REPORTABLE

N THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 5783 of 2022
[@ SPECIAL LEAVE PETITION (C) NO. 2784/2020]

UNION OF INDIA & ANR. ... APPELLANT(S)

VERSUS

M/s. GANPATI DEALCOM PVT. LTD. ... RESPONDENT(S)

JUDGMENT

N.V. RAMANA, CJI

1. Leave granted.

2. This case involves a tussle between the normative and positivist positions regarding the nature of a crime and punishment. Treating the Constitution as a flag post, a result of this tussle is sought in the following deliberation.

3. This appeal is filed against the impugned judgment dated 12.12.2019 passed by the High Court of Judicature at Calcutta in APO No. 8 of 2019 along with Writ Petition No. 687 of 2017.

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4. The short legal question which arises for this Court's consideration is whether the Prohibition of Benami Property Transactions Act, 1988 [for short 'the 1988 Act'], as amended by the Benami Transactions (Prohibition) Amendment Act, 2016 [for short the '2016 Act'] has a prospective effect. Although a purely legal question arises in this appeal, it is necessary to have a brief factual background in mind before we advert to the analysis.

5. On 02.05.2011, the respondent–company purchased a property in its name from various sellers for a total consideration of Rs.9,44,00,000/-. It is said that the consideration for the aforesaid purchase was paid from the capital of the company. On 31.03.2012, 99.9% of the respondent–company shareholdings were acquired by M/s PLD Properties Pvt. Ltd. and M/s Ginger Marketing Pvt. Ltd. at a discounted price of Rs.5/- per share for a total amount of Rs.19,10,000/-. It is a matter of fact that the two directors of the respondent-company (viz. Shruti Goenka and Ritu Goenka) also held directorship in the subsequent purchaser company.

6. Accordingly, on 29.08.2017, the Deputy Commissioner of Income Tax (Adjudicating Authority) issued a notice to the respondent–company invoking Section 24(1) of the 2016 Act to show cause as to why the aforesaid property should not be considered as Benami property and the respondent company as Benamidar within the meaning of Section 2(8) of the 2016 Act. On 06.09.2017, the respondent–company replied to the aforesaid show-cause notice denying that the scheduled property is a Benami property.

7. The Adjudicating Authority, by order dated 24.11.2017, passed an order under Section 24(4)(b)(i) of the 2016 Act, provisionally attaching the property.

8. Aggrieved by the aforesaid attachment order, the respondent-company filed a Writ Petition (being W.P. No. 687 of 2017) before the High Court of Calcutta. The aforesaid writ petition was disposed of by the learned Single Judge by an order dated 18.12.2018 with a direction to the Adjudicating Authority to conclude the proceedings within 12 weeks.

9. Aggrieved, the respondent-company filed an appeal against the aforesaid order being APO No. 8 of 2019.

10. The High Court, vide impugned order dated 12.12.2019, while quashing the show-cause notice dated 29.08.2017, held that the 2016 Act does not have retrospective application.

(i) The 2016 Amendment Act, which came into force on 01.11.2016, was a new and substantive legislation, inter alia, substituting and widening the definition of 'benami property and benami transaction', and in order to have retrospective operation for the period or transactions entered into prior to 01.11.2016, a provision to that effect should have been specifically providing under the said Act; in the absence of any express provision to that effect, simply by virtue of the provisions contained in subsection (3) of Section 1 of the 1988 Act [which remained unaltered by the 2016 Amendment Act, and have consequently been retained under the Benami Act], the provisions of the 2016 Amendment Act cannot be impliedly construed as retrospective;

(ii) Reference was made to and reliance was placed on the unreported ruling of the learned Single Judge of the Rajasthan High Court dated 12.07.2019 in the case of ***Niharika Jain v. Union of India*** [S.B.C.W.P. No. 2915/2019], wherein, following the ruling of the Single Judge of the Hon'ble Bombay High Court in the case of ***Joseph Isharat v. Mrs. Rozy Nishikant Gaikwad*** [S.A. No. 749/2015; decided on 01.03.2017/30.03.2017], it was held that in terms of the protection enshrined under clause (1) of Article 20 of the Constitution of India, the 2016 Amendment Act, amending, inter alia, the definition of "benami transaction", could not be given retrospective effect, and the amendments brought about vide the said (amendment) Act would be enforceable only with effect from the date of the enactment / coming into force of the said amendment Act i.e., on or after 01.11.2016 – reliance in this regard was also placed on the ruling of

this Court in the case of ***Rao Shiv Bahadur Singh vs. State of Vindhya Pradesh,*** AIR 1953 SC 394;

(iii) The 1988 Act, which came into force on 19.05.1988 [except Section 3, 5 and 8 thereof which came into force on 05.09.1988], provided for punishment for persons entering into a "benami transaction", which was made non-cognizable and bailable, and also however, provided for acquisition of property held to be benami; provisions of the 1988 Act, were never operationalized since the rules and procedure required to be framed under Section 8 of the said Act bringing into existence the machinery for implementation of the 1988 Act, were never notified – therefore, although the 1988 Act was part of the statute book, the same was rendered a "dead letter", and all transactions and properties alleged 'benami', carried out / acquired between the period of 19.05.1988 and 01.11.2016, were deemed to have been accepted by the Government as valid 'vesting rights' in the parties to such alleged transactions; *ergo*, the Central Government, having waived its right of implementation and operationalisation of the 1988 Act for the period prior to 01.11.2016, cannot now do so indirectly by way of retrospective operation of the 2016 Amendment Act.

11. Aggrieved by the aforesaid impugned order, the Union of India is in appeal before this Court.

12. SUBMISSIONS

12.1 Shri S.V Raju, learned Additional Solicitor General ('ASG') has contended as under:

i. As per the pre-amendment Act, there was no machinery or procedure in place to effectuate proceedings against Benami transactions. It is submitted that in order to remedy this mischief of lack of procedure, the Amendment Act, which was a consolidating Act, was brought in.

ii. It was not an offence that is sought to be implemented retrospectively, but merely the procedures are laid down to implement the Act of 1988. He stated that the pre-amendment Act already recognizes Benami transactions as contrary to law, and hence no new or substantive law is being made.

iii. It is settled law that procedural law can be applied retrospectively, and the bar against retrospective application is only applicable to substantive law.

iv. The legislative intent for bringing an amendment to the existing act, and not enacting a new law, was to ensure that no immunity is granted to persons who engaged in benami transactions while the pre-amendment Act was in operation.

v. It was further submitted that Section 5 and Section 27 of the Act are to be read together as the latter provides the mechanism through which the Benami property may be confiscated by the Adjudicating Authority. As per Section 27(3), once the confiscation order is passed by the Authority, the rights in the property are vested in the Central Government. It was reiterated that confiscation is not a penal provision, as the same has civil consequences. Both, acquisition and confiscation are civil in nature, and therefore, they can be used interchangeably. Therefore, any amendment act which is consolidating in nature, can have provisions which are confiscatory in nature and the same can be applied retrospectively. For this, the learned ASG referred to ***Yogendra Kumar Jaiswal v. State of Bihar,*** (2016) 3 SCC 183, para 149, and submitted that in this judgment, this Court has held that confiscation is not a punishment, and that Article 20(1) is not attracted. The Court also held that confiscation as imposed by the Adjudicating

Authority would not amount to any punishment, and is only a deprivation of the property of the person in question.

vi. The learned ASG also referred to ***Mithilesh Kumari v. Prem Behari Khare,*** (1989) 2 SCC 95, para 21, to submit that by necessary implication, the machinery and procedural provisions of the amended Act are retrospective in nature.

12.2 Shri Vikramjit Banerjee, learned ASG has submitted as under:

i. The Parliament has the power to enact retrospective legislation even in case of a criminal Statute, as long as it complies with Article 20(1) of the Constitution of India. He further argued that as per Article 20(1), prohibition exists only on conviction and sentencing of the *ex-post facto* law, and not against passing such a law.

ii. Forfeiture, acquisition, and confiscation are not punishments and therefore not subject to Article 20(1)

restrictions. He then pointed out that the adjudication proceedings are also not in the nature of prosecution, and hence cannot be restricted by Article 20.

iii. That acquisition of property without paying compensation amounts to confiscation, and confiscation envisages a civil liability.

12.3 Dr. Abhishek Manu Singhvi, learned Senior Advocate appearing for the respondent has contended as under:

i. The 1988 Act did not make its provisions applied retrospectively. The Parliament purposely ensured that when the 1988 Ordinance was replaced by the parent Act, only the provisions from the 1988 Ordinance were continued from the date of the promulgation of the ordinance. The other provisions introduced by the parent Act, namely Sections 3, 5 and 8, were made only prospectively applicable from the date on which the parent Act was brought into effect.

ii. The 2016 Act was not intended to be retrospectively applicable as the same is not explicitly stated.

Parliament deemed it fit to leave it to the Central Government to enforce the 2016 Act from an appointed date by notifying it in the official gazette, as mentioned in Section 1(2) of the 2016 Act.

iii. It was further argued that when the statute carves out distinct penalties in respect of benami transactions entered into in the unamended regime *vis-a-vis* the benami transactions entered into after the amendment Act of 2016, it clearly indicates that the amended Act is prospective in nature.

iv. Learned Senior Advocate also relied on the cases of ***R. Rajagopal Reddy v. Padmini Chandrasekharan,*** (1995) 2 SCC 630 and ***Mangathai Ammal v. Rajeswari***, (2020) 17 SCC 496, in the context of Sections 4(1), 4(2) and 3(2) of the parent Act, to contend that the abovementioned provisions are prospective in nature.

v. It is also argued that insertion of Section 2(9) by an amendment to the parent Act provides a new definition to benami transactions and has

substantially changed the scope of the offence by enlarging its ambit. In the unamended Act, only transfer of property was an offence. However, the 2016 Act has added multiple other actions as offences under the category of benami transactions. It is a well settled principle of law that any enactment which substantially affects the rights of people cannot be applied retrospectively, and therefore, the amended 2016 Act can only be prospective in nature. For this, the judgment of this Court in the case of ***Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Pvt. Ltd,*** (2015) 1 SCC 1 was relied on.

13. INTRODUCTION TO PRACTICE OF PROPERTIES HELD BENAMI IN INDIA

13.1 Having heard the parties, it is necessary for this Court to trace the history of benami transactions in India. The term 'benami transaction' generally implies that one purchases the property in the name of somebody else, i.e., a name lender, and the purchaser does not hold beneficial interest

in the property. Literally, 'benami' means 'without a name'. The simplest of example is if person 'A' (real owner) purchases a property from 'B' in the name of 'C' (benamidar/ostensible owner), wherein 'A' exercise rights/interest over the property.

13.2 The term 'benami', which was alien to statutory law during the colonial regime and in the early days of the Republic, was known in the legal parlance of lawyers. Even in Mohammedan law, such transactions were commonly referred as *furzee* or *farzi*, derived from Arabic word *furaz*.[1] Over the passage of time, this nebulous concept appeared in cases without much clarity with respect to its basic contours. Conceptually, there are two views which arise from the Doctrine of Benami. The first view is that the benamidar does not hold title over the property, and the second view is that although the title passes to the benamidar, he holds it in trust.

13.3 Eventually, there developed two loose categories of transactions that were colloquially termed as benami, which can be explained through the following examples:

1 McNaughten's Selected Report Vol. I, Reporter's Note at p. 368.

(i.) Tripartite: 'B' sells a property to 'A' (real owner), but the sale deed mentions 'C' as the owner/benamidar.

(ii.) Bipartite: 'A' sells property to 'B' without intending to pass the title to 'B'.

The first instance was usually termed as a real benami transaction, and the second transaction was considered either as a sham transaction or "loosely" benami transaction. In ***Sree Meenakshi Mills Ltd. v. Commissioner of Income Tax, Madras***, AIR 1957 SC 49, speaking for the Bench, Venkatarama Ayyar, J., stated that the first category of transactions is 'usually' termed as benami, while the second category is 'occasionally' considered a benami transaction. He added that it is "perhaps not accurately so used". In ***Thakur Bhim Singh v. Thakur Kan Singh***, AIR 1980 SC 727, Venkataramiah, J. straightway called the first category as benami but chose to describe the second category as "loosely" termed benami. This distinction is relevant and will be adverted to later.

13.4 Numerous reasons, some desirable and some undesirable, were contributory factors for the proliferation of such a practice in India. Some of them are as follows:

(i) Secret provisions for families within Hindu Joint family system;[2]
(ii) Mitigation of political and social risk;[3]
(iii) Defrauding creditors;[4]
(iv) Evasion of taxes.

13.5 Judicial recognition of such transactions came about in the early 19th century under the colonial courts. In ***Mt. Bilas Kunwar v. Desraj Ranjit Singh***, AIR 1915 PC 96, the Privy Council observed as under:

> "Down to the taluqdar's death the natural inference is that the purchase was a benami transaction; a dealing common to Hindus and Muhammadans alike, and much in use in India; it is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our common law, that where a feoffment is made without consideration the use results to the feoffer."

2 West and Buhler, 'Hindu Law', (Fourth Edition), Pg. 157, 563.
3 Pollock, The Law of fraud, Misrepresentation and Mistake in British India (1894), page 83-84.
4 K. K. Bhattacharya, Joint Hindu Family, (Tagore Law Lectures) (1884-85) Pg. 469-470.

In ***Punjab Province v. Daulat Singh***, AIR (29) 1942 FC 38, the Federal Court, while evaluating the propriety of such transactions, observed as under:

> "A notion has sometimes prevailed in this country that all benami transactions must be regarded as reprehensible and improper if not illegal; but, as late as in 1915, Sir George Farwell, delivering the judgment of the Judicial Committee in 37 ALL. 557 spoke of them as 'quite unobjectionable' and as having their analogues in the English law; and Mr. Amreer Ali, delivering the judgment of the Committee in 46 Cal. 566, observed that "there is nothing inherently wrong in it, and it accords, within its legitimate scope, with the ideas and habits of the people". As indicated by the qualifying words "within its legitimate scope", their Lordships' observations were clearly not meant to countenance transactions entered into for fraudulent or illegal purposes."

13.6 In ***Jaydayal Poddar v. Bibi Hazra***, AIR 1974 SC 171, this Court laid down a test to determine whether a transaction is benami or not. The following factors were to be considered:

(i) The source from which the purchase money came;
(ii) The nature and possession of property after purchase;
(iii) Motive, if any, for giving the transaction a benami colour;
(iv) The position of the parties and the relationship, if any, between the Claimant and the alleged Benamidar.
(v) The custody of the title-deeds after the sale, and

(vi) The conduct of the parties concerned in dealing with the property after the sale.

13.7 The judiciary came to establish the general principle that in law, the real owner is recognized over the ostensible owner.[5] This principle had certain statutory exceptions, albeit limited, such as Section 66 of Civil Procedure Code, 1908 with respect to properties wherein sale certificates are issued by courts; and Section 281A of the Income Tax Act, 1961, which allows filing of suit by the original owner to enforce his right over a benami property, only if the same is declared for taxing purpose, as provided thereunder. Such provision under the Income Tax Act did not bar such benami transactions completely, rather it only attempted to legitimize and bring them into the net of taxation. Such provision, while disincentivizing transactions beyond the taxation net, had also inevitably accepted the positive factors in recognizing the same. Further, it is a matter of fact that the Indian Trusts Act has recognized and accepted the principle behind benami transactions.

5 *Murlidhar Narayandas v. Paramanand Luchmandas*, AIR 1932 Bom. 190; *Radhakishan Brijlal v. Union of India*, AIR 1959 Bom. 102 (V46 C40); *Gur Prasad v. Hansraj*, AIR (33) 1946 Oudh. 144.

13.8 The 57th Report of the Law Commission (1973) succinctly captures the general principles prevailing as on that date, in the following manner:

> "5.2 **Summary of present position**-in general-A few basic points concerning benami transactions may be stated, as follows:
> (a) Benami transfer or transaction means the transfer by or to a person who acts only as the ostensible owner in place of real owner whose name is not disclosed;
> (b) The question whether such transfer or transaction was real or benami depends upon the intention of the beneficiary;
> (c) The real owner in such cases may be called the beneficiary, and the ostensible owner the benamidar.
> ...
> 5.3. **Effect of benami transfer**.- The effect of a benami transfer is as follows:-
> (a) A person does not acquire any interest in property by merely leading his name;
> (b) The benamidar has no beneficial interest though he may re-present the legal owner as to third person.
> **(c) <u>A benami transaction is legal, except in certain specified situations.</u>**
>
> **(Emphasis supplied)**

13.9 Prior to the 1973 Report, the broad position on the legality of various kinds of benami transactions can be captured as follows:

SL. NO.	NATURE OF TRANSFER	LEGALITY AND CONSEQUENCES
A	Transfer in favour of wife or child (whether or not with	Governed by Section 64, Income-tax Act

	the object of transferring title to the wife or child) without adequate consideration		(also see point G in table). [No criminal liability unless the case falls within Section 415 to 424 or Section 206-207 of Indian Penal Code]
B	Transfer in favour of wife or child for consideration, but for a fraudulent purpose and not in good faith		Governed by Section 6(h)(2) and Section 58 of Transfer of Property Act. [Criminal liability if the case falls within Section 415 to 424 or Section 206-207 of Indian Penal Code]
C	Transfer in favour of wife or child for consideration, and with genuine object of transferring title to the wife or child		Not covered by any provision (No criminal liability)
D	(i)	Transfer in favour of a person other than wife or child without consideration, but with the genuine object of transferring title and with no fraudulent purpose	Not covered by any provision. (No criminal liability)
	(ii)	Transfer in favour of a person other than wife or child without consideration, and without intent to transfer title, but with no fraudulent purpose.	Governed by Section 281A of Income Tax Act, 1961 (also see point G in table). [No criminal liability]
	(iii)	Transfer in favour of a person other than wife or child without consideration, and with	Governed by Section 6(h)(2) and Section 53 of Transfer of Property Act. [Criminal liability

		intent to transfer title, but for a fraudulent purpose and not in good faith.	if the case falls within Section 415 to 424 or Section 206-207 of Indian Penal Code]
	(iv)	Transfer in favour of a person other than wife or child without consideration, without intent to transfer title and for fraudulent purpose.	Governed by Section 281A of Income Tax Act, 1961 (See point G in table). Also section 6(h)(2) and Section 59, Transfer of Property Act. (Criminal liability if case falls within Section 415 to 424 of Indian Penal Code or Section 206-207 of that Code)
E	Transfer in favour of person other than wife or child for consideration, with intent to transfer title, but for a fraudulent purpose and not in good faith.		Governed by Section 6(h)(g) and Section 53, Transfer of Property Act. (criminal liability if case falls within Section 415 to 424 of Indian penal Code or Section 206-207 of that Code
F	Transfer in favour of person other than wife or child with consideration, but with genuine object of transferring ownership and with no fraudulent intent		Not covered by any provision.
G	Transfer in favour of any person benami (i.e., without consideration and with no genuine intent to transfer)		Object of checking tax evasion substantially achieved by barring a suit instituted without informing the taxing authorities. See Section 231A, Income Tax Act (inserted by Act 45 of 1972)

13.10 It may be necessary to note that the Law Commission, through its aforementioned 57th Report, did not find it suitable to accept the stringent provision of making benami transactions liable to criminal action. Rather, it recommended adoption of certain less stringent, civil alternatives in the following manner:

> "6.3. **Possible alternative for regulating benami transaction**. - Several possible alternatives could be thought of, with reference to prohibiting or regulating benami transactions for avoiding prejudice to private individuals or minimising litigation:-
>
> (i) Entering into a Benami transactions could be made an offence;
>
> (ii) A provision may be enacted to the effect that in a civil suit a right shall not be enforced against the benamidar or against a third person, by or on behalf of the person claiming to be the real owner of the property on the ground of benami; a similar provision could be made to bar defences on the ground of benami.
>
> (This provision would be based on the principle on which the existing provisions in the Civil Procedure Code and the new provision in the Income-tax Act are based but could be wider in scope and more radical). -
>
> (iii) The present presumption of a resulting trust in favour of the person who provided the consideration may be displaced (as in England) by the presumption of advancement, in cases where the person to whom property is transferred is a near relative of the person who provided the consideration. (This would bring in the doctrine of advancement, so as to rebut the presumption of resulting trust under section 82 of the Trusts Act).

Whichever alternative is adopted, it may be desirable to make an exception for an acquisition made by the manager of a joint Hindu family in the name of one of the co-parceners, and similar cases.

...

6.24. **First alternative not likely to be effective**-The first alternative referred to above, namely, the imposition of a criminal prohibition against benami transactions, is the most drastic alternative, but it is not likely to be more effective than the others. A prohibition backed by criminal sanctions would not, moreover, be desirable, unless the mens rea is also included in the provision to be enacted.

If this alternative is to be adopted, a provision could be enacted on the following lines:--

"Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such person did not intend to pay or provide such consideration for the benefit of the transferee, the person paying or providing the consideration shall be guilty of an offence punishable with imprisonment upto three years, or with fine, or both.

Provided that this section shall not apply where the transferee is a co-parcener in a Hindu undivided family in which such other person is also a co-parcener, and it is proved that such other person intended to pay or provide such consideration for the benefit of the co-parceners in the family.

Exception--Nothing in this section shall be deemed to affect section 66 of the Code of Civil Procedure, 1908 or any provision similar thereto."

Yet another device for giving effect to the first alternative, with a requirement of mens rea, would be to have a law on the following lines:

> "Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such person did not intend to pay or provide such consideration for the benefit

> of the transferee, the person paying: or providing the consideration shall, if he has caused the transfer to be entered into with the intention of facilitating the evasion of any law, or defeating the claims of his creditors, or the creditors of any other person be guilty of an offence punishable with imprisonment upto three years, or with fine, or with both."

Yet another device to give effect to the first alternative would be to add a section in the Indian Penal Code as follows-

> "421A. Whoever, dishonestly or fraudulently causes to be transferred to any person, any property, for which transfer he has paid or provided the consideration, intending thereby to prevent, or knowing to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, or intending thereby to facilitate, or knowing it to be likely that he will thereby facilitate, the evasion of any law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine. or with both."

6.25. **Second alternative**. --The second alternative is less drastic than. the first. In form. it could follow the existing statutory provision limiting the judicial recognition of benami transactions, such as, section 66. Code of Civil Procedure, 1908. But its scope would be much wider. The provision' could be to the effect that no suit shall lie to enforce a right in respect of any property held benami, either against the person in whose name 'the property is held or against any other person, by or on behalf of a person who claims to be the real owner 'of the property on the ground that the person in whose name the property is held is a benamidar of the claimant. (If necessary, a defence can also be barred).

…

6.27. **Second alternative refusal to recognise Benami preferred.** -- In our opinion, the simplest alternative would be the second alternative. The law should refuse to- recognise the Benami character of transactions, without making them an offence. The law should, in effect, provide that where property is transferred benami, the benamidar will become the real owner. The result of such a provision will be that the fact that the benamidar did not provide the consideration, or that the consideration was provided by a third person, will not be a ground for recognising a person other than the benamidar as owner. To put the matter in broad terms, the doctrine of benami will, under the pro- posed amendment, cease to be a part of the Indian law.
It may be observed that in enacting the proposed provision, the legislature will carry, to its logical conclusion, the trend illustrated by provisions, such as, section 66 of the Code of Civil Procedure. The section in the Code is applicable to involuntary alienations, while the proposed provision will extend the same principle to voluntary transactions as Well.

We think that this will be the simplest and most effective course, and is, therefore, preferable to others.

The amendment will bring out a change in the legal position in some of the situations where, at present, the benami character is re- cognised.

6.27A. We are also of the view that it is not necessary to enact a prohibition attracting criminal penalties---- which is the course suggested in the first alternative. Such a prohibition will have to be ac- companied by a requirement of mens rea, thus narrowing down its scope and limiting its practical utility."

13.11 It must be noted that during this time, the Constitution was undergoing a slow churning *qua* the right to property. The above propositions, laid down by Federal Courts and Privy Council are to be understood in a context where there was a general common law right to property, which later made its forays into the Constitution of India under Articles 19(1)(f) and 31. In 1978, the Indian Parliament took a drastic measure and did away with this fundamental right to property and relegated the same to a constitutional right under Article 300A.

13.12 Further, it was an era during which India pursued 'socialism', which was also included in the Preamble of the Constitution through the 42nd (Amendment) Act in 1976. Successive judicial opinions in ***Kesavananda Bharati v. State of Kerala,*** (1973) 4 SCC 225 etc., viewed the right to property as a stumbling block in the path of achieving social goals that the government of the time aspired to.

13.13 In 1988, an Ordinance –viz. The Benami Transactions (Prohibition of the Right of Recover Property) Ordinance, 1988 (Ordinance 2 of 1988.) – was promulgated. This

statutory instrument being not satisfactory, it was referred to the Law Commission again.

13.14 In any case, the issue was re-examined by the Law Commission in the year 1988 through its 130th Report. Although the Law Commission characterized the 130th Report as a continuation of its earlier recommendations, it can be observed that some radical changes were suggested. Some of the key observations are as under:

> "3.2 The first question that must engage our attention at once is the width and coverage of the proposed legislation. **In order to encompass benami transactions concerning various types of property, the legislation should cover both movable, immovable, tangible and intangible property. Unfortunately every type of property, such as land, houses, shares, debentures, bonds, bank accounts, deposit receipts and negotiable instruments, is capable of being held benami. Therefore, it is equally legitimate to have an extensive coverage of the proposed legislation by encompassing property of every denomination**. …
>
> …
>
> 3.18 Therefore, viewed from either angle, the Law Commission is of the firm opinion that the legislation replacing the ordinance should also be retroactive in operation and that no locus penitentia need be given to the persons who had entered into benami transactions in the past. They had notice of

one and half decades to set their house in order. No more indulgence is called for. …
…

4.5Before we conclude on this chapter, it is necessary to point out that certain tax laws have confirmed legitimacy on the benami transactions and derived benefit in the form of revenue collection from it. It was, therefore, said that if now all benami transactions are invalidated and an all-enveloping prohibition is imposed, the revenue laws would suffer loss of revenue. Reference in this connection was made to section 27 of the Income-tax Act, 1962 dealing with income from house property. The various sub-sections of section 27 deal with transfer of property by husband to wife and vice-versa. It also involves the case of impartable estate. The law commission is unable to appreciate how a total prohibition of benami transaction and the holder being made the real owner would defeat revenue laws. If one escapes, the other pays, and if it is suggested that the other may not be within the dragnet of the tax laws and that both would benefit by the prohibition and abolition of benami transactions. In the immediate future such effect may be produced but the long term interest would help in defending such spurious transactions between husband and wife. Section 22 may be read accordingly. But it was pointed out that where transfer of flats is prohibited either by the rules of the co-operative society which has built the flats or by the rules of authorities like the Delhi Development Authority, a modus operandi has come into existence whereby violating the law, the flat is sold and the purchaser would pay the amount and taken an

> irrevocable power of attorney and enter into possession. It was further said that the provisions of the Income-tax Act have recognized such transfers and treat the attorney as owner for the purpose of income-tax as per the provisions of the Finance Act, 1987. If the sole purpose of entering into such a transaction is the violation of existing law which has been passed after due consideration, it is time that no recognition is conferred and the law is allowed to take its own course. Even in the name of revenue loss, violation of existing laws cannot be protected.
>
> 4.6The Law Commission would like to make it very clear that some of provisions of the tax laws may become anachronistic because of the present approach of the law commission. This is inevitable. The tax laws were enacted at the time when benami was a part of Indian law. Such laws would have to conform to the changing legal order. Yet a further solution is offered in this behalf in the next chapter."

(emphasis supplied)

14. FRAMEWORK UNDER THE 1988 ACT

14.1 This brings us to the statutory framework under the 1988 unamended Act, having nine sections. Section 2(a) defines benami transactions as any transaction in which property is transferred to one person for a consideration paid or provided by another person. The law chose to include only tripartite benami transactions, while bipartite/loosely described as benami transactions, were left out of the

definition. Reading the aforesaid definition to include sham/bipartite arrangements within the ambit would be against the strict reading of criminal law and would amount to judicial overreach.

14.2 The above definition does not capture the essence of benami transactions as the broad formulation includes certain types of legitimate transactions as well. The transferee/property holder's lack of beneficial interest in the property was a vital ingredient, as settled by years of judicial pronouncements and common parlance, and found to be completely absent in the definition given in the Act. On literal application of the aforesaid Section 2(a), the following transactions could have been caught in the web of the Act:

(a) 'A' purchases property in name of his son's wife 'B', for the benefit of the son's family from person 'Y', treats the consideration as a gift to the son, and pays gift tax on it.

(b) 'A' who is old and infirm, purchases a property in the name of 'B', intending that 'B' will hold the property in trust of the son of 'A', who is mentally retarded.

(c) A firm 'X' purchases property in the name of the working partner 'B' for the benefit of the firm 'X', making the payment out of the firm's funds.

14.3 Section 2(c) of the 1988 Act defines property to be property of any kind, whether movable or immovable, tangible, or intangible, and includes any right or interest in such property. This definition appears to be broad and inclusive of all kinds of property and includes various rights and interests. Interestingly, the aforesaid broad formulation of property came about for the first time in the 130th Law Commission Report; such definitional broadening was for the first time introduced only in 1988 and was never contemplated during the 57th Report (1973). This aspect becomes important, and will be addressed later, while analysing the question of retrospectivity.

14.4 Section 3 of 1988 Act states as under:

> **3. Prohibition of benami transactions-** (1) No person shall enter into any benami transaction.
>
> (2) Nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife of the unmarried daughter.
>
> (3) Whoever enters into any benami transaction shall be punishable with

> imprisonment for a term which may extend to three years or with fine or with both.
>
> (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable.

Section 3 puts forth a prohibitive provision. Further, it intended to criminalize an act of entering into a benami transaction.

14.5 Section 4 noted as under:

> **4.Prohibition of the right to recover property held benami**- (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.
>
> (2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.
>
> (3) Nothing in this section shall apply,--
>
> (a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

> (b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

14.6 Section 5 states:

> **5. Property of benami liable to acquisition**-
> (1) All properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedure as may be prescribed.
> (2) For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section (1).

It may be noted that Section 5 was never utilized as it was felt that there was requirement of additional statutory backing to make the law effective.[6]

14.7 Section 6 provided that nothing in the 1988 Act will affect Section 53 of the Transfer of Property Act or any law relating to transfers for an illegal purpose. The object of Section 6 was to vest ownership rights in benamidars as opposed to the real owner. It was not the intention of the 1988 Act to protect such persons from creditors who allege diversion of

6 Standing Committee on Finance 2015-2016, 16th Lok Sabha, Ministry of Finance (Deptt. of Revenue), The Benami Transactions Prohibition (Amendment) Bill, 2015, 28th Report, Part I.

funds in a fraudulent manner and allow them to escape their liability to the creditors. Therefore, Section 6 limited the application of Section 4 in such cases.

14.8 Section 7 of the 1988 Act repealed Sections 81, 82 and 94 of the Indian Trusts Act, 1882 (2 of 1882); Section 66 of the Code of Civil Procedure, 1908 (5 of 1908.); and Section 281A of the Income Tax Act, 1961 (43 of 1961). Section 8 empowered the Central Government to make rules to give effect to the Act. The final section, Section 9, repealed the earlier Ordinance.

14.9 The main thrust of the argument put forth by the Union of India in this appeal is that the amended 2016 Act only clarified the 1988 Act. Law Officers appearing for the Union of India trained their guns on the point that the 1988 Act had already created substantial law for criminalizing the offence and the 2016 amendments were merely clarificatory and procedural, to give effect to the 1988 Act. Such a submission mandates us to examine the law of the 1988 Act in detail and determine the scope of the earlier regime to

understand as to whether the 2016 amendments were substantive or procedural.

14.10 Reading Section 2(a) along with Section 3 makes one thing clear – the criminal provision envisaged under the aforesaid provisions does not expressly contemplate *mens rea.* Under the Indian jurisprudence, the law on the subject is fairly well-settled. It has been subjected to the judicial scrutiny of this Court on several occasions. It does not call for a detailed discussion and is enough to restate the principles. *Mens rea* is an essential ingredient of a criminal offence. Doubtless, a statute may exclude the element of *mens rea*, but it is a sound rule of construction adopted in England – and also accepted in India – to construe a statutory provision creating an offence in conformity with common law rather than against it, unless the statute expressly or by necessary implication excluded *mens rea*. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil which by itself is not decisive of the question as to whether the element of a guilty mind is excluded from the ingredients of an offence. *Mens rea* by necessary implication may be excluded from a statute only

where it is absolutely clear that implementation of the object of the statute would otherwise be defeated. [refer ***Nathulal v. State of Madhya Pradesh***, AIR 1966 SC 43]

14.11 In the above light, this Court's first endeavour is to attempt to interpret the law to imply *mens rea*. However, the language of Section 2(a) coupled with Section 3, completely ignores the aspect of *mens rea*, as it intends to criminalize the very act of one person paying consideration for acquisition of property for another person. The *mens rea* aspect was specifically considered by the 57th Law Commission Report, and the same was not integrated into the unamended 1988 Act. The observations made in the 130th Law Commission Report indicate that benami transactions are abhorrent when it comes to public wealth and impedes the government from achieving its social goals. This clearly allows us to infer that the 1988 law was envisaged on the touchstone of strict liability.

14.12 Such strict statutory formulation under Section 2(a) read with Section 3 had left loose ends in the 1988 Act. In this light, the prosecution would only have to prove only that

consideration was paid or consideration was provided by one person for another person and nothing more. In all the judicial precedents, this Court has had the occasion to examine this legislation on the civil side and never on the criminal side, which would bear a higher standards. Conflation of the ingredients under Section 3(1) and (2) with those of Section 4, to forcefully implied *mens rea,* cannot be accepted.

14.13 It may be noted that Supreme Court has dealt with the interpretation of Section 4 of 1988 Act, on several occasions. In ***Mithilesh Kumari v. Prem Behari Khare***, (1989) 2 SCC 95, this Court was called upon to examine as to whether the aforesaid provision has retrospective application, held as under:

> **"22.** As defined in Section 2(*a*) of the Act " 'benami transaction' means any transaction in which property is transferred to one person for a consideration paid or provided by another person". A transaction must, therefore, be benami irrespective of its date or duration. Section 3, subject to the exceptions, states that no person shall enter into any benami transaction. This section obviously cannot have retrospective operation. However, Section 4 clearly provides that no suit, claim or action to enforce any right in respect of any property

held benami against the person in whose name the property is held or against any other person shall lie, by or on behalf of a person claiming to be real owner of such property. **This naturally relates to past transactions as well. The expression "any property held benami" is not limited to any particular time, date or duration. Once the property is found to have been held benami, no suit, claim or action to enforce any right in respect thereof shall lie. Similarly, sub-section (2) of Section 4 nullifies the defences based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property**. It means that once a property is found to have been held benami, the real owner is bereft of any defence against the person in whose name the property is held or any other person. **In other words in its sweep Section 4 envisages past benami transactions also within its retroactivity**. In this sense the Act is both a penal and a disqualifying statute. In case of a qualifying or disqualifying statute it may be necessarily retroactive. For example when a Law of Representation declares that all who have attained 18 years shall be eligible to vote, those who attained 18 years in the past would be as much eligible as those who attained that age at the moment of the law coming into force. When an Act is declaratory in nature the presumption against retrospectivity is not applicable. Acts of this kind only declare. A statute in effect declaring the benami

transactions to be unenforceable belongs to this type. The presumption against taking away vested right will not apply in this case inasmuch as under law it is the benamidar in whose name the property stands, and law only enabled the real owner to recover the property from him which right has now been ceased by the Act. In one sense there was a right to recover or resist in the real owner against the benamidar. *Ubi jus ibi remedium*. Where there is a right, there is a remedy. Where the remedy is barred, the right is rendered unenforceable. In this sense it is a disabling statute. All the real owners are equally affected by the disability provision irrespective of the time of creation of the right. A right is a legally protected interest. The real owner's right was hitherto protected and the Act has resulted in removal of that protection.

23. When the law nullifies the defences available to the real owner in recovering the benami property from the benamidar the law must apply irrespective of the time of the benami transactions. The expression “shall lie” in Section 4(1) and “shall be allowed” in Section 4(2) are prospective and shall apply to present (future stages) and future suits, claims or actions only. This leads us to the question whether there was a present suit between the respondent-plaintiff and the defendant-appellant on the date of the law coming into force. We have noted the dates of filing the suit and judgments of the courts below. On the date of Section 4 of the Act coming into force, that is, 19-5-1988 this appeal was pending and, of course, is still pending. Can the suit itself be said to be pending?

(**emphasis supplied**)

14.14 The aforesaid interpretation was re-examined by this Court in ***R. Rajagopal Reddy v. Padmini Chandrasekharan,*** (1995) 2 SCC 630 and while partly over-ruling ***Mitilesh Kumari*** (supra), it was held as under:

> **11.** ... Thus it was enacted to efface the then existing right of the real owners of properties held by others benami. **Such an Act was not given any retrospective effect by the legislature. Even when we come to Section 4, it is easy to visualise that sub-section (1) of Section 4 states that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other shall lie by or on behalf of a person claiming to be the real owner of such property.** As per Section 4(1) no such suit shall thenceforth lie to recover the possession of the property held benami by the defendant. Plaintiff's right to that effect is sought to be taken away and any suit to enforce such a right after coming into operation of Section 4(1) that is 19-5-1988, shall not lie. **The legislature in its wisdom has nowhere provided in Section 4(1) that no such suit, claim or action pending on the date when Section 4 came into force shall not be proceeded with and shall stand abated.** On the contrary, clear legislative intention is seen from the words "no such claim, suit or action shall lie", meaning thereby no such suit, claim or action shall be permitted to be filed or entertained or admitted

to the portals of any court for seeking such a relief after coming into force of Section 4(1). …

The word 'lie' in connection with the suit, claim or action is not defined by the Act. If we go by the aforesaid dictionary meaning it would mean that such suit, claim or action to get any property declared benami will not be admitted on behalf of such plaintiff or applicant against the defendant concerned in whose name the property is held on and from the date on which this prohibition against entertaining of such suits comes into force. With respect, the view taken that Section 4(1) would apply even to such pending suits which were already filed and entertained prior to the date when the section came into force and which has the effect of destroying the then existing right of plaintiff in connection with the suit property cannot be sustained in the face of the clear language of Section 4(1). It has to be visualised that the legislature in its wisdom has not expressly made Section 4 retrospective. Then to imply by necessary implication that Section 4 would have retrospective effect and would cover pending litigations filed prior to coming into force of the section would amount to taking a view which would run counter to the legislative scheme and intent projected by various provisions of the Act to which we have referred earlier. It is, however, true as held by the Division Bench that on the express language of Section 4(1) any right inhering in the real owner in respect of any property held benami would get effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1), and henceafter Section 4(1) applied no suit can lie in respect to such a past benami transaction. To that extent the section may be retroactive.

To highlight this aspect we may take an illustration. If a benami transaction has taken place in 1980 and a suit is filed in June 1988 by the plaintiff claiming that he is the real owner of the property and defendant is merely a benamidar and the consideration has flown from him, then such a suit would not lie on account of the provisions of Section 4(1). Bar against filing, entertaining and admission of such suits would have become operative by June 1988 and to that extent Section 4(1) would take in its sweep even past benami transactions which are sought to be litigated upon after coming into force of the prohibitory provision of Section 4(1); but that is the only effect of the retroactivity of Section 4(1) and nothing more than that. **From the conclusion that Section 4(1) shall apply even to past benami transactions to the aforesaid extent, the next step taken by the Division Bench that therefore, the then existing rights got destroyed and even though suits by real owners were filed prior to coming into operation of Section 4(1) they would not survive, does not logically follow.**

12. So far as Section 4(2) is concerned, all that is provided is that if a suit is filed by a plaintiff who claims to be the owner of the property under the document in his favour and holds the property in his name, once Section 4(2) applies, no defence will be permitted or allowed in any such suit, claim or action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself suggests that a new liability or restriction is imposed by Section

4(2) on a pre-existing right of the defendant. Such a provision also cannot be said to be retrospective or retroactive by necessary implication. It is also pertinent to note that Section 4(2) does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of Section 4(2) is concerned, the prohibition of Section 4(1) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held benami. On the contrary, it is a suit, claim or action flowing from the sale deed or title deed in the name of the plaintiff. Even though such a suit might have been filed prior to 19-5-1988, if before the stage of filing of defence by the real owner is reached, Section 4(2) becomes operative from 19-5-1988, then such a defence, as laid down by Section 4(2) will not be allowed to such a defendant. However, that would not mean that Section 4(1) and Section 4(2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights of real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially Section 4 thereof. It is also pertinent to note that Section 4(2) enjoins that no such defence "shall be allowed" in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of Section 4(2). If such a defence is already allowed in a pending suit prior to the coming into operation of Section 4(2), enabling an issue to be raised on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was allowed Section 4(2) was out

of the picture. Section 4(2) nowhere uses the words: "No defence based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person, shall be allowed to be raised or continued to be raised in any suit." With respect, it was wrongly assumed by the Division Bench that such an already allowed defence in a pending suit would also get destroyed after coming into operation of Section 4(2). We may at this stage refer to one difficulty projected by learned advocate for the respondents in his written submissions, on the applicability of Section 4(2). These submissions read as under:

…

13. According to us this difficulty is inbuilt in Section 4(2) and does not provide the rationale to hold that this section applies retrospectively. The legislature itself thought it fit to do so and there is no challenge to the vires on the ground of violation of Article 14 of the Constitution. It is not open to us to rewrite the section also. Even otherwise, in the operation of Section 4(1) and (2), no discrimination can be said to have been made amongst different real owners of property, as tried to be pointed out in the written objections. In fact, those cases in which suits are filed by real owners or defences are allowed prior to coming into operation of Section 4(2), would form a separate class as compared to those cases where a stage for filing such suits or defences has still not reached by the time Section 4(1) and (2) starts operating. Consequently, latter type of cases would form a distinct category of cases. There is no question of discrimination being meted out while dealing with these two classes of cases

> differently. A real owner who has already been allowed defence on that ground prior to coming into operation of Section 4(2) cannot be said to have been given a better treatment as compared to the real owner who has still to take up such a defence and in the meantime he is hit by the prohibition of Section 4(2). Equally there cannot be any comparison between a real owner who has filed such suit earlier and one who does not file such suit till Section 4(1) comes into operation. All real owners who stake their claims regarding benami transactions after Section 4(1) and (2) came into operation are given uniform treatment by these provisions, whether they come as plaintiffs or as defendants. Consequently, the grievances raised in this connection cannot be sustained.

14.15 Returning to the discussion at hand, there is no doubt that the unamended 1988 Act tried to create a strict liability offence and allowed separate acquisition of benami property. This begs the question whether such a criminal provision, which the State now intends to make use of, in order to confiscate properties after 28 years of dormancy, could have existed in the books of law. Other than the abuse and unfairness such exercise intends to bring about, there is a larger constitutional question about existence of such strict provisions without adequate safeguards.

15. SUBSTANTIVE DUE PROCESS, MANIFEST ARBITRARINESS AND PROVISIONS UNDER 1988 ACT.

15.1 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.

15.2 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.

15.3 Indian jurisprudence has matured through years of judicial tempering, and the country has grown to be a jurisdiction having 'substantive due process'. A brief sketch of the jurisprudential journey thus far, may be necessary to aid our understanding.

15.4 There is no gain saying that deletion of the phrase 'due process of law' from the draft Constitution was inspired by the views of James Bradley Thayer and Justice Felix Frankfurter, who held that concentration of power to examine reasonability of a legislation through judicial review would fall foul of separation of powers and denigration of parliamentary sovereignty. Dr. Ambedkar himself did not want to side with any of the above opinions, rather he envisaged the situation as one who is caught between Charybdis and Scylla.

15.5 The emphasis on the aforesaid deletion by the majority in ***A.K Gopalan v. State of Madras***, AIR 1950 SC 27, was somewhat drawn back by the celebrated dissent of Fazal Ali, J., wherein the term "Procedure established by law" was interpreted to mean "Procedural due process". This judicial quibbling was ultimately set to rest in ***Maneka Gandhi v. Union of India***, (1978) 1 SCC 248, wherein a combined reading of Articles 14, 19 and 21 would make it clear that the judiciary, so to say, always had the forensic power to examine reasonability of a law, both procedural as well as substantive. Later expositions have only given colour to expand what was implicit under the three golden Articles of Part III. In ***Sunil Batra v. Delhi Administration***, (1978) 4 SCC 494, the word law as occurring under Article 21 was interpreted to mean *jus* and not merely *lex*. It may be necessary to quote the observation of the majority in the aforesaid case in the following manner:

> "228…The word "law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in **Maneka Gandhi case that the law must be right, just and fair and not arbitrary, fanciful or oppressive**."
>
> (**Emphasis supplied**)

15.6 Without burdening this judgment with a series of precedents laid down by this Court, we may refer only to the majority opinion in ***K. Puttaswamy v. Union of India***, (2017) 10 SCC 1, wherein the law has been settled by a Nine-Judge Bench of this Court in the following manner:

> **"294.** The Court, in the exercise of its power of judicial review, is unquestionably vested with the constitutional power to adjudicate upon the validity of a law. When the validity of a law is questioned on the ground that it violates a guarantee contained in Article 21, the scope of the challenge is not confined only to whether the procedure for the deprivation of life or personal liberty is fair, just and reasonable. Substantive challenges to the validity of laws encroaching upon the right to life or personal liberty has been considered and dealt with in varying contexts, such as the death penalty (*Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580]) and mandatory death sentence (*Mithu* [*Mithu* v. *State of Punjab*, (1983) 2 SCC 277 : 1983 SCC (Cri) 405]), among other cases. A person cannot be deprived of life or personal liberty except in accordance with the procedure established by law. Article 14, as a guarantee against arbitrariness, infuses the entirety of Article 21. The interrelationship between the guarantee against arbitrariness and the protection of life and personal liberty operates in a multi-faceted plane. First, it

ensures that the procedure for deprivation must be fair, just and reasonable. Second, Article 14 impacts both the procedure and the expression "law". A law within the meaning of Article 21 must be consistent with the norms of fairness which originate in Article 14. As a matter of principle, once Article 14 has a connect with Article 21, norms of fairness and reasonableness would apply not only to the procedure but to the law as well.

295. Above all, it must be recognised that judicial review is a powerful guarantee against legislative encroachments on life and personal liberty. To cede this right would dilute the importance of the protection granted to life and personal liberty by the Constitution. Hence, while judicial review in constitutional challenges to the validity of legislation is exercised with a conscious regard for the presumption of constitutionality and for the separation of powers between the legislative, executive and judicial institutions, the constitutional power which is vested in the Court must be retained as a vibrant means of protecting the lives and freedoms of individuals.

296. The danger of construing this as an exercise of "substantive due process" is that it results in the incorporation of a concept from the American Constitution which was consciously not accepted when the Constitution was framed. Moreover, even in the country of its origin, substantive due process has led to vagaries of judicial interpretation. Particularly having regard to

> the constitutional history surrounding the deletion of that phrase in our Constitution, it would be inappropriate to equate the jurisdiction of a constitutional court in India to entertain a substantive challenge to the validity of a law with the exercise of substantive due process under the US Constitution. Reference to substantive due process in some of the judgments is essentially a reference to a substantive challenge to the validity of a law on the ground that its substantive (as distinct from procedural) provisions violate the Constitution."

15.7 The law with respect to testing the unconstitutionality of a statutory instrument can be summarized as under:

a. Constitutional Courts can test constitutionality of legislative instruments (statute and delegated legislations);

b. The Courts are empowered to test both on procedure as well as substantive nature of these instruments.

c. The test should be based on a combined reading of Articles 14, 19 and 21 of the Constitution.

15.8 One of the offshoots of this test under Part III of the Constitution is the development of the doctrine of manifest arbitrariness. A doctrinal study of the development of this area may not be warranted herein. It is well traced in

Shayara Bano v. Union of India, (2017) 9 SCC 1. We may only state that the development of jurisprudence has come full circle from an overly formalistic test of classification to include the test of manifest arbitrariness. A broad formulation of the test was noted in the aforesaid case as under:

> **"95.** On a reading of this judgment in *Natural Resources Allocation case* [*Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1], it is clear that this Court did not read *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] as being an authority for the proposition that legislation can never be struck down as being arbitrary. Indeed the Court, after referring to all the earlier judgments, and *Ajay Hasia* [*Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722] in particular, which stated that legislation can be struck down on the ground that it is "arbitrary" under Article 14, went on to conclude that "arbitrariness" when applied to legislation cannot be used loosely. Instead, it broad based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. And a constitutional infirmity is found in Article 14 itself whenever legislation is "manifestly arbitrary" i.e**. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment**.

> Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc."
>
> **(emphasis supplied)**

15.9 In ***Joseph Shine v. Union of India,*** (2019) 3 SCC 39, this Court was concerned with the constitutionality of Section 497 of the IPC relating to the provision of adultery. While declaring the aforesaid provision as unconstitutional on the aspect of it being manifestly arbitrary, this Court reiterated the test as under:

> "...The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation Under Article 14. **Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary**. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well Under Article 14."
>
> **(emphasis supplied)**

15.10 In ***Hindustan Construction Co. Ltd v. Union of India***, (2020) 17 SCC 324, this Court struck down Section 87 of

the Arbitration Act on the ground of manifest arbitrariness as the Parliament chose to ignore the judgment of this Court, without removing the basis of the same or identifying a principle for militating against the same.

15.11 Coming back to the 1988 Act, the two provisions with which we are concerned are Sections 3 and 5 of 1988 Act. They are required to be separately analysed herein. At the outset, we may notice that the enactment was merely a shell, lacking the substance that a criminal legislation requires for being sustained. The reasons for the same are enumerated in the following paragraphs.

15.12 First, the absence of *mens rea* creates a harsh provision having strict liability. Such an approach was frowned upon by the 57th Law Commission Report as concerns of tax evasion or sham transactions in order to avoid payment to creditors were adequately addressed by the existing provisions of law. Even the 130th Law Commission Report did not expressly rule out the inclusion of *mens rea*. The legislative move to ignore earlier Law Commission Reports without there being a principle identified to do away with the aspect of *mens rea* should be a contributory factor in

analysing the constitutionality of the aforesaid criminal provision under the 1988 Act.

15.13 Further, under the amended 2016 Act, the aspect of *mens rea*, is brought back through Section 53. Such resurrection clearly indicates that doing away of the *mens rea* aspect, was without any rhyme or reason, and ended up creating an unusually harsh enactment.

15.14 Second, ignoring the essential ingredient of beneficial ownership exercised by the real owner contributes to making the law even more stringent and disproportionate with respect to benami transactions that are tripartite in nature. The Court cannot forcefully read the ingredients developed through judicial pronouncements or under Section 4 (having civil consequence) into the definition provided under Sections 2 and 3 (espousing criminal consequences), to save the enactment from unconstitutionality. Such a reading would violate the express language of Section 2(a), of excluding one ingredient from the definition of 'benami transaction', and would suffer from the vice of judicial transgression. In removing such an essential ingredient, the legislature did not identify any

reason or principle, which made the entire provision of Section 3 susceptible to arbitrariness. Interestingly, for tripartite benami transactions, the 2016 Act brings back this ingredient through Section 2(9)(A)(b). In this context, we may state that it is a simple requirement under Article 20(1) that a law needs to be clear and not vague. It should not have incurable gaps which are yet to be legislated/filled in by judicial process.

15.15 Third, it is fairly admitted by the learned ASG, Mr. Vikramjit Banerjee appearing for the Union of India, that the criminal provision was never utilized as there was a significant hiatus in enabling the functioning of such a provision.

15.16 Fourth, reading Section 2(a) with Section 3(1) would have created overly broad laws susceptible to be challenged on the grounds of manifest arbitrariness. If this Court reads criminal provisions of the Benami Act to have had force since 1988, then the following deleterious consequences would ensue:

(i.) Section 187C of the Companies Act, 1956 assured protection to nominal and beneficial holding of

shares if the prescribed declaration duly made are at serious risk.

(ii.) Benami cooking gas connections which have been regularized from time to time are at risk.

(iii.) Housing colonies and benami allotments of DDA flats which have been regularised from time to time are at risk.

15.17 The criminal provision under Section 3(1) of the 1988 Act has serious lacunae which could not have been cured by judicial forums, even through some form of harmonious interpretation. A conclusion contrary to the above would make the aforesaid law suspect to being overly oppressive, fanciful and manifestly arbitrary, thereby violating the 'substantive due process' requirement of the Constitution.

15.18 Coming to Section 5 of the 1988 Act, it must be noted that the acquisition proceedings contemplated under the earlier Act were *in rem* proceedings against benami property. We may note that, jurisprudentially, such *in rem* proceedings transfer the guilt from the person who utilized a property which is a general harm to the society, to the property itself.

15.19 When such proceedings are contemplated under law, there need to be adequate safeguards built into the provisions, without which the law would be susceptible to challenge under Article 14 of the Constitution. Coming to Section 5 of the 1988 Act, it was conceived as a half-baked provision which did not provide the following and rather left the same to be prescribed through a delegated legislation:

(i) Whether the proceedings under Section 5 were independent or dependant on successful prosecution?

(ii) The standard of proof required to establish benami transaction in terms of Section 5.

(iii) Mechanism for providing opportunity for a person to establish his defence.

(iv) No 'defence of innocent owner' was provided to save legitimate innocent buyers.

(v) No adjudicatory mechanism was provided for.

(vi) No provision was included to determine vesting of acquired property.

(vii) No provision to identify or trace benami properties.

(viii) Condemnation of property cannot include the power of tracing, which needs an express provision.

Such delegation of power to the Authority was squarely excessive and arbitrary as it stood. From the aforesaid, the Union's stand that the 2016 Act was merely procedural, cannot stand scrutiny.

15.20 In any case, such an inconclusive law, which left the essential features to be prescribed through delegation, can never be countenanced in law to be valid under Part III of the Constitution. The gaps left in the 1988 Act were not merely procedural, rather the same were essential and substantive. In the absence of such substantive provisions, the omissions create a law which is fanciful and oppressive at the same time. Such an overbroad provision was manifestly arbitrary as the open texture of the law did not have sufficient safeguards to be proportionate.

15.21 At this stage, we may only note that when a Court declares a law as unconstitutional, the effect of the same is that such a declaration would render the law not to exist in the law books since its inception. It is only a limited exception under Constitutional law, or when substantial actions have been undertaken under such unconstitutional laws that going back to the original position would be next to

impossible. In those cases alone, would this Court take recourse to the concept of 'prospective overruling'.

15.22 From the above, Section 3 (criminal provision) read with Section 2(a) and Section 5 (confiscation proceedings) of the 1988 Act are overly broad, disproportionately harsh, and operate without adequate safeguards in place. Such provisions were still-born law and never utilized in the first place. In this light, this Court finds that Sections 3 and 5 of the 1988 Act were unconstitutional from their inception.

15.23 Having said so, we make it abundantly clear that the aforesaid discussion does not affect the civil consequences contemplated under Section 4 of the 1988 Act, or any other provisions.

16. **2016 ACT AND ITS ANALYSIS**

16.1 The next subject of examination is the 2016 Act, which amends the 1988 Act, and expanded the 1988 Act to 72 sections (from 9 sections), divided into 8 chapters. At the outset, we need to understand the general scheme of the law. The definition of benami transactions, which is the heart of the entire 1988 Act, has undergone a metamorphosis and stands as under:

[DEFINITIONS.

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, 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.

16.2 Major changes envisaged under the definition are as under:

(i) Expansion of the definition from arm's length transactions contemplated under the 1988 Act, to arrangements and schemes.

(ii) Additional ingredient of benefits flowing to the real owner, a lacuna pointed in the earlier part, under 1988 Act, is included in terms of Section 2(9)(A)(b).

(iii) Expansion of the ambit through Section 2(9)(C), to those properties where benamidar denies knowledge of such ownership.

(iv) Expansion of the ambit through Section 2(9)(D), wherein the person providing the consideration is not traceable or is fictitious.

(v) Expansion from recognition of only tripartite transactions under 1988 Act, to also include bipartite transactions.

16.3 Section 2(26) of the 2016 Act defines a property. This definition has been expanded to include proceeds from the property as well. Such expansion allows for tracing of proceeds and is a substantial change as compared to the 1988 Act. Along with this, benami property has been defined under Section 2(8). Benamidar is defined under Section 2(10).

16.4 Chapter 2 contains four provisions which are modified provisions of the 1988 Act. Section 3 now bifurcates offences into two separate categories based on the time period of the benami transaction. Under Section 3(2), punishment of three years is mandated for those who have entered into benami transactions from 05.09.1988 to 31.10.2016. Section 3(3) applies to those benami transactions which have been entered into after commencement of the amended 2016 Act and the punishment for the aforesaid is prescribed under Section 53 of Chapter VII. It may be noted that under Section 3(3), the punishment is increased from three years to a maximum of seven years and a fine may be imposed which extend up to 25% of the fair market value of the property. This distinction

between Section 3(2) and 3(3) read with Section 53, contains the element of *mens rea*.

16.5 Section 4 remains the same as under the 1988 Act, barring the fact that Section 4(3) has integrated the exceptions provided under the definition of benami transaction in terms of Section 2(9). The civil consequences provided under Section 4 continue to apply even post the 2016 Act. The interpretation of the aforesaid section, as given in the ***R. Rajagopal Reddy Case*** (supra), continues to apply.

16.6 Section 5 on the other hand has been modified and it presently stands as under:

> 5. **Property held benami liable to confiscation. —**Any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government.

16.7 Chapter III relates to the administrative mechanism of the authorities required for implementation of the 2016 Act. Chapter IV relates to attachment, adjudication, and confiscation of benami property. These provisions relate to forfeiture, which need to be analysed hereinafter.

16.8 Section 24(1) states that, if the initiating Officer, on the basis of gathered material, having reason to believe, that a particular property is a benami property, then he ought to issue notice[7] to the beneficial owner (if identified) as well as to the ostensible owner (if any) seeking an explanation as to why the property should not be treated as Benami.

16.9 The 2016 Act provides for provisional attachment of the property where the concerned officer has genuine reason to believe, based on the material gathered, that the person in possession of the property held in benami may alienate the property. Such provisional attachment cannot be taken recourse to every time. Recourse under Section 24(3) of the 2016 Act should be exercised in exceptional circumstance after previous approval of Approving Authority. Such interim provisional attachment is strictly limited by time.

16.10 Adjudication under Section 24(4) is mandatory and requires the authority to examine the same on a *prima facie* basis. Such adjudication must take place after providing collected material to the accused, along with the show cause notice. A reasoned order is mandated under the aforesaid provision.

7 In terms of Section 25 of the 2016 Act.

The Officer is mandated to present a statement of case to the adjudicating officer, in terms of Section 24(5) of the 2016 Act.

16.11 Adjudication under Section 26 mandates notice and disclosure obligation to various other persons. The adjudicating authority can either pass an order in terms of Section 26(3)(c)(i) or (ii), or pass an order for further inquiries in terms of Section 26(3)(b).

16.12 Section 27(1) relates to confiscation of property, wherein if a property is adjudicated as a benami property under Section 26(3), then the adjudicating authority can give an opportunity to the concerned persons, and after hearing the parties, pass an order confiscating the property. The aforesaid confiscation order is subject to the order passed by the Appellate Tribunal under Section 46. Order of confiscation vests such property absolutely in the Central Government, free from all encumbrances and no compensation shall be payable in respect of such confiscation.

16.13 Section 27(4) provides that in the interregnum of initiating confiscation proceedings, any third-party rights created to

defeat the purpose of the Act shall be null and void. Sub clause 5 mandates that if no order of confiscation is made and the same has attained finality, no claim can be made against the Government for the process.

16.14 Section 28 mandates appointment of an Administrator by the Central Government to manage the property. Such an Administrator shall have the power to take possession of such a property upon order of confiscation, in terms of Section 29.

16.15 Chapters V and VI delineate the powers of the Appellate Tribunal as well as Special Courts. Chapter VII consists of offences and penalties. Specifically, we may refer to Section 53:

> **53. Penalty for Benami Transaction**
> (1) Where any person enters into a benami transaction in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, the beneficial owner, benamidar and any other person who abets or induces any person to enter into the benami transaction, shall be guilty of the offence of Benami transaction.
> (2) Whoever is found guilty of the offence of benami transaction referred to in sub-section (1) shall be punishable with rigorous imprisonment for a term which

> shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to twenty-five per cent. of the fair market value of the property.

Interestingly, a crime which attracted strict liability under the 1988 Act, is modified to include a *mens rea* aspect in terms of the recommendations of the 57th and 130th Law Commission Reports.

16.16 It may be necessary to note that no prosecution can be initiated without previous sanction of the competent authority as provided under Section 55, which reads as under:

> 55. No prosecution shall be instituted against any person in respect of any offence under sections 3, 53 or section 54 without the previous sanction of the Board.

16.17 Perusal of the remaining provisions is not required for the purpose at hand.

17. WHETHER SECTION 3(1) AND CHAPTER IV READ WITH SECTION 5 OF THE 2016 ACT HAVE RETROACTIVE EFFECT?

17.1 The thrust of the arguments advanced by the Union of India can be crystallized as under:

(i.) That the 1988 Act was a valid enactment with procedural gaps that were filled retrospectively by the 2016 amendment.

(ii.) That the provision of confiscation (civil forfeiture) under the 1988 Act, being in the domain of civil law, is not punitive and therefore, the prohibition under Article 20(1) of the Constitution is not attracted in this case.

17.2 With respect to the first line of argument, our discussion above can be summarized as under:

(a.) Section 3(1) of 1988 Act is vague and arbitrary.

(b.) Section 3(1) created an unduly harsh law against settled principles and Law Commission recommendations.

(c.) Section 5 of 1988 Act, the provision relating to civil forfeiture, was manifestly arbitrary.

(d.) Both provisions were unworkable and as a matter of fact, were never implemented.

17.3 Having arrived at the aforesaid conclusions that Sections 3 and 5 were unconstitutional under the 1988 Act, it would mean that the 2016 amendments were, in effect, creating

new provisions and new offences. Therefore, there was no question of retroactive application of the 2016 Act. As for the offence under Section 3(1) for those transactions that were entered into between 05.09.1988 to 31.10.2016, the law cannot retroactively invigorate a stillborn criminal offence, as established above.

17.4 As per the concession made by the Union of India and a fair reading of Section 53 of the 2016 Act, the offence under the aforesaid provision is prospective, and only applied to those transactions that were entered into after the amendment came into force, *viz.*, 1.11.2016. Any contrary interpretation of Section 3 of the 1988 Act would be violative of Article 20(1) of the Constitution. Article 20(1) reads as under:

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

17.5 In ***T. Barai v. Henry Ah Hoe***, (1983) 1 SCC 177, this Court has expounded Article 20 (1) in the following manner:

"22. It is only retroactive criminal legislation that is prohibited under Article 20(1). The prohibition contained in Article 20(1) is that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence prohibits nor shall he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It is quite clear that insofar as the Central Amendment Act creates new offences or enhances punishment for a particular type of offence no person can be convicted by such ex post facto law nor can the enhanced punishment prescribed by the amendment be applicable. But insofar as the Central Amendment Act reduces the punishment for an offence punishable under Section 16(1)(*a*) of the Act, there is no reason why the accused should not have the benefit of such reduced punishment. The rule of beneficial construction requires that even ex post facto law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and common sense. This finds support in the following passage from *Craies on Statute Law*, 7th Edn., at pp. 388-89:

"A retrospective statute is different from an ex post facto statute. "Every ex post facto law…" said Chase, J., in the American case of *Calder* v. *Bull* [3 US (3 Dall) 386: 1 L Ed 648 (1798)] "must necessarily be retrospective, but every retrospective law is not an ex post facto law. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive; it is a good general rule that a law should have no retrospect, but in cases in which the laws may justly and for the benefit of the community and also of individuals relate

> to a time antecedent to their commencement: as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But *I do not consider any law ex post facto within the prohibition that mollifies the rigour of the criminal law*, ***but only those that create or aggravate the crime, or increase the punishment or change the rules of evidence for the purpose of conviction...***. There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime."

17.6 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.

17.7 The continued presence of an unconstitutional law on the statute book, or the claim that such law was not challenged before Constitutional Courts, does not prevent this Court from holding that such unconstitutional laws cannot enure to the benefit of or be utilized to retroactively amend laws to cure existing constitutional defects. If such curing is

allowed, then Article 20(1) of the Constitution would be rendered nugatory.

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

17.9 Although we have held that Section 5 of the 1988 Act was unconstitutional for being manifestly arbitrary, however such holding is of no consequence if this Court comes to the conclusion that confiscation under Section 5 of 2016 Act read with Chapter IV, was civil in nature and is not punitive.

17.10 It is well settled that the legislature has power to enact retroactive/retrospective civil legislations under the Constitution. However, Article 20(1) mandates that no law

mandating a punitive provision can be enacted retrospectively. Further, a punitive provision cannot be couched as a civil provision to by-pass the mandate under Article 20(1) of the Constitution which follows the settled legal principle that "*what cannot be done directly, cannot be done indirectly*".

17.11 Therefore, the immediate question which arises for consideration is whether the retroactive confiscation provided under Section 5 read with Chapter IV of 2016 Act is punitive or not?

17.12 At the outset, we may note that Shri S. V. Raju, learned ASG, has submitted that acquisition provided under Section 5 of the 1988 Act is same as confiscation provided under Section 5 read with Chapter IV of the 2016 Act. He states that both concepts are related to civil law and is not concerned with punitive punishments as provided under the Indian Penal Code, 1860.

17.13 Acquisition under the earlier 1988 Act as well as confiscation under the 2016 Act are said to have been enacted on the reasoning that the property emanating from the benami transaction also gets tainted. The substantive

difference between the acquisition provision under the earlier enactment and the confiscation provision under the 2016 Act is that proceeds of benami transactions have been made traceable under the 2016 Act.

17.14 Before we analyse the other provisions, it is necessary to give a brief introduction to the concept of civil forfeiture in India, as the same was argued by the learned ASG. Under Admiralty jurisdiction, the concerned Admiralty Courts had the jurisdiction to forfeit vessels under its civil jurisdiction *in lieu* of any maritime claim. Same was the law across various common law jurisdictions, such as the United States of America and the United Kingdom.

17.15 Forfeiture occurs in various types, few of which are found in India. Broadly, forfeitures can be categorized as civil and criminal. On the civil side, there can be *in rem* or *in personam* forfeitures. Punitive forfeitures under the criminal law are *in personam*. Criminal forfeitures usually take place at the conclusion of a trial, when the guilt of the accused is established. Standards of evidentiary requirement differ greatly between civil and criminal forfeiture.

17.16 The historic origin of *in rem* civil forfeiture in common law jurisdictions was earlier mostly restricted to trans-national crimes. These early laws mandated that the property was subject to forfeiture because it was the instrument by which the offence was committed, and it was necessary to confiscate such property to remove it from circulation. However, the Twentieth century saw expansion of forfeiture laws into a wide array of crimes. The modern forfeiture laws not only allow forfeiture of property used to facilitate the crime, but cover the proceeds of the offence as well. In the Supreme Court of the United States, constitutional challenges laid to such civil forfeiture laws have been dismissed as they were usually attributed to historic prevalence of such forfeiture laws. However, such historic reasons of its existence cannot justify continued expansion of civil forfeiture laws, as has been observed by Justice Clarence Thomas in the following manner:

> "This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses," and "These forfeiture operations frequently target

> the poor and other groups least able to defend their interests in forfeiture proceedings".[8]

17.17 In the case at hand, although expansion of forfeiture laws originates from the Parliament's concern for decriminalizing property holdings, however, we are reminded of Justice Oliver Wendell Holmes, who has stated as under:

> "The customs beliefs or needs of a primitive time establish a rule or a formula. In the course of centuries, the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to enquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content and in time even the form modifies itself to for the meaning which it has received."[9]

17.18 While categorizing the forfeiture proceedings as civil or criminal, the test laid down by the European Court of Human Rights in ***Engel v The Netherlands (No.1)***, [1976] 1 EHRR 647, have been treated as giving authoritative guidance. Those tests are set out in paragraphs 80 to 82 of the Report and are as follows:

8 ***Leonard v. Texas***, 137 S. Ct. 847, 847-48 (2017).
9 Oliver Wendell Holmes in *The Common Law* 5 (1881).

> "(i) The manner in which the domestic state classifies the proceedings. This normally carries comparatively little weight and is regarded as a starting point rather than determinative -- see Ozturk v Germany [1984] 6 EHRR 409 at 421 and 422.
> (ii) The nature of the conduct in question classified objectively bearing in mind the object and purpose of the Convention.
> (iii) **The severity of any possible penalty -- severe penalties, including those with imprisonment in default and penalties intended to deter are pointers towards a criminal classification of proceedings -- see Schmautzer v Austria [1995] 21 EHRR 511.**
>
> In Lauko v Slovakia [1998] ECHR 26138/95 the court observed that these criteria were alternatives and not cumulative although a cumulative approach might be adopted where a separate analysis of each criterion did not make it possible to reach a clear conclusion as to the existence of a 'criminal charge'."
>
> (**emphasis supplied**)

The aforesaid proposition has also been confirmed by the House of Lords in ***R v. H***, [2003] 1 ALL ER 497.

17.19 In ***Kennedy v Mendoza-Martinez***, 372 US 144 (1963), the Supreme Court of the United States, while concerned with the constitutionality of legislation that imposed forfeiture of citizenship on those who had left or remained outside the United States during wartime to evade military service, had

laid down the following relevant factors to classify forfeiture law:

> (a) Whether the sanction involves an affirmative disability or restraint;
>
> (b) Whether it has been historically regarded as a punishment;
>
> (c) Whether it is only applicable where there has been a finding of scienter (that is, a finding that an act has been done knowingly and intentionally);
>
> (d) Whether its operation promotes the traditional retributive and deterrent aims of punishment;
>
> (e) Whether the behaviour to which the statute applies is already a crime;
>
> (f) Whether an alternative purpose to which it may be rationally connected is attributable to it; and
>
> (g) Whether it appears excessive in light of the alternative purpose assigned.

17.20 Coming to the Indian case laws, in ***State of West Bengal v. S. K. Gosh***, AIR 1963 SC 255, this Court was concerned with the Criminal Law Amendment Ordinance 38 of 1944, wherein the law provided only for attachment of the property, after conviction is given effect to. Unlike the present law, the taint on the property is squarely determined by the Criminal Court deciding the criminal

conviction. Confiscation contemplated under Section 13 of the Criminal Law Amendment Ordinance 38 of 1944 could only be given effect to after the verdict of guilty by Criminal Court. In the light of such unique provisions, the Court characterized such forfeiture laws as civil in nature. We may note that such a law did not contemplate an independent confiscation proceeding as created under this law, rather, a mechanism was devised to confiscate a property after criminal conviction.

17.21 This Court, while noting that forfeiture is no doubt punitive under Article 20(1) of the Constitution as it is one of the punishments prescribed under Section 53 of IPC, held that Section 13(3) of the Criminal Law Amendment Ordinance 38 of 1944 was not punitive as the same was dependent on prior criminal prosecution and determination of amount which was to be forfeited in the following manner:

> "**12.** Further what s. 13(3) of the 1944-Ordinance which provides for forfeiture requires is that there should be in the final judgment of the criminal court a finding as to the amount of money or value of property in pursuance of s. 12. As soon as that finding is there, the District Judge would know the amount he is to forfeit, and the purpose of the finding is that if the District Judge is asked to

make a forfeiture under s. 13(3) he should know exactly the amount which he is require to forfeit. So long therefore as the criminal court trying an offender has given a finding as to the amount of money or value of other property procured by means of the offence in the judgment that in our opinion is sufficient compliance with s. 12(1) of the 1944-Ordinance and the requirement therein that it should be on the representation of the prosecution is a mere formality. Obviously, even a determination under s. 10 of the 1943-Ordinance as amended in 1945 of the amount procured by the offence must be at the instance of the prosecution for it is the prosecution which will provide the material for that determination which in turn will be the basis on which the fine will be determined by the court under s. 10. ...

...

14. This brings us to the contention which found favour with Bhattacharya J., namely, that the provision of s. 13(3) is a punishment and that as the 1944-Ordinance was not in force at the time when the offence was committed s. 13(3) could not be applied to the respondent inasmuch as Art. 20(1) lays down that no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Two arguments have been urged on behalf of the appellant in this connection. In the first place, it is urged that the respondent remained in office till August 25, 1944 while the Ordinance came into force on August 23, 1944 and therefore the conspiracy by means of which the money was procured continued till after the Ordinance had come into force and therefore Art. 20(1) can have no application, for it cannot be said that the respondent was being

> subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In the second place, it is urged that the forfeiture provided by s. 13(3) is not a penalty at all within the meaning of Art, 20(1), but is merely a method of recovering money belonging to the Government which had been embezzled. It is urged that the Government could file a suit to recover the money embezzled and s. 13(3) only provides a speedier remedy for that purpose and the forfeiture provided therein is not a penalty within the meaning of Art. 20(1)."

17.22 In ***Divisional Forest Officer v. G. V. Sudhakar Rao***, (1985) 4 SCC 573, this Court was concerned with the power of forfeiture under Section 44(2)(A) of Andhra Pradesh Forest Act, 1967. Noting that Section 45 of the Forest Act prior to the amendment had a provision for civil forfeiture only after the conviction of an accused under the Forest Act, it was felt that such a provision was insufficient to prevent the growing menace of ruthless exploitation of government forests and illicit smuggling of teak, red sandalwood, etc. It was in this context that a separate mechanism was formulated to ensure that there was no unreasonable delay in confiscation of property.

17.23 It may be noted that this case did not involve a constitutional challenge under Article 20(1) to the aforesaid rules. In any case, this Court has held that the new mechanism formulated under the amended Act was completely independent of criminal prosecution.

17.24 To the same extent, in ***State of Madhya Pradesh v. Kallo Bai***, (2017) 14 SCC 502, this Court interpreted the Madhya Pradesh Van Upaj (Vyapar Viniyam) Adhiniyam, 1969 to have independent confiscation proceedings from criminal prosecution in view of the non-obstante clause under Section 15C of the Adhiniyam. It may also be noted that there was no challenge to the aforesaid Act, as being violative of Article 20(1) of the Constitution. The Court held as under:

> **"14.** Sub-section (1) of Section 15 empowers forest officers concerned to conduct search to secure compliance with the provisions of the Adhiniyam. On a plain reading of sub-section (2), it is clear that the officer concerned may seize vehicles, ropes, etc. if he has reason to believe that the said items were used for the commission of an offence under the Adhiniyam. Confiscation proceedings as contemplated under Section 15 of the Adhiniyam is a quasi-judicial proceedings and not a criminal proceedings. Confiscation proceeds on the basis of the "satisfaction" of

the authorised officer with regard to the commission of forest offence. Sub-section (3) of the provision lays down the procedure to be followed for confiscation under the Adhiniyam. Sub-section (3-A) authorises forest officers of rank not inferior to that of a Ranger, who or whose subordinate, has seized any tools, boats, vehicles, ropes, chains or any other article as liable for confiscation, may release the same on execution of a security worth double the amount of the property so seized. This provision is similar to that of Section 53 of the Forest Act as amended by the State of Madhya Pradesh. Sub-section (4) mandates that the officer concerned should pass a written order recording reasons for confiscation, if he is satisfied that a forest offence has been committed by using the items marked for confiscation. Sub-section (5) prescribes various procedures for confiscation proceedings. Sub-section (5-A) prescribes that whenever an authorised officer having jurisdiction over the case is himself involved in the seizure, the next higher authority may transfer the case to any other officer of the same rank for conducting confiscation proceedings. Sub-section (6) provides that with respect to tools, vehicles, boats, ropes, chains or any other article other than timber or forest produce seized, confiscation may be directed unless the person referred to in clause (*b*) of sub-section (5) is able to satisfy that the articles were used without his knowledge or connivance or, as the case may be, without the knowledge or connivance of his servant or agent and that all reasonable and necessary precautions had been taken against the use of such objects for commission of forest offence."

17.25 In ***Yogendra Kumar Jaiswal v. State of Bihar***, (2016) 3 SCC 183, a Division Bench of this Court was concerned with the constitutional challenge to various enactments such as the Orissa Special Courts Act, 2006 and the Bihar Special Courts Act, 2009. Both the enactments had provisions for confiscation. While interpreting the confiscation provisions, this Court read down the same to only mean interim attachment. In other words, confiscation was interpreted as akin to attachment proceedings. The Court mandated that any confiscation would be contingent on the final outcome of the criminal proceedings and the logical corollary to the same was that confiscation proceedings were not completely independent and ultimately had to be adjudicated along with the trial of the main criminal case.

17.26 In ***Abdul Vahab v. State of Madhya Pradesh***, (2022) SCC Online SC 262, this Court was concerned with the interpretation of the Madhya Pradesh Cow Slaughter (Prohibition) Act, 2004, wherein it was held that confiscation proceedings could not be independent of acquittal in the criminal case. If a contrary interpretation was taken, then

the same would be violative of Article 300A of the Constitution. This Court distinguished the case from the judgment of ***Kallo Bai*** (supra), by placing reliance on the absence of a provision such as Section 15C of Madhya Pradesh Van Upaj (Vyapar Viniyam) Adhiniyam, 1969 under the Madhya Pradesh Cow Slaughter (Prohibition) Act, 2004.

17.27 In ***Vijay Madanlal Choudary & Ors v. Union of India***, SLP (Civ.) No. 4634 of 2014 and others, this Court dealt with confiscation proceedings under Section 8 of the Prevention of Money Laundering Act, 2002 ("**PMLA**") and limited the application of Section 8(4) of PMLA concerning interim possession by authority before conclusion of final trial to exceptional cases. The Court distinguished the earlier cases in view of the unique scheme under the impugned legislation therein. Having perused the said judgment, we are of the opinion that the aforesaid ratio requires further expounding in an appropriate case, without which, much scope is left for arbitrary application.

17.28 From the above discussion, it is manifest that the Courts have read down the provisions of civil forfeiture to be

dependent on the underlying criminal prosecution to temper the harsh consequences envisaged under such provisions. No doubt, such reading down was mandated to ameliorate harsh consequences of confiscatory laws which otherwise would have allowed the State agencies to take over the property without seriously pursuing the criminal prosecutions. At this stage, we can only recommend that the utility of independent provisions of forfeiture, distinct from criminal prosecution, needs to be utilised in a proportional manner, looking at the gravity of the offence. Few examples which may pass the muster of proportionality for having such stringent civil forfeiture, may relate to crimes involving terrorist activities, drug cartels or organised criminal activities. As we have discussed, the application of such a provision to numerous other offences which are not of such grave severity, would be of serious risk of being disproportionate, if procedures independent of criminal prosecution are prescribed. We may note that the proportionality of separate confiscation procedure prescribed under the 2016 Act, has not been argued herein. Accordingly, we leave the aforesaid question of law open.

17.29 Under the IPC, forfeiture is recommended to be a form of punishment under Section 53. Accordingly, the Code of Criminal Procedure, 1976 provides for a mechanism for interim custody and forfeiture at the conclusion of trial under Section 451 of the Cr.P.C. (*in personam* forfeiture), which reads as under:

> **451. Order for custody and disposal of property pending trial in certain cases**. When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.
> Explanation.- For the purposes of this section," property" includes-
> (a) property of any kind or document which is produced before the Court or which is in its custody,
> (b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.
>
> **452. Order for disposal of property at conclusion of trial.**
> (1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any

> person claiming to be entitle to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

Aforesaid provisions under the Cr.P.C. have inbuilt safeguards of *in personam* criminal forfeiture, wherein confiscation occurs at the end of the trial. Under these provisions, confiscation is to be determined at an evidential standard of 'beyond reasonable doubt' and are dependent on the result of the criminal trial.

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

17.31 Characterization of the confiscation proceedings under Chapter IV of the 2016 Act as Civil may therefore not be appropriate. There is an implicit recognition of the forfeiture being a punitive sanction, as the Officer is mandated to build a case against the accused for such confiscation, wherein the presumption of innocence is upheld structurally. Being a punitive provision, it is trite that one integrates the 'presumption of innocence' within the Chapter as the same forms a part of the fundamental right.[10]

17.32 Additionally, the 2016 Act now condemns not only those transactions which were traditionally denominated as benami, rather a new class of fictitious and sham transactions are also covered under the same. In this regard, we may notice that the intention of the legislature is to condemn such property and there is an implicit effort by the Parliament to take into consideration the fact that such transactions are often acquired from ill-gotten wealth. These proceedings cannot be equated as enforcing civil obligations

10 ***Narendra Singh v. State of Madhya Pradesh***, (2004) 10 SCC 699.

as, for example, correcting deficiencies in the title. It goes further and the taint attaches to the proceeds as well.

17.33 In view of the above discussion, it is manifest that the 2016 Act contemplates an *in-rem* forfeiture, wherein the taint of entering into such a benami transaction is transposed to the asset itself and the same becomes liable to confiscation. At the cost of repetition, we may note that the taint of benami transactions is not restricted to the person who is entering into the aforesaid transaction, rather, it attaches itself to the property perpetually and extends itself to all proceeds arising from such a property, unless the defence of innocent ownership is established under Section 27(2) of the 2016 Act. When such a taint is being created not on the individual, but on the property itself, a retroactive law would characterize itself as punitive for condemning the proceeds of sale which may also involve legitimate means of addition of wealth.

17.34 Jurisprudentially, a law may enable forfeiture of property by peculiar reason of its circumstances, of it being dangerous to the community by reasons of any form or position that it assumes. In such cases, forfeiture is not deemed to be

punishment inflicted on its owner. By contrast, if the law provides that the Government shall forfeit a property 'A' for, (1) what was carried on in property 'B', or (2) what the owner does in a matter not connected with property 'A' or (3) a bare intent which does not necessarily relate to the conduct in property 'A', in such cases, forfeiture is punishment without any exception. In this case, the property may not be inherently dangerous or denigrate any standard of morality. It is just the condemnation of the method of transfer and holding, which was once a recognized form of property holding in India. In such a case, the *in rem* civil proceeding utilized retroactively, would characterize itself as penal.

17.35 In the case at hand, the authority that initiates such confiscation, is granted extensive powers of discovery, inspection, compelling attendance, compelling production of documents. They are further empowered to take the assistance of police officers, custom officers, income tax officers and other relevant officers for furnishing information. It is also pertinent to note that any person who fails to furnish information, is subjected to a penalty of

₹25,000/- (Rupees Twenty-Five Thousand) under Section 54(A). It is also necessary to note that a person who supplies false information before any authority, is subjected to rigorous imprisonment of upto 5 years under Section 54 of the 2016 Act.

17.36 This Court is aware of the fact that the 'Right to Property' is not a fundamental right, rather it is a constitutional right that can be abridged by law. However, this Court is not concerned with the constitutionality of such a measure, wherein such considerations have to be balanced. Rather, the focus is only on the characterization of retroactive confiscation, which in these facts and circumstances, are punitive.

17.37 In view of the fact that this Court has already held that the criminal provisions under the 1988 Act were arbitrary and incapable of application, the law through the 2016 amendment could not retroactively apply for confiscation of those transactions entered into between 05.09.1988 to 31.10.2016 as the same would tantamount to punitive punishment, in the absence of any other form of punishment. It is in this unique circumstance that

confiscation contemplated under the period between 05.09.1988 and 31.10.2016 would characterise itself as punitive, if such confiscation is allowed retroactively. Usually, when confiscation is enforced retroactively, the logical reason for accepting such an action would be that the continuation of such a property or instrument, would be dangerous for the community to be left free in circulation. In ***R (on the appln of the Director of the Assets Recovery Agency) v Jia Jin He and Dan Dan Chen***, [2004] EWHC Admin 3021, where Collins, J. had stated thus:

> "52. In Mudie, at page 1254, in the judgment of Laws LJ, who gave the only reasoned judgment, there is set out the citation from Butler which reads, so far as material, as follows:
>
> > "It is the applicant's contention that the forfeiture of his money in reality represented a severe criminal sanction, handed down in the absence of the procedural guarantees afforded to him under article 6 of the Convention, in particular his right to be presumed innocence [sic]. The court does not accept that view. In its opinion, the forfeiture order was a preventive measure and cannot be compared to a criminal sanction, since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs. It

> follows that proceedings which led to the making of the order did not involve 'the determination ... of a criminal charge (see Raimondo v Italy [1994] 18 EHRR 237, 264, at para 43; and more recently Arcuri v Italy (Application No 52024/99), inadmissibility decision of 5th July 2001..."”

17.38 When we come to the present enactment, history points to a different story wherein benami transactions were an accepted form of holding in our country. In fact, the Privy Council had, at one point of time, praised the *sui generis* evolution of the doctrine of trust in the Indian law. The response by the Government and the Law Commission to curb benami transactions was also not sufficient as it was conceded before this Court that Sections 3 and 5 of the 1988 Act in reality, *dehors* the legality, remained only on paper and were never implemented on ground. Any attempt by the legislature to impose such restrictions retroactively would no doubt be susceptible to prohibitions under Article 20(1) of the Constitution.

17.39 Looked at from a different angle, continuation of only the civil provisions under Section 4, etc., would mean that the legislative intention was to ensure that the ostensible owner

would continue to have full ownership over the property, without allowing the real owner to interfere with the rights of benamidar. If that be the case, then without effective any enforcement proceedings for a long span of time, the rights that have crystallized since 1988, would be in jeopardy. Such implied intrusion into the right to property cannot be permitted to operate retroactively, as that would be unduly harsh and arbitrary.

18. Conclusion

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

a) Section 3(2) of the unamended 1988 Act is declared as unconstitutional for being manifestly arbitrary. Accordingly, Section 3(2) of the 2016 Act is also unconstitutional as it is violative of Article 20(1) of the Constitution.

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

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

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

e) Concerned authorities cannot initiate or continue criminal prosecution or confiscation proceedings for transactions entered into prior to the coming into force of the 2016 Act, *viz.*, 1.11.2016. As a consequence of the above declaration, all such prosecutions or confiscation proceedings shall stand quashed.

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

18.2 The appeal is disposed of in the above terms.

.....CJI.
(N.V. RAMANA)

.....J.
(KRISHNA MURARI)

.....J.
(HIMA KOHLI)

NEW DELHI;
AUGUST 23, 2022.