IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present :- Hon'ble Mr. Justice I. P. Mukerji
Hon'ble Mr. Justice Md. Nizamuddin

APO No. 8 of 2019
with
WP No. 687 of 2017

M/s. Ganpati Dealcom Pvt. Ltd.
Vs.
Union of India & Anr.

For the Appellant : Mr. J. P. Khaitan, Sr. Adv.
Mrs. Manju Agarwal
Mr. Bajrang Manot
.....Advocates

For the Respondents : Mr. Kaushik Chanda, Ld. ASG
Mr. R. M. Roy
Ms. Debjani Ray
Mr. Anil Gupta

....Advocates

Judgement On : 12.12.2019

I.P. MUKERJI, J.

Ganpati Dealcom Pvt. Ltd., the appellant writ petitioner was incorporated on 7th September, 2007. Its registered office is at 101, Balaram Dey Street, Kolkata – 700006.

On 2nd May, 2011 it purchased the property numbered 9, Sarat Chatterjee Avenue, Kolkata. The sellers were diverse individuals. The total consideration was Rs.9,44,00,000/-. The property was large, the land area being 8 cottahs and 13 chittaks. The building standing on it was up to the

third floor having a total area of 6336.5 sq. ft. of which the ground floor had 1965.5 sq. ft., the first floor 1965.5 sq. ft., the second floor 1965.65 sq. ft. and the third floor 440 sq. ft. Prior to the purchase of this property six individuals appeared to have been allotted shares in the appellant. They were Nakul, Neha, Shruti, Ritu, Rajesh and Ashok Kumar Goenka, all living in Kamdhenu Building, 4A Ray Street, Kolkata – 700020. Nakul, Neha and Shruti were allotted substantial shares, 4,881 for Nakul, 15,214 for Neha and 10,048 for Shruti. Each of the others was allotted 200 to 300 shares.

At the time when this transaction was made The Benami Transactions (Prohibition) Act, 1988 was in force.

Some material provisions of the Act need to be set out:-

"THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988

1. Short title, extent and commencement-

.....

(3) The provisions of sections 3, 5 and 8 shall come into force at once, and the remaining provisions of this Act shall be deemed to have come into force on the 19th day of May, 1988.

2. Definitions- *In this Act, unless the context otherwise requires,--*

(a) benami transaction means any transaction in which property is transferred to one person for a consideration paid or provided by another person;

(c) property means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.

3. Prohibition of benami transactions*- (1) No person shall enter into any benami transaction. (2) Nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife of the unmarried daughter. (3) 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. (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this section shall be non-cognizable and bailable.*

5. Property of benami liable to acquisition*- (1) All properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedure as may be prescribed. (2) For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section (1).*

8. Power to make rules*- (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act. (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-- (a) the authority competent to acquire properties under section 5; (b) the manner in which, and the procedure to be followed for, the*

acquisition of properties under section 5; (c) any other matter which is required to be, or may be, prescribed. (3) Every rule made under this Act shall be laid, so soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule. 9. Repeal and saving- (1) The Benami Transactions (Prohibition of the Right of Recover Property) Ordinance, 1988 (Ord.2 of 1988.) is hereby repealed. (2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been or taken under the corresponding provisions of this Act."

This Act was amended by the Benami Transaction (Prohibition) Amendment Act, 2016. It was to come into force on the date notified in the Official Gazette by the Central Government. This date was 1st November, 2016 as notified on 25th October, 2016. By the amending Act benami transaction was redefined and widened. More exceptions were provided. For example under the 1988 Act to attract its rigour, it was enough that a property was transferred to one person for a consideration provided by

another. But the amending Act relaxed this liability by the addition of a provision that the property had to be held for the benefit of the person providing the consideration. I will give you another example. In the unamended Act property transferred to the wife or unmarried daughter was outside its purview. By this amendment transfer in favour of any child of the transferee would have a similar effect. In Section 5 of the unamended Act, benami properties were subject to acquisition without any right to receive compensation whereas under Section 27 of the Amendment Act, the property was simply liable to confiscation, without any clarification regarding compensation.

On 29th August, 2017 the respondent authority invoked Section 24(1) of the Act after its amendment. They issued a notice to the appellant alleging that the said property was benami under Section 2(8) of the said Act of 1988, as amended. It also alleged violation of Section 2(9)(D) thereof. It said that the consideration for this transaction was provided by "non-traceable fictitious/shell entities having no real business", rendering the transaction benami.

On 6th September, 2017 the appellant replied to this show cause notice stating that the property had been acquired by the fund of the company and not from fictitious persons.

On 9th October, 2017, the respondents gave reasons in support of the show cause notice by saying that the Goenkas were the beneficial owners of the property.

On 20th October, 2017 the appellant wrote to the respondents through a firm of lawyers S. K Tulsiyan and Co. In this letter they took very interesting legal points which were technical in nature. In a nutshell the objections were that the alleged benami transactions took place at the time of operation of the 1988 Act prior to the 2016 amendment. The show cause notice was issued under the amended Act. The amendment had prospective operation only. A show cause notice under the amended Act could not have been issued for alleged offences committed before the amendment came into force. The substantive rights which had accrued to the appellant under the 1988 Act were not taken away by the 2016 amendment. The said show cause notice was bad in law, was the preliminary objection.

Two substantial points raised by Mr. Khaitan, learned Senior Counsel for appellant need to be crystallized.

The first was that the amending Act had no retrospective effect for an alleged benami transaction made in 2011. A show-cause notice could not have been issued under the 1988 Act as amended. The show-cause notice dated 29th August, 2017 was issued under Section 24(1) of the 1988 Act, as amended. It asked the appellant to show-cause as to why the subject immovable property was not a benami property under Section 2(8) of the 1988 Act. There was no Section 2(8) in the original 1988 Act. Therefore, the reference was unmistakably to the Act as amended in 2016.

Secondly, it was said that the rules were not framed under the 1988 Act making it inoperative. Or, in other words, the government had deliberately not given effect to this Act. The 2016 amendment contained a detailed machinery for the enforcement of the provisions of the 1988 Act as amended in 2016.

In those circumstances a valuable right had accrued to the appellant on the date of coming into force of the amendment. This valuable right had not been taken away by the amendment. Therefore, a transaction of 2011 against which the government had taken no action could not be revived by the amendment Act which did not have any retrospective effect.

In the affidavit-in-opposition of the respondent authority which was affirmed in December, 2018 the following case was made out:

> *"5. a) .....*
>
> *b) .....*
>
> *c) .....*
>
> *d) It is further submitted that material on record indicated that Petitioner has invested in property of Rs.9,44,00,000/- in the financial year 2011-12. Thus, the copy of related purchase deeds was obtained and it is noted that company had purchased a property (land containing 8 Kattash 13 Chattacks together with a residential building having total floor containing 6336 Sq. Ft.) on 02.05.2011 at 9, Sarat Chatter Avenue, Kolkata. It is also gathered that the sources of fund is out of capital of the company. The return of the company was examined for the assessment years 2012-13 to 2016-17. It is seen that company has raised share capital of Rs.14,89,50,000/- (face value Rs.10/- and premium Rs.390/-*

per share) during the financial year 2007-08. From the return for the assessment year 2008-09 (financial year 2007-08) it is observed that the company's turnover ***is Nil.***

On perusal of records it is noted that petitioner company had invested Rs.9,44,00,000/- in property during the financial year 2011-12 relevant to assessment year 2012-13 out of the capital (Rs.14,89,50,000/-) raised by the company in Financial year 2007-2008 and 2008-09. It is found from Form 2 of the ROC return that the petitioner company allotted equity shares to the following companies.....On verification of the material on record it is seen that the following 14 (out of above 19) companies are shell companies which are managed and controlled by Entry Operators Shri Anand Sharma and Shri Janardhan Chokhani.

i) Abhishek Polyplast Pvt. Ltd.
ii) Ajay Software Pvt. Ltd.
iii) Classic Advertising & Services Pvt. Ltd.
iv) Gulmohar Builders Pvt. Ltd.
v) Gulmohar Power & Fuel Pvt. Ltd.
vi) Manish Merchants Pvt. Ltd.
vii) Puja Promoter Pvt. Ltd.
viii) Pankaj Infotech Pvt. Ltd.
ix) Pawanputra Advertising Pvt. Ltd.
x) Rameswar Finvest Pvt. Ltd.
xi) Tanish Infotech Pvt. Ltd.
xii) Tanish Tradecom Pvt. Ltd.
xiii) Yogita Developers Pvt. Ltd.
xiv) Trimurti Advisory Services Pvt. Ltd.

The company submitted that in 10.10.2016 (financial year 2016-17) the company again allotted equity shares (face

value 10/-, premium Nil per share) to ***Nakul Goenka, Neha Goenka, Shruti Goenka, Ritu Goenka, Rajesh Goenka and Ashok Kumar Goenka.*** *All of them have the same residential address i.e. Kamdhenu Building, 4A, Ray Street, Kol-20. It transpires from the return filed by the company that the turnover of the company from the A.Y. 2012-13 to A.Y. 2016-17 is Nil. The company has only negligible amount of interest income, profit on sale of investment and dividend income during this period.*

Further material in possession indicated that the amount of investment and continuance thereof in the form of share capital by such companies where virtually there is no business operation is a pre-meditated investment to facilitate the beneficiary to use the share capital on his own interest. In this case share capital received from the shell companies was invested in the property in the form of (land containing 8 Kattash 13 Chattacks together with a residential building having total floor containing 6336 Sq. Ft.) on 02.05.2011 at 9, Sarat Chatter Avenue, Kolkata in the name of the company (M/s. Ganpati Dealcom Pvt. Ltd.).”

The learned Additional Solicitor General argued that the amendments were very carefully woven into the fabric of the parent Act. He referred to Section 1(2) of the amending Act which stated that different dates may be appointed for coming into force of different provisions of the Act. He argued that Section 1(3) of the Parent Act said that provisions of the Act except 3, 5 and 8 as per the Act would come into force on 19th May, 1988. The amending Act was grafted into it. Therefore, the amendments of 2016 had

retrospective effect. He also argued that the concept of benami property and benami transaction remained the same on amendment. So was the provision regarding acquisition and compensation. The amending Act merely provided a machinery for the implementation of the Parent Act.

Learned Additional Solicitor General also argued that the proceedings emanating from the show-cause notice were yet to be finally adjudicated upon. The appellant/writ petitioner should be directed to participate in those proceedings. If they find themselves aggrieved by any order to be passed they are free to approach the appellate authority.

This writ application was disposed of by a final judgment and order made on 18th December, 2018 by Mr. Justice Basak. His lordship ruled that the show-cause needed to be adjudicated upon as "questions of law, fact and mixed questions of law and fact" were involved. The appellant/writ petitioner was directed to establish before the adjudicating authority that its shareholders could not be treated as the beneficial owner of a property when it was purchased in the name of a company, which was a separate legal entity than that of its shareholders. The question of jurisdiction of the adjudicating officer could also be gone into in those proceedings.

Discussion:-

On 19th May, 1988 the Benami Transaction (Prohibition of the right to recover property) Ordinance, 1988 was promulgated by the President of India.

The Benami Transactions (Prohibition) Act, 1988 was enacted on 5th September, 1988. It stated that the provisions of Sections 3, 5 and 8 would come into force at once. The remaining provisions of the Act were deemed to have come into force on 19th May, 1988, the date of enactment of the Ordinance. The Benami Transactions (Prohibition) Amendment Act, 2016 came into force on 1st November, 2016. In the amending Act certain key changes were made. Benami property was defined in Section 2(8). Benami transaction was redefined in Section 2(9)(A). Section 3 was amended to insert a provision that anybody entering into any benami transaction on and after the date of commencement of the amending Act would be punishable under Chapter VII which dealt with offences and prosecution. Sections 5 and 6 of the 1988 Act were altered by enacting that any property which was the result of a benami transaction was liable to be confiscated by the Central government. The use of the words "acquisition" and the explanation thereto that benami property acquired would not be compensated for by the government, in the 1988 Act, were deleted.

In **R. Rajagopal Reddy (Dead) By LRS. and Ors. Vs. Padmini Chandrasekharan (Dead) by LRS.** reported in **(1995) 2 SCC 630**, the Supreme Court interpreting Section 3(1) of the said Act of 1988 opined in paragraph 10 that it created "a new offence.....new liability" and would have prospective operation in relation to offences which took place after the provision came into force. It also opined in paragraph 18 that the Act was not declaratory or curative legislation but created substantive rights.

In **Commissioner of Income Tax (Central)- I, New Delhi vs. Vatika Township Private Limited** reported in **(2015) 1 SCC 1** the Supreme Court laid down the following dictum with regard to retrospectivity of a legislation in paragraph 28 of the report as under:

> *"**28.** Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v. Eyre, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.*
>
> ***29.** The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the*

enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

In **Niharika Jain & Ors. Vs. Union of India & Ors.** reported in an unreported decision of the Rajasthan High Court made on 12th July, 2019, the Court inter alia held that the 2016 amendment had prospective effect. First, the effect of an amendment has to be appreciated.

The effect of an amendment was very lucidly described by Mr. Justice Jagannadhadas in **Shri Ram Narain Vs. The Simla Banking & Industrial Co. Ltd.** reported in **AIR 1956 SC 614.** His lordship approved the dictum laid down by the same court in **Shamarao V. Parulekar v. The District Magistrate, Thana, Bombay & Ors.** reported in **AIR 1952 SC 324** in page 621:

"The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a, part of itself, into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink

and the old words scored out so that thereafter there is no need to refer to the amending Act at all". Now there is no question about the correctness of this dictum. But it appears to us that it has no application to this case. It is perfectly true as stated therein that whenever an amended Act has to be (1) (1952) S.O.R. 683."

The learned Judge added that this reading of the unamended portion with the amended provisions was to ascertain the meaning of the Act as amended, but subject to the following condition:

"But this is not the same thing as saying that the amendment itself must be taken to have been in existence as from the date of the earlier Act. That would be imputing to the amendment retrospective operation which could only be done if such retrospective operation is given by the amending Act either expressly or by necessary implication."

Bennion on Statutory Interpretation, 6th edition has said in page 262 of the text book *"the fact that the drafter fails to provide necessary transitional provisions does not mean that a new provision inserted in an Act is to be treated s having been present since the Act was originally passed."* Again in pages 264 and 265, the author wrote as follows *"A more subtle problem concerns the effect of the new wording on the words that remain. An Act is to be construed as a whole. Are the unaltered words of the Act to be construed as meaning what they did before the others were amended? It was held in* ***A-G Vs. Lamplough*** *reported in* ***(1878) 3 EX D 214*** *that, unless the*

contrary intention appears from the amending Act, the answer to this question is yes.....

.....Effect of amending Act- it follows that the usual rule is that the function of the amending Act is to serve as an instrument for altering the text of the earlier Act, subject only to the need for commencement and transitional provisions. Unless the contrary intention appears, the other provisions of the amending Act should not affect the construction of words inserted by it into the earlier Act. ***Brown Vs. Bennett (2002) 2 All ER 273 at 40 -42; Medcalf Vs. Mardell (2003) 1 AC 120, 133-134; Compare Craftrule Ltd. Vs. 41-60 Albert Palace Mansions (Freehold) Ltd. (2010) EWHC 1230 (Ch) (28)"***

By an amendment an existing Act is supplemented by new provisions adding to or subtracting from it. It is usual that parts of the existing Act are retained. Say for example, there is a provision in the existing Act for penalty in the case of acquisition of property described as benami. If the definition of benami property, its acquisition and the penal provisions remain unaltered after the amendment, and the alleged contravention took place before the amendment, it would not affect any proceeding taken in respect of that contravention, after the amendment, because these provisions are continued by the amending Act, untouched and unaffected by it. But take the case here. The definitions of benami transaction and property are radically changed by the amending Act. So are the provisions

regarding investigation of contraventions, offences etc., the consequence of it namely, confiscation, prosecution etc. The show-cause notice dated 29th August, 2017 was issued under Section 24(1) of the 1988 Act as amended. It referred to the alleged benami transaction by the appellant under Section 2(8) and 2(9)(D) thereunder. Therefore to allege contravention of the 1988 Act as amended in 2016 the contravention should have been made after the date of coming into force of the amendment. In the absence of retrospective operation of the amending Act, one cannot allege that the transaction resulting in the said contravention of the 1988 Act as amended in 2016 took place in 2011. That is exactly what the impugned show-cause notice proposed to do.

Now, it is an accepted principle of law that the statute cannot have any retrospectivity unless expressly provided therein.

In **Rao Shiv Bahadur Singh and Anr. Vs. State of Vindhya Pradesh** reported in **AIR 1953 SC 394**, the Supreme Court was concerned with the interpretation and application of Article 20 of our Constitution. The court remarked that "this article in its broad import has been enacted to prohibit convictions and sentences under ex-facto laws." It defined ex-post facto laws as those which "voided and punished what had been lawful when done."

This case was cited to support the argument that the 2016 amendment could not be utilized to charge the appellant with contravention or convict

him for an alleged offence under it but which was not so under the 1988 Act.

All the above authorities were cited by Mr. Khaitan.

I reject the contention of the Additional Solicitor General that the provision in Section 1(2) of the said Act automatically made the amending Act of 2016 retrospective. The 2016 amendment is a new legislation and in order to have retrospectivity it should have been specifically provided therein that it was intended to cover contraventions at an earlier point of time. That express provision is not there. Therefore this contention of the Additional Solicitor General fails.

Now, I come to the second most important point.

This point raised by Mr. Khaitan is also very substantial. Section 5 of the 1988 Act before amendment provided for acquisition of benami property. Section 3 provided for punishment with imprisonment for a term extending to three years for persons entering into a benami transaction, which was made non-cognizable and bailable.

That the property was benami would be held to be so and acquired following a procedure to be prescribed.

Now, it follows that a decision whether a property was benami or not had to be made followed by acquisition and initiation of criminal proceedings, if one has to make a proper construction of the said Act.

A declaration that the property was benami could not have been made unless a procedure was prescribed by rules made under Section 8.

No rules under that section were ever made. Hence, although the Act was entered in the statute book, it was an Act on paper only and inoperative. By the addition of Chapter III to the Act by the Amendment Act of 2016, an adjudicating authority and its composition, jurisdiction and powers were provided.

Exercising powers under Section 28(2) read with Section 59 of the Amendment Act the Central Government by a Notification No. SO 3290E dated 25th October, 2016 notified specified Income Tax Authorities to act as "Initiating Officer, Approving Authority and Administrator" for benami transactions. Furthermore, by another Notification No. SO 3288E dated 25th October, 2016 Adjudicating Authority was notified.

In **P. Kasilingam & Ors. Vs. P.S.G. College of Technology & Ors.** reported in **1995 Supp (2) SCC 348**, the Supreme Court said: *"Moreover, the Act and the Rules form part of a composite scheme. Many of the provisions of the Act can be put into operation only after the relevant provision or form is prescribed in the Rules. In the absence of the Rules the Act cannot be enforced."*

In **Canbank Financial Services Ltd vs Custodian & Others** reported in **(2004) 8 SCC 355** the Supreme Court specifically held in paragraph 67 that the said Act of 1988 had not been made workable as no rules under Section 8 of the said Act for acquisition of benami property had been framed. These two cases were also cited by Mr. Khaitan.

Section 6(c) of the General Clauses Act, 1897 is most important. It lays down that repeal of an enactment, which necessarily includes an

amendment, would not affect "any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed", unless a different intention is expressed by the legislature.

Without question, the omission on the part of the government to frame rules under Section 8 of the 1988 Act rendered it a dead letter and wholly inoperative. Assuming that the appellant had entered into a benami transaction in 2011, no action could be taken by the Central government, in the absence of enabling procedural rules. It is well within the right of the appellant to contend that the Central government had waived its rights. It could also contend that no criminal action could be initiated on the ground of limitation. Now, these rights which had accrued to the appellant could not, in the absence of an express provision be extinguished by the amending Act of 2016. In other words, applying the definition of benami property and benami transaction the Central government could not, on the basis of the 2016 amendment allege contravention and start the prosecution in respect of a transaction in 2011.

For the reasons given above, the main show cause notice dated 29th August, 2017 and the subsequent notice dated 9th October, 2017 issued by the respondents are a nullity, in my opinion.

Both the said notices are quashed and set aside. I make it absolutely clear that this order will not prevent the respondents from taking proper steps in accordance with law, as they may be advised.

To the above extent, this appeal (APO 8 of 2019) is allowed. The impugned judgment and order dated 18th December, 2018 is set aside.

Certified photocopy of this judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,

(MD. NIZAMUDDIN, J.) **(I. P. MUKERJI, J.)**