

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on 23.01.2020****Judgment Delivered on 06.02.2020****Writ Appeal No. 29 of 2020**

*{Arising out of order dated 15.11.2019 passed by the learned Single Judge in Writ
Petition (C) No. 3819 of 2019}*

1. Tulsiram, S/o Shri Ghaneshram, aged about 68 years.
2. Manki Bai, W/o Shri Tulsiram, aged about 59 years.

Both the Appellants are R/o Village Barekel, P.S. & Tehsil-Pithora, District
Mahasamund (C.G.)

---- Appellants**Versus**

1. Assistant Commissioner of Income Tax (Benami Prohibition), Room No. 201,
First Floor, Central Revenue Building, Civil Lines, Raipur (C.G.)
2. Initiating Officer, PBPT Act, Assistant Commissioner of Income Tax (Benami
Prohibition), Room No. 201, First Floor, Central Revenue Building, Civil Lines,
Raipur (C.G.)
3. Union of India, through its Secretary, Ministry of Finance (Department of
Revenue) Government of India, New Delhi (wrongly typed as Income Tax
Department, Government of India, New Delhi.)
4. Adjudicating Officer under the Prohibition of Benami Property Transactions Act,
1988, Room No. 26, 4th Floor, Jeevan Deep Building, Parliament Street, New
Delhi.

---- Respondents

For Appellants	:	Shri Surfaraj Khan, Advocate.
For Respondents No.1,2&4	:	Shri Amit Choudhary, Smt. Naushina Afrin Ali and Shri Ajay Kumrani, Advocates.

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice**Hon'ble Shri Justice Parth Prateem Sahu, Judge****CAV Judgment****Per P. R. Ramachandra Menon, Chief Justice**

1. Writ Petitioners are the Appellants. Grievance is against the verdict passed by
the learned Single Judge, whereby the challenge raised against the Annexures

P/1 & P/2 notices/proceedings under the Prohibition of Benami Property Transactions Act, 1988 (for short, 'Act of 1988') has been repelled, holding that it is rather premature as the matter is still pending before the competent authority and only 'provisional attachment' of the property has been ordered till the final adjudication.

2. Heard Shri Surfaraj Khan, the learned counsel appearing on behalf of the Appellants and Shri Amit Choudhary and Smt. Naushina Afrin Ali, the learned counsel representing the Respondents No. 1, 2 and 4.
3. The Appellants are husband and wife and they own different extents of properties in different villages acquired by utilizing the funds allegedly from their own sources. Ever since purchase/acquisition of the properties, they are stated as enjoying the same with absolute ownership, exclusive possession and clear and marketable title. While so, the Petitioners were served with Annexure P/1 notice dated 31.07.2019 issued by the 1st Respondent to the effect that, as per the information gathered by the said Respondent, the above properties were to be held as 'benami properties' and hence the said properties were provisionally attached, till final adjudication.
4. On receipt of Annexure P/1, the Appellants submitted Annexure P/5 reply, explaining the facts and figures. It was pointed out that all the properties mentioned in the notice, except those items which were specifically pointed out as belonging to somebody else (as disclosed from Annexure P/4), were purchased prior to the Benami Transaction (Prohibition) Amendment Act, 2016 (for short, 'Amendment Act, 2016') which came into force only from 01.11.2016 and hence they cannot be proceeded against. The title deeds of the properties owned by the Appellants are produced as Annexure P/3. However, the 2nd Respondent, without any regard of the explanation offered by the Petitioners/Appellants issued Annexure P/2 order dated 27.08.2019, whereby

Annexure P/1 provisional order was confirmed. This made the writ Petitioners to approach this Court by filing the writ petition seeking for a direction to quash Annexures P/1 and P/2 notices/proceedings.

5. The main challenge raised before the learned Single Judge was that the 2nd Respondent was proceeding to 'confiscate' the property and that the power to confiscate the property has been brought into force only as per the Amendment Act, 2016. Earlier, on establishing the facts and figures as to the benami nature of the property, the course of action available was only to have the property acquired without any compensation. The provision to 'confiscate' the property was brought in, as per the Amendment Act, 2016, which came into force only from 01.11.2016. This being the position, the above property cannot be attached even provisionally in connection with any proceeding, as no confiscation of the property is possible. Reliance was also sought to be placed on the verdict passed by the Apex Court in ***Mangathai Ammal (Died) through L.Rs. and Others vs. Rajeswari and Others*** reported in **AIR 2019 SC 2918** and on the ruling rendered by a learned Single Judge of the Rajasthan High Court in Civil Writ Petition No. 2915 of 2019 and connected cases holding that the amendment is only having prospective effect.
6. The prayers were opposed from the part of the Respondents pointing out that the writ petition was premature, insofar as Annexures P/1 and P/2 are only in respect of provisional attachment till the matter is finally adjudicated by the 2nd Respondent. It is only with intent to see that no third party right is created over the properties concerned, which are *prima facie* found as benami properties in view of the incriminating materials/evidence collected. It was also pointed out that the judgment sought to be relied on by the writ Petitioners were not having application insofar as the question whether the property had to be confiscated or not, was yet to be decided. After hearing both the sides, the learned Single Judge declined interference, holding that Annexures P/1 and P/2 proceedings

were only provisional and it was open for the writ Petitioners to raise all the contentions before the adjudicating authority, where the matter was pending. This is put to challenge in this appeal.

7. Shri Surfaraj Khan, the learned counsel appearing for the Appellants submits that Annexure P/3 title deeds clearly reveal that all the said properties were purchased by the Appellants themselves utilizing their funds much prior to 01.11.2016; *i.e.*, the date on which Amendment Act, 2016 was brought into force. The provision for 'confiscation' of the property is a substantive law, which can have only prospective application and cannot be of any retrospective effect. This is the law declared by the Rajasthan High Court referring to all the relevant provisions of law and the binding precedents. Reliance is also sought to be placed on ***Mangathai Ammal (supra)***. The learned counsel submits that substantial changes have been introduced to the old Act, which earlier contained only 9 provisions/sections. The drastic changes brought about as per Amendment Act, 2016 cannot be called as 'procedural' in nature and hence not retrospective.
8. It is pointed out that the Appellants had purchased the said properties using their own money and particulars of the sources and funds have already been passed on to the 2nd Respondent. Even in a case where the above properties are held to be benami, the proceedings can only be for 'acquisition' under the old Act and not for 'confiscation' under the Amendment Act, 2016. These vital aspects were omitted to be properly noted by the learned Single Judge who interpreted Sections 3, 5 and 8 as retrospectively amended, which is not correct as discernible from the very terminology used in the provision by using 'present tense' and not in past tense (with reference to Section 3). Under Section 5 of the old Act, the benami property could have been proceeded against only for 'acquisition', though without compensation; whereas a substantive change has been brought about as per the Amendment Act, 2016 which provides for

'confiscation' which is applicable only in respect of properties purchased after the date on which the amended statute came into force *i.e.* on 01.11.2016. When the authority has no power to proceed against the old properties, the properties purchased prior to 01.11.2016 are not liable to be proceeded against and the Appellants are being unnecessarily harassed. Hence it requires to be interdicted, submits the learned counsel.

9. The learned counsel for the Respondents reiterates the submissions as already made before the learned Single Judge, as taken note of in the judgment. It is pointed out that serious lacunae and inadequacies were felt by the law makers in giving effect to the Act in the manner as actually intended and it was accordingly, that the ways and means were carved out, providing for a more effective procedure to deal with the situation. The learned counsel also points out the instances of violation of the statutory provisions were segregated, providing for appropriate punishment in respect of the violation of the provisions under the old Act and higher extent of punishment in respect of such violations after the commencement of the Amendment Act, 2016 from 01.11.2016. Since the penal provisions are not having any retrospective effect, the enhanced punishment will be applicable only prospectively; *i.e.* after 01.11.2016. The circumstance under which a conscious decision was taken to bring out the amendment to the existing statute, instead of repealing the same and bringing a new enactment, is highlighted with reference to the proceedings held on the floor of the Parliament to the effect that the old Act, if repealed and a new Act was introduced, there was a chance to have all the wrong-doers/offenders to go scot-free. Specific reference is also made to Section 65 of the Act (as amended), which refers to transfer of the pending cases, pointing out the fact that the present Act is applicable in respect of old transactions *i.e.* prior to 01.11.2016 and also in respect of subsequent transactions, as the case may be.

10. The salient features of the statutory provisions, as pointed out by the learned counsel for the Respondents in this regard by way of “Written Synopsis” (supported by affidavit) are as given below:

“i) Sub section 1(3) of the PBPT Act, which remains unaltered by the Amendment Act, 2016, specifically make the provisions of sections 3, 5 and 8 of the PBPT Act from 05.09.1988 and states that the remaining provisions shall be deemed to have come into force on 19.05.1988.

ii) Further, Section 3 of the PBPT Act imposes a punishment of imprisonment upto three years and/or fine for entering into a benami transaction prior to the date of commencement of the Amendment Act, 2016 and, thereafter punishment shall be in accordance with Chapter VII, containing section 53, 54 and 55, that enhanced penal consequences of entering into a benami transaction after the date of commencement of the Amendment Act, 2016 have consciously been made prospective by that amendment statute.

lii) Section 5 of the Benami Transaction (Prohibition) Act, 1988 as applicable from 1988 clearly lays down that all properties held benami shall be subject to a acquisition by such authority, in such manner and after following such procedure as may be described. It has been further clarified, for the removal of doubts, that no amount shall be payable for the acquisition of any property. Hence, provisions for acquisition without compensation, in effect confiscation, were already in existence since 1988 and the Amendment Act, 2016 has only prescribed the procedure for the same. As such, by providing elaborate procedure for confiscation of benami property instead of acquisition of such property without compensation, no additional ability is proposed to be imposed on the Benamidar and/or beneficial owner of the property. “Acquisition without compensation” [Section 5 of the pre-amendment PBPT Act, 1988] is nothing but confiscation [Section 5 of the amended PBPT Act, 1988],

iv) Similarly, section 65 of the PBPT Act stipulates that every suit or proceeding in respect of a benami transaction pending before any forum on the date of the commencement of this Act shall stand transferred to the Adjudicating Authority or the Appellate Tribunal, as the case may be. This section also make it explicit that there could be proceedings initiated under the original Benami Act of 1983 and that such proceedings were to be

continued in accordance with the provisions of the Amendment Act, 2016 from the stage they were before the commencement of the Amendment Act.

v) As regards the intention of the Legislature, while enacting the Amendment Act of 2016, the clarification given by the Hon'ble Finance Minister in the Lok Sabha on 27.07.2016 while recommending the Amendment Bill, 2016 to the House. He stated that *".... if we brought in a new Bill, properties acquired benami between the period of 1988 onwards would have all gone scot free. So, it was considered necessary that the old law be allowed to remain, and the new amendments be inserted into the old law itself."*

vi) The specific lacuna sought to be remedied was, in the words of the Hon'ble Finance Minister, *"... this Act (Benami Act of 1988) had to be operationalized through rules, and the rules were never framed"*

viii) It is a fact that the various procedures for confiscation of properties held benami were inserted for the first time into the statute through the Amendment Act, 2016, to that extent they would be retrospective in their application being curative in nature. In order to understand as to whether the present amendment is a curative legislation, the observations of Hon'ble Supreme Court in the case of **R Rajgopal Reddy vs. Padmini Chandrasekharran reported in (1995) 2 SCC 630 can be seen at para 17, 18:**

"17. As regards, reason No-3, we are of the considered view that the Act cannot be treated to be declaratory in nature. Declaratory enactment declares and clarifies the real intention of the legislature in connection with an earlier existing transaction or enactment, it does not create new rights or obligations. On the express language of Section 3, of the Act cannot be said to be declaratory but in substance it is prohibitory in nature and seeks to destroy the rights of the real owner qua properties held benami and in this connection it has taken away the right of the real owner both for filing a suit or for taking such a defence in a suit by benamidar. Such an Act which prohibits benamis transactions and destroys rights flowing from such transaction as existing earlier is really not a declaratory enactment. With respect, we disagree with the line of reasoning which commanded to the Division Bench. In this connection, we may refer to the following observations in 'Principles of Statutory Interpretation' 5th Edition 1992, by Shri G.P. Singh, at page 315 under the caption 'Declaratory statutes'.

The presumption against the retrospective operation is not applicable to declaratory statutes. As states in CRAIES and approved by the Supreme Court: "For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error whether in the Statement of common law or in the interpretation of the statutes. Unusually, if not invariably, such an Act contains a preamble, and also the word declared' as well as the word enacted". But the use of the words 'it is declared' is no conclusive that the Act is declaratory for these words may, at times be used to introduce new rules of law and the Act in the later case will be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to explain an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language shall be deemed always to have meant' is declaratory, and is in pain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so when the pre-amended provision was clear and unambiguous. And amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect are therefore if the principal Act was existing law when the constitution came into force the amending Act also will be part of the law. In Mithilesh Kumari V. Prem Bihari Khare, Section 4 of the Benami Transactions (Prohibition) Act, 1988 was, it is submitted, wrongly held to be an Act declaratory in nature for it was not passed to clear any doubt existing as to the common law or the meaning or effect of any statute. The conclusion however that Section 4 applied also to past benami transactions may be supportable on the language used in the Section.

18. No exception can be taken to the aforesaid observations of learned author which in our view can certainly be pressed in service for judging whether the impugned section is declaratory in nature or not. Accordingly, it must be held that Section 4 or for that matter the 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 transactions and for whom new liabilities are created by the Act.

viii) Even on the aspect relating to whether a procedure can be prescribed for reaching an object which was earlier intended to, the Hon'ble Supreme Court in the case of Kapur Chand Pokhraj vs State of Bombay reported in AIR 1958 SC 993 at Para 9 held as under:

“9. In Maxwell's Interpretations of Statutes, the following passage appears at Page 225:

“Although to make a law punish that which, at the time when it was done, was not punishable, is contrary to sound principle, a law which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions.”

Therefore by virtue of the above decision, the produce now initiated for confiscating the property which was contemplated either also is retrospective in nature.

Further, the Hon'ble Supreme Court in Buckingham and Carnatic Vs. Venkataiah reported in AIR 1964 SC 1272 had also noted that, “... *If the words used in the section are capable of two constructions one of which is shown patently to assist the achievement of the object of the Act, courts would be justified in preferring that construction to the other which may not be able to further the object of the Act.*”

viii) The object of the Act was clearly stated by the then Finance Minister while introducing the Amendment Act, 2016 as “.... *the principal object behind this bill is that a lot of people who have unaccounted money invest and buy immovable property in the name of some other person or a non-existent person or a fictitious person or a benami person. So these transaction are to be discouraged..... It is predominantly an anti-black money measure that any transaction which is benami is illegal and the property is liable to be confiscated.*

x) The Amendment Act, 2016 to the extent of the procedural mechanism including the appellate forums set out therein, would also be governed by the Supreme Court decision in Rao Shiv Bahadur Singh Vs The State of Vindhya Pradesh (1953) SCR 1188 wherein it is stated that, “.... *a person accused of the commission of an offence has no vested right to be tried by a particular court or a*

particular procedure..... There is no principle underlying Art. 20 of the Constitution which makes a right to any course of procedure a vested right."

xi) As regards the 'enhanced punishment' introduced by the Amendment Act, 2016, referred to in the impugned judgment, the same, contained in the provisions of sections 53, 54 and 55 of the Amended Act have specifically been made prospective in the statute by the provisions of section 3(3) and could not be a valid basis for declaring the other procedural provisions of the Amendment Act, 2016 to be capable of prospective application alone.

Xii) Any law which makes engaging in certain activity a punishable offence, cannot be given retrospective effect because of the constitutional bar on retrospective criminal law. Therefore, Benami Transaction (Prohibition) Act, 1988 (the original act, 1988) was amended and not repealed. The consequence of this is that all benami transactions which have taken place between 1988 and the commencement of the Benami Transaction (Prohibition) Amendment Act, 2016 (i.e. Amendment Act, 2016) can be proceeded against. Since the original Act already prohibits benami transactions and makes it a punishable offence, benami transaction which have taken place from 1988 to 31.10.2016 will be proceeded against the original Act, 1988. Punishment in such cases will be to the extent provided by the law in force at time when the offence of benami transaction was committed and in the original Act, a maximum punished of imprisonment up to three years and/or fine has been provided.

Xiii) In the context of the challenge to the retrospective application of the prescribed procedure brought into the statute by the Amendment Act, 2016, it is relevant to note that the Hon'ble Calcutta High Court while deciding a similar challenge in the Writ Petition No.25872/2017 in the case of Macro Entertainment Pvt. Ltd. vs. Union of India had held that, *"..... Section 1(3) of the 1988 Act itself provides for perspective of its operative portions, viz. Its penal clauses, in contra distinction to its definition/defining provisions. Furthermore, this Court has no reason to accede to Prayer (a) of the writ petition upon noticing that the steps contemplated under Section 24(supra) follow the notice of IO and, being procedural apply in seriatim to the notice for the purpose of identifying a benami transaction prohibited in the statute book w.e.f. 19th May, 1988. Accordingly, no jurisdictional violation of exercise of powers under the 1988 Act (as amended) is occurred."*

11. As per the above "Written Synopsis" (supported by affidavit) filed on behalf of the Respondents, reference is also made to the clarification given by the Finance Minister in the Lok Sabha on 27.07.2016 while recommending the Amendment Bill, 2016. It is the contention of the Respondents that the amendment made with effect from 01.11.2016 is 'substantive', insofar as the 'punishment' is concerned; whereas it is only 'procedural', in respect of the various steps to be pursued. It is also pointed out that, with regard to the fate of the property, once it is established that it is 'benami property', there is no much difference; as, even under the old Act it was to be acquired without compensation. After the amendment, the property is liable to be confiscated, which is more or less equal in effect. In any view of the matter, a finding has to be rendered on conclusion of the adjudication and hence the challenge now raised is premature in all respects.
12. It is seen from Annexure P/1 dated 31.07.2019 that, as per the information gathered by the 2nd Respondent, one Laxmi Narayan Agrawal @ Punnu Seth of residing in the District Mahasamund had allegedly purchased benami properties of more than 200 acres of land in different villages/Tehsil in the name of the Appellants herein, as detailed therein. After conducting the verification and on finding the necessity to take further steps, approval was obtained under Section 23 of the Act of 1988 from the competent authority on 14.09.2018 to conduct further investigation. Documents were called for from the Land Revenue Authorities and Bank statements were obtained from the Banks concerned, besides recording the statements of the Appellants herein.
13. The outcome of the scrutiny done with reference to above materials has been given in Annexure P/1, to the effect that the Appellants were not having sufficient income to purchase the above properties. It was even beyond the knowledge of the Appellants that some of such properties were registered in their names. Show cause notice was issued to the Appellants on 02.05.2019,

which was served on 09.05.2019 and pursuant to their request, notice was also served on the Appellants in 'Hindi', by post, on 04.06.2019. On submitting a reply to the show cause notice, it was considered and the 2nd Respondent found that the particulars furnished by the Appellants did not reconcile with the materials on record. It was accordingly, that a *prima facie* finding was rendered to the effect that the matter required to be proceeded further; thus passing Annexure P/1 order of provisional attachment in terms of the mandate under Section 24 (5) of the Act of 1988. Annexure P/1 provisional attachment was later confirmed, pending final adjudication, vide Annexure P/2 dated 27.08.2019.

14. Considering the sequence of events and the nature of challenge raised by the Appellants/writ Petitioners, in the light of the version put forth by the Respondents as discussed by the learned Single Judge, it is evident that no prejudice has been caused to the Appellants/Petitioners in any manner, because of the 'provisional attachment'. This is more so, in view of the submissions made by the learned counsel for the Appellants during the course of hearing, that the Petitioners/Appellants would undertake that they would not alienate the properties till the adjudication is finalized. If the Appellants do not have any intention to alienate the property, they need not feel worried about Annexures P/1 and P/2 'provisional attachment'. What will be the course of action to be ordered by the 2nd Respondent on culmination of the adjudication proceedings, is a matter which is still to be ascertained. How the properties of the Appellants/Petitioners, covered by the Annexure P/3, are going to be dealt with by 2nd Respondent is yet to be decided. Whether any provisions of the statute which are 'substantive' in character would be applied retrospectively by the 2nd Respondent, is also not known; which can be considered only after passing the final order. The very purpose of passing 'provisional order of attachment', pending adjudication, is only to see that no third party interest is

created over the property. When the Appellants concede that they do not have any intent/idea to alienate the properties, there cannot be any genuine grievance in this regard as well. The Annexures P/1 and P/2 order passed by the proceedings issued by the 2nd Respondent are only of interim measure; which is only to sub-serve the final verdict and always subject to the outcome of the adjudication.

15. In the said circumstances, this Court finds that the interference declined by the learned Single Judge is not liable to be assailed under any circumstance. It is open for the Appellants to raise all contentions, legal and factual, before the 2nd Respondent. The appeal stands dismissed, making it clear that this Court has not expressed anything with regard to the merits of the case. No costs.

Sd/-

(P. R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge