

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE C.V.BHASKAR REDDY

W.P.Nos. 33191, 33195, 33198, 33199, 33203, 34454, 34670, 34676, 34687, 34691,
34755, 34799, 34800, 34801, 34802, 34803, 35092, 35093, 35113, 35132, 35134,
35144, 35146, 35153, 35154, 35155, 35156, 35171, 35276, 35279 and 33403 of 2022;
23070, 23497, 23501, 23566, 23575 of 2021

COMMON ORDER: (Per the Hon'ble the Chief Justice Ujjal Bhuyan)

This order will dispose of the above batch of writ petitions.

2. We have heard Mr. C.V.Narsimham, Mr. G.Mohan Sai and Mr. Rohan Aloor, learned counsel for the petitioners; Mr. B.Narsimha Sarma, learned counsel for the respondents- Income Tax Department; and Mr. B.Mukherjee, learned counsel representing learned Assistant Solicitor General of India appearing for Union of India.

3. For the sake of convenience, we divide the above batch of writ petitions into three groups in the following manner:

Group A:- W.P.Nos.23070, 23497, 23501, 23566, 23575 of 2021.

Group B:- W.P.Nos.33191, 33195, 33198, 33199, 33203, 34454, 34670, 34676, 34687, 34691, 34755, 34799, 34800, 34801, 34802, 34803, 35092, 35093, 35113, 35132, 35134, 35144, 35146, 35153, 35154, 35155, 35156, 35171, 35276, 35279 of 2022

Group C:- W.P.No.33403 of 2022

4. In the first batch of cases *i.e.*, **Group A**, the challenge made is to the show cause notices dated 02.09.2021 issued by the Assistant Commissioner of Income Tax being Initiating Officer, Benami Transactions (Prohibition) Unit, Hyderabad under Section 24(1) of the Prohibition of Benami Property Transactions Act, 1988 (briefly 'the Benami Property Act' hereinafter)

5. In the second batch of cases *i.e.*, **Group B**, the challenge is to the order passed by the adjudicating authority under Section 26(3) of the Benami Property Act. Though the dates are different in each of the writ petitions, in the lead case of this group being W.P.No.33191 of 2022, the order passed by the adjudicating authority is dated 25.03.2022.

6. In the last case *i.e.*, **Group C**, the challenge has been made to the order dated 12.04.2022 passed by the Commissioner of Income Tax, who is also the initiating officer of the Benami Transactions (Prohibition) Unit, Hyderabad under Section 24(4)(b)(i) of the Benami Property Act.

7. For the sake of convenience, let us take W.P.No.33191 of 2022 as the lead case.

8. In this case, show cause notice under Section 24(1) of the Benami Property Act dated 30.12.2019 was issued to the petitioner-M/s. Neopride Pharmaceuticals Limited by the Assistant Commissioner of Income Tax/Initiating Officer. In serial No.3 of the statement forming part of the show cause notice, the benami property *i.e.*, the subject matter of benami transaction was described as under:

“The moveable property being 97,500 shares of M/s Neopride Pharmaceuticals Limited worth Rs.9,75,000/- allotted in FY 2014-15.

2. Proceeds thereof being corresponding “Fixed Asset” to the tune of equivalent amount acquired as against the share capital introduced in the books of M/s Neopride Pharmaceuticals Limited during the FY 2014-15 so routed through benami transaction.’

9. Assistant Commissioner of Income Tax/Initiating Officer, while calling upon the petitioner to show cause, passed an order under sub-section (2) of Section 18 and sub-section (3) of Section 24 of the Benami Property Act provisionally attaching the aforesaid property for a period of 90 days from the last date of the month in which the show cause notice was issued *i.e.*, 30.11.2019, further directing that the attached property should not be transferred or converted or disposed or

moved in any manner whatsoever until or unless specifically permitted to do so by the undersigned.

10. Thereafter, the aforesaid authority passed order dated 18.03.2021 under Section 24(4)(a)(i) of the Benami Property Act. As per the said order, the provisional attachment of the property was continued till such time order was passed by the adjudicating authority under Section 26(3) of the Benami Property Act.

11. Finally, after notice and hearing, adjudicating authority passed order dated 25.03.2022 under Section 26(3) of the Benami Property Act. By the said order, the adjudicating authority held that the movable property is a benami property being subject matter of benami transaction within the meaning of Section 2(9)(c) of the Benami Property Act. Consequently, the provisional attachment order has been confirmed.

12. At this stage, we may note that in the year 2016, Benami Transactions (Prohibition) Amendment Act, 2016 was enacted to amend the Benami Property Act.

13. We may mention that Benami Transactions (Prohibition) Amendment Act, 2016 (briefly ‘the Amendment Act’ hereinafter) had received the assent of the President on 25.10.2016 whereafter, it was notified in the Gazette on 01.11.2016.

14. In all the writ petitions before us, the primary challenge made is that the transactions which have been classified by the respondents as benami transactions and the property accrued therefrom, which have been classified by the respondents as benami property, were acquired prior to 25.10.2016 or 01.11.2016. Such a transaction could not have been classified as benami transaction by retroactively applying the law enacted in the year 2016. For example, in W.P.No.33191 of 2022, the alleged benami properties have been mentioned as follows:

“The moveable property being 97,500 shares of M/s Neopride Pharmaceuticals Limited worth Rs.9,75,000/- allotted in FY 2014-15 on 08.01.2015.

Proceeds thereof being corresponding “Fixed Asset” added during the FY 2014-15 for Rs.4,38,33,534/- in the form of “Immovable Property admeasuring 47790 sq. mts. In Sy.Nos.49P, 50P and 51P, Plot No.24E in laout T-1 in Lalamkodur (v) registered vide doc. Number 2717/2015 of SRO Yelamanchili”, to the tune of Rs.9,75,000/- equivalent to the share capital routed through benami transaction and introduced in the books of M/s Neopride Pharmaceuticals Limited during the FY 2014-15.’

15. Thus, the shares were allotted on 08.01.2015 and the fixed assets accrued therefrom finds place in the books of account during the financial year 2014-2015 *i.e.*, being prior to 25.10.2016 or 01.11.2016.

16. The issue before us is no longer *res integra* not only in view of the law laid down by this Court in **Nexus Feeds Limited v. the Assistant Commissioner of Income Tax**¹, but in view of the law declared by the Supreme Court in **Union of India v. Ganpati Dealcom Pvt. Ltd.**²

17. Mr. B.Narsimha Sarma, learned counsel for the respondents-Income Tax Department, while acknowledging that in view of the decision rendered by the Supreme Court in **Union of India v. Ganpati Dealcom Pvt. Ltd.** (2 supra), the matter stands covered, however submits that respondents are contemplating filing of review petition before the Supreme Court seeking review of the decision in **Union of India v. Ganpati Dealcom Pvt. Ltd.** (2 supra). Therefore, hearing of the present batch of cases may be deferred for some time.

18. We are unable to accept the submissions made by learned counsel for the respondents for the simple reason that the decision of the

¹ 2022(5) TMI 262

² 2022 SCC Online SC 1064

Supreme Court in **Union of India v. Ganpati Dealcom Pvt. Ltd.** (2 supra) is binding on all Courts, Tribunals and Authorities throughout the country. Hearing cannot be deferred on the ground that respondents are contemplating to file a review petition for review of the aforesaid decision. As a matter of fact, we find that after the adjudication order was passed on 25.03.2022 in W.P.No.33191 of 2022, para 18A was inserted by the adjudicating authority taking note of the decision of this Court in **Nexus Feeds Limited v. the Assistant Commissioner of Income Tax** (1 supra). However, the adjudicating authority proceeded to decide on merits with the observation that the legal question as to retrospectivity vis-à-vis prospectivity of the Amendment Act of 2016 was pending before the Supreme Court.

19. In **Nexus Feeds Limited v. the Assistant Commissioner of Income Tax** (1 supra), this Court held as follows:

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.

20. Thus, from the above, it is evident that this Court took the view that Section 2(9)(A) and 2(9)(C) of the Act inserted by the Amendment Act of 2016 are prospective in nature because these two provisions have significantly and substantially widened the definition of 'benami transaction' than as was there in the unamended Benami Property Act of 1988.

21. Taking note of the fact that Central Government had notified the date of coming into force of the Amendment Act of 2016 as 01.11.2016, this Court held that these two provisions cannot be applied to a transaction, which took place prior to 01.11.2016. In that case, the

transaction was dated 14.12.2011. Therefore, the show cause notice, provisional attachment order as well as the adjudicating order were declared null and void being without jurisdiction and consequently, quashed.

22. In **Union of India v. Ganpati Dealcom Pvt. Ltd.** (2 supra), which went to the Supreme Court from a decision of the Calcutta High Court, the question, which was considered by the Supreme Court was whether the Benami Property Act as amended by the Amendment Act of 2016 has a prospective effect ? While examining this question, Supreme Court went into the constitutionality of the original Act *i.e.*, Benami Property Act. At the first place, it was held as follows:

The simple question addressed by the counsel appearing for both sides is whether the amended 2016 Act is retroactive or prospective. Answering the above question is inevitably tied to an intermediate question as to whether the 1988 Act was constitutional in the first place. The arguments addressed by the Union of India hinges on the fact that the 1988 Act was a valid substantive law, which required only some gap filling through the 2016 Act, to ensure that sufficient procedural safeguards and mechanisms are present to enforce the law.

According, to the Union of India, the 2016 Act was a mere gap filling exercise.

However, upon studying the provisions of the 1988 Act, we find that there are questions of legality and constitutionality which arise with respect to Sections 3 and 5 of 1988 Act. The answers to such questions cannot be assumed in favour of constitutionality, simply because the same was never questioned before the Court of law. We are clarifying that we are not speaking of the presumption of constitutionality as a matter of burden of proof. Rather, we are indicating the assumption taken by the Union as to the validity of these provisions in the present litigation. Such assumption cannot be made when this Court is called upon to answer whether the impugned provisions are attracted to those transactions that have taken place before 2016.

23. After elaborate deliberation, Supreme Court came to the conclusion that Section 3 (criminal provision), Section 2(a) (definition clause) and Section 5 (confiscation proceedings) of the Benami Property Act are overly broad, disproportionately harsh and without adequate safeguards. Though such provisions were in a dormant condition, nonetheless, Supreme Court declared Sections 3 and 5 of the Benami

Property Act as unconstitutional from inception. It was held as follows:

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 stillborn 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.

24. Continuing with the deliberation, Supreme Court observed that once Sections 3 and 5 of the Benami Property Act were declared as unconstitutional, it would mean that the Amendment Act of 2016 would in effect create new provisions and new offences as the offences under Section 3(1) for the transactions entered into between 05.09.1988 (when the original Act received the presidential assent) and 25.10.2016 (when the Amendment Act of 2016 was notified), the law cannot retroactively invigorate a still-born criminal offence. Thereafter, it was categorically held that the Amendment Act of 2016 containing criminal provisions would be applicable only prospectively. Supreme Court held as follows:

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.

25. Supreme Court clarified that as it has held that criminal provisions under the Benami Property Act were arbitrary and incapable of application, the law through the 2016 amendment could not retroactively apply for confiscation of those transactions entered into between 05.09.1988 to 25.10.2016 as the same would amount to punitive punishment. Finally, the Supreme Court concluded as under:

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

a) Section 3(2) of the unamended 1988 Act is declared as unconstitutional for being manifestly arbitrary.

Accordingly, Section 3(2) of the 2016 Act is also unconstitutional as it is violative of Article 20(1) of the Constitution.

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

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

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

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

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

26. From the above, it is evident that Supreme Court has declared that the Amendment Act of 2016 is not merely procedural but prescribes substantive provisions. Therefore, concerned authorities cannot initiate or continue criminal prosecution or confiscation proceedings for transactions entered into prior to coming into force of

the 2016 Amendment Act *i.e.*, 25.10.2016. As a consequence, all such transactions or confiscation proceedings shall stand quashed. Supreme Court has also clarified that *in rem* forfeiture provision under Section 5 of the Amendment Act of 2016 being punitive in nature can only be applied prospectively and not retroactively.

27. In view of finality of the law declared by the Supreme Court, the impugned show cause notices, provisional attachment orders as well as the adjudicating orders passed by the various authorities under the Benami Property Act as amended by the Amendment Act of 2016 impugned in the batch of writ petitions cannot be sustained. Accordingly, those are hereby set aside and quashed.

28. All the writ petitions are allowed in the above terms. No costs.

As a sequel, miscellaneous petitions, pending if any, stand dismissed.

UJJAL BHUYAN, CJ

C.V.BHASKAR REDDY, J

Date: 13.09.2022
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