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

+ **W.P.(C) 8522/2018 & CM No. 32769/2018**

SMT. SUNITA GUPTA

..... Petitioner

Through: Mr Varun Jain and Mr Navin
Kumar, Advocates.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Ms Shiva Lakshmi, CGSC with
Mr Sidharth Singh and Mr R. R.
Rai, Advocates for UOI.
Mr Ruchir Bhatia, Sr. Standing
Counsel.

WITH

+ **W.P.(C) 8468/2018 & CM No. 32548/2018**

SHRI PREM CHAND GUPTA

..... Petitioner

Through: Mr Varun Jain and Mr Navin
Kumar, Advocates.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Ms Shiva Lakshmi, CGSC with
Mr Siddharth Singh, Advocates
for R-1/UOI.
Mr Ruchir Bhatia, Sr. Standing
Counsel.

WITH

+ **W.P.(C) 8470/2018 & CM No. 32550/2018**

SHUBHAM GUPTA

..... Petitioner

Through: Mr Varun Jain and Mr Navin
Kumar, Advocates.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Ms Shiva Lakshmi, CGSC with
Mr Siddharth Singh, Advocates
for R-1/UOI.
Mr Ruchir Bhatia, Sr. Standing
Counsel.

AND

+ **W.P.(C) 8678/2018 & CM No. 33321/2018**

MS. SAKSHI GUPTA

..... Petitioner

Through: Mr Varun Jain and Mr Navin
Kumar, Advocates.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Ms Shiva Lakshmi, CGSC with
Mr Siddharth Singh, Advocates
for R-1/UOI.
Mr Ruchir Bhatia, Sr. Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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20.08.2018

VIBHU BAKHRU, J

1. The petitioners have filed the present petitions impugning the provisional attachment orders passed in their respective cases by the Initiating Officer (hereafter 'IO'). The said orders have been passed under Section 24 (3) of the Prohibition of *Benami* Property Transactions Act, 1988 (hereafter 'the Act').

2. The principal issue raised in these petitions is common and, therefore, the petitions have been heard together. The petitioners assail the jurisdiction of the IO to pass orders of provisional attachment on the ground that similar orders had been passed earlier which were set aside by the Adjudicating Authority. The Adjudicating Authority had – after considering the responses of the petitioners – held the properties (amounts) sought to be attached were not *benami* properties. The petitioners claim that in the aforesaid circumstances, it was not open for the IO to issue a fresh show cause notice and pass a provisional order attaching the properties in question (the amounts lying in the respective bank accounts of the petitioners).

3. In order to provide a factual context to the controversy, the facts as obtaining in W.P. (C) 8522/2018 are narrated below:-

3.1 On 25.01.2017, the IO passed an Order of Provisional Attachment under Section 24 (3) of the Act restraining Smt Sunita Gupta – the petitioner in W.P. (C) 8522/2018 – from transferring or charging the property amounting to ₹2,99,000/- deposited in the savings bank account of the petitioner bearing no. 006001013451 maintained with Jain Cooperative Bank, Vishwas Nagar Branch,

Delhi. The aforesaid order was also accompanied by summons issued under Section 19(1) of the Act, whereby Ms Gupta was called upon to furnish certain documents.

3.2 On 08.02.2017, the IO issued a show cause notice under Section 24(1) of the Act calling upon Ms Sunita Gupta to explain as to why an order under Section 24(4)(a)(i) of the Act should not be passed continuing the Provisional Attachment Order passed under Section 24 (3) of the Act. It was alleged that Sh Nitin Jain was the beneficial owner of the sum of ₹2,99,000/-, which was deposited in the personal account of Ms Sunita Gupta.

3.3 In compliance of the aforesaid show cause notice, the petitioner as well as Sh Nitin Jain, the alleged beneficial owner of the funds, filed a response to the said show cause notice denying the allegations made in the said show cause notice. On 21.04.2017, the IO passed an order under Section 24 (4)(a)(i) of the Act continuing the provisional attachment of the property in question (amount of ₹2,99,000/- deposited in the petitioner's account) till the Adjudicating Authority passes any order.

3.4 On 05.05.2017, the IO made a reference to the Adjudicating Authority under Section 24 (5) of the Act. Thereafter, on 15.05.2017, the Adjudicating Authority issued a show cause notice under Section 26(1) of the Act to Ms Gupta and Sh Nitin Jain. Ms Gupta and Sh Nitin Jain filed their responses to the show cause notice on 05.10.2017. On 25.10.2017, the IO also filed a rejoinder to the replies

furnished by Ms Gupta and Sh Nitin Jain.

3.5 After the pleadings were complete, the Adjudicating Officer finally heard the oral submissions on 30.12.2017. After considering the submissions made by the parties, the Adjudicating Authority passed an order dated 21.05.2018 under Section 26 (3) of the Act holding that the property in question (the amount deposited in the bank account of the petitioner) was not a *benami* property.

3.6 Thereafter, on 26.05.2018, the IO issued a fresh show cause notice under Section 24 (1) of the Act, *inter alia*, calling upon the petitioner to once again show cause why the amount of ₹2,99,000/- (the property in question) deposited in the petitioner's account be not treated as a *benami* property within the meaning of Section 2(8) and 2(9) of the Act. The said show cause notice is impugned in the petition filed by Ms Sunita Gupta (W.P. (C) 8522/2018).

3.7 The facts in other petitions are more or less identical. In W.P. (C) 8468/2018, the IO alleges that the amount of ₹2,99,000/- deposited in the account of Sh Prem Chand Gupta is the *benami* property of Sh Nitin Jain; in W.P. (C) 8470/2018, it is alleged that a sum of ₹2,83,000/- deposited in the account of Sh Shubham Gupta is the *benami* property of Sh Nitin Jain; and in W.P. (C) 8678/2018, the sum of ₹2,99,000/- deposited in the account of Smt Sakshi Gupta is alleged to be the *benami* property of Sh Nitin Jain. It is alleged that the properties (amounts) amounts in question were deposited in the bank accounts of the petitioners in high value currency notes that were

demonetized on 08.11.2016.

Reasons and Conclusions

4. The petitioners contend that the Adjudicating Authority had already passed an order under Section 26 (3) of the Act holding that the properties (amounts) in question are not *benami* properties and, therefore, it is not open for the IO to once again pass orders attaching the same. The petitioners have also relied on the decision of the Calcutta High Court in ***Jasoda Jiban Saha (P.) Ltd. v. S.K. Chatterjee & Anr.: AIR 1961 Cal 195*** in support of their contention

5. Before proceeding further, it would be relevant to refer to Section 24 of the Act, which reads as under:-

“24. Notice and attachment of property involved in benami transaction. – (1) 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 why the property should not be treated as benami property.

(2) Where a notice under sub-section (1) specifies any property as being held by a *benamidar* referred to in that sub-section, a copy of the notice shall also be issued to the beneficial owner if his identity is known.

(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 as may be prescribed, for a period not exceeding ninety days from the date of issue of notice under sub-section (1).

(4) The Initiating Officer, after making such inquiries and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice under sub-section (1),—

(a) where the provisional attachment has been made under sub-section (3),—

(i) pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under sub-section (3) of section 26; or

(ii) revoke the provisional attachment of the property with the prior approval of the Approving Authority;

(b) where provisional attachment has not been made under sub-section (3),—

(i) pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under sub-section (3) of section 26; or

(ii) decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.

(5) Where the Initiating Officer passes an order continuing the provisional attachment of the property under sub-clause (i) of clause (a) of sub-section (4) or passes an order provisionally attaching the property

under sub-clause (i) of clause (b) of that sub-section, he shall, within fifteen days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority.”

6. The Adjudicating Authority was of the view that an order under Section 24(3) of the Act could not be passed by the IO without first issuing a show cause notice in terms of Section 24(1) of the Act. A plain reading of Section 24(1) of the Act indicates that where the IO 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 such property should not be treated as a *benami* property. Thus, the two essential conditions for issuing a show cause notice under Section 24(1) of the Act are: (i) that the IO must have reason to believe on the basis of material in his possession, that any person is a *benamidar*; and (ii) he must record such reasons in writing. If the aforesaid conditions are met/complied with, the IO may issue a notice calling upon the person to show cause, within such time as may be specified in the notice, as to why the property in question should not be treated as a *benami* property.

7. A plain reading of sub-section (3) of Section 24 of the Act indicates that the IO may issue an Order of Provisional Attachment if he is of the opinion that the person in possession of the property held *benami* would alienate such property during the period specified in the notice; that is, the time provided by the IO for the noticee to show cause as to why such property should not be treated as a *benami*

property.

8. It is, at once, clear that an order under Section 24(3) of the Act is only for the purposes of provisionally attaching the property till the IO completes his inquiry pursuant to the show cause notice issued under Section 24(1) of the Act. It is also relevant to note that an Order of Provisional Attachment under Section 24(3) of the Act cannot exceed period of ninety days from the date of issuance of the show cause notice under Section 24(1) of the Act.

9. In the facts of the present cases, the orders under Section 24(3) of the Act were passed prior to issuance of show cause notice under Section 24(1) of the Act. The Adjudicating Authority considered the above and held that the Provisional Attachment Orders under Section 24(3) of the Act and the orders under Section 24(4)(a)(i) of the Act passed subsequently could not be sustained. The relevant extract of the order dated 21.05.2018 passed by the Adjudicating Authority under Section 26(3) of the Act in the case of Ms Sunita Gupta (W.P.(C) 8522/2018) is set out below:-

“The purported Provisional attachment Order under section 24(3) of PBPT Act, passed by the 1.0 is enclosed at page no. 7 of the Reference. However, the said order dated 25.01.2017, in fact appears to be a communication addressed to the Jain Cooperative Bank, Delhi, 110002. Copy whereof is also endorsed to Smt. Sunita Gupta (A/c holder) (Benamidar). Perusal of the said communication indicates that thereby Jain Cooperative Bank was prohibited and restrained, until further order from transferring or charging the property amounting to Rs.2.99 lakhs alleged to be Behami property including

proceeds from such property from the said bank account and other bank account maintained in the Bank as per provisions of section 24(3) of the PBPT Act. Thus what is annexed is the communication dated 25.01.2017, but it appears that no order in terms of section 24(3) is passed or/and annexed with the Reference. Section 24(3) of the PBPT Act provides that where the I.O. is of the opinion that the person is 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 as may be prescribed, for a period not exceeding ninety days or the dated of issue of notice under sub-section (1) of section 24. From the said communication dated 25.01.2017 it is evident that there is no period specified, which may be in accordance with the period mentioned in the show cause notice issued in terms of section 24(1) of PBPT Act. Further there is no reference as to the duration of the period for which the said order passed under section 24(3) of the PBPT Act would be operative. The provisions requires that it should not exceed 90 days from the date of issue of notice under section 24(1) of the PBPT Act. Thus neither there is any order passed nor produced in terms of section 24(3).

However, most significantly the order passed in terms of section 24(3) could not have been passed unless a notice in terms of section 24(1) was issued; As aforesaid admittedly the show cause notice in the present case was issued on 08.02.2017, i.e. much after 25.01.2017, when the order under section 24(3) was passed. Section 24(1) of the Act provides that where the I.O., on the basis of material in his possession, has a reasons to believe that any person is a Benamidar in respect of the 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, why the property should not be treated as a Benami property. The issuance of an order

under section 24 (3) of the Act, mandatorily requires that there ought to have been a notice issued firstly in terms of section 24(1) of PBPT Act. The notice under section 24 (1) also requires recording of the reasons in writing. Thus there has to be reasonable belief would necessarily a foundation for forming the opinion in terms of section 24(3) of the PBPT Act. As no notice in terms of section 24(1) was issued or was in existence, the order under section 24(3) of the PBPT Act could not have been passed. As discussed aforesaid even there is no appropriate order passed in terms of section 24(3) of the PBPT Act. Once it is determined that the order under section 24(3) of the Act could not have passed without issuance of the show cause notice in terms of section 24(1) of PBPT Act, the purported order passed by the I.O. is clearly a illegal order. It has no legal existence, being null and void. Consequently there could not have been continuation of the purported order passed under section 24(3) of the PBPT Act, in terms of the provisions contained in section 24(4)(a)(i) for continuing the provisional attachment of the property till the passing of the order by the Adjudicating Authority under section 26(3) of the Act.”

10. At this stage, it is also relevant to refer to Section 26(3) of the Act, which reads as under:-

“26. Adjudication of *benami* property —

XXXX XXXX XXXX XXXX

(3) The Adjudicating Authority shall, after—

- (a) considering the reply, if any, to the notice issued under sub-section (1);
- (b) making or causing to be made such inquiries and calling for such reports or evidence as it deems fit; and
- (c) taking into account all relevant materials,

provide an opportunity of being heard to the person specified as a *benamidar* therein, the Initiating Officer, and any other person who claims to be the owner of the property, and, thereafter, pass an order—

- (i) holding the property not to be a *benami* property and revoking the attachment order; or
- (ii) holding the property to be a *benami* property and confirming the attachment order, in all other cases.”

11. The expression ‘*benami* property’ is defined under Section 2(8) of the Act to mean ‘any property which is subject matter of a *benami* transaction and also includes the proceeds from such property.’ The term ‘*benami* transaction’ is defined under Section 2(9) of the Act.

12. As noticed above, the Adjudicating Authority had concluded that the IO could not pass an order under Section 24(3) of the Act prior to issuing a show cause notice under Section 24(1) of the Act. In this view, the Adjudicating Authority did not sustain the Orders of Provisional Attachment passed by the IO. A plain reading of Section 26(3) of the Act also indicates that the Adjudicating Authority had no power to remand the matter to the IO. In terms of Section 26(3) of the Act, he was either required to hold the properties (amounts) in question not to be *benami* properties and revoke the Provisional Attachment Orders or proceed to hold the properties (amounts) in question to be *benami* properties and confirm the Provisional Attachment Orders.

13. The question whether the Adjudicating Officer could

independently conclude whether the properties (amounts) in question are *benami* properties notwithstanding any procedural defect in issuance of the Orders of Provisional Attachment is a contentious issue. This Court is, *prima facie*, of the view that the Adjudicating Officer was required to examine the material on record and after making such inquiries as necessary, take a view whether the properties (amounts) in question were *benami* properties or were not *benami* properties. Given the express language of Section 26(3) of the Act, it is possible to contend that it was not open for the Adjudicating Authority to conclude that the properties (amounts) in question were not *benami* properties only because the Orders of Provisional Attachment issued under Section 24(3) of the Act were defective. However, it is not necessary to examine this controversy in the present petition, as this Court is informed that the IO has already filed appeals under Section 46 of the Act before the Appellate Tribunal impugning the orders passed by the Adjudicating Authority under Section 26(3) of the Act. However, it is undisputed that the Adjudicating Authority has not examined the issue whether the amounts deposited in the bank accounts of the petitioners were *benami* properties within the meaning of Section 2(8) of the Act.

14. The limited controversy to be examined in the present case is whether the IO was barred from issuing a fresh show cause notice under Section 24(1) of the Act. It is apparent from the above that the Adjudicating Authority had set aside the Provisional Attachment Orders passed under Section 24(3) and 24(4)(a)(i) of the Act only on

the ground that the IO had not followed the procedure in terms of the scheme of Section 24 of the Act. The Adjudicating Authority had not examined the issue whether the properties (amounts) in question were *benami* properties in terms of Section 2(8) of the Act.

15. In the aforesaid circumstances, this Court finds no reason which would preclude the IO from issuing a fresh show cause notice and curing the procedural defect as observed by the Adjudicating Authority. The principles analogous to *res judicata* do not apply, as the Adjudicating Authority has not taken any decision on the merits of the matter; that is, he has not decided whether the sums deposited in the bank accounts of the petitioners were *benami* properties of Sh Nitin Jain.

16. It is well settled that if an order is set aside on account of violation of the principles of natural justice or on account of any procedural defect in the decision making process, the concerned authority is not precluded from re-initiating the proceedings after curing the procedural defects. This is, of course, subject to the condition that the fresh proceedings are (a) within the jurisdiction of the authority; and (b) are not barred by limitation. In the present case, there is no dispute that the IO has the jurisdiction to issue a show notice under Section 24(1) of the Act. There is also no dispute that such notice is not barred by limitation. In view of the above, this Court is unable to accept that the IO (respondent no.3) was in any manner precluded from issuing the show cause notice.

17. In *Thimmasamudram Tobacco Co. vs Assistant Collector of Central Excise, Nellore: AIR 1961 AP 324*, the Andhra Pradesh High Court had considered the question whether the Assistant Collector could initiate proceedings under the Central Excise Act after his order had been set aside for violating the procedure and/or the principles of natural justice. In the aforesaid context, the Division Bench of Andhra Pradesh High Court has observed as under:-

“Assuming that section 35 of the Central Excise Act does not clothe the appellate authority with power to remand the matter to the officer whose orders is appealed against, nothing stands in the way of the Assistant Collector initiating the proceedings afresh, when his order was quashed not on merits but on technical grounds, i.e. for not following either the procedure or the dictates of natural justice. In a case where the flaw in the order appealed against consists of in the non-observance of certain procedure or in not giving effect to the maxim ‘audi alteram partem’, it is open to the officer concerned to start the procedure once again with a view to follow the rules of procedure and the principles of natural justice.”

18. In *Superintendent (Tech.I) Central Excise, IDD Jabalpur and Ors. v Pratap Rai: 1978 (3) SCC 113*, the Supreme Court had referred to the aforesaid passage with approval and observed as under:-

“We find ourselves in complete agreement with the view taken by the Andhra Pradesh High Court and the observations made by Reddy, C.J. who spoke for the Court. It is obvious that in the instant case the Appellate Collector found that the order of the Assistant Collector suffered from a serious procedural infirmity, viz., that it was passed without giving the

respondent a proper opportunity of being heard, and, therefore, had to be vacated. In such circumstances, therefore, it cannot be said that fresh proceedings by complying with rules of natural justice could not be started against the respondent. ”

19. The aforesaid decisions were also referred by the Supreme Court in a later decision in *Vipulbhai Mansingbhai Chaudhary v. State of Gujarat and Anr.*: (2017) 13 SCC 51.

20. In view of the above, the IO was not proscribed from issuing a fresh show cause notice under Section 24(1) of the Act. It was contended on behalf of the petitioners that the Adjudicating Authority had finally held the properties (amounts) in question as not *benami* properties in the order dated 21.05.2018 and, therefore, the only option opened to the IO would be to challenge the same in an appeal under Section 46 of the Act, which had been done. It was contended that although the Adjudicating Authority had found that the IO had not complied with the provisions of Section 24 of the Act, the finding that the properties (amounts) in question were not *benami* properties was on merits. Therefore, the IO could not issue a fresh show cause notice.

21. The aforesaid contention is also unpersuasive. A plain reading of the orders dated 21.05.2018 passed by the Adjudicating Authority clearly indicate that he had not examined the question whether the properties (amounts) in question were *benami* properties within the meaning of Section 2(8) of the Act. He had, nonetheless, held the properties to be not *benami* properties in view of the provisions of

Section 26(3) of the Act, which only provided the Adjudicating Authority two options: pass orders holding the properties (amounts) in question not to be *benami* properties and revoking the Provisional Attachment Orders; or holding the properties (amounts) in question to be *benami* properties and confirming the Provisional Attachment Orders. Thus, if the petitioners insist that the finding of the Adjudicating Authority is on merits, the orders passed by the Adjudicating Authority would be unsustainable.

22. This Court is of the view that the conclusion of the Adjudicating Authority must be read in the context of its reasons. As noticed above, the orders of the Adjudicating Authority are founded on the basis that the IO did not follow the procedure as required under Section 24 of the Act. Thus, the only manner, in which the orders passed by the Adjudicating Authority dated 21.05.2018 under Section 26(3) of the Act can be read is to mean that the Orders of Provisional Attachment were set aside for failure on the part of the IO to follow the scheme of Section 24 of the Act and not because the properties (amounts) in question were found to be not *benami* properties.

23. In view of the above, the present petitions are unmerited and are, accordingly, dismissed. All pending applications stand disposed of.

VIBHU BAKHRU, J

AUGUST 20, 2018

pkv/MK