

**APPELLATE TRIBUNAL FOR SAFEMA, FEMA, PMLA, NDPS, PBPT Act
AT NEW DELHI**

Date of Decision:31stOctober, 2018

- 1. FPA/PBPT/26/CHN/2018**
G. Bahadur Appellant
- 2. FPA/PBPT/32/CHN/2018**
K. Viyakumar Appellant
- 3. FPA/PBPT/41/CHN/2018**
S. Praveen Appellant
- 4. FPA/PBPT/42/CHN/2018**
S. Thalopathy Appellant
- 5. FPA/PBPT/43/CHN/2018**
P.Shankar Appellant
- 6. FPA/PBPT/44/CHN/2018**
R. Illayaraja Appellant
- 7. FPA/PBPT/52/CHN/2018**
P. Gunasekran Appellant
- 8. FPA/PBPT/56/CHN/2018**
Arun Vasanthageethan Appellant
- 9. FPA/PBPT/62/CHN/2018**
M.S.Sudheesh Kumar Appellant

Vs.

Shri K. Visakh ... Respondent
Asst. Commissioner of Income Tax,
Initiating Officer,
Chennai

Advocates/Authorized Representatives who appeared

For the Appellants : Sh. Anirudh Bakhru and Sh. Sudhir Chandra, Advocates

For the Respondent : Sh. Anish Dhingra, SPP for Initiating Officer (Respondent)

CORAM

JUSTICE MANMOHAN SINGH : CHAIRMAN

JUDGEMENT

**FPA/PBPT/26/CHN/2018, FPA/PBPT/32/CHN/2018,
FPA/PBPT/41/CHN/2018, FPA/PBPT/42/CHN/2018,
FPA/PBPT/43/CHN/2018, FPA/PBPT/44/CHN/2018,
FPA/PBPT/52/CHN/2018,
FPA/PBPT/56/CHN/2018&FPA/PBPT/62/CHN/2018**

1. By this Order, I propose to decide the above-mentioned nine appeals filed by the appellants under Section 46 of the Prohibition of Benami Property Transactions Act,1988 against the Order dated 27.03.2018 passed by the Adjudicating Authority, New Delhi.

2. Most of the facts and legal issues involved in all the appeals are common so as the impugned order, except the names of the appellants, quantum of advance salary paid in cash to the appellants and the dates of advance amount returned back are different. The chart of the same having full details of three appeals would be reproduced in the later part of my order.

3. The relevant facts are taken from appeal no. 26/2018 filed by G.Bahadur. The same are referred as under:-

- i) The Appellant is employed as a Security in St. Joseph's College of Engineering since 1995 and is drawing salary of Rs. 28,529/- p.m. The said college is run by St. Joseph Institute of Science

&Technology Trust (in short “Trust”), whose Chairman is Shri B. Babu Manoharan. He has a bank account No. 482948206 with Indian Bank, Chennai in which there was a credit balance of Rs. 970/- on the date of attachment.

- ii) The Appellant on 14/11/2016 had received an amount of Rupees 50,000/- as salary advance from the Trust. The appellant deposited the entire amount of Rs. 50,000/- in his bank account, which was subsequently withdrawn by him and consumed for his personal purposes.
- iii) On 17/11/2016, a search action u/s 132 of the Income tax Act, 1961 was conducted in the case of the Trust.

4. During the course of search, sworn statement of the Appellant was recorded on 28/11/2016 by the Income Tax Authorities. The appellant in his sworn statement deposited the above facts.

5. The Appellant received a show cause notice dated 14/12/2016 from the Initiating Officer (I.O), but the said show cause notice was not accompanied with any relied upon documents.

The show cause mentions as under:

“The list of persons to whom the said cash of Rs. 8.18 crores was distributed contains your name Shri/Smt. Shri Ganesh Bahadur which shows that you have received the cash amount of Rs. 50,000/-.

You also under sworn statement taken on 28/11/2016 has stated that you have received the cash amount of Rs. 50,000/-. This clearly establishes the fact that you have held the cash amount and also lent your name.”

6. It was alleged that the contents of the above show cause are contrary to the factual position. It was clearly pointed out by the appellant in his sworn

statement that Rs. 50,000/- received by him as salary advance was deposited in his bank account, which was subsequently withdrawn by him and consumed.

7. Knowing fully well that no such deposited amount was held by the appellant for the benefit of the alleged beneficial owner, the I.O went ahead and issued a Provisional Attachment Order under sub-section (3) of Section 24 of the Act for provisionally attaching the aforesaid Indian bank account of the Appellant by completely disregarding the facts recorded in the sworn statement of the Appellant and his reply to the show cause notice. The Provisional Attachment Order dated 25.01.2017 reads as under: -

“The sum of Rs. 50,000/- is due from the Benamidhar, through Thiru Ganesh Bahadur on account of Benami transactions (Prohibitions) Amendment Act, 2016. The savings bank account held by the Benamidhar in your branch is SB A/c No. 482948206. You are hereby required u/s 24(3) of the Benami Transactions (Prohibitions) Amendment Act, 2016 to attach any amount due from you to or held by you or.....”

8. The Appellant placed on record before the Adjudicating Authority the statement of his Indian Bank account from November, 2016 to March, 2017 to show that Rs. 50,000/- was deposited in the account, which was spent for his personal benefit much before the date of attachment i.e., 25.01.2017.

9. The appellant in his reply dated 09/02/2017 to the Provisional Attachment order reiterated the factual position as per records and requested the I.O to withdraw the Provisional Attachment order. The I.O completely ignoring the replies given to him to him from time to time by the Appellant, passed the Attachment order dated 13.03.2017 under section 24(4)(a)(i) of the Act continuing the provisional attachment of the property already made under sub-section (3) of Section 24 of the Act which is packed with factual inaccuracies.

10. In the I.O's order, it was stated, as under:-

- a. Para 6 of I.O's order reproduces a part of the Appellant's statement as under:

"Yes after demonetisation I had received Rs.50000 from Shri Sethu (attendance incharge) on 14/11/2016 which I had deposited in my Indian bank account(jeppiar branch). I had received 50 notes of Rs.1000/- denominations which I deposited in jeppiar branch of Indian bank on 14/11/2016 "

- b. But in Para 4 of the I.O's order, he writes as under:

"In response to the notice, the Benamidar had filed a reply, stating that the sum received by cash from ThiruBabu Manoharan (Beneficial owner) are his salary in advance. His reply is not acceptable, because in the sworn statement recorded before the Assistant/Deputy Director of Income tax (Inv.), during the course of the search, it has been stated by him that they have received the said amount as a loan."

- c. It was stated by the appellant that I.O has given a false finding that 'the statement before DDIT (Inv) and the submissions made before Initiating Authority are contradictory. Hence their reply in response to the show cause notice issued is only an afterthought.

- d. Finally, entirely on non-existing facts, the I.O has held as under:

"This shows that ThiruBabu Manoharan has forced his employees to distribute, deposit and retain his own money in demonetized currency in the guise of loan received, which has to be repaid after some time in new currency as per his convenience."

11. The main case of the appellant is that the order passed by the I.O under sub-section (4) of Section 24 of the Act dated 13.03.2017 is wrong as it relates to a property which does not exist at all. Thus, the Approving Authority has also failed in his duties to do justice with the Appellant.

12. The Adjudicating Authority has passed the order dated 27.03.2018 under sub-section (3) of section 26 of the Act upholding the order passed by

the I.O under sub-section (4) of Section 24 of the Act dated 13.03.2017 by concluding that:

“The I.O has shown by sufficient material that the properties involved are benami properties. Consequently the property is declared to be a benami property in the hands of the benamidars and the attachment order is required to be confirmed and is hereby confirmed.

The attachment order passed under section 4 of PBPT Act dated 13.03.2017 is hereby confirmed. The properties are declared are to be benami properties. The reference no. 3 of 2017 is allowed.”

13. It is not disputed by the learned counsel for the respondent that these nine appellants who had allegedly received the said amount, have returned back/adjusted the remaining salary amount to the management before 31.3.2017. The detailed chart is also provided by the learned counsel of the

S. No (1)	Tribunal's Reference & Appellant's Name (2)	Salary advance taken (3)	Part Salary Advance returned within 10 days (4)	Remaining/Entire Salary Advance returned back (5)
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appellant during the course of hearing of the appeal. The factual position in the chart is not denied by the counsel for the respondent. The same is reproduced hereunder:-

		Date of receipt	Amount Rs.	Date of Return	Amount Rs.	Date of Return	Amount Rs.	Mode of Return
D.1	PB 26/2018 Ganesh Bahadur	14.11.2016	50,000	-	-	29.03.2017	50,000	Bank Transfer
D.2	PB 32/2018 K Vijayakumar	14.11.2016	2,00,000	-	-	30.03.2017	2,00,000	Cash
D.3	PB 41/2018 S Praveen	14.11.2016	50,000	-	-	29.03.2017	50,000	Bank Transfer
D.4	PB 42/2018 S. Thalapathy	14.11.2016	50,000	-	-	30.03.2017	50,000	Cash
D.5	PB 43/2018 P Shankar	14.11.2016	50,000	-	-	31.03.2017	50,000	Bank Transfer
D.6	PB 44/2018 R Ilayaraja	16.11.2016	50,000	-	-	31.03.2017	50,000	Bank Transfer
D.7	PB 52/2018 P Gunasekaran	14.11.2016	2,00,000	-	-	29.03.2017	2,00,000	Bank Transfer
D.8	PB 56/2018 Arun Vasanthageethan	14.11.2016	2,50,000	19.11.2016	1,65,000	28.03.2017	85,000	Bank Transfer
D.9	PB 62/2018 M S Sudheesh	14.11.2016	2,00,000	19.11.2016	1,65,000	28.03.2017		

14. On the same lines, affidavits have been filed by the appellants stating that –

- i. Shri Ganesh Bahadur has stated in his affidavit that he is employed as a Security in St. Joseph's Engineering College since 1995 and drawing salary of Rs.28,529/- per month. The college is run by St. Joseph's Institute of Science & Technology Trust. He had received an amount of Rs.50,000/- as salary advance from the Trust on 14.11.2016 and returned back the said amount of Rs.50,000/- to the Trust on 29.03.2017 through bank transfer.
- ii. In his affidavit, Shri K. Vijayakumar has stated that he is employed as Lab Assistant in St. Joseph's College of Engineering since 2003 and drawing salary of Rs.19,586/- per month. The college is run by St. Joseph's Institute of Science & Technology Trust. He had received an amount of Rs.2,00,000/- as salary advance from the Trust on 14.11.2016 and returned back the said amount of Rs.2,00,000/- to the Trust on 30.03.2017.
- iii. In his affidavit, Shri S. Praveen has stated that he is employed as bakery master in St. Joseph's College of Engineering since 2003 and drawing salary of Rs.19,586/- per month. The college is run by St. Joseph's Institute of Science & Technology Trust. He had received an amount of Rs.50,000/- as salary advance from the Trust on

- 14.11.2016 and returned back the said amount of Rs.50,000/- to the Trust on 30.05.2017 through bank transfer.
- iv. Shri S. Thalaphy has mentioned in his affidavit that he is employed as Lab Assistant in St. Joseph's College of Engineering since 2010 and drawing salary of Rs.19,698/- per month. The college is run by St. Joseph's Institute of Science & Technology Trust. He had received an amount of Rs.50,000/- as salary advance from the Trust on 14.11.2016 and returned back the said amount of Rs.50,000/- to the Trust on 30.03.2017.
- v. In his affidavit, Shri P. Shankar has stated that he is employed as a Mess Employee in St. Joseph's College of Engineering since 2003 and drawing salary of Rs.19,000/- per month. The college is run by St. Joseph's Institute of Science & Technology Trust. He had received an amount of Rs.50,000/- as salary advance from the Trust on 14.11.2016 and returned back the said amount of Rs.50,000/- to the Trust on 31.03.2017 through bank transfer.
- vi. Shri R. Illayaraja has stated in his affidavit that he is employed as a Mess Employee in St. Joseph's College of Engineering since 2000 and drawing salary of Rs.20,095/- per month. The college is run by St. Joseph's Institute of Science & Technology Trust. He had received an amount of Rs.50,000/- as salary advance from the Trust on 16.11.2016 and returned back the amount of Rs.50,000/- to the Trust on 31.03.2017 through bank transfer.
- vii. In his affidavit, Shri P. Gunasekaran has mentioned that he is employed as Office Assistant in St. Joseph's Institute of Technology since 2004 and drawing salary of Rs.20,926/- per month. The college is run by St. Joseph's Educational Trust. The appellant received an amount of Rs.2,00,000/- as salary advance from the Trust on 14.11.2016 and he returned back the said amount of Rs.2,00,000/- to the Trust on 29.03.2017 through bank transfer.

viii. Shri K . Arun Vasanthageethan has stated in his affidavit that he is employed as Professor in St. Joseph's Institute of Technology since 2012 and drawing salary of Rs.82,274/- per month. The college is run by St. Joseph's Educational Trust. The appellant received an amount of Rs.2,50,000/- as salary advance from the Trust on 14.11.2016, out of which on the insistence of Income Deptt. authorities, he returned back an amount of Rs.1,65,000/- to the Trust on 19.11.2016. The remaining salary advance of Rs.85,000/- was returned back by him to the Trust on 28.3.2017 through bank transfer.

ix. Shri M.S. Sudeesh Kumar has stated in his affidavit that he is employed as Accounts Officer in St. Joseph's College of Engineering since 2003 and drawing salary of Rs.39,940/- per month. The college is run by St. Joseph's Institute of Science & Technology Trust. He had received an amount of Rs.2,00,000/- as salary advance from the Trust on 14.11.2016, out of which on the insistence of Income Deptt. authorities, he returned back an amount of Rs.1,07,000/- to the Trust on 14.11.2016. The remaining salary advance of Rs.93,000/- was returned back by him to the Trust on 29.3.2017 through bank transfer.

15. The factual position is not denied by the respondent that St. Joseph College of Engineering and St. Joseph Institute of Technology are two colleges run by two trusts. Mr Babu Manoharan is the Chairman of both the trusts and the engineering colleges.

16. The Initiating Officer by virtue of his order dated 13.03.2017 u/s 24(4)(a)(i) of the Act has held the chairman to be the beneficial owner and 49 employees of these colleges as benamidars thereafter attaching the salary bank accounts of these employees up to the value of the alleged "*benami*" property.

17. A search action by the Income Tax Department commenced on 17.11.2016. During the course of this search, from the office computer of the accountant, details of disbursement of amounts to various Department Heads for further disbursements were found.

18. The statement of the Chairman was recorded during the course of search wherein he stated that salary advance was given to employees of two colleges as salary advance for their personal purposes. This was given only to interested employees, who gave their consent for the same. The employees in their statements also agreed to having received such money. He also said that he would pay tax on the entire amount mentioned in the list of disbursement, as income of the trusts. The trust accordingly honored the Chairman's commitment and paid taxes on income of Rs 8.18 Crores, availing the scheme of PMGKY. In the present lot or total 49 appeals, no appeal is with regard to Chairman.

19. The grounds 3 to 7 of the appeal are reproduced hereunder in order to understand the case of the appellants in the appeals.

Ground 3: Order of the Authority is perverse, illegal and completely not sustainable for the following reasons:

- i. The Authority has not considered any of the Appellant's written submission filed on 15-05-2017 and 23-06-2017 and also not considered the arguments made by the Appellant's Senior Legal Counsel during course of the final hearing on 13.09.2017.
- ii. Furthermore, the order of the Adjudicating Authority has brought into consideration entirely non-existent and outright imaginary facts, which were not even alleged anywhere by the Initiating Officer (IO).
- iii. Order of the Adjudicating Authority is completely devoid of the facts as:
 - a. there is no mention of facts contained in the show cause notice under sub-section (1) of section 24 of the Act issued to the appellant;

- b. there is no mention of the facts contain in the order passed under section 24(4)(a)(i) by the IO.
- c. even in the facts contained in the Rejoinder dated 10.07.2017 filed by the IO before the Adjudicating Authority have not been mentioned.
- d. A Table containing the facts of the individual cases was submitted before the Authority, and each case should have been considered separately, but there is no mention of it anywhere in the order.
- e. There is not even a whisper or murmur in the order of any of the submissions made by the Counsels representing the IO and the Appellant.
- f. Benami Transaction has not been identified. The transaction in question is a genuine transaction wherein the cash was received by the appellant from her employer as a salary advance and it was never held by the Appellant for the benefit of the alleged beneficial owner.
- g. Benami Property has not been identified. In the show cause notice, the alleged property is the cash received. Whereas the IO has attached the bank account of the Appellant where no such cash has ever been deposited for the future benefit of the alleged beneficial owner.
- h. Benamidar has not been established. The Appellant has received the cash as salary advance for her personal purposes and she was never holding the alleged property of the so called beneficial owner.
- i. Even the owner of the property is not established. The transaction in question in salary advances paid by the educational institutes through its Chairman. Mr. Babu Manoharan is neither the beneficial nor the source of the amounts disbursed.

Ground 4: Property was not held for the benefit of alleged beneficial owner and hence the order passed by the Authority is liable to be set aside.

The facts of the present case clearly show that the cash of Rs. 50,000/- received by the Appellant as salary. Such genuine transactions are outside the purview of the Benami Act.

Ground 5: Disbursed amount belongs to the Trusts and not the alleged beneficial owner and hence the order passed by the Authority is liable to be set aside.

The Adjudicating Authority while passing the order has completely ignored the fact that the amount of Rs. 8.18 crores disbursed by the two Trusts (namely St. Joseph Educational Trust and St. Joseph Institute of Science & Technology Trust) has been fully declared by the Respective Trusts under the Pradhan

Mandhri Garib Kalyan Yojana (PMGKY) scheme and even appropriate taxes were paid in full, the evidence of which was submitted before the Adjudicating Authority on 15-05-2017.

Ground 6: The Adjudicating Authority has passed the order by completely ignoring the fact that the alleged benami property does not exist in this case as the appellant had deposited the entire amount of Rs. 50,000/- in his bank account which was subsequently withdrawn and used by him much before the date of attachment i.e. on 25/01/2017.

Ground 7 : Order passed by the Authority is not in conformity with the Benami Law and hence liable to be set aside.

- i. The provisions of the Benami Act clearly show that every cash transaction is not a benami transaction. There has to be a beneficial interest which is *sin quo non* for the existence of a transaction prohibited under the Act.
- ii. The order of the Adjudicating Authority is completely void, illegal and unjust as all the references made and proceedings conducted by them during the course of the adjudication were contrary to the mandatory provisions stipulated under the Prohibition of Benami Property Transactions Act, 1988.
- iii. The provisions of the Act must be interpreted in a manner so that it is in conformity with not only its legislative intent but also with settled constitutional principles. The validity of the provisions might have received constitutional protection, but when stringent laws become applicable as a result where of some persons are to be deprived of his/her right in a property, scrupulous compliance of the statutory requirements is imperative.

20. The definition of Section 2(5), 2(9) and 2(10) of the Benami Act is read as under:

2(5) “attachment “ means the prohibition of transfer, conversion, disposition or movement of property, by an order issued under this Act;

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 53-A 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.

2(10) "benamidar" means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name;

21. Every cash transaction cannot be termed as a “*benami*” transaction. As per section 2(9) A of the Act, the following twin conditions need to be satisfied-

- 1) the property being held by a person who has not provided the consideration,
- 2) the property is held by that person for the immediate or future benefit, direct or indirect of the person who has provided the said consideration.

22. The characteristic of a “benami” transaction is that there must be a mere lending of name without any intention to benefit the person in whose name it is made i.e. a mere name lender. The mischief sought to be punished by the Act are only such transactions which have a name lending element without deriving any benefit therein i.e. “benami” transactions. (Para 1.5 Law Commission Report No. 57 and Statement Object and Reasons of the 1988 Act).The same read as under:-

1.5 Meaning of ‘benami transaction’-Purchase or holding of properties in the name of another is known in India, as a benami transaction. This custom has been recognised by Indian Courts for a long time Literally, the word “benami” means ‘without name’. The essential legal characteristic of these transactions is that there is no intention to benefit the person in whose name the transaction is made. The name of that person, popularly known as the ‘benamidar’, as the Privy Council pointed out. Is simply an alias for that of the person beneficially interested. The benamidar has the ostensible title to the property standing in his name; but the beneficial ownership of the property does not vest in him but in the real owner.

23. The Act was amended in the year 2016 with the following objects:

“ STATEMENT OF OBJECTS AND REASONS

The Benami Transactions (Prohibition) Act, 1988 was enacted to prohibit benami transactions and the right to recover property held benami. The said Act, inter alia, provides that—(a) all the properties held benami shall be subject to acquisition by such authority in such manner and after following such procedure as may be prescribed; (b) no amount shall be payable for the acquisition of any property held benami; (c) the purchase of property by any person in the name of his wife or unmarried daughter for their benefit would not be benami transaction; (d) the securities held by a depository as registered owner under the provisions of the Depositories Act, 1996 or participant as an agent of a depository would not be benami transactions.

2. During the administration of the Benami Transactions (Prohibition) Act, 1988, it was found that the provisions of the aforesaid Act are inadequate to deal with benami transactions as the Act does not—(i) contain any specific provision for vesting of confiscated property with Central Government; (ii) have any provision for an appellate mechanism against an action taken by the authorities under the Act, while barring the jurisdiction of a civil court; (iii) confer the powers of the civil court upon the authorities for its implementation; and (iv) provide for adequate enabling rule making powers.”

Thus, the Act should be interpreted in a manner so as to punish only transactions that have mere lending of name without any intention to benefit the person in whose name it is made.

24. Using a juxtaposition in the definition as per 2 (9) A, “where the money is transferred to, or is held by, a lecturer, and the consideration for such money has been provided, or paid by, another person”; In the present case, all the appellants have never held the movable property or the same was registered in their respective banks.

25. The nine appellants are merely employees of the Trust (who is their employer). The statement of Chairman has already been recorded. From the entire record, it has not been established that the appellants had any point of time hatched any conspiracy with the employer in order to conceal any cash amount or they have any link and nexus with the employer pertaining to any criminal activities. It is admitted by the respondent that they were employees with the Trust and highly qualified persons. Even the advance-salary received by them against the services to be provided by them. The same would have to be treated as earned money and disclosed income. It is not a case where they have received the advance salary amount and left the job. In the present cases, there is no direct or indirect evidence available on record to show that they were involved in assisting any crime. They have already paid/adjusted the entire amount towards their salaries.

26. The law in this regard is quite settled:-

RE: DIRECT OR INDIRECT ATTEMPT:

i) ***In State of Maharashtra v. Mohd. Yakub, (1980) 3 SCC 57, the Honble Supreme Court observed that-***

“13. Well then, what is an “attempt”? ...In sum, a person commits the offence of “attempt to commit a particular offence” when (i) he intends to commit that particular offence and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.”

Thus, an “attempt to indulge” would necessarily require not only a positive “intention” to commit the offence, but also preparation for the same coupled with doing of an act towards commission of such offence with such intention to commit the offence. Respondent failed to produce any material or circumstantial evidence whatsoever, oral or documentary, to show any such ‘intention’ and ‘attempt’ on the part of any of the petitioners.

31) **RE: KNOWINGLY ASSISTS OR KNOWINGLY IS A PARTY:**

In Joti Parshad v. State of Haryana: 1993 Supp (2) SCC 497 the Hon’ble Supreme Court has held as follows-

“5. Under the Indian penal law, guilt in respect of almost all the offences is fastened either on the ground of “intention” or “knowledge” or “reason to believe”. We are now concerned with the expressions “knowledge” and “reason to believe”. “Knowledge” is an awareness on the part of the person concerned indicating his state of mind. “Reason to believe” is another facet of the state of mind. “Reason to believe” is not the same thing as “suspicion” or “doubt” and mere seeing also cannot be equated to believing. “Reason to believe” is a higher level of state of mind. Likewise “knowledge” will be slightly on a higher plane than “reason to believe”. A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same.”

iii) **Actually involved:**

If there is no direct / indirect involvement of any person or property with the proceeds of the crime nor there is any aspect of knowledge in any person with respect to involvement or assistance nor the said person is party to the said transaction., cannot be penalized for no fault of his.

Therefore, it cannot be the Scheme of the Act whereby bona fide person without having any direct/ indirect involvement in the crime.

27. The impugned order assumes that the object of the disbursement was to bring undisclosed amount into circulation by depositing into 3rd person accounts, who did not own the money legitimately. There is no material on record about any 3rd persons accounts. Furthermore, there is no material on record to show that the lecturers owned the money illegitimately.

28. The only material present with the initiating officer were sworn statements. These statements only disclose a receipt of cash. This is insufficient to construe the existence of a “*benami*” transaction.

29. These statements would show that the money in question was no longer with the college staff and was either returned or spent and could not have been attached.

30. The Notice would show that it is mechanical in nature and only talks about receipt of cash. In fact all notices are identical except for the amount mentioned in paragraph 5 therein shows a lack of application of mind, thus making the jurisdiction assumed under section 24 invalid.

31. The Respondent could not have formed an opinion that the Appellant would alienate property knowing that the money is with the Income Tax Authorities in the absence of cogent and clear evidence.

32. It was rightly argued by Shri Anirudh Bakhru, learned counsel for the appellant that once the entire salary advance was returned back/adjusted to the Trust, the question of Appellant depositing any amount out of it in his bank account did not arise. Therefore, there was no benami property lying in the Bank account of the Appellant which has been attached.

33. a) In the case of Ohlson v. Hylton [1975] 1 WLR 724, the Queens Bench Division held:

“This is a case in which the mischief at which the statute is aimed appears to me to be very clear. Immediately prior to the passing of the Act of 1953 the criminal law was adequate to deal with the actual use of weapons in the course of a criminal assault. Where it was lacking, however, was that the mere carrying of offensive weapons was not an offence. The long title of the Act reads as follows: “An Act to prohibit the carrying of offensive weapons in public places without lawful authority or reasonable excuse.” Parliament is there recognising the need for preventive justice where, by preventing the carriage of offensive weapons in a public place, it reduced the opportunity for the use of such weapons. I have no doubt that this was a worthy objective, and that the Act is an extremely important one. If, however, the prosecutor is right, the scope of section 1 goes far beyond the mischief aimed at, and in every case where an assault is committed with a weapon and in a public place an offence under the Act of 1953 can be charged in addition to the charge of assault. In such a case the additional count does nothing except add to the complexity of the case and the possibility of confusion of the jury. This has in fact occurred.”

b) In R.M.D. Chamarbaugwalla v. Union of India, 1957 SCR 930 : AIR 1957 SC 628, a Constitution Bench of the Apex Court held:

“6. If the question whether the Act applies also to prize competitions in which success depends to a substantial degree on skill is to be answered solely on a literal construction of Section 2 (d), it will be difficult to resist the contention of the petitioners that it does. The definition of “prize competition” in Section 2(d) is wide and unqualified in its terms. There is nothing in the wording of it, which limits it to competitions in which success does not depend to any substantial extent on skill but on chance. It is argued by Mr Palkhivala that the language of the enactment being clear and unambiguous, it is not open to us to read into it a limitation which is not there, by reference to other and extraneous considerations. Now, when a question arises as to the interpretation to be put on an enactment, what the court has to do is to ascertain “the intent of them that make it”, and that must of course be gathered from the words actually used in the statute. That, however, does not mean that the decision should rest on a literal interpretation of the words

used in disregard of all other materials. "The literal construction then", says Maxwell on Interpretation of Statutes, 10th Edn., p. 19, "has, in general, but prima facie preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act; to consider, according to Lord Coke: (1) What was the law before the Act was passed; (2) What was the mischief or defect for which the law had not provided; (3) What remedy Parliament has appointed; and (4) The reason of the remedy". The reference here is to Heydon case [(1584) 3 Co. Rep 76 ER 637]. These are principles well settled, and were applied by this Court in Bengal Immunity Company Limited v. State of Bihar [(1955) 2 SCR 603, 633]. To decide the true scope of the present Act, therefore we must have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature, such as the history of the legislation and the purposes thereof, the mischief which it intended to suppress and the other provisions of the statute, and construe the language of Section 2(d) in the light of the indications furnished by them.

c) Turning first to the history of the legislation, its genesis is to be found in the Bombay Lotteries and Prize Competitions Control and Tax Act (Bom 54 of 1948). That Act was passed with the object of controlling and taxing lotteries and prize competitions within the Province of Bombay, and as originally enacted, it applied only to competitions conducted within the Province of Bombay. Section 7 of the Act provided that "a prize competition shall be deemed to be an unlawful prize competition unless a licence in respect of such competition has been obtained by the promoter thereof". Section 12 imposed a tax on the amounts received in respect of competitions which had been licensed under the Act. With a view to avoid the operation of the taxing provisions of this enactment, persons who had thereto before been conducting prize competitions within the Province of Bombay shifted the venue of their activities to neighbouring States like Mysore, and from there continued to receive entries and remittances of money therefor from the residents of Bombay State. In order to prevent evasion of the Act and for effectually carrying out its object, the legislature of Bombay passed Act 30 of 1952 extending the provisions of the Act of 1948 to competitions conducted outside the State of Bombay but operating inside it, the tax however being limited to the amounts remitted or due on the entries sent from the State of Bombay. The validity of this enactment was impugned by a number of promoters of prize competitions in proceedings by way of writ in the High Court of Bombay, and dealing with the contentions raised by them, Chagla, C.J. and Dixit, J. who heard the appeals arising from those proceedings, held that the competitions in question were gambling

in character, and that the licensing provisions were accordingly valid, but that the taxes imposed by Sections 12 and 12-A of the Act were really taxes on the carrying on of the business of running prize competitions, and were hit by Article 301 of the Constitution, and were therefore bad. It is against this decision that Civil Appeal No. 134 of 1956, already referred to, was directed.

34. The position created by this judgment was that though the States could regulate the business of running competitions within their respective borders, to the extent that it had ramifications in other States they could deal with it effectively only by joint and concerted action among themselves. That precisely is the situation for which Article 252(1) provides. Accordingly, following on the judgment of the Bombay High Court, the States of Andhra, Bombay, Madras, Orissa, Uttar Pradesh, Hyderabad, Madhya Bharat, Patiala and East Punjab States Union and Saurashtra passed resolutions under Article 252(1) of the Constitution authorising Parliament to enact the requisite legislation for the control and regulation of prize competitions. Typical of such resolutions is the one passed by the legislature of Bombay, which is in these terms:

“This Assembly do resolve that it is desirable that control and regulation of prize puzzle competitions and all other matters consequential and incidental thereto insofar as these matters are concerned with respect to which Parliament has no power to make laws for the States, should be regulated by Parliament by law.”

Having regard to the circumstances under which the resolutions came to be passed, there cannot be any reasonable doubt that the law which the State legislatures moved Parliament to enact under Article 252(1) was one to control and regulate prize competitions of a gambling character. Competitions in which success depended substantially on skill could not have been in the minds of the legislatures which passed those resolutions. Those competitions had not been the subject of any controversy in court. They had done no harm to the public and had presented no problems to the States, and at no time had there been any legislation directed to regulating them. And if the State legislatures felt that there was any need to regulate even those competitions,

they could have themselves effectively done so without resort to the special jurisdiction under Article 252(1). It should further be observed that the language of the resolutions is that it is desirable to control competitions. If it was intended that Parliament should legislate also on competitions involving skill, the word “control” would seem to be not appropriate. While control and regulation would be requisite in the case of gambling, mere regulation would have been sufficient as regards competitions involving skill. The use of the word “control” which is to be found not only in the resolution but also in the short title and the preamble to the Act appears to us to clearly indicate that it was only competitions of the character dealt with in the Bombay judgment, that were within the contemplation of the legislature.”

35. In jurisprudence, the thumb rule is that the basic law on the subject to be applied for violation of the statute. No doubt, in the interest of the public and welfare of the society, the state is always welcome to bring the amendment in the existing law. New legislature can be brought which may have stringent provisions to cure the system which can be applied against the violators of the law. However, at the same time, when the stringent provisions are to be applied, it is the duty of the Authority to apply the said provisions very carefully. The investigation has to be carried out as per settled law, the mechanical order under those circumstances cannot be passed.

Thus, if the respondent wishes to invoke the amended provision of Benami Act, the respondent has to adhere the provisions strictly as defined and not otherwise against the innocent parties. The respondent has to provide cogent and clear reason to the aggrieved parties. In the facts of present appeals, even otherwise, the appellants have not held any benami property. They cannot be treated as Benamidar. The money has already been returned or adjusted against their salaries. The irony is that the respondent is neither placing on record the reasons to believe nor supplying the copy of the parties concerned.

36. Even the Adjudicating Authority has not considered the reply filed by the appellant properly. The impugned order is unsustainable as it punishes the appellants for wanting to defeat the purpose of demonetization, which has no direct nexus with the Act and is beyond the purview of the Act.

37. The impugned order assumes that the object of the disbursement was to bring undisclosed amount into circulation by depositing into 3rd person accounts, who did not own the money legitimately. There is no material on record about any 3rd persons accounts. Furthermore, there is no material on record to show that the lecturers owned the money illegitimately.

38. The impugned order is also contrary to record with respect to the findings that the sworn statements, which were recorded, were withdrawn and that the advance was beyond the paying capacity of the lecturers and staff.

39. It is imperative that the investigating officer must form a reason to believe based on application of mind and appreciation of the material on record (*ACIT v. Dhariya Construction Co.*(2010)328 ITR 515&*CIT v. Kelvinator India Ltd* (2010) 320 ITR 561).

40. The notice shows that it is mechanical in nature and only talks about receipt of cash. In fact all notices are identical except for the amount mentioned. It shows a lack of application of mind, thus making the jurisdiction assumed under section 24 is invalid.

41. The facts of the present case are clear that the property was never held by the appellants. The amount received by them have returned/adjusted towards salaries. Even the question of any arrangement in the present case does not arise as the appellants have received only advance salary from the employer under oral contract at the asking of the respondent, the same was immediately returned. The said factual position has not been denied by the respondent. This is also not a case where the person providing the consideration was not traceable or fictitious. The admitted position is that the

management/employer was very much traceable, his statement was recorded, the money returned by the appellants was dealt by the department.

42. The existence of the “*benami*” transaction has to be proved by the authorities i.e. the person who alleges the transaction (*Sitaram Agarwal v. Subrata Chandra, (2008) 7 S.C.C. 716*). The authorities have failed to discharge the burden of proof. The authority has purely gone on the premise that cash is transferred from one person to another, with an object to defeat ,demonetization. This is insufficient to establish a “*benami*” transaction.

43. The transaction where cash is paid to person in lieu of a future promise cannot be a “*benami*” transaction as there is no lending of name. There can be no “*benami*” transaction if the future benefit is due from the person who is also the holder of property.

44. The impugned order is not sustainable as it punishes the appellants for wanting to defeat the purpose of demonetization, which has no direct nexus with the Act and is beyond the purview of the Act.

45. Under these circumstances, the impugned order dated 27.3.2018 in all nine appeals is set-aside. The attached properties are released forthwith. The appeal and pending application are disposed of.

46. No costs.

**(Justice Manmohan Singh)
Chairman**

**New Delhi,
31st Oct., 2018.**
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