

(2019) 09 DEL CK 0117

In the Delhi High Court

Case No : Civil Writ Petition No. 9841 Of 2019, Civil Miscellaneous Application
No. 40695 Of 2019

Initiating Officer, ACIT Benami Prohibition

APPELLANT

Vs

Appellate Tribunal Under The Prohibition Of Benami Property
Transactions Act, 1988 & Ors

RESPONDENT

Date of Decision : 13-09-2019

Acts Referred:

Prohibition Of Benami Property Transactions Act, 1988 — Section 2(9), 5, 7, 24, 24(4),
24(5), 26, 26(1), 26(3), 26(7), 46, 49, 49(3), 49(4),
Code Of Criminal Procedure, 1973 — Section 482
Income Tax Act, 1961 — Section 26A, 260A, 260A(1)

Citation : (2019) 09 DEL CK 0117

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Raghvendra Singh, Vipul Agrawal, Rajiv Nayar, Saurabh Seth,
Arshdeep Singh, Manik Dogra

Judgement

Prathiba M. Singh, J

CM APPL. 40696/2019 (exemption)

1. Allowed, subject to all just exceptions. Application is disposed of.

W.P.(C) 9841/2019 and CM APPL. 40695/2019

2. The present writ petition has been filed challenging the order dated 26th July, 2019 passed by the Appellate Tribunal for Prohibition of Benami Property Transactions Act ('Appellate Tribunal'). The challenge raised is that no appeal could have been filed before the Appellate Tribunal against the show-cause notice issued by the adjudicating authority under Section 26 of the Prohibition of Benami Property Transactions Act, 1988 ('Benami Act') as the said provision does not permit such an appeal challenging a show-cause notice.

3. Mr. Raghvendra Singh, Id. Sr. Standing Counsel submits that the impugned

order of the Tribunal, in effect, has stopped the Adjudicating Authority from proceeding further in the matter inasmuch as the operation of the show cause notice dated 21st June, 2019 has itself been stayed.

4. On the other hand, Mr. Rajiv Nayar, Id. Sr. Counsel for Respondent No. 2, submits that he has a preliminary objection as to the maintainability of the present petition. He submits that under Section 49 of the Benami Act, an appeal against an order of the Appellate Tribunal would lie to the High Court, and not a writ petition. He relies upon the judgement in M.C. Mittal v Central Bank of India (1996) 36 DRJ 315 (DB) to argue that the order would have to be appealed against and no writ would lie. He further submits that the issue has been substantively decided in favour of his client by a judgement in a writ petition filed by the Respondent No.2 before this Court under the Prevention of Money Laundering Act, 2002 ('PMLA Act'). He further submits that the matter has reached the Supreme Court, where a status quo order has been passed.

5. In rejoinder, Mr. Raghvendra Singh, Sr. Standing Counsel submits that a writ petition is the only efficacious remedy, as under Section 49, only such appeals where substantial questions of law are raised can be entertained, and in the present writ petition, the Petitioner is challenging an interim order of the Appellate Tribunal, which would not be appealable under Section 49. He relies upon a judgement rendered in Rajesh Agarwal HUF Vs. CIT, Ghaziabad (2014) 51 Taxmann.com 26 (Allahabad).

6. The issues raised in the present writ petition would require adjudication by this Court. The judgment of this Court dated 9th April, 2015 in CRL. M.C. 5508/2014 arose out of a petition under Section 482 of the Code of Criminal Procedure against proceedings initiated under the PMLA Act.

7. The present show-cause notice dated 21st June 2019, has been issued under Section 26(1) of the Benami Act. Vide the said notice, Respondent No. 2 and 3 have been directed to file their replies along with documents and evidence. The operative portion of the show cause notice reads as under:-

"NOTICE TO SHOW CAUSE UNDER SECTION 26(1)

"Whereas initiating officer has passed an order under section 24(4) in respect of properties indicated in the said order. He has provisionally attached properties under THE PROHIBITION OF BENAMI PROPERTY TRASACTIONS ACT 1988 and has made reference under section 24(5) of the said Act for confirmation of the said Provisional Attachment Order.

I.O. has held the properties to be Benami Properties Involved in benami transactions within the meaning of section 2(9) of THE PROHIBITION OF BENAMI PROPERTY TRASACTIONS ACT 1988.

You are hereby called upon to furnish such Documents, particulars or evidences/ as is considered necessary to prove your claim that the property is not Benami property under the Act and is not covered by/Involved in the benami transactions

within the meaning of section 2(9) of the Act.

You are given this show cause notice to explain as to why all or any of such properties should not be declared to be Benami Properties involved in benami transactions under THE PROHIBITION OF BENAMI PROPERTY TRASACTIONS ACT 1988, and why the Provisional Attachment Order be not confirmed.

Copy of the reference along with Annexure/relied upon documents are enclosed herewith.

Your are directed to appear before the Bench of Dr. D Singhai (Chairman) and Shri Vinod Anand Jha, Hon'ble member (Finance) Adjudicating Authority,

THE PROHIBITION OF BENAMI PROPERTY TRASACTIONS ACT 1988 in person or through an Advocate/ Authorized Represented duly instructed on 01.08.2019 at 2.30 pm in court Room-1, Room No. 25, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001 falling which the reference shall be heard and decided in your absence as per the law. Given under my hand and the seal of the Adjudicating Authority, this 21st Day of June 2019."

8. The jurisdiction of the Tribunal is governed by Section 46 of the Act, the relevant portion of which reads:

"46 (1) Any person, including the Initiating Officer, aggrieved by an order of the Adjudicating Authority may prefer an appeal in such form and along with such fees, as may be prescribed, to the Appellate Tribunal against the order passed by the Adjudicating Authority under sub-section (3) of section 26, within a period of forty-five days from the date of the order"

9. A perusal of the above provision shows that an Appeal to the Appellate Tribunal lies only from 'an order of the Adjudicating Authority' and that too 'under sub-section (3) of Section 26'. The show-cause notice issued on 21st June 2019, is under Section 26(1) of the Benami Act and not under Section 26 (3). The reasons for this are not far to seek. The scheme of the Benami Act, under Section 5, provides for confiscation of any property which is subject matter of a benami transaction, by the Central Government. An Adjudicating Authority is appointed under Section 7. The proceedings for confiscation are initiated by the Initiating Officer under Section 24 of the Benami Act. If the Initiating Officer passes a provisional order of attachment of the property, he draws up a statement of case and refers it to the Adjudicating Authority under Section 24(5) of the Benami Act.

10. The second level of adjudication then begins by the Adjudicating Authority issuing a show cause notice under Section 26(1) of the Benami Act. The said show-cause has to be issued within a period of thirty days upon the reference being received. At least 30 days' period has to be given for filing of the reply and furnishing the information. After affording an opportunity of being heard, the Adjudicating Authority has to pass appropriate orders as per Section 26. However, the statute provides a specific time period for the said process to be

concluded i.e., a period of one year. The relevant provision i.e., Section 26(7) reads as under:

"26(7) No order under sub-section (3) shall be passed after the expiry of one year from the end of the month in which the reference under sub-section (5) of section 24 was received."

Thus, the enquiry and the adjudication are time bound as per the statute. The statute does not contemplate any interdiction by the Appellate Tribunal during the process of adjudication while the Adjudicating Authority is seized of the matter. It is only thereafter, that an appeal has been provided for under Section 46. This however would not bar exercise of powers in writ jurisdiction.

11. Insofar as the remedy of Appeal to the High Court is concerned, a reading of Section 49 reveals that the High Court has to be satisfied that there is a substantial question of law. The relevant provisions - Section 49(3) and 49 (4) read:

"49...

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question."

The judgement in M.C. Mittal (supra) deals with the meaning of an 'order' under the Recovery of Debts Due To Banks And Financial Institutions Act, 1993 where a provision similar to Section 49 (3) and (4) does not exist. In fact, in Rajesh Agarwal HUF (supra), the Allahabad High Court has held, in the context of Section 260-A of the Income Tax Act, 1961, as under:

"4. The Court pointed out to the learned counsel for the assessee that the appeal against an interim order is not maintainable under Section 260-A of the Act. The learned counsel for the assessee submitted that the appeal under Section 26-A of the Act can be filed against every order of the Tribunal, which would include even an interim order. Section 260A (1) of the Act reads as under:

"260A (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal [before the date of establishment of the National Tax Tribunal], if the High Court is satisfied that the case involves a substantial question of law."

5. From a perusal of the aforesaid, it is apparently clear that an appeal shall lie from every order passed in the appeal by the Appellate Tribunal, if a substantial question of law is involved. The word "every order" does not mean an interim order or an order passed on a Miscellaneous Application. It means a final order disposing of the appeal.

.....

8. In the light of the aforesaid, it is apparently clear, that the words "an appeal shall lie to the High Court from every order passed in appeal" has to be given purposeful meaning. The words "passed in appeal" means an order finally deciding an appeal. An order passed by the Tribunal on a Miscellaneous Application is not an order passed in an appeal. Similarly, an order passed by the Tribunal deciding one ground in the appeal is not a final order and, consequently, the appeal is not maintainable against an interlocutory order."

12. It cannot be said at this stage that the judgement in the PMLA proceedings would bar proceedings under the Benami Act. Moreover, in a challenge to the said judgement dated 9th April, 2015 the Supreme Court has passed a status quo order which reads:

"Counter affidavit be filed within four weeks.

Rejoinder, if any, be filed within two weeks hence.

In the meantime, Status quo as obtains today, shall be maintained by the parties."

13. The questions raised by the respective parties shall be finally adjudicated after completion of pleadings. Clearly, the show-cause notice under challenge has been issued under Section 26(1) and the same does not, prima facie, constitute 'an order' passed by the Adjudicating Authority. The jurisdiction of the Appellate Tribunal to entertain the Respondent's challenge to the show-cause notice is in doubt.

14. Issue notice to the Respondents returnable on 30th January, 2020. Till the next date of hearing, the interim order passed by the Appellate Tribunal staying the operation of the notice dated 21st June, 2019, shall remain suspended. Replies to the show cause notice, shall be filed within 30 days from today. The Adjudicating Authority shall thereafter proceed in accordance with law and in accordance with the timelines prescribed under Section 26 of the Act. The adjudication process by the Adjudicating Authority shall be subject to the outcome of the present writ petition and shall be without prejudice to the rights and contentions of the parties, which may be raised in the present writ petition. The observations in the present order are prima facie in nature.

15. Order Dasti under signature of the Court Master.