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BENAMI TRANSACTIONS' PROHIBITION LAW AMENDMENT IS PROSPECTIVE, HOLDS RAJASTHAN HIGH COURT

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Introduction

In a batch of writ petitions (Civil Writ Petition No. 2915/2019 and others), the Hon'ble Rajasthan High Court (High Court) has held that the Benami Transactions (Prohibition) Amendment Act, 2016 (Amendment Act) is prospective in nature and cannot have retrospective effect (Judgment).

Background

The Amendment Act which was brought into force from 1 November 2016 (Effective Date), amended the principal benami law, viz. Benami Transactions (Prohibition) Act, 1988 (Old Benami Law) and changed its name to Prohibition of Benami Property Transactions Act, 1988 (Amended Benami Law) and expanded the Old Benami Law comprising of 9 sections to 72 sections.

As per the provisions of the Old Benami Law, any benami property was to be acquired by the government without the requirement to pay any compensation for such acquisition. However, Rules and Regulations for the acquisition of benami property were never framed and notified under the Old Benami Law, thus making the provision regarding acquisition of benami property, under the Old Benami Law provisions redundant. The Amendment Act amended the Old Benami Law to, *inter alia*, introduce (1) 'penal consequences' relating to '**confiscation**' (instead of '**acquisition**' as per Old Benami Law) of benami property and (2) 'enhanced punishment', whereby the imprisonment sentence was extended from 3 years to 7 years. Further, under the Old Benami Law, there was no provision for an appellate mechanism against action taken by the authorities.

Facts

Income-tax raids were conducted on various premises belonging to the petitioners and in course of the same, several incriminating documents indicating several benami transactions in purchase of lands (Alleged Benami Transactions) were found. Thereafter, provisional attachment orders were issued, despite the fact that the Alleged Benami Transactions took place prior to the Effective Date.

Tax authorities had contended that (1) the Amendment Act has a retrospective application and cannot be considered to be prospective keeping in view of the underlying object and intent in introduction of Amendment Act - i.e. *to prohibit benami transactions and the right to recover property held benami*, and (2) '**confiscation**' of

the benami property, has only replaced the provisions, and is not a new provision introduced by way of the Amendment Act. Further, since the Amended Benami Law also consisted of an appellate mechanism, the tax authorities challenged the maintainability of petitioners' writs.

On the contrary, the petitioners argued that the Amendment Act is prospective in nature as (1) the government has specifically provided 1 November 2016 as the Effective Date for the Amendment Act, (2) penal consequences have been introduced by the Amendment Act, which can, by virtue of Article 20 of the Constitution of India, only be prospective in nature. Further, in relation to challenge to the maintainability of the writ petitions, the petitioners contended that since they have challenged the very jurisdiction and authority of the respondent department to make provisional attachment of the alleged benami property(ies) under the Amended Benami Law, the writ petitions were maintainable as the petitioners had no other remedy for redressal of their grievance.

Judgment

With respect to the issue about maintainability of writ petition, the High Court held that the writ petitions were maintainable in light of the Supreme Court's decision in the case of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. [(1998) 8 SCC 1] wherein it was held that 'alternative remedy' does not operate as a bar for exercising writ jurisdiction in at least the following three contingencies, namely, (1) where the writ petition has been filed for the enforcement of any of the fundamental rights or (2) where there has been a violation of the principle of natural justice or (3) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. The High Court noted that if executive authority exercised the power without jurisdiction that would subject an individual to lengthy legal proceedings and unnecessary harassment.

With respect to the issue about retrospective application of the Amendment Act, the High Court held that unless there is a clear and unambiguous intent for retrospective effect to be given to a legislation which affects accrued rights or imposes obligations or casts new duties or attaches a new disability, the same has to be treated as 'prospective'. The Court also observed that the Amendment Act neither appears to be clarificatory nor curative. Resultantly, and in view of the fact that by way of amendment, penal consequences have been introduced providing for confiscation of the benami property and enhanced punishment, the Court held that the Amendment Act is 'prospective' in nature. In this regard, the Court noted that the power to confiscate and consequent forfeiture of rights or interests are drastic (being penal in nature), and that therefore, such statutes have to be read very strictly.

Comments

Interestingly, when the Amendment Act was debated in the Parliament, the then Finance Minister while clarifying the intent behind introducing an amendment (to enlarge the 9-section Old Benami Law to a 72-section Amended Benami Law) to the Old Benami Law, and not a new benami law, had stated that if the Old Benami Law would have been repealed, it could have been interpreted as granting immunity to those who acquired benami properties between 1988 and 2016.

The Amended Benami Law contains stringent penal consequences for anyone who enters into any benami transaction on and after the Effective Date (1 November 2016). This Judgment re-iterates that the amendments introduced by the Legislature (by way of the Amendment Act) affect 'substantive rights' of the parties and hence, must be applied prospectively. This would mean that benami transactions undertaken prior to the Effective Date will continue to remain out of the purview of the enhanced penal consequences introduced vide the Amendment Act and would continue to be governed

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by the Old Benami Law. One would have to wait and see if this Judgment is challenged before Supreme Court.

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