

BENAMI TRANSACTIONS

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[The Prohibition of Benami Property Transactions Act, 1988, is an amendment of the older Benami Transactions (Prohibition) Act, 1988, and has come into force from 1 November 2016.]

CONSTITUTIONAL AMENDMENTS

There are some rights, which are known as human rights or fundamental rights because they are very fundamental for the existence of human being and live and development of a human to its fullest. 'Right to property' was never considered one of these natural rights because it was a creation of statute.

Therefore Right to property as a fundamental right was removed from Chapter of Fundamental Rights by deleting Art. 19(f) and Art. 31 of Constitution of India. As stated earlier right to property was a creation of statute and to achieve the goal of social equal distribution of resources, it became necessary to use the tool of law to regulate the distribution of resources, property being one of the most prominent resources. It became necessary to get rid of ways in which property is being concentrated in few hands.

One of the important ways of the concentration of such property was a Benami transaction which would allow a person to hold real ownership rights of by transferring ownership for namesake to someone else. Thus, defeating purpose of most of the property redistribution statutes like Urban Land Ceiling Act. It had impacted Indian economy as well, by circulation of illegal money and thus affecting economic and the corollary of that social growth as well. To deal with this problem, it took years to identify the problem itself and after much deliberation Benami Transaction (Prohibition) Act, 1988 was passed to effectively tackle Benami transactions.

The Indian Legislature has often been criticized for its laid back approach towards that archaic and antiquated laws that in today's age and date rapidly get obsolete. In the innovative and highly imaginative world of money laundering and tax evasion, perpetrators always come up with increasingly complex transactions in order to dispose of their ill-gotten gains. Merely plugging the loopholes as they are discovered then, ensures that the authorities remain two steps behind these perpetrators. In an effort to curb profits from criminal activities as well as to plug leaks in collection of taxes, the Legislature has undertaken many comprehensive steps in the recent past to impose strong deterrents upon and to aid effective action upon economic offenses. Various laws such as the PMLA (Prevention of Money Laundering Act), the Companies Act, the Information Technology Act and the Benami Property

(Prohibition) Act, 1998 have seen comprehensive enactments/amendments to better address challenges thrown up by technology, globalization & to provide strong teeth to the Law enforcement machinery.

Originally, the President, following the recommendations of the 57th Law Commission Report promulgated the Benami Transactions (Prohibition of Right to Recover Property) Ordinance 1988, on 19th May, 1988.

Thereafter, the Benami Transactions (Prohibition) Bill, 1988 was passed by both the houses of Parliament and on 5th September, 1988, it became the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as "the Original Act). The Original Act was a small Act with 9 sections.

The Benami Transactions (Prohibition) Amendment Act, 2016 has amended the Original Act and has enlarged it from an Act having 9 sections to an Act having 72 sections. The Amending Act has even renamed the Original Act as "The Prohibition of Benami Property Transactions Act, 1988". The Amending Act has come into force on 1.11.2016.

May 13, 2015	The Benami Transactions (Prohibition) Bill, 2015 introduced in Lok Sabha to amend and incorporate certain provisions to the original Act.
April 28, 2016	Standing committee submitted its report upon examination of Bill
July 22, 2016	Government proposed amendments to the Amendment Bill 2015
July 27, 2016	Amendment Bill was passed by Lok Sabha
Aug 02, 2016	Rajya Sabha approved the Amendment Bill
Aug 10, 2016	President gave his assent to the Amending Act
Nov, 2016	Date on which the Amending Act came into force
Nov 1, 2016	The Prohibition of Benami Property Transactions Rules, 2016 came into force

BRIEF HISTORY :

Word Benami is of Persian origin, which literally means ‘without a name’. Benami in its technical sense means ‘holding properties in the name of another’. The system of Benami transactions is not peculiar to Hindu law and it has some traces in Mohamedan law as well, they are known as ‘*farzee*’. The origin of this practice is somewhat superstitious. It was considered that on the basis of the birth date of a person some people were considered as more auspicious thus property was purchased

in their names. Also, another reason is it was a very convenient way of hiding family affairs from public.

The legal essence of Benami transaction revolves around the peculiar characteristic that there is no intention of benefitting that person in whose name the property is transacted. The person in whose name property is transacted is called 'Benamidar' which is merely an alias for a person in whose name beneficial ownership of property actually vests.

There are many factors which led to the practice of Benami transactions such as:

1. The Joint family system and desire to make provisions for benefit for some.
2. Fraud on creditors.
3. Tax evasion.
4. Social and political risks of conquest or confiscation, like in a case of Mughals with the constant fear of political turmoil certain transactions were rampant.

PREVALENCE OF BENAMI TRANSACTION IN INDIA :

Taking into account socio-economic and political history of India it can be stated that Benami transactions are not uncommon in India. Even prior to independence in many cases the question of Benami transactions came up. In case of *Panjab Province v. Daulat Singh*, A.I.R. 1942 F.C. 38 (Federal Court) state that,

“The practice has long been common in this country for intending alienees of this land to take document of transfer in the name of their friends or relatives, sometimes in view to defeat the claim of creditors, sometimes in view of defeating other members of their family and sometimes to escape restrictions imposed upon them by Government’s Conduct Rules etc.”

In another Privy Council decision of *Bilas Kanwar v. Desraj Ranjit Singh*, AIR 1916 P.C. 96 (Privy Council). Sir George Farwell observed that,

“Down to the taluqdar’s death the natural inference is that the transaction was a Benami transaction a dealing common to Hindus and Muhammadans alike, and much in use in India; it is quite unobjectionable and has curious resemblance to our doctrine of English law that the trust of a legal estate results to the man who pays purchase money, and this again follows analogy of our Common law, that where a feoffment is made without a consideration the use results to the feoffee.”

In light of the socioeconomic and legal history of India irrespective of whatever factors led to the emergence and prevalence of Benami transaction in India, it is certain that Benami transaction has deep judicial roots in India and have been

recognized by judiciary really long ago.' *Mina Kumari v Bijoy Singh, (1916) ILR 44 Cal 662 (Calcutta)* . *Sheikh Bahadur Ali v. Sheikh Dhomu, 1 Calcutta Sud. R. Diw. Rep. 250. (High Court of Calcutta)*

1988 to 2016

Recently there have been much deliberation on the law to tackle Benami transactions . Committing to deal strongly with black money, Finance Minister Arun Jaitley introduce this new amendment .

Some points from Minister's speech:

The Minister said while the 1988 Act has nine sections, the amended law would have 71 sections. Further, he added that states are digitalising the land records which will help in dealing with the black money.

Jaitley said the Benami bill is aimed at seizing benami property besides prosecuting those indulging in such activities as the provisions for prosecution could not be operationalised in want of rules in the 1988 Act.

He said the government was bringing amendment as if it would have brought a new Act "penal provisions could not apply retrospectively and those guilty of violations would have got scot-free."

The 1988 Act, which also has provisions for prosecution, has not been operationalised as the rules in this regard have not been framed, he said and added Law Ministry has suggested amendment for entire functioning of the Bill and accordingly rules have to be framed.

The Minister said while the 1988 Act has nine sections, the amended law would have 71 sections. Under Article 20 of the Constitution, penal provisions cannot be applied retrospectively, he said.

He said the government has accepted the Parliamentary Standing Committee's suggestion to change the words in the Bill from "known sources of income" to "known sources" with a view to further strengthen the provisions.

Jaitley said that offences under the amended law would be non-cognisable as the government does not want multiple agencies to get involved and harass people.

Besides bonafide religious trusts, he said there are few exceptions relating to Hindu Undivided Family and trusts owning properties.

Jaitley said that fiduciary and trustee holding is allowed under the Benami bill but the investment should be made from the known sources of income.

He said the law also provides for those genuine property purchases which could have been funded by family members or other sources as a loan.

The earlier term of "known source of income" has been replaced with "known sources" with regard to purchase of property, the Finance Minister added.

He said the property outside the country will not be covered under the Benami law but will be dealt with under the black money law.

The Finance Ministry said that sufficient safeguards have been put in place to prevent any misuse provisions of the Benami law, which seeks to confiscate such properties.

"Four layers of officers and an appeal tribunal has been created since this is a major power," he said, adding it is being done because there were apprehensions that one officer might end up being corrupt.

Talking about the properties in tribal areas, he said those can be exempted from the purview of the law by the Governor of the respective state.

On concerns being expressed over mandatory use of PAN Card for purchase of high value properties, he said already 22-23 crore cards have been issued out of 25 crore families and anyone spending lakhs of rupees could obtain it online.

Further, he added that states are digitalising the land records which will help in dealing with the black money.

After demonetisation, Prime Minister Narendra Modi Modi said in Goa that he will crack the whip on benami property holders.

"We will take action against 'benami' property. This is major step to eradicate corruption and black money... We are going to take action against the properties which are purchased in the name of others (benami). That is the property of the country. My government feels that it is our responsibility to help the poor and I will do it,".

BENAMI TRANSACTION : Intention and source of consideration :

Relying on Sec. 5 of Transfer of Property Act, 1882, Benami transaction is essentially a type of 'transfer of property' and thus it is not illegal *per se*. Because Sec. 5 does not

necessitate the condition that, '*transfer in favour of one person may not be in the name of another person*'. There is nothing inherently wrong in Benami transactions if they are within legitimate scope, which clearly excludes transactions, entered into for fraudulent and illegal purpose. Till such transactions are not violative of the law, courts are bound to give them effect. Considering the nature of the transaction though these transactions are not always harmful, whenever they exceed legitimate scope they can have disastrous effects. Thus there were certain Benami transactions, which were identified, as illegal and thus punishable.

Whether a transaction is Benami or not is a subjective question varying according to facts and circumstances of the case. However, in a case of ***Jayadayal Peddar v. Bibi Hazra***, AIR (1974) S.C.171 (S C).their Lordships of Supreme Court had laid down following tests:

- “Source of the purchase – money i.e. who paid the price?
- Nature of possession of the property after the purchase i.e. who had the possession?
- Motive, if any for Benami transaction i.e. why the property was purchased in the name of the other person?
- The relationship between the parties i.e., whether the real owner and the ostensible owner were related to each other or were strangers or friends?
- Conduct of the parties in dealing with the property i.e., who used to take care of and control over the property?
- Custody of the title deeds after the sale.”

Recently Supreme Court in **P. Leelavathi vs. V. Shankarnarayana Rao dt : (In Civil Appeal Number 1099 of 2008 Dt 9th April 2019** once again laid down the test as follows :

- Mere financial assistance by a person to another to buy Property By the latter would not Ipso-Facto hold it a Benami Transaction
- The Burden to Prove A Transaction as benami is upon the person who asserts it so
- While considering whether a particular transaction is Benami in nature the following six circumstances can be taken as a guide:
 - 1. The source from which the purchase money came.
 - 2. The nature and the possession of the properties after purchase
 - 3. Motive, if any for giving the transaction a benami colour
 - 4. The position of the parties and the relationship if any between the claimant and the alleged Benamidar
 - 5. The custody of the title deeds after the sale and
 - 6. The conduct of the parties concerned in dealing with the property after the sale.

- Referred case laws :
 - Thakur Bhim Singh vs Thakur Kan Singh (1980) 3 SCC 72.
 - Jaydayal Poddar vs Bibi hajra (Mst)(1974)1 SCC 3
 - Bina Pani Paul vs Pratima Ghosh (2007) 6 SCC 100
 - Valliammal vs Subramanyam (2004) 7 SCC 233

Thus, the *dominant question is of intention and source of consideration paid* for the transaction, though possession of property also matters. Though motive in itself is not determining factor, it has relative weight when it comes to burden of proof which rests on a person who claims the transaction to be Benami.

‘Benami Transaction’ as defined by the original enactment meant “*any transaction in which property is transferred to one person for a consideration paid or provided by another person*” with exceptions provided for coparceners in a Hindu Undivided Family & a person holding property in a fiduciary capacity subject to the conditions laid down by Sec. 4(3)(a). This definition was not only generic but it also lent itself to ambiguities in interpretation. With merely 9 sections, it relied heavily on secondary legislation in the form of rule making powers conferred by Sec. 8 for enforcement of the provisions of the Act. Though the Act provided for acquisition of Benami properties, via Sec. 5, neither did it explicitly make holding Benami properties a criminal offence under the Act itself nor did it set up a comprehensive mechanism for administration of the Act, preferring to rely therefore on secondary legislation and other existing laws.

Section 2(9) of the new Act defines ‘**Benami Transactions**’. A “Benami transaction” means a transaction or an arrangement 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 the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration OR

a transaction or an arrangement in respect of a property carried out or made in a fictitious name; OR

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; OR

a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious.

However, Sec. 2(9)(A) also provides for the exceptions in the case of a Karta or member of a HUF, family members and lineal descendants or a fiduciary as long as they satisfy the conditions set out in sub-sections (i-iv).

In the case **Anis Ur Rehman v. Mohd. Tahir (2019) 261 Taxman 488 (Delhi)(HC)** the court observed that by provisions of section 2(9) of Amended Act, expressions HUF, fiduciary capacity and trustee have been defined, giving them meaning which law required, and this was done to remove any doubt or confusion with respect to meaning of expressions fiduciary capacity and trustee as found in repealed provisions of section 4(3) of unamended Act; therefore, by defining expressions fiduciary capacity and trustee, it is not as if any vested right existing under earlier provisions of section 4(3) is taken away. **Therefore definitions of exempted transactions to prohibited benami property transactions, and now contained in four exceptions in section 2(9) were always deemed to have been included in exceptions to prohibited benami transactions.**

Section 2(26) of the Act defines ‘**Property**’: The original Act had defined property to mean property of any kind, whether movable or immovable, tangible or intangible, and included any right or interest in such property. The amending Act expands the definition of ‘Property’ to further include within its ambit assets that can be corporeal or incorporeal, any rights or interest or legal documents or instruments evidencing title to or interest in the property and if the property is capable of conversion then the property in the converted form. Importantly, it also includes within the definition of property any of the proceeds from the property .

Benami Property-S.2(8)

“ means any property which is the subject matter of a benami transaction and also includes the proceeds from such property”

Benamidar – S 2(10)

“ means 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”

Beneficial owner – S 2(12)

“means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar”

SEC 2(9)(iv) AND ITS INADEQUACY:

The Section 2(9)(iv) of the Act provides that a property held by any person in the name of his brother or sister or lineal ascendant or descendant has been kept out of the definition of became property only if his her name also appears as joint owner in such property. This definition or exception is not only confusing since such a transaction will, even otherwise, not be became due to appearance of name of the real owner as joint owner, but will also be of no help to such elderly members of the family who had contributed fully or substantially for purchase of property in the name of their son, daughter, brother and sister in the past without inclusion of their names as joint owners in the property documents. Such transactions, even though done even prior to coming into force of the 1988 Act, will still be termed as Benami and such elderly persons and blood relations will still be deprived from not only claiming or enforcing their rights in such property but also from contesting any claim in a suit or legal proceedings as sub-sections (1) & (2) of Section 4 have been retained in their original shape. This is not only self-contradictory in itself but also contrary to laws like the Senior Citizen Act, 2007.

For instance, in *G Mahalingappa v. GM Savitha*, an old father from South India, who purchased a property in the name of his infant daughter because she was born under an auspicious *nakshatra* under a belief he would prosper by this, was dragged right up to the Supreme Court by the same daughter after she grew up and the apex court even commented upon this unfortunate part of the case.

Considering the aforesaid section 2(9)(iv) is required to make specific exception for such genuine transactions even in the case of non-HUF families and where the name of the elder member of the family who has partly or fully paid for the property, does not occur as a joint owner. Motive should be the barometer, and where the motive is genuine there is no reason as to bring elder citizens in the ambit of the act.

Transfer of Property Act, 1882: Sec. 41 dealing with ‘ostensible owner’ and Sec. 53 ‘fraudulent transfers’.

SECTION 41, TRANSFER OF PROPERTY ACT, 1882 AND ITS IMPLICATIONS:

Section 41 of Transfer of Property Act, 1882 deals with concept of ‘ostensible owner’ the section states that,

“Transfer by ostensible owner.- Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on

the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

Sec. 41 allows a person to buy property in the name of another as an ostensible owner therefore issue arises why the purchase of property in the name of another person is prohibited under Benami Transaction.

WHAT SECTION AIMS TO ACHIEVE:

The object of Sec. 41 is to protect the interest of innocent third parties who with reasonable care and in good faith enter into a transaction with the ostensible owner, where the real owner was himself failed to protect his or her interest by impliedly or explicitly authorizing the ostensible owner to transact.

To avail protection of Sec 41 following are the conditions:

1. The primary condition is that the person who is transferring the property should be an ostensible owner. There should be consent from the real owner, which can be implied or express form.
2. The ostensible owner should get some consideration in return of the property.
3. Reasonable care has to be taken by the transferee about the authority of transferor to the property and the transferee had acted in good faith.
4. This section is applicable only to transfer of immovable property and not in the case of movable property.

The transaction can be considered voidable at the instance of the real owner if he can prove that he never gave implied or explicit authority to transferor to transfer the property. The real owner also has to prove that transferee did not take reasonable care to check the authority of transferor and did not act in good faith. However important point to take into account is that real owner need not have authorized that particular transfer of property, mere fact that he or she has given authority to an ostensible owner to transferor is sufficient to defeat the claim of the real owner. In the case of Benami transaction, Benamidar is merely a name lender and unconditional authority rests with a person who provides the consideration. Whereas in the case of ostensible owner actual authority rests with the ostensible owner. This difference has been explained by Supreme Court in *Bhim Singh v. Kam Singh*, AIR 1980 SC 727 (732) (Supreme Court of India)

“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 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 Benami transaction is a case where a person who is the owner of the property executes a conveyance in favor 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 two kinds of Benami transactions lies in the fact that in 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 later case, there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance.”

So, clearly, after the passing of the Benami Transactions Act, the scope of application of section 41 has become very limited. Ultimately, the transferee, who purchases the property from the ostensible owner, cannot take the benefit of section 41 unless the ostensible owner is the wife or unmarried daughter of the real owner. Exception to Benami transaction as per the provisions of the Act that is to include the transaction in the name of wife or unmarried daughter, in fiduciary capacity to create the trust or as a coparcener in HUF property. The new Act Expands the exception to brother and sister or lineal ascendant or descendants where names of benamidar and real owner are as ‘joint-owners’

SECTION 53, TRANSFER OF PROPERTY ACT, ITS IMPLICATIONS:

This section serves dual purpose that is, the protection of transferee who acts in good faith, pays due consideration and to whom property has been transferred and to defeat or delay the creditor of the transferors to whom property has been transferred. Sec 53 states that,

53. Fraudulent transfer:

“(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration. Nothing in this sub-section shall affect any law for the time being in force relating to insolvency. A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. For

the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.”

Section 53 essentially envisages a situation where in order to delay and defeat creditor, transferor transfers the property to the transferee, so that creditors cannot claim dues arising out of that property

The transaction as mentioned in Sec. 53 is that if a property transferred between transferor and transferee has to be valid transfer and it cannot be a fictitious or sham transaction. In a situation where there is no real intention of the actual transfer of property and real intention is the satisfaction of some ulterior motive beneficial to the transferor. However, in the case of Benami transaction, there is no real transfer at all. This is explained by Sir Lawrence Jenkins in *Mina Kumari v Bijoy Singh*,

“The difference between fraudulent transaction and Benami transaction is distinct though it is often blurred. Such colourable or sham deeds do not require to be set aside, for the real title is all along with the transferor. They are outside the scope of section 53. It is relevant to note that a contention that the transaction is a sham and nominal transaction, and that the property was never conveyed at all though transferee holds it for the-the benefit of transferor, and remained the property of the original owner, may go even contrary to the contentions raised that are based upon s 53 of the TP Act. If the contention that it is a sham and nominal transaction is accepted, s 53 may not have any application. In fact, the challenge based on s 53 involves the admission that the transfer is a real one.”

Benami transaction is different from the fraudulent transaction because in the case of Benami transaction there is no transaction at all, but in the case of the fraudulent transaction there is transaction but that is a result of a conspiracy between transferor and transferee.

RE-TRANSFER OF TITLE TO REAL OWNER IS PROHIBITED:

Prior to the passage of Benami Transaction (Prohibition) Act, 1988 judiciary was approving of Benami transactions in a sense that if a real owner goes to court to claim ownership title, after due proceedings court would award the same. However, Sec. 4 Benami Transaction(Prohibition) Act, 1988 , prohibited such an action against benamidar. Still, this was not enough to completely control Benami transactions because a usual relationship between real owner and benamidar was fiduciary or was of dominance thus, it was hardly possible for benamidar to go against real owner’s

wish and prevent retransfer of property. Thus, though the legal suit was prohibited, retransfer of property could have been done without going to court.

Efforts are being made to change this situation. Benami Transaction (Prohibition) Act prohibits such re-transfer. Sec. 6 of the Act states that,

6. (1) *No person, being a benamdar shall re-transfer the Benami property held by him to the beneficial owner or any other person acting on his behalf.*

(2) *Where any property is re-transferred in contravention of the provisions of subsection (1), the transaction of such property shall be deemed to be null and void."*

PROSPECTIVE OR RETROSPECTIVE:

1. 2016 Amendment Act has not changed Sec. 1(3), sec. 3(1)&(2) and sec. 4(1) & (2) of the Act . These provisions continued as they were in 1988 Act.
2. Coming into force of section 3 and 4 is governed by section 1(3) of the act.
3. Sections 1(2) and 1(3) were not changed by the 2016 Amendment Act. Hence, in section 1(3), "at once" means when 1988 Act came into force on 5-9-1988 [Clarification given by the Finance Minister during Loks Sabha debate on 27-7-2016].
4. Sections 3(1) and 3(2) were not changed by the 2016 Amendment Act. Hence, they continue as they were in force from 5-9-88.
5. Hence, benami property acquired after 5-9-88 will attract penal provisions.
6. Section 3(3) came into force on 1-11-2016. Hence, Section 3(3) creates a new liability
7. Sections 4(1) and 4(2) were not changed by the 2016 Amendment Act. In terms of section 1(3), sections 4(1) and 4(2) shall be deemed to have come into force on 19 May 1988 (i.e. the date of 1988 Ordinance).

Thus, new section controls Benami transactions more effectively. The question which arises how to apply this provision prospectively or retrospectively. It is a rule of retrospection that the statute is presumed to be prospective unless the contrary is provided in the statute. Because retrospection, while dealing with procedural aspect also affects substantive rights of parties. However as per the decision of *Mithila Kumari v. Prem Behari Khare* , Sec. 4 of Benami Transaction (Prohibition) Act, 1988 is declaratory in nature where presumption against retrospective nature is not applicable. This means that does not matter when was transaction has taken place, once it's declared to be void it is void. For instance, when Law of Representation declares that completing 18 years of age is the criterion for voting, so it does not mean

that those who have become 18 in past cannot vote. This case explains nature of Sec. 4 in following words,

“In one sense there was a right to recover or resist in the real owner against the Benami- dar. Ubi jus ibi remedium. Where there is a right, there is a remedy. Where the remedy is barred, the right is rendered unenforceable. In this sense, it is a disabling statute. All the real owners are equally affected by the disability provision irrespective of the time of creation of the right. A right is a legally protected interest. The real owner’s right was hitherto protected and the Act has resulted in the removal of that protection.”

Thus, when new legislation is passed that can apply to transactions taken place prior to the date of commencement of such legislation, if legislation is declarative like envisaged in new legislation, 2016. The expression “shall” in sec. 6(1) is prospective and shall apply to present (future stages) and future suits, claims or actions only. Thus, though transaction has taken place but the suit is pending, by virtue of it being declaratory legislation, re-transfer of property should not be allowed.

Thus, in reality, Sec 6 tries to implement the principle of retrospective nature as envisaged in *Mithila Kumari v. Prem Behari Khare* thus, strengthening the verdict given.

BENAMI TRANSACTIONS ARE DIFFICULT TO DETECT:

Benami transactions are hardly entered into with complete strangers. Usually, they are entered into with blood relatives or family members or some good friend with whom a person shares a fiduciary relationship. Another instance where majorly Benami transactions take place is landlord and tenant or master and his servant where the relationship is influenced by other considerations like fear of losing his or her job. Thus due to the nature of the relationship between parties, there is limited scope for litigation.

Authorities set out for the purposes of this Act

The principal Act, being enacted in 1988 also suffered from limitations imposed by developing technology as well as legal jurisprudence. Though the Financial Memorandum of the 2015 Bill also sought the implementation of the said Act by the existing institutional structure of the Income Tax Department, the legislature in its wisdom has seen it fit to comprehensively set out Authorities for the implementation of the Act, the composition of the said authorities, the Jurisdiction exercised by the said authorities and the powers thereof (Chapter III Amending Act). The Authorities set out for the purposes of this Act are [Sec. 18(1)]

- The Initiating Officer
- Approving Authority
- Administrative Authority
- Adjudicating Authority

It has specifically been provided by Sec. 19(1) that the authorities shall have all the powers as vested with a civil court under CPC (Code of Civil Procedure) while trying a suit with respect to discovery and inspection, enforcing the attendance of any person for examination under oath, compelling production of books of account and other documents, issuing commissions, receiving evidences on affidavits and for any other prescribed matters.

The Act also provides that the following officers shall assist the authorities in the enforcement of this Act subject to Sec. 20 of the Act:-

- Income Tax Authorities
- Customs and Central Excise Department Officers
- Narcotics Drugs and Psychotropic Substances Act Officers
- Officers of a recognised stock exchange
- Officers of Reserve Bank of India
- Police
- Officers of Enforcement under Foreign Exchange Management Act
- Officers of Securities and Exchange Board of India
- Officers of any 'body corporate' constituted or established under State of Central Act
- Officers of the Central Government, State Government, local authorities or banking companies notified by Central Government for the purpose of this Act.

JURISDICTION OF THE INVESTING OFFICER

Jurisdiction of the investing officer can be based on any one of the following three:

- Location of Benami Transaction/property
- Location of Benamidar
- Location of Beneficial Owner

ATTACHMENT, ADJUDICATION AND CONFISCATION

The powers listed out in Chapter III are comprehensive and a far cry from merely providing for framing of Rules as set out by the 'Principal Act'. Besides vesting substantial powers in the hands of the Authorities under this Act, it also explicitly

provides for active assistance by officers of every major Government body which automatically shall enable the authorities to have access to a vast database of information and resources provided for by virtually all the major regulatory/investigating bodies. This shall enable the authorities to carry out in-depth investigations and provide water tight cases for attachment and prosecution.

The Principal Act enabled the Central Government by notification in the Official Gazette to make necessary rules to carry out the purposes of this Act by providing an authority competent to acquire properties [Sec. 8(2)(a)], prescribing the manner in which and procedure to be followed for acquisition of properties [Sec. 8(2)(a)] and other providing for other matter which is required to be or may be prescribed for carrying out the purposes of the Act. However, Chapter IV of the Amending Act puts in place specific provisions with regards to Attachment, Adjudication and Confiscation.

POWER TO PROVISIONALLY ATTACH

Sec. 24 of the Amending Act empowers the Initiating Officer to issue a **show cause notice to a Benamidar** based on material in his possession after recording his reasons in writing with a copy to be sent to the beneficial owner if traceable. It further empowers him, if he is under the opinion that the Benami may alienate the said property, to attach the said property with previous approval of the Approving Authority for a period not exceeding ninety days. After making inquiries and calling for reports and evidence within a period of ninety days of issuing the show cause notice the Initiating Officer has the power to provisionally attach the Benami property if not already done and if provisional attachment is already done, the Initiating Officer has the power to pass an order continuing the attachment until the Adjudicating Authority passes the order in the matter. However, if the said provisional attachment is done or continued by the Initiating officer as per Sec. 24(4), he shall have to draw up a statement of the case and refer it to the Adjudicating Authority within 15 days.

Chapter V provides for the setting up of the Appellate Tribunal that shall ordinarily sit in Delhi or at any other place the Central Government will decide in consultation with the Chairperson of the Appellate Authority. The Tribunal shall not be bound by procedure laid down by the Code of Civil Procedure but shall have powers to regulate its own procedure. It shall also have the powers vested in a Civil Court under Code of Civil Procedure in respect of matters enumerated by Sec. 40(2) of the Amending Act. The orders of the Appellate Tribunal are appealable before the High Court within a period of 60 days only on questions of law.

CONSEQUENCES OF BENAMI TRANSACTION

However, secondary legislation and rules have inherent limitations and suffer from a multitude of legal challenges. Measures put in place for preventing money laundering and tax evasion or other criminal or anti-social activities via 'Benami Transactions' needed to fulfill a dual purpose, of preventing the beneficial owners of the 'Benami' properties from actually benefiting from the transaction as well as by prosecution. An obvious shortcoming of the 'Principal Act' was that it did not explicitly make entering into a 'Benami' Transaction a crime by itself.

Chapter VII of the Amending Act states that any person entering into a Benami Transaction in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, as the beneficial owner or as the Benamidar and any other person who abets or induces any person to enter into a Benami transaction shall be guilty of the offence of 'Benami Transaction' [Sec 53(1)]. Whoever is found guilty of committing the said offence shall be punishable with a minimum of one year rigorous imprisonment but which may extend to up to seven years along with a fine which may extend to 25% of the fair market value of the property [Sec. 53(2)]. In addition, if any person required to furnish information under this act knowingly gives false information or provides a false document, the person shall be punishable with a minimum of six months rigorous imprisonment but which may extend up to five years along with a fine which may extend to 10% of the fair market value of the property [Sec 54]. However, Sec. 55 of the amending Act also provides that no prosecution shall be instituted against any person in respect of any offense u/s 3, 53 or 54 without prior sanction of the board. The Provisions of 53(2) and 54 clearly seek to bring out the fact that **indulging in, abetting or assisting a Benami Transaction is taken as a serious offense** by the Government of India and the punishment is now commensurate with the crime.

The Initiating officer is required to process the case for prosecution of the persons concerned under sections 3, 53 and 54, at any stage depending on the facts of the case.

Stage of Filing Prosecution Complaints :

As per relevant provision of the act, filing of prosecution complaints is not linked with attachment or confiscation of benami property. Therefore, attachment or confiscation is not a pre-requisite for filing prosecution complaint under the Act. However, fulfilment of necessary ingredients of the offence(s) under the Act is necessary for filing prosecution complaint(s), subject to requisite previous sanction of the CBDT.

SPECIAL COURTS FOR TRIAL OF OFFENCES :

Chapter VI of the Act provides for Special Courts to be set up for trial of offences under the Act. Such Courts shall be constituted by the Central Government in consultation with the Chief Justice of the High Court by notification and the Special Court so constituted shall take cognizance of an offence punishable under the Act only upon a written complaint made by the Adjudicating Authority or an officer authorized by the State or Central Government. Though the Appellate Tribunal is not bound by the Code of Civil Procedure, the Code of Criminal Procedure shall apply to prosecution proceedings before the Special Court. If the accused is charged of other offenses under Code of Criminal Procedure at the same trial, the Special Court will have the jurisdiction to try him for all such other offences.

BENAMI TRANSACTION AND ITS RELATION TO MONEY LAUNDERING:

From the above discussion, it is clear that Benami transaction is carried out with the aim to hide the real source of money. Benami Transaction tried to control such transactions, however, it could not realize the object of the Act to its fullest because it failed to take into account all forms of Benami transactions. The the concept of Benami transactions in light of object its tries to achieve that is hiding the illegal source of money. Thus, if the definition of Benami transaction is broadened it can include other forms of dealing with black money as well like money laundering.

The Benami Act operates on a different plane. It is not only restricted to proceeds of crime because its objective is to prohibit a benami transaction so that the beneficial owner would be compelled to keep the property in his own name only and the legal complexities owing to the apparent ownership not being the real ownership, could be avoided. The prohibition would apply irrespective of the nature or source of the funds invested in the property. Thus, the Benami law applies equally to both a property acquired through proceeds of crime and a property acquired through legitimate means and hence its scope is wider than PMLA. Though, a benami transaction could be used to disguise the real ownership of a property to prevent detection of the illegal activity that produced it, but that may not always be the case. This is because a benami transaction could be entered into for several other purposes also like defrauding creditors, avoiding payment of taxes or social reasons. In view of the above, the Benami Act was proposed as a separate legislation and not as a part of the PMLA. Further, except for the common institutional set up for adjudication and appeal, there is no overlap with the provisions of the law regarding money laundering and hence there is no scope of any confusion in this regard

As per Sec. 3 of Prevention of Money Laundering Act, 2002,

“Offense of money-laundering.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of the offence of money-laundering.”

As per the above section, the essence of money laundering lies in legitimize or assisting to legitimize source of ill-gotten money that is money obtained through criminal or corrupt activities and introducing in the economy as legitimate money. It is carried out in three stages *viz. placement* that is collecting money derived from illegal sources and changed into form less suspicious to enforcing agencies, *layering* hiding the source of money through various methods like wire transfer, monetary transfers including passing it through various transactions, jurisdiction and changes in currency to hide the illegal source of money and *integration* that is reintroduction of money back into economy by converting into legitimate business earnings through normal financial or commercial transaction.

Thus, money laundering is a new kind of Benami transaction.

THE FUGITIVE ECONOMIC OFFENDERS ORDINANCE 2018 :

The bill was introduced in the Lok Sabha on 12.03.2018 but could not be passed. Therefore, it was introduced as an ordinance .

WHO IS FUGITIVE ECONOMIC OFFENDER?

Section 2(1)(f) :

Any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India who-

- has left India so as to avoid criminal prosecutions, or
- being abroad, refuses to return to India to face criminal prosecutions

SCHEDULED OFFENCE

- Offence under the Indian Penal Code (approximately 28 offences included).
- Offence under the Negotiable instrument Act. 1881
- Offence under the Reserve Bank of India Act,1934
- Offences under the Customs Act, 1962

- Offence under the Prohibition Of Benami Property Transaction Act,1988
- Offences under the Securities and Exchange Board of India ACT, 1992
- Offences under the Prevention of Money Laundering ACT, 2002
- Offences under the Limited Liability Partnership Act, 2008
- Offences under the Foreign Contribution (Regulation) Act, 2010
- Offences under the Companies Act, 2013
- Offences under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015
- offences under the Insolvency and Bankruptcy Code, 2016
- offences under the Central Goods and Services Tax Act, 2017

As per Section 4, Director or Deputy Director file an application in the special court for an individual to be declared as fugitive economic offender.

SECTION 12

After declaration of an individual as fugitive economic offenders by the special court, it may order for confiscation of

- a) the proceeds of crime in India or abroad, whether or not such property is owned by the fugitive economic offender; and
- b) any other property or Benami Property in India or abroad, owned by the fugitive economic offender

CONCLUSION:

Benami transactions essentially involves the transfer of property. Thus, Benami Transaction (Prohibition) Act, 1988 naturally has some impact on Transfer of Property Act, 1882. The Amending Act has 71 Sections as opposed to 9 Sections that constituted the Principal Act. This amendment is not only comprehensive, but also critical in an era where technology and other advancements demand a strong institutional framework in fighting the menace of black money and the murky parallel economies that characterize countries that have laws that are typically ineffective and

law administrations that are inefficient. The amendment has comprehensively set out a mechanism not only for fast detection and investigations but also for effective and speedy dispute resolution and prosecution. The constitution of the Tribunals shall greatly enhance the speed of dispute resolutions as opposed to overburdened civil courts bound by the rules of the Civil Procedure Code where a suit typically take a number of years to reach its logical conclusion. On the prosecution side, by setting up Special Courts that shall exclusively look after matters under this Act, the speed of disposal of criminal trials shall also be enhanced. The effectiveness of the amended Act shall be gauged by its performance over time, however it is a giant stride in the right direction.

^In light of increased black money problems, it has become necessary to tackle the problem expeditiously. Benami Transaction (Prohibition) Act, 1988 envisages a remedy for that, however, unless suitable civil machinery is put into action it will not be possible. In addition to this, It is observed that Benami transactions in its entirety are difficult to eliminate from the society, because of the very nature of the relationship between parties who enter into such kind of transaction. Rather Benami transactions are refining themselves by not being restricted only to transaction between real owner and benamidar, it has modified itself to many other forms like money laundering. As stated earlier, Benami transaction is quintessential part of transfer of property, mere passage of radical legislations like Prevention of Money Laundering Act, 2002 is not sufficient but its impact on Transfer of Property needs to be studied, analyzed and understood.

About 25 special units across India have been formed by the CBDT in 16 regional/zonal offices, to implement its action-plan against benami properties in India. These special units are formed only to investigate and take action against all those individuals and entities related to undisclosed domestic and foreign properties. Each unit will have four to five members including 3 to 4 Income-tax officials, one Additional Commissioner/ Joint Commissioner and one Deputy Commissioner. Each unit would be headed by an Additional Commissioner.

It is learnt that there are about 15 lakh registered companies in India; and only 6 lakh companies file their Annual Return. This means that large number of these companies may be indulging in financial irregularities.

It is learnt that a Task Force has been set-up under the co-chairmanship of the Revenue Secretary and Corporate Affairs Secretary with members from various regulatory Ministries and Enforcement Agencies to monitor the actions taken against deviant shell companies by various agencies.

The department has formed a special unit called Benami Properties Unit (BPU) to identify and probe such assets. Apart from politicians, there are hundreds of such properties belonging to some top businessmen in the country.

The CBDT has introduced the Reward Scheme for informants giving information of benami property actionable under Prohibition of Benami Property Transactions Act, 1988 as amended by Benami Transactions (Prohibition) Amendment Act, 2016 *vide* Letter [F.No.299/31//2017-DIR (INV.III)/22], dated 23-4-2018.

Case Laws :

1. K. Renuga v. K. Vasakh, ACIT (2018) 259 Taxman 492 (PBPTA-AT)

S. 3 : Prohibition of benami transaction-**Notice and attachment of property involved in benami transaction-Advance salary**-existence of 'benami' transaction has to be proved by authorities i.e. person who allege transaction Authority had purely gone on premise that cash was transferred from one person to another, with an object to defeat, demonetization, which was insufficient to establish a 'benami' transaction-Order of attachment was directed to be released forth with.[S. 24]

2. P. Ezhilpandian v. K. Visakh, Dy. CIT (2018) 259 Taxman 583 (PBPTA-AT)

S. 3 : Prohibition of benami transaction – **Loan repaid in cash** – The existence of the 'benami' transaction has to be proved by the authorities, i.e., the person who alleges the transaction-The authorities have failed to discharge the burden of proof- The authority has purely gone on the premise that cash is transferred from one person to another, with an object to defeat, demonetization. This is insufficient to establish a 'benami' transaction. [S. 24]

3. P. Leelavathi v. V. Shankarnarayana Rao (SC), www.itatonline.org

Benami Transactions (Prohibition of Right to Recover Property) Ordinance , 1988.

S.2 :Financial assistance was given is not a determinative factor –**Burden of proving the Benami Transaction lie on the person who alleges** – Appeal of petitioner is dismissed.

4. Manoj Arora v. Mamta Arora (2018) 258 Taxman 1 (Delhi)(HC)

Benami Property Transactions (Prohibition) Amendment Act, 2016.
S. 2(9) : Benami Transactions- **Purchase of property from known source in the name of wife will not be a benami property**- Husband will be de jure owner and not of his wife who will be de facto owner in whose name title deed exists, it is **legally permissible** for a person to purchase an immovable property in name of his spouse from his known sources. [S.2(9)(A)(b)]

5. G. Bahadur v. K. Visakh ACIT (2018) 259 Taxman 556 (PBPTA-AT)

S. 3 : Prohibition of benami transaction-**Payment of advance salary by employer to its employee to defeat purpose of demonetisation didn't come under purview of Benami Transaction.** [S.24, 46]

6. Cascade Energy Pte Ltd. v. UOI (2018) 405 ITR 614 (Mad) (HC)

S.24:Jurisdiction Of Officer — Notification No. S. O. 1620(E), dt. 18-5-2017 uploaded on Website of E-Gazette On 22-5-2017 — Department of publication Certifying date as 18-5-2017 — Notice and order of provisional attachment by Officer not authorised by Notification ,n 19-5-2017 is held to be not valid. [S. 2(8) , 2(21), 18(1), 59]

7. Anis Ur Rehman v. Mohd. Tahir (2019) 261 Taxman 488 (Delhi)(HC)

S. 2(9) : Benami transaction- Defining expressions fiduciary capacity and trustee, it is not as if any vested right existing under earlier provisions of section 4(3) is taken away. [S. 4(3)]

By provisions of section 2(9) of Amended Act, expressions HUF, fiduciary capacity and trustee have been defined, giving them meaning which law required, and this was done to remove any doubt or confusion with respect to meaning of expressions fiduciary capacity and trustee as found in repealed provisions of section 4(3) of unamended Act; therefore, by defining expressions fiduciary capacity and trustee, it is not as if any vested right

existing under earlier provisions of section 4(3) is taken away. Therefore definitions of exempted transactions to prohibited benami property transactions, and now contained in four exceptions in section 2(9) were always deemed to have been included in exceptions to prohibited benami transactions.

8. Akashdeep Initiating Officer v. Manpreet Estate LLP (AT PBPT Act), www.itatonline.org

S. 2(9) : Benami transaction—**Burden of proof-Property was purchased out of loan proceeds -Burden of proof on revenue**-Appeal of revenue was dismissed. Dismissing the appeal of the revenue the Tribunal held that; After amendment, the onus of proving a benami transaction rests entirely on the shoulders of the owner/benamidar. Before amendment, the burden of proof was on the prosecution to prove the guilt of the Benamidar and beneficial owner. Once both are able to discharge their burden of proof as per amended law, then the burden of proof shifts to the prosecution. Once the burden shifts upon the IO, the principles of general law available prior to amendment would apply. Accordingly the appeal of revenue was dismissed. (MP-PBPT-163/MUM/2019 (Stay) FPA-PBPT-206/MUM/2018, dt. 26.03.2019)

9. Guruswami Ganga Naikar v. Vaishali Mohan Kshirsagar (2019) 261 Taxman 504 (Bom.)(HC)

S. 4 : Prohibition of the right to recover property held benami-Fiduciary capacity – Purchase of property in the name of trustworthy employee—Trial Court rejected the suit to recover the property on the ground that suit was barred—Matter restored back to Trial Court decide on merits. [Civil Procedure Code, 1908, Order VII Rule 11(d)]

10. V. Rajinikanth. v. DCIT (2019) 260 Taxman 47 (PBPTA – AT)/T. Raja v. K.Visakha (2019) 260 Taxman 225 ((PBPTA – AT)

Prohibition of Benami Property Transactions Act, 1988 S.2(9): Benami transaction- **Advance salary** -Allegation of amount was advanced to

bring demonetised money in to circulation – Order attaching the bank account was set aside – The authorities have failed to discharge the burden. [S. 2(5),3,24, 46, PMLA ,2002 , S. 2(u)]

Order attaching the bank account on the presumption that the amount was advanced to bring demonetised money in to circulation was set aside .The attached properties are released on the ground that the authorities have failed to discharge the burden . Followed Sitaram Agarwal v. Subrata Chandra (2008) 7 SCC 716 .

11. Ekant Baruta v. Rakesh Baruta (2019) 261 Taxman 565 (Delhi)(HC)

S. 2(9) : Benami transaction–Person making contribution for purchase of property are not owners of property but property in law is of persons in whose name title with respect thereto has been recorded. [S. 4]

Plaintiff instituted suit for partition of a property claiming that plaintiff and four defendants were having 1/5th undivided share therein under deed of purchase of subject property in favour of plaintiff and four defendants . Defendant No. 1, in opposition to application under Order XII rule 6 of CPC stated that though sale deed by which property was purchased was in joint names of plaintiff and four defendants but entire sale consideration for purchase of property was equally paid by defendant No. 1 and by his brother 'A'. Plea of sale consideration having been contributed by defendant No. 1 and 'A', did not in law constitute defendant No. 1 and 'A' as owners of property and property in law is of persons in whose name title with respect thereto has been recorded i.e., plaintiff and four defendants. Accordingly defence of defendant No. 1 was not allowed under section 4 and, thus, final decree for partition of property was passed.

12. Mangathai Ammal vs. Rajeswari (Supreme Court), dtd: 18/05/2019

Benami Transactions: While considering whether a particular transaction is benami, the intention of the person who contributed the purchase money is determinative. The intention has to be decided on the basis of surrounding circumstances; relationship of parties; motives governing their action in

bringing about the transaction and subsequent conduct. The payment of part sale consideration & stamp duty cannot be the sole criteria to hold the sale/transaction as benami

THANK YOU

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