-Section (4) of the principal Act has been omitted.

53. For a better appreciation of Section 3 of the 1988 Act as amended by the Amendment Act of 2016, we may reconstruct Section 3 as it stands today post amendment as under:

3. Prohibition of *benami* transactions.

(1) No person shall enter into any *benami* transaction.

(2) Whoever enters into any *benami* transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(3) Whoever enters into any *benami* transaction on and after the date of commencement of the *Benami* Transactions (Prohibition) Amendment Act, 2016, shall, notwithstanding anything contained in Sub-Section (2), be punishable in accordance with the provisions contained in Chapter VII.

54. As per Section 7 of the Amendment Act of 2016, Sub-Section (3) of Section 4 of the principal Act has been omitted. Sections 5 and 6 of the principal Act have been substituted in entirety as per Section 8 of the Amendment Act of 2016. As per the substituted Section 5, any property which is the subject matter of *benami* transaction shall be liable to

confiscation by the Central Government. Thus, there is a perceptible shift from Section 5 of the principle Act to the present Section 5 substituted by the Amendment Act of 2016. While earlier, all properties held benami were liable to acquisition, post amendment those are liable to be confiscated by the Central Government.

55. Under the new Section 6 there is complete prohibition on retransfer of benami property by a benamidar to the beneficial owner or any other person acting on his behalf.

56. Section 9 of the Amendment Act of 2016 provides for insertion of new Chapters III to VII after Section 6 of the principal Act. On being so substituted, Chapter III deals with authorities including adjudicating authority with Section 18 dealing with jurisdiction of the various authorities; Chapter IV provides for attachment, adjudication and confiscation. Section 24 which is the new provision and which was not there in the 1988 Act finds place in Chapter IV. It provides for notice and attachment of property involved in benami transaction.

57. Sub-Section (1) of Section 24 says that where the Initiating Officer on the basis of material in his possession has reason to believe that any person is a benamidar in respect of a property, he may after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice as to why the property should not be treated as benami property. Sub-Section (2) provides for issuance of a copy of such notice to the beneficial owner also if his identity is known. As per Sub-Section (3) where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the property during the period specified in the notice, he may with the previous approval of the approving authority by order in writing, attach provisionally the property in the manner prescribed for a period not exceeding 90 days from the date of issue of notice under Sub-Section (1). Sub-Section (4) provides for continuation of provisional attachment till passing of order by the adjudicating authority under Sub-Section (3) of Section 26 or for revoking the provisional attachment of the property. Further, where there is no provisional attachment under Sub-Section (3), the Initiating Officer may, after making such enquiries and calling for such

reports or evidence, shall within a period of 90 days from the date of issue of notice under Sub-Section (1), pass an order provisionally attaching the property with prior approval of the approving authority till passing of order by the adjudicating authority under Sub-Section (3) of Section 26 or till the Initiating Officer may decide not to attach the property as specified in the notice with the prior approval of the approving authority. As per Sub-Section (5), in a case where the Initiating Officer passes an order continuing the provisional attachment of the property, he shall within 15 days from the date of the attachment draw up the statement of the case and refer it to the adjudicating authority.

58. Section 25 deals with manner of service of notice under Sub-Section (1) of Section 24.

59. This brings us to Section 26 providing for adjudication of benami property. Sub-Section (1) provides for issuance of notice to the persons mentioned therein including benamidar, beneficial owner etc., by the adjudicating authority upon receipt of reference under Sub-Section (5) of Section 24. Sub-Section (2) says that where the property is held jointly by more than one person, the adjudicating authority shall make

all endeavours to serve notice to all persons holding the property. Sub-Section (3) says that the adjudicating authority after considering the reply to the notice issued and after causing such enquiries as deemed fit and taking into account all relevant materials besides providing an opportunity of hearing to the benamidar and any other person claiming to be the owner of the property, pass an order holding the property not to be a benami property or holding the property to be a benami property. If the property is held to be benami property, then the attachment order shall be confirmed and if the property is held to be not a benami property, the attachment order is to be revoked. As per Sub-Section (7), no order under Sub-Section (3) shall be passed after expiry of one year from the end of the month in which the reference under Sub-Section (5) of Section 24 was received.

60. Section 27 deals with confiscation and vesting of benami property. Once a property is held to be a benami property, the adjudicating authority shall make an order confiscating such property, but after giving an opportunity of being heard to the person concerned. Sections 28 and 29

come into play post confiscation as those deal with management and possession of such properties.

61. Chapter V comprising of Sections 30 to 49 provides for Appellate Tribunal to hear appeals against orders of the adjudicating authority. Against any decision or order of the Appellate Tribunal, an aggrieved party may file appeal to the High Court which is provided in Section 49.

62. Chapter VI provides for Special Courts for trial of offences punishable under the 1988 Act as amended by the Amendment Act of 2016.

63. Chapter VII comprising of Sections 53 to 55 provides for penalty for indulging in benami transaction. Under Sub-Section (2) of Section 53, whoever is found guilty of the offence of benami transaction shall be punished with rigorous imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine which may extend to twenty five percent of the fair market value of the property.

64. Chapter VIII comprises of miscellaneous provisions from Sections 56 to 72 dealing with repeal and saving, transitional provisions, rule making power etc.

65. Central Government issued three notifications on 25.10.2016. As per the first notification, the adjudicating authority appointed under Sub-Section (1) of Section 6 of the Prevention of Money Laundering Act, 2002 and the Appellate Tribunal established under Section 25 of that Act would discharge the functions of the adjudicating authority and the Appellate Tribunal under the 1988 Act until adjudicating authorities are appointed and Appellate Tribunal is established under the 1988 Act. Further, by the second notification, Central Government appointed 01.11.2016 as the date on which provisions of the Amendment Act of 2016 would come into force. The third notification provides for the notified income tax authorities exercising powers and performing functions of the adjudicating authority under the 1988 Act.

66. In exercise of the powers conferred by Section 68 of the 1988 Act, as amended, the Central Government has made a set of rules called “The Prohibition of Benami Property

Transactions Rules, 2016” (referred to hereinafter as ‘the Rules’).

67. Having dealt with the 1988 Act, the Amendment Act of 2016 and the related notifications issued by the Central Government, we may now advert to the allegations made by the respondents against the petitioner.

68. According to the respondents, the transaction entered into by the petitioner with respondent No.3 on 14.12.2011 is a benami transaction; respondent No.3 being the benamidar and petitioner being the beneficial owner. The show cause notice dated 30.12.2019, provisional order of attachment dated 31.12.2019 and the impugned order dated 30.03.2021 are quite clear in that the said transaction conclusively falls within the ambit of Section 2 (9) (A) of the 1988 Act. As a matter of fact, vide the impugned order dated 30.03.2021, first respondent concluded that the said transaction was arranged by the petitioner (beneficial owner) so that its funds out of unknown sources gets parked in the name of the benamidar and in the form of shares. Therefore, according to the first respondent, it is proved beyond reasonable doubt that the consideration has flown through the beneficial owner

for its immediate or future benefit, direct or indirect, thereby conclusively falling under Section 2(9)(A) of the 1988 Act. In the pleadings it has further been clarified that the transaction in question was a benami transaction under Section 2 (9) (A) read with Section 2 (9) (C) of the 1988 Act. Therefore, there is no manner of doubt that according to the first respondent the transaction entered into by the petitioners with third respondent on 14.12.2011 is a benami transaction within the meaning of Section 2 (9) (A) read with Section 2 (9) (C) of the 1988 Act.

69. We have already noted above as to how the definition of benami transaction as finding place in the unamended 1988 Act has undergone a qualitative change post the Amendment Act of 2016. Under Section 2 (a) of the unamended 1988 Act, benami transaction was defined to mean any transaction in which property is transferred to one person for a consideration paid or provided by another person. Thus, for a transaction to come within the ambit of benami transaction under the unamended 1988 Act, it must be a transaction in which property is transferred; such property must be transferred to one person by another person; and such

transfer of property must be for a consideration paid or provided by the transferor. Under the Amendment Act of 2016, the definition of benami transaction has been expanded which we have already dealt with in paragraphs 49 and 50 of this judgment. Since the specific allegation and finding of the respondents against the petitioners is that the transaction entered into by the petitioner with the third respondent on 14.12.2011 is a benami transaction within the meaning of Section 2 (9) (A) read with Section 2 (9) (C) of the 1988 Act as amended by the Amendment Act of 2016, we may once again analyze the said provisions.

69.1 Admittedly, these two provisions were not in the statute either on the date when the 1988 Act was enacted or when the transaction took place on 14.12.2011. It has been brought into the statute book vide the Amendment Act of 2016. Question for consideration is whether the aforesaid definitions can be applied to the above transaction which took place on 14.12.2011?

70. As per Section 2 (9) (A), a benami transaction would mean a transaction or an arrangement – (a) where a property is transferred to or is held by a person and the consideration

for such property has been provided or paid by another person; and (b) the property is held for the immediate or future benefit, direct or indirect of the person who has provided the consideration barring the four exceptions carved out with which we may not be concerned.

71. Thus, as per Section 2 (9) (A), there must be a transaction or an arrangement; as per such transaction or arrangement, a property is transferred to or is held by a person; the consideration for such property is provided or paid by another person. Pausing here for a moment, on a comparative analysis of this definition with the definition of benami transaction under the unamended 1988 Act, we find that there is a subtle but significant difference in the later definition even at this stage itself. As per the amended definition, the property need not be transferred by 'another person'. The property can be transferred to by any person or held by a person on behalf of any person. But the consideration for such property is provided or paid by the 'another person'. The amended definition proceeds further; such transferred property must be held for the immediate or future benefit of the person who has provided the

consideration and such benefit may be direct or indirect. It is equally significant to note that under the unamended 1988 Act there was no definition of 'benamidar' and 'beneficial owner'. These two expressions are defined under the Amendment Act of 2016 and must be read in conjunction with the new definition of benami transaction as provided in Section 2 (9). Benamidar is the person, real or fictitious, in whose name the benami property is transferred or who holds such benami property; this would include a person who lends his name to such transfer or holding of benami property. Again, beneficial owner means, the person for whose benefit the benami property is held by a benamidar, whether his identity is known or not.

72. We may now revert back to Section 2 (9) (C) of the Amendment Act, 2016, as per which a benami transaction means, a transaction or an arrangement in respect of a property where the owner of the property is not aware of or denies knowledge of such ownership. Therefore, what Section 2 (9) (C) contemplates is that in the event of a transaction or an arrangement in respect of a property if the owner of the property says that he is not aware of and denies knowledge of

such ownership, then such a transaction or an arrangement would be a benami transaction.

73. From the above analysis, it is beyond any doubt that Section 2 (9) (A) and Section 2 (9) (C) are substantive provisions, inasmuch as if a transaction or an arrangement comes within the ambit of the aforesaid two provisions, then it would be a benami transaction which is not only prohibited under Sub-Section (1) of Section (3) but is also an offence punishable under Sub-Sections (2) and (3) thereof as well as under Section 53 of the 1988 Act as amended. It is interesting to note that under Sub-Section (2) of Section (3), the penalty for the offence of benami transaction is imprisonment which may extend to three years or with fine or with both. However, Sub-Section (3) of Section (3) clarifies that whoever enters into any benami transaction after coming into force of the Amendment Act of 2016 i.e., after 01.11.2016, shall be punished in accordance with Section 53 notwithstanding anything contained in Sub-Section (2) which provides for a stiffer penalty of rigorous imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine which may extend to

twenty five percent of the fair market value of the property. We may, even at the cost of repetition, mention that it is not the case of the respondents that the transaction in question is a benami transaction within the meaning of Section 2 (a) of the unamended 1988 Act. If it is a benami transaction under Section 2 (a) of the unamended 1988 Act, then it would attract the lesser penalty under Section 3(2). But if it is a benami transaction under Sections 2 (9) (A) and 2 (9) (C) of the 1988 Act as amended by the Amendment Act of 2016, then it will attract the stiffer penalty under Section 3 (3).

74. Respondents have contended that by the Amendment Act of 2016 only machinery provisions have been incorporated in the 1988 Act. But for the reasons mentioned above, Section 2 (9) (A) and Section 2 (9) (C) cannot be said to be machinery or procedural provisions. Those are offence creating or defining provisions and hence substantive; and if a transaction or arrangement falls within the four corners of the above provisions then it would attract a stiffer penalty than the hitherto milder penalty.

75. At this stage, we may briefly analyze the distinction between procedural law and substantive law. According to

Black's Law Dictionary, 9th edition, substantive law is that part of the law that creates, defines and regulates the rights, duties and powers of parties. On the other hand, procedural law would cover the rules and prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves. Supreme Court in **Thirumalai Chemicals Limited Vs. Union of India**¹⁰ was considering the question as to whether the Appellate Tribunal constituted under the Foreign Exchange Management Act, 1999 was right in rejecting a belated appeal filed under Section 19 of the said Act by applying the first proviso to Sub-Section (2) of Section 52 of the Foreign Exchange Regulation Act, 1973 instead of following the proviso to Sub-Section (2) of Section 19 of the Foreign Exchange Management Act, 1999. It was in that context, Supreme Court delved into the above issue. According to the Supreme Court, law is well settled that the manner in which the appeal has to be filed, its forum and the period within which the same has to be filed, are matters of procedure, while the right conferred on a party to file an appeal is a substantive right. Thereafter, Supreme Court delineated the

¹⁰ (2011) 6 SCC 739

distinction between substantive and procedural laws as under:

23. Substantive law refers to a body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. Right of appeal being a substantive right always acts prospectively. It is trite law that every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation.

24. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and an aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

25. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to a few of those decisions. This Court in *Garikapati Veeraya v. N. Subbiah Choudhry* [AIR 1957 SC 540] , *New India Insurance Co. Ltd. v. Shanti Misra* [(1975) 2 SCC 840] , *Hitendra Vishnu Thakur v. State of Maharashtra* [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087] , *Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar* [(1999) 8 SCC 16] and *Shyam Sunder v. Ram Kumar* [(2001) 8 SCC 24] , has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This Court has held that the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.

76. This brings us to the question of retrospectivity. The entire hearing was confined only on this point. While according to the petitioners, the impugned transaction being prior in point of time to the Amendment Act of 2016, the definition of benami transaction under Sections 2 (9) (A) and 2 (9) (C) as introduced by the Amendment Act of 2016, would not be applicable. On the contrary, it is the contention of the

respondents that the definitions as well as provisions like Section 24 providing for issuance of show cause notice etc., are machinery provisions and therefore they would be read to have become effective from the date the 1988 Act came into the statute book. However, in view of the discussions made above, we have held the above two provisions of Sections 2 (9) (A) and 2 (9) (C) to be substantive.

77. Article 20 of the Constitution of India deals with protection in respect of conviction for offences. Sub-Article (1) says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The other two Sub Articles of Article 20 are not relevant for the present discourse. So Article 20 (1) has got two parts. By the first part, no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. The second part says that such a person shall not be subjected to a penalty greater than that which might have been inflicted under the law in force at

the time of commission of the offence. Sub-Section (3) of Section (3) of the 1988 Act as amended by the Amendment Act of 2016 takes care of the second part of Article 20 (1) by clarifying that for committing the offence of benami transaction after the date of coming into force of the Amendment Act of 2016 i.e. from 01.11.2016, the offender would face a higher penalty notwithstanding the penalty provided in Sub-Section (2) of Section (3).

78. Learned Additional Solicitor General had argued that Sub-Section (2) of Section (3) provides for penalty for committing the offence of benami transaction prior to coming into force of the Amendment Act of 2016 i.e. prior to 01.11.2016. While this may be true, the fact remains that the charge against the petitioner is not of indulging in benami transaction as per the definition of benami transaction under Section 2 (a) of the unamended 1988 Act; rather the charge is specific; petitioner had indulged in benami transaction as defined under Section 2 (9) (A) read with Section 2 (9) (C) of the 1988 Act as brought in by the Amendment Act of 2016. Admittedly, these two provisions were not there when the transaction in question took place on 14.12.2011. On the

basis of our analysis we have already held these two provisions to be of substantive character as creating an offence; being of much wider amplitude than the substituted Section 2 (a) of the unamended 1988 Act.

79. Justice G.P. Singh in his celebrated work 'Principles of Statutory Interpretation', 14th edition writes that the Union Parliament and the State Legislatures have plenary powers of legislation within the fields assigned to them but subject to certain constitutional and judicially recognized restrictions. Parliament as well as State Legislatures can legislate prospectively as well as retrospectively. However, according to him, it is a cardinal principle of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. Quoting Lopes L.J, he says that every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have retrospective effect. Adverting to amending Act, he says that to apply an amending Act which creates a new obligation or pay additional

compensation or which reduces the rate of compensation to pending proceedings for determination of compensation for acquisitions already made retrospectively would not be permissible unless such a construction follows from express words or necessary implication. Regarding penal statutes he is quite clear. Penal statutes which create offences or which have effect of increasing penalties in existing offences will only be prospective by reason of the constitutional restriction imposed by Article 20 of the Constitution. Therefore, if an Act creates a new offence it will bring into its fold only those offenders who commit all ingredients of the offence after the Act comes into operation. It is a settled principle of interpretation of criminal law that such provisions have to be strictly construed and cannot be given a retrospective effect unless the legislative intent and expression is clear beyond ambiguity. However, the prohibition of Article 20 of the Constitution to enact retrospective penal laws would have no application to a law which only modifies the rigor of an existing penal law.

80. In Hitendra Vishnu Thakur Vs. State of Maharashtra¹¹, one of the questions which fell for consideration before the Supreme Court was whether the 1993 amendment amending Section 157 (2) of the Code of Criminal Procedure, 1973 (Cr.P.C) by modifying Section 20 (4) (b) and adding a new provision as Section 20 (4) (b), would be applicable to the pending cases i.e. whether it was retrospective in operation? Issue before the Supreme Court was whether such amendment would apply to pending cases i.e. those cases which were pending investigation on the date when the amendment came into force and charge sheet or challan had not been filed. It may be mentioned that by way of the aforesaid amendment, the maximum period during which an accused under the Terrorist and Disruptive Activities Act, 1987 (TADA) could be kept in custody pending investigation was reduced from one year to 180 days besides enabling the prosecution to seek extension of time for completion of the investigation. Evidently, this provision was beneficial to the accused and the Designated Court had held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not

¹¹ (1994) 4 SCC 602

complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the Court. It is in that context, Supreme Court culled out from the case laws the principles with regard to the ambit and scope of an Amending Act. It was held as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation, unless made retrospective, either expressly or by necessary intendment, whereas a Statute which merely affects procedure, unless such a construction is texturally impossible, is presumed to be retrospective in its application, should not be given an extended meaning, and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal, even though remedial, is substantive in nature.

(iii) Every litigant has a vested right in substantive law, but no such right exists in procedural law.

(iv) A procedural Statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished.

(v) A Statute which not only changes the procedure but also creates a new rights and liabilities, shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

81. Thus, a statute which affects substantive rights is presumed to be prospective in operation unless made retrospective either expressly or by necessary intendment. On the other hand, a statute which merely effects procedure is presumed to be retrospective. Every litigant has a vested

right in substantive law. But no such right exists in procedural law. Even in case of a procedural law, it should not be generally applied retrospectively where the result would be to create new disability or obligation or to impose new duties in respect of transactions already accomplished.

82. Constitution Bench of the Supreme Court in **K.S.Paripoornan Vs. State of Kerala**¹² was considering the correctness of the decision of the Supreme Court in **Union of India Vs. Zora Singh**¹³, decided by a bench of three judges. In **Zora Singh** (supra) it was held that payment of additional amount payable at the rate of 12% p.a on the market value under Sub-Section (1A) inserted in Section 23 of the Land Acquisition Act, 1894 by the Land Acquisition (Amendment) Act, 1984 had to be ordered in every case where the reference was pending before the reference Court on the date of commencement of the Amending Act. Constitution Bench noted that a statute dealing with substantive rights differs from a statute which relates to procedure or evidence or is declaratory in nature inasmuch as while the statute dealing with substantive rights is *prima facie* prospective unless it is

¹² (1994) 5 SCC 593

¹³ (1992) 1 SCC 673

expressly or by necessary implication made to have retrospective effect, a statute concerned mainly with matters of procedure or evidence or which is declaratory in nature has to be construed as retrospective unless there is a clear indication that such was not the intention of the legislature. A statute is regarded retrospective if it operates on cases or facts coming into existence before its commencement in the sense that it affects the character or consequences of transactions previously entered into or of other past conduct. It was further held the above principles are equally applicable to amendatory statutes. Like original statutes they will not be given retrospective construction unless the language clearly makes such construction necessary. There is a presumption that an amendment shall operate prospectively. The Constitution Bench held as follows:

44. A statute dealing with substantive rights differs from a statute which relates to procedure or evidence or is declaratory in nature inasmuch as while a statute dealing with substantive rights is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective effect, a statute concerned mainly with matters of procedure or evidence or which is declaratory in nature has to be construed as retrospective unless there is a clear indication that such was not the intention of the legislature. A statute is regarded retrospective if it operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. By virtue of the presumption against retrospective applicability of laws dealing with substantive rights transactions are neither invalidated by

reason of their failure to comply with formal requirements subsequently imposed, nor open to attack under powers of avoidance subsequently conferred. They are also not rendered valid by subsequent relaxations of the law, whether relating to form or to substance. Similarly, provisions in which a contrary intention does not appear neither impose new liabilities in respect of events taking place before their commencement, nor relieve persons from liabilities then existing, and the view that existing obligations were not intended to be affected has been taken in varying degrees even of provisions expressly prohibiting proceedings. (See : Halsbury's Laws of England, 4th Edn. Vol. 44, paras 921, 922, 925 and 926).

45. These principles are equally applicable to amendatory statutes. According to Crawford:

Amendatory statutes are subject to the general principles relative to retrospective operation. Like original statutes, they will not be given retrospective constructions, unless the language clearly makes such construction necessary. In other words, the amendment will usually take effect only from the date of its enactment and will have no application to prior transaction, in the absence of an expressed intent or an intent clearly implied to the contrary. Indeed there is a presumption that an amendment shall operate prospectively.

83. The above principles were reiterated by the Supreme Court in **Videocon International Limited Vs. Securities and Exchange Board of India**¹⁴. The issue for determination before the High Court was whether amendment to Section 15Z of the Securities and Exchange Board of India Act, 1992 by the Securities and Exchange Board of India (Amendment) Act, 2002 would operate prospectively or retrospectively. The question was whether post amendment an appeal would lie to the High Court or not. The High Court took the view that

¹⁴ (2015) 4 SCC 33

such appeals filed after coming into force of the amended Section 15Z would not be maintainable. This view was questioned before the Supreme Court. Supreme Court proceeded on the basis of two well established principles. Firstly, while provisions of a statute dealing merely with matters of procedure may have retrospective effect, provisions which touch upon an existing right are not to be applied retrospectively in the absence of express enactment or necessary intendment. Secondly, right of appeal is a substantive right. Supreme Court referred to the ambit and scope of an Amending Act as culled out in **Hitendra Vishnu Thakur** (supra) and thereafter held that there is a presumption against the retrospective operation of a statute; an Amending Act which affects the procedure is presumed to be retrospective unless the Amending Act provides otherwise. Supreme Court succinctly highlighted the distinction between substantive law and procedural law in the following manner:

Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice; but in what courts and within what time I must institute proceedings are questions of procedural law, for they relate merely to the modes in which the courts fulfill their functions.

84. Having noted the above, we find that insofar the Amendment Act of 2016 is concerned, Sub-Section (2) of

Section 1 thereof says that the said Amendment Act of 2016 shall come into force on such date as the Central Government may, by notification in the Official Gazette appoint and different dates may be appointed for different provisions and any reference in any such provision to the commencement of the Amendment Act of 2016 shall be construed as a reference to coming into force of that provision. Central Government, in exercise of the powers conferred by Sub-Section (2) of Section 1, issued notification dated 25.10.2016 appointing the first day of November, 2016 (01.11.2016) as the date on which provisions of the Amendment Act of 2016 shall come into force.

85. Thus, from the notification dated 25.10.2016 as alluded to hereinabove, which has since been published in the Official Gazette, it has been clearly mentioned that Central Government has appointed the first day of November, 2016 as the date on which provisions of the Amendment Act of 2016 shall come into force. Respondents have not placed any other notification of the Central Government to the effect that provisions of Section 2 (9) of the Amendment Act of 2016 shall have effect from an anterior date. In fact, in the earlier part of

this judgment we have referred to Finance (No.2) Act, 2019, more particularly to Part A of Chapter VI thereof. Part VIII contained amendments to the 1988 Act. As per Section 173 of the Finance (No.2) Act, 2019, Section 23 of the 1988 Act has been amended by insertion of an Explanation. But it has been clarified that such insertion shall be deemed to have come into force from the first day of November, 2016. In other words, the Explanation should be read as part of the Amendment Act of 2016, which came into force with effect from the first day of November, 2016, Section 23 being part of the Amendment Act of 2016. However, as per Section 174 of the Finance (No.2) Act, 2019, Section 24 of the 1988 Act brought into the statute book by way of the Amendment Act of 2016 has been further amended but with effect from the first day of September, 2019. There were other amendments also which were given effect to from the first day of September, 2019. Therefore, when the Finance (No.2) Act, 2019 sought to give retrospective effect to the amendment of Section 23, it was made expressly clear that the amendment to Section 23 by way of insertion of the Explanation shall be deemed to have been given effect to from the first day of

November, 2016 i.e. on the date when Section 23 was given effect to.

86. A Division Bench of the Calcutta High Court in **Ganpati Dealcom** (supra) has held that the Amendment Act of 2016 cannot have retrospective application; it is prospective. However, in SLP (C) No.2784 of 2020 (**Union of India Vs. Ganpati Dealcom**), a two Judge Bench of the Supreme Court passed an order on 03.02.2020 issuing notice on the Special Leave Petition and staying that portion of the judgment of the Calcutta High Court declaring that the Amendment Act of 2016 is prospective in nature. A single Bench of the Rajasthan High Court in **Niharika Jain** (supra) has held that Amendment Act of 2016 cannot have any retrospective effect. However, following the order of the Supreme Court dated 03.02.2020 a Division Bench of the Rajasthan High Court in **Deputy Commissioner Vs. Pallavi Mishra**, vide the order dated 26.08.2020 has stayed the judgment of the learned Single Judge. Therefore, we have refrained from referring to and relying upon the aforesaid decisions of the Calcutta High Court in **Ganpati Dealcom** (supra) and that of the Rajasthan High Court in **Niharika Jain** (supra).

87. At this stage, we may deal with the decisions / orders relied upon by the respondents. In **Kailash Assudani** (supra) a Single Bench of the Madhya Pradesh High Court examined the challenge made to an order of the Initiating Officer prohibiting and restraining the petitioner from transferring or changing the subject property in any manner till passing of necessary order by the adjudicating authority under the 1988 Act. The sole ground on which this order was challenged by the petitioner was that principles of natural justice were not followed by the Initiating Officer. It was in that context, learned Single Judge took the view that petitioner would have the opportunity to raise all possible grounds before the adjudicating authority and therefore did not interfere.

87.1 Insofar the decision of the Single Bench of the Madras High Court in **Dinesh Chand Surana** (supra) is concerned, petitioner did not contend the ground of retrospectivity. Petitioner only challenged the order passed under Section 24 (4) of the 1988 Act while complaining that documents sought for by him were not furnished. While relegating the petitioner to the forum of adjudicating authority, learned Single Judge of the Madras High Court

directed the respondents to furnish certified copies of the documents and statements recorded by the petitioner during the course of survey proceedings.

87.2 A Single Bench of the Chattisgarh High Court examined a challenge to the order of provisional attachment of immovable properties under Section 24 (4) (b) of the 1988 Act. Contention made by the petitioner was that Section 24 of the 1988 Act, as amended by the Amendment Act of 2016, would not have retrospective effect and would only be prospective i.e. with effect from 01.11.2016 onwards. It was in that context, learned Single Judge of the Chattisgarh High Court in **Tulsiram (1 supra)** held that the provisions of the Amendment Act of 2016 would have no existence by itself without the provisions of the 1988 Act and therefore the entire 1988 Act inclusive of the amended provisions would apply irrespective of the period of purchase of the alleged benami property. We are afraid, in view of the line of reasoning which we have adopted, we can accept the view expressed by the learned Single Judge of Chattisgarh High Court. In fact, as noticed, the challenge was made to the applicability of Section 24 retrospectively. We have already

examined the provisions of Section 24 of the 1988 Act as introduced by the Amendment Act of 2016. It provides for notice and attachment of property involved in benami transaction. The circumstances and the procedure to be followed before issuing show cause notice is dealt with in Sub-Section (1) and Sub-Section (2) says that a copy of such notice should also be issued to the beneficial owner. Sub-Section (3) empowers the Initiating Officer to provisionally attach the alleged benami property for a period not exceeding 90 days from the date of issue of the show cause notice under Sub-Section (1) if the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the same. While Sub-Section (4) provides for continuation of provisional attachment till passing of order by the adjudicating authority or for revoking the provisional attachment, Sub-Section (5) says that in the event of continuation of provisional attachment of the property, the Initiating Officer shall make a reference to the adjudicating authority. Evidently, provisions of Section 24, are clearly procedural and as we have analyzed above, a procedural provision can have retrospective effect; rather it is presumed to have a retrospective effect. Therefore, while Section 24 may

have a retrospective effect, we are clear in our view that Section 2 (9) (A) and Section 2 (9) (C) being substantive provisions, creating an offence by widening the definition of benami transaction cannot have retrospective effect. As a matter of fact, Section 2 (9) (A) and Section 2 (9) (C) were not the subject of consideration in **Tulsiram** (1 supra).

87.3 Lastly, respondents have also relied upon a Single Bench decision of the Madras High Court in **K.Nagarajan Vs. Adjudication Authority**¹⁵. We find that challenge made to attachment order under the 1988 Act was on the ground of violation of the principles of natural justice. Learned Single Judge took the view that the challenge was made at the very initial stage when the adjudication was not yet complete. Therefore, petitioner was relegated to the forum of the adjudicating authority, with liberty to submit his objection / defence statements, evidence and documents, further directing the respondents to consider the same and conclude the proceedings in a time bound manner. We are afraid, the above decision can hardly be of any assistance to the respondents.

¹⁵ **W.P.No.22037 of 2017, decided on 31.08.2021**

88. After the hearing was over, learned counsel for the petitioner submitted a memo enclosing therewith a copy of judgment and order of a Division Bench of this Court dated 21.04.2020 in **G.Tuhin Kumar Vs. State Bank of India**¹⁶ contending that by the said judgment a coordinate Bench of this Court had taken the view that the Amendment Act of 2016 has no retrospective application. A reply memo has been filed by the respondents submitting that no reliance should be placed on the said decision as it is not applicable to the facts of the present case. Since the aforesaid decision in **G.Tuhin Kumar** (16 supra) was submitted after the hearing was over, we have not considered the same.

89. A three Judge Bench of the Supreme Court in **R.Rajagopal Reddy** case (9 supra) considered the question as to whether Section 4 (1) of the 1988 Act could be applied to suit, claim or action to enforce any right in property held benami against person in whose name such property is held or any other person if such proceeding is initiated by or on behalf of a person claiming to be the real owner thereof prior to coming into force of Section 4 (1) of the 1988 Act. While

¹⁶ 2020 (4) ALD 598

answering this question, Supreme Court held that Section 4 or for that matter the 1988 Act as a whole is not a piece of declaratory or curative legislation. It creates substantive rights in favour of benamidars and destroys substantive rights of real owners who are parties to such transaction and for whom new liabilities are created by the 1988 Act. On that basis it was held that earlier Division Bench decision of the Supreme Court in **Mithilesh Kumar vs. Prem Behari Khare**¹⁷ which took the view that Section 4 (2) of the 1988 Act could be pressed into service in connection with suits filed prior to coming into operation of that Section did not lay down the correct law. Accordingly, the question was answered in the negative.

90. A Single Bench of the Bombay High Court in **Joseph Isharat** case (6 supra) was considering a second appeal wherein counsel for the appellant (defendant) submitted that plaintiff came within the definition of ‘unmarried daughter’ even under the 1988 Act prior to the amendment and therefore the prohibition against entering into a benami transaction did not apply to the suit transaction. Learned

¹⁷ (1989) 2 SCC 95

Single Judge held that under the 1988 Act as it stood on the date of the suit as well as on the date of filing of written statement and passing of the decree by the Courts below provided for the definition of 'benami transaction' under Section 2 (a). Learned Single Judge noted that the 1988 Act came to be amended in 2016. Amendment came into effect from 01.11.2016. Under the amendment, definition of benami transaction has undergone a change. Thereafter, learned Single Judge posed the question as to whether the amended provisions would apply to the suit transaction since the suit transaction itself was executed prior to the amendment. Additionally, the suit was filed, defence raised and was decreed before the Amendment Act of 2016 came into force. After noting that the amendments introduced by way of the Amendment Act of 2016 affected substantive rights of the parties, Bombay High Court held that the same must be applied prospectively. Taking the above view the second appeal was dismissed.

91. It may be mentioned that assailing the above decision of the Bombay High Court in **Joseph Isharat** (6 supra) a Special Leave Petition was filed before the Supreme Court being SLP

(C) No.12328 of 2017. The same was however dismissed by order dated 28.04.2017.

92. In **Mangathai Ammal** case (8 supra) the original plaintiffs did not plead that the sale deeds / transactions in favour of defendant No.1 were benami transactions. Even the trial Court did not specifically frame the issue as to whether the sale deeds / transactions in favour of defendant No.1 were benami transactions or not. Notwithstanding the same, the trial Court and the High Court held that the sale deeds / transactions in favour of defendant No.1 were benami transactions; whereafter relief of partition was granted in favour of the plaintiffs. Supreme Court analyzed the contours of benami transactions and also considered its earlier decision in **Binapani Paul Vs. Pratima Ghosh**¹⁸. After noting that the 1988 Act came to be amended in the year 2016, Supreme Court held as follows:

12. It is required to be noted that the benami transaction came to be amended in the year 2016. As per Section 3 of the Benami Transaction (Prohibition) Act 1988, there was a presumption that the transaction made in the name of the wife and children is for their benefit. By Benami Amendment Act, 2016, Section 3(2) of the Benami Transaction Act, 1988 the statutory presumption, which was rebuttable, has been omitted. It is the case on behalf of the Respondents that therefore in view of omission of Section 3(2) of the Benami Transaction Act, the plea of statutory presumption that

¹⁸ (2007) 6 SCC 100

the purchase made in the name of wife or children is for their benefit would not be available in the present case. Aforesaid cannot be accepted. As held by this Court in the case of Binapani Paul (Supra) the Benami Transaction (Prohibition) Act would not be applicable retrospectively. Even otherwise and as observed hereinabove, the Plaintiff has miserably failed to discharge his onus to prove that the Sale Deeds executed in favour of Defendant No. 1 were benami transactions and the same properties were purchased in the name of Defendant No. 1 by Narayanasamy Mudaliar from the amount received by him from the sale of other ancestral properties.

92.1. Thus, Supreme Court held that the 1988 Act would not be applicable retrospectively. After holding so, the partition granted in favour of the plaintiffs was suitably modified.

93. From the conspectus of the discussions made above, it is apparent that Section 2 (9) (A) and Section 2 (9) (C) are substantive provisions creating the offence of benami transaction. These two provisions are significantly and substantially wider than the definition of benami transaction under Section 2 (a) of the unamended 1988 Act. Therefore, Section 2 (9) (A) and Section 2 (9) (C) can only have effect prospectively. Central Government has notified the date of coming into force of the Amendment Act of 2016 as 01.11.2016. Therefore, these two provisions cannot be applied to a transaction which took place prior to 01.11.2016. Admittedly, in the present case, the transaction in question is dated 14.12.2011. That being the position, we have no

hesitation to hold that the show cause notice dated 30.12.2019, provisional attachment order dated 31.12.2019 and the impugned order dated 30.03.2021 are null and void being without jurisdiction. Consequently, the impugned order is set aside and quashed.

94. In the result, all the writ petitions are accordingly allowed. However, there shall be no order as to costs.

95. Miscellaneous petitions, if any, pending in all these writ petitions, shall stand closed.

UJJAL BHUYAN, J

Dr. CHILLAKUR SUMALATHA, J

Date: .03.2022.

Kvsn