

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS) No. 188 of 2022

(Under Section 61 (1) of the Insolvency and Bankruptcy Code, 2016)

**(Arising out of the Impugned Order dated 29.03.2022 in MA/1373/ 2019
in MA/1130/CAA/2019 in CP/612(IB)/2017, passed by the
'National Company Law Tribunal', Division Bench – II, Chennai)**

In the matter of:

Mr. P. Eswaramoorthy

Liquidator of M/s. Senthil Papers and
Boards Private Limited
44/1, 5th Street, Ramalinga Jothi Nagar,
Near Corporation Office,
Nanjundapuram Road,
Ramanathapuram,
Coimbatore – 641045

..... Appellant

v.

The Deputy Commissioner of

Income Tax (Benami Prohibition)

Office of The Deputy Commissioner
of Income Tax (Benami Prohibition)
Room No. 104, 1st Floor, Income Tax
Investigation Wing Building
46, M.G. Road, Nungambakkam,
Chennai – 600034

..... Respondent

Present:

For Appellant : Mr. B. Dhanaraj, Advocate

For Respondent : Mr. R. Sankaranarayanan,
Addl. Solicitor General
For Mr. B. Ramana Kumar and Mr. Rajesh,
Income Tax Standing Counsels

(With)

Company Appeal (AT) (CH) (INS) No. 189 of 2022

(Under Section 61 (1) of the Insolvency and Bankruptcy Code, 2016)

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in MA/1130/CAA/2019 in CP/612(IB)/2017, passed by the
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..... Appellant

v.

**The Deputy Commissioner of
Income Tax (Benami Prohibition)**

Office of The Deputy Commissioner
of Income Tax (Benami Prohibition)
Room No. 104, 1st Floor, Income Tax
Investigation Wing Building
46, M.G. Road, Nungambakkam,
Chennai – 600034

..... Respondent

Present:

For Appellant : Mr. B. Dhanaraj, Advocate

For Respondent : Mr. R. Sankaranarayanan,
Addl. Solicitor General
For Mr. B. Ramana Kumar and Mr. Rajesh,
Income Tax Standing Counsels

J U D G M E N T
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

Comp. App (AT) (CH) (INS.) No. 188 of 2022 :

Background:

The `Appellant / Petitioner' (`Liquidator' of `M/s. Senthil Papers and Boards Private Limited'), has preferred in the instant Comp. App (AT) (CH) (INS.) No. 188 of 2022, on being dissatisfied with the `impugned order' dated 29.03.2022 in MA/1373/2019 in MA/1130/CAA/2019 in CP/612(IB)/2017, passed by the `Adjudicating Authority', (`National Company Law Tribunal'), Division Bench – II, Chennai.

Comp. App (AT) (CH) (INS.) No. 189 of 2022 :

2. The `Appellant / Petitioner' (`Liquidator' of `M/s. Senthil Papers and Boards Private Limited'), has preferred in the instant Comp. App (AT) (CH) (INS.) No. 189 of 2022, on being dissatisfied with the `impugned order' dated 29.03.2022 in MA/1372/2019 in MA/1130/CAA/2019 in CP/612(IB)/2017, passed by the `Adjudicating Authority', (`National Company Law Tribunal'), Division Bench – II, Chennai.

3. Earlier, the 'Adjudicating Authority' ('National Company Law Tribunal', Division Bench – II, Chennai), while passing the 'impugned order' dated 29.03.2022 in MA/1372/2019 & MA/1373/2019 in MA/1130/CAA/2019 in CP/612(IB)/2017 (Filed under Section 60 (5), read with Rule 11 of NCLT Rules, 2016), at Paragraphs 16 to 19, had observed the following:

16. ``Heard the Counsels for both the Parties, and perused the documents on record including the judgements, memos and written statements. The Corporate Debtor was ordered for Liquidation vide Order dated 14.02.2019 by this Adjudicating Authority. It is seen from the Orders of the Respondents that the Provisional attachments were made on 01.11.2019. At this juncture it is pertinent to note that the period of moratorium starts with the initiation of the CIRP and ends in two circumstances: either on the commencement of Liquidation or upon the approval of a resolution plan. In the present case, the Liquidation period has commenced before the date of in which the provisional attachment was made which indicates that the Respondents herein had not acted in violation of the moratorium. Further, the question of violation of Section 32A does not arise at all as there is no sale of property of the Corporate Debtor consequent to any Resolution Plan.

17. Moreover, the provisional attachment made by the Respondents comes under the statute of Prohibition of Benami Property Transaction Act, 1988 which in itself has stipulated the due process with respect to attachment of property under Section 7 of the same. The contention of the Applicant that both being special act The Insolvency and Bankruptcy Code, 2016 should prevail over The Prohibition of Benami Property Transaction Act, 1988 as per the general principle for construction does not hold in the instant case.

18. However, in the present circumstances, as there is nothing to stop the Applicant / Liquidator herein to proceed under the relevant provision to revive the provisional attachment. And that, this

Adjudicating Authority having not found any conflict between the two statutes as there is no bar in selling the property of the Corporate Debtor solely on the ground that the Corporate Debtor is under Liquidation. And that the Liquidator is also not barred by the code to add the said property into the liquidation estate. The applicant / Liquidator herein is open to approach the appropriate forum to raise the attachment or any other relief as per the provisions of the said act.

19. Further, the reliance placed by the Applicant / Liquidator in the matter of Gujarat Urja Vikas Nigam Ltd. vs. Amit Gupta and in Tata Consultancy Services Ltd. vs. Vishal Ghisulal Jain to substantiate that the Insolvency Bankruptcy Code, 2016, should prevail in the event of inconsistency cannot be relied IN the instant case as stated supra, this Adjudicating Authority is of the view that there is no inconsistency to be drawn.’’

‘and ‘Dismissed’ these ‘Petitions’.

Appellant’s Contentions in Comp. App (AT) (CH) (INS.) Nos. 188 and 189 of 2022 :

4. The Learned Counsel for the Appellant submits that the ‘Adjudicating Authority’ (‘Tribunal’), had failed to consider the intent of the ‘Appellant / Liquidator’, in filing the ‘Petitions’, as part of his duty and to protect and preserve the ‘Assets’ of the ‘Corporate Debtor’.

5. The Learned Counsel for the Appellant contends that the ‘Adjudicating Authority’, had erred in appreciating that the ingredients of Section 60 (5) of the I & B Code, 2016, enjoins the ‘Tribunal’, to ‘entertain’ and ‘dispose of’, any ‘question of priorities’ or ‘any question

of Law or Facts’, arising out of or in relation to the ‘Insolvency Resolution’ or ‘Liquidation Proceedings’ of the ‘Corporate Debtor’, under the I & B Code, 2016.

6. The Learned Counsel for the Appellant points out that the ‘Adjudicating Authority’ (‘Tribunal’), should have seen that the ‘Books of the Corporate Debtor’ and ‘Income Tax Returns’, evidence ‘Nil cash inflows’, into the ‘Corporate Debtor’, during the period of demonetization and thereby, the ‘Corporate Debtor’s Assets’, shall not be covered under , ‘The Prohibition of Benami Property Transactions Act, 1988’.

7. According to the Appellant, the ‘Adjudicating Authority’ (‘Tribunal’), should have noted that the ‘Company’s Term Loan’, for Rs.199 Crores and Cash Credit for Rs.30 Crores, through ‘Consortium Arrangements’, the ‘Security’ given were all the ‘movable and immovable Assets’ of the Company, ‘Present’ and ‘Future’. Also that, the respective ‘Mortgages’, were created as early as on 02.11.2009, 18.11.2009, 25.03.2013, well before the purported Transfer of Rs.400/- Crores to the Promoters, during Demonetization Period. In fact, these ‘Assets’, belonged to the ‘Corporate Debtor’, and were not acquired out of any alleged ‘Benami Transactions’.

8. The contention advanced on behalf of the Appellant is that there is no evidence is available to exhibit that the `Promoters`, brought the money into the `Corporate Debtor` out of Rs.400/- Crores, during the `Demonetisation Time`, and this aspect was not looked into by the `Adjudicating Authority`. Further, the `Adjudicating Authority`, should have been any `Asset`, under the `Attachment`, shall not be made part of the `Liquidation Estate`, and thus had erred in stating that the I & B Code, 2016, does not bar the inclusion of the `Assets`, into the `Liquidation Estate`.

9. The plea of the Appellant is that the `Adjudicating Authority` (`Tribunal`), had committed an error, in directing the `Appellant` to claim the `Relief` of raising the `Attachment`, over the `Corporate Debtor`s Assets`, before any other `Forum`, though the `NCLT`, is duly vested with the `Jurisdiction`, to set aside such `Attachment`. Moreover, the `Adjudicating Authority` (`Tribunal`), should have declared that the `Assets` of the `Corporate Debtor`, cannot be said to be the `Assets`, acquired out of the proceeds of the `Benami Properties`, in the light of the Records of the `Corporate Debtor`.

10. The Learned Counsel for the Appellant points out that the `Adjudicating Authority`, should have declared that the I & B Code,

2016, has an 'Overriding Effect', over the Prohibition of Benami Property Transactions Act, 1988.

11. The other stance of the Appellant is that the 'Adjudicating Authority', had failed to note that the 'Appellant', was not against the 'Attachment' of the 'Assets', in so far as they fall part of the 'Benami Transactions', the present case does not involved the 'Corporate Debtor's Assets', as part of the 'Alleged Benami Transactions', which involved, the 'Directors' of the 'Corporate Debtor'.

12. The Learned Counsel for the Appellant comes out with a plea that the 'Adjudicating Authority', should have exercise the power vested in it, under the provisions of the I & B Code, 2016, notwithstanding anything contained in any other Law, for the time being inforce, especially by virtue of Section 238 of the I & B Code, 2016.

13. The Learned Counsel for the Appellant points out that the 'Moratorium' of the 'Corporate Debtor', had commenced on 14.11.2017, by means of the 'Corporate Insolvency Resolution Process Order', and the same is continuing, pursuant to the 'Order of Liquidation', passed on 14.02.2019, as per Section 33 (5) of the I & B Code, 2016. But, in violation to the 'Moratorium', the 'Respondent' / 'Department', had

issued a 'Show Cause Notice' and a 'Provisional Attachment Order', both dated 01.11.2019, against the 'Assets' of the 'Corporate Debtor'.

14. The Learned Counsel for the Appellant, refers to the 'Reply' of the 'Liquidator, dated 20.11.2019 (vide Annexure 5, page 50 of the Appeal Paper Book in Comp. App (AT) (CH) (INS.) No. 188 of 2022, whereby, it was informed categorically (by the Liquidator), in regard to the date of 'Moratorium' and the 'Assets' of the 'Corporate Debtor', were not purchased from the funds of the 'Benami Proceeds', and the 'Assets' of the 'Corporate Debtor', was mortgaged in favour of the 'Secured Creditors', from the year 2013. Apart from that, the 'Disclosure Statement' (vide Page 126 of the Appeal Paper Book – Annexure A6), 'Audited Balance Sheets', for the Financial Year 2016-17, 2017-18 and 2018-19. The 'Bank Statements' from October 2016 to March 2017, and 'Independent Forensic Audit Report', clearly exhibit that the 'Corporate Debtor', had not received the purported sum of Rs.400/- Crores and despite the same, the 'Respondent', had failed to release the 'Provisional Attachments', passed against the 'Corporate Debtor'.

15. The Learned Counsel for the Appellant, refers to the Judgment of this 'Tribunal', dated 09.04.2021 in Comp. App (AT) (INS.) No. 575 of

2019, in *The Directorate of Enforcement v. Sh. Manoj Kumar Agarwal & 2 Ors.* wherein at Paragraph 41, it was observed as under:

41. ``..... If hindrance is being created by the attachment or by taking over the possession, it would be a question of priority arising out of or in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor and such question can be decided by the Adjudicating Authority under Section 60 (5) (c) of IBC which reads as under:

“60.....

(5)....

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.”

16. According to the Appellant, the inapplicability of the ‘Embassy Judgment’, passed by the Hon’ble Supreme Court, was mentioned in Comp. App (AT) (INS.) 579 of 2019, Judgment dated 09.04.2021 (vide Paragraph 22) and further that, the ‘Embassy Judgment’, is inapplicable to the facts of the present case, as per Article 142 (2) of the Constitution of India and Section 32A of the I & B Code, 2016. Also that , it is the stand of the Appellant that the Embassy Judgment was passed by the Hon’ble Supreme Court of India, before the insertion of Section 32A of the ‘Code’, and that presently, the immunity is granted, as per Section

32A of the 'I & B Code, 2016', to prevent any action against the properties of the 'Corporate Debtor', undergoing 'Liquidation'. Hence, the 'Instant Appeals', are perfectly maintainable in 'Law'.

17. The Learned Counsel for the Appellant comes out with a Plea that the 'Appellant / Liquidator', has assailed the 'Assessment Order', dated 31.12.2019, before the 'Commissioner of Income Tax' ('Appeal'), and the same was 'allowed', by the 'Commissioner of Income Tax' ('Appeal'), on 31.03.2022, observing that there was no need to add sum of Rs.400/- Crores protectively in the hands on the 'Corporate Debtor', over and above, the Addition, in the hands of 'Directors' of the 'Corporate Debtor', and the 'Respondent', had filed an 'Appeal', against the said Order, wherein 'no Stay', was granted, by the 'Appellate Tribunal'.

18. The Learned Counsel for the Appellant points out the responsibility of paying back the alleged Sum of Rs.400/- Crores, is not vested in the hands of the 'Ex-Directors' of the Corporate Debtor', not the 'Corporate Debtor', and hence, question of the 'Attachments of the Properties' of the 'Corporate Debtor', does not arise.

19. The Learned Counsel for the Appellant points out that the 'Properties', attached by the 'Respondent', are already charged with the

`Registrar of Companies', but also `mortgaged', to the `Secured Creditors', in the year 2013, by means of `Registered Memorandum of Deposit of Title Deeds', dated 25.03.2013 (vide Doc. No. 1751 of 2013), but the `Respondent', had attached the `Properties' of the `Corporate Debtor', which are no way connected to the `Proceeds' of `Claim'.

20. The Learned Counsel for the Appellant, refers to the Judgment of the Hon'ble High Court of Gujarat, dated 17.02.2023 in Special Civil Application No.19387 of 2022 in Welspun Steel Resources Private Ltd. V. Union of India, wherein at Paragraph Nos. 6.4, 7, it is observed that `only such property which are derived or obtained directly or indirectly as a result of a criminal activity can be regarded as proceeds of crime and there should be some materials to suggest formation of opinion in regard to reason to believe that the properties are proceeds of crime'.

21. The Learned Counsel for the Appellant, adverts to the Judgment of the `Appellate Tribunal' (Prohibition of Benami Property Transactions Act, 1988) dated 31.10.2018 (in FPA-PMLA-2173/MUM/2018) in Bank of India v. The Deputy Director, Directorate of Enforcement, Mumbai, wherein, at Paragraph Nos. 11, 12 and 40, it is categorically observed that the `Properties', already mortgaged to the `Banks', much before the alleged offence, has to be released.

22. The Learned Counsel for the Appellant comes out with a plea, that the `Corporate Debtor`, had availed `numerous Loans` and `Working Capital Facility`, from the `Financial Creditors` / `Banks`, and the `attached properties` of the `Corporate Debtor`, were `mortgaged`, to the `Banks`, as `Collateral Securities`, to the facilities availed. Hence, the `properties` of the `Corporate Debtor`, which are not involved in the alleged `Offence`, which are `mortgaged`, to the `Financial Creditors`, even much before the `alleged Offence`, and not being the `Properties`, purchased from the `Proceeds of Crime`, are `liable` to be `Released` and are covered under the `Liquidation Estate` of the `Corporate Debtor`, as per Section 36 (3) of I & B Code, 2016.

23. According to the Appellant, the Hon`ble High Court of Delhi, by an `Order` dated 15.12.2021, made in W.P. (C) No. 3261 of 2021 in Nitin Jain, Liquidator PSL Limited v. Enforcement Directorate, was pleased to allow the Writ Petition after explaining elaborately on Section 32A of I & B Code, 2016, and further, restrained the Respondent ED from taking any further action, coercive or otherwise against the `Liquidation Estate`, of the `Corporate Debtor`.

24. The Learned Counsel for the Appellant points out that the Manoj Kumar Judgment, delivered by the `Appellate Tribunal`, had explained

the applicability of Section 32A on the attachments made by 'PMLA', on the 'Properties' of 'Corporate Debtor', and further held that if a property is attached, under 'PMLA', which is belonging to the 'Corporate Debtor', if 'Corporate Insolvency Resolution Process', is initiated, the property should become available to full objects of I & B Code, 2016, till a 'Sale' of 'Liquidation Asset' occurs.

25. The Learned Counsel for the Appellant, relies on the Judgment of this 'Tribunal', dated 17.02.2020 in JSW Steel Ltd. v. Mahendar Kumar Khandelwal & Ors., uphold the 'Order', passed by the 'National Company Law Tribunal', on applying retrospective effect of the Ordinance, 2019, to the attachments made prior to the 'Ordinance' and accordingly, declared that the attachments are illegal and without jurisdiction.

26. The Learned Counsel for the Appellant points out that the Hon'ble Supreme Court of India in its Judgment dated 07.02.2001 (in Appeal (Civil) No. 3760 of 1995 in the matter of Solidaire India Ltd. v. Fairgrowth Financial Services P. Ltd. (2001) (1) SCR 932), observed that, if two special statutes contain non-obstante clause, the latest statute will prevail.

27. The Learned Counsel for the Appellant contends that in the `Order` dated 10.08.2018 in P.R. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd. ion SLP (C) No. 6483 of 2018, wherein, the Hon`ble Supreme Court held that Section 238 of the I & B Code, 2016, which override anything inconsistent contained in any other enactment, including the Income Tax Act.

28. The Learned Counsel for the Appellant submits that in Bank of India v. The Deputy Director, Directorate of Enforcement, Mumbai, the `Appellate Tribunal`, in its Judgment dated 31.10.2018, had observed that the I & B Code, 2016, overrides the Proceedings of PMLA, because of the reasons that the Properties are mortgaged with the Bank and hence the `Provisional Attachment`, is quashed, and hence, the I & B Code, 2016, overrides the `Proceedings of the Prohibition of Benami Property Transactions Act, 1988, especially, on the `Mortgage Properties` of the `Corporate Debtor`.

29. In conclusion, the Learned Counsel for the Appellant takes a stand that the I & B Code, 2016, was enacted with a `Prime Aim`, that the `Insolvency Resolution` of the `Corporate Debtor`, in a time bound manner for `Maximisation of Value of its Assets`, and balance the interests of all the `Stakeholders`, including `Alteration` in the `Order`

of priority of payment of 'Government Dues'. In fact, the provisions of the I & B Code, 2016, will prevail over any 'Act', in which, the 'Government' claims priority, touching upon the 'Assets' of the 'Corporate Debtor'. Therefore, the 'Appellant', prays for setting aside the 'impugned order' of the 'Adjudicating Authority', and to 'allow' the instant 'Appeals'.

Respondent's Submissions:

30. The Learned Additional Solicitor General of India for the Respondent contends that once the 'Cause of Action', arose under the 'Prohibition of Benami Property Transactions Act, 1988', in terms of Section 4 and 5 of the said Act, 'any 'Properties', which are subject matter of 'Transaction', shall be liable to be 'confiscated', by the 'Central Government', and hence, the 'Property' or 'Asset', cannot be considered as an 'Asset' of the 'Judgment Debtor', and cannot be vested with him.

31. On behalf of the Respondent, it is projected that the 'Liquidator', does not have the power to deal with the properties mentioned in the 'Order' dated 28.01.2020, passed by the Initiating Officer U/s. 24(4) of PBPT Act in Order No. 39/DCIT(PB)/2019-20 and 'Order', passed by the 'PBPT Adjudicating Authority', U/s. 26(3) in his order dated 03.11.2021 in Order F. No. OCA/MDS/124/2021, under IBC Code, 2016.

32. According to the Respondent, the 'Adjudicating Authority', after providing an 'Opportunity of Hearing', had determined under Section 26(3) of the 'Prohibition of Benami Property Transactions Act, 1988', that if the 'Assets' of a 'Person' or 'Benami Assets', then, under Section 27 of the said Act, the 'Adjudicating Authority, shall make an 'Order', confiscating the property, held to be 'Benami Property'. Furthermore, if an 'Appeal', is filed before the 'Appellate Tribunal', the 'Confiscation of Property', shall be made, subject to the 'Order' of the 'Appellate Tribunal', under Section 46 of the 'Prohibition of Benami Property Transactions Act, 1988'.

33. The contention of the Respondent is that, as per 'Section 27 subclause (3) of the PBPT Act, 1988', once, the 'Confiscation Order', was passed, in that event, all the rights and title in such property shall vest absolutely in the Central Government, free of all encumbrances and no compensation shall be payable in respect of such 'Confiscation'.

34. It is represented on behalf of the Respondent / Department that Section 27 of the 'Prohibition of Benami Property Transactions Act, 1988', reads as under:

27. ``Confiscation and vesting of benami property.—

(1) Where an order is passed in respect of any property under sub-section (3) of section 26 holding such property to be a benami property, the 'Adjudicating Authority' shall, after giving an opportunity of being heard to the person concerned, make an order confiscating the property held to be a benami property:

Provided that where an appeal has been filed against the order of the Adjudicating Authority, the confiscation of property shall be made subject to the order passed by the Appellate Tribunal under section 46:

Provided further that the confiscation of the property shall be made in accordance with such procedure as may be prescribed.

(2) Nothing in sub-section (1) shall apply to a property held or acquired by a person from the benamidar for adequate consideration, prior to the issue of notice under sub-section (1) of section 24 without his having knowledge of the benami transaction.

(3) Where an order of confiscation has been made under sub-section (1), all the rights and title in such property shall vest absolutely in the Central Government free of all encumbrances and no compensation shall be payable in respect of such confiscation.

(4) Any right of any third person created in such property with a view to defeat the purposes of this Act shall be null and void.

(5) Where no order of confiscation is made upon the proceedings under this Act attaining finality, no claim shall lie against the Government.’’

35. The clear cut stand of the Respondent is that, in the instant case, the ‘Adjudicating Authority’ (‘Prohibition of Benami Property Transactions Act, 1988’), having passed an ‘Order’, treating the ‘Appellant’s Assets’ as ‘Benami Assets’, only the ‘Appellate Tribunal’, under ‘PBPT Act’, can test the veracity of the ‘PBPT Adjudicating Authority’.

36. In this connection, the Learned Counsel for the Respondent adverts to the decision of the Hon’ble Supreme Court of India in M/s. Embassy Property

Developers Private Limited V. State of Karnataka & Other, reported in [2020 (1) MLJ 65 = CDJ 2019 SC 1351], wherein, at Paragraph 40, it is observed as under:

40. ``Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.``

37. On the side of the Respondent, a reliance is placed upon the Judgment of this `Tribunal' dated 18.08.2022, in C. Ramasubramaniam, Liquidator of Padmaadevi Sugars Ltd. Vs. DCIT (Benami Prohibition), in Company Appeal (AT) (CH) (Ins) No. 292 / 2022, wherein, it is observed as under:

``It must be borne in mind that in the act / transaction of 'Money Laundering', there is 'Washing the Money'. In case of a 'Benami Transaction', to evade or avoid 'Tax' or 'defrauding' the 'Revenue', the 'Victim' is the 'State' and not the 'individual', which in 'Law' is 'species' of 'fraud'.

The 'onus' of establishing that a particular 'sale' is 'Benami' and the apparent purchaser is not the 'real owner', rests upon the person asserting it to be so. The burden is to be strictly discharged by letting in evidence of a definite character, which will either directly prove the fact of 'Benami' or establish circumstances, unerringly and reasonably and raising an inference of that fact, as per decision of the Hon'ble Supreme Court in Jeydayal Poddar V Bibi Hazre reported in 1974 SCC Page 3.

It comes to be known that the 'provisional Attachment' dated 01.11.2019 was affirmed on 10.11.2021 by the 'Competent Authority,' under Section 24 (3) of 'The Benami Transactions (Prohibition) Act, 1988'. Also, it is crystalline clear that the Applicant / Appellant cannot embark upon a method to avoid / evade / supplant or circumvent the procedural hierarchy, as envisaged under the 'The Benami Transactions (Prohibition) Act, 1988', to be fulfilled by an aggrieved / affected person. To put it succinctly, the Applicant / Resolution Professional of M/s. Padmaadevi Sugars Ltd. cannot take umbrage under Section 60 (5) of the Insolvency & Bankruptcy Code, 2016 etc., in preferring an Application in MA(IBC)/05(CHE)/2020 in CP (IB) No.768(CHE)/2018 before the Adjudication Authority' (National Company Law Tribunal, Division Bench - II, Chennai), for the latent and patent reason that the 'procedural wrangle' is to be adhered to and followed by the 'Aggrieved / affected parties' which cannot be 'shaked' or 'shackled with'.'''

38. It is pointed out that before the Hon'ble Supreme Court of India in Civil Appeal No(s). 7140 of 2022, between C. Ramasubramaniam v. The Dy. Commissioner of Income Tax (Benami Prohibition) & Ors., which is pending, wherein, on 31.10.2022, 'Notice' was issued to the Respondent(s), returnable in four weeks.

39. The Learned Counsel for the Respondent, refers to the Judgment of this 'Tribunal', in Kiran Shah, RP of KSL and Industries Limited V. Enforcement Directorate, Kolkatta, (vide Comp. App AT INS. 817 of 2021), reported in MANUNL/0005/2022, wherein the implication of

Section 32A of the I & B Code, 2016, was examined, where an 'Attachment' of the 'Corporate Debtor's Asset', was made under the 'Prevention of Money Laundering Act, 2002'. In fact, this 'Tribunal', at Paragraph 110 of the Judgment in Kiran Shah, RP of KSL and Industries Limited V. Enforcement Directorate, Kolkatta, had observed as under:

110. "As far as the present case is concerned, the 'Appellant/Resolution Professional' even though has filed Company Appeal (AT) (Ins) No. 817 of 2021 being dissatisfied with the order dated 31.12.2020 in IA 81 of 2020 in CP(IB) No. 397/NCLT/AHM/2018 [filed by the Applicant / IRP for KSL Industries Ltd./Corporate Debtor under Sections 14, 18, 25 & 60(5) of Code] seeking to set aside the 'Attachment of the Property of the 'Corporate Debtor' by the Respondent/Enforcement Directorate vide order dated 24.10.2019 passed by the 'Adjudicating Authority' PMLA etc., this 'Tribunal' makes it candidly clear that filing of Application under Section 60(5) of the I & B Code is not an 'all pervasive' one, thereby conferring 'Jurisdiction' to an 'Adjudicating Authority' (NCLT) to determine 'any question/issue of priorities', question of Law or Facts pertaining to the 'Corporate Debtor' when in reality in 'Law', the 'Adjudicating Authority' (NCLT) is not empowered to deal with the matters falling under the purview of another authority under PMLA. Viewed in that perspective, IA 81 of 2020 in CP (IB) No. 397/NCLT/AHM/2018 filed by the Applicant/IRP for KSL & Industries Ltd is held by this 'Tribunal' as not maintainable in law. Resultantly, the 'Appeal', was dismissed."

40. The Learned Counsel for the Respondent, refers to the 'Common Order' of 'Hon'ble High Court of Madras' dated 25.10.2021 in W.P. Nos.

8146 to 8150, etc., wherein at Paragraph 76 to 78, it is observed and held as under:

76. ``The challenge to the impugned orders under Section 24(4) fails and the respondents are directed to proceed in line with Sections 25 and 26 forthwith. All writ petitions are dismissed. The petitioners were protected during the pendency of these Writ Petitions by virtue of an undertaking given by learned Standing Counsel for the respondents that there would be no escalation of the matter to the stage of adjudication. With the passing of this order that undertaking does not continue any longer.

77. The respondents will continue with adjudication under Section 25 and complete proceedings in light with the mandate of that Section. Notices under Section 26 of the PBPT Act will be issued within a period of 30 days from date of issue of these orders accompanied with all material that the respondents rely on and proceedings under Section 26 shall be conducted scrupulously in line with the mandate thereof.

78. The petitioners shall be afforded full opportunity to put forth all contentions before the adjudicating authority who shall take note of the same and pass speaking orders in accordance with law. Connected Miscellaneous Petitions are closed and the order of interim protection, if any, stands vacated forthwith. No costs.``

41. The Learned Counsel for the Respondent points out that in regard to the `Appeal`, preferred by the `Income Tax Appellate Tribunal`, Chennai, against the deletion of `Penalty Order`, by CIT(A), the said `Appeal`, is numbered as `ITA/234/CHNY/2023`, etc.

42. Finally, on behalf of the Respondent / Department, a prayer is made to dismiss the 'Appeals', and to uphold the 'impugned order' dated 29.03.2022 in MA/1373/2019 and MA/1372/2019 in MA/1130/CAA/2019 in CP/612(IB)/2017, passed by the 'Adjudicating Authority' ('Tribunal').

Glimpse of The Prohibition of Benami Property Transactions Act, 1988:

Benamidar:

43. Section 2 (10) of The Prohibition of Benami Property Transactions Act, 1988, defines 'Benamidar' meaning, 'a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name'.

Attachment:

44. Section 2 (5) of the Act 1988, defines 'Attachment' meaning, 'the prohibition of transfer, conversion, disposition or movement of property, by an order issued under this Act'.

Benami Property:

45. Section 2 (8) of the Act 1988, defines 'Benami Property' meaning, 'any property which is the subject matter of a 'Benami Transaction' and also includes the proceeds for such property'.

Benami Transaction:

46. Section 2 (9) of the Act 1988, defines 'Benami Transaction' meaning,

(A) a transaction or an arrangement__

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—

(i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;

(ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

Explanation.—For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), if, under any law for the time being in force,—

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

(ii) stamp duty on such transaction or arrangement has been paid; and

(iii) the contract has been registered.”

Person:

47. Section 2(24) of the The Prohibition of Benami Property Transactions Act, 1988 (Act 45 of 1988), defines ‘Person’, intend to include;

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm;

(v) an association of persons or a body of individuals, whether incorporated or not;

(vi) every artificial juridical person, not falling under sub-clauses (i) to (v);”

Property:

48. Section 2(26) of the Act, 1988, defines ‘Property’ meaning assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property.

Classification of Benami Transactions:

49. The Hon’ble Supreme Court of India in the matter of Meenakshi Mills Ltd. v. CIT, reported in AIR 1957 SC at Page 49, had classified ‘Benami Transactions’, into ‘Genuine’ or ‘Real’ and ‘Sham’ Transactions, the ‘distinguishing feature’, being an ‘intention’ of ‘Transferor’ or ‘Vendor’, to actually give ‘Possession’, to the ‘Purchaser’, in ‘whatever name’ or ‘Retain’ the ‘Title’ and ‘Beneficial Interest’, to himself.

50. Further, in the aforesaid decision, it is observed as under:

“The word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one, the usual class, the sale is genuine and title is transferred but the real transferee is not the ostensible transferee but another and in the other, where the term is inaccurately applied, the sale to the benamidar is fictitious and the title of the transferor is not intended to pass. The fundamental difference between these two classes is that while in the former title vests in the transferee, in the latter it remains with the transferor, and when a dispute arises the question as to who paid the consideration becomes relevant only with respect to the former class while in the latter the only question is whether any consideration was paid at all.”

51. Moreover, the concept of 'Benami', is explained by the Hon'ble Supreme Court of India in Thakur Bhim Singh (Dead) by Lrs. v. Thakur Kan Singh, reported in 1980, 3 SCC, Page 72, and the same is as under:

“Two kinds of benami transactions are generally recognized in India. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami. In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner. The second case which is loosely termed as a benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. The difference between the two kinds of benami transactions referred to above lies in the fact that whereas in the former case, there is an operative transfer from the transferor to the transferee though the transferee holds the

property for the benefit of the person who has contributed the purchase money, in the latter case, there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance. One common feature, however, in both these cases is that the real title is divorced from the ostensible title and they are vested in different persons. The question whether a transaction is a benami transaction or not mainly depends upon the intention of the person who has contributed the purchase money in the former case and upon the intention of the person who has executed the conveyance in the latter case. The principle underlying the former case is also statutorily recognized in Section 82 of the Indian Trusts Act, 1882 which provides that where property is transferred to one person for a consideration paid or provided by another person and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. This view is in accord with the following observations made by this Court in Meenakshi Mills, Madurai v. The Commissioner of Income-Tax, Madras [1956] S.C.R. 691 at p. 722.’

Attachment of Property:

52. Section 24 of The Prohibition of Benami Property Transactions Act, 1988, enjoins the ‘Initiating Officer’, to ‘Attach’, the ‘Benami Property’, only provisionally that too, with ‘prior Approval’ of the ‘Approving Authority’.

53. Section 24(2) of the Act, 1988, provides for an ‘Issuance of Notice’, as per Section 24(1) of the Act for the ‘Benamidar’, as well as

the 'Beneficial Owner', in consonance with Section 11 that the 'Authorities', shall be guided by the 'Principles of Natural Justice'.

54. Section 24(5) of the Act, 1988, obliges the 'Initiating Officer', to make a reference of the case to the 'Adjudicating Authority', within 15 days of 'Provisional Attachment', ordered by him.

55. Rule 5 of The Prohibition of Benami Property Transaction Rules, 2016 (Appendix III) provides, that the 'Initiating Officer', shall provisionally 'Attach', any 'Property', in the manner provided in 2nd Schedule of Income-tax Act, 1961.

Adjudication of Benami Property:

56. To be noted, that Section 26 of the Act, 1988, clarifies that

(a) While 'Attachment', can be made on prima facie coming to the conclusion in regard to the Benami Nature of Property, it cannot be confiscated without an 'Adjudication'.

(b) Sub-section 1 (2), protects an innocuous purchaser of 'Benami Property', who made the 'Purchase', for an adequate consideration, without having knowledge of its 'Benami' nature, before the 'Notice', under Section 24(1) of the Act.

(c) Sub-section 2(3) of the Section 26 of the Act, provides for 'Vesting' of Confiscated Benami Property. Section 27 of the

Act, pertains to 'Confiscation' and 'Vesting' of 'Benami Property'.

Non-obstante Clause:

57. It is pointed out that there should be a clear 'inconsistency', between the two, before giving an 'Overriding Effect', to the 'Non-obstante Clause', as per decision in R.S. Raghunath v. State of Karnataka, reported in AIR 1992, SC Page 81 at Spl Pg. 89.

58. If one finds, 'two or more enactments', operating in the same field and each containing a 'Non-obstante Clause', stating that its provisions will have effect 'notwithstanding anything inconsistent' therewith, contained in any other 'Law', for the time being 'inforce', then, one is to see the 'Purpose' and 'Policy', underlying 'two enactments', and 'language', used in them.

59. A 'Non-obstante Clause', may be used as a 'Legislative Device', to 'Modify', the 'ambit' of 'provision' or 'Law', mentioned in 'Non-obstante Clause'.

60. Ordinarily, there is a 'Close Approximity', between the 'Non-obstante Clause', and 'enacting part' of the 'Section', and 'Non-obstante Clause', may throw some light, as to the 'Scope' and 'Ambit' of 'enacting part', in case of its 'ambiguity' (vide Aswini Kumar Ghose v. Arabinda

Bose & Anr., reported in AIR 1952 SC Page 369, Page 390), but, when `enacting part`, is cleared its `Scope`, cannot be cut down or `enlarged`, by `resort` to `Non-obstante Clause`.

61. A `Conflict`, between the `two Special Acts`, which both contain `notwithstanding clauses`, can also be `resolved`, by looking, which is more `special`, than the `other`, in addition to the consideration that the `Conflict`, arose because of a `provision` added later in the `act`, which is more `special`.

Principle of Election:

62. Where there is `no repugnancy` or `inconsistency`, between the `two remedies`, `Principle of Election`, will not `Apply`, in the considered opinion of this `Tribunal`.

Income Tax Dues:

63. The `Income Tax Dues`, are like `Crown Debts`, as per decision of the Hon`ble Supreme Court of India in Principal Commissioner of Income Tax v. Monnet Ispat and Energy Ltd. (2018) 211 Comp Cas 99 (SC).

Liquidator:

64. There is no 'two opinion' of a 'pivotal fact' that the 'Liquidator's actions', are to be under the 'parental supervision' of an 'Adjudicating Authority' ('Tribunal'). A 'Liquidator', has 'no unfettered powers', to 'discharge', his 'duties', but, he is to 'perform', his 'functions', in a 'reasonable' and 'prudent' manner.

65. A 'Tribunal' / an 'Appellate Tribunal', will not 'interfere', in a Liquidator's action / decision, and will interfere when he has not acted in a 'Bonafide' manner or he acted, in a way that 'no reasonable Liquidator', could have acted. He cannot involve 'Aliens', while dealing with the 'Liquidator's Affairs'.

Appraisal:

66. At the outset, this 'Tribunal' points out that the 'Appellant'/'Liquidator' of M/s. Senthil Paper & Boards Private Ltd., Coimbatore, had filed an MA/1373/2019 in MA/1130/CAA/2019 in CP/612/IB/CB/2017, before the 'Adjudicating Authority' ('Tribunal'), seeking the 'Reliefs' of 'Interim Stay', of the 'Order' of 'Provisional Attachment' dated 01.11.2019, made in File No. IO/PBPT/Senthil Papers & Boards / 216, pending consideration of the above Application, and to

set aside the `Order of Provisional Attachment`, dated 01.11.2019, made in the aforesaid File.

67. The Appellant / Petitioner / Liquidator, had preferred MA/1372/2019 in MA/1130/CAA/2019 in CP/612(IB)/2017 (before the `Adjudicating Authority` / `Tribunal`), seeking to (a) grant Interim Stay, over the operations of the `Provisional Attachment Order`, dated 01.11.2019, made in File No. IO/PBPT/Senthil Papers & Boards / 210, and (b) Set aside the `Order of Provisional Attachment`, dated 01.11.2019, made in the aforesaid File.

68. According to the Appellant / Liquidator / Petitioner, the `Adjudicating Authority`, had admitted CP/612/IB(CB)/2017 against M/s. Senthil Papers and Boards Private Limited and ordered the initiation of `CIRP`, declaring `Moratorium`, with respect to `Corporate Debtor`.

69. It transpires that the Appellant / Liquidator, had placed the `proposed Resolution Plans`, before the `Committee of Creditors`, during the 9th CoC Meeting, that took place on 02.11.2018. After due consideration of the `Resolution Plans` submitted, the `CoC`, had rejected the `Resolutions Plans`, and consciously had resolved to prefer an `Application` for `Liquidation` of the `Corporate Debtor`, before the

`Adjudicating Authority'. In MA/604/2018, filed by the `Appellant / Liquidator /Petitioner', under Section 33 (2) of the I & B Code, 2016, for `Liquidation' of the `Corporate Debtor', a `Liquidation Order', was passed on 14.02.2019.

70. It is brought to the fore, that the Liquidation of the Corporate Debtor, was commenced on 14.02.2019. The Ex-Director / Shareholder of the Corporate Debtor, had preferred an `Appeal', i.e., Comp. App (AT) (INS.) No. 432 of 2019, before the `Appellate Tribunal', and the `Appellate Tribunal', was pleased to `Disposed of', the `Appeal', on 03.05.2019, by making the following observations:

“In view of the observations aforesaid, we hold that the Liquidator is required to act in terms of the aforesaid directions of the Appellate Tribunal and take steps under Section 230 of the Companies Act. If the members of the Corporate Debtor or the Creditors or a class of creditors like `Financial Creditor' or `Operational Creditor' approach the Company through the liquidator for compromise or arrangement by making proposal of payment to all the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the Liquidator on behalf of the will move an application under Section 230 of the Companies Act, 2013, before the `Adjudicating Authority' i.e., National Company Law Tribunal, Chennai Bench, in terms of the observations as made in above.”

71. It comes to be known that one Mr. O. Arumugasamy, an Ex-Director / Shareholder, had placed a Scheme of Compromise /

Arrangement (under Section 230 of the Companies Act, 2013) with the Liquidator on 10.07.2019, etc. After the receipt of 'Revised Scheme', the 'Appellant / Petitioner / Liquidator', preferred MA/1130/CCA/2019 in CP/612/IB(CB)/2017, for convening the 'Meeting' of both 'Secured and Unsecured Creditors', in regard to the proposed Scheme and the said 'Application', was 'Allowed' on 08.11.2019, by the 'Adjudicating Authority'.

72. It appears that the Appellant / Petitioner / Liquidator (pending the Liquidation Proceeding), had received a 'Notice' dated 01.11.2019, from the Respondent, to 'Show Cause', as per Section 24(1) of the The Prohibition of Benami Property Transactions Act, 1988, as to why the 'Property' being the proportionate share of the Land, owned by the 'Corporate Debtor', out of the total extent of 889.82 Acres, where the factory of the 'Corporate Debtor', was located, should not be treated as 'Benami Property', and that, any 'Reply' ought to be provided on or before 21.11.2019. The Respondent, also had issued a 'Provisional Attachment Order' dated 01.11.2019, as per Section 24(3) of the Act, 1988.

73. The Appellant / Petitioner gave his 'Reply' dated 20.11.2019, pointing out that the 'Notice', issued was not warranted against the

`Assets' of the `Corporate Debtor', and as to how the `Provisional Attachment' of the `Assets' of the `Corporate Debtor', by the `Respondent', was not Sustainable.

74. According to the Appellant / Petitioner / Liquidator, the `Notice' to `Show Cause' dated 01.11.2019, mentioned that during the course of such proceedings, various incriminating documents and loose sheets were found and seized, as per which during the period of demonetisation, Rs.400/- Crores in `Old High Denomination Notes', were given to Senthil Group, Coimbatore, for the purchase of the Paper Mill in Coimbatore District, belonging to Smt. Sasikala, through her Intermediaries, etc.

75. The crystalline stand of the Appellant / Liquidator is that, there was no Cash Inflows into the Company, either in the form of Cash or Cheque, from the Promoters of the Company or others, and the same is evidenced from the Disclosure on `Specified Bank Notes', given by the `Statutory Auditor', in his `Report' for the Financial year 2016-17, filed with the `Ministry of Corporate Affairs'. To support the fact that there was no Cash Flows into the Corporate Debtor, the `Appellant' / `Petitioner', had enclosed the Copy of the Audited Balance Sheets for the Financial Years 2016-17, 2017-18 and 2018-19, Income Tax Returns for the Years 2016-

17, 2017-18 and 2018-19 and the Bank Statements from October 2016 to March 2017 of the Corporate Debtor.

76. The prime plea of the Appellant / Petitioner / Liquidator is that, when the Charge on the Assets was subsisting, it is not known, as to how, such transactions could have been made and any transaction sought to be made, during the subsistence of Charge by the 'Suspended Director', 'Promoters' and 'Boards', is void. Further, the 'Assets' sought to be attached, continued to stand in the name of the 'Corporate Debtor', which the 'Creditors', are entitled to.

77. According to the Respondent / Department, during 2017, search actions (under the Income Tax Act, 1961), were initiated in respect of Smt. V.K. Sasikala and Others and that resting upon the materials emanated during search proceedings, information relating to certain Transactions was sent to the Office of DCIT, Respondent, vide Letter dated 17.05.2019, by the JDIT (Inv.) (OSD), Unit-2(1), Chennai, and the information reflected that numerous incriminating documents and loose sheets for found and seized, which showed among other things that during the Demonetisation period, Rs.400/- Crores in 'Old High Denomination Notes', were given to Senthil Group, Coimbatore, for the purchase of a

Paper Mill, in Coimbatore District, belonging to Senthil Group, by Smt. Sasikala, through her Intermediaries.

78. Later, a Service Apartment at Room No.302, Shylee Nivas Service Apartments, Nutech Lushington, Old No. 41, New No. 76, Block-II, 1st Main Road, CIT Nagar, Nandanam, Chennai – 35, was searched on 18.11.2017 (based on source information), during which many Original Memorandum of Understandings, Land Documents, Share Certificates, etc., were found and seized.

79. It is the stand of the Respondent that the seized material included Share Certificates of M/s. Saradha Papers and Boards Private Limited (Erstwhile name of M/s. Senthil Papers and Boards Private Limited) in the names of Shri. T.N. Vetrivel, Shri. A. Senthil Kumar, Shri. O. Arumugasamy, Shri. T.N. Mariya Gouder and Shri. M. Palanisamy. Further, a `Memorandum of Understanding`, mentioning the details of `Sale of Assets` of M/s. Senthil Papers and Boards Private Limited, along with its Paper Mill 830 Tonnes Per Day, running business and 15 MW cogeneration Power Plant, etc., where M/s. Senthil Paper and Boards Pvt. Ltd. is located and 7,74,538 sq.ft. construction on it and also the details of

Transfer of entire Equity Share of M/s. Senthil Papers and Boards Pvt. Ltd., was also seized from the Service Apartment.

80. That apart, Senthil Group was also covered by a Search, as per Section 132, under the Income Tax Act, 1961, and Mr. A. Senthil Kumar, MD of M/s. Senthil Papers and Boards Pvt. Ltd., admitted on oath that they had received Cash in OHD's to the tune of Rs.400 Crores through Mr. S. Senthil, Advocate, towards the Sale of the above Company.

81. In the instant case, it is quite evident that the Respondent / Department had attached the 'Property' of the 'Corporate Debtor', as per the ingredients of the Provisions of 'The Prohibition of Benami Property Transactions Act, 1988'. Therefore, an 'Attachment' effected, under 'The Prohibition of Benami Property Transactions Act, 1988', is to be assailed under the relevant provisions of the said Act, 1988, and in fact, the 'I & B Code, 2016', only pertains to questions concerning the 'Insolvency Resolution' or 'Liquidation Proceedings' of the 'Corporate Debtor'. Viewed in that perspective, the 'Attachment', made as per Section 24(3) of 'The Prohibition of Benami Property Transactions Act, 1988', cannot be a 'subject matter' of 'proceedings', under Section 60(5) of the I & B Code, 2016, in the considered opinion of this 'Tribunal'. To put it differently, the 'Adjudicating Authority' ('National Company Law

Tribunal'), is not the proper 'FORA', to determine the controversies, revolving around the 'Attachment' of the 'Property', under 'The Prohibition of Benami Property Transactions Act, 1988', as held by this 'Tribunal'. As such, it is held by this 'Tribunal', that the filing of the instant Comp. App (AT) (CH) (INS.) Nos. 188 and 189 of 2022, by the 'Appellant / Petitioner / Liquidator', per se are 'not Maintainable', in the 'eye of Law'.

82. At this stage, this 'Tribunal', pertinently points out that the 'Onus', has to be strictly discharged by adducing legal evidence of the 'Definitive Character', which would either directly prove the fact of 'Benami' or 'establish' circumstances unerringly and reasonably, raising an inference of that fact, as per decision of the Hon'ble Supreme Court of India in Jaydayal Poddar (Deceased) V. Mst. Bibi Hazra & Ors. (1974) 1 SCC, Page 3.

83. It cannot be gainsaid that the 'Benami Transactions', are not confined to 'purchases only', and can extend to other 'Modes of Transfer', as well. The 'Burden' to establish 'Benami', lies on a 'Person', who asserts so. The relevant circumstances were (i) Source of Consideration (ii) The nature of Possession of Property (iii) The Motives,

if any (iv) The position of the Parties (v) The custody of Title Deed and (vi) The conduct of Parties in dealing with the Property, after Sale.

84. An existence of 'Fiduciary Relationship', is to be determined on the basis of facts and circumstances of the individual case, as per decision of the Hon'ble Supreme Court of India in Marcel Martins V. M Printer & Ors., AIR 2012 1987.

85. In so far as the 'Revocation of the Attachment', effected by the 'Respondent / Department' is concerned, 'The Prohibition of Benami Property Transactions Act, 1988', has a 'Viable', 'Effective' and 'Efficacious Hierarchy', to be 'resorted to', and the 'Appellant', is to take 'Recourse', to that 'Remedy'. Even an 'Appeal', is provided, under the Act, 1988, for 'Redressal' of 'Grievances', suffered by an 'Aggrieved Person', as opined by this 'Tribunal'.

86. A mere running of the eye of the ingredients of Section 60(5) of the Code, clearly indicates that it is not an all pervasive Section, conferring 'Jurisdiction', to an 'Adjudicating Authority' ('Tribunal'), to determine any questions, relating to the 'Corporate Debtor'. One cannot fall back upon Section 60(5) of the I & B Code, 2016, for seeking 'remedy',

concerning the matter, relating to 'The Prohibition of Benami Property Transactions Act, 1988', in the earnest opinion of this 'Tribunal'.

87. In so far as the 'Annulling' of the 'Assessment Order', issued under the Income Tax Act, 1961, and the 'Notice of Demand', dated 31.12.2019, issued under the Income Tax Act, 1961, the said Act, enjoins an 'Appeal', being preferred against an 'Assessment Order', under the relevant provision of the Income Tax Act, 1961.

88. It is to be remembered that a 'Moratorium', under Section 14 of the I & B Code, 2016, does not affect the 'Provisional Attachment Order', passed under 'The Prohibition of Benami Property Transactions Act, 1988'. The object of the 'Act 1988', is to 'Prohibit the Benami Transactions', and the 'right' to 'redeem' / 'recover', the 'Property', held 'Benami', for matters connected therewith or incidental thereto.

89. However, the preface to the I & B Code, 2016, shows that it is meant to consolidate and amend the 'Laws', relating to 'Reorganisation and Insolvency Resolution of Corporate Persons, Partnership Firms and Individuals', in a time bound method, ofcourse, for 'Maximisation of Values', etc.

90. A closure scrutiny of 'The Prohibition of Benami Property Transactions Act, 1988', and the 'I & B Code, 2016', clearly exhibit that they do operate in their own field and without any simmering doubt, this 'Tribunal', without any 'haziness', holds that an 'element of public interest', is involved in 'PBPT Act'.

91. Only when a Resolution Plan was approved by the 'Adjudicating Authority' ('Tribunal'), Section 32A of the I & B Code, 2016, gets attracted. In reality, an 'Adjudicating Authority' ('Tribunal'), cannot traverse upon matters which is beyond its 'scope'. To put it precisely, 'issues'/^disputes', pertaining to an 'Attachment', effected under 'The Prohibition of Benami Property Transactions Act, 1988', cannot be gone into, by an 'Adjudicating Authority' ('Tribunal'), under the I & B Code, 2016. In short, the 'Appellant / Liquidator', cannot take umbrage, either under the ingredients of Section 32A, coupled with Section 60(5) of the I & B Code, 2016.

92. One cannot brush aside a candid fact, when a particular enactment / statute, showers certain 'rights', 'obligations', 'determination of remedies', then, 'recourse' to be done by a person and also that a public law remedy, under 'The Prohibition of Benami Property Transactions

Act, 1988', cannot be claimed, before an 'Adjudicating Authority' ('Tribunal'), under the I & B Code, 2016, as held by this 'Tribunal'.

93. It cannot be lost sight off, 'Section 67 of The Prohibition of Benami Property Transactions Act, 1988', provides for a non-obstante clause, which runs to the following effect:

67. "Act to have overriding effect.— The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

94. In the instant case, it transpires that the 'Respondent / Department', had effected the 'Provisional Attachments', on 01.11.2019. As a matter of fact, the 'Liquidation Order', in respect of the 'Corporate Debtor', was passed by the 'Adjudicating Authority' ('Tribunal'), on 14.02.2019. The other vital fact that emerges is that, the 'Liquidation Period', began, prior to the 'Date of the Provisional Attachment Order', and this points out clearly that, no 'malafide' or 'ill will', can be attributed to the 'Respondent / Department', in any manner.

95. Moreover, the aspect of 'Invocation of Section 32A of the I & B Code, 2016', does not arise on any score, because of the fact that there

was no 'Sale of Property' of the 'Corporate Debtor', based on any 'Resolution Plan'.

96. As a matter of fact, in ITA.No.1043/2019-20, filed by the Appellant (M/s. Senthil Papers and Boards Private Limited, Coimbatore – 18), Represented by the 'Liquidator', on 31.03.2022, an 'Order', was passed, wherein, at Paragraph 6.4, 6.5 and 7, it is observed as under:

6.4. 'As the entire addition of Rs.400 Crore, were confirmed in the hands of the Directors of the appellant company in proportionate to their shareholding pattern it is considered and opined that there is no need to make any decision in respect of the same amount in the hands of the appellant company which was added protectively.

6.5. In this background, by considering the fact about the confirmation of addition in the hands of the Directors, the grounds raised by the appellant company upon the issue of addition of Rs.400 Crore in the hands of the company protectively are allowed.

7. In the result, the appeal is treated as allowed.''

97. It is brought to the notice of this 'Tribunal', on behalf of the 'Respondent / Department' that, as against the said 'Order', dated 31.03.2022, passed in CIT (A), the Income Tax Department, had filed an 'Appeal', before the 'Income Tax Appellate Tribunal', bearing No. 503/Chny/2022, and the same is pending. No wonder, in 'Law, an 'Appeal', is a continuation of 'Original Proceedings'.

98. Be that as it may, in the light of foregoing qualitative and quantitative discussions, this `Tribunal`, taking note of the divergent contentions advanced on either side, considering the fact that `Liquidator`, cannot bypass a remedy, provided under `The Benami Transactions (Prohibition) Act, 1988`, in assailing the `Order`, passed by the `Adjudicating Authority`, before the `Appellate Tribunal`, under the `PBPT Act, 1988`, keeping in mind of the surrounding facts and circumstances of the case, in a holistic fashion, comes to a resultant conclusion that the view arrived at, by the `Adjudicating Authority` (`National Company Law Tribunal`, Division Bench – II, Chennai), in dismissing the MA/1373/2019 and MA/1372/2019 in MA/1130/CAA/2019 in CP/612(IB)/2017, through its `Impugned Order`, dated 29.03.2022, is free from `Legal Infirmities`. Consequently, the `Appeals`, fail.

Disposition:

In fine, the Comp. App (AT) (CH) (INS.) Nos. 188 and 189 of 2022, are `Dismissed`. No costs. The connected pending `Interlocutory Applications`, if any, are `Closed`.

Before parting with the case, this 'Tribunal', makes it quite clear that the 'Dismissal' of the aforesaid 'Appeals', will not 'preclude' the 'Appellant / Liquidator / Petitioner', to 'approach', the 'Competent Forum', for 'Redressal' of his grievances, seeking necessary 'reliefs', thereto, as deemed fit in the subject matter in issue, in the manner known to 'Law', and in accordance with 'Law', if he so desires / advised.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member Technical)

13/03/2023
SR / TM