**APPELLATE TRIBUNAL FOR SAFEMA AT NEW DELHI**

1. **MP-PBPT-2092/MUM/2022 (Misc.)**
   **MP-PBPT-970/MUM/2020 (Stay)**
   **MP-PBPT-972/MUM/2020 (Exem.)**
   **FPA-PBPT-1079/MUM/2020**

   M/s. Prism Scan Express Pvt. Ltd. ... Appellant

   Versus

   The Initiating Officer,
   DCIT (BPU-2), Mumbai ...
   Respondent

2. **MP-PBPT-2093/MUM/2022 (Misc.)**
   **MP-PBPT-973/MUM/2020 (Stay)**
   **MP-PBPT-975/MUM/2020 (Exem.)**
   **FPA-PBPT-1080/MUM/2020**

   M/s. Futurage Corporate Care Pvt. Ltd. ... Appellant

   Versus

   The Initiating Officer,
   DCIT (BPU-2), Mumbai ... Respondent

3. **MP-PBPT-2698/MUM/2022**
   **FPA-PBPT-1085/MUM/2020**

   Suresh Bhageria ... Appellant

   Versus

   The Initiating Officer,
   DCIT (BPU-2), Mumbai ... Respondent

**<u>Advocates/Authorized Representatives who appeared</u>**

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| For the Appellants<br>**FPA-PBPT-1079 & 1080/MUM/2020** | : | Mr. Madhav Khurana,<br>Ms. Sanjivani,<br>Mr. Nikhil Pillai, Sh. Athak Walia<br>& Sh. Parth Kaushik,<br>Advocates |
| For the Respondent | : | Mr. Manmeet Singh Arora,<br>S.P.P. |
| For the Appellant<br>**FPA-PBPT-1085/MUM/2020** | : | Sh. Singh & Sh. Gurfateh Singh<br>Khosa, Advocates |
| For the Respondent | : | Mr. Manmeet Singh Arora,<br>S.P.P. |

**CORAM**

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| **JUSTICE MUNISHWAR NATH BHANDARI** | : | **CHAIRMAN** |
| **SHRI V. ANANDARAJAN** | : | **MEMBER** |

**ORDER**
**15/12/2023**

**FPA-PBPT-1079/MUM/2020,**
**FPA-PBPT-1080/MUM/2020 &**
**FPA-PBPT-1085/MUM/2020**

These appeals have been filed under section 46 of Prohibition of Benami Property Transactions Act, 1988 (in short, the Act of 1988). It is to challenge the order dated 11.05.2020 passed by the Adjudicating Authority on a reference. The Adjudicating Authority has confirmed the Provisional Attachment Order dated 01.04.2019. By the order of provisional attachment, demat and bank accounts of two Companies, namely M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited were attached.

2. It is stated that one of the appellants Suresh Bhageria, is a promoter and Director of M/s Bhageria Industries Limited (In short "BIL") and part of Bhageria Group of Companies. A survey was conducted under section 133 A of the Income Tax Act, 1961 on Bhageria Industries Ltd. It was alleged that there is benami

purchase of shares of B.I.L. by Benamidars, M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited.

3. It was also alleged that the financials of M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited are not administered with the credentials of their Directors. It is also found that Directors of above two Companies were not drawing any benefits from the Company. They were the employees of B.I.L.. More than 50% of shareholding of M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited was held by two other Companies, i.e. M/s Wayforward Trade Private Limited and M/s Accelerate Tradestar Private Limited. The financials of M/s Wayforward Trade Private Limited and M/s Accelerate Tradestar Private Limited were also not commiserating with the credentials of the Directors. The companies had no business activities. The funds in the companies were not matching with the credentials of the Directors. They were having no means to infuse money in the Company. The Companies yet purchased the shares of B.I.L. and other Companies.

4. Based on the survey, an inference was drawn that M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited are involved in Benami transactions. During the course of the survey, statements of Directors of all the four companies were recorded under section 131 of the Income Tax Act.

5. The Directors of four companies, namely, M/s Prism Scan Express Pvt. Ltd., M/s Futurage Corporate Care Private Limited, M/s Wayforward Trade Private Limited and M/s Accelerate Tradestar Private Limited denied knowledge about the business activities of the Company. The Directors of M/s Accelerate Tradestar Private Limited alleged to have majority shareholding of M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited used to sign documents on the instruction of one Mr. Pikesh in lieu of cash.

6. In pursuance to the survey, Initiating Officer found that the transaction of investment in share of BIL by M/s Prism Scam Express Private Limited and M/s Futurage Corporate Care Limited are Benami Transaction under section 2 (9) ( C) and (D) of the Act.

7. The two companies were treated as Benamidars for purchase of shares of Bhageria Industries Ltd. and accordingly a show cause notice was served under section 24 (1) of the Act of 1988. The Initiating Officer attached demat accounts of M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited by invoking section 24 (3) of 1988 the Act. The Initiating Officer drew the following conclusions pursuant to the enquiry:-

***(i) Prism and Futurage had negligible funds till financial year 2013-14***
***(ii) The directors of the two companies were inducted in 2014.***
***(iii) Thereafter, huge funds were infused in the two companies by way of share capital on huge premium.***
***(iv) These funds were used for investments in shares, mainly of listed companies such as BIL***
***(v) There was no evidence of conduct of business by Prism and Futurage***
***(vi) One of the directors of Prism – Sh. Rohit Lohiya, and one of the directors of Futurage- Sh. Murarilal Gupta - work as Managers in BIL.***
***(vii) The contact email ID in one of the bank accounts of Prism and Futurage is 'accounts.mumbai@bhageriagroup.com'.***
***(viii) The Headquarters of the Bhageria Group were located in the same geographical area as a bank accounts of Prism and Futurage.***

8. On a show cause notice, the appellants submitted their response. The provisional attachment order was, however, confirmed and is being challenged by these appeals. Before going further into the facts, it would be relevant to refer the only issue

raised by the counsel for the appellant to challenge the order of Adjudicating Authority. It was in reference to the Judgement of the **Apex Court in the case of Ganpati Dealcom Private Limited Versus Union of India, 2020 SCC online SC 1064.** It was submitted that the Benami Transaction involved in this case is prior to the amendment in the Act of 1988. The amendment was brought by the notification dated 25th October, 2016 to amend certain provisions of the Act, 1988. The amendment by the Amending Act of 2016 was subject matter of challenge before the Apex Court in the case of Ganpati Dealcom (Supra).

9. After elaborate discussion of the issues raised before the Apex Court, it was held that section 3 (2) of the unamended Act of 1988 is unconstitutional. Section 3 (2) of the Act of 2016 was also declared unconstitutional. It was further held that forfeiture provision under section 5 of unamended Act of 1988, prior to Amending Act of 2016 was also unconstitutional for being manifestly arbitrary.

10. In rem, it was held that forfeiture proceedings under section 5 of the Act of 2016 would be prospective and would not have

retrospective effect. It was with the direction that authorities cannot initiate or continue the criminal prosecution or confiscation proceedings for a benami transaction prior to coming into force the Act of 2016 vide the notification dated 25.10.2016. In reference to the aforesaid, the learned counsel for the appellant submitted that benami transaction involved in this case are prior to the amendment in the Act of 1988 by Amending Act of 2016.

11. The alleged share purchased by benami transactions are of the period prior to 01.11.2016, i.e. before the Amending Act of 2016 so amended by the Benami Transactions (Prohibition) Amendment Act, 2016 (In short, the Act of 2016).

12. In the light of the aforesaid, prayer was made to set aside both the orders by applying the Judgement of the Apex Court in the case of Ganpati Dealcom Private Limited (Supra).

13. The counsel for the appellant did not argue any other issue while making oral arguments but later on, submitted written arguments, touching even factual issues also.

14. We would deal with those issues also but the first issue, rather the only issue argued orally before the Tribunal is to be dealt with first because if the case is covered by the judgement of the Apex Court in the case of Ganpati Dealcom Private Limited (Supra), nothing more would require then to set aside both the orders impugned herein.

15. A contest to the legal issue in reference to the judgement of the Apex Court was made by the learned counsel for the respondents. It was submitted that the benami transactions involved in the present case are not only of the period prior to 01.11.2016, (Date from which Amending Act 2016 was given effect) but are even of the period subsequent to it.

16. Elaborating the arguments, it was submitted that transfer of shares may be prior to the amendment by the Amending Act 2016, but they were held by the two companies M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited even subsequent to the amendment.

17. In the light of the aforesaid, they were involved in the benami transactions even subsequent to the amendment.

A reference of the definition of "Benami Transaction" under section 2 (9) of the Act of Amending Act of 2016 was given and is quoted hereunder:-

***Section 2. Definitions.— In this Act, unless the context otherwise requires,—***
***(9) "benami transaction" means,—***
***(A) a transaction or an arrangement—***
***(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and***
***(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—***
***(i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;***
***(ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;***
***(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;***
***(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or***
***(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or***
***(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;***
***(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;***
***Explanation.—For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), if, under any law for the time being in force,—***
***(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;***
***(ii) stamp duty on such transaction or arrangement has been paid; and***
***(iii) the contract has been registered.***

18. As per the definition quoted above, the benami transaction means a transaction or an arrangement where a property is transferred to or is held by a person and the consideration of such property has been provided or paid by another person. The aforesaid definition is applicable to this case. According to the definition, "benami transaction" does not mean only transfer of property, but include even its holding by a person without payment of consideration rather it was paid or provided by another person. Since it has come on record that on the date of survey, subsequent to amendment by the Amending Act 2016 and even show cause notice, the shares were held by the appellant Companies, it would fall in the definition of "Benami Transaction" under the Amending Act of 2016.

19. The aforesaid issue was not argued by the counsel for the appellant in reference to word "held" rather they prayed for quashing of the orders in the light of the Judgement in the case of Ganpati Dealcom Private Limited (Supra).

20. The reference of paragraph nos. "69, 90, 91, 92, 93, 96, 98, 117, 120, 127, and 130" were given to support the arguments.

21. Those paras are quoted hereunder for ready reference:-

> ***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.***
>
> ***90. With respect to the first line of argument, our discussion above can be summarized as under:***
>
> *(a.)* ***Section 3(1) of 1988 Act is vague and arbitrary.***
> ***(b.) Section 3(1) created an unduly harsh law against settled principles and Law Commission recommendations.***
> ***(c.)Section 5 of 1988 Act, the provision relating to civil forfeiture, was manifestly arbitrary.***
> ***(d.) Both provisions were unworkable and as a matter of fact, were never implemented.***
>
> ***91. Having arrived at the aforesaid conclusions that Sections 3 and 5 were unconstitutional under the 1988 Act, it would mean that the 2016 amendments were, in effect, creating new provisions and new offences. Therefore, there was no question of retroactive application of the 2016 Act. As for the offence under Section 3(1) for those transactions that were entered into between 05.09.1988 to 31.10.2016, the law cannot retroactively invigorate a stillborn criminal offence, as established above.***
>
> ***92. As per the concession made by the Union of India and a fair reading of Section 53 of the 2016 Act, the offence under the aforesaid provision is prospective, and only applied to those transactions that were entered into after the amendment came into force, viz., 1.11.2016. Any contrary interpretation of Section 3 of the 1988 Act would be violative of Article 20(1) of the Constitution. Article 20(1) reads as under:***

***<u>20.Protection in respect of conviction foroffences</u>***
***(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.***

***93. In the case at hand, the 2016 Act containing the criminal provisions is applicable only prospectively, as the relevant Sections of the pre-amendment 1988 Act containing the penal provision, have been declared as unconstitutional. Therefore, the question of construction of the 2016 Act as retroactive qua the penal provisions under Sections 3 or 53, does not arise.***

***96. This brings us to the last aspect as to the retroactive operation of confiscation (forfeiture) under Section 5 read with Chapter IV of the 2016 Act. It is the argument of the Union of India that civil forfeiture being in the domain of civil law is not punitive in nature. Therefore, it does not attract the prohibition contained under Article 20(1) of theConstitution. Meaning thereby, that if this Court holds that the civil forfeiture prescribed under the 2016 Act is punitive, only then will the prohibition under Article 20(1) apply. If not, then the prohibition does not apply.***

***98 It is well settled that the legislature has power to enact retroactive/retrospective civil legislations under the Constitution. However, Article 20(1) mandates that no law mandating a punitive provision can be enacted retrospectively. Further, a punitive provision cannot be couched as a civil provision to by-pass the mandate under Article 20(1) of the Constitution which follows the settled legal principle that "what cannot be done directly, cannot be done indirectly".***

***117 From the above discussion, it is manifest that the Courts have read down the provisions of civil forfeiture to bedependent on the underlying criminal prosecution to temper the harsh consequences envisaged under such provisions. No doubt, such reading down was mandated to ameliorate harsh consequences of confiscatory laws which otherwise would have allowed the***

***State agencies to take over the property without seriously pursuing the criminal prosecutions. At this stage, we can only recommend that the utility of independent provisions of forfeiture, distinct from criminal prosecution, needs to be utilised in a proportional manner, looking at the gravity of the offence. Few examples which may pass the muster of proportionality for having such stringent civil forfeiture, may relate to crimes involving terrorist activities, drug cartels or organised criminal activities. As we have discussed, the application of such a provision to numerous other offences which are not of such grave severity, would be of serious risk of being disproportionate, if procedures independent of criminal prosecution are prescribed. We may note that the proportionality of separate confiscation procedure prescribed under the 2016 Act, has not been argued herein. Accordingly, we leave the aforesaid question of law open.***

***120 Coming to the Benami Act post the Amendment, the interplay of Sections 27(3), (5) and 67 of the 2016 Act creates a confiscation procedure which is distinct from the procedure contemplated under the CrPC or any other enactment till now in India. This separation of the confiscation mechanism is not merely procedural. It has also altered substantive rights of the evidentiary standards from 'beyond reasonable doubt' to 'preponderance of probabilities'. Such a change of standards cannot be merely termed as procedural.***

***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 31.10.2016 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 31.10.2016 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. InR (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..."'"***

***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., 1.11.2016. 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.***

22. The perusal of the paras quoted above not only makes a reference of the amended provisions but also deals with the issues over the constitutional validity of the provisions of the Act of 1988 and the Amending Act of 2016. The conclusions thereupon were drawn by the Apex court in para 130 quoted above. The benami transaction prior to the Amending Act 2016 were not to be touched in reference to the amended provisions.

23. It is not in doubt that benami transaction prior to the amendment is to be governed by Judgement of the Apex Court and for it, certain provisions of the Amending Act, which includes even provision of forfeiture would not apply. It would, however, be relevant to find out whether benami transaction is of a period prior to the amendment or even subsequent to it also.

24. For the aforesaid, we need to reiterate the definition of "Benami Transaction." It not only refers in the transfer of property but also its holding and thereby, if somebody is holding the

benami properties subsequent to the amendment, it would come in the sweep of "benami transaction".

25. If it is a case of transfer of property prior to the amendment in the definition of "Benami Transaction" and such property is not held by the benamidar as on the date of the amendment or subsequent to it, then the Amending Act of 2016 would not be applicable to such a transaction.

26. In other case, where though transfer of the property is prior to the Amending Act 2016, but it is still held by the benamidar even subsequent to the amendment, it would be a "benami transaction" under the Amending Act, 2016.

27. The clarity of the issue has been made in the light of the contest by the respondents for the first time and accordingly, we hold that the Judgement of Apex court in the case of Ganpati Dealcom Private Limited (Supra) would apply taking into consideration whether the benami transaction falling under section 2 (9) is of a period prior to the Amending Act, 2016 or it is even subsequent to it.

28. The learned counsel for the appellant has made reference of the judgement of the Apex Court in the case of Commissioner of Wealth Tax, (CWT) Versus Suresh Seth, (1981) 2 SCC 790.

29. It was submitted that once the transfer of property took place prior the Amending Act 2016, then subsequent holding of the property cannot be considered to be a continuance offence.

30. Reference of para 11 of the Judgement (Supra) was given to submit that a wrong or a default of any nature would not continue after its completion and accordingly it was urged that the case in hand involves a transaction prior to the Amending Act, 2016.

31. The learned counsel has made a further reference of the Judgement of the Apex Court in the case of C.I.T Vs. Vatika Township Private Limited (2015) (1) SCC (1). It is to submit that the legislation is presumed to be

prospective in nature unless it is made retrospective. The idea behind the rule is that current law should govern current activities. The law passed today cannot apply to the event of the past.

32. The learned counsel for the appellant has given reference of the Judgement dated 08.03.2022 of Telangana High Court in the case of Nexus Feeds Limited & Others Versus The Assistant Commissioner of Income Tax in Writ Petition No. 14695 of 2021. There, the Division Bench of the High Court dealt with the similar issue. The High Court recorded its findings in reference to section 2 (9) (A) of the Act of 1988. It was in relation to transfer of shares between the Companies. It was held that the Amendment of 2016 would not apply retrospectively being prospective in nature.

33. Reference of para 29, 32.6, 68, 69, 69 , 69.1, 70, 71, 73 and 93 of the said judgement was given. It was submitted that the controversy before the Division Bench of the High Court was similar to what is involved

in this case. The High Court examined the issue minutely and held that any transfer of share prior to the amendment by the Amending Act of 2016 would not be governed by the amended provision. A transaction was not an offence in the year prior to the amendment by the Act of 2016 would not be an offence as per section 2 (9) (A) and (C ) of the Amending Act.

34. We have considered the submissions made aforesaid. To analyse the issue, we have gone through the judgements referred to above.

35. If the facts of this case are taken into consideration, the transfer of shares of B.I.L in favour of Companies, M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited started after the year 2013. The fact, however, remains that those shares are still held by the appellant Companies and it was not only on the date of amendment by the Amending Act of 2016 but even at the time of survey by the Income Tax Department for the year 2018.-19.

36. The appellants were holding the shares on the date of initiation of action and it could not be disputed by the appellants. The perusal of the definition of “Benami Transaction” not only makes a reference of transfer of property to fall in the definition of “Benami Transaction” but even its holding section 2 (9) (A) of Amending Act, 2016 has two parts to consider a transaction to fall within the purview of Benami Transaction, as defined under section 2 (9) (A) of the Act. The first is about the transfer of the property to a person of which consideration was paid or provided by another person. The second part has been separated from first part by putting word “or” in between. Under the second part of definition, if the property is held by a person whose consideration has been provided or paid by another person then also it would be a “Benami Transaction”.

37. The appellant has referred to the definition only by taking the first part, i.e. transfer of shares ignoring

the second part of the definition regarding holding of property. If a person is holding a property as on the date of the amendment or subsequent to it, whose consideration was paid or provided by another person, then it will fall under the definition of "Benami Transaction". The consideration of definition of "Benami Transaction" by dividing it into two parts was not made earlier.

38. In the case of Nexus Feeds Limited & Others (Supra), we do not find a specific argument in reference to holding of property by a person of which consideration was paid or provided by another person.

39. For the aforesaid purpose, we refer para 69, 69.1, 70, 71, 73 and 93 of the said judgement and are quoted here under.

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

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

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

*70. As per Section 2 (9) (A), a benami transaction would mean a transaction or an arrangement - (a) where a property is transferred to or is held by a person and the consideration for such property has been provided or paid by another person; and (b) the property is held for the immediate or future benefit, direct or indirect of the person who has provided the consideration barring the four exceptions carved out with which we may not be concerned.*

*71. Thus, as per Section 2 (9) (A), there must be a transaction or an arrangement; as per such transaction or arrangement, a property is transferred to or is held by a person; the consideration for such property is provided or paid by another person. Pausing here for a moment, on a comparative analysis of this definition with the definition of benami transaction under the unamended 1988 Act, we find that there is a subtle but significant difference in the later definition even at this stage itself. <u>As per the amended definition, the property need not be transferred by 'another person'. The property can be transferred to by any person or held by a person on behalf of any person. But the consideration for such property is provided or paid by the 'another person'.</u> The amended definition proceeds further; such transferred property must be held for the immediate or future benefit of the person who has provided the consideration and such benefit may be direct or indirect. It is equally significant to note that under the unamended 1988 Act there was no definition of 'benamidar' and 'beneficial owner'. These two expressions are defined under the Amendment Act of 2016 and must be read in conjunction with the new definition of benami transaction as provided in Section 2 (9). Benamidar is the person, real or fictitious, in whose name the benami property is transferred or who holds such benami property; this would include a person who lends his name to such transfer or holding of benami property. Again, beneficial owner means, the person for whose benefit the benami property is held by a benamidar, whether his identity is known or not.*

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

***3(2). But if it is a benami transaction under Sections 2 (9) (A) and 2 (9) (C) of the 1988 Act as amended by the Amendment Act of 2016, then it will attract the stiffer penalty under Section 3 (3).***

***93. From the conspectus of the discussions made above, it is apparent that Section 2 (9) (A) and Section 2 (9) (C) are substantive provisions creating the offence of benami transaction. These two provisions are significantly and substantially wider than the definition of benami transaction under Section 2 (a) of the unamended 1988 Act. Therefore, Section 2 (9) (A) and Section 2 (9) (C) can only have effect prospectively. Central Government has notified the date of coming into force of the Amendment Act of 2016 as 01.11.2016. Therefore, these two provisions cannot be applied to a transaction which took place prior to 01.11.2016. Admittedly, in the present case, the transaction in question is dated 14.12.2011. That being the position, we have no hesitation to hold that the show cause notice dated 30.12.2019, provisional attachment order dated 31.12.2019 and the impugned order dated 30.03.2021 are null and void being without jurisdiction. Consequently, the impugned order is set aside and quashed.***

40. The Hon'ble High Court, no doubt propounded a ratio of prospective operation of the Amending Act of 2016 and even refers to the definition of "Benami Transaction". But, the specific argument in reference to holding of the property by a person whose consideration was paid or provided by another person was not raised rather emphasis was in regard to the transfer of the property prior to the amendment by the Amending Act of 2016. The specific argument aforesaid was not raised even before us in any of the appeals decided by this Tribunal earlier rather the decision therein was based on the admission of the counsel for the respondents that Benami Transaction involved therein was of the period prior to 01.11.2016. The orders were passed on the admission of the parties that Benami Transaction is prior to 01.11.2016.

41. In the instant case, a contest was made by the counsel for the respondents who submitted that if anyone is holding a property after the amendment by the Amending Act, 2016 though transfer of property is prior to 01.10.2016, such a transaction would fall in the definition of "Benami Transaction" as given under section of 2 (9) (A) of the Act of 2016.

42. We find force in the arguments of the learned counsel for the respondents. The Tribunal or for that even a court cannot ignore the statutory provision and for that to miss any word used in the statute. The word "held" has to be given true meaning and that too after proper reading of the definition, otherwise we would be giving interpretation to the provision going contrary to the definition of "Benami Transaction". It can be explained by an illustration for clarity of the issue.

43. If a property is transferred to a person whose consideration was paid or provided by a person prior to

01.11.2016 and such a property is not held by the person on date or subsequent to the amendment then such a Benami Transaction would not be affected by the Amending Act 2016.

44. However, if transfer of property took place prior to 01.10.2016 and property is "held" by the person even subsequent to the date aforesaid who has not paid the consideration, rather it was paid or provided by another person, then irrespective of the date of transfer of the property, its holding would be a "Benami Transaction".

45. We cannot ignore the word, "held" for giving proper interpretation of the definition of "Benami Transaction". Accordingly, while we rely upon the Judgement of Hon'ble Apex Court in the case of Ganpati Dealcom Private Limited (Supra) but with clarity that if a person holds the property even after the amendment then even if transfer was prior to 01.11.2016, such a transaction would be a Benami Transaction under the

Amending Act of 2016 and it would apply to such a transaction.

46. In the case of Nexus Feeds Limited & Others, the Division Bench of Telangana High Court has recorded admission of the respondents about the Benami Transactions of a period prior to the Amending Act 2016.

47. The perusal of para 71 otherwise makes it clear that if the property is transferred to any person or held by a person on behalf of any other person of which consideration was provided or paid by another, then it would fall under the definition of "Benami Transaction". The emphasis was made even in regards to the transfer of the property held immediately or for future benefit of the person who has provided the consideration. It would also fall in the definition of "Benami Transaction".

48. According to the Division Bench of the High Court, the two expression words, "transfer" and "held" under the amended provision need to read in conjunction and conclusions have been drawn in para 71 in the case (Supra) that "Benamidar" is a person,

real or fictional, in whose name the Benami property is transferred or who holds such Benami property.

49. The conclusion therein are against the appellants who referred subsequent paras, which are literally based on the admissions of the party where it was agreed that the Benami Transaction was of the period prior to the amendment by the Amending Act, 2016. That being the position, the judgement supra, does not support the appellant.

50. The appellants have referred to the judgement of the Apex Court in the case of Suresh Seth (Supra). It is to submit that there cannot be a continuous offence. If the offence is committed on a particular day, it ends on the same day. The arguments have been made in the ignorance of the facts in the case of Suresh Seth. If an offence is complete in all respect on a particulars day or days, then obviously the judgement in the case Suresh Seth (Supra) would apply. It would however depend on the nature of the offence and even the provision. In the instant case, the definition of "Benami Transaction" has two parts. One is on the transfer of the property and another on its holding. The use of the word "held" under

section 2 (9) (A) (a) is of significance and would make a transaction to be a Benami Transaction, if a person holds a property even on the date of amendment or subsequent to it of which consideration has been provided or paid by another person prior to the amendment. We have given illustration for the aforesaid to hold that if a property was transferred prior to the amendment by the Amending Act, 2016 and is not held by the transferee as on the date of the amendment, then the amended provision would not apply but after transfer of the property prior to the amendment if it is held by the Benamidar as on the date of the amendment or subsequent thereto, it would fall within the definition of "Benami Transaction" and registration of case for that would not be considered to be a continuous offence but becoming an offence in reference to the amended definition of "Benami Transaction". Accordingly, the judgement in the case of Suresh Seth (Supra) would not apply to the case.

51. The first issue is accordingly decided against the appellant and in the favour of the respondents because property was "held" even after the amendment by the Amending Act of 2016.

52. The learned counsel for the appellant has filed written arguments wherein issues have been raised even in reference to the facts of this case. The learned counsel submitted that no evidence was brought by the respondents to show any Benami Transaction in the hands of the appellant Companies and involvement of Suresh Bhageria, the other appellant.

53. It alleged that side opposite has failed to prove that the finance brought in M/s Prism Scan Express Pvt. Ltd. and also in M/s Futurage Corporate Care Private Limited was by the appellant Suresh Bhageria.

54. The respondent failed to show that the corporate capital brought in the appellant Companies, was at the instance or by Suresh Bhageria.

55. It was also stated that M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited were not holding majority share of BIL, rather it was only 4% to 5% of the total share of the B.I.L. It is also that they purchased shares of other Companies also other than of B.I.L.

56. In view of the above, the respondents failed to prove Benami transaction in the hands of any of the appellants and thereby the Initiating Officer had drawn conclusions based on surmises and conjectures.

57. Merely for the reason that the email ID for the bank accounts of the appellant Companies were the same and having reference of "Bhageria" therein could not have resulted in a conclusion about Benami transaction. It could not have been even in reference to the employees of B.I.L to be the Directors of the appellant companies and thereby the learned Initiating Officer failed to conduct a fair, impartial and proper investigation in the matter.

58. The appellant has even alleged violation of principle of natural justice in passing the Provisional Attachment Order. It is for the reason that initially the attachment was initiated in reference to section 2 (9) ( C) and (D) of the Act of 2016 but finally, they invoked section 2 (9) (A) and (C ) of the Act of 2016 without a

notice for it. Thus, principle of natural justice was violated.

59. It is also stated that no reason to believe under section 24 (1) of the Act of 1988 was recorded by the Initiating Officer. It is despite a mandate of the statute. If the reasons to believe were recorded then it was not supplied to the appellant with the show cause notice. The facts aforesaid has been admitted by the respondent in their reply. Failure to furnish reason to believe is not only a violation of provisions of Act but also principle of natural justice. Thus, on the aforesaid grounds also, the impugned order deserves to be set aside.

60. It is lastly contended that the respondent have even failed to follow the procedure given under Rule 5 of Prohibition Of Benami (Property Transactions) Rules, 2016. The rule provides manner of the attachment. However, in the present case, it was not followed and therefore the attachment of the bank accounts and

demat suffers from illegality and accordingly the impugned order deserves to be set aside.

61. We have considered the arguments made by the appellant in reference to the facts though while making oral arguments, none of those issues were raised. However, it has been raised in the written arguments and accordingly we would be dealing with it.

62. It is submitted that a case of "Benami Transaction" could not be proved by the respondent. The findings have been recorded based on inferences. The Initiating Officer based on his own imagination found that the benamidar Companies were working at the behest of Shri Suresh Bhageria, promoter of M/s B.I.L.

63. We find that aforesaid factual aspects were considered by the Adjudicating Authority. It was found that the two appellant companies, namely, Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Pvt.

Ltd. were not having any funds till 2013-14 and after the companies were acquired, funds have been infused for making investments in financial year 2014-15. The sources of funds in both companies are by way of share capital on high premium. The same was infused by paper companies which were not having any business activity. The Directors of the two appellants were the employees of M/s B.I.L. According to the appellant, finance in the companies was induced after the year 2013-14 but failed to show the source for it.

64. The statements of the Directors of the two companies namely Rohit Vinod Lohiya and Sapna Lohiya were recorded. They had no knowledge of the business activities of the appellant Company and admitted that no benefit from the Company was drawn. They were signing the documents on the instructions. They accepted themselves to be 'Dummy'. The same was the position for M/s Futurage Corporate Care Private Limited because its Director was also employee of B.I.L. and had no knowledge about business activity of the Company.

65. Rohit Vinod Lohia of M/s Prism Scan Express Pvt. Ltd. admitted that he is working as Manager, Sales in B.I.L. and was getting salary of Rs. 56,000/- per month. In the same manner, Shri Murari Lal Gupta, Director of M/s Futurage Corporate Care Private Limited had admitted himself to be the Manager, Sales in B.I.L. and was getting salary of Rs. 53,000/- per month. He was not getting any benefit from M/s Futurage Corporate Care Private Limited rather used to sign the documents on the instructions having no knowledge about the business.

66. Another Director, Sunita Gupta of M/s Futurage Corporate Care Private Limited admitted that she is not drawing any financial benefit from the company and used to sign the documents on the instruction.

67. Registered address of M/s Prism Scan Express Pvt. Ltd. is the residential address of the directors shri Rohit Lohiya and Ms. Sapna Lohiya and there was no evidence of any business activity at the premises. Similarly, the registered address of Futurage Corporate Care Pvt. Ltd. is the residential address of Shri Murarilal Gupta and Ms. Sunita Gupta, directors and there was no evidence

of any business activity being carried on from the premises.

68. M/s Accelerate Tradestar Private Limited also induced funds in the appellant Company. The Director, Girish Bhatt had denied any knowledge about the Company. He was in fact not knowing that he is a Director of the Company. He was not getting any benefits from the Company. He was signing the documents as and when asked by Mr. Pikesh and in lieu of that, he was getting an amount of Rs. 25,000/- per annum.

69. The another Director of the said company Tej Singh Ramola was from a very poor background. He denied knowledge about his Directorship or shareholding in the company. He was not getting any financial benefit from the company except Rs. 25,000/- cash per annum. Mr. Rajkumar Saraf was the Director of M/s Wayforward Trade Private Limited had admitted that he has no knowledge about M/s Wayforward Trade Private Limited. The statement of Ms. Manju Rajkumar Saraf,

Director of Wayforward Trade Private Limited was also recorded. She was the housewife and having no income.

70. The statement of Rakesh Bhageria, the Sales Head of Bhageria Industries Ltd were also recorded. He did not comment on the statements of Director of M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited. The same was the position of Suresh Bhageria. Thus, in their statements recorded during the survey, the Directors of the two appellant companies and other connected persons admitted that they were working on the instructions of Shri Suresh Bhageria. The another connecting material was the email I.D. having name of Bhageria Industries though M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited were shown to be the separate Companies.

71. The Companies were shown to have offices at the residences. The Adjudicating Authority recorded certain facts to show brief financial profiling of Benamidar

Companies and following common features were found which are as under :-

- *Both companies are managed and controlled by Shri Suresh Bhageria.*
- *Both benamidar companies have directos who are employees of beneficial (employee of Mr. Suresh Bhageria) were appointed in March 2014.*
- *Neither of the companies had any funds till FY 2013-14 , and after acquisition of these companies, funds have been infused for making investment from FY 2014-15.*
- *The sources of funds in both the companies are by way of share capital on huge premium from corporate shareholders.*
- *The persons providing consideration in both the companies are same that is corporate shareholders.*
- *Both benamidar companies have applied the funds received into investment in share mainly listed companies whose promoter is Shri Suresh Bhageria.*
- *Same Authorized Representative has represented for both benamidar companies.*
- *The submissions and the clarification to the statement on oath filed by the both companies are similar.*

72. The Adjudicating Authority further considered that Directors in their statement stated about the investment by others. The summons were issued to all those who said to have contributed for the financials

of the Companies, but none appeared to make statement, rather details of entities were found to be incorrect for service of summons. It was thus recorded that funds in two benamidar companies, i.e. M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited Companies was brought at the instance of appellant, Suresh Bhageria. Eleven companies induced money in two appellant company on higher premium having no business activity. Those companies were summoned but only one responded. The shares on higher premium was to generate money for purchase of shares of BIL.

73. Detailed finding on each issue has been given. Thus, it is not correct to state that the respondent failed to prove benami transaction rather it is the appellant Companies failed to show and prove the financial sources or the source of inducement of finances after the year 2013-2014 other than by co-appellant.

74. It is also submitted that appellant Companies rightfully invested in the shares of B.I.L. and otherwise they were investing in other shares also. The argument aforesaid was made without clarifying as to from where the finance came in the Companies because inducement of finance in the Companies in rightful manner could not be proved by the appellants to show their innocence, but they utterly failed in doing so. A company having no business activity could get corporate finance on higher premium. M/s Futurage Corporate Care Private Limited has shown wholesale business but had no activity of purchase and sale for wholesale to carry out the activities. No expenses were shown to have incurred towards salaries/wages, payment of indirect taxes, electricity, rent etc. They were mere paper companies.

75. The clear conclusion from the survey and subsequent investigation was that control over the two appellant companies was acquired in the year 2014-15 and finances were infused into the companies at the

instance of Shri Suresh Bhageria for the purpose of engaging in benami transactions in the shares of B.I.L. and other group companies of the Bhageria group. In fact, the two companies had no activity other than investment in B.I.L. and other Bhageria group companies.

76. In view of the above, we do not find the respondent failed to prove Benami transaction as per the provision of PBPT Act.

77. The counsel for the appellant further submitted that inducement of finances in the two Appellant Company could not have been questioned once they were assessed by the Income Tax Department. The Corporate shareholding and share premium on a higher rate was disclosed in the Income Tax Return of 2015-2016 and 2016-2017 and the specific question, "whether the funds received in the form of share premium are from disclosed sources and have been correctly offered for Tax" has been decided.

78. The appellant had disclosed the sources with relevant information and was accepted by the Tax Authorities. Thus, inducement of funds said to be in the shape of corporate shares on a higher premium could not have been questioned.

79. We find that assessment of income by the income tax authority remain on different footing. They remain concerned about the income and tax payment. The Tax Authorities conducted survey subsequently to detect benami transaction. The assessment of income does not regularize benami transaction, rather it will take its own course. If income of someone is assessed and thereupon found to be out of benami transaction, the action under the Act of 1988 can be taken.

80. All the facts on record are surrounding and pointing towards active role of Suresh Bhageria to first induce the funds into the Companies and then to get purchase of shares of B.I.L. apart from other

companies of the group and thereby, it could not be inferred that Initiating Officer was predetermined to make out a case.

81. The appellant had further referred to the statement of Director of Erstwhile shareholder of the company during course of survey. It was submitted by the counsel for the appellant that they ceased to be shareholder at the time of survey in December, 2018. Thus, their statements could not have been relied upon.

82. According to the appellant, the statement of Erstwhile shareholder was irrelevant whereas, we find it be relevant. It is to find out the financials of the two appellant Companies from the year 2013-2014 onwards and to draw conclusion about the Benami Transaction. The statements of the then Directors were relevant and rightly relied by the respondents.

83. In fact, the material available on record and perused by us is sufficient to show close connection

between Suresh Bhageria, the promoter of B.I.L. group with M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited and reason of investment in shares of B.I.L. and other companies as benamidars. The appellant has failed to show any business activities of the appellant companies in the year 2013-14 and subsequently to get corporate shareholders on premium. The inducement of funds was itself through Benami Transactions, otherwise Corporate Share would not have been given on higher premium of a Company having no business activity. The money induced therein was used to purchase shares of BIL and other Companies.

84. In the light of the aforesaid, we are unable to accept the argument of the appellant that the inferences have been drawn on extraneous consideration.

85. The another argument pressed while referring to the written arguments was as to whether proceedings

could have been initiated for alleged Benami transaction under two sub section (A) and ( C) of Section 2(9) of the Act of 2016. The argument was even that section 2 (9) (A) (C ) are in conflict with each other and therefore entire action became illegal. The argument has been raised without going through the provision and the facts available on the record. Section 2 (9) (A) (a) was attracted in view of holding of shares as on the date of amendment by the Amending Act of 2016 and even subsequent to it and so far as section 2 (9) (C ) is concerned, it would be attracted when the transaction or arrangement in respect of the property is denied by the owner of the property or he denies knowledge of such ownership.

86. The initial notice and even show cause notice was in reference to section 2 (9) (B) (C ), however, the order was passed in reference to section 2 (9) (A) and (C) of Amending Act of 2016. It needs to be clarified that even if the initial show cause notice was not given in reference to section 2 (9) (A) of the Amending Act of

2016, the respondents were not precluded from passing the order in reference to provision attracted on the facts of the case. It is necessary to add that mere reference of an incorrect provision of law would not frustrate the proceeding if a case is made out on facts and under the relevant provision. We otherwise find that section 2 (9) (C ) applies to the facts of case even independent for which notice was earlier served. The transaction or an arrangement in respect of the property where the owner of the property is not aware of or denies knowledge of such ownership on the date of survey or a show cause notice, even if the transfer of property is prior in time. It is the settled law of land that proceedings can be initiated in reference to two different provisions if a case is made out in reference to the individual provision.

87. In the instant case, there was transfer of shares prior to the Amending Act of 1916, but such shares were held by the appellant Companies even after the

amendment and therefore it would fall within the definition of "Benami Transaction".

88. In the instant case, the Director of appellant Company, i.e. M/s Prism Scan Express Pvt. Ltd. and M/s Futurage Corporate Care Private Limited have denied knowledge about their shareholding or even interest in the Company and thereby the respondent have rightly applied section 2 (9) (A) (C ) of the Act. At this stage, it was submitted that initially show cause notice was not issued in reference to sub-section A rather it was under sub-section (B) and (C ) of section 2 (9).

89. The show cause notice can be given by referring to a particular provision but after appropriate proceedings, if a case is made out under other provision then an order passed thereupon would not be illegal.

90. Thus, we do not find any substance in any of the arguments.

91. It is further submitted that despite a mandate of section 24 (1) of the Act of 1988, the reasons to believe recorded in writing was not supplied to the appellant. We have gone through the record and find that a copy of the reasons to believe was not only supplied to the appellant but it has been enclosed with the appeal. In view of the above, the argument for alleged violation of Act is not made out.

92. The argument has been raised that Rule 5 of Rules, 2016 was not complied for attachment. It provides the manner of attachment.

93. We find arguments to be of no substance as the attachment of the property was made after following the rules and therefore the appellant failed to specify specific rule, alleged to have violated for attachment of the property. Thus, even the last argument raised by the appellant cannot be accepted.

94. In view of the discussion made above, we do not find any force in the appeals and accordingly the same are dismissed.

**(Justice Munishwar Nath Bhandari)**
**Chairman**

**( V. Anandarajan )**
**Member**

**New Delhi,**
**15/12/2023**
'M'