

THE CHAMBER OF TAX CONSULTANTS

WORKSHOP ON BENAMI ACT, PMLA AND BMA

WEST END HOTEL, MUMBAI

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FUNDAMENTAL PROVISIONS OF BENAMI ACT

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CONSEQUENCES OF BENAMI TRANSACTION

1. PROHIBITION OF RIGHT TO RECOVER BENAMI PROPERTY – S. 4

- *RO* cannot recover property from *B*
- *RO* defence against *B* is barred

2. CONFISCATION – S. 5

- Benami property liable for confiscation by CG.

3. PROHIBITION ON RE-TRANSFER OF PROPERTY – S. 6

- *B* cannot re-transfer benami property to *RO*
- Re-transfer of property – null and void

4. PUNISHMENT – S. 53

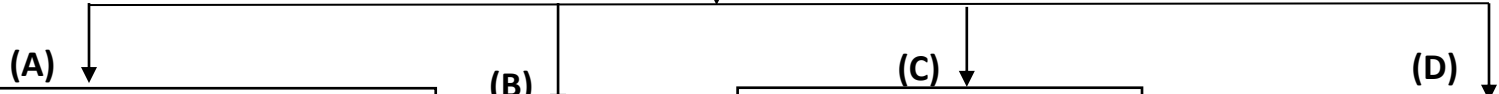
- Rigorous Imprisonment: 1-7 years *and*
- Fine upto 25% of FMV

BENAMI ACT

“Benami Transaction”

[Section 2(9)]

TRANSACTION/ARRANGEMENT



- Property transferred to or held by **B**
- ***Consideration paid by BO***
- ***Property held by B for benefit of BO***

Four Exceptions to (A)

- ***Fiduciary*** ; Trustee, Executor, Partner, Director, Depository
- Karta/Member -HUF
- Spouse/child
- Brother, Sister Lineal A/D (Jt. Ownership in Document)

}

Consideration paid out of "known sources"

(B)

Transaction in Fictitious Name

(C)

Owner

- Not aware of ownership
- Denies ownership

(D)

Payer of Consideration

- Not traceable
- Fictitious

Exception to (A) to (D)

P/Attorney Transaction

- Consideration paid by **B**
- Possession with **B**
- Ownership with **BO**
- Stamp duty paid
- Contract Registered

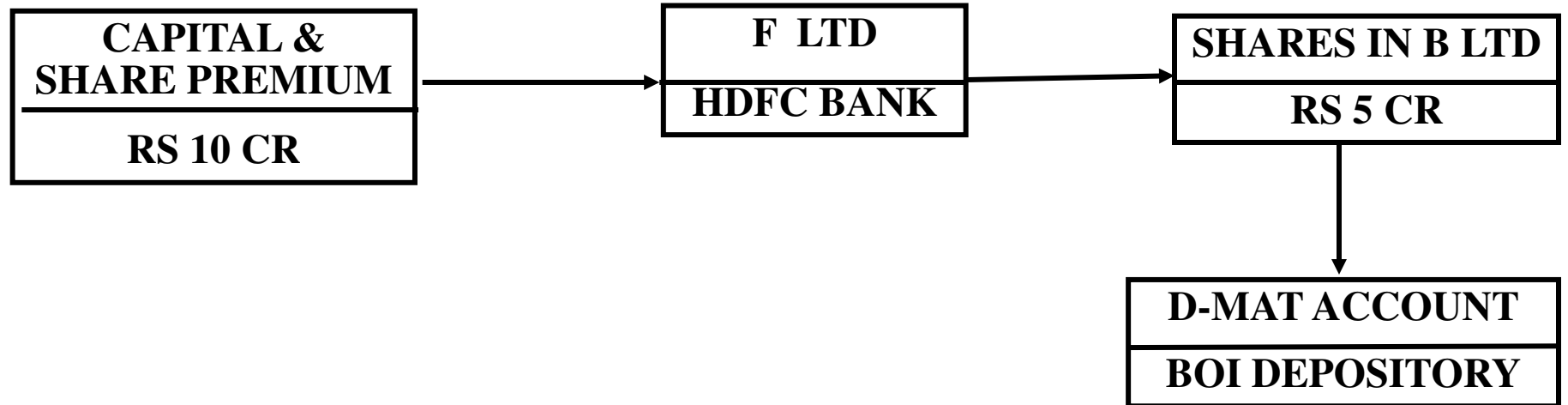
CASE STUDY 1

1. *F Ltd* was incorporated in 2010 for the purpose carrying on the business of finance and investment.
2. In June 2013, *F Ltd* issued 10 lakh equity shares of Rs 10/- each at a premium of Rs 90 per share and received Rs 10 crores by way of capital and share premium.
3. *F Ltd* invested Rs 5 crores in equity shares of *B Ltd*, through stock exchange.
4. The tax assessment of *F Ltd* for assessment year 2014-15 was completed after scrutinizing the particulars of the amount received by *F Ltd* by way capital and share premium. The assessment was completed after verifying and accepting the explanation and particulars furnished by *F Ltd* about the source of capital and share premium.
5. In January 2019, *F Ltd* received SCN under section 24(1) of Benami Act alleging that *F Ltd* is benamidar for unknown beneficial owners in respect of the sum of Rs 10 crores received as capital and share premium.
6. *F Ltd* also received the Order of provisional attachment under section 24(3) pursuant to which the D-Mat account of *F Ltd* with BoI in which shares of *B Ltd* were held, was attached.
7. *F Ltd* seeks your advice for dealing with the allegation in SCN under section 24(1) and Order of attachment under section 24(3).

Please advise *F Ltd*.

BENAMI TRANSACTION

CASE STUDY 1 – Contd ...



BENAMI TRANSACTION

EXCEPTION 1

PROPERTY HELD BY KARTA/MEMBER OF HUF

- **KARTA OR MEMBER OF HUF HOLDS THE PROPERTY**
- **PROPERTY IS HELD FOR THE BENEFIT OF KARTA/MEMBER/OTHER MEMBERS**
- **CONSIDERATION FOR THE PROPERTY**
 - **HAS BEEN PROVIDED OR PAID**
 - **OUT OF KNOWN SOURCES OF THE HUF**

BENAMI TRANSACTION

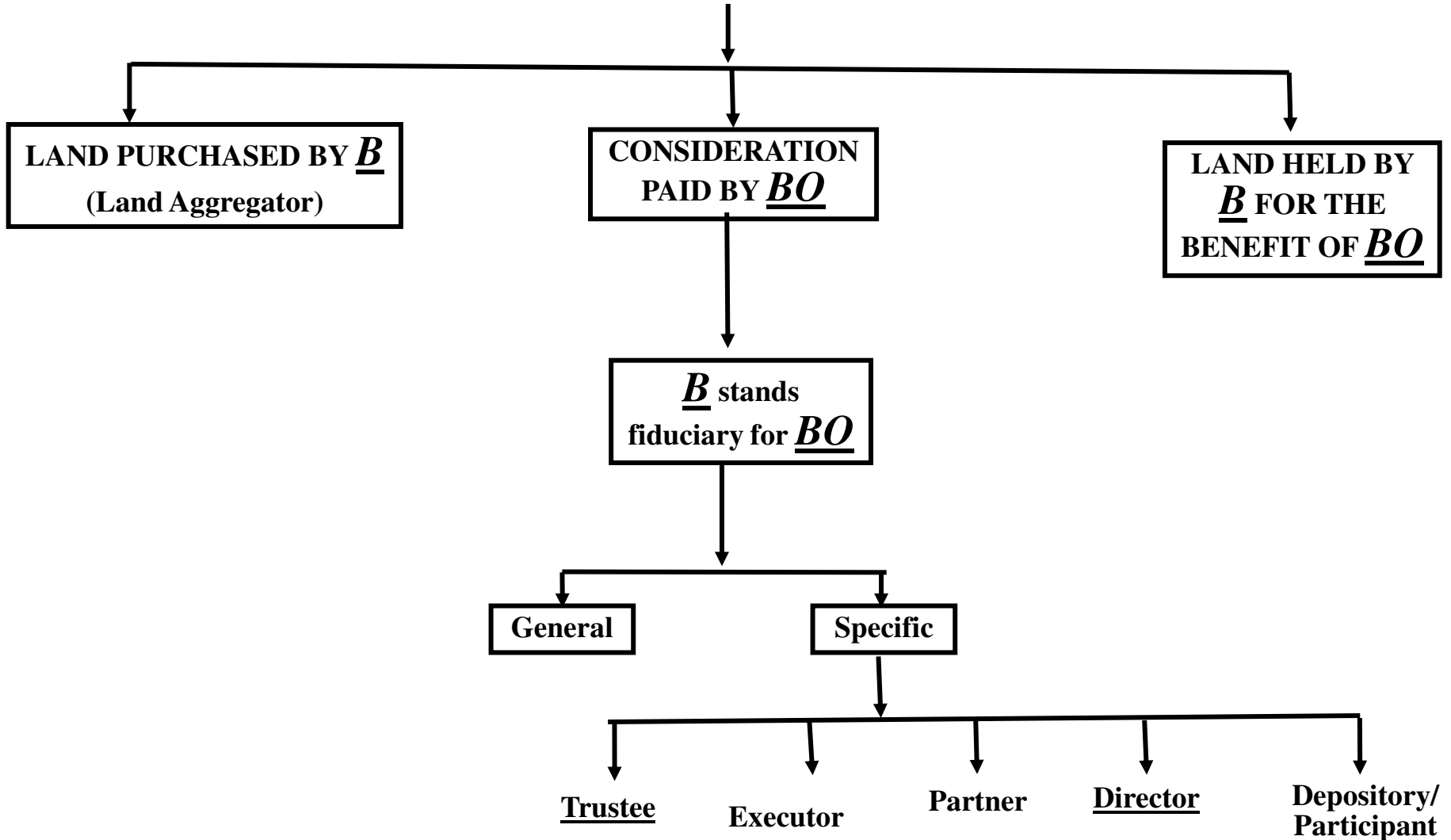
EXCEPTION 2

PROPERTY HELD IN FIDUCIARY CAPACITY

- PROPERTY IS HELD BY **B** IN A **FIDUCIARY** CAPACITY
- **B** HOLDS THE PROPERTY **FOR THE BENEFIT OF BO**
- **B INCLUDES**
 - TRUSTEE
 - EXECUTOR
 - PARTNER
 - DIRECTOR OF COMPANY
 - DEPOSITORY
 - PARTICIPANT AS AGENT OF DEPOSITORY
 - ANY OTHER PERSON NOTIFIED BY CG

CASE STUDY 2
FIDUCIARY CAPACITY

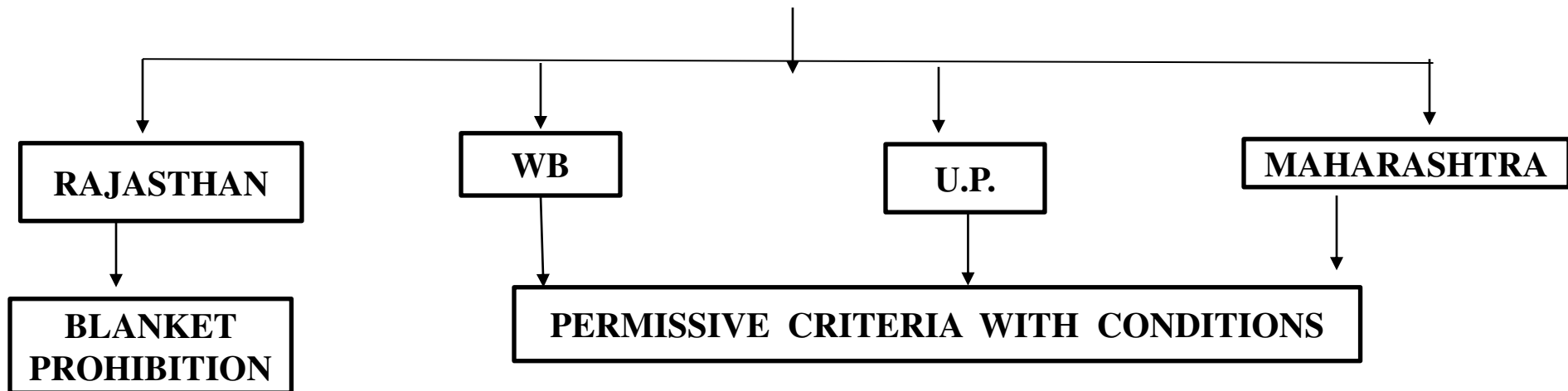
PURCHASE OF LAND SUBJECT TO
LAND CEILING ACT



CASE STUDY 2 – Contd FIDUCIARY CAPACITY

PRELIMINARY STEP TO ASCERTAIN POSSIBILITY OF CLAIMING FIDUCIARY RELATIONSHIP

ILLUSTRATIVE STUDY OF LAND LAWS OF RELEVANT STATES



- **Except with general or special permission of (Provision for compounding of offence)**
- **State Government vested with power to exercise discretion (industrial promotion policy or Scheme of State Government)**
- **Precedents of State Government having exercised discretion**

CASE STUDY 2 – Contd FIDUCIARY CAPACITY

DOCUMENTATION TO ESTABLISH FIDUCIARY RELATIONSHIP

AGREEMENT BETWEEN *F* AND *BO*

PREAMBLE

- **Identification of land for project**
- **Application to Government for project approval**
- **Object of engaging *F***
 - **To expedite project execution**
- **Contingency provision**
 - **Approval not received**
 - ***F* to transfer land to *BO***

OPERATIVE CLAUSES

- **Basis of fiduciary relationship**
- **Nature of Authority given to *F***
- **Obligations of *BO***
- **Obligations of *F***

BENAMI TRANSACTION

EXCEPTION 3

PROPERTY HELD IN THE NAME OF SPOUSE OR CHILD

- **PROPERTY HELD BY INDIVIDUAL**
- **THE INDIVIDUAL HOLDS THE PROPERTY IN THE NAME OF HIS SPOUSE OR CHILD**
- **CONSIDERATION FOR SUCH PROPERTY**
 - **HAS BEEN PROVIDED OR PAID**
 - **OUT OF THE KNOWN SOURCES OF THE INDIVIDUAL**

EXCEPTION 4

PROPERTY HELD IN NAME OF BROTHER, SISTER,

LINEAL ASCENDANT OR DESCENDANT

- **PROPERTY HELD BY A PERSON**
- **THE PERSON HOLDS THE PROPERTY IN THE NAME OF HIS**
 - **BROTHER; OR**
 - **SISTER; OR**
 - **LINEAL ASCENDANT; OR**
 - **LINEAL DESCENDANT**
- **THE NAMES OF SUCH PERSON AND INDIVIDUAL APPEAR AS JOINT OWNER IN THE DOCUMENT**
- **THE CONSIDERATION FOR SUCH PROPERTY**
 - **HAS BEEN PROVIDED OR PAID**
 - **OUT OF KNOWN SOURCES OF THE INDIVIDUAL**

BENAMI PROPERTY
[Section 2(8)]

“*BENAMI PROEPRTY*” MEANS

- ANY PROPERTY [S. 2(26)] →
- WHICH IS THE SUBJECT MATTER OF BENAMI TRANSACTION [S. 2(9)] →

AND ALSO INCLUDES

- THE PROCEEDS FROM SUCH PROPERTY

PROPERTY

[Section 2(26)]

“*property*” means

- assets of any kind
 - movable or immovable
 - tangible or intangible
 - corporeal or incorporeal
- *and* includes
- any right, interest, legal documents/instruments
 - evidencing title to or interest in the property
- property in converted form
- proceeds from the property

BENAMIDAR
[Section 2(10)]

“*BENAMIDAR*” MEANS

- A PERSON [S. 2(24)] →

OR

- A FICTITIOUS PERSON
 - IN WHOSE NAME BENAMI PROPERTY [S. 2(8)] →
IS TRANSFERRED OR HELD

AND INCLUDES

- A PERSON WHO LENDS HIS NAME.

PERSON
[Section 2(24)]

“PERSON” SHALL INCLUDE

- i. AN INDIVIDUAL
- ii. A HINDU UNDIVIDED FAMILY
- iii. A COMPANY
- iv. A FIRM
- v. AN AOP OR BOI, WHETHER INCORPORATED OR NOT
- vi. EVERY ARTIFICIAL JURIDICAL PERSON
[NOT FALLING UNDER (i) TO (v)]
[Being “inclusive” definition, there can be more than six categories]

BENEFICIAL OWNER
[Section 2(12)]

“*BENEFICIAL OWNER*” MEANS

- A PERSON [S. 2(24)] →
 - WHETHER HIS IDENTITY IS KNOWN OR NOT
- FOR WHOSE BENEFIT
- THE BENAMI PROPERTY [S. 2(8) r.w. 2(26)] →
 - IS HELD BY A BENAMIDAR [S.2(10)] →

CASE STUDY 3

BURDEN OF PROOF

EXPANSION OF BUSINESS WITH FINANCE FROM ABROAD

A partnership firm is engaged in the business of manufacture and export of diamond jewellery at Rajkot (“the Firm”).

Recently, the Firm received offers from several customers in USA for purchase of jewellery made from lab-grown diamonds.

The project report prepared by the consultant of the Firm estimated investment of US\$ 15 million in the project to manufacture lab-grown diamonds.

An international fund operating from London (“the Fund”) has offered US\$ 10 million to the Firm in any manner permissible under the Indian Law.

The partners of the Firm propose to accept the offer of the Fund as the cost of finance and other terms are attractive.

The due-diligence conducted by the legal advisors of the Firm show that there is no clarity about the source from which US\$ 10 million would be provided by the Fund.

The Firm apprehends the possibility of adverse inference under the Benami Act that the Firm is benamidar who holds money for unidentified **BO**.

The Firm approaches you for your advice whether it should accept the offer of the Fund.

PMLA
Reverse Burden of Proof
[S. 24]

Burden of Proof - In any proceeding relating to proceeds of crime under this Act,-

- (a) In the case of a person **charged** with the offence of money-laundering under section 3, the Authority or Court shall, **unless the contrary is proved**, **presume** that such proceeds of crime are involved in money-laundering; and
- (b) In the case of **any other person** the Authority or Court, may **presume** that the proceeds of crime are involved in money-laundering. [*Emphasis supplied*]

**PROPERTY ACQUIRED PRIOR TO
2016 AMENDMENT ACT - STATUS**

PROHIBITION OF BENAMI TRANSACTIONS

3. *Prohibition of benami transactions.*—

(1) No person shall enter into any benami transaction.

¹ *****

² [(2)] Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years *or* with fine *or* with both.

³ [(3)] Whoever enters into any benami transaction *on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016*(43 of 2016) shall, notwithstanding anything contained in sub-section (2), be punishable in accordance with the provisions contained in Chapter VII.]

[Section 53: *Rigorous* Imprisonment (1-7 years) *and* Fine upto 25% of FMV of property]

1 Omitted by s. 6, Act 43 of 2016 (w.e.f. 1-11-2016).

2 Sub-section (3) renumbered as sub-section (2) thereof by s. 6, *ibid.* (w.e.f. 1-11-2016).

3 Ins. by s. 6, *ibid* (w.e.f. 1-11-2016).