



August 2022

Supreme Court held that provisions of the Benami Transaction (Prohibition) Amendment Act, 2016 cannot be applied retroactively and *inter alia* declared Section 3(2) of the same as unconstitutional

The Supreme Court of India (“**Supreme Court**”) in a recent judgment of *Union of India and Anr. v. M/s Ganpati Dealcom Pvt. Ltd.*¹, has held that the provisions, particularly Section 5, of Benami Transaction (Prohibition) Amendment Act, 2016 (“**2016 Act**”) cannot be applied retrospectively. The Supreme Court also declared Section 3(2) of the 2016 Act, and Section 3(3)² and Section 5 of the Benami Transaction (Prohibition) Act, 1988 (“**1988 Act**”) as unconstitutional for being manifestly arbitrary.

Brief Facts

M/s Ganpati Dealcom Pvt. Ltd. (“**Respondent**” or “**Ganpati**”) purchased a property on May 02, 2011, from various sellers. The purchase price was paid out of the capital of Ganpati. Subsequently, on March 31, 2013, 99.9% of the shareholding of Ganpati was acquired by two other entities, *viz.*, M/s PLD Properties Pvt. Ltd. and M/s Ginger Marketing Pvt. Ltd. (the “**Acquirers**”) at a discounted price.

Later, on August 19, 2017, the Deputy Commissioner of Income Tax (“**Adjudicating Authority**”) issued a notice to the Respondent under Section 24(1) of the 2016 Act, requiring it to show cause as to why the aforesaid property should not be considered as benami property and Ganpati as benamidar within the meaning of Section 2(8) of the 2016 Act.

By way of reply dated September 06, 2017, the Respondent denied that the said property was a benami property. However, the Adjudicating Authority passed an order provisionally attaching the said property under Section 24(4)(b)(i) of the 2016 Act on 24 November 2017.

Aggrieved by the order passed by the Adjudicating Authority, the Respondent filed a Writ Petition before the Hon’ble High Court of Calcutta (“**High Court**”), which was disposed of on December 18, 2018, with a direction to the Adjudicating Authority to conclude proceedings within 12 (twelve) weeks.

The Respondent preferred an appeal against the aforesaid order. The High Court, vide order dated December 12, 2019 (“**Impugned Order**”), held that the 2016 Act does not have retrospective application. It was held that the provisions of the 2016 Act could not apply to the transaction concluded in 2011 and accordingly it quashed the show-cause notice.

The Impugned Order was challenged by the Union of India in a Special Leave Petition before the Supreme Court.

¹ SLP (C) No. 2784 of 2020 delivered on August 23, 2022

² Please note that the Supreme Court has declared Section 3(3) of the 1988 Act unconstitutional and references to Section 3(2) of the 1988 Act in the text of the judgment are typographical errors.

Issues

1. Whether the 1988 Act was constitutional?³
2. Whether the amendments carved out in the 2016 Act are procedural or substantive?⁴
3. Whether the retroactive confiscation provided under Section 5 read with Chapter IV of the 2016 Act is punitive or not?⁵
4. Whether the 2016 Act has a prospective effect?⁶

Decision of the Supreme Court

ISSUE NO. I: Whether the 1988 Act was constitutional?

1. Section 3(3) and Section 5 of the 1988 Act are unconstitutional for being manifestly arbitrary.

(a) While declaring Section 3(3) of the 1988 Act as unconstitutional, the Supreme Court observed that the said criminal provision was never utilized as there were significant hiatus in enabling the functioning of the said provision and bears serious lacunae (i.e., (i) absence of *mens rea* which made the provision unusually harsh; and (ii) Section 2(a) read with Section 3(1) of the 1988 Act created overly broad laws susceptible to be challenged on the ground of manifest arbitrariness) which have not been cured by judicial fora. Accordingly, the Supreme Court held that Section 3(3) of the 1988 Act is overly oppressive, fanciful, manifestly arbitrary and violative of the 'substantive due process' requirement of the Constitution of India.

(b) While declaring Section 5 of the 1988 Act as unconstitutional, the Supreme Court observed that instead of providing substantive provision (*qua* standard of proof, mechanism providing opportunity for a person to establish his defense etc.)⁷, Section 5 of the 1988 Act left the same to be prescribed by delegated legislation and therefore, was a half-baked provision. Accordingly, the Supreme Court held that Section 5 of the 1988 Act being conceived without any adequate safeguards, is unconstitutional from its inception.

2. Section 3(2) of the 2016 Act is unconstitutional for being violative of Article 20(1) of the Constitution of India.

While dealing with the Issue No. 1, the Supreme Court observed that Section 3 of the 2016 Act classifies offences into 2 (two) categories based on time period of the benami transaction. Section 3(2) of the 2016 Act prescribes the punishment for benami transactions entered prior to commencement of the 2016 Act and Section 3(3) of the 2016 Act applies to the benami transactions which have been entered into after commencement of the 2016 Act.

Observing that Section 3(2) of the 2016 Act is akin to Section 3(3) of the 1988 Act (which has been declared unconstitutional), the Supreme Court declared Section 3(2) of the 2016 Act as unconstitutional as well. In this regard, the Supreme Court observed that unconstitutional laws (even if they remain on the statute book) cannot inure to the benefit of, or be utilized to, retroactively amend laws to cure existing constitutional defects, as that would render Article 20(1) of the Constitution of India nugatory.

ISSUE No. II: Whether the amendments carved out in the 2016 Act are procedural or substantive?

The 2016 Act prescribes substantive provisions and is not merely procedural.

³ Para 15.1

⁴ Para 14.9

⁵ Para 17.11

⁶ Para 4

⁷ Para 15.19

The Supreme Court noted that Section 5 of the 1988 Act omitted in providing substantive provisions and left the same to be prescribed by delegated legislation, such delegation of power was found excessive and, therefore, it was held that the contention that the 2016 Act is merely procedural could not stand. In addition, it was also observed that in the 2016 Act, 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 Code of Criminal Procedure, 1973 or any other law. Since the same altered substantive rights of evidentiary standards, it was found to not be merely procedural.⁸ Accordingly, the Supreme Court held that the 2016 Act prescribes substantive and not procedural provisions.

ISSUE No. III: Whether the retroactive confiscation provided under Section 5 read with Chapter IV of the 2016 Act is punitive or not?

The punitive *in rem* forfeiture provision under Section 5 of the 2016 Act can only be applied prospectively.

It was observed that under the 2016 Act, Section 5 read with Chapter IV implicitly recognizes a forfeiture as a punitive sanction. It was further observed by the Supreme Court that the 2016 Act contemplates an *in rem* forfeiture, wherein the taint of entering into such benami transaction is transposed to the asset itself, which becomes liable confiscation. Therefore, it was found that when such a taint is created not on the individual, but on the property itself, a retroactive law would characterize itself as punitive. The Supreme Court held that such retroactive confiscation cannot be allowed and Section 5 of the 2016 Act would only apply prospectively.

ISSUE No. IV: Whether the 2016 Act has a prospective effect?

Quashing of all proceedings involving benami transactions preceding enforcement of the 2016 Act

Since Section 3 and Section 5 of the 1988 Act were declared unconstitutional, the Supreme Court observed that the 2016 Act has, in effect, created new provisions and new offences, leaving no question of retroactive application of the 2016 Act. After holding that the 2016 Act could not be retroactively applied for confiscation, the Supreme Court further held that the concerned authorities could not initiate or continue criminal prosecution or confiscation proceedings for benami transactions entered into prior to the enforcement of the 2016 Act, i.e., October 25, 2016. It was directed that all such proceedings be quashed, as the same would be tantamount to retroactive punitive punishment.

JSA Comment

The judgment of the Supreme Court and the principles laid down therein are well in accord with the settled principles with regard to retrospective application of penal statutes. The judgment gives relief in cases where the 'concerned authorities' have acted overzealously and initiated action for transactions concluded prior to the enforcement of the 2016 Act. It also brings clarity in respect of the enforcement of the 2016 Act, and eliminates fear and uncertainty amongst the business community in that regard. The judgment, therefore, deserves to be welcomed.

⁸ Para 17.30

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23 Ranked Lawyers



15 Practices and
18 Ranked Lawyers



7 Practices and
2 Ranked Lawyers



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