$~3, 7 to 9 & 47 to 50

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 3706/2020, CM APPL. 13257/2020(Stay) & CM APPL. 27333/2020(Stay)

JALADI PRASUNA & ORS ..... Petitioners

Through: Appearance not given

versus

UNION OF INDIA & ORS ..... Respondent

Through: Ms. Pratima N. Lakra, CGSC with Ms. Vrinda Baheti, Adv. for UOI

Mr. Kanhaiya Sehgal, Ms. Priya Garg, Mr. Chetan Bhardwaj, Mr. Gurjas Puri Singh, Mr. Prasanna, Advs. for R-3 and 4.

7

\+ W.P.(C) 6919/2022, CM APPL. 39549/2022(Direction)

M/S PSS AGRO INVESTMENT PRIVATE LIMITED..... Petitioner

Through: Mr. Sidharth Luthra, Sr. Adv. with Mr. Sidharth Aggarwal, Sr. Adv. with Mr. Ashwani Taneja, Mr. Divyam Aggarwal, Mr. Udit Atul, Mr. Prabhat Kumar Rai, Ms. Shreya, Ms. Peeha Verma, Mr. Mayank, Advs.

versus

INITIATING OFFICER BENAMI PROHIBITION UNIT & ORS. ..... Respondent

Through: Mr. Anurag Ahluwalia, CGSC with Mr. Danish Khan, Adv. for UOI.

Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Vipul Agarwal and Mr. Parth Semwal, Advs. for Income Tax Department.

8

\+ W.P.(C) 10619/2022 & CM APPL. 30759/2022(Interim Stay) CM APPL. 39559/2022(Direction)

VIVEK NAGPAL & ORS. ..... Petitioner

Through: Mr. Sidharth Luthra, Sr. Adv. with Mr. Sidharth Aggarwal, Sr. Adv. with Mr. Ashwani Taneja, Mr. Divyam Aggarwal, Mr. Udit Atul, Mr. Prabhat Kumar Rai, Ms. Shreya, Ms. Peeha Verma, Mr. Mayank, Advs.

versus

INITIATING OFFICER (NCT OF DELHI) BENAMI PROHIBITION UNIT -1, NEW DELHI AND ORS. ..... Respondent

Through: Mr. Satya Ranjan Swain, Sr. Panel Counsel, Mr. Sahaj Garg, G.P. with Mr. Kautilya Birat, Advs. for R-3.
Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Vipul Agarwal and Mr. Parth Semwal, Advs. for Income Tax Department.

9

\+ W.P.(C) 10621/2022 & CM APPL. 30762/2022(Interim Stay)
CM APPL. 39560/2022(Direction)

KKH INVESTMART PVT LTD ..... Petitioner

Through: Mr. Sidharth Luthra, Sr. Adv. with Mr. Sidharth Aggarwal, Sr. Adv. with Mr. Ashwani Taneja, Mr. Divyam Aggarwal, Mr. Udit Atul, Mr. Prabhat Kumar Rai, Ms. Shreya, Ms. Peeha Verma, Mr. Mayank, Advs.

versus

INITIATING OFFICER (NCT OF DELHI) BENAMI PROHIBITION UNIT-1 , NEW DELHI AND ORS..... Respondent

Through: Mr. Shoumendu Mukherji, Sr. Panel Counsel with Ms. Megha Sharma, Mr. Prashant Rawat, G.P. for UOI.
Mr. Zoheb Hossain, Sr. Standing

Counsel with Mr. Vipul Agarwal and Mr. Parth Semwal, Advs. for Income Tax Department.

47

\+ W.P.(C) 5158/2017 & CM APPL. 22042/2017(Stay)
CM APPL. 3165/2018(Stay)
CM APPL. 30007/2018(Add. Affidavit)
SATYENDAR K JAIN ..... Petitioner
Through: Mr. Dayan Krisyhnan, Sr. Adv. with Mr. Vivek Jain, Mr. Vaibhav Yadav, Mr. Amit Anand and Ms. Devyani, Advs.

versus

THE UNION OF INDIA & ORS ..... Respondent
Through: Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Vipul Agarwal and Mr. Parth Semwal, Advs. for Income Tax Department.

48

\+ W.P.(C) 10932/2018 & CM APPL. 42587/2018(Stay)
NILESH KUMAR ..... Petitioner
Through: Mr. Amit Anand and Ms. Devyani, Advs.

versus

UNION OF INDIA AND ANR. ..... Respondent
Through: Mr. Anurag Ahluwalia, CGSC with Mr. Danish Khan, Adv. for UOI.
Mr. Zoheb Hossain, Sr. Standing Counsel with Mr. Vipul Agarwal and Mr. Parth Semwal, Advs. for Income Tax Department.

49

\+ W.P.(C) 13450/2019 & CM APPL. 54547/2019(Stay)
CM APPL. 39664/2022(Direction)

M/S DEBONAIR TIE-UP PVT. LTD. AND ANR. ..... Petitioner

Through: Mr. Abhimanyu Bhandari, Ms. Roohe Hina, Ms. Ananya Sikri, Mr. Akarsh Sharma, Advs.

versus

INITIATING OFFICER (NCT OF DELHI) BENAMI PROHIBITION UNIT-1, NEW DELHI AND ORS..... Respondent

Through: Ms. Shiva Lakshmi, CGSC with Ms. Srishti Rawat and Mr. Ritwik Sneha, Advs. for R-2 and 4.
Mr. Kunal Sharma and Mr. Zeyhra Khan, Advs. for R-1 and R-3

50

\+ W.P.(C) 3139/2019 & CM APPL. 14366/2019(Stay)

RELIANCE COMMODITIES DMCC ..... Petitioner

Through: Mr. Anirudh Bakhru, Mr. Ayush Puri, Mr. Tejaswini, Ms. Umang Tyagi, Mr. Prateek Kumar, Advs.

versus

ACIT / INITIATING OFFICER AND ORS. ..... Respondent

Through: Ms. Shiva Lakshmi, CGSC with Ms. Srishti Rawat, Ms. Ritwik Sneha, Advs. for R-2

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

% 10.10.2022

This batch of writ petitions assail proceedings initiated by the respondents under the **Prohibition of Benami Property Transactions Act, 1988.** They assail proceedings initiated under the said enactment for attachment and confiscation of properties which were admittedly acquired

prior to the enforcement of the Benami Transactions (Prohibition) Amendment Act, 2016. These petitions would be liable to be allowed in light of the recent decision rendered by the Supreme Court in **Union of India & Anr. v. Ganpati Dealcom Pvt.Ltd.,** [2022 SCC OnLine SC 1064]

The issue of retrospective application of the provisions introduced by virtue of the 2016 Amendment stood crystallised in paragraphs 47 and 48 of the report thus:-

> "47. The simple question addressed by the counsel appearing for both sides is whether the amended 2016 Act is retroactive or prospective. Answering the above question is inevitably tied to an intermediate question as to whether the 1988 Act was constitutional in the first place. The arguments addressed by the Union of India hinges on the fact that the 1988 Act was a valid substantive law, which required only some gap filling through the 2016 Act, to ensure that sufficient procedural safeguards and mechanisms are present to enforce the law. According, to the Union of India, the 2016 Act was a mere gap filling exercise.
>
> 48. However, upon studying the provisions of the 1988 Act, we find that there are questions of legality and constitutionality which arise with respect to Sections 3 and 5 of 1988 Act. The answers to such questions cannot be assumed in favour of constitutionality, simply because the same was never questioned before the Court of law. We are clarifying that we are not speaking of the presumption of constitutionality as a matter of burden of proof. Rather, we are indicating the assumption taken by the Union as to the validity of these provisions in the present litigation. Such assumption cannot be made when this Court is called upon to answer whether the impugned provisions are attracted to those transactions that have taken place before 2016."

Dealing with the retrospective operation of Sections 3 and 5 of the enactment, the Supreme Court held as follows:-

> "57. Coming back to the 1988 Act, the two provisions with which we are concerned are Sections 3 and 5 of 1988 Act. They are required to be separately analysed herein. At the outset, we may notice that the enactment was merely a shell, lacking the substance that a criminal legislation requires for being sustained. The reasons for the same are enumerated in the following paragraphs

58. First, the absence of mens rea creates a harsh provision having strict liability. Such an approach was frowned upon by the 57th Law Commission Report as concerns of tax evasion or sham transactions in order to avoid payment to creditors were adequately addressed by the existing provisions of law. Even the 130th Law Commission Report did not expressly rule out the inclusion of mens rea. The legislative move to ignore earlier Law Commission Reports without there being a principle identified to do away with the aspect of mens rea should be a contributory factor in analysing the constitutionality of the aforesaid criminal provision under the 1988 Act.

60. Second, ignoring the essential ingredient of beneficial ownership exercised by the real owner contributes to making the law even more stringent and disproportionate with respect to benami transactions that are tripartite in nature. The Court cannot forcefully read the ingredients developed through judicial pronouncements or under Section 4 (having civil consequence) into the definition provided under Sections 2 and 3 (espousing criminal consequences), to save the enactment from unconstitutionality. Such a reading would violate the express language of Section 2(a), of excluding one ingredient from the definition of 'benami transaction', and would suffer from the vice of judicial transgression. In removing such an essential ingredient, the legislature did not identify any reason or principle, which made the entire provision of Section 3 susceptible to arbitrariness. Interestingly, for tripartite benami transactions, the 2016 Act brings back this ingredient through Section 2(9)(A)(b). In this context, we may state that it is a simple requirement under Article 20(1) that a law needs to be clear and not vague. It should not have incurable gaps which are yet to be legislated/filled in by judicial process.

65. When such proceedings are contemplated under law, there need to be adequate safeguards built into the provisions, without which the law would be susceptible to challenge under Article 14 of the Constitution. Coming to Section 5 of the 1988 Act, it was conceived as a half-baked provision which did not provide the following and rather left the same to be prescribed through a delegated legislation:

(i) Whether the proceedings under Section 5 were independent or dependant on successful prosecution?

(ii) The standard of proof required to establish benami transaction in terms of Section 5.

(iii) Mechanism for providing opportunity for a person to establish his defence.

(iv) No 'defence of innocent owner' was provided to save legitimate innocent buyers.

(v) No adjudicatory mechanism was provided for.

(vi) No provision was included to determine vesting of acquired property.
(vii) No provision to identify or trace benami properties.
(viii) Condemnation of property cannot include the power of tracing, which needs an express provision.

66. Such delegation of power to the Authority was squarely excessive and arbitrary as it stood. From the aforesaid, the Union's stand that the 2016 Act was merely procedural, cannot stand scrutiny.

67. In any case, such an inconclusive law, which left the essential features to be prescribed through delegation, can never be countenanced in law to be valid under Part III of the Constitution. The gaps left in the 1988 Act were not merely procedural, rather the same were essential and substantive. In the absence of such substantive provisions, the omissions create a law which is fanciful and oppressive at the same time. Such an overbroad provision was manifestly arbitrary as the open texture of the law did not have sufficient safeguards to be proportionate.

69. From the above, Section 3 (criminal provision) read with Section 2(a) and Section 5 (confiscation proceedings) of the 1988 Act are overly broad, disproportionately harsh, and operate without adequate safeguards in place. Such provisions were still-born law and never utilized in the first place. In this light, this Court finds that Sections 3 and 5 of the 1988 Act were unconstitutional from their inception."

Ruling on the powers of attachment and confiscation in respect of properties acquired and in which interests stood created prior to the 2016 Amendment, the Supreme Court observed:-

"123. In view of the above discussion, it is manifest that the 2016 Act contemplates an in-rem forfeiture, wherein the taint of entering into such a benami transaction is transposed to the asset itself and the same becomes liable to confiscation. At the cost of repetition, we may note that the taint of benami transactions is not restricted to the person who is entering into the aforesaid transaction, rather, it attaches itself to the property perpetually and extends itself to all proceeds arising from such a property, unless the defence of innocent ownership is established under Section 27(2) of the 2016 Act. When such a taint is being created not on the individual, but on the property itself, a retroactive law would characterize itself as punitive for condemning the proceeds of sale which may also involve legitimate means of addition of wealth.

127. In view of the fact that this Court has already held that the criminal

provisions under the 1988 Act were arbitrary and incapable of application, the law through the 2016 amendment could not retroactively apply for confiscation of those transactions entered into between 05.09.1988 to 25.10.2016 as the same would tantamount to punitive punishment, in the absence of any other form of punishment. It is in this unique circumstance that confiscation contemplated under the period between 05.09.1988 and 25.10.2016 would characterise itself as punitive, if such confiscation is allowed retroactively. Usually, when confiscation is enforced retroactively, the logical reason for accepting such an action would be that the continuation of such a property or instrument, would be dangerous for the community to be left free in circulation. In *R (on the appln of the Director of the Assets Recovery Agency) v. Jia Jin He and Dan Dan Chen*, [2004] EWHC Admin 3021, where Collins, J. had stated thus:

> "52. In Mudie, at page 1254, in the judgment of Laws LJ, who gave the only reasoned judgment, there is set out the citation from Butler which reads, so far as material, as follows:
>
> > "It is the applicant's contention that the forfeiture of his money in reality represented a severe criminal sanction, handed down in the absence of the procedural guarantees afforded to him under article 6 of the Convention, in particular his right to be presumed innocence [sic]. The court does not accept that view. In its opinion, the forfeiture order was a preventive measure and cannot be compared to a criminal sanction, since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs. It follows that proceedings which led to the making of the order did not involve 'the determination ... of a criminal charge (see *Raimondo v. Italy* [1994] 18 EHRR 237, 264 at para 43; and more recently *Arcuri v. Italy* (Application No 52024/99), inadmissibility decision of 5th July 2001..."""

129. Looked at from a different angle, continuation of only the civil provisions under Section 4, etc., would mean that the legislative intention was to ensure that the ostensible owner would continue to have full ownership over the property, without allowing the real owner to interfere with the rights of benamidar. If that be the case, then without effective any enforcement proceedings for a long span of time, the rights that have crystallized since 1988, would be in jeopardy. Such implied intrusion into the right to property cannot be permitted to operate retroactively, as that

would be unduly harsh and arbitrary.

Conclusion

130. In view of the above discussion, we hold as under:

a) Section 3(2) of the unamended 1988 Act is declared as unconstitutional for being manifestly arbitrary. Accordingly, Section 3(2) of the 2016 Act is also unconstitutional as it is violative of Article 20(1) of the Constitution.

b) In rem forfeiture provision under Section 5 of the unamended Act of 1988, prior to the 2016 Amendment Act, was unconstitutional for being manifestly arbitrary.

c) The 2016 Amendment Act was not merely procedural, rather, prescribed substantive provisions.

d) In rem forfeiture provision under Section 5 of the 2016 Act, being punitive in nature, can only be applied prospectively and not retroactively.

e) Concerned authorities cannot initiate or continue criminal prosecution or confiscation proceedings for transactions entered into prior to the coming into force of the 2016 Act, viz., 25.10.2016. As a consequence of the above declaration, all such prosecutions or confiscation proceedings shall stand quashed.

f) As this Court is not concerned with the constitutionality of such independent forfeiture proceedings contemplated under the 2016 Amendment Act on the other grounds, the aforesaid questions are left open to be adjudicated in appropriate proceedings."

In light of the aforesaid enunciation of the law on the subject, it is evident that the impugned proceedings cannot be sustained.

Accordingly, and in view of the law as declared by the Supreme Court, the instant writ petitions are allowed. The impugned summons dated 12 February 2019, Show Cause Notice dated 01 July 2019, and Order of Provisional Attachment dated 08 March 2019 as well as order dated 03 June 2019 in W.P.(C)3706/2020, impugned Show Cause Notices dated 17 March 2021 and 26 July 2021, Provisional Attachment Order dated 18 March 2021 and continuation order dated 28 June 2021 in W.P.(C)6919/2022, impugned Provisional Attachment Order dated 18 March 2021, continuation order

dated 28 June 2021, Show Cause Notices dated 17 March 2021 and 26 July 2021 in W.P.(C)10619/2022, impugned Provisional Attachment Order dated 18 March 2021, continuation order dated 28 June 2021, Show Cause Notices dated 17 March 2021 and 26 July 2021 in W.P.(C)10621/2022, orders dated 24 May 2017 in W.P.(C)5158/2017, Show Cause Notice dated 24 July 2018 and Provisional Attachment Order dated 25 July 2018 in W.P.(C)10932/2018, impugned Show Cause Notice dated 21 May 2018, Provisional Attachment Order dated 27 July 2018 and order dated 29 August 2019 in W.P.(C)13450/2019, impugned Show Cause Notice dated 31 October 2018, Provisional Attachment Order dated 01 November 2018 and order dated 28 January 2019 in W.P.(C)3139/2019 and proceedings emanating from aforenoted orders shall consequently stand quashed.

YASHWANT VARMA, J.

OCTOBER 10, 2022/*neha*