APPELLATE TRIBUNAL UNDER SAFEMA AT NEW DELHI

1. MP-PBPT-197/DLI/2004 (Recall)
FPA-PBPT-1006/DLI/2019

Nitin Gupta ... Appellant

2. FPA-PBPT-1007/DLI/2019

Raj Kumar Sharma ... Appellant

3. MP-PBPT-864/DLI/2019
FPA-PBPT-1008/DLI/2019

Devender Kumar Jha ... Appellant

4. MP-PBPT-198/DLI/2024 (Recall)
FPA-PBPT-1010/DLI/2019

Mohit Garg ... Appellant

Versus

The Initiating Officer
DCIT (BPU), Delhi ... Respondent

Advocates/Authorized Representatives who appeared

For the Appellants : Mr. Aditya Chaudhary, Adv. At Sl.No.1
Appellant himself at Sl.No.2
Ms. Ishita Farsaiya, Adv. At Sl.No.3
Mr. Aditya Chaudhary, Adv. At Sl.No.4

For the Respondent : Mr. Kanhaiya Singhal, Adv.

CORAM
JUSTICE MUNISHWAR NATH BHANDARI : CHAIRMAN
SHRI BALESH KUMAR : MEMBER

ORDER
05.11.2024

1. By this appeal under Section 46(1) of Prohibition of Benami Property Transactions Act, 1988 (in short, the Act of 1988), a challenge has been made to the order dated 16.10.2019 passed

by the Adjudicating Authority confirming the attachment and also the reference sent by the initiation officer.

2. The brief facts of the case:

a) The learned counsel for the appellant submitted that at the time of demonetization of currency notes of Rs. 1000 and 500, jewellers were the first to be approached by high network individuals for purchase of gold. The appellant Nitin Gupta was also contacted by many individuals. The appellant Nitin Gupta was however, not involved in sale of gold bullions thus, he introduced parties to one Mohit Garg who had promised commission to the appellant in lieu of introducing the individuals for purchase of gold bullions.

b) Sh. Mohit Garg in association with Rajeev Kushwaha and others deposited the cash into bank accounts of various firms namely Sunrise Trading Company, Himalaya International and RD Traders controlled by Rajeev Singh Kushwaha along with Devendra Kumar Jha and Raj Kumar Sharma. The amount was then transferred to M/s Bengal Marketing Pvt. Ltd. and finally to gold bullions trading firms being Aadi Traders, Siddhivinayak Jewellers, Yash enterprises and S.K. Impex.

c) The income tax authorities conducted search and seizure on the residence of the appellant but no material or document was found so as to invoke the provisions of the Act of 1988. It came to the notice of the appellant that Rs.

3,70,89,400/- was provided by various buyers to Mohit Garg and that amount was seized by the income tax authorities on 22.11.2016 from the possession of Mohit Garg, Raj Kumar Sharma and Devendra Kumar Jha while they were on the way to Axis Bank. They were stopped by the police where an amount of Rs. 3,70,89,400/- was found with them and has been taken to be undisclosed income. The appellant Nitin Gupta vide letter dated 03.03.2017 addressed to DDIT Inv, Unit 7(1) informed that the amount of Rs. 3,70,89,400/- is his income and disclosed under the Pradhan Mantri Garib Kalyan Yojana, 2016 and thereupon appellant deposited 25% of the said undisclosed income amounting to 92 lakhs. The appellant was however, held to be beneficial owner of the amount recovered from Mohit Garg, Raj Kumar Sharma and Devendra Kumar Jha.

d) The appellant Nitin Gupta initially disputed the ownership of the currency notes as his income. He was served with a notice under Section 24(1) of the Act of 1988 on 30.06.2018 to show cause as to why cash amounting to Rs. 3,70,89,400/- may not be considered as benami property and the appellant to be benamidar along with others. The notice was not given to appellant Nitin Gupta under section 24(2) to show cause as to why he should not to be held to be beneficial owner.

e) The statement of appellant and others were recorded from time to time followed by provisional attachment order.

Argument of the counsel for the appellant

3. The learned counsel for the appellant submitted that there is no element of benami transaction involved for the cash of Rs. 3,70,89,400/- recovered from Mohit Garg, Raj Kumar Sharma and Devendra Kumar Jha as they categorically stated that the amount belongs to appellant Nitin Gupta. In view of the above, a case of benami transaction would not be made out because the cash found with the three persons named above was held on trust of Nitin Gupta. The case would accordingly fall under one of the exceptions to Section 2(9)(A) of the Act of 1988 as amended by the Amending Act of 2016. The benamidars appellant before this Tribunal were holding the cash on trust under fiduciary capacity. The Adjudicating authority ignored the aforesaid aspect while confirming the reference and the attachment of the property.

4. The learned counsel for the appellant elaborately argued the issue as to in what cases the property held by someone else on trust can be taken to be under fiduciary capacity. A specific reference to the definition of "*benami transaction*" amended by the Act of 2016 was given and for that specifically section 2(9)(A) was referred. A reference to clause (b)(ii) of the aforesaid provision was given to indicate exception to the aforesaid provision. In case, the property is given to other person on trust

then, it would be taken to be under fiduciary capacity and thereby, would not be considered to be a case of benami transaction. The respondents ignored the aforesaid aspect and therefore, the impugned order deserves to be set aside.

5. The learned counsel for the appellant made reference of the judgment of this Tribunal in the case of FPA-PBPT-1124/CHN/2020 **Initiating Officer, DCIT, BPU, Chennai vs. Sivashankari & Anr.** and also, of the Supreme Court in the case of **Sri Marcel Martins vs. M. Printer & Ors.** reported in AIR 2012 SC 1987 to support his argument.

6. The learned counsel for the appellant further submitted that what has been seized and attached is demonetized cash which had no fair market value in terms of section 2(16) of the Act of 1988 thus, it could not have been considered to be property in terms of section 2(26) of the Act of 1988. The reference of the dates when the amount was seized has been given to show that the recovery and seizure of the demonetized money was having no fair market value and thus, could not have been considered to be a property to fall under the definition of Benami transaction.

7. The learned counsel for the appellant further submitted that show cause notice to Nitin Gupta was given under section 24(1) of the Act of 1988. It is to show cause as to why he should not be treated to be a benamidar. However, in the final order he was taken to be beneficial owner for which no show cause notice was

given. For beneficial owner, the notice is to be given under section 24(2) of the Act of 1988. In absence, of the requisite notice to hold Nitin Gupta to be a beneficial owner, the appellant could not defend the case. Thus, on the aforesaid ground also the impugned order deserves to be set aside. The prayer was accordingly made to allow the appeal.

Arguments of the respondents

8. The appeal has been contested by the counsel for the respondents. The elaborate arguments to contest the issues raised by the counsel for the appellant were made. Those arguments would be referred while dealing with the issues raised by the appellant to avoid repetition of the same facts to make the order bulky. Accordingly, while dealing with each argument of the appellant reference of the counter made by the respondents would be taken into consideration to record finding by us.

Finding of the Tribunal

9. The learned counsel for the appellant submitted that when the amount was recovered from Mohit Garg, Raj Kumar Sharma and Devendra Kumar Jha, it was categorically disclosed to be of the appellant Nitin Gupta. The amount was found with the three persons named above in fiduciary capacity and in the light of the aforesaid, it would fall within one of the exceptions to Section 2(9)(A) which is reproduced hereunder for ready reference:

> *"Section 2 (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."

10. The provision quoted above refers to the exceptions of the main provision and one of the exceptions is that of the properties held in the fiduciary capacity as trustee and other capacity, then it would fall within one of the exceptions of benami transaction. The issue for our consideration is as to whether the present case would fall in one of the exceptions referred to above.

11. The facts available on record shows that what has been recovered from Mohit Garg, Raj Kumar Sharma and Devendra Kumar Jha is the demonetized money said to be belonging to the appellant Nitin Gupta as per his letter. The pleas have been taken that the amount was given to three persons on trust and thus, they were holding it in fiduciary capacity. If the simple test is applied to bring a case in one of the exceptions given under section 2(9)(A) of the Act of 1988, it can be accepted but the case has checkered history. It has been admitted by the parties that what was recovered from Mohit Garg, Raj Kumar Sharma and Devendra Kumar Jha is the demonetized money. The allegation is that the money was given to them to get monetized money and therefore, purpose of giving money to them was not to keep it with them in fiduciary capacity but for other purposes. The issue further required to be seen is whether in a case where the money was transferred to others by means other than legal then, can it fall under one of the exceptions under section 2(9)(A) of the Act of 1988. The answer to the issue is that if the money has been given

or passed on to others for illegal purposes or the purpose other than legal then, holding of the property cannot be said to be in fiduciary capacity. It can be when it is given to a person to hold it and not for its use further for any purpose. In the instant case, the currency note was not given to Mohit Garg, Raj Kumar Sharma and Devendra Kumar Jha for its retention on trust but for conversion of demonetized money to monetized. The evidence available on record proves it because the money was channelized through shell companies and for that the accounts were opened so that cash amount of demonetized currency can be deposited in the account and thereupon, through banking channels, it is transferred so as to make it monetized money. The purpose aforesaid is apparent and cannot be accepted that the appellant Nitin Gupta has given the currency notes to three others under trust rather it was for purpose of getting it converted to monetize, thus we do not find that the case in hand would fall under one of exception to section 2(9)(A) of the Act of 1988 and therefore, the judgment of Tribunal in **Sivashankari & Anr (supra)** and so as the judgment of the Apex court in the case of **Sri Marcel Martins (supra)** would have no application. In those cases, the property was given to others on trust and not for its use for illegal purpose or any other purpose and therefore, it was found to be a simple case of passing of the property to keep it in fiduciary capacity which is not the case in hand. Thus, we are unable to accept the first argument raised by the counsel for the appellant.

12. The second issue raised in the appeal preferred by Nitin Gupta is that the notice was served to him under section 24(1) of the Act of 1988 treating him to be benamidar of the cash recovered from Mohit Garg, Raj Kumar Sharma and Devendra Kumar Jha. He was however, taken to be beneficial owner of the property later on for which no notice was given though, to treat someone to be beneficial owner, a notice is required to be given under section 24(2) of the Act of 1988. We have considered the rival submissions. To analyze the issue in reference of section 24(1) and (2) is relevant thus, quoted hereunder:

> ***"24. Notice and attachment of property involved in benami transaction*** -
> *(1) Where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as benami property.*
> *(2) Where a notice under sub-section (1) specifies any property as being held by a benamidar referred to in that sub-section, a copy of the notice shall also be issued to the beneficial owner if his identity is known."*

The perusal of section 24(2) would reveal that a copy of notice under Section 24(1) is to be given to the beneficial owner if his identity is known. In the instant case, at the stage of reference, the identity of beneficial owner was not known therefore, all were taken to be benamidar and accordingly notice was issued under section 24(1) of the Act of 1988. Once a copy of notice under section 24(1) is given then as per sub-section (2) of Section 24, the beneficial owner can be identified for which no separate notice

under Section 24(2) is required rather Section 24(2) requires a copy of the notice under sub-section (1) the beneficial owner if his identify is known. In the instant case, the identity of the beneficial owner was not known at the time of issuance of the notice. It could be revealed during the process of adjudication in pursuance to the notice under Section 24(1) of the Act of 1988 of which a copy was served on appellant Nitin Gupta as is required under section 24(2) of the Act of 1988 thus, we find no illegality in the order. It is also a fact that even if notice specifies a wrong provision or does not make a reference of any provision, the order would not vitiate in pursuance of it if material available on record shows jurisdiction of the authority and material otherwise available to decide the case on merits. In this regard we may refer to the judgment of Apex Court in the case of **Md. Shahabuddin vs. State of Bihar & Ors.** reported in MANU/SC/0203/2010 where the challenge to the notice was made on the similar grounds and has not been accepted by the Apex court. It has been held that mere reference of the wrong provision or non-reference does not vitiate the order if otherwise, the authority is competent to pass the order based on the material available on record. In the instant case, the appellant Nitin Gupta himself pleaded to be the owner of the currency notes seized from Mohit Garg, Raj Kumar Sharma and Devendra Kumar Jha thus, he was rightly taken to be beneficial owner though the appellant has sought immunity from being a beneficial owner based on the

definition of benami transaction given under section 2(9)(A) of the Act of 1988, as amended. We accordingly do not find that issuance of notice under section 24(1) to Nitin Gupta and thereupon treating him to be benamidar based on the material available on record would vitiate the proceedings and accordingly, the second argument raised by the appellant cannot be accepted.

13. The issue discussed above is required to be analysed further in reference to the statement of the appellant Nitin Gupta. He initially disowned the currency notes recovered from three persons, namely, Mohit Garg, Raj Kumar Sharma and Devendra Kumar Jha. He later on changed the statement and claimed that currency notes belong to him. The relevant part of the show cause notice dated 30.06.2018 is reproduced hereunder:

> *"6. During the statement of Sh. Nitin Gupta recorded on oath on 25.11.2016 u/s 131(1A) of the 1.T. Act, 1961, he denied that he had given any cash to Sh. Mohit Garg and also when questioned about his relationship with M/s Aadi Traders, he stated that he does not know about this firm. Further, on 26.11.2016 during the recording of statement of Sh. Nitin Gupta on oath u/s 132(4) of the LT. Act, 1961, he was again asked the same question and in response to which he stated that he has some business relationship with M/s Aadi traders. Further, in his reply dated 10th July. 2017, he admitted that he had given some cash to Sh. Mohit Garg but stated that such cash belonged to M/s Aadi Traders, Sh. Shashank Jain and Sh. Prateek Bansal. Sh. Shashank Jain in his statement, which was recorded on oath u/s 131(1A) of the 1.T. Act, 1961 on 06.03.2017, denied giving any cash to Sh. Nitin Gupta and M/s Aadi Traders also denied the same. Sh. Prateek Bansal accepted having given some cash to Sh. Nitin Gupta but stated that such cash belonged to Sh. Anirudh Aggarwal, Sh. Ravi Aggarwal and Sh. Vinod Deshmukh. Thus, the real owners of the cash could not be established, as per the information submitted to this office by ADIT, Unit-7(4), Delhi."*

It is to demonstrate that at the time of issuance of the notice, the IO had relied on the material available on record at the relevant time. However, during the course of adjudication, there was change in the statement of appellant Nitin Gupta and accordingly the order was passed holding him to be the beneficial owner. The appellant Nitin Gupta in his statement dated 26.09.2018 u/s 19(1)(b) of the Act of 1988 stated that he has made a declaration of his income under the Pradhan Mantri Garib Kalyan Yojana, 2016. The appellant Nitin Gupta thus, changed his stand and stated that the money was belonging to him. In view of the changed stand and the plea raised before the Adjudicating Authority, he was transformed from benamidar to beneficial owner. The appellant is trying to seek benefit of his own default of change in his version and accordingly for that reason also, we are unable to accept the second ground raised by the appellant.

14. The impugned order has been challenged even in reference to section 2(16) and 2(26) of the Act of 1988. Both the provisions are quoted hereunder for ready reference:

> *"**2(16) "fair market value"**, in relation to a property, means—*
> *(i) the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and*
> *(ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with such manner as may be prescribed;*
> ***2 (26) "property"** means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into*

some other form, then the property in the converted form and also includes the proceeds from the property"

15. The case of the appellant was that the old demonetized money was not having monetary value in terms of the RBI circular and therefore, the cash could have been used only for limited purpose that is, to be exchanged or deposited in the bank account. It has no value unless it is deposited in the bank account. In the light of the aforesaid, the attachment of demonetized cash having no fair market value could not fall under section 2(16) of the Act of 1988 and at the same time could not have been considered to be property to fall under 2(26) of the Act of 1988. To analyze the issue, we have quoted the relevant provisions. Section 2(16) defines "*fair market value*." It refers to the price that the property would ordinarily fetch on the sale in the open market or where the price referred is sub clause (a) is not ascertainable then such price, as may be determined in accordance with such manner as may be prescribed. The reference of section 2(26) has also been given which defines the "*property*" which means asset of any kind whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal document or interest evidencing title or interest in the property etc. The case of the appellant is that demonetized money had no fair market value and thus, could not have been termed to be property. We find no force in the argument because the currency notes of 1000 and 500 were demonetized by the Government of

India but with the permission to tender the notes for getting monetized money. The period for it was given and thereby, the demonetized money could have been used for getting it to be monetized. The time was extended by the RBI and if aforesaid is taken into consideration with the date of search and seizure, it would become clear that on the date of search and seizure the demonetized money could have been converted into monetized with its deposit in the bank and could have been by way of tender. It was thus a property with its fair market value. Thus, we are unable to accept the argument of the counsel for the appellant that demonetized money was not having fair market value at the time of its seizure and accordingly even the third argument is rejected.

16. The last argument raised by the counsel for the appellant was in regard to the finding recorded by the IO going contrary to record. The argument was made by the appellant referring to record but we do not find, that the finding recorded by the IO and ultimately by the Adjudicating Authority is contrary to record. In fact IO, caused investigation/inquiry and what was found in the inquiry has been recorded. At the initial stage, appellant Nitin Gupta did not accept the currency notes to be belonging to him rather he disowned the ownership of the currency notes. Accordingly, the case was taken up for causing show cause notice but during the course of adjudicating proceedings, the appellant Nitin Gupta came out with a changed stand and claimed ownership of

currency notes. Since there was change in version, the case was adjudicated by the Adjudicating Officer as per the material found available with it. In the light of the aforesaid, we are unable to accept even the last argument of the appellant.

17. The appeals would accordingly fail and are dismissed.

(Justice Munishwar Nath Bhandari)
Chairman

(Balesh Kumar)
Member

New Delhi,
5th November, 2024