

Re-Initiation of Proceedings by Initiating Officer – Validity

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The Honourable High Court of Delhi recently in the case of Smt Sunita Gupta v Union of India has an occasion to examine the validity of re-initiation of proceedings by Initiating Officer (IO) under the Prohibition of Benami Property Transactions Act, 1988 (Benami Act). The Honourable High Court after considering the facts of the case has held that there is nothing in law to stop the IO from re-initiating the proceedings if the procedural defects were made correct and the issue of notice is not barred by limitation.

The facts of the case before the Honourable High Court are as follows. On 25.01.2017, the IO has passed an Order of Provisional Assessment in terms of Section 24(3) of Benami Act restraining Smt Sunita Gupta from transferring or charging the property amounting to Rs 2,99,000/- deposited in the savings bank account stating that beneficial owner of such property (amount) is Mr Nitin Jain.

On 08.02.2017, the IO issued a show cause notice under Section 24(1) of Benami Act asking Smt Sunita Gupta to explain why the provisional attachment order issued earlier should not be continued. Smt Sunita Gupta along with Mr Nitin Jain has responded to the notice denying the allegations. However, IO has passed an order continuing the provisional attachment till the Adjudicating Authority (AA) passes an order.

On 05.05.2017, the IO has made a reference to AA and on 15.05.2017, the AA has issued a show cause notice to Smt Sunita Gupta and Mr Nitin Jain to file their replies. After perusing the replies, the AA has come to a conclusion that the property held by Smt Sunita Gupta is not a benami property and has set aside the order passed by IO.

On 26.05.2018, the IO has issued a fresh show cause notice calling Smt Sunita Gupta to explain why the amount of Rs 2,99,000/- should not be considered as benami property within the meaning of Section 2(8) and 2(9) of the Benami Act. The said notice was challenged in the Writ Petition before the Honourable High Court of Delhi wherein the validity of re-initiating the proceedings by IO is questioned. The petitioners (Smt Sunita Gupta) has stated that once the AA has passed an order, the recourse available to IO is to prefer an appeal before the Tribunal under the provisions of the Benami Act but not to re-initiate the proceedings.

The Honourable High Court has held that the AA has set aside the order of IO for the reason that IO has passed a provisional attachment order under Section 24(3) without issuing a notice under Section 24(1). A plain reading of Section 24(1) makes it clear that IO has reasons to believe that any person is a benamidar in respect of a property, the IO after recording his reasons in writing, may issue a notice to person to show cause why such person should not be treated as benamidar. Further, on a plain reading of Section 24(3), the IO can issue a provisional attachment order restraining to transfer the benami property if he is of the opinion that the person in possession of such benami property would alienate such property **during the period specified in the notice, that is the time given by IO for the noticee to show cause why such property should not be treated as benami property.**

The AA on combined reading of Section 24(1) and 24(3) has held that to pass a provisional attachment order, the IO has to first issue a show cause notice. Since in the given facts of the case, the IO has resorted to issue a provisional attachment order on Smt Sunita Gupta without first issuing a show cause notice under Section 24(1). Hence, the AA has held that such provisional attachment

order issued under Section 24(3) and subsequent order for continuing such provisional attachment order cannot be sustained.

Hence, the Honourable High Court has held that since the order of AA setting aside the order of IO is for the reason that IO has not adopted the procedure laid down in Section 24 and AA has not examined whether the property is actually a benami property¹, the IO is not precluded from issuing a fresh show cause notice by curing the procedural defect as observed by AA. The Honourable High Court has also held that the principles of *res judicata* do not apply since the AA has not taken any decision on the merits of the case.

The Honourable High Court after placing reliance on various Supreme Court judgments has concluded in the following words vide Para 16:

It is well settled that if an order is set aside on account of violation of the principles of natural justice or on account of any procedural defect in the decision making process, the concerned authority is not precluded from re-initiating the proceedings after curing the procedural defects. This is, of course, subject to the condition that the fresh proceedings are (a) within the jurisdiction of the authority; and (b) are not barred by limitation. In the present case, there is no dispute that the IO has the jurisdiction to issue a show notice under Section 24(1) of the Act. There is also no dispute that such notice is not barred by limitation. In view of the above, this Court is unable to accept that the IO (respondent no.3) was in any manner precluded from issuing the show cause notice.

¹ The High Court made a passing reference that the issue as to whether the AA could independently conclude whether the properties are benami notwithstanding any procedural defect in issuance of attachment orders, is a contentious one and given the language of Section 26(3), the court is of prima facie view that AA is only duty bound to see whether the properties are benami or not and does not have powers to remand the matter to IO.