

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving the Order	Date of Pronouncing the Order
20.12.2017	25.01.2018

Coram

The Hon'ble Mr.Justice T.S.Sivagnanam

Writ Petition Nos.14626 to 14628 of 2017
and

W.M.P.Nos.15862 to 15864 of 2017
W.M.P.Nos.19504 to 19509 of 2017 &
W.M.P.No.23213 of 2017

Cascade Energy Pte Ltd.,
Rep., by its Authorised Signatory,
Mr.Rajiv Pradhan,
Having its registered office at
203, Hougang Street, No.03-73,
Singapore - 530203

...Petitioner in all W.Ps.

Vs.

1. Union of India,
Ministry of Finance,
Department of Revenue,
Rep., by its Secretary, Dr.Hasmukh Adhia
128-A, North Block, New Delhi.
2. Shri.R.V.Aroon Prasaad, IRS,
Deputy Commissioner of Income Tax,
Corporate Circle (I), Chennai,
Initiating Officer,
Room No.611, Wanaparthi Block, VI Floor,
Aayakar Bhawan 121, Mahatma Gandhi Road,
Chennai - 600 035.
3. Deputy Commissioner of Income Tax
(Benami Prohibition), Chennai,
Wanaparthi Block, VI Floor,
Aayakar Bhawan 121, Mahatma Gandhi Road,
Chennai - 600 035.
4. Addl., Commissioner of Income Tax,
Corporate Range-1, Chennai,
Approving Authority,
Wanaparthi Block, VI Floor,
Aayakar Bhawan 121, Mahatma Gandhi Road,
Chennai - 600 035.

5. Addl., Commissioner of Income Tax,
(Benami Prohibition)
Wanaparthi Block, VI Floor,
Aayakar Bhawan 121, Mahatma Gandhi Road,
Chennai - 600 035.

6. Registrar of Companies, Chennai
Block No.6, B Wing, Second Floor,
26, Shastri Bhavan,
Chennai - 600034.

7. M/s.Archer Power Systems Private Ltd.,
3rd Floor, Block A, Bannari Amman Towers,
No.29, Dr.Radhakrishnan Road, Mylapore,
Chennai -600 004, Rep., by its Director,
Rohit Rabindernath.

8.Rohit Rabindranath ...Respondents in all W.Ps

(R7 & R8 are impleaded vide order of this Court dated 25.01.2018 by TSSJ in W.M.P.Nos.19504 to 19509 of 2017 in W.P.Nos.14626 to 14628 of 2017)

Prayer in W.P.No.14626 of 2017: Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Prohibition, or any other Writ Order or Direction in the nature of a prohibition prohibiting the respondents from exercising jurisdiction or proceeding further in any manner with the proceedings initiated by show cause notice bearing Co.Cir 1 (1)/Benami/2017-18, dated 19.05.2017, issued purportedly under Section 24(1) of the Benami Transactions (Prohibition) Amendment Act, 2016 to the petitioner by the second respondent.

Prayer in W.P.No.14627 of 2017: Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari, or any other Writ, Order or Direction in the nature of a Certiorari calling for the records culminating in Covering Letter/Order bearing Co.Cir 1(1)/Benami/2017-18, dated 19.05.2017, issued by the second respondent to the petitioner and quash the same.

Prayer in W.P.No.14628 of 2017: Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari, or any other Writ, Order or Direction in the nature of a Certiorari calling for the records culminating in the order of provisional attachment dated 19.05.2017 issued by the second respondent to the 6th respondent under Section 24(3) of the Benami Transactions (Prohibition) Amendment Act, 2016 and quash the same.

For Petitioner : Mr.P.Chidambaram Sr.Counsel &
Mr.M.S.Krishnan Sr.Counsel for
Mr.V.Sankara Narayanan

Mr.Adeesh Anto

For Respondents : Mr.G.Rajagopalan ASG assisted by
Mr.A.P.Srinivas

Mr.A.N.Jayaprathap for RR2to5

Mr.P.H.Arvind Pandian Sr. Counsel

Mr.P.S.Raman Sr.Counsel &

Mr.Sathish Parasaran Sr.Counsel
for Mr.Sricharan Rangarajan for
proposed parties

Mr.V.Venkatesan SCGSC for R1

COMMON ORDER

These Writ Petitions question the orders passed under the Prohibition of Benami Property Transactions Act, 1988, as amended by Act No.43 of 2016, w.e.f. 01.11.2016 (hereinafter referred to as the "Act" for brevity).

2(i). The petitioner, in all these Writ Petitions, is M/s.Cascade Energy Pte Ltd., having its registered office at Singapore.

2(ii) In W.P.No.14626 of 2017, the petitioner seeks for issuance of Writ of Prohibition, restraining the official respondents from in any manner proceeding with the show cause notice, dated 19.05.2017, issued by the second respondent under Section 24(1) of the Act, calling upon the petitioner to show cause as to why 51% shares and debentures held by the petitioner in an Indian company Zynergy Solar Projects Pvt., Ltd (Zynergy India).

2(iii). In W.P.No.14627 of 2017, the petitioner seeks for issuance of a Writ of Certiorari, to quash the order dated 19.05.2017, issued under Section 24(3) of the Act, intimating the petitioner that pursuant to the provisional attachment of shares and debentures, enforced, the petitioner is restricted/prohibited from dealing in any manner and from exercising any rights in relation to the shares and debentures.

2(iv). In W.P.No.14628 of 2017, the petitioner seeks for issuance of a Writ of Certiorari, to quash the order of

provisional attachment, dated 19.05.2017, issued by the second respondent to the 6th respondent under Section 24(3) of the Act.

3. The brief factual background leading to the present litigation is as follows:-

The petitioner had invested in an Indian company Zynergy India, a company promoted by Mr.Rohit Rabindernath(Mr.RR) by way of shares and debentures. The petitioner holds 51% of the share capital of Zynergy India; 5,43,470 fully compulsorily and mandatorily convertible debentures of face value Rs.100/- each, issued by Zynergy India and 20,00,000/- optionally fully convertible debentures of face value Rs.100/- each, issued by Zynergy India. The petitioner would state that none of the transactions are benami transactions and the petitioner is not a benamidar and the shares and debentures are not benami property. The transactions done by the petitioner, were completed well before the amendment to the Prohibition of Benami Transaction Act, 1988, which amendment received the assent of the President of India on 11.08.2016 and the Act came into force w.e.f 01.11.2016. It is further submitted that there has been several litigation between the petitioner and Mr.RR and various entities controlled by him including the other shareholders of Zynergy India by name M/s.Archer Power Systems Limited (hereinafter referred to as "Archer" for brevity). It is alleged that after receiving substantial investment from the petitioner, Mr.RR is alleged to have siphoned money out of Zynergy India, refused to make necessary disclosures and comply with the mandatory filings required under the Companies Act, 2013 and when the petitioner sought for transparency of the transactions, Mr.RR and various companies controlled by him initiated litigation against the petitioner with a view to prevent them from examining the affairs of Zynergy India. M/s.Archer represented by Mr.RR filed C.P.No.13 of 2017, before the National Company Law Tribunal (NCLT) to restrain the petitioner from exercising its rights in relation to the shares and debentures and also approached this Court in O.A.No.347 of 2017, in which this Court initially granted an exparte interim injunction on 07.04.2017, which was vacated after the petitioner entered appearance and contested the matter, by order dated 01.06.2017 and O.A.No.347 of 2017, was dismissed. It is submitted that when O.A.No.347 of 2017, was listed on 01.06.2017, for passing orders, the impugned attachment order and the impugned prohibitory order issued to the second respondent was produced before the Court and an argument was placed stating that those orders also should be taken into consideration before passing orders in O.A.No.347 of 2017. It is submitted that the Court did not accede to such request and proceeded to dismiss O.A.No.347 of 2017. The petitioner would state that the scanned copies of the impugned orders were sent to the petitioner by e-mail, on 01.06.2017, at 10.57am and the actual physical copies were received only on 05.06.2017 by unregistered air-mail. It is further submitted

that the petitioner has filed C.P.No.19 of 2017, before the NCLT against Mr.RR and his group for oppression and mismanagement and the NCLT, by order dated 27.04.2017, ordered status quo and restrained the conduct of any related party transactions, without leave of the Tribunal and directed the management of Zynergy India to produce relevant information as sought for by the petitioner. The petitioner would allege that the impugned proceedings have been initiated to prevent NCLT from proceeding further with C.P.No.19 of 2017. The petitioner would attribute certain personal motives to the second respondent, Shri.R.V.Aroon Prasaad, IRS., Deputy Commissioner of Income Tax, Corporate Circle (I), Chennai, who has been impleaded in his personal capacity, stating that the second respondent for extraneous consideration, has passed the impugned orders only to favour Mr.RR in the private litigation between Mr.RR and the petitioner.

4. Mr.P.Chidambaram, learned Senior counsel appearing for the petitioner explained about the shareholding pattern in Zynergy India and the pattern of investment made in the company and how the debentures and shares were allotted to the petitioner. It is submitted that on the date of issuance of the impugned orders, the second respondent had no jurisdiction to issue the same, as he was not the gazetted initiating officer under the Act and thus lacked statutory jurisdiction even to issue the impugned orders. The transactions done by the petitioner with the Indian Company, were completed in all aspects long before the Amendment Act came into force (01.11.2016), which is evident from the certificate of foreign inward remittance, form No.PAS-03, PAS-05. The learned counsel referred to the provisions of the Act, namely, the definition of Benami transaction as defined under Section 2(9), the meaning of the word 'notification' as defined under Section 2(21) and the various provisions under Chapters-II to VIII, which were added by the Amendment Act, w.e.f., 01.11.2016. Referring to Section 18(1) of the Act, it is submitted that the authorities, who are empowered to take action under the Act, have been stipulated therein, they being (a) The Initiating Officer, (b) The Approving Authority, (c) The Administrator and (d) The Adjudicating Authority.

5. Reference was also made to Section 59 of the Act, which deals with power of the Central Government to issue directions. It is submitted that Section 24 under which the impugned orders have been issued falls under Chapter IV of the Act, which deals with attachment, adjudication and confiscation. It is submitted that in terms of sub-section (2) of Section 24, where a notice under sub-section (1) specify any property as being held by a benamidar referred to in that sub-section, a copy of the notice shall also be issued to the beneficial owner, which provision has not been followed and copy of the notice has not

been forwarded.

6. Relying upon Rule (5) of the Prohibition of Benami property Transaction Rules, 2016, ('Rules' for brevity). It is submitted that for the purposes of sub-section (3) of Section 24, the Initiating Officer shall provisionally attach any property in the manner provided in the second schedule of the Income Tax Act, 1961 and the attachment can only restrain the transfer of shares and the right to receive dividend and the impugned prohibitory order goes beyond the impugned attachment order by restricting/prohibiting, the petitioner from exercising any right in relation to shares and debentures and this restriction is not found in the main attachment order issued by the 6th respondent. Referring to the notification, dated 18.05.2017, issued by the Central Board of Direct Taxes (Department of Revenue), Ministry of Finance, it is submitted that the said notification supersedes the notification dated 25.10.2016 and directs that the income tax authorities under Section 116 of the Income Tax Act specified in column-(2) of the Schedule having headquarters at places specified in corresponding entry in column-(3), to exercise powers and perform functions of the "authority" under the prohibition of Benami Property Transaction Act, specified in the corresponding entries in column (4) in respect of the territorial areas specified in the corresponding entries in column (5) of the schedule having jurisdiction vested in them. It is submitted that serial No.9, deals with the officers having headquarters at Chennai and in terms of clause (1) of serial No.9, the Joint Commissioner of Income Tax/Additional Commissioner of Income Tax, (Benami Prohibition), Chennai, is the Approving Authority and in terms of serial No.9(ii), the Assistant Commissioner of Income Tax/Deputy Commissioner of Income Tax, (Benami Prohibition), Chennai is the Initiating Officer and in terms of clause 9(iii), the Income Tax Officer (Benami Prohibition), Chennai is the Administrator and all the three authorities can exercise jurisdiction over the territorial areas within the limits of the State of Tamil Nadu and Union Territory of Puduchery (including Karaikal, but excluding Mahe and Yanam).

7. The learned Senior counsel compared the schedule in the notification, dated 18.05.2017, with that of the schedule in the notification, dated 25.10.2016, which stood superseded, and submitted that the Initiating Officer in terms of the superseded notification dated 25.10.2016, is the Assistant Commissioner of Income Tax/Deputy Commissioner of Income Tax, Corporate Circle-I (1) and in terms of the notification, dated 18.05.2017, such authority will have no jurisdiction to initiate proceedings as the authority, who is empowered to initiate action, is the Assistant Commissioner of Income Tax/Deputy Commissioner of Income Tax (Benami Prohibition), Chennai.

8. Referring to the counter affidavit filed by the second respondent, dated 19.06.2017, it is submitted that the second respondent has admitted that he was holding charge as DCIT, Corporate Circle-I(1) and vide notification, dated 25.10.2016, he was the Initiating Officer under the Act and in the course of discharge of his function, he received a complaint letter along with enclosures, dated 17.05.2017, from Mr.RR against the petitioner herein to initiate action under the Benami Prohibition Amendment Act and on perusal of the materials, reasonable belief was formed that the transactions would fall under the said Act and therefore, show cause notice under Section 24(1) was issued to the nominee directors of the petitioner by exercising its powers, as the Initiating Authority for which approval was given by the approving authority. It is further submitted that Mr.K.Visakh IRS, took charge as Assistant Commissioner of Income Tax [Benami Prohibition] and the cases, which were handled by the second respondent, were handed over to him for further continuation namely, 62 files were handed over on 29.05.2017 and 6 files on 02.06.2017 and the files pertaining to the petitioner was handed over to the new incumbent on 05.06.2017, who took charge on the very same day. Therefore, the second respondent seeks to justify the issuance of the provisional attachment order and the show cause notice, dated 19.05.2017, as being well within his powers and jurisdiction. The learned Senior counsel has drawn the attention of the Court to the additional counter affidavit filed by the second respondent, dated 07.07.2017, in which it has been averred that though the Gazette of India is dated 18.05.2017, it was digitally signed and published only on 22.05.2017 and came to his knowledge only thereafter, and therefore, it is in good faith and in exercise of powers under Act, the impugned orders were issued by the second respondent. Though in paragraph 3 of the said counter affidavit, the date of notification is stated as 22.05.2017, the learned Senior Standing counsel appearing for the Department clarified that it is a typographical error and the date should be read as 18.05.2017. The learned Senior counsel referred to the Additional counter affidavit filed by Mr.Visakh IRS, dated 28.08.2017, it has been stated that the first respondent addressed a letter dated 07.08.2017 to the Commissioner of Income Tax (Judicial), Chennai and clarified that notification, dated 18.05.2017, was uploaded by the Government of India Press on the website of E-Gazette on 22.05.2017 at 18.06hours. This stand has been further reiterated in the common counter affidavit filed by Mr.K.Visakh IRS, dated 29.08.2017. In the said counter affidavit, it has been stated that in terms of Section 1(3) of the Act, the provisions of Section 3, 5, 8 shall come into force at once and the remaining provision of the Act shall be deemed to have come into force on 19.05.1988 and therefore, the second respondent was well within the jurisdiction to initiate the impugned proceedings.

9. Based on the averments set out in four counter affidavits filed by the second respondent and the new incumbent, it is submitted that the case of the second respondent is solely based upon the date on which, the Gazette notification was uploaded by the Directorate of Printing at the Government of India Press to justify the jurisdiction of the second respondent to initiate proceedings. It is submitted that the notification would come into operation as soon as it is published in the Gazette of India i.e., the date of publication of Gazette and this being the correct legal position, the contention of the second respondent referring to the date on which the notification was uploaded in the official website, is not sustainable. In this regard, the learned Senior counsel referred to the decisions in the cases of State of Maharashtra vs. Mayer Hans George [AIR 1965 SC 722]; B.K.Srinivasan & Ors., vs. State of Karnataka & Ors., [(1987) 1 SCC 658]; M/s.Pankaj Jain Agencies vs. Union of India & Ors., [(1994) 5 SCC 198] and Union of India & Ors., vs. Ganesh Das Bhojraj [(2000) 9 SCC 461].

10. It is submitted that in the case of Ganesh Das Bhojraj, (supra) the Court considered the decisions in Mayer Hans George, B.K.Srinivasan & Ors., M/s.Pankaj Jain Agencies (supra) and held that the decisions rendered in M/s.Pankaj Jain Agencies represents, the correct position of law on the subject and the decisions rendered in CCE vs. New Tobacco Company [(1998) 8 SCC 250] and the decisions in Garware Nylons Ltd., vs. Collector of Customs & Central Excise [(1998) 8 SCC 282], do not lay down the correct law and by applying the law laid down in M/s.Pankaj Jain Agencies, it has to be held that the notification dated 18.05.2016, would come into force on the same day and not as contended by the second respondent on 22.05.2016, the date on which, it was uploaded in the website. Therefore, it is submitted that the officer having come to know of it later is of no relevance and the date of publication, is the date of notification in the Gazette i.e., 18.05.2017. In this regard, the learned Senior counsel has drawn the attention of this Court to the reply received to a query under the Right to Information Act, vide application, dated 21.06.2017, wherein the Chief Public Information Officer by reply dated 13.07.2017, informed the petitioner that the date of e-publication on e-gazette website is 18.05.2017. Therefore, it is submitted that the notification as defined under Section 2(21) of the Act would mean a notification published in the official gazette and the expression "notified" shall be construed accordingly and the notified date being 18.05.2017, the second respondent had no jurisdiction on 19.05.2017, to issue the impugned orders.

11. Nextly, it is submitted that no action can be taken against the petitioner under the 2016 amended Act as the same is only prospective and all transactions were prior, during 2015-16 i.e., before the Amendment Act coming into force w.e.f. 01.11.2016. It is submitted that all the provisions of the

Amended Act has substantive provisions and can be only prospective and cannot have retrospective application. In this regard, reliance was placed on the decision of the High Court of Bombay in the case of Joseph Isharat vs. Rozy Nishikant Gaikwad [MANU/MH/0646/2017], which decision was confirmed by the Hon'ble Supreme Court, as the Special Leave Petition filed against the said judgment in SLP.No.12328/2017, was dismissed on 28.04.2017.

12. Referring to Section 5(1) of the Old Act, it is submitted that all properties held 'Benami' shall be subject to acquisition by such authority, in such manner and after following such procedure, as may be prescribed and no procedure was prescribed, Rules were not framed under the Old Act. After the Amendment, Section 5 states that any property, which is subject matter of Benami Transaction shall be liable to be confiscated by the Central Government. Therefore, it is clear that the amended provisions are substantive in character and can have only prospective effect and action cannot be taken under the Amended Act. It is further submitted that the impugned order dated 19.05.2017, restricting/prohibiting the petitioner from dealing in any manner and from exercising any rights in relation to the shares and debentures is ultra vires, Section 24 (3) of the Act read with Schedule II of the Income Tax Act, 1961 as in terms of the said provisions, there can be only a prohibitory order from selling and receiving dividends alone. Further, it is submitted that the second respondent cannot address the Registrar of Companies, the sixth respondent, as the attachment has to be effected by the initiating authority, in terms of sub-section (3) of Section 24 and sub-section (5) of Section 24. Further, it is submitted that the second respondent has not complied with the provisions of sub-section (2) of Section 24 and notice has not been issued to the beneficial owner and it has been given only to the nominee Director at Chennai, who cannot represent the Hongkong Company, hence, the impugned proceedings as ultra vires Section 24(2) of the Act. It is further submitted that to term a transaction as 'benami transaction', it should fall within definition of Section 2(9)(A) of the Act and to bring a transaction within the said provision, both the contingencies contemplated under Section 2(9)(A)(a) and (b) have to be satisfied and the allegation as set out in the impugned order does not satisfy both the conditions, as there is no allegation that the Singapore company is holding shares on behalf of Kohli Ventures in British Virgin Islands and Cascade Global in Hongkong.

13. Further, commenting upon the allegations made in the show cause notice, dated 19.05.2017, it is submitted that though the second respondent has stated that he has reason to believe, no reasons have been set out in the show cause notice and no reasons have been recorded in writing while issuing the show cause notice as required under Section 24(1) of the Act. What

has been stated by the second respondent in the impugned show cause notice, is only his conclusion and not how he had reason to believe that any person is the benamidar and there is no reasons recorded in writing to the said effect. In this regard, reliance was placed on the decision in the case of ITO, I Ward, District VI, Calcutta & Ors vs. Lakhmani Mewal Das [(1976) 3 SCC 757] and the decision in the case of Union of India vs. M.L.Capoor [(1973) 2 SCC 836].

14. Once again referring to the counter affidavit filed by the second respondent, dated 19.06.2017, it is submitted that the second respondent has only stated that on perusal of the materials, reasonable belief was formed that the transactions should fall under the Act and therefore, the show cause notice under Section 24(1) was issued. The counter affidavit is silent as to what he found from the materials and merely stating in the additional counter affidavit, dated 07.07.2017, that he acted in good faith with proper application of mind is not reason to believe that the petitioner is a benamidar in respect of the property. It is further submitted that the counter affidavit filed by the new incumbent Mr.K.Visakh IRS, dated 29.08.2017, only states that the second respondent based on the materials in his possession, has formed a reason to believe before issue of show cause notice and what are such reasons have not been spelt out which shows that the second respondent had no reason to believe that the petitioner is benamidar in respect of the shares and debentures and has not recorded any reasons in writing while issuing notice to the petitioner to show cause as to why the property should not be treated as a benami property.

15. Mr.G.Rajagopal, learned Additional Solicitor General appearing for the official respondents submitted that the impugned proceedings is only a show cause notice and there is no cause of action for filing a Writ Petition against the said notice and even assuming that copy of the notice should have been sent to the original owner, which is in his submission was not required, and even it be so, it is still a curable defect. In this regard, the learned Additional Solicitor General referred to the decision of the Hon'ble Supreme Court in the case of Gokaraju Rangaraj vs. State of A.P., [(1981) 3 SCC 132] to invoke the defacto doctrine to the facts and circumstances of the case and submitted that the impugned show cause notices/orders cannot be stated to have become defective for the reasons set out by the petitioner. It is further submitted that the Amendment Act came into force on 01.11.2016 and in terms of the amended provision, the Initiating Officer as defined under Section 2(19) of the Act is by designation and not by name and therefore, the authority was well within his jurisdiction to initiate proceedings and pass an order of attachment, which has been done after obtaining the approval from the Approving Authority. It is further submitted that the Amended Act is

retroactive and not retrospective and in this regard, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Excel Crop Care Ltd., vs. CCI & Anr [(2017) 8 SCC 47], wherein the Court took into consideration the earlier decision in the case of R.Rajagopal Reddy vs. Padmini Chandrasekharan [(1995) 2 SCC 630] and held that merely because an agreement relating to Benami transaction was entered to prior to come into force of the Benami Transaction (Prohibition) Act, 1988, it would not mean that the provisions of the said Act will not apply retroactively to such an agreement and render it void. With regard to the manner in which subjective satisfaction has to be recorded, the learned Additional Solicitor General referred to the decisions of the Hon'ble Supreme Court in the case of Barium Chemicals Ltd., & Anr., vs. Company Law Board & Ors., [AIR 1967 SC 295] and Harihar Prasad Dubey vs. Tulsi Das Mundhra & Ors., [AIR 1981 SC 81,].

16. Referring to the letter addressed by the CBDT to the Commissioner of Income Tax (Judicial), dated 07.08.2017, it is submitted that the Directorate of Printing, Government of India has stated that the notification, dated 18.05.2017, was uploaded by the Government of India Press on the website of e-gazette on 22.05.2017 at 18.06 hours and in the said communication, the judgment of the Hon'ble Supreme Court in Garware Nylons Ltd., (supra) has been referred and it is submitted that upon printing of the notification dated 18.05.2017, by the Directorate of Printing, the Government of India on 22.05.2017 for the Public, the notification became effective from 22.05.2017. Therefore, it is submitted that as on the said date, the second respondent had jurisdiction to issue the impugned proceedings. Further, it is submitted that the second respondent has not expressed anything on the merits of the matter and it is only a show cause notice and the petitioner should be directed to respond to the same for the matter to be decided in accordance with law and the Writ Petition being pre-mature, is liable to be dismissed.

17. The private parties namely, Mr.RR and M/s.Archer have filed petitions to implead themselves, as the respondents in the Writ Petition in WMP.Nos.19504 to 19509 of 2017. The prayer for impleadment has been stoutly opposed by the petitioner at the very inception which was taken note of by the Court even prior to filing of the impleadment petition in its order dated 11.07.2017, when the private parties intervened in the proceedings. However, subsequently when the matter was listed for hearing the learned Senior counsel for the petitioner agreed to advance submissions in the main Writ Petitions reserving the petitioner's right to oppose the impleadment on the ground that the proposed parties are neither proper nor necessary party to the litigation.

18. Mr.P.S.Raman, Mr.Sathish Parasaran and Mr.P.H.Arvind

Pandian, learned Senior counsels appearing for the impleading parties and have made their submissions. After referring to the various averments as set out in the affidavit filed in support of the Writ Petition, it is submitted that there are direct allegations made against the impleading parties, serious comments have been made connecting the impleading parties to Shri.R.V.Aroon Prasaad, IRS, the second respondent, malice has been attributed and hence, they should be impleaded as respondents in the Writ Petition. It is submitted that in order to effectively adjudicate upon the lis in the present matter, the parties should be impleaded as respondents in the Writ Petition, more particularly when Mr.RR is the defacto complainant with respect to the information provided and he ought to have been impleaded as a party for an effective adjudication of the dispute. It is further submitted that the Writ Petitioner is a shell company owned and controlled by one Mr.Tej Kohli, an individual against whom several criminal investigation remain pending and has been indicted by the Courts of United States of America for various offences and the impleading parties acquired knowledge of these facts, only when several Banks refused to approve loans on the basis that the said Mr.Tej Kohli did not satisfy the KYC norms. Further, it is submitted that the affidavit filed in support of the Writ Petition is replete with references to fraud and collusion by the impleading parties and the said Shri.R.V.Aroon Prasaad, IRS, and such allegations are wholly unsubstantiated and lack in merit and however, the seriousness of the allegations has made the parties to seek for impleadment and they are entitled to the answer the allegations levelled against them and also to protect their commercial interest.

19. It is further submitted that the notification was uploaded only on 22.05.2017 and it will come into effect only on that date and the new officer assuming charge will continue with the proceedings and the question of malafides does not arise. The order of attachment now passed is only provisional and if the officer is satisfied, he will lift the attachment. To elaborate upon the rights of the shareholder, the learned Senior counsel referred to the decision of the LIC vs. Escorts & Ors., [(1986) 1 SCC 264]. It is further submitted that rights vis-a-vis, an attachment by a judgment debtor is different from the attachment under the Benami Act i.e., all the rights have to be stopped from being exercised. With regard to the recording of reasons, the learned Senior counsel referred to the decision of the Hon'ble Supreme Court in the case of ITO, I Ward, District VI, Calcutta & Ors vs. Lakhmani Mewal Das (supra) and in particular to the observations made in paragraph 7 of the said judgment. Further, it is submitted that the language of Section 24(2) of the Act does not mandate that notice has to be served on the beneficial owner simultaneously and the fact remains notice has been given. Further, it is submitted that the Writ

Petitioner has filed revised returns at Singapore after the order of attachment.

20. The Writ Petitioner has filed a common counter affidavit to the implead applications, apart from setting out certain facts, which may not be very relevant at this stage, it is contended, no relief has been sought for against the proposed parties and as such, they are neither proper or necessary parties and the relief claimed by the petitioner is against the official respondents and it is not known as to how it affects the impleading parties. Further, any order passed by this Court in the present proceedings would not bind the impleading parties and the Writ Petitioner being dominus litus, is entitled to decide as to who has to be impleaded as party respondents to the Writ Petitions.

21. The impleading parties have filed a reply affidavit to the counter affidavit filed by the Writ Petitioner setting out facts, which are of no relevance at this stage in the present proceedings.

22. The Court also heard the learned Senior counsels on the validity of the impugned orders much of which were in support of the submissions made by the learned Additional Solicitor General. It is submitted that the publication is mandatory and only if it is published, the notification will become effective. In support of such contention, reliance was placed on the Hon'ble Supreme Court in the case of Union of India & Ors., vs. Ganesh Das Bhojraj (supra). Further, it is submitted that for the sake of arguments, if a converse case is taken up for consideration, the Writ Petitioner would have come to Court challenging that the Assistant Commissioner of Income Tax (Benami Prohibition) had no jurisdiction on 18.05.2017, to initiate proceedings as notification was published only on 22.05.2017.

23. Mr.Sathish Parasaran, learned Senior counsel appearing for the impleading party referred to the decision in the case of R.Rajagopal Reddy vs. Padmini Chandrasekharan (supra) with regard to the aspect regarding retrospectivity and retroactivity of the amendment Act. For the said proposition, the learned counsel referred to the decision of the High Court of Gujarat in the case of Apex Electricals Ltd., vs. ICICI Bank Ltd [(2003)-117 Company cases 412] (Gujarat) and Mohan Lal vs. State of Rajasthan[(2015) 6 SCC 222]

24. Further, it is submitted that the impleading parties were the first to commence litigation under the Prevention of Money Laundering Act and there is no plurality of ownership as against the Benami Act. Referring to Section 2(24) of the Act, which defines 'person', is an inclusive definition and includes

all. In terms of Section 2(9) of the Act, acquisition is an offence and holding is also an offence and in terms of Section 2 (26), property has been defined to mean assets of any kind and includes any right or interest. After referring to the contents of the impugned notice, it is submitted that the notice is specific and it gives details about duality of ownership. By referring to the decision of the Hon'ble Supreme Court in the case of M/s.Phool Chand Bajrang Lal & Anr., vs. ITO & Anr., [(1993) 4 SCC 77], it is submitted that the belief is that of the Income Tax Officer, the sufficiency of reasons for forming the belief is not for the Court to judge, but it is open to the assessee to establish that there infact existed no belief or that the belief was not at all a bonafide one or was based on vague, irrelevant, non-specific investigation. None of the factors mentioned in the decision are present in the impugned show cause notice and therefore, the Court will not sit in judgment over the reasons and it is open to the Writ Petitioner to establish before the officer their bonafides. Referring to Section 63 of the Act, it is submitted that the said provision states that no notice shall be deemed to be invalid merely by any reason of mistake, defect or omission of notice and it is sufficient that if insubstance and effect it is in conformity with or in according to the intent and purpose of the Act.

25. Mr.P.H.Arvind Pandian, learned Senior counsel appearing for the impleading party, submitted that the transfer of shares was subject to the (Indian) Companies Act and therefore, they can be brought within the ambit of the Benami Act and in support of such proposition, reliance was placed on the decision in the case of N.R.Harikumar vs. WW Apparels (India) Private Ltd & Ors., [2015-5-MLJ-422 (para 7 to 15)]. It is further submitted that the Benami Property is not required to be located in India only and the statutory definition will include even foreign properties. However, in the instant case, the Companies Act would apply to the share transfer and therefore, the second respondent has jurisdiction to initiate proceedings. Reliance was placed on the decision of the High Court of Bombay in the case of Sabita Rajesh Narang vs. Sandeep Gopal Raheja & Ors., [Manu/MH/2397/2015], for the contention that the 2013 Act came into force before the present suit was filed. Section 89(8), makes it clear that absent the necessary declaration, no right in relation to that shareholding is enforceable. This would have been entered on the companies' registers of members. There is no such case even made out.

26. It is further submitted that where a substantive power is conferred upon a Court or Tribunal, all incidental and ancillary power necessary for an effective exercise of the substantive power has to be inferred and in support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Chief Executive Officer & Vice

Chairman, Gujarat, Maritime Board vs. Haji Daud Haji Harun Abu & Ors., [(1996) 11 SCC 23]. Therefore, it is submitted that the proposed parties shall be impleaded as the respondents in the case as when legal malafides are alleged, the party should be made a respondent to the proceedings and in support of such contention, reliance was placed on the decision in the case of Medley Minerals India Ltd., vs. State of Orissa [(2004) 12 SCC 390 (para 16)].

27. In reply to the above submissions Mr.M.S.Krishnan, learned Senior counsel appearing for the Writ Petitioner submitted that the date of uploading is something equivalent to the gazette being made available for sale and uploading is not relevant for taking into consideration the date of publication, which is 18.05.2017 and it shall be the relevant date for all purposes. In this regard, the decisions relied on by the Mr.P.Chidambaram, learned Senior counsel for the petitioner were reiterated. It is submitted that the letter referred to by the learned Additional Solicitor General has been issued by the Printing Department, which department is entitled to only certify the date of uploading and not the date of publication, as they would be incompetent to make such certification. Even in the said letter, the decisions of the Hon'ble Supreme Court in the case of Garware Nylons Ltd., (supra) has been relied on, which decision has been overruled and held to be no longer good law in the case of M/s.Pankaj Jain Agencies (supra). To support the argument, the learned Senior counsel referred to Section 8 of the Information Technology Act, 2000, which deals with publication of Rule, Regulation etc., in electronic gazette and the proviso under Section 8 provides that where the Rule, Regulation, Order, by-law, notification, or any other matter is published in the official gazette or electronic gazette, the date of publication shall be deemed to be the date of the gazette, which was published in any form and in terms of the said provision, the date of publication of the notification shall be 18.05.2017. Section 2(p) of the Income Tax Act defines digital signature to mean authentication of any electronic record by a subscriber by means of electronic method or procedure in accordance with provisions of Section 8, which deals with authentication of electronic records and the said date can at best be only the date of uploading and not to be taken as the date of notification of the gazette. Further, it is submitted that "defacto doctrine" as submitted by the learned Additional Solicitor General will not apply to the facts of the present case, since the second respondent on the date when he issued the impugned notice had no jurisdiction. This is more so, because, the post has been specifically mentioned. To demonstrate as to what was the purport and intent of mentioning the specific post for the initiating authority, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Shri Ishar Alloy Steels Ltd., vs. Jayaswals Neco Ltd.,

[(2001) 3 SCC 609]. Thus, it is submitted that Section 24 read with Section 2(19) and Section 59 makes it clear that it is only the Assistant Commissioner of Income Tax (Benami Prohibition), who has jurisdiction to initiate proceedings and not any Assistant Commissioner of Income Tax. Further, it is submitted that the Act being a penal statute, cannot be retroactive and cannot be used to punish the petitioner for alleged offence which took place prior to new Act coming into force. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Ritesh Agarwal & Anr., vs. Securities & Exchange Board of India, [(2008) 8 SCC 205 (para 25)] and T.Barai vs. Henry Ah Hoe & Anr., [(1983) 1 SCC 177 (para 22)]. Further, it is submitted that the Act creates a new liability and therefore, can be only prospective. To support such contention, reliance was placed on the decision in the case of R.Rajagopal Reddy vs. Padmini Chandrasekharan [(1995) 2 SCC 630]. Further, it is submitted that even procedural statutes will be prospective as held by the Hon'ble Supreme Court in the case of Pyare Lal Sharma vs. Managing Director & Ors., [(1989) 3 SCC 448 (para 21)] and Hitendra Vishnu Thakur & Ors., vs. State of Maharashtra [(1994) 4 SCC 602 (para 26)], Excel Wear vs. Union of India & Ors., (1978) 4 SCC 224; C. Gupta vs Glaxo Smithkline Pharmaceutical Ltd., [(2007) 7 SCC 171]. Even assuming that the provisions of the old Act would apply, it will have no application on allocation of shares, as allotment of shares is not transfer of shares and therefore, will not fall within the ambit of acquisition. To support the proposition that allotment is not transfer and creation is not transfer, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Canbank Financial vs. Custodian [(2004) 8 SCC 355 (para 59,64,99)] and S.Samuel M.D., Harrisons Malayalam & Anr., [(2004) 1 SCC 256 (para 12,13,17)]. Further, it is submitted that from the typed set of documents filed by the respondent, it is seen that the note put up for issuance of show cause notice and the attachment is simultaneous, which will show that the second respondent acted in great haste, which establishes malafide intention. Subsequently, by a separate order, the petitioner was restrained from exercising their voting right as well. Further, it is submitted that attachment could have been done only if there is reasonable apprehension that the assessee is about to dispose of the security. The second respondent has not brought out as to on what basis he reasonably apprehended that the petitioner would alienate the shares when there was no such intention to do so. Further, the second respondent has not formed any opinion as required under Section 24(3) before passing the impugned order. In fact, the petitioners are effectively contesting their right to retain their holding in the company. In this regard, reliance was placed on the decision of the High Court of Bombay in the case of Gandhi Trading vs Assistant Commissioner Of Income Tax [1999 (239) ITR 337 (Bombay)]. By relying upon the decision of the High Court

of Bombay in the case of Keyur Shah vs. UOI [Manu/MH/1476/2014], it is submitted that it has been held that merely by stating that for protecting the interest of the revenue, the property should not be allowed to be sold/transferred or leased cannot justify an order of provisional attachment as required under Section 28BA of the Customs Act, 1962. Thus, for the above reasons, the learned Senior counsel prays that the impleading petitions may be dismissed and the Writ Petition may be allowed and the impugned proceedings may be quashed.

28. Heard the learned counsels appearing for the parties and perused the materials placed on record.

29. The following questions arise for consideration in these Writ Petitions:-

(i) Whether the proposed parties, Mr. RR and Archer are proper and necessary parties to the Writ Petitions and should they be impleaded as respondents?;

(ii) Whether the second respondent had jurisdiction to issue the impugned notice, dated 19.05.2017, the impugned prohibitory order, dated 19.05.2017, and the impugned attachment order dated 19.05.2017?;

(iii) Whether the amended Act, namely, the Benami Transactions (Prohibition) Amendment Act, 2016, could be applied retrospectively/retroactively to cover the transactions done by the petitioners; and

(iv) Whether the action of the second respondent Shri. R.V. Aroon Prasaad, I.R.S., is tainted with malafide and was based on extraneous consideration to benefit a private party/proposed party.

30. The proposed parties had filed Miscellaneous Applications to implead them as respondents to the Writ Petitions. It was argued that Mr. RR was the defacto complainant, who provided information based on which the impugned orders have been passed and in such cases, the defacto complainant ought to be impleaded as a party for an effective adjudication of the dispute. It was further submitted that the affidavit filed in support of the Writ Petition is replete with references to fraud and collusion by the proposed party and Government staff, which allegations are wholly unsubstantiated and lack in merit and since the allegations are serious, the proposed party seek impleadment they are entitled to answer the allegations levelled against them and also to protect their commercial interest.

31. It is not in dispute that the impugned proceedings are as a result of a complaint lodged by Mr. RR, as this has been admitted by the petitioner in the affidavit filed in support of the Writ Petitions. That apart, the petitioner has stated that there has been spurt of the litigation between the petitioner

and Mr.RR and various entities controlled by him including the other shareholder of Zynergy India namely, Archer and the reason of such litigation is that after receiving substantial investment from the petitioner, Mr.RR appears to have started siphoning money out of Zynergy India, refused to make necessary disclosures and comply with mandatory filing requirements under the Companies Act, 2013. It is further stated that when the petitioner began to object and seek transparency, Mr.RR and various companies controlled by him initiated litigation so as to avoid his statutory and contractual obligations and prevented the petitioner from examining the affairs of Zynergy India. There are references to the petitions filed by M/s.Archer represented by Mr.R.R before the NCLT and this Court and the orders passed thereon. Further, it is stated that it is Mr.RR's intention to produce the impugned orders before the NCLT and to contend that no orders can be passed by NCLT at the instance of the petitioner, as the petitioner's entire shareholding in Zynergy India has been attached and the petitioner has been prohibited from exercising any rights pertaining inter alia their shareholding in Zynergy India.

32. The general rule with regard to impleadment of parties is that the petitioner or the plaintiff being dominus litis may choose the persons against whom, he wishes to litigate and cannot be compelled to sue a person against whom, he does not seek any relief. But the Court is given the discretion to add as a party, any person who is found to be a necessary party or a proper party. Though the provision of the Code of Civil Procedure are not applicable to a Writ proceedings, it has been held that principles analogous to the Code of Civil Procedure should be applied to a Writ proceedings as well [see Public Service Commission Uttaranchal vs. Manta Bish & Ors., (2010) 12 SCC 204]

33.Order 1, Rule 10 (2) CPC is not about the right of a non party to be impleaded as a party, but about the judicial discretion of the Court to strike out or to add a party at any stage of the proceedings. A necessary party is one without whom, no order can be effectively made. A proper party is one, whose presence is necessary for a complete and final decision of question involved in the proceedings.[see Mumbai International Airport Private Ltd vs. Regency Convention Centre and Hotels Private Ltd., [(2010) 7 SCC 417].

34.The reason, which makes it necessary to make a person, a party to an action, so that he should be bound by the result of the action and question to be settled. Thus, the test would be whether the said party is a necessary or proper party and presence of such party before the Court is necessary for complete and effective adjudication of the subject matter. Further, proper party has been explained is a person, whose

presence is considered appropriate for effective decision of the case, though no relief may have been claimed by him. A party can be impleaded, if he has a direct interest and a legal interest in the subject matter. In a Writ Petition against the Government, if allegations are made against private parties or the officials, they should be impleaded as respondents. In the cases on hand, the petitioner has made several allegations against the Deputy Commissioner of Income Tax, Corporate Circle (I), Chennai, who was the Initiating Officer of the impugned proceedings and rightly he has been impleaded as the second respondent in his personal capacity. However, the petitioner has not impleaded Mr.RR and Archer, though there are several allegations made against them relating to transactions with the petitioner and connecting them with the second respondent. Therefore, I am of the considered view that the impleading parties are proper parties, whose presence is necessary for a complete and final decision of the question involved in these proceedings. Furthermore, if impleaded, they would be bound by the result of the action and the question to be settled in these Writ Petitions. Therefore, W.M.P.Nos.19504 to 19509 of 2017 are allowed and the proposed parties are impleaded as respondents 7 & 8 in the Writ Petitions. Thus, the question No.(i) is answered accordingly.

35.The next question to be answered is a very crucial question in the present proceedings, as it will determine the fate of the litigation and if the question is answered in favour of the petitioner, nothing more is required to be done in the matter and there would be no necessity to decide the other two questions. In the event, the question is answered against the petitioner, there may be a necessity to answer the remaining two questions. With this caveat I proceed to consider the question No.(ii) being whether the second respondent had jurisdiction to issue the impugned notice, dated 19.05.2017, the impugned prohibitory order, dated 19.05.2017, and the impugned attachment order dated 19.05.2017.

36.The contention of the petitioner is that the notification in SO 1620(E), dated 18.05.2017, was published in the gazette of India, dated 18.05.2017, and comes into force on the said date. The said notification was issued by the Central Board of Direct Taxes (CBDT) in exercise of the powers conferred under Section 28(2) read with Section 59 of the Prohibition of Benami Property Transactions Act, 1988 and in supersession of CBDT notification No. SO 3290 (E), dated 25.10.2016, published in the Gazette of India, dated 25.10.2016, except as respects things done or omitted to be done before that supersession and the Central Government directed that the Income Tax authorities, under Section 116 of the Act specified in column No.(2) of the Schedule to the notification having headquarters at the places specified in the corresponding entry in column No.(3), to

exercise the powers and perform the functions of the "authority" under the Prohibition Benami Property Act 45 of 88 specified in the corresponding entries in column No.(4) in respect of territorial areas specified in the corresponding entry No.(5) of the schedule having jurisdiction vested with them. Serial No.(9) of the schedule to the notification pertains to the income tax authorities having headquarters at Chennai and it reads as follows:-

MINISTRY OF FINANCE
(Department of Revenue)
(CENTRAL BOARD OF DIRECT TAXES)
NOTIFICATION
New Delhi, the 18th May, 2017
(Income-tax)

S.O.1621(E)

Serial No.	Income-tax Authority	Headquarters	Authority under the Prohibition of Benami Property Transactions Act, 1988	Territorial Area
(1)	(2)	(3)	(4)	(5)
9	(i) Joint Commissioner of Income-tax/ Additional Commissioner of Income-tax, (Benami Prohibition), Chennai (ii) Assistant Commissioner of Income-tax/Deputy Commissioner of Income-tax, (Benami Prohibition), Chennai (iii) Income Tax Officer (Benami Prohibition), Chennai	Chennai	(i) Approving Authority (ii) Initiating Officer (iii) Administrator	Areas within the limits of the State of Tamilnadu and Union territory of Puducherry (including Karaikal but excluding Mahe and Yanam)

37. In column No.(4) of the above schedule, the authorities under the Benami Act have been mentioned namely, the Approving Authority, the Initiating Authority and the Administrator. In column No.(2), the designation of the Income tax Authorities has been mentioned, from which it is seen that the Approving Authority sofar as the headquarters at Chennai having territorial jurisdiction of areas within the limits of State of Tamil Nadu and Union Territory of Puducherry (including

Karaikal, but excluding Mahe & Yanam) is the Joint Commissioner of Income Tax/Additional Commissioner of Income Tax, (Benami Prohibition), Chennai. The Initiating Officer is the Assistant Commissioner of Income Tax/Deputy Commissioner of Income Tax, (Benami Prohibition), Chennai and the Administrator is the Income Tax Officer (Benami Prohibition), Chennai.

38. Admittedly, the second respondent is not a Deputy Commissioner of Income Tax (Benami Prohibition), but Deputy Commissioner of Income Tax, Corporate Circle (I). The question would be if the second respondent is not the Initiating Officer, as notified in the notification, dated 18.05.2017, could he have initiated proceedings under the Benami Act against the petitioner.

39. The petitioner's case is that the date of the gazette and the notification is 18.05.2017 and on and after the said date, it is only the income tax authority, who has been notified in the notification, who could exercise jurisdiction under the Benami Act. The respondents would contend that though the notification is dated 18.05.2017, the same was uploaded online by the Government of India Press, New Delhi on the website of E-Gazette only on 22.05.2017 and therefore, the notification would come into effect on and after the said date and not on 18.05.2017 and therefore, the second respondent was well within his jurisdiction to initiate proceedings under the Benami Act.

40. In Mayer Hans George (supra), one of the question, which fell for consideration is with regard to the date of coming into force of a notification issued by the Government of India, dated 25.08.1948, stating that gold and gold articles should not be brought into India or sent to India except with the general or special permission of the Reserve Bank of India. On the same date, the Reserve Bank of India issued a notification giving a general permission for bringing or sending any gold provided it was on through transit to a place outside India. On 24.11.1962, the Reserve Bank of India published a notification dated 08.11.1962, in supersession of its earlier notification placing further restrictions on the transit of such gold to a place outside the territory of India. One of the arguments was that the notification dated 08.11.1962, being merely subordinate or delegated legislation could be deemed to be in force not from the date of its issue or publication in the Gazette, but only when it is brought to the notice of the persons, who would be affected by it and that as the same was published in the Gazette of India only on 24.11.1962, and whereas the respondent therein left Zurich on 27.11.1962, he could not possibly have had any knowledge thereof the new restriction imposed by Indian authorities and therefore, cannot be held guilty of an offence. While testing the correctness of the said submission, it was held that the notification by the Reserve Bank of India varying

the scope of exemption was admittedly published in the official gazette - the usual mode of publication in India and it was so published long before the respondent therein landed in Mumbai and the question therefore, is not whether, it was published or not, for a truth, it was published, but whether it is necessary that publication should be proved to have been brought to the knowledge of the accused and that there would be no question of individual service of a general notification on every member of the public and all that the subordinate law making body can or need do, would be to publish it in such manner that persons can, if they are interested, acquaint themselves with its contents. Further, it was pointed out that for an Indian law to operate and be effective in the territory, where it operates, it is not necessary that it should either be published or made known outside the country and as it was published and made known in India by publication in the Gazette on 24th November, the ignorance of it by the respondent, who is the foreigner is wholly irrelevant.

41. In B.K.Srinivasan (supra), one of the questions was, how and when a subordinate legislation becomes effective. It was held that it is necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. It will take effect only when it is published through the customarily recognised official channel namely, official gazette or some other reasonable mode of publication.

42. In M/s.Pankaj Jain Agencies (supra), the Court, took into consideration the decision in the cases of Mayer Hans George (supra), B.K.Srinivasan (supra), it was held that the mode of publication being prescribed, notification will come into force from the date of its publication in official gazette and it is not necessary that the notification be made known or broadcast in same recognizable way to make it enforceable.

43. In Ganesh Das Bhojraj, (supra), the Court took into consideration the decision in the cases of Mayer Hans George (supra), B.K.Srinivasan (supra), and M/s.Pankaj Jain Agencies (supra), it was held that the method and mode provided for grant of exemption or withdrawal of exemption is issuance of notification in the official gazette and for bringing the notification into operation, the only requirement of the Section is its publication in the official gazette and no further publication is contemplated. Therefore, it was held that the view in Mayer Hans George (supra), which was followed in M/s.Pankaj Jain Agencies's case represents the correct exposition of law and the notification under Section 25 of the Customs Act would come into operation as soon as it is published

in the Gazette of India. Thus, the decisions in the case of New Tobacco Company (supra), and Garware Nylons Ltd., (supra), were held to be no longer good law.

44. In ITC Bhadrachalam Paperboards & Anr., vs. Mandal Revenue Officer A.P., & Ors., [(1996) 6 SCC 634], it was held that the object of official publication in the gazette, is not merely to give information to public; Official Gazette, as the very name indicates, is an official document; it is published under the authority of the Government; publication of an order or rule in the Gazette, is the official confirmation of the making of such an order or rule; the version as printed in the Gazette is final and the same order or rule may also be published in the newspaper or may be broadcast by radio or television. It was pointed out that if a question arises when was a particular order or rule made, it is the date of Gazette publication that is relevant and not the date of publication in the newspaper or in the media. It was held that publication of an order or rule is the official irrefutable affirmation that a particular order or rule is made, is made on a particular day, (where the order or rule takes effect from the date of publication) and is made by a particular authority; it is also an official version of the order or rule and in terms of Section 83 of the Evidence Act, 1872, the Court shall presume the genuineness of the Gazette and the Court will take judicial notice, of what is published therein, unlike the publication in newspaper, which has to be proved as a fact as provided in the Evidence Act. Thus, the legal position which emerges from the above decisions, is that the notification, dated 18.05.2017, would come into effect from the date of publication in the official Gazette.

45. The contention raised by the official respondents as well as the private respondents is that the CBDT issued a clarification, dated 07.08.2017, confirming that the notification, dated 18.05.2017, was uploaded online by the Government of India Press (Directorate of Printing) on the website of e-gazette on 22.05.2017. By reading the Press release, dated 29.10.2016, issued by the Press Bureau of India, Ministry of Law and Justice, it is submitted that physical printing was being done away with and it was decided to switch to exclusive e-publishing of all gazette notification by uploading read with Section 2(21) of the 2016 Act and Section 8 of the Information and Technology Act, the notification could have come into force only on 22.05.2017, by uploading on the e-gazette by the Directorate of Printing as mentioned in the notification itself.

46. The Directorate of Printing, Government of India vide

letter dated 31.07.2017, addressed to the CBDT stated that the notification in question (18.05.2017) was received in the Press on 18.05.2017 at 07.20 p.m., without any special instructions that is urgent/priority etc., and Government of India Press, New Delhi, uploaded the notification on the website of e-gazette on 22.05.2017 at 18:06:31 hours. Based on such clarification, the CBDT, addressed the Commissioner of Income Tax (Judicial), vide letter dated 07.08.2017, stating that the Directorate of Printing, the Government of India has stated that the notification dated 18.05.2017, was uploaded by the Government of India Press on the website of e-gazette on 22.05.2017 at 18.06 hours. Further, the said communication, refers to the decision in Garware Nylons Ltd., (supra), to justify their stand that the notification would become effective from 22.05.2017. It appears that the Officer namely, DCIT (OSD), (INV.I), CBDT was unaware that the decision in Garware Nylons Ltd., (supra), was held to be no longer good law in the decision in M/s.Pankaj Jain Agencies (Supra). Thus, the respondents placed heavy reliance on the communication received from the Directorate of Printing, which specifies the date on which the notification was uploaded on the website of the e-gazette i.e., on 22.05.2017. The Directorate of Printing states that the notification was received in the Press on 18.05.2017, at 7.20p.m., without any special instructions. Thus, it goes without saying, that had there been any special instruction to upload it by a particular date, the Directorate of Printing would have done so. Hence, in the absence of any special instructions, routine procedure was followed and the uploading took place on 22.05.2017. Thus, it has to be seen as to whether the date of uploading could be taken as the date of the notification coming into force.

47. One important factor to be borne in mind is that the communication is sent from the Directorate of Printing uses the expression "uploaded" and does not use the word "published". As held by the Hon'ble Supreme Court in the aforementioned decision, what is crucial is the date of publication of the notification. Thus, in my considered view, the Directorate of Printing can at best furnish information as to the date of printing and the date on which the Gazette was made available for sale to the general public as per old the procedure and as per revised procedure, the date of uploading. If that is so, it has to be seen as to which would be the department of the Government of India, who would be competent to answer the query as to when the notification dated 18.05.2017, was published. The appropriate authority would be the department of publication.

48. The petitioner through their counsel filed an online application under the Right to Information Act to the Department of Publications, Government of India, vide application dated 21.06.2017. In the said application, the following information

was sought for

(i) please state the date of publication of SO 1621 (E) passed under sub-section (2) of Section 28 read with Section 59 of the Prohibition of Benami Property Transactions Act, 1988 by the Central Government (Department of Revenue) in the Gazette of India; (ii) please state the date on which SO 1621(E) comes into effect; (iii) please state the date on which SO1621(E) was digitally signed; (iv) please state whether applicable date for coming into force of SO 1621(E) is the date of publication in the gazette or the date of digital signature; (v) please state if the department can make publications in the gazette of India without a digital signature; (vi) please state reason for mismatch, if any, between the date of publication of SO 1621(E) in the Gazette of India and the date of digital signature.

49. Though the petitioner raised six queries, the Department of Publication answered query No.(i) by stating that the date of e-publication on e-gazette website is 18.05.2017. With regard to the other questions, it was stated that it is closely related to Government of India Press, therefore, the RTI application is being forwarded to the Chief Public Information Officer of Government of India Press, New Delhi.

50. As noticed above, the Press Information Bureau, Government of India, issued a press release on 9th October, 2015, stating that in a significant initiative, the Ministry of Urban Development has stopped physical printing of Government of India's gazette notification and introduced e-publishing of the same putting an end to a long wait for the important document. Further, it was stated that gazette notification is an important legal requirement to validate, authenticate and to make effective various kinds of laws, acts, rules, orders and government decisions. All user groups had to wait for a few months for copies of such notification as physical printing of the same was a time taking exercise. The Ministry's and departments of Government used to submit their Gazette publication requirements to the Government Printing Presses, where the work of type setting, printing and publication was undertaken and hard copies were, then made available for sale for usage by all Governments and private users.

51. The Ministry of Urban developments directed the Department of publication to stop physical printing and switch over to e-publishing of all gazette notifications on its official gazette within the five days of receipt of the same from the respective Ministries and Departments. User groups and citizens can download and print all gazette notifications free

of charge. Thus, it is clear that e-publishing of Government of India gazette is a substitute for physical printing of the gazette notification. The press release clearly indicates that physical printing of gazette notification is time consuming, expensive and not environment friendly. If such is the objective of the Government of India, it would be too hard a proposition to state that the notification issued by the Government would take effect only from the date on which, it is uploaded in the official website. If the same interpretation is to be given with regard to the old practice of physical printing, then it would amount to stating that the notification issued by the Government of India, would come into force, only on the date when it is made available for sale to the public. This interpretation is wholly untenable and contrary to the law laid down by the Apex Court in M/s. Pankaj Jain Agencies (supra). Interestingly, the authority who is competent to speak on the date of publication has stated that the date of e-publication on e-gazette website is 18.05.2017. Thus, the date of uploading by the Directorate of Printing is of no consequence and what is relevant, is the date as certified by the Department of Publication that is on 18.05.2017.

52. Having steered heard of this legal/factual position, it has to be seen as to whether the second respondent could have exercised jurisdiction as an Initiating Officer.

53. Section 2(19) defines 'Initiating Officer' to mean an Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of Section 2 of the Income Tax Act, 1961. Section 2(21) defines notification to mean a notification published in the official gazette and the expression notified shall be construed accordingly.

54. Section 18 deals with "authorities and jurisdiction", under sub-section (1) of Section 18, the following shall be the authorities for the purposes of the Benami Act, (a) Initiating Officer; (b) Approving Authority; (c) Administrator and (d) the Adjudicating Authority. Sub-section (2) of Section 18 states that the above mentioned authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, assigned, as the case may be, to it under the Benami Act or in accordance with such Rules as may be prescribed. Section 28(2) of the Benami Act, empowers the Central Government to issue orders published in the official Gazette, notify as many of its officers as it thinks fit, to perform the functions of Administrator. Section 59 of the Benami Act deals with 'powers of Central Government to issue directions, etc'. In terms of sub-section (1) therein the Central Government may from time to time, issue such orders, instructions or directions to the authorities or require any person to furnish information, as it may deem fit for the proper administrator of the Act and such

authorities and all other persons employed in execution of the Act shall observe and follow the orders, instructions and directions of the Central Government. In terms of sub-section (2) of Section 59 in issuing the directions or orders under sub-section (1), the Central Government may have regard to any or more of the following criteria namely, (a) territorial areas; (b) classes of persons; (c) classes of cases; and (d) any other criterion that may be specified by the Central Government in this behalf.

55. The notification, dated 18.05.2017, has been issued in exercise of the powers conferred under Section 28(2) read with Section 59 of the Benami Act and it supersedes the earlier notification dated 25.10.2016. Thus, in exercise of the power under Section 59(2), the Central Government has specified the Initiating Officer, who would be entitled to exercise jurisdiction within the limits of the State of Tamil Nadu and Union Territory of Puducherry (including Karaikal, but excluding Mahe & Yanam) is the Assistant Commissioner of Income Tax/Deputy Commissioner of Income Tax (Benami Prohibition), Chennai. Thus, when a statutory notification is issued specifying the authority who will be entitled to exercise power as an Initiating Officer, no other authority would be entitled to exercise such power and if done so, it would be without jurisdiction.

56. The learned Additional Solicitor General referred to Section 2(19) which defines Initiating Officer to mean an Assistant Commissioner or a Deputy Commissioner of Income Tax as defined in clauses 9A and 19A respectively of Section 2 of Income Tax Act and the second respondent being a Deputy Commissioner of Income Tax was well within his jurisdiction to initiate proceedings under Section 24 of the Act. This argument could have been accepted, but for the notification, dated 18.05.2017. As noted earlier, the notification in SO 1620 (E) was issued in exercise of the powers conferred on the Government of India under Section 59 of the Act, which provision empowers the Central Government to issue directions and while issuing directions, the Central Government may have regard to the territorial area or classes of persons or classes of cases or any other criterion that may be specified by the Central Government. In exercise of such power, the notification has specifically mentioned an Officer in the rank of Assistant Commissioner of Income Tax (Benami Prohibition)/Deputy Commissioner of Income Tax (Benami Prohibition) as Initiating Officer. Sub-section (1) of Section 59 states that when Central Government issues directions all persons employed in execution of the Act shall observe and follow the orders, instructions and directions of the Central Government. Therefore, to state that a Deputy Commissioner of Income Tax other than the Deputy Commissioner of Income Tax (Benami Prohibition) could exercise jurisdiction, would be in direct conflict with the mandate

contained in Section 59(1) of the Act.

57. In Commissioner of Income Tax vs. Sayed Ali [(2011) 3 SCC 537], the challenge was to the jurisdiction of the Commissioner of Customs (Preventive), Mumbai, to issue show cause notice under Section 28 of the Customs Act, as he was not a "proper officer" as defined under Section 2(34) of the Customs Act. Section 2(34) of the Customs Act defined "proper officer", in relation to any functions to be performed under the Customs Act to mean officer of the customs who is assigned those functions by the Board or the Commissioner of Customs. After considering the definition of "proper officer", the Apex Court pointed out that it is clear from a mere look at the provision that only such officers of customs, who have been assigned specific functions would be "proper officers" in terms of Section 2(34) of the Act. It was further held that specific entrustment of function either by the Board or the Commissioner of Customs is therefore, the governing test to determine whether the "officers of customs", is the "proper officer". Thus, on a conjoint reading of Section 24(34) and Section 28 of the Customs Act, it was held that only such a customs officer, who has been assigned the specific functions of assessment and reassessment of the duty in the jurisdictional area, where the import concerned has been effected, by either the Board or the Commissioner of Customs in terms of Section 2(34) of the Customs Act is competent to issue notice under Section 28. Further, it was held that any other reading of Section 28 would render the provision of Section 2(34) otiose in as much as the test contemplated under Section 2(34) is that of specific conferment of such function.

58. The revenue contended that once territorial jurisdiction is confirmed the Collector of Customs (Preventive) becomes a proper officer in Section 28 of the Customs Act, it was held that if such contention is accepted, it would lead to a situation of utter chaos and confusion, in as much as, all officers of customs, in a particular area be it under the Collectorate of Customs (imports) or the preventive Collectorate would be "proper officers". Therefore, it was held that it is only officers of customs, who are assigned the functions of assessment, which would include reassessment, working under the jurisdictional Collectorate within whose jurisdiction, the bills of entry or package declaration had been filed and consignment had been cleared for home consumption will have jurisdiction to issue notice under Section 28 of the Customs Act.

59. Thus, when the Central Government has specified that the Initiating Officer having headquarters at Chennai, whose territorial area is within the limits of State of Tamil Nadu and Union Territory of Puducherry (including Karaikal, but excluding Mahe and Yanam), shall only be the Deputy Commissioner of the Income Tax (Benami Prohibition) and not any other Deputy

Commissioner of Income Tax. The above mentioned interpretation becomes clearer, if we look at Section 34 of the Benami Act. The said Section falls in Chapter IV of the Act dealing with attachment, adjudication and confiscation. Section 24(1) of the Act deals with notice an attachment of property involved in Benami Transaction. Sub-section (1) states where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a Benamidhar in respect of a property, he may after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as 'Benami Property'. Sub-section (3) of Section 24, states that where the Initiating Officer is of the opinion that the person in possession of the property held Benami may alienate the property during the period specified in the notice, he may with the previous approval of the approving authority by order in writing, attached provisionally, the property in the manner as prescribed for a period not exceeding 90 days from the date of issue of notice under sub-section (1). Sub-section (4) also commences with the word "the" and states that the Initiating Officer, after making such enquiries and calling for such reports or evidence as deems fit and taking into account all relevant materials, shall, within a period of 90 days from the date of issue of notice under sub-section (1) do any of the acts as provided under clauses (a) and (b) in Section 24(4). Similarly sub-section (5) of Section 24 also refers to "the Initiating Officer". Thus, the question would be as to what is the import and purpose of using the definite article "the".

60. In *Shri Ishar Alloys Steels Ltd vs. Jayawals Neco Ltd.*, [(2001) 3 SCC 609], one of the questions, which fell for consideration was, what is meant by, "the bank", as mentioned that clause (a) of the proviso (2) Section 138 of the Negotiable Instruments Act, 1981? Answering the question, the Apex Court held that the use of the words "a bank" and "the bank" in the Section is an indicator of the intention of the legislature. The former is an indirect (sic indefinite) Article and later is prefixed by a direct (sic definite) article. It was pointed out that if the legislature intended to have the same meanings of "a bank" and "the bank", there was no cause or occasion for mentioning it distinctly and differently by using two different articles. It was further held that "the" is word before nouns, with the specifying or particularizing effect as opposed to the indefinite or generalising force of "a" or "an". It determines what particular thing is meant; i.e., what particular thing we are to assume to be meant; "The" is always mentioned to denote a particular thing or a person". "The", would, therefore, refer implicitly to a specified bank and not any bank. Therefore, it was held "the bank" referred to in clause (a) to the proviso to Section 138 of the NI Act would mean the drawee bank, on which the cheque is drawn and not all banks, where the cheque is

presented for collection including the bank of the payee, in whose favour, the cheque is issued.

61. As pointed out earlier, Section 24 of the Act refers to "the Initiating Officer". Therefore, it denotes 'a particular officer or a person' and it cannot be generalised and stated that all Deputy Commissioners of Income Tax and Assistant Commissioners of Income Tax can function as the Initiating Officer under Section 24. Thus, the only and correct conclusion would be that "the Initiating Officer" in the instant case can be either an Assistant Commissioner of Income Tax (Benami Prohibition), Chennai or the Deputy Commissioner of Income Tax (Benami Prohibition), Chennai and not any other Assistant Commissioner of Income Tax or Deputy Commissioner of Income Tax and the second respondent not being the Deputy Commissioner of Income Tax (Benami Prohibition), Chennai, was denuded of jurisdiction to act as "the Initiating Officer", on and after 18.05.2017, that being the date on which, the gazette was published.

62. The learned Senior counsel appearing for the private respondents referred to two decisions to support their contention that the notification dated 18.05.2017, comes to the effect on the date of its publication, which is only by uploading the same on-line on to e-gazette. The first decision was the case of Ganesh Das Bhojraj (supra), which has been dealt in the preceding paragraphs, which held that the law laid down in M/s. Pankaj Jain Agencies (supra), is the correct position, thereby holding that decisions in the case of Garware Nylons Ltd., (supra) and New Tobacco Company (supra), is no longer good law. This decision has been dealt with in the preceding paragraphs. The next decision relied on is in the case of S.K. Shukla & Ors vs. State of U.P. & Ors., [(2006) 1 SCC 314]. The question which was considered by the Court was that on the relevant date whether the whole area of Uttar Pradesh was notified area or not under Section 4(9) of the Prevention Of Terrorism Act, 2002, [POTA]. The Court called for the Secretarial file and found that decision on the note sheet was taken on 22.01.2003, and communication was sent to the Government Press for publication of it on 23.01.2003, but in fact, it was published as per the record of the Government Press, on 29.01.2003, though the notification was dated 23.01.2003. Therefore, the Court concluded that the whole area was notified on 29.01.2003 only and not on 23.01.2003, the date of the notification. The said decision cannot be applied to the case on hand, as the competent authority certified as to the date of publication i.e., the Department of Publication has certified the date of e-publication is 18.05.2017. E-publication of the Gazette is the only mode of publication as on date as physical printing and publication of Government Gazette has been done away with. Therefore, the notification dated

18.05.2017, having been e-published on 18.05.2017, it takes effect from the said date.

63. The learned Additional Solicitor as well as the learned Senior counsels appearing for the private respondents sought to invoke the 'defacto doctrine'. It has to be seen as to whether such doctrine could be invoked, when the Court has come to the conclusion that the second respondent lacked inherent jurisdiction on the day when the impugned notification/orders were passed. Explaining the said doctrine, the Apex Court pointed out that the defacto doctrine requires two requisites namely, (i) the possession of the office and the performance of the duties attached thereto and (ii) colour of title, i.e., apparent right to the office and acquiescence in the possession thereof by public. It was pointed out that according to the doctrine, the acts of officers defacto perform within the sphere of their assumed official authority in the interest of the public or third parties and not for their own interest or generally held valid and binding, as if they were performed by de jure officers. The Court referred to the decision of the Allahabad High Court in *Jayakumar vs. State*, 1968 Allahabad Law Journal 877, upheld the judgment of the District Judges, whose appointments were later struck down by the Supreme Court on the principle that the acts of officers defacto or not to be questioned because of want of legal authority except by some direct proceedings instituted for the purpose by state or by some one claiming the office dejuri, or except when the person himself attempts to build up some right, or claim some privilege or benefit by reason of being the officer which he claims to be. It was held that in all other cases, the acts of officers defacto are valid and effectual, while he suffered to retain the office, as though he were an officer by right and the same legal consequences will flow from them for protection of the public and of third parties. Referring to the decision in the case of *Gokaraju Rangaraj, vs. State of Andhra Pradesh* [(1981) 3 SCC 132], wherein the question as to the effect of the declaration of the Court holding the appointment of an Additional Session Judge is invalid on judgments pronouncement by him prior to the such declaration came up for consideration. It was observed that defacto doctrine is founded on good sense, the sound policy and practical interest. It is aimed at prevention of public and private mischief and the prevention of public and private interest. It avoids endless confusion and needless chaos. The legal principle laid down was that defacto doctrine can be invoked in cases, where there was appointment to office, which is defective, but notwithstanding the defect to the title of the office, the decisions made by such a defacto officer clothed with the power and functions of the office would be as efficacy as those made by a dejuri officer. However, this will not be true of a total intruder or usurper of office. Further, it was pointed out that defacto doctrine does not come

to the rescue of an intruder or usurper or total stranger to the office and the doctrine can have no application to the case of a person, who is not the holder of the office. The applicability of the defacto doctrine cannot be made to the present proceedings in an abstract manner, but has to be done bearing in mind the provisions of the Benami Act and in particular Section 24, Section 59 read with Section 2(19) and the notification dated 18.05.2017. If it is done, then the second respondent is not a person, who is the holder of the office, the Deputy Commissioner of Income Tax (Benami Prohibition), Chennai and for the purposes of the Benami Act, he could be termed as an usurper or total stranger to the office though not as a Deputy Commissioner of Income Tax, Central Circle (I). Thus, when a person, who has no authority to initiate proceedings under the Benami Act or issue orders of attachment under the Benami Act, does so, the very foundation on which he has done such act collapses and the proceedings have to be held to be wholly without jurisdiction.

64. Thus, for the above reasons, it is held that the second respondent lacked inherent jurisdiction to initiate proceedings as on 19.05.2017 and the impugned notice, the impugned prohibitory order and the order of attachment are held to be without jurisdiction and consequently are liable to be set aside. In the above, question No.(ii) is answered in favour of the petitioner.

65. In the light of the decision taken on the above question, it is not necessary for this Court to go into the other aspects, as the very foundation based on which the second respondent exercised jurisdiction has collapsed and the proceedings are held to be void. Thus, the other questions raised by the learned counsels on either side are left open including the allegations of malafide against the second respondent.

66. In the result, the Writ Petitions are allowed and the impugned orders/proceedings are quashed. No costs. Consequently, connected Miscellaneous Petitions in W.M.P.Nos.19504 to 19509 of 2017 are allowed and W.M.P.Nos.15862 to 15864 and 23213 of 2017 are closed.

s/d-

Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

pbn

To

1. The Secretary
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2. Shri.R.V.Aroon Prasaad, IRS,
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- 3.The Deputy Commissioner of Income Tax
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- 4.The Addl., Commissioner of Income Tax,
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- 5.The Addl., Commissioner of Income Tax,
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- 6.The Registrar of Companies, Chennai
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+3 Ccs to Mr.A.P. Srinivas, Advocates sr 6031,6032,6033.
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Writ Petition Nos.14626 to 14628 of 2017

NMI (CO)
SP(07/02/2018)