



Overview of Prohibition of Benami Property Transactions Act, 1988

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What is the meaning of `benami`

- The word `benami` means without name
- It is a system of acquiring and holding property and even of carrying on business in names other than those of the real owners. This system is usually called the benami system which is and has been common practice in this country.
- A benamidar is simply an `alias` for that of the person beneficially interested.
- Benami transactions is a practice common to all communities and prevalent in this country for a very long time. Benami transactions have received judicial recognition from very early times, as can be seen from the classic decision of the Privy Council in *Gopeekrist Gosain v. Gungapersaud Gosain* [1854]
- Why benami ?

Background

■ In the 57th Report of the Law Commission of India on benami transactions, regarding benami transactions in general, it was stated, with reference to judicial decisions, thus:

"Principle that transaction is presumed to be for benefit of person providing money. The principle is that where property is acquired in the name of one person but the purchase price is paid by another, a presumption arises that the transaction was one for the benefit of the person providing the money. Such cases are common in India where benami transactions are recognised.

Benamidar representing the true owner. — In general, the benamidar fully represents the owner of the property in dealings with third persons. In fact, that is the very object of benami transactions. The property stands in the name of the benamidar, and a third party would not be able to challenge his title so long as the real owner does not come in the picture.

Position as between real owner and third parties. — As to the position between the real owner of the property and third parties: Ordinarily, the real owner will have no occasion to make any assertions about title. If however, such a situation does arise, then the law will have regard to the reality, and (disregarding the ostensible title of the benamidar), the law will allow the real owner to assert his ownership, as a general rule.”

Background

- 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.
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- The Benami Transactions (Prohibition) Amendment Act, 2016 (hereinafter referred to as “the Amending Act”) 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.

Chronology of Amendment Act

May 13, 2015	The Benami Transactions (Prohibition) Amendment 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 the Bill
July 22, 2016	Government proposed amendments to the Amendment Bill, 2015
July 27, 2016	Amendment Bill was passed by Lok Sabha
Aug 2, 2016	Rajya Sabha approved the Amendment Bill
Aug 10, 2016	President gave his assent to the Amending Act
Nov 1, 2016	Date on which the Amending Act came into force
Nov 1, 2016	The Prohibition of Benami Property Transactions Rules, 2016 came into force

Benami Transactions as understood prior to the Original Act

- Benami transactions, a practice common to all communities and prevalent in this country for a very long time, have received judicial recognition from very early times, as would be seen from the classic decisions of the Privy Council in *Gopeekrist Gosain v. Gungapersaud Gosain* [1854] 6 MIA 53, in *Mt. Bilas Kunwar v. Desraj Ranjit Singh* AIR [1915] PC 96 and in *GurNarayan v. Sheo Lal Singh* AIR [1918] PC 140.
- **What then were benami transactions, as understood prior to the Act?** As early as 1908, the Privy Council, in *Petherpermal Chetty v. Muniandy Servai* [1908] ILR 35 Cal. 551 at 558, approved the statement in *Mayne's Hindu Law* (7th edition) as correct. The Privy Council observed thus:

Benami Transactions as understood prior to the Original Act

■ "In *Mayne's Hindu Law* (7th edn., p. 595, para 446), the result of the authorities, on the subject of benami transactions, is correctly stated thus:

- '446 . . . Where a transaction is once made out to be a mere benami, it is evident that the benamidar absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A. But, if A requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and has become reality. It may be very proper for a Court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If, however, he has not defrauded anyone, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons have been allowed to recover property which they had assigned away ... where they had intended to defraud creditors, who, in fact, were never injured... But, where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies: *In pari delicto potior est conditio possidentis*. The court will help neither party. 'Let the estate lie where it falls'.' “

The Judicial Committee of the Privy Council in Gur Narayan's case (supra) described the nature of benami thus:

"The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system, is and has been a common practice in the country. . . The rule applicable to benami transactions was stated with considerable distinctness in a judgment of this Board delivered by Sir George Farwell. Referring to a benami dealing, their Lordships say:

'It is quite unobjectionable and has a curious resemblance to the doctrine of our English Law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our common law that where a feoffment is made without consideration the use results to the feoffor.'

So long, therefore, as a benami transaction does not contravene the provisions of the law, the Courts are bound to give it effect. As already observed, the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. . . .

Meaning of `feoffment' and `feoffor'

- The Free Dictionary by Farlex explains the meaning of `feoffment' as –
 - “*Total relinquishment and transfer of all rights of ownership in land from one individual to another.*”

A feoffment in old England was a transfer of property that gave the new owner the right to sell the land as well as the right to pass it on to his heirs.
An essential element of feoffment was *livery of seisin*, a ceremony for transferring the possession of real property from one person to another.
Feoffment is also known as enfeoffment.
- Merriam Websters explains the meaning of feoffment and feoffor as –
 - “the historical method of granting a freehold estate in land by actual delivery of possession originally by livery of seisin”
 - Feoffor has been explained as one who makes feoffment.

Difference between 'benami' and 'sham'

- Is there any difference between benami and sham transactions? In a very early decision of the Madras High Court in *Rangappa Nayakar v. Rangasami Nayakar* AIR 1925 Mad. 1005 it was held thus:

".. .The essence therefore of a sham transaction is that though a registered deed is brought into existence no title of any kind, either legal or beneficial is intended to be passed thereby to any person whatsoever, that is to say, the deed of transfer is not intended to effect any transfer of property. **The difference therefore between sham transactions and benami transactions is one of intention.** If the deed of transfer is made with the intention of placing the property in the name of third person, the intention clearly amounts to a transfer of the legal title and such a transaction can scarcely be called a sham transaction, but comes directly within the meaning of benami transactions properly so called." (p. 1008)

Difference between 'benami' and 'sham'

■ We have the direct authority of the Supreme Court in at least two decisions. In ***Sree Meenakshi Mills Ltd. v. CIT [1957] 31 ITR 28***, Justice Venkatarama Ayyar, speaking for the Court, held thus:

- ". . . In this connection, it is necessary to note that the word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example, when A sells properties to B but the sale deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word 'benami' is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B. But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid. . . ." (p. 52)

Observations In *Bhim Singh v. Kan Singh* AIR [1980] SC 727

■". . .Two kinds of benami transactions are generally recognised 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 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 recognised 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" (p. 732)

`Sham' as explained by Delhi HC in Krishna Kumar v. Harnamdas

- The Delhi High Court has in the case of Krishna Kumar v. Harnamdas [1991] 56 Taxman 233 (Delhi) has held as under –
 - “Benami transaction, according to section 2(e) means any transaction in which the property is transferred to one person for a consideration paid or provided by another person. This definition would apply only if (i) there is a transfer of property, and (ii) the consideration is paid or provided not by the transferee, but by another person. In a benami transaction it must be established that the property is held or possessed by the benamidar and that consideration was paid by another person. If possession is not transferred to the benamidar and actually the consideration is paid by another person and the possession of the property is also taken by such other person, the transfer deed by which the property is shown to have been sold to the benamidar would be merely a sham document. It will go to show that the real intention of the parties was not to confer any right, title or interest on the benamidar. The Act will apply only when both the conditions, i.e., the transfer of possession to the benamidar as well as the payment of consideration by a person other than the benamidar are proved and it will not extend to a case where actually the possession of the property has not been transferred to the benamidar.

`Sham' as explained by Delhi HC in Krishna Kumar v. Harnamdas

- In such a case, if a party pleads that there never was any intention to create any right in the name of transferee and he was simply used as a name-lender, and is able to prove that fact by some cogent and convincing evidence, the Court is obligated to return a finding that the deed was sham and did not affect the rights of such a person. Rather the real and ostensible title merges in one and the same person and the person in whose name the property is mentioned in the deed is a mere name-lender. In the instant case, the gist of the pleadings of the defendants was that actually the defendants had given the bid at the spot, had paid consideration after the acceptance of the bid, had taken the possession of the plot and, after raising construction thereon had gone into possession. Nowhere in their written statement they had used the word 'benami'. Throughout they had stated that the plaintiff was only a name-lender and that was also because of the relationship of mutual trust and confidence. The plaintiff happened to be the real brother-in-law of the deceased defendant, i.e., the maternal uncle of defendant Nos. 2 and 3. It was never the intention of the parties that plaintiff would ever get possession of the property in question and, therefore, section 4 would not be applicable.”

Onus or Burden of proof

- The burden of proof regarding benami is upon the one who alleges benami. The burden to prove passing of consideration or the motive is on the person who alleges benami. This aspect of the matter was considered by the **Supreme Court in Valliammal (D) By Lrs vs Subramaniam & Ors (2004) 7 SCC 233**, where it was held:

*“This Court in a number of judgments has held that it is **well- established that burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami.** The essence of a benami transaction is the intention of the party or parties concerned and often, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. Referred to Jaydayal Poddar vs. Bibi Hazra,*

Onus or Burden of proof ...

- 1974 (1) SCC 3; *Krishnanand vs. State of Madhya Pradesh*, 1977 (1) SCC 816; *Thakur Bhim Singh vs. Thakur Kan Singh*, 1980 (3) SCC 72; *His Highness Maharaja Pratap Singh vs. Her Highness Maharani Sarojini Devi & Ors.*, 1994 (Supp. (1) SCC 734; and *Heirs of Vrajlal J. Ganatra Vs. Heirs of Parshottam S. Shah*, 1996 (4) SCC 490. It has been held that in the judgments referred to above that the question **whether a particular sale is a benami or not, is largely one of fact, and for determining the question no absolute formulas or acid test, uniformly applicable in all situations can be laid.** After saying so, this Court spelt out following **six circumstances which can be taken as a guide to determine the nature of the transaction:**

- (i) *the source from which the purchase money came;*
- (ii) *the nature and possession of the property, after the purchase;*
- (iii) *motive, if any, for giving the transaction a benami colour;*

Onus or Burden of proof ...

(iv) *the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;*

(v) *the custody of the title deeds after the sale; and*

(vi) *the conduct of the parties concerned in dealing with the property after the sale."*

- ***The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. We would examine the present transaction on the touchstone of the above two indicia."***

Findings on the basis of which the transaction was held benami

- The Supreme Court in **G. Mahalingappa v. G. M. Savitha** [2005] 147 Taxman 583 (SC) held that the following findings of fact arrived at by the appellate court and the trial court would conclusively prove that the transaction in question was benami in nature:
 - (i) the appellant had paid the purchase money;
 - (ii) the original title deed was with the appellant;
 - (iii) the appellant had mortgaged the suit property for raising loan to improve the same;
 - (iv) he paid taxes for the suit property;
 - (v) he had let out the suit property to defendant Nos. 2 and 5 and was collecting rents from them;
 - (vi) the motive for purchasing the suit property in the name of plaintiff was that the plaintiff was born on an auspicious nakshatra and the appellant believed that if the property was purchased in the name of plaintiff / respondent, the appellant would prosper; and
 - (vii) the circumstances surrounding the transaction, relationship of the parties and subsequent conduct of the appellant tend to show that the transaction was benami in nature.

When is burden of proof discharged by the party alleging the transaction to be benami

■ In **First ITO v. M. R. Dhanalakshmi Ammal** [1978] 112 ITR 413 (Mad.), it was held that the true test to determine whether the transaction is benami or not is to look in to the intention of the parties, viz., whether it was intended to operate as such or whether it was meant to be colorable. If colorable, the transaction is benami, otherwise, the transaction is not benami, and the issue cannot be displaced by mere conjecture or suspicion as to the various circumstances surrounding the transaction since the very object of a benami transaction is secrecy. The Court further held that the burden of proof by the party who sets up the case of benami nature of transaction would be discharged by satisfying the following well-known criteria, viz.

- (i) the source of purchase relating to the transaction;
- (ii) possession of the property;
- (iii) position of the parties and their relationship to one another;
- (iv) circumstances, pecuniary or otherwise, of the alleged transfer;
- (v) the motive for the transaction;
- (vi) the previous and subsequent conduct of the parties.

When is burden of proof discharged by the party alleging the transaction to be benami ...

- Each of the above said circumstances taken by itself is of no particular value and affords no conclusive proof of the intention to transfer the ownership from one person to the other; but a combination of some or all of them and a proper weighing and appreciation of their value would go a long way towards indicating whether the ownership has really been transferred or where the real title lies. In every benami transaction the intention of the parties is the essence.

Tests for deciding benami nature of transactions

■ In **Vinayakrao v D. Chaudhary v. ITO** [1986] 15 ITD 180 (Nag. – Tribunal), the Tribunal culled out the following recognized tests laid down by various High Courts and Supreme Court for deciding the issue regarding benami nature of transaction:

- (i) the burden of proving whether a particular person is a benamidar of other or not is upon the person alleging the same;
- (ii) the essence of benami is the intention of the party or parties concerned. The intention is often shrouded in a thick veil which cannot be easily pierced through but such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious burden that rests on him nor justify the acceptance of mere conjectures and surmises as a substitute of proof;
- (iii) the question whether a purchase in the name of the wife by the husband out of money provided by him is benami for his own benefit would depend upon the intention of the parties at that time of purchase;

- (iv) the source from which the purchase money came is not always decisive of the real ownership of the property though it may prima facie show that he who provides money does not intend to part with the beneficial interest in the property;
- (v) the nature and possession of property after purchase;
- (vii) the position of the parties and the relationship, if any, between the parties;
- (viii) the custody of title deeds after sale;
- (viii) the conduct of the parties concerned in dealing with the property after sale; who manages the property and who enjoys the usufruct and who is recognised as owner by the Government and semi-government authorities and third parties and other relevant circumstances depending upon the fact of the case.

Tests for deciding benami nature of transactions ...

- Where there was no proof to establish necessary ingredients of benami like contribution of capital, enjoyment of profits and control of business, AO could not be said to be justified in including income of sister concern PFI in the hands of assessee-company on ground that PFI was benamidar of assessee – **Parakh Foods Ltd. v. DCIT [1998] 64 ITD 396 (Pune-Trib.)**.
- Although for determining an issue relating to benami nature of a property or even a business concern, no absolute formulae or acid tests, uniformly applicable in all situations, can be laid down, yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances –

Tests for deciding benami nature of transactions ...

- (i) the source from which the purchase money came;
- (ii) the nature and possession of the property, after the purchase;
- (iii) motive, if any, for giving the transaction a benami colour;
- (iv) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
- (v) the custody of the title-deeds after the sale; and
- (vi) the conduct of the parties concerned in dealing with the property after the sale.

Although the above criteria are applicable to the cases of benami purchase of properties, the same should, mutatis mutandis apply to the cases of benami nature of business concerns also – **G. L. Chabada v. ITO [1995] 53 ITD 53 (Bang.-Trib.)**.

Inference of person being benamidar held justified

- In the following instances inference of a person being benamidar of another was held to be justified :
 - (i) Where evidence produced on behalf of B himself in the case relating to his assessment itself was sufficient to establish that B did not have any source of income so as to make investment in the contract business, there was no error in the finding of the ITO that B was a benamidar – **Uttamchand Jain v. CIT [1988] 173 ITR 298 (MP)**.
 - (ii) In **ACIT v. Panchuram Deshmukh [2010] 133 TTJ 53 (Bilaspur – Trib.)** it was held that AO was justified in holding assessee as benamidar of one “T” and assessing the income computed in his case in T’s hands in view of the fact that AO observed that assessee, who was partner in a firm controlled by one “T”, was a man of no means; that huge funds were transferred to him from firm’s account and money withdrawn from assessee’s bank account went back to firm; and that despite huge

Inference of person being benamidar held justified

■ business, assessee's standard of living had not improved. In order to treat a person as benamidar of other person, the transaction has to be only an ostensible one without any intention to part with the beneficial interest. The first test is the source from which the consideration has come and the second test is who actually had enjoyed the benefits. In the instant case, the money was given by the firm and the benefits were retained which had gone to firm which was controlled by "T" and his close associates. The firm had been used for the same. All bank transactions were controlled by "T" and his close associates. Those circumstances showed that the assessee was benamidar of "T". In view of the factual and legal discussion, it was found that the money was indirectly invested by "T" and the fruit of business had gone back to him as well. Therefore, the income computed in the assessee's case was rightly held assessable only in the hands of the said "T" on substantive basis.

Inference of person being benamidar held justified ...

■ (iii) Where wife, daughter, employees and friends of assessee were partner in a firm and in assessment proceedings of firm it was held to be bogus and spurious on ground that business of firm was managed by assessee with other partners who had no experience and said order was not challenged by firm, said firm was to be considered as benami of assessee and income derived by firm was to be assessable as income of assessee – **CIT v. G M Dharja [2000] 243 ITR 104 (Kar.)**

■ (iv) Where wife of assessee has no independent income, acquisition made in her name will be treated as acquisition made by assessee – **M K Jha v. ITAT [2008] 303 ITR 81 (Pat.)**.

■ (v) Where partners of assessee firm were members of HUF and business was also carried on from premises of HUF and partners were ignorant about business, finding that assessee-firm was benami of HUF was justified – **Paras & Co. v. CIT [1995] 211 ITR 914 (Raj.)**.

Inference of person being benamidar held NOT justified

- In the following instances inference of a person being benamidar of another was held to be NOT justified –

- (i) Where property stood in name of assessee's minor son, loans taken for purchasing property were confirmed, no money was invested by assessee in purchasing the house and rental income was not used by assessee, addition of rental income in assessee's hands on the ground that minor son was his benamidar could not be said to be justified – **Zafrul Hassan Iraqi v. ITO [1998] 61 TTJ 387 (Jp-Trib.)**.

- (ii) Where assessee had produced profit and loss account and assessment orders of parties in whose accounts credits appeared in books of account of assessee and their bank accounts were duly verified by AO, it could not be said that those parties were not genuine and benamidar of assessee simply because the parties were not produced and their bank accounts were opened with introduction of one of the

Inference of person being benamidar held NOT justified ...

- partners of assessee-firm – **Dimco Silk Mills v. ITO [1999] 107 Taxman 41 (Ahd.)(Mag.)**.
- (iii) Where the assessee's wife was made co-allottee of land and both the assessee and his wife equally shared cost and equally invested for construction of house which stood registered in joint names and by agreement among them wife was allotted two floors of house, it could not be said that the wife was benamidar of the assessee – **Vinayakrao D. Chaudhary v. ITO [1986] 15 ITD 180 (Nag.-Trib.)**
- (iv) When the assessee with her technical background, carried on business in separate business premises employing labour, merely because her main transactions supported by bills and accounts, were with a company of which her father was a managing director she should not be said to be benami of her father or company – **Smt. Saroj Silsalewal v. ITO [1989] 44 Taxman 244 (Jp. Mag.)**.

Inference of person being benamidar held NOT justified ...

■ (v) Where assessee's wife had been assessed for several years in respect of share income from a firm which had been granted registration, merely because during search of assessee's residence his wife stated that she did not know the name of firm and the share of profit therein though she admitted she was a partner, she could not be treated as assessee's benami so as to include share income in assessee's hands – **Guarishanker Omkarmal v. ITO [1990] 37 TTJ 353 (Ahd. – Trib.)**.

■ (vi) Merely because common cash book was being maintained by assessee and his wife and his mother-in-law for their separate business, the ladies could not be said to be benamidars of assessee when initial capital of ladies had already been accepted in their individual assessments and they had also been withdrawing money from the business – **ITO v. Nemichand Garg [1987] 23 ITD 309 (Jp.- Trib.)**.

■ (vii) Merely because business run by assessee was being conducted by him from same premises in which assessee's husband was also carrying on business, it could

Inference of person being benamidar held NOT justified ...

- not be held, in absence of other material, that assessee's business was a benami one and that she was her husband's benamidar – **ITO v. Ghanshyambhai R. Thakkar [1996] 88 Taxman 65 (Mag.) / 56 TTJ 460 (Ahd. Trib.)**.
- (viii) Where third party evidence proved that assessee's wife carried on hundi business, ITO was not justified in treating business of wife as assessee's so as to make addition in hands of assessee – **Harbans Lal Gupta v. ITO [1990] 37 TTJ 636 (Delhi – Trib.)**.
- (ix) Where following dissolution of old firm and constitution of new firm assessee was not partner in new firm but treated his share in dissolved firm as loan to new firm and minor son of assessee was admitted to benefits of partnership of new firm and a gift received by minor from grandfather was contributed as capital by minor, minor could not be treated as benamidar of assessee – **Manaklal v. CIT [1980] 122 ITR 894 (MP)**.

Inference of person being benamidar held NOT justified ...

- (x) Where partners of a firm were directors of assessee company and said firm was found genuine and granted registration and assessee was selling a product through firm, firm could not be treated as benami of assessee – **Pudinjerekara Agencies (P.) Ltd. v. CIT [1988] 173 ITR 637 (Ker.)**.

Statutory provisions curtailing or modifying the general principles of benami

- Prior to the Act, there were several statutory provisions which curtailed or modified the general principles of benami. Thus, under section 66 of the Code of Civil Procedure no suit could be maintained against any person claiming title under a purchase certificate issued by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. Section 281A of the Income-tax Act, 1961 inserted by the Taxation Laws (Amendment) Act, 1972 provided for the failure to furnish information in respect of properties held benami and prohibited institution of suits to enforce any right in respect of any property held benami unless certain specified conditions are fulfilled.

Provisions of Indian Trusts Act, 1882 which are since deleted

- The Indian Trusts Act, 1882 had, in Chapter IX, made provisions for "Certain obligations in the nature of trusts".
- Section 81 of the Indian Trusts Act reads thus:
 - **"81. Where it does not appear that transfer intended to dispose of beneficial interest.** — Where the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative."
- Section 82 provided thus:
 - **"82. Transfer to one for consideration paid by another.** — 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.
 - Nothing in this section shall be deemed to affect the Code of Civil Procedure. Section 317 of Act No. XI of 1859 (to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency), section 36."

Provisions of Indian Trusts Act, 1882 which are since deleted

- **"84. *Transfer for illegal purpose.*** — Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

- And section 94 reads thus:

- **"94. *Constructive trusts in cases not expressly provided for.*** —In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands."

S. 281A of the Income-tax Act which is since deleted

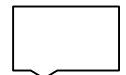
- **Effect of failure to furnish information in respect of properties held benami.**
- **281A.** —(1) No suit to enforce any right in respect of any property held *benami*, whether against the person in whose name the property is held or against any other person, shall be instituted in any court by or on behalf of a person (hereafter in this section referred to as the claimant) claiming to be the real owner of such property unless notice in the prescribed form and containing the prescribed particulars in respect of the property has been given by the claimant within a period of one year from the date of acquisition of the property, to the Chief Commissioner or Commissioner.
- (1A) Where any such property is acquired by the claimant before the 1st day of March, 1984, the provisions of sub-section (1) shall be deemed to have been fulfilled if notice in the prescribed form and containing the prescribed particulars in respect of the property is given by the claimant, within a period of one year from the said date, to the Chief Commissioner or Commissioner.

S. 281A of the Income-tax Act which is since deleted

- (1B) Notwithstanding anything contained in sub-section (1) or sub-section (1A), in relation to any suit relating to any immovable property of a value not exceeding fifty thousand rupees, the provisions of sub-section (1) or, as the case may be, sub-section (1A), shall be deemed to have been fulfilled if, at any time before the suit, notice in the prescribed form and containing the prescribed particulars in respect of the property has been given by the claimant to the Chief Commissioner or Commissioner.
- (2) The Chief Commissioner or Commissioner shall, on an application made in the prescribed manner, by the claimant or any person acting on his behalf or claiming under him, and on payment of the prescribed fees, issue, for the purposes of a suit referred to in sub-section (1), a certified copy of any notice given by the claimant under sub-section (1) or sub-section (1A) or sub-section (1B), within fourteen days from the date of receipt of the application.

Distinction between the Original Act and Amended Act

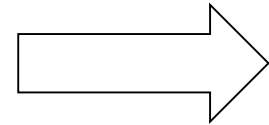
Original Act	Amended Act
Benami Transactions (Prohibition) Act, 1988	Prohibition of Benami Property Transactions Act, 1988
9 sections	72 sections
Acquisition of property	Confiscation of property
Benami Transactions Rules absent	Benami Transactions Rules notified
No administration	Administration defined
Imprisonment for 3 years or fine or both	Rigorous imprisonment for a period not less than one year



Definitions as per original Act

■ 2. *Definitions.*—In this Act, unless the context otherwise, requires,—

(a) "benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person;



(b) "prescribed" means prescribed by rules made under this Act;

(c) "property" means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.'

Prohibition of benami transactions as per original Act

■ Prohibition of benami transactions.

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

(2) Nothing in sub-section (1) shall apply to –

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;

(b) the securities held by a –

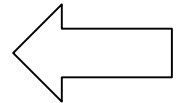
(i) depository as registered owner under sub-section (1) of section 10 of the Depositories Act, 1996 (22 of 1996);

(ii) Participant as an agent of a depository.

Explanation: The expressions “depository” and “participants” shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section (1) of section 2 of the Depositories Act, 1996.

(3) 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.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable.



Acquisition of benami property and Act not to apply in certain cases – Ss 5 and 6 of the original Act

5 Property held benami liable to acquisition -

- (1) All properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedure, as may be prescribed.
- (2) For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section (1).

6 Act not to apply in certain cases –

Nothing in this Act shall affect the provisions of section 53 of Transfer of Property Act, 1882, or any law relating to transfers for an illegal purpose.”

Whether the original Act applies to a sham transaction?

■ Before the Kerala High Court in the case of **Ouseph Chacko v. Raman Nair [1990]**

49 Taxman 410 (Ker.) the following questions arose for determination –

- (i) Is a sham transaction `benami`?
- (ii) Does section 4 of the Benami Transactions (Prohibition) Act, 1988 apply to sham transactions?

The Court after exhaustively considering various decisions of the Privy Council, the Apex Court and also the provisions of the Indian Trusts Act, the provisions of the Benami Transactions (Prohibition) Act, 1988, it observed that in view of the decision of the Apex Court in Shree Meenakshi Mills case and in Bhim Singh's case **the question for consideration is whether the Act applied to both these cases, or whether it is limited only to the benami transactions falling in the first category and does not extend to those falling in the second category.**

The Kerala High Court, in this case held that -

'sham transaction' – is it a 'benami transaction' as per the original Act

■ The Act has provided a definition for 'benami transaction'. It means any transaction in which property is transferred to one person for a consideration paid or provided by another. It contemplates cases where (a) there is a transfer of property, and (b) the consideration is paid or provided not by the transferee, but by another. Where there was no transfer of property as in a sham document, there is no consideration for the transaction which does not satisfy the definition of 'benami transaction' under the Act. The definition of 'benami transaction' in the Act, thus, excludes from its purview a sham transaction. Further, section 81 of the Indian Trusts Act, 1882, applies to a transaction under which no transfer was intended and no consideration passed, i.e., to a sham transaction. But section 82 provides for another class of transactions which are also statutorily treated as obligations in the nature of a trust and they relate to transfer to one for consideration paid by another. It is significant that section 82 has practically been bodily lifted and incorporated in the definition of 'benami transaction' in the present Act. This definition has nothing to do with the concept contained in section 81. If the Act intended to embrace transactions covered by section 81 also, there was no reason for restricting the definition of 'benami transaction' to the phraseology employed in section 82. **This also gives an indication that sham transactions, loosely called benami transactions, which are in fact not benami transactions in the real sense of the term, are not subject to the rigour of the Act.** It is true that section 3 uses the words 'benami transaction' and section 4 uses only the word 'benami'. But that makes no qualitative difference in the application of the Act.

Does 'held' in s. 4 mean possessed or occupied?

■ As regards applicability of s. 4 it held that –

■ “Ss. 3 and 4 have to be read and understood together. They are not disjunctive provisions in a comprehensive legislation intended to prohibit benami transactions. Sections 3 and 4 are complementary to each other and intended to achieve the same object. While section 3 prohibits the creation of any 'benami transaction', section 4 prevents any suit, claim or action to enforce any right in respect of any property 'held benami'. It is only when any right in respect of a property 'held benami' is sought to be enforced in any suit or claim that section 4 is attracted. 'Hold' according to Black's Dictionary means 'to possess by virtue of a lawful title as in the expression, common in grants, to have and to hold, to possess, to occupy, to be in possession and administration of. **In the context and setting of section 4, the word 'held' has to be understood as 'possessed or occupied'. If the possession or occupation is not benami, section 4 can have no application.** An intended benami does not confer even pretended rights. A benami transaction where the property is so held as benami is the subject of the statutory prohibition under sections 3 and 4. The definition of 'benami transaction' is inextricably connected with all the provisions of the Act, as the Act is intended 'to prohibit benami transactions and the right to recover property held benami and for matters connected therewith or incidental thereto'. S. 4 cannot be invoked in case of transactions which were sham or only nominal.”

Retrospective applicability of s. 4 of the unamended Act which has remained the same in the Amended Act as well

- In **Mithilesh Kumari & another vs. Prem Behari Khare** [(1989) 1 SCR 621] the Supreme Court observed that though section 3 is prospective and though section 4(1) is also not expressly made retrospective by the legislature, by necessary implication, it appears to be retrospective and would apply to all pending proceedings wherein right to property allegedly held benami is in dispute between the parties and that section 4(1) will apply at whatever stage the litigation might be pending in the hierarchy of the proceedings, for the reasons mentioned therein.

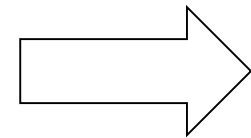
Retrospective applicability of s. 4 of the unamended Act

- The Supreme Court in a later decision in the case of **R. Rajagopal Reddy vs. Padmini Chandrasekharan [(1995) 2 SCC 630]** agreed with the view that “on the express language of Section 4(1) any right inhering in the real owner in respect of any property held benami would get effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1), and hence-after Section 4(1) applied no suit can lie in respect to such a past benami transaction. To that extent the Section may be retrospective.
- However, the court did not agree with the view that “Section 4 (1) would apply even to such pending suits which were already filed and entertained prior to the date when the Section came into force and which has the effect of destroying the then existing right of plaintiff in connection with the suit property cannot be sustained in the face of the clear language of Section 4(1).”

Short title, extent and commencement – S. 1

■ Short title, extent and commencement.

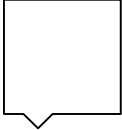

1. (1) This Act may be called the ¹[*Prohibition of Benami Property Transactions Act, 1988*] (45 of 1988).
- (2) It extends to the whole of India except the State of Jammu and Kashmir.
- (3) The provisions of sections 3, 5 and 8 shall come into force at once, and the remaining provisions of this Act shall be deemed to have come into force on the 19th day of May, 1988.



1. Substituted for "*Benami Transactions (Prohibition) Act, 1988*" by the *Benami Transactions (Prohibition) Amendment Act, 2016*, w.e.f. **1-11-2016**†

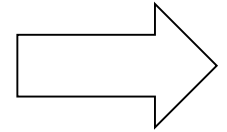
■ †**NOTIFICATION NO. SO 3289(E) [No.98/2016 (F.No.149/144/2015-TPL (Part-II, dated 25-10-2016).**—In exercise of the powers conferred by sub-section (2) of section 1 of the *Benami Transaction (Prohibition) Amendment Act, 2016* (43 of 2016), the Central Government hereby appoints the 1st day of November, 2016 as the date on which provisions of the said Act shall come into force.

Definition of `benami property' and `property'

- '2. In this Act, unless the context otherwise requires,—
- (8) "*benami* property" means any property which is the subject matter of a *benami* transaction and also includes the proceeds from such property; 
- The term `benami property' is exhaustively defined. It also includes proceeds from such property. A question would arise as to whether a property acquired with such proceeds will also be regarded as benami property? What would be the position if the proceeds are since invested in another property or are spent away?
- (10) "benamidar" 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.
- (26) "property" means 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; 

Definition of `transfer' and `person'

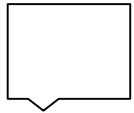
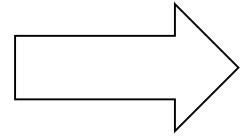
- '2. In this Act, unless the context otherwise requires,—
- (29) "transfer" includes sale, purchase or any other form of transfer of right, title, possession or lien;
- The term `transfer' is inclusively defined. The second part states that any other form of transfer (ie. a form other than sale or purchase) of right, title, possession or lien is also covered. Therefore, mortgage, lease, tenancy, gift, will all be transfers.
- (24) "person" shall 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);The definition is identical to the definition of `person' in s. 2(31) of the Income-tax Act, 1961 except that local authority is not included herein.



Definition of 'benami transaction'

■ (9) "*benami* transaction" means,—

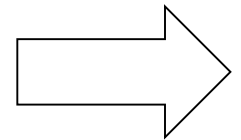
■ (A) a transaction or an arrangement—



■ (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,

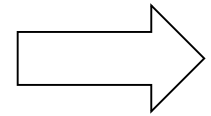



except when the property is held by—

(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;

Definition of `benami transaction' ...

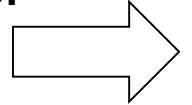
 (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 and any other person as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

Definition of `benami transaction' ...

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

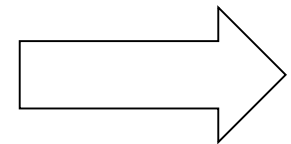
Definition of `benami transaction' ...

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, 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.



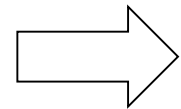
Is the Explanation retrospective in view of the opening words `For the removal of doubts, it is hereby declared that”

words and expressions not defined in this Act

■ '2. In this Act, unless the context otherwise requires,—

(31) words and expressions used herein and not defined in this Act but defined in the Indian Trusts Act, 1882, the Indian Succession Act, 1925, the Indian Partnership Act, 1932, the Income-tax Act, 1961, the Depositories Act, 1996, the Prevention of Money-Laundering Act, 2002, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013, shall have the same meanings respectively assigned to them in those Acts.'

■ Therefore, if a word / expression is used in this Act but is not defined in this Act one will need to check if it is defined in any of the 8 Acts mentioned above. If the answer is in the affirmative, such word / expression will have the same meaning assigned to them in those Acts. A difficulty may arise if a word / expression is defined in more than one of these 8 Acts and the two definitions are different, which one be adopted for the purposes of this Act.



Meaning of 'fiduciary relationship'

■ In Re. Coomber (1911) 1 CH 723 Moulton LJ observed,

“Fiduciary relationships are of various types. They extend from the relation of myself with an errand boy when I send him to bring me back my change upto the most intimate and confidential relations which can possibly exist between one party and another, where one is fully in the hands of the other because of infinite trust in him.”

■ Sir Underhill says,

“A fiduciary relationship exists wherever there is a relationship of confidence.”

“Equity imposes duties or disabilities upon the person in whom confidence is reposed (the fiduciary) in order to prevent possible abuse of confidence. The categories of cases in which fiduciary duties and obligations arise spring from factual circumstances ... A fiduciary may or may not have property vested in him ... whilst a 'trustee' is always a fiduciary, in various contexts the following have also been held to be fiduciaries [(1962) Camb LJ 69; (1963) Camb LJ 119]:

Meaning of 'fiduciary relationship' ...

- Personal representatives
- Directors
- Solicitors and Professional Advisers (eg Accountants, Stock Brokers)
- Employees
- Tenants for life
- Guardians
- Company Promoters
- Partners
- Receivers
- Liquidators

Meaning of 'fiduciary relationship' ...

■ When two persons stand in such a relation that while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence enables the other in whom the confidence is reposed to exert influence or dominion over the confiding party to his own benefit and advantage at the expense of the person trusting him, the relation existing between them is of 'fiduciary character'; and it means and includes various kinds of relations in which one holds the position of influence and dominion over the other. Relations existing between

- (a) Parent and a child, guardian and ward : Lakshmi Das v. Roop Lal, ILR 30 Mad 169 (FB);
- (b) husband and wife : AIR 1925 Oudh 16: 78 IC 850; 11 Moo IA 551: 8 WR 3 PC;
- (c) doctor and patient : Gibson v. Russel 2 Y & Col (CC) 104;
- (d) agent and his principal : AIR 1927 PC 148: 103 IC 239; ILR 25 All 358; ILR 18 Cal 545 (PC) : 18 IA 144: 17 IC 363; AIR 1929 Lah 309 : 116 IC 899; AIR 1931 Nag 69 : 134 IC359
- (e) lawyer and client : ILR 3 Cal 473;
- (f) trustee and beneficiary, spiritual adviser and disciple : ILR 30 Bom 578; are of a fiduciary character." (See also 1956 Andh WR 911).

Meaning of 'fiduciary relationship'

- In *Nellie v. Wapshare v. Pierce Leslie & Co.*, AIR 1960 Mad 410 (which went in appeal to Supreme Court (*Pierce Leslie & Co. v. Nellie Wapshare*, AIR 1969 SC 848)) the Madras High Court observed that “where confidence is reposed by one in another and that leads to a transaction in which there is a conflict of interest and duty in the person in whom such confidence is reposed, fiduciary relationship immediately springs into existence.” (Although the decision of Madras High Court was reversed by the Supreme Court, but not in respect of these observations).
- It is the courts which, taking into account the nature of relationship and the nature of transaction, will decide whether 'fiduciary duties and obligations arise from factual circumstances' of the particular case. One essential feature to look for is whether the person in fiduciary character is bound 'to protect the interest of the other person'. The binding 'to protect the interest of the other person' need not be necessarily legal or contractual. It may be even moral.

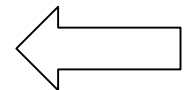
Meaning of 'fiduciary relationship'

■ Supreme Court in Marcel Martins v. M. Printer [2012] 21 taxmann.com, after considering several authorities and citing them with approval held that –

“while the expression “fiduciary capacity” may not be capable of a precise definition, it implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. The expression is in fact wider in its import for it extends to all such situations as place the parties in positions that are founded on confidence and trust on the one part and good faith on the other.”

The Court further held that -

“in determining whether a relationship is based on trust or confidence, relevant to determining whether they stand in a fiduciary capacity, the Court shall have to take into consideration the factual context in which the question arises for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case



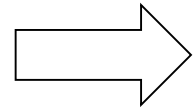
Prohibition of Benami Transactions – Section 3 of amended Act

■ '3. Prohibition of benami transactions

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

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



■ Present sub-section (2) was earlier sub-section (3) and sub-section (2) under the Old Act was –

“(2) Nothing in sub-section (1) shall apply to –

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;

(b) the securities held by a –

(i) depository as registered owner under sub-section (1) of section 10 of the Depositories Act, 1996 (22 of 1996);

(ii) Participant as an agent of a depository.

Explanation: The expressions “depository” and “participants” shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section

Legal consequences of benami transaction

- The following are the legal consequences of benami transactions:
- 1 **Benami transaction is a punishable offence** – 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 – Section 3(2) of the Act [Formerly section 3(3) of the Act].
- 2 **Prohibition of the right to recover property held benami** – No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name this property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property – Section 4(1)
- 3 **No defence based on any right in respect of any property held benami**, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action or by or on behalf of a person claiming to be the real owner of such property – Section 4(2).
- 4 **Property held benami liable to confiscation** - Any property, which is the subject matter of benami transaction, shall be liable to be confiscated by the Central Government – New section 5 as substituted by the 2016 Amendment Act.

Legal consequences of benami transaction ...

■ 5 **Prohibition on re-transfer of property by benamidar** – No person, being a benamidar shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf – New section 6(1). Any such re-transfer shall be null and void – New section 6(2). However, this prohibition shall not apply where the re-transfer is made in accordance with the Income Declaration Scheme, 2016 – i.e. in accordance with section 190 of the Finance Act, 2016 – New section 6(3).

Prohibition of the right to recover property held benami – S 4

■ “4. Prohibition of the right to recover property held benami

(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defense based on any right in respect of any property held benami, whether against any the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.”

Omitted by the *Benami* Transactions (Prohibition) Amendment Act, 2016, w.e.f. **1-11-2016**. Prior to its omission, sub-section (3) read as under :

(3) Nothing in this section shall apply,—(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.”

Confiscation of benami property and prohibition on re-transfer of property by benamidar – Ss 5 and 6

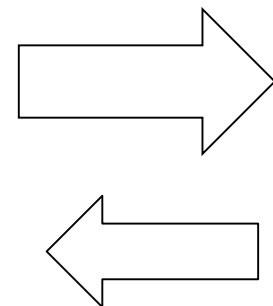
5 Property held benami liable to confiscation - Any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government.



6 Prohibition on re-transfer of property by benamidar –

(1) No person, being a benamidar 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 sub-section (1), the transaction of such property shall be deemed to be null and void.



■ 18. Authorities and jurisdiction

- (1) The following shall be the authorities for the purposes of this Act, namely:—
 - (a) the Initiating Officer;
 - (b) the Approving Authority;
 - (c) the Administrator; and
 - (d) the Adjudicating Authority.

- (2) The authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, assigned, as the case may be, to it under this Act or in accordance with such rules as may be prescribed.

Powers of authorities – S. 19

■ S. 19(1) of the Act provides that for the purposes of this Act, the authorities shall have the same powers as are vested in a civil Court while trying a suit in respect of the following matters viz-

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including any official of a banking company or a public financial institution or any other intermediary or reporting entity, and examining him on oath;
- (c) compelling the production of books of account and other documents;
- (d) issuing commissions;
- (e) receiving evidence on affidavits; and
- (f) any other matter which may be prescribed.

■ All the persons summoned under s. 19(1) shall be bound -

- (i) to attend in person or through authorized agents, as any authority under this Act may direct, and
- (ii) to state the truth upon any subject with respect to which they are examined or make statements, and produce such documents as may be required.

Powers of authorities – S. 19

- Every proceeding under sub-sections (1) and (2) shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.
- Any authority under this Act may, for the purposes of this Act, requisition the service of any police or other officer or any officer of the Central Government or State Government or both to assist him for all or any of the purposes specified in sub-section (1), and it shall be the duty of every such officer to comply with the requisition or direction.
- Sub-section (5) defines “reporting entity” for the purposes of this section to mean any intermediary or any authority or of the Central or the State Government or any other person as may be notified in this behalf.
- Explanation to the section states that the term ‘intermediary’ for the purposes of sub-section (5) shall have the same meaning as assigned to it in s. 2(1)(n) of the Prevention of Money Laundering Act, 2002.

Power of authority to conduct inquiry, etc. – S. 23

- **23. Power of authority to conduct inquiry, etc.** – The Initiating Officer, after obtaining prior approval of the Approving Authority, shall have power to conduct or cause to be conducted any inquiry or investigation in respect of any person, place, property, assets, documents, books of account or other documents, in respect of any other relevant matters under this Act.

- Webster's Merriam Dictionary explains the meaning of 'inquiry' as
 - An examination into facts or principles;
 - A systematic investigation often of a matter of public interest

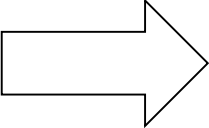
Notice and attachment of property by IO – Ss. 24 and 25

- The initial notice will be issued by Initiating Officer (IO) if, based on the material in his possession, he has reason to believe that any person is a benamidar in respect of a property.

- For issuance of notice by the Initiating Officer the following pre-conditions are to be satisfied –
 - (i) there has to be a property;
 - (ii) there has to be material in the possession of IO;
 - (iii) based on such material in possession of IO, he (IO) has reason to believe that any person is a benamidar of a property;
 - (iv) he has recorded the reasons in writing.

- Upon satisfaction of all the above mentioned conditions, IO may issue a notice to the person (benamidar) asking him to show cause why the property specified in the notice should not be treated as a benami property. The notice issued has to specify the time within which the person is required to show cause.

Notice and attachment of property by IO – Ss. 24 and 25

- A copy of such notice shall also be issued to the beneficial owner if his identity is known.
- 
- Sub-section (2) of section 24 reads as under –
 - (2) Where a notice under sub-section (1) specifies any property as being held by a benamidar referred to in that sub-section, a copy of the notice shall also be issued to the beneficial owner if his identity is known.
(emphasis supplied)
 - Considering the language of sub-section (2) it is not clear as to whether there can be a notice which does not specify a property as being held by a benamidar?
 - The notice under s. 24(1) may be served on the person named therein either by post or as if it were a summons issued by a Court under CPC.

Notice and attachment of property by IO – Ss. 24 and 25

The notice may be addressed to-

in the case of	notice may be addressed to
an individual	an individual
a firm	the managing partner or the manager of the firm
a HUF	the karta or any member of such family
company	the principal officer thereof
any other association or body of individuals	the principal officer or any member thereof
any other person (not being an individual)	the person who manages or controls his affairs

Notice and attachment of property by IO – Ss. 24 and 25

- IO has the power to attach the property referred to in his notice if the following conditions are satisfied –
 - i) he is of the opinion that the person in possession of the property held benami may alienate the property within the period specified in the notice;
 - ii) he has obtained previous approval of the Approving Authority.

Meaning of `alienate` – Black’s Law Dictionary explains the meaning of alienate as – to transfer or convey (property or a property right) to another.

- The attachment has to be by an order in writing passed by the IO. Such attachment is to be for a period of upto 90 days from the date of issue of notice under subsection (1) of section 24 i.e. the date of issue of first notice.
- The Initiating Officer after -
 - (i) making such inquiries as he deems fit; and
 - (ii) calling for such reports or evidence as he deems fit; and
 - (iii) taking into account all relevant materials

Notice and attachment of property by IO – Ss. 24 and 25

shall within a period of 90 days from the date of issue of notice under sub-section (1) of section 24, IO may –

(a) where provisional attachment has been made –

(i) pass an order continuing the provisional attachment of the property till the passing of the order by the Adjudicating Authority under s. 26(3). Such order continuing the provisional attachment is required to be passed after obtaining prior approval of the Approving Authority;

(ii) revoke the provisional attachment of the property with the prior approval of the Approving Authority.

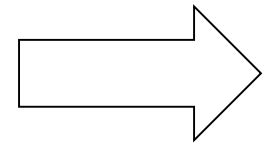
■ Therefore, where provisional attachment is made, continuing the same till the passing of the order by the Adjudicating Authority or revoking the same has to be with the prior approval of the Approving Authority.

Notice and attachment of property by IO – Ss. 24 and 25

(b) where provisional attachment has not been made –

- (i) pass an order provisionally attaching the property till the passing of the order by the Adjudicating Authority under s. 26(3). Such order is required to be passed after obtaining prior approval of the Approving Authority;
- (ii) decide not attach the property as specified in the notice, with the prior approval of the Approving Authority.

■ Within a period of 15 days from the date of his order continuing the provisional attachment or his passing an order attaching the property, the IO has to draw up a statement of the case and refer it to the Adjudicating Authority. In all cases where a reference will be made to the Adjudicating Authority the property will be provisionally attached.



■ In a case where the IO revokes the provisional attachment or decides not to attach the property specified in the notice, there will be no further reference to the Adjudicating Authority.

Adjudicating Authority – S. 26

- **Adjudicating Authority** – The Adjudicating Authority acts on a reference made to it by the Initiating Officer. In the cases where a reference is made to the Adjudicating Authority, the property would be provisionally attached by the Initiating Officer.

- The Adjudicating Authority shall within a period of 30 days from the date on which a reference has been received by it issue a notice to the following persons –
 - (i) the person specified as a benamidar in the reference under s. 24(5);
 - (ii) any person referred to as the beneficial owner therein (in the reference under s. 24(5)] or identified as such;
 - (iii) any interested party including a banking company;
 - (iv) any person who has made a claim in respect of the property.

- Where the property is held jointly by more than one person, the Adjudicating Authority shall make all endeavors to serve notice to all persons holding the property jointly. However, the service of notice shall not be invalid on the ground that it has been served on any one of the persons and not to all the persons holding the property.

Adjudicating Authority – S. 26

- The notice will call upon the person mentioned therein to furnish such documents, particulars or evidence as is considered necessary.
- The notice will also specify a date by which it has to be complied with. However, the person to whom the notice is issued shall be provided a time of at least 30 days to furnish the information sought.
- The Adjudicating Authority shall within a period of one year from the end of the month in which the reference under s. 24(5) was received by it pass an order –
 - (i) holding the property not to be a benami property and revoking the attachment order; or
 - (ii) holding the property to be a benami property and confirming the attachment order, in all other cases.
- The order passed by the Adjudicating Authority is an appealable order. Appeal may be preferred to the Tribunal against the order of the Adjudicating Authority.

Adjudicating Authority – S. 26

- Before passing the order as stated above, the Adjudicating Authority shall –
 - (i) consider the reply, if any, to the notice issued by AA under s. 26(1);
 - (ii) make or cause to be made such inquiries and call for such reports or evidence as it deems fit; and
 - (iii) take into account all relevant materials;
 - (iv) provide an opportunity of being heard to -
 - (a) the person specified as a benamidar in the notice issued by it;
 - (b) the Initiating Officer; and
 - (c) any other person who claims to be the owner of the property.

- **Part of the property is benami** – Where Adjudicating Authority is satisfied that some part of the properties in respect of which a reference is made to it is benami but is not able to specifically identify such part, he shall record a finding to the best of his judgement as to which part of the properties is held benami [S. 24(4)].

Adjudicating Authority – S. 26

- **Additional Properties held benami** – Where in the course of the proceedings before it, the AA has reason to believe that a property, other than the property referred to it by the IO is benami property, it shall provisionally attach the property and the property shall be deemed to be a property referred to it on the date of receipt of reference under s. 24(5).
- Therefore, for additional property sought to be held benami, the time period will commence on the date of reference of the original property. It is not clear whether the power is to be exercised only when the property referred to it is not a benami property but some other property is or where the property referred to it is a benami property and also some other property is allegedly a benami property.
- **Power to strike out or add names of persons** – Sub-section (6) of section 26 gives power to the Adjudicating Authority, at any stage of proceedings either to strike out the name of any party improperly joined or add the name of any person whose presence before the Adjudicating Authority may be necessary to enable him to adjudicate and settle all the questions involved in the reference. The name may be struck off on the basis of an application of any party or suo motu.

Adjudicating Authority – S. 26

- **Who can represent the benamidar or any other person who claims to be the owner of the property** - The benamidar or any other person who claims to be owner of the property may appear either in person or may take the assistance of an authorized representative of his choice to present his case.

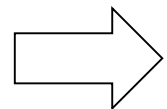
- The following persons, authorized in writing, may represent the benamidar or any other person claiming to be owner of the property, (hereinafter referred to as “the represented person”) before the Adjudicating Authority –
 - (i) a person related to the represented person or a person regularly employed by the represented person i.e. a relative or an employee; or
 - (ii) any officer of a scheduled bank with which the represented person maintains an account or has regular dealings; or
 - (iii) any legal practitioner who is entitled to practice in any civil Court in India; or
 - (iv) any person who has passed any accountancy examination recognized in this behalf by the Board; or
 - (v) any person who has acquired such educational qualifications as the Board may prescribe for this purpose.

Confiscation and vesting of benami property – S. 27

- Upon, the Adjudicating Authority passing an order under s. 26(3) of the Act holding the property to be a benami property, the Adjudicating Authority shall make an order under section 27(1) confiscating the property held to be a benami property. The confiscation of the property shall be made in accordance with the prescribed procedure. However, before passing an order confiscating the property, the Adjudicating Authority is required to grant an opportunity of being heard to the person concerned.
- S. 27(1) uses the word `shall' therefore it appears that the confiscation is inevitable fall out of the property being held to be a benami property. However, if this view is correct then there is no reason why opportunity of being heard has been provided for.
- However, in a case where an appeal has been filed against the order of the Adjudicating Authority, the confiscation of property shall be subject to the order passed by the Appellate Tribunal under section 46.

Confiscation and vesting of benami property – S. 27

- Sub-section (2) of section 27 provides nothing stated in sub-section (1) [i.e. making of a confiscation order] shall apply to a property which is held or acquired by a person for adequate consideration from a benamidar, prior to issue of notice under s. 24(1), without his knowledge of benami transaction.
- Upon a confiscation order being made under sub-section (1) of section 27, 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 [s. 27(3)].
- Any right of any third person created in such property with a view to defeat the purposes of the Act shall be null and void [S. 27(4)].
- Where no order of confiscation is made upon the proceedings under this Act attaining finality, no claim shall lie against the Central Government [S. 27(5)].



Possession of Property – S. 29

■ **29.** (1) *Where an order of confiscation in respect of a property under sub-section (1) of section 27, has been made, the Administrator shall proceed to take the possession of the property.*

(2) *The Administrator shall,—*

(a) *by notice in writing, order within seven days of the date of the service of notice to any person, who may be in possession of the benami property, to surrender or deliver possession thereof to the Administrator or any other person duly authorised in writing by him in this behalf;*

(b) *in the event of non-compliance of the order referred to in clause (a), or if in his opinion, taking over of immediate possession is warranted, for the purpose of forcibly taking over possession, requisition the service of any police officer to assist him and it shall be the duty of the officer to comply with the requisition.*

■ Section 29 deals with taking over of possession of a property in respect of which an order under s. 27(1) [i.e. an order of confiscation]. The Administrator has the power to take over possession of the property by giving notice in writing to the person who may be in possession of the property of seven days

Possession of Property – S. 29

■ S. 29 deals with taking over possession of a property in respect of which an order under s. 27(1) [i.e. an order of confiscation] has been made. The Administrator has the power to take over possession of the property, of which an order under s. 27(1) has been passed, by giving notice in writing to the person who may be in possession of the property. The Administrator shall by a notice in writing order any person who is in possession of the property to surrender or handover the possession of the property to the Administrator or any person authorised by the Administrator in writing.

■ In case of non-compliance of the order of the Administrator to hand over the possession of the property, the Administrator may forcibly take over the possession of the property. For the purpose of forcibly taking over the possession of the property he may requisition the service of any police officer to assist him and it shall be the duty of the officer to comply with the requisition.

■ If the Administrator is of the opinion that taking over of immediate possession is warranted, he may forcibly take over possession of the property. For the purpose of forcibly taking over the possession of the property he may requisition the service of any police officer to assist him and it shall be the duty of the officer to comply with the

Penalty for benami transaction – S. 53

- **53. Penalty for benami transaction – (1)** Where any person enters 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, the beneficial owner, benamidar and any other person who abets or induces any person to enter into the benami transaction, shall be guilty of the offence of benami transaction.
- (2) Whoever is found guilty of the offence of benami transaction referred to in subsection (1) shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to twenty-five per cent of the fair market value of the property.

Penalty for benami transaction – S. 53

- Section 53(1) provides that a person (beneficial owner, 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 if any person enters into a benami transaction either –
 - i) in order to defeat the provisions of any law; or
 - ii) to avoid payment of statutory dues; or
 - iii) to avoid payment to creditors.

- Section 53(2) states that a person found guilty of the offence of benami transaction referred to in sub-section (1) shall be punishable with
 - i) rigorous imprisonment for a term of not less than one year and which may extend to seven years; and
 - ii) a fine which may extend to twenty-five per cent of the fair market value of the property.

Penalty for benami transaction – S. 53

- While it is clear that a person will be punishable under s. 53(2) only if the ingredients of s. 53(1) are satisfied, it is not clear as to whether the property will be confiscated only if the ingredients of section 53(1) are satisfied or even de hors the satisfaction of the conditions mentioned in s. 53(1) e.g. a person enters into a benami transaction but the purpose is not one of the 3 stated in s. 53(1), will the property be confiscated?

- It appears that there could be two views viz. -

- View 1 – the confiscation is by virtue of the provisions of s. 5 of the Act which do not state that the ingredients of s. 53(1) need to be satisfied.

- Provisions of s. 66 which deal with proceedings against legal representatives provides that any proceeding which could have been taken against the deceased if he had survived may be taken against the legal representative and all the provisions of the Act shall apply except sub-section (2) of section 3 and the provisions of Chapter VII. Therefore, there is a bar on the legal representative being prosecuted but there is no bar on the confiscation of the benami property. This would imply that the confiscation of the property is not dependent on satisfaction of the conditions mentioned in s. 53(1).

Penalty for benami transaction – S. 53

- View 2 – section 27 states that where an order is passed in respect of any property under s. 26(3) holding such property to be a benami, the Adjudicating Authority shall, after giving an opportunity of hearing to the person concerned make an order confiscating the property held to be a benami property. Therefore, the order confiscating the property will be only after the property is held to be benami property. If the confiscation has to follow in all cases where the property is held to be a benami property what is the point of giving an opportunity of hearing to the person concerned.

Penalty for false information – S. 54

■ **“54. Penalty for false information** – Any person who is required to furnish information under this Act knowingly gives false information to any authority or furnishes any false document in any proceeding under this Act, shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to five years and shall also be liable to fine which may extend to ten per cent of the fair market value of the property.”

■ The penalty under this section will apply if ‘any person’ cumulatively satisfies the following conditions –

- (i) he is required to furnish information under this Act; and
- (ii) he knowingly furnishes false information to any authority

or

furnishes any false document in any proceeding under this Act.

Punishment –

- (i) rigorous imprisonment for a term not less than 6 months but which may extend to 5 years; and
- (ii) a fine which may extend to ten per cent of the fair market value of the property.

Special Court – S. 50

- It appears that an Authority under the Act will have to file a complaint in writing to the Special Court about an offence having been committed under this Act by any person. Upon receiving the complaint, the Special Court will take cognizance of the offence and conduct a trial. The trial under s. 50 of the Act shall be conducted by the Special Court as expeditiously as possible and every endeavour shall be made by the Special Court to conclude the trial within six months from the date of filing of the complaint.
- A Sessions Court will be designated to be a Special Court. Such designation shall be done by the Central Government in consultation with the Chief Justice of the High Court. The Central Government may designate one or more Courts of Session to be Special Court or Special Courts. The notification designating the Court to be a Special Court shall also specify the area or areas or the case or class or group of cases which may be tried by such Sessions Court as a Special Court.

Special Court – S. 50 ...

- Special Court will take cognizance of any offence punishable under this Act only on a complaint in writing made by an Authority under this Act. Central or State Government, may, by a general or special order, authorise in writing any officer of the Central Government or State Government for the purpose of making a complain to the Special Court.
- If the accused is charged, at the same trial, of an offence, under Criminal Procedure Code, other than the offence under this Act, then the Special Court, under s. 50(2) of the Act, has been empowered to try the accused even for such other offence other than the offence under this Act.
- Save as otherwise provided in this Act, the provisions of Criminal Procedure Code shall apply to the proceedings before the Special Court.
- Persons conducting the prosecution before the Special Court shall be deemed to be Public Prosecutors. Central Government is empowered to appoint a Special Public Prosecutor for any case or class or group of cases.

Special Court – S. 50 ...

- A person shall qualify for appointment as a Public Prosecutor if he has been in practice as an advocate for at least seven years and to qualify for appointment as a Special Public Prosecutor he should have been in practice as an advocate for at least ten years.
- Every person appointed as a Public Prosecutor or as a Special Public Prosecutor under s. 51 shall be deemed to be a Public Prosecutor within s. 2(u) of Cr.PC and provisions of that Code shall have effect accordingly.
- Against the order of the Special Court, an appeal will lie to the High Court under s. 52.
- The High Court will exercise all the powers conferred by Chapter XXIX or Chapter XXX of Cr.PC as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Sessions trying cases within the local limits of the jurisdiction of the High Court.

Previous sanction for prosecution – S. 55

- **55. Previous sanction.** - No prosecution shall be initiated against any person in respect of any offence under sections 3, 53 or section 54 without the previous sanction of the Board.

Repeal of provisions of certain Acts – S. 56

■ **56. Repeal of provisions of certain Acts –** (1) Sections 81, 82 and 94 of the Indian Trusts Act, 1882, section 66 of the Code of Civil Procedure, 1908 and section 281-A of the Income-tax Act, 1961 are hereby repealed.

■ (2) For the removal of doubts, it is hereby declared that nothing in sub-section (1) shall affect the continued operation of section 281-A of the Income-tax Act, 1961 in the State of Jammu and Kashmir.

■ Section 56 of the Act repeals the following five provisions of other Acts –

- (i) Section 81 of the Indian Trusts Act, 1882;
- (ii) Section 82 of the Indian Trusts Act, 1882;
- (iii) Section 94 of the Indian Trusts Act, 1882;
- (iv) Section 66 of the Civil Procedure Code, 1908;
- (v) Section 281-A of the Income-tax Act, 1961.

However, since the Act does not apply to Jammu & Kashmir, section 281A of the Act shall continue to be in operation in the State of Jammu & Kashmir.

Certain transfers to be null and void – S. 57

■ **“57. Certain transfers to be null and void** – Notwithstanding anything contained in the Transfer of Property Act, 1882 or any other law for the time being in force, where, after the issue of a notice under section 24, any property referred to in the said notice is transferred by any mode whatsoever, the transfer shall, for the purposes of the proceedings under this Act, be ignored and if the property is subsequently confiscated by the Central Government under section 27, then, the transfer of the property shall be deemed to be null and void.”

■ Section 57 provides for two consequences in case property referred to in the notice issued under section 24 is transferred by any mode whatsoever, after the issue of notice under section 24 –

- (i) the transfer shall, for the purposes of the proceedings under this Act, be ignored; and
- (ii) if the property is subsequently confiscated, then, the transfer of the property shall be deemed to be null and void.

Certain transfers to be null and void – S. 57 ...

- Therefore, while the proceedings are on and till the property is not confiscated, the transfer shall be ignored for the limited purposes of the proceedings under this Act and upon the order of confiscation being passed, the transfer shall be deemed to be null and void. The provisions of this section are notwithstanding anything contained in TOPA or any other law for the time being in force.

- The provisions of section 57 would not apply to a case where the property referred to in the notice has been transferred before issue of a notice under section 24 of the Act. This provision is consistent with what is stated in s. 27(2) of the Act which provides that the provisions of s. 27(1) dealing with passing of an order for confiscation of property shall not apply if the property is held or has been acquired

- (i) from a benamidar;
- (ii) for adequate consideration;
- (iii) prior to issue of notice under s. 24(1);
- (iv) without his having knowledge of the benami transaction.

Exemption – s. 58

■ **“58. Exemption – (1)** The Central Government may, by notification, exempt any property relating to charitable or religious trusts from the operation of this Act.

(2) Every notification issued under sub-section (1) shall be laid before each House of Parliament.”

■ While replying to debate on the Amendment Bill, the Finance Minister, in reply to a question as to whether the properties of charitable or religious trusts are exempt from the provisions of the Act, clarified as under:

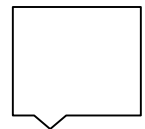
“If there is a genuine property which belongs to a church, mosque, gurudwara or a temple, Section 58 says the Government has power to exempt it. But if you make an illegal business out of it, as you are suggesting us now that the property is your benami property and you create a fake religious sect and start keeping benami properties, then the Government would not exempt it But obviously if somebody plays a fraud, the Government has a power not to exempt such a property on which a fraud is played Section 53 (sic section 58) is meant only for bonafide religious properties, not for religious properties only being used as a pretext of tax evasion.”



Application of other laws not barred – S. 60

- **60. Application of other laws not barred** – The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of any other law for the time being in force.
- **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.
- While replying to the debate on the Amendment Bill in Lok Sabha on 27.7.2016, the Finance Minister clarified as follows:

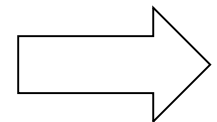
“Is this law in conflict with the Income-tax Act in any way? The answer is `no’. The Income-tax deals with various provisions of taxation, the powers to levy the procedures, etc. This particular law deals with any benami property which is acquired by a person in somebody else’s name to be vested in the Central Government. So the two Acts are supplementary to each other as far as this Act is concerned.”



Offences to be non-cognizable – S. 61

- **61 Offences to be non-cognizable** – Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this Act shall be non-cognizable.

- Section 3(4) which has been omitted by the 2016 Amendment Act, provided that an offence shall be “non-cognizable and bailable.” The words “and bailable” are not there in section 61. This would imply that it was a conscious decision of the legislature to make the offence non-bailable. The word “non-cognizable” is defined in Criminal Procedure Code as follows, “‘non-cognizable offence’ means an offence for which, a police officer has no authority to arrest without warrant. Non-Cognizable offenses are those which are not much serious in nature. Example- Assault, Cheating, Defamation. Section 155 of Cr. Pc provides that in a non-cognizable offense or case, the police officer cannot receive or record the FIR unless he obtains prior permission from the Magistrate. Under a Non-Cognizable offense/case, in order to start the investigation, it is important for the police officer to obtain the permission from the Magistrate.



Questions for consideration

- Whether the 1988 Act as amended by the 2016 Amendment Act will apply to undervaluation of assets?
- In case of home loans, disbursement is made by lender issuing DD or cheque in the name of the seller of the property and debiting the account of the buyer-borrower in whose name the property is registered. Here since consideration is provided by a person other than the person in whose name property is registered, is it a benami transaction?
- Will the answer to the above question change in case of home loans for purchase of under-construction flats where tripartite agreement is entered into between seller-builder, buyer and lender?
- Mr. X purchases a property which is registered in his name for Rs. 1.25 crore. Rs 20 lakh is paid by him from amounts declared in ITRs. Rs. 1.05 crore is paid “in black” from amounts not declared in ITRs. Will the property be treated as benami as it is not funded from known sources of X.

Questions for consideration

- During an income-tax raid at Mr. X's residence, his wife Mrs. X admits that she was a partner in a firm but stated that she did not know her share and other details. Will it be a benami transaction under sub-clause (C) of clause (9) of new section 2?
- The term `benami transaction' covers "a transaction or arrangement in respect of a property where the person providing the consideration is not traceable or fictitious". What happens in case of charities where donors wish to remain anonymous and provide the consideration?
- How does `benami transaction' differ from a `sham transaction'?
- Whether power of attorney transactions in immovable properties are `benami transactions'?
- Is the clarification in Explanation to section 2(9) regarding power of attorney transactions in properties retrospective?

Questions for consideration

- Is the new definition in clause (9) of section 2 of the 1988 Act retrospectively applicable?
- What is meant by `transaction or arrangement`?
- Is it necessary that the `benami property` has to be an immovable property?
- Is it necessary that the “benami property” has to be located in India?
- Will an undervalued property be treated as benami property?
- Does the clarificatory and declaratory Explanation to section 2(9) confer legal title on power of attorney holders having possession of properties?
- Is every acquisition of a property by an individual in the name of his brother and sister to be regarded as a benami transaction?

Questions for consideration

- If in the case of 20 storeyed building, 10 floors are in the name of the person who provided consideration while remaining 10 floors are in benami name. Will the entire property be regarded as `benami property`?
- Who is `benamidar`?
- Whether a person can be treated as benamidar of another merely because he is closely related to the other?
- Whether job worker is benamidar of two client-firms merely because the partners of two firms are directors or shareholders in the company?
- Whether a firm can be treated as benami of another merely because both firms had common partners and operated from the same premises?
- What is meant by “known sources”? Does it mean “known sources of income” of the individual?

Questions for consideration

- What is the definition of “child”? Whether the term “child” would cover only minor children?
- Whether married daughter will also be covered by the term “any child”?
- Whether “child” would include “step-child”, “adopted child”, “illegitimate child”?
- Where loans were given by parents as well as outsiders and minor sons purchased properties and sale deeds were registered in the names of minors, can they be regarded as Benamidars?
- Whether “cousin” will come within the scope of the term “brother” or “sister”?
- What are the consequences if the conditions specified in Explanation to definition of the term ‘benami transaction’ are not satisfied?

Questions for consideration

- Whether step-brother or half-brother or step-sister or half-sister is covered within the term “brother” or “sister”?
- If an individual purchases property in the name of his mother/father/grandparent(s), will it be regarded as `benami transaction`?
- What would happen if the property is in the name of a Director, but the money has come from the company? Would the transaction be regarded as a benami transaction?
- A holding company holds any shares in its subsidiary company in the name of its nominee to ensure that number of members in the subsidiary do not fall below the statutory limit. Is this benami transaction?



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Why not a new Act instead of amending the old Act?

■ A question arose when such a large number of amendments have been made, why not enact a new law altogether instead of amending the existing law through an Amendment Act? While replying to debate on the Amendment Bill in Lok Sabha on 27.7.2016, the Finance Minister answered this question as under:

- “..... The reason why the Standing Committee said that we need a new Bill is that the original 1988 Bill was a small bill with nine sections. It provided for acquisition of a property. Now, when you acquire, you pay compensation. In any acquisition law, compensation is to be payable. There was no vesting of that property in the Government. It was an acquisition in favour of the Government. Then, the entire procedure, the principles of compensation, the authorities for acquisition and implementing – all was absent in that Bill.

Why not a new Act instead of amending the old Act? ...

- The Law Ministry took a view that the basic principles of the Bill, if all this to be done by the rules, would be ultra vires because this would be a case of excessive delegation, and therefore, the rules cannot be framed. From 1988 till today 2016, the rules have not been framed. One of the Hon'ble Members wanted to know whether any properties have been actually acquired. The answer is `no' because the machinery for enforcement itself was not created, though there are two judgments of the Supreme Court which interprets this Act in order to tell us as to what is benami and what is not benami.
- The 1988 Act also has a provision for prosecution. The provision for prosecution, prohibition and acquisition remained in that Act. So, the prosecution provision under section 3(3) says that whosoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or both. So, whoever

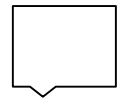
Why not a new Act instead of amending the old Act? ...

- subsequent to the 1988 entered into a transaction which was a benami transaction, either of the two parties would be liable for prosecution.
- So, if we had accepted the recommendation of the Standing Committee – repealed the 1988 Act and recreated the new law in 2016 – that would have been granting immunity to all people who acquired properties benami between 1988 and 2016. Obviously, the acquisition now cannot take place, but the penal provisions of the 1988 Act also would have stood repealed.
When a new Act with a similar provision would have come, it could only apply for a penal provision to properties which are benami and entered into after 2016.

Why not a new Act instead of amending the old Act? ...

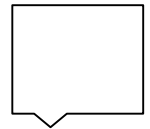
- Anybody will know that **a law can be made retrospective, but under Article 20 of the Constitution of India, penal laws cannot be made retrospective.**

The simple answer to the question why we did not bring a new law is that a new law would have meant giving immunity to everybody from the penal provisions during the period 1988 to 2016 and giving a 28 year immunity would not have been in larger public interest, particularly if large amounts of unaccounted and black money have been used to transact those transactions. That was the principal object. Therefore, prima facie the argument looks attractive that 'there is a 9 sections law and you are inserting 71 sections into it. So, you bring a new law.', but a new law would have had consequences which would have been detrimental to public interest."



Exemption to charitable or religious trusts – clarification by FM

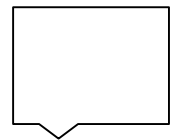
- While replying to debate on the Amendment Bill, the Finance Minister clarified new section 58 as under:
 - “If there is a genuine property which belongs to a church, mosque, gurudwara or a temple, Section 58 says the Government has power to exempt it. But if you make an illegal business out of it, as you are suggesting us now that the property is your benami property and you create a fake religious sect and start keeping benami properties, then the Government would not exempt it But obviously if somebody plays a fraud, the Government has a power not to exempt such a property on which a fraud is played Section 53 (sic section 58) is meant only for bonafide religious properties, not for religious properties only being used as a pretext of tax evasion.”



Is this law in conflict with the Income-tax Act in any way?

- While replying to the debate on the Amendment Bill in Lok Sabha on 27.7.2016, the Finance Minister clarified as follows:

“Is this law in conflict with the Income-tax Act in any way? The answer is `no’. The Income-tax deals with various provisions of taxation, the powers to levy the procedures, etc. This particular law deals with any benami property which is acquired by a person in somebody else’s name to be vested in the Central Government. So the two Acts are supplementary to each other as far as this Act is concerned.”



Is every transaction where consideration is provided by a person other than a transferee a `benami transaction`

■ In its submissions before the Parliamentary Standing Committee on Finance, the Ministry of Finance explained the amendment to the definition of `benami transaction` as under –

■ “..... The circumstances in which another person pays or provides the consideration to the transferee for being passed on to the transferor may be manifold. A person may provide consideration money to the transferee out of charity or under some jural relationship such as creditor and debtor or the like. The final relationship between such other person and the transferee has nothing to do or may have nothing to do with the jural relationship between the transferor and the transferee. The intention of the other person paying or providing the consideration is in substance the main factor to be considered and is of great importance. If that other person really intends that he should be the real owner of the property, then only the transferee

Is every transaction where consideration is provided by a person other than a transferee a 'benami transaction'?

- may be characterized as a benamidar, whether the transferee is a fictitious person or a real person having no intention to acquire any title by means of the transfer. It was perhaps for this very reason that intention of the persons actually paying or providing consideration to the transferee was incorporated as an essential element in the provisions of section 82 of the Indian Trusts Act. It would appear to be unreasonable to rest the provisions relating to benami transactions on the payment or provision of consideration alone by a person other than transferee. To have such a provision in a sweeping language may make the Act unworkable in actual implementation. The actual payment or provision of consideration has been made the dominant factor, but by itself it may have no real substance unless the person providing the consideration does so with the intention of actually benefiting himself.

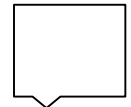
Is every transaction where consideration is provided by a person other than a transferee a `benami transaction`

- In view of the above, it is proposed that the payment alone by the other person should not be the only consideration for deciding a benami transaction rather intention of the other person paying or providing the consideration should be considered for deciding a benami transaction. Therefore, to hold a transaction or an arrangement as benami, it is proposed to provide an additional test that the benamidar should be holding the property for the benefit of the person providing the consideration”
[Para 2.10 of the 58th Report of the Parliamentary Standing Committee on Finance].



Part of the property which is benami only will be acquired

- While replying to the debate on the Amendment Bill in Rajya Sabha on 2.8.2016, the Finance Minister clarified as follows:
 - “Now, only the benami property will be acquired. Then, that part of the property which is not benami will not be acquired. For example, there is a 20 storeyed building, 10 floors are in your own name and 10 floors are held benami, the ones which are in your name would not be acquired, but the ones which are benami will be acquired.”



Meaning of `known sources`

■ “Known sources” of the individual should not be construed as “known sources of income”. The words “of income” were originally there in the Amendment Bill but were omitted at the time of passing of the Bill. In his reply to the debate on the Amendment Bill, the Finance Minister clarified in this regard in the Rajya Sabha as under:

- “.... This is exactly what the Standing Committee went into. The earlier phrase was that you have purchased this property so you must show money out of your known sources of income. So, the income had to be personal. Members of the Standing Committee felt that the family can contribute to it, you can take a loan from somebody or you can take loan from bank which is not your income. Therefore, the word “income” has been deleted and now the word is only “known sources”. So, if a brother or sister or a son contributed to this, this itself would not make it benami, because we know that is how the structure of the family itself is



Property of a company held by its director whether benami

- In this regard, the Finance Minister clarified as follows while replying to the debate on the Amendment Bill in Rajya Sabha:

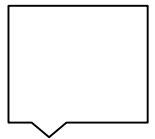
“..... What would happen if the property is in the name of a Director, but the money has come from the company. Already in this Act there is an exception that if you hold it as a fiduciary of the company as a Director, then, it is not an offence. If you hold it as a trustee of a trust, it is not an offence. So fiduciary holding is allowed as an exception to benami



Does `foreign property` also come within scope of benami

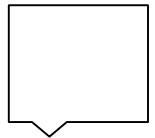
- While there is no requirement in either section 2(8) or in section 2(26) that the property or benami property should be located in India. However, in his reply to the debate on the Amendment Bill in Rajya Sabha on 2.8.2016, the Finance Minister clarified as follows:

“What happens if the asset is outside the country? If an asset is outside the country, it would not be covered under this Act. It would be covered under the Black Money Law, because you are owning a property or an asset outside the country....”



Will POA transactions be regarded as benami transactions

- It appears that by virtue of Explanation to section 2(9), power of attorney transactions will not be regarded as 'Benami transactions' provided the conditions mentioned therein are satisfied. In his reply to the debate on the Amendment Bill in Rajya Sabha on 3.8.2016, the Finance Minister has clarified as under:
 - “As far as power of attorneys are concerned, I have already said, properties which are transferred in part performance of a contract and possession is given then that possession is protected conventionally under section 53A of the Transfer of Property Act. That is how all the power of attorney transactions in Delhi are protected, even though title is not perfect and legitimate. Now, those properties have also been kept out as per the recommendation made by the Standing Committee.”

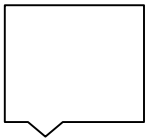


Meaning of 'provided' – Pawan Kumar Gupta v. Rochiram Nagdeo (1994) 4 SCC 243

- Section 2(a) of the Benami Act defines benami transaction as “any transaction in which property is transferred to one person for a consideration paid or provided by another person.” The word “provided” in the said clause cannot be construed in relation to the source or sources from which the real transferee made up funds for buying the sale consideration. The words “paid or provided” are disjunctively employed in the clause and each has to be tagged with the word “consideration”. The correct interpretation would be to read it as “consideration paid or consideration provided”. If consideration was paid to the transferor then the word provided has no application as for the said sale. Only if the consideration was not paid in regard to a sale transaction the question of providing the consideration would arise. In some cases of sale transaction ready payment of consideration might not have been effected and the provision would be made for such consideration. The word “provided” in section 2(a) of the Benami Act cannot be understood in a different

Meaning of 'provided' – Pawan Kumar Gupta v. Rochiram Nagdeo (1994) 4 SCC 243

- sense. Any other interpretation is likely to harm the interest of persons involved in genuine transactions, e.g. a purchaser of land might have availed himself of loan facilities from banks to make up purchase money. Could it be said that since the money was provided by the bank it was benami transaction.?
- We are, therefore, not inclined to accept the narrow construction of the word “provided” in Section 2(a) of the Benami Act. So even if appellant had availed himself of the help rendered by his father Pyarelal for making up the sale consideration that would not make the sale deed a benami transaction so as to push it into the forbidden area envisaged in Section 3(1) of the Benami Act.



Are the amendments made by Amendment Act of 2016 retrospective in operation

- There is no dispute on the fact that the Amendment Act of 2016 would come in force w.e.f. 1st November, 2016 and, hence, the amendments made by the Amendment Act would also be with effect from 1st November, 2016.
- However, if one was to look at the literal meaning of sub-section (3), then the peculiar wording of the provision would mean that sections 3, 5, and 8 of the Benami Act would come into effect from 5th September, 1988 and all other sections would come into effect from 19th May, 1988 i.e. all the amendments made to the Act would always be having a retrospective applicability irrespective of the nature and purpose of the amendment.
- If the above stated interpretation is correct, then it would also mean that if there is a change in the numbering of sections, which has indeed happened in the Amendment Act of 2016, same provision would be applicable from different dates. e.g. original section 8 in the old Act has been renumbered as section 68 in the new Act. This would mean that the same section, dealing with the power to make Rules, would

Are the amendments made by Amendment Act of 2016 retrospective in operation

- have different dates of applicability while reading the same in the Old Act i.e. w.e.f. 5th September, 1988 and the Amended Act i.e. w.e.f. 19th May, 1988.
- On the other hand, if one reads sub-section (3) of section 1 to be relevant only for the purpose of coming into force of the Act for the first time, then each amendment subsequently would have to be considered from the date from which the amendment has been made effective. If this interpretation is correct, then only if a provision has been specifically inserted with retrospective effect, would the same be required to be treated as being applicable retrospectively.
- Although the matter cannot be said to be free from doubt, the latter view of reading sub-section (3) of section 1 to be applicable only for the enforcement of the Act for the first time seems to be the better interpretation. However, the matter cannot be said to be free from doubt and one cannot rule out the other view i.e. earlier view as being a possible view on this issue.

Are the amendments made by Amendment Act of 2016 retrospective in operation

- Recently, the Bombay High Court has in the case of **Joseph Isharat v. Rozy Nishikant Gaikwad [MANU/MH/0646/2017]** vide order dated 1.3.2017 held that the amendments introduced by the Legislature affect substantive rights of the parties and must be applied prospectively.
- The Special Leave Petition filed against the said judgment in SLP. No. 12328/2017, was dismissed on 28.04.2017.
- The Review Petition filed against the dismissal of the said SLP has also been dismissed by the Apex Court vide its order dated 5.10.2017.

Are the amendments made by Amendment Act of 2016 retrospective in operation

- The Bombay High Court has in its order dated 1.3.2017 held as follows -
 - 7. What is crucial here is, in the first place, whether the change effected by the legislature in the Benami Act is a matter of procedure or is it a matter of substantial rights between the parties. If it is merely a procedural law, then, of course, procedure applicable as on the date of hearing may be relevant. If, on the other hand, it is a matter of substantive rights, then prima facie it will only have a prospective application unless the amended law speaks in a language "which expressly or by clear intention, takes in even pending matters.". Short of such intendment, the law shall be applied prospectively and not retrospectively.

Are the amendments made by Amendment Act of 2016 retrospective in operation

- The Bombay High Court has in its order dated 1.3.2017 held as follows -
 - 8. As held by the Supreme Court in the case of R. Rajagopal Reddy v. Padmini Chandrasekharan MANU/SC/0061/1996 : (1995) 2 SCC 630, Section 4 of the Benami Act, or for that matter, the Benami Act as a whole, creates substantive rights in favour of benamidars and destroys substantive rights of real owners who are parties to such transaction and for whom new liabilities are created under the Act. Merely because it uses the word "it is declared", the Act is not a piece of declaratory or curative legislation. If one has regard to the substance of the law rather than to its form, it is quite clear, as noted by the Supreme Court in R. Rajagopal Reddy, that the Benami Act affects substantive rights and cannot be regarded as having a retrospective operation. The Supreme Court in R. Rajagopal Reddy also held that since the law nullifies the defences available to the real owners in recovering the properties held benami, the law must apply

Are the amendments made by Amendment Act of 2016 retrospective in operation

- The Bombay High Court has in its order dated 1.3.2017 held as follows -
 - irrespective of the time of the benami transaction and that the expression "shall lie" in Section 4(1) or "shall be allowed" in Section 4(2) are prospective and apply to the present (future stages) as well as future suits, claims and actions only. These observations clearly hold the field even as regards the present amendment to the Benami Act. The amendments introduced by the Legislature affect substantive rights of the parties and must be applied prospectively.

Are the amendments made by Amendment Act of 2016 retrospective in operation – SOP dated 10th August, 2017

- The following extracts from SOP dated 10th August, 2017, bearing reference No. F. No. 414/63/2016-IT(Inv-I) are indicative that the provisions of the Amendment Act are not retrospective in nature.
- Para 2 reads as under –
 - “2. The Act is applicable since 1988:
 - Section 1(3) of the Prohibition of Benami Property Transactions Act, 1988 reads as under :
 - The provisions of section 3, 5 and 8 shall come into force at once, and the remaining provisions of this Act shall be deemed to have come into force on the 19th day of May, 1988.”

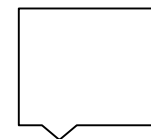
Are the amendments made by Amendment Act of 2016 retrospective in operation – SOP dated 10th August, 2017

- The provisions of sections 3, 5 and 8 of the Prohibition of Benami Property Transactions Act, 1988 came into force w.e.f. 5.9.1988 and the remaining provisions of the Act came into force on 19.5.1988. The amended provisions of the Act [as amended by Benami Transactions (Prohibition) Act, 2016 came into force with effect from 1st November, 2016.

“5. Certain important issues with regard to the Act:

(i)

(ii) **The Act is applicable from 1988** - As mentioned above, the Act is applicable from 1988. Benami property / transactions and the persons involved are liable for consequences *in accordance with the law prevalent at **that** point of time.* Prosecution provisions in respect of benami transaction entered into on or after 1.11.2016 are more rigorous.



Meaning of `benefit`

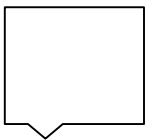
- For a transaction to be held as `benami transaction`, it is not sufficient that the consideration has to be paid by a person other than the transferee of the property, but the property must also be held for the immediate or future benefit, directly or indirectly, of the person who has paid the consideration.
- The issue which arises for consideration is as to what would come within the ambit of the term `benefit`.
- In interpreting section 62 of the Income-tax Act, 1961 which also refers to direct or indirect benefit to the transferor, the Hon'ble Madras High Court in the case of **Manickavasagan v. ITO 53 ITR 292, 305** held that the characteristic of a benefit is that it has to be real and not notional, concrete and not abstract, certain and not conjectural. It is also held that if the benefit received by a person is illusory or so slight as to be considered negligible, then it would not amount to a direct or indirect benefit to that person. From the above it would seem that for a transaction to be

Meaning of `benefit`

- treated as a benami transaction, the person providing the consideration must get some real and tangible benefit from the property. The benefit could be an immediate benefit i.e. at the time of purchase of property or the benefit could be at a future point of time.
- The section further treats a transaction to be a `benami transaction` even when there is an indirect benefit to the person who has paid the consideration. The question as to what would come within an indirect benefit is a very subjective question and one will have to look at the facts of a case to determine whether there is an indirect benefit or not e.g. if the property purchased by Mr. X for which consideration is paid by Mr. A, is used for the benefit of a company of which Mr. A owns all the share capital then one can conclude that it is a case of an indirect benefit and, hence, transaction would be a benami transaction. However, the contrary i.e. the consideration paid by the Company and property used for the benefit of Mr. A, will not

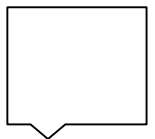
Meaning of `benefit`

- be treated as a benami transaction as a benefit to A's shareholder cannot be regarded as an indirect benefit to the company. The only way that the Department can allege benami transaction in such a case would be by arguing that corporate veil of the company be lifted and the consideration should be treated as paid by Mr. A itself.



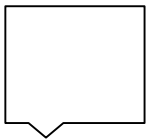
Who can declare the transaction as null and void?

- Section 6(2) holds the transfer in contravention of sub-section (1) to be null and void. The issue which arises for consideration is whether such transaction can be held to be null and void by the appropriate authority or whether any proceedings would have to be taken for getting the transaction to be declared null and void.
- In the context of section 281 of the Income-tax Act, which also provides that transactions in certain circumstances, would be null and void, the Apex Court in the case of **TRO v. Gangadhar Vishwanath Ranade 234 ITR 188 (SC)** has held that it is not in the jurisdiction of the AO to declare the transaction void. However, the AO would have to file a suit in the Court of competent jurisdiction to get the transaction declared as void. Considering the aforesaid decision, even under the Benami Act, the authority claiming to treat the transaction as void, would be required to file a suit in the Court of competent jurisdiction to get it so declared and it will not be open to the authority to pass an order holding the transaction to be null and void.



How can a notice be issued to a fictitious person?

- In a case where the benamidar is `fictitious' [Section 2(9)(B)], how would the Initiating Officer issue the notice to the benamidar. Section 24 of the Act provides for the issue of notice to the benamidar and with only a copy of the notice to the beneficial owner. The question which arises for consideration is when the benamidar is a fictitious person how would the Initiating Officer serve a notice to a fictitious person and, if a notice is not validly served to a fictitious person, whether the proceedings under the Benami Act could be continued at all?
- When the section requires the copy of the notice to be given to the beneficial owner, would it be a sufficient compliance when the notice is only served to the beneficial owner?



Is the time limit prescribed under sections 24(4) and 24(5) discretionary or mandatory?

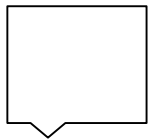
- Sub-section (4) of section 24 provides that the time limit of 90 days from the date of the issue of notice to pass an order for continuing or attaching the property by the IO.
- Similarly, sub-section (5) provides for 15 days for the IO to draw up the statement and refer the same to the Adjudicating Authority.
- The section uses the term “shall” for providing the time limit for the IO to pass an order.
- The Supreme Court has in the case of **Hemalatha Gargya v. CIT 259 ITR 1** held that the use of the term ‘shall’ in a statute ordinarily speaking, means that the statutory provision is mandatory, unless, there is something in the context in which the word is used which would justify the departure from the meaning. Therefore, the question which arises for consideration is considering the whole scheme of the Benami Act, can it be said that the time limit prescribed in sub-section (4) and (5) are mandatory?

Is the time limit prescribed under sections 24(4) and 24(5) discretionary or mandatory?

- If the aforesaid time limit is indeed held to be mandatory, whether it would be open to the IO to issue a fresh notice under section 24(1) of the Act for the same property and on the basis of the same material, if no order has been passed under section 24(4) within the time limit prescribed?
- Can the IO take the stand that there is no such bar on issuing a fresh notice as no order has been passed for the initial notice?
- Lastly, whether the principle of res judicata would be applicable to such an attempt by the IO?

Can fresh notice be issued u/s 24(1) on the basis of fresh material in respect of same benami property

■ An interesting question which can arise for consideration is - when the IO has passed an order under section 24(4)(a)(ii) or section 24(4)(v)(ii) deciding to revoke the provisional attachment or deciding not to attach the property, is it open to the IO to issue a fresh notice under section 24(1), on the ground that new or fresh material has come to his possession on the basis of which he has reason to believe that the same property is a benami property? It would also be pertinent to consider that the order under section 24(4)(a)(ii) or section 24(4)(b)(ii) has been passed by the IO with the approval of the Approving Authority, in such a case, would it be open to him to independently come to the belief that the alleged property is the benami property and initiate fresh proceedings?

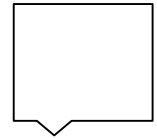


Can aggrieved person seek copy of approval of the Approving Authority?

- An order passed under sub-section (3) or sub-section (4) of section 24 is required to be passed after seeking approval of the Appropriate Authority. The issue which arises for consideration is whether the person aggrieved by such an order can ask for a copy of such approval from the Appropriate Authority and challenge the validity of the order so passed in case the approval has not been given appropriately or has been given without application of mind?
- The Bombay High Court has in the case of **Suntan Trading Co. Ltd. (WP No. 763 of 2015 dated July 23, 2015)** has taken the view in the context of approval granted under section 151 of the Act that an assessee has a right to seek approval of the higher authority which is required to be obtained before initiating reassessment proceedings under the Act. Again, whether the interpretation given in the Income-tax Act shall be applied in the context of Benami Act or not, is not free from doubt.

Can aggrieved person seek copy of approval of the Approving Authority?

- However, as the matter of general principle and on the basis of the principles of natural justice, a person aggrieved from an impugned order should be able to seek the approval of the authority so as to seek appropriate relief against the impugned order.

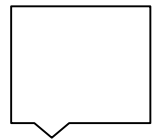


Enlargement of the scope of the term `property`

- The scope of the term `property` has been enlarged by the Amendment Act of 2016 to include certain assets as property which would not have been regarded as property before the Amendment.
- The question that arises for consideration is applicability of the provision for properties coming within the scope of the amended definition of the term `property`, but not a property as per the old definition, which were acquired before the amendment.
- As discussed earlier, an offence cannot be made applicable with retrospective effect and, hence, any asset which comes within the ambit of the term property as per the amended definition but was not a property as per the old definition, the provisions of the Benami Transactions (Prohibition) Amendment Act, 2016 would apply prospectively to such property i.e. from 1st November, 2016.

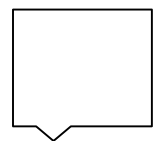
Enlargement of the scope of the term 'property'

- The only other issue which arises for consideration is that in the amended definition of the term property, the 'proceeds from the property' is also held to be a property.
- The following issues which arise for consideration can be explained by way of the following example –
- Mr. A purchased a property, a benami property in the name of Mr. X in the year 1990. The said property was sold in the year 2015, i.e. before the amendment for Rs. 1,00,00,000. Now the question is whether the 'proceeds of the property' would itself be regarded as 'benami property' or not?
- Whether it would make a difference if the property is sold in the year 2017?
- Even if 'proceeds from the property' i.e. Rs. 1,00,00,000 is regarded as property, can the same be treated as 'benami transaction' as defined in section 2(9) of the Benami Act. And if so, it would come within which clause of the said section?



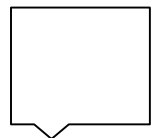
Issues with reference to definition of the term `transfer`

- With respect to the aforesaid definition, the issues which arise for consideration are-
- As the term `transfer` has been defined in Benami Act, but it is merely an inclusive definition to mean any form of transfer of right, title, possession or lien, whether Section 2(31) of the Benami Act, which provides that meaning of a term in other Acts can be looked into, in case the term is not defined in Benami Act? Can it be said that the term `transfer` is not defined in the Benami Act?
- Even if section 2(31) can be applied, whether one can look at the definition of `transfer` in section 2(47) of the Income-tax Act considering (i) that the same is also an inclusive definition and (ii) the definition is restrictive definition which applies qua capital assets only?
- Whether the definition under the Money Laundering Act, 2001, which defines transfer to include sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien can be considered?



Scope and applicability of s. 2(31) to the Benami Act

- An interesting issue which arises for consideration is if a term is defined differently in the Acts mentioned in section 2(31) then which of the definition will have to be considered for the purpose of the Benami Act.
- To illustrate, under the Companies Act, 2013, a company is defined to mean a company incorporated under this Act or under any previous Company Law i.e. a foreign company is not included in the definition of 'company'.
- Under the Income-tax Act, the term 'company' is defined much widely to mean an Indian company or a body corporate incorporated by or under a law of a country outside India.
- Therefore, the question which arises for consideration is whether a foreign company is covered as a person under the Benami Act?
- Even if the foreign company is not regarded as a company, would the same come within the ambit of an artificial juridical person?



Meaning of `transaction`

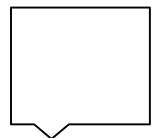
- The term `transaction` is not defined in the Benami Act and does not seem to be defined in any of the 8 Acts mentioned in section 2(31) and, therefore, one will have to give natural meaning to the term `transaction` to understand the scope of the Benami transaction.
- As per Black's Law Dictionary, transaction is, inter alia, defined as under –
 - “Any activity involving two or more persons”

Meaning of `arrangement`

- In so far as the term `arrangement` is concerned, the same has not been defined in definition section of the Income-tax Act, but there is a definition of the term `arrangement` in section 102(1) of the Income-tax Act, 1961.
- Section 102 defines the term `arrangement` specifically for Chapter X-A of the Income-tax Act which deals with General Anti-Avoidance provisions.
- The issue which arises for consideration is whether in looking for meaning of a term in another Act, one can look at specific definition, i.e., definition only for the purpose of a particular section or Chapter.
- As specified definitions are only for the limited purpose, the same cannot be regarded as meaning assigned to the term in the Act. e.g. if the term arrangement is used in any section which does not come within Chapter X-A of the Income-tax Act, the definition of the term `arrangement` in section 102 cannot be pressed into service.

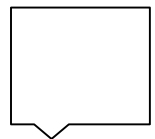
Meaning of 'arrangement'

- Hence, the said definition cannot be said a meaning assigned to a term 'arrangement' under the Act.
- Hence, reference cannot be made to such limited definition to understand the meaning of the term in the Benami Act.
- Accordingly, one will again have to understand the term 'arrangement' through its natural meaning.
- The term 'arrangement' is defined in Black's Law Dictionary to interalia mean -
 - “the mode or system in which parts of element have been put or disposed in accordance with some plan or design; the way in which something is organized”



Necessity of the Explanation to S. 2(9)

- Explanation to S. 2(9) provides that a transaction covered by section 53A of the Transfer of Property Act would not come within the ambit of the term 'benami transaction' if certain conditions as specified therein are fulfilled.
- The issue which arises for consideration is even if the conditions as specified therein are not fulfilled, would the transaction come within the main part of the definition of benami transaction i.e. would any of the clauses (A) to (D) apply?
- If the same would not be applicable, then what was the need for the Explanation and what would be the consequence of non-fulfilment of the conditions of the Explanation.



Are benamidar and beneficial owner both covered u/s 3(2)

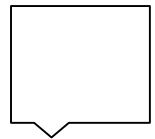
- Section 3(2) provides that any person entering into a benami transaction shall be punishable with imprisonment for a term which may extend to 3 years or with fine or both.
- The issue which arises for consideration is whether both 'benamidar' and 'beneficial owner' are covered within the ambit of section 3(2)?
- There can be no dispute as to the fact that 'beneficial owner' is covered u/s 3(2).
- What needs to be considered is whether the 'benamidar' is covered or not?
- If the benamidar is covered, would he be liable when his name has been entered without his knowledge or concurrence?
- What about a spouse being purchaser of property purchased by the husband not from a known source?
- The three possibilities which need to be considered are (i) benamidar is covered in all cases; (ii) Benamidar is not covered in any case; and (iii) 'benamidar' may be held for prosecution depending on his conduct and actions.

Are benamidar and beneficial owner both covered u/s 3(2)

- Sub-section (3) of section 3 provides that any person entering into benami transaction after the commencement of the Amendment Act of 2016, would be punishable in accordance with the provisions contained in Chapter VII.
- Chapter VII contains sections 53 to 55 which deal with offences and prosecution.
- Section 53 of the Benami Act provides that when a 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, then the beneficial owner, the benamidar and any other person who abets or induces any person to enter into a benami transaction, shall be guilty of offence of benami transaction.
- Whoever is found guilty of such an offence, he is punishable with imprisonment which may extend to seven years and also fine upto 25% of the fair market value of the property.

Are benamidar and beneficial owner both covered u/s 3(2)

- In this section although benamidar is specifically held to be guilty, but the benamidar should be held guilty only if the benami transaction has been carried on with his knowledge and consent.
- Section 54 provides for a punishment not less than 6 months but up to 5 years on any person who is required to furnish information under this Act and who knowingly furnishes false information to the Authority or furnishes false documents in any proceedings under the Act.
- From this provision, it is clear that it is not intended to cover a person who has either in good faith or mistakenly submitted some information which turns out to be false or incorrect.

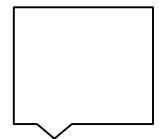


Issues arising out of Exceptions to clause A of `benami transaction`

- Property purchased by an individual in the name of his brother or sister would be regarded as benami property – such transaction would not come within the exceptions provided in clause (iii) as only spouse or child is covered therein or in clause (iv) as only joint ownership is exempted in clause (iv).
- Therefore, such a transaction would be regarded as a benami transaction and both the individual and relative of such individual would be liable to punishment under the Benami Act and the property will also be confiscated.
- An interesting issue which arises is whether every purchase of property by an individual in the name of his brother or sister is to be regarded as benami transaction or is it only when the ingredients of clause (A) are satisfied that the transaction will be regarded as a benami transaction.

Property purchased in the name of spouse or child not out of known source

- Property purchased by an individual in the name of spouse or child not from a known source.
- The issue which would arise in the present case is whether the spouse / child who has acted in good faith agreed to become a purchaser of a property for which consideration is paid by the husband / father without realizing the same was not paid from a known source, would be liable for punishment under section 3(2) of the Benami Act.
- Similar issue will arise in the case of a joint purchaser of a property in case of other family members when the consideration is not paid out of a known source.
- In such a situation, the spouse or the family member of the individual cannot be said to be liable of committing an offence and be punishable under section 3(2) of the Act.





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Reserve Bank of India v. Peerless General Finance and Invest Co. Ltd.

■ It is now well known that in order to interpret a statute, where the provisions thereof are ambiguous, a contextual meaning has to be given thereto. Reference in this connection may be made to *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.* [1987] 61 Comp Cases 663, 692 ; [1987] 1 SCC 424, where, in paragraph 33, it has been held by the Supreme Court as follows :

■ "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With those glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the

Must. Najmun Bibi v. Jamila Khatoon [1991] 187 ITR 548 (PAT.)

- It is now well known that for the purpose of construing a statute, the purpose of the Act and the legislative intent must receive the foremost consideration of the court.
- Reference in this connection may be made to *Vatan Mal v. Kailash Nath* [1989] 3 SCC 79.
- It is now well settled by various decisions of the Supreme Court of India that Parliament is presumed to know the law existing at the time of enacting the statute.
- It is now well settled that in India, acquisition of a property by a husband in the name of his wife has been a common feature. However, such type of acquisition of property by the husband in the name of his wife could have been for the purpose of entering into a benami transaction or for the purpose of making a grant of such a property to his wife.
- It is now will settled that if a person raises a plea that an apparent state of affairs is not the real state of affairs or the apparent owner is not the real owner, the onus of proof to prove the necessary ingredients of a benami transaction lies upon the person who set up such a plea.
- However, in a case where a plea is raised that such an acquisition was made by the husband for the benefit of his wife, *i.e.*, by way of gift or grant, the burden of proof shifts to the other side.

Must. Najmun Bibi v. Jamila Khatoon [1991] 187 ITR 548 (PAT.)

- While interpreting the provision of sub-section (2) of section 3 of the said Act, one cannot lose sight of the settled law in this regard.
- Reference, in this connection may be made to *CED v. Alope Mitra* [1980] 126 ITR 599, 612, wherein the Supreme Court held as follows :
 - "The law in this matter is not in doubt and is authoritatively stated by a long line of decisions of the Privy Council starting from the well known case of *Gopeekrist Gosain v. Gungapersaud Gosain* [1854] 6 M.I.A. 53 to *Sura Lakshmiah Chetty v. Kothandarama Pillai* [1925] LR 52 I.A. 286 ; AIR 1925 PC 181 and of this court in *Shree Meenakshi Mills Ltd. v. CIT* [1957] [31 ITR 28](#) ; AIR 1957 SC 49. As observed by Knight Bruce L. J. in *Gopeekrist Gosain's* case, the doctrine of advancement is not applicable in India so as to raise the question of a resulting trust. When a property is purchased by a husband in the name of his wife, or by a father in the name of his son, it must be presumed that they are benamidars, and if they claim it as their own by alleging that the husband or the father intended to make a gift of the property to them, the onus rests upon them to establish such a gift. In *Sura Lakshmiah Chetty's* case, AIR 1925 PC 181, 182 the law was stated with clarity by Sir John Edge in these words:

- 'There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband although the ostensible title is in the wife.'
- It is but axiomatic that a benami transaction does not vest any title in the benamidar but vests in the real owner. When the benamidar is in possession of the property standing in his name, he is in a sense the trustee for the real owner ; he is only a name-lender or an alias for the real owner. In *Petherpermal Chetty v. Muniandy Servai* [1908] LR 35 IA 98 ; ILR 35 Cal 551, the Judicial Committee quoted with approval the following passage from *Mayne's Hindu Law*, 7th Edn, para 446 (ILR 35 Cal at 558) :
- 'Where a transaction is once made out to be a mere benami, it is evident that the benamidar absolutely disappears from the title. His name is simply an alias for that of the person beneficially interested.'
- The cardinal distinction between a trustee known to English law and a benamidar lies in the fact that a trustee is the legal owner of the property standing in his name and the cestui que trust is only a beneficial owner, whereas in the case of a benami transaction the real owner has got the legal title though the property is in the name of the benamidar. It is well settled that the real owner can deal with the property without reference to the latter. In

- *Gur Narayan v. Sheo Lal Singh* [1919] LR 46 IA 1 ; AIR 1918 PC 140, the Judicial Committee referred to the judgment of Sir George Farwell in *Mst. Bilas Kunwar v. Desraj Ranjit Singh* [1915] LR 42 IA 202 ; AIR 1915 PC 96, where it was observed that a benami transaction had a curious resemblance to the doctrine of English law that the trust of the legal estate results to the man who pays the purchase-money, and went on to say (49 IC, at page 5, col. 1) :
- '.... the benamidar has no beneficial interest in the property or business that stands in his name ; he represents, in fact, the real owner, and so far as their relative legal position is concerned, he is a mere trustee for him.'
- In *Guran Ditta v. Ram Ditta* [1927] 55 I A 235 ; AIR 1928 PC 172, the Judicial Committee reiterated the principle laid down in *Gopeekrist Gosain's case* [1854] 6 M I A 53 (PC), and observed that in the case of a benami transaction, there is a resulting trust in favour of the person providing the purchase money.
- A benamidar has no interest at all in the property standing in his name. Where the transaction is once made out to be benami, the court must give effect to the real and not to the nominal title subject to certain exceptions. In *Mulla's Hindu Law*, fourteenth edn. p. 638, four exceptions to the normal rule are brought out. But these exceptions are not material in this case. One of the exceptions enumerated therein is that where a benamidar sells, mortgages or otherwise transfers for value property held by him without the

- knowledge of the real owner, the real owner is not entitled to have the transfer set aside unless the transferee had notice, actual or constructive, that the transferor was merely a benamidar. The principle is embodied in section 41 of the Transfer of Property Act. The section makes an exception to the rule that a person cannot confer a better title than he has. The section is based on the well-known passage from the judgment of the Judicial Committee in *Ramcoomar Koondoo v. Mac-queen* [1872] IA Supp. 40, at page 43 :
- 'It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it.'
- A benamidar is an ostensible owner and if a person purchases from a benamidar, the real owner cannot recover unless he shows that the purchaser had actual or constructive notice of the real title. But from this it does not follow that the benamidar has real title to the property, he is merely an ostensible owner thereof."

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- The provision in relation to a burden of proof is a procedural law. Such procedural laws in the Evidence Act and other Acts are well known and Parliament may, regard being had to the nature of the statute, make law relating to the presumption which may be raised by a court of law including that a particular fact, if established, shall be a conclusive proof of a relevant fact.
- Reference in this connection may be made to *Sodhi Transport Co. v. State of U. P.*, AIR 1986 SC 1099.
- In this situation, sub-section (2) of section 3 of the said Act has to be interpreted as thereby now a statutory presumption has been raised to the effect that if a person makes a purchase in the name of his wife or unmarried daughter, it should be presumed that such a transaction has been entered into for the benefit of the wife or unmarried daughter of such person. However, the presumption so raised in law is a rebuttable presumption. Thus, Parliament has recognised the doctrine of advancement.
- Taking thus all facts and circumstances of this case, in my opinion, in a case of this nature, where a husband has purchased a property in the name of his wife and raised a substantial structure thereupon, Parliament did not intend to bar a remedy or a defence.
- In this view of the matter, in my opinion, the judgment and decree passed by the learned court below cannot be sustained inasmuch as, it was required of him to take into consideration the reasonings adopted by the teamed trial court and meet the same. As noticed hereinbefore, the learned court of appeal below has committed an error of record in holding that the defendant in



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- **Whether the 1988 Act as amended by the 2016 Amendment Act will apply to undervaluation of assets?**
- No. The Act deals only with those properties where consideration is provided by somebody else and the name is that of a benami. Whether property is adequately valued or undervalued is a subject of the Income-tax act, 1961 and the Benami Act has nothing to do with valuation.

- **In case of home loans, disbursement is made by lender issuing DD or cheque in the name of the seller of the property and debiting the account of the buyer-borrower in whose name the property is registered. Here since consideration is provided by a person other than the person in whose name property is registered, is it a benami transaction?**
- It is not a benami transaction as the lender is not a beneficial owner of the property. The buyer-borrower is not holding it “for the immediate or future benefit, direct or indirect,” of the lender. There is no intention that lender will be real owner while borrower will be the on record owner. Lender is only interested in repayment of loan and has limited interest in the property as security till the loan is repaid.

- **Will the answer to the above question change in case of home loans for purchase of under-construction flats where tripartite agreement is entered into between seller-builder, buyer and lender?**
- No. There will be no change in the answer as the nature and essence of the transaction remains the same as in the previous question.

■ **Mr. X purchases a property which is registered in his name for Rs. 1.25 crore. Rs 20 lakh is paid by him from amounts declared in ITRs. Rs. 1.05 crore is paid “in black” from amounts not declared in ITRs. Will the property be treated as benami as it is not funded from known sources of X.**

■ **Answer:** No. As property is registered in the name of Mr. X and he only has paid consideration, question of funding from known sources is irrelevant. As provider of consideration is the on record owner, property transaction is not a benami transaction. Question of funding out of known sources would arise only where the property was registered in the name of spouse and / children or where it was registered in joint names of Mr. X and his brother / sister / lineal ascendant / lineal descendant.

- **During an income-tax raid at Mr. X's residence, his wife Mrs. X admits that she was a partner in a firm but stated that she did not know her share and other details. Will it be a benami transaction under sub-clause (C) of clause (9) of new section 2?**
- Sub-clause (C) covers a case of “a transaction or arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership”. In the instant case, the wife is not unaware of the fact that she is partner nor denies it. She admits that she owns a share in the firm as a partner. Only that she doesn't know the details. Lack of knowledge of details cannot be said to be “not aware of, or denies knowledge of such ownership.”

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- Where assessee's wife had been assessed for several years in respect of share income from a firm which had been granted registration, merely because during search of assessee's residence his wife stated that she did not know name of firm and the share of profit therein though she admitted she was a partner, she could not be treated as assessee's benami so as to include share income in assessee's hands – **Gaurishanker Omkarmal v. ITO [1990] 37 TTJ 353 (Ahd – Trib).**

- **The term Benami transaction covers “a transaction or arrangement in respect of a property where the person providing the consideration is not traceable or fictitious”. What happens in case of charities where donors wish to remain anonymous and provide the consideration?**
- New Section 58 inserted into the Act by the 2016 Amendment Act empowers the Central Government to exempt any property relating to charitable or religious trusts from the operation of this Act. Therefore, charities and places of worship which receive large donations especially of movable properties like Gold from anonymous donors will not be hit if covered by Exemption notification.

■ How does `benami transaction' differ from a `sham transaction'?

- There exists an actual transaction or arrangement which has taken place. This is where benami transaction differs from a sham / bogus / fictitious transaction. In a sham transaction or bogus transaction or fictitious transaction, no transaction has actually taken place and the transaction is merely shown to have taken place on paper. In **Sree Meenakshi Mills Ltd. v. CIT [1957] 31 ITR 28**, the Supreme Court explained that the word `benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, for example, when A sells properties to B but the sale deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word `benami' is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when A purports

- to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former (benami transactions) there is an operative transfer resulting in the vesting of title in the transferee, in the latter (sham transactions) there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. In benami transactions, it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B. But when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid.

■ **Whether power of attorney transactions in immovable properties are `benami transactions`?**

■ **Answer:** The Explanation below sub-clause (D) of clause (9) of section 2 clarifies 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 it, 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.

- Thus, by virtue of Explanation to section 2(9), power of attorney transactions will not be regarded as Benami transactions. In his reply to the debate on the Amendment Bill in Rajya Sabha on 3.8.2016, the Finance Minister has clarified as under:

- “As far as power of attorneys are concerned, I have already said, properties which are transferred in part performance of a contract and possession is given then that possession is protected conventionally under section 53A of the Transfer of Property Act. That is how all the power of attorney transactions in Delhi are protected, even though title is not perfect and legitimate. Now, those properties have also been kept out as per the recommendation made by the Standing Committee.”

- **Is the clarification in Explanation to section 2(9) regarding power of attorney transactions in properties retrospective?**
- Yes. As the Explanation uses the words “For the removal of doubts, it is hereby declared”, the Explanation is retrospective in effect.
- **Does the clarificatory and declaratory Explanation to section 2(9) confer legal title on power of attorney holders having possession of properties?**
- No. It only removes the taint of benami from POA deals. The Supreme Court decision regarding POA not being title documents stands and is not legislatively overcome by these amendments.

- **Is the new definition in clause (9) of section 2 of the 1988 Act retrospectively applicable?**
- Sub-clause (A) of clause (9) will have retrospective effect as the same is in line with court rulings. Also, the Explanation below sub-clause (D) will have retrospective effect. It appears that new sub-clauses (B) to (D) will only have prospective effect. As regards retrospectivity of sub-clauses (B) to (D), matter needs Ministry's clarification.

- **What is meant by `transaction or arrangement`?**

- The act does not define the term “transaction” or “arrangement”. In ordinary common parlance, transaction means exchange of goods or resources between atleast two distinct parties.

- **Is it necessary that the `benami property` has to be an immovable property?**

- No. Not at all. In fact, “property” is defined to mean property 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 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 [Section 2(26)].

- **Is it necessary that the “benami property” has to be located in India?**
- No. There is no such statutory requirement. However, the Finance Minister has clarified that if transaction involves foreign property, it would be covered under Black Money Act and not under Benami Act.

- **Will transaction in a foreign property also come within the scope of the term “benami transaction”?**

- Yes. There is no requirement in either section 2(8) or in section 2(26) that the property or benami property should be located in India. However, in his reply to the debate on the Amendment Bill in Rajya Sabha on 2.8.2016, the Finance Minister clarified as follows:

- “What happens if the asset is outside the country? If an asset is outside the country, it would not be covered under this Act. It would be covered under the Black Money Law, because you are owning a property or an asset outside the country....”

- **Will an undervalued property be treated as benami property?**
- No. The Act deals only with those properties where consideration is provided by somebody else and the name is that of a benami. Whether property is adequately valued or undervalued is a subject of the Income-tax Act, 1961 and the Benami Act has nothing to do with valuation.

■ **If in the case of 20storeyed building, 10 floors are in the name of the person who provided consideration while remaining 10 floors are in benami name. Will the entrie property be regarded as `benami property`?**

■ No. the 10 floors which are registered in the name of provider of consideration will not be treated as benami property. The other 10 floors registered in benamidar's name will be regarded as benami property. While replying to the debate on the Amendment Bill in Rajya Sabha on 2.8.2016, the Finance Minister clarified as follows:

■ “Now, only the benami property will be acquired. Then, that part of the property which is not benami will not be acquired. For example, there is a 20 storied building, 10 floors are in your own name and 10 floors are held benami, the ones which are in your name would not be acquired, but the ones which are benami will be acquired.”

■ Who is `benamidar`?

■ “Benamidar” 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 [Section 2(10)].

■ If documents of title to property are in assessee’s name, onus is on ITO to show that it is somebody else’s property – **Sovaram Jokhiram v. CIT [1944] 12 ITR 110 (Pat.)**.

■ Whether A is a benamidar of B is to be determined after examining the evidence and factual conspectus of the case in detail. There is no hard and fast formula.

■ Where assessee had successfully bid for contract for sale of country liquor and also signed contract with Excise Department and was recognized to be real contractor with State Government, he could not subsequently claim that he was not real contractor but was a benamidar for somebody else who, being his employer, compelled him to sign papers – **Rampal Thakurdin Gupta v. CIT [1998] 97 Taxman 350 / 234 ITR 304 (MP)**.

- In the following instances inference of a person being benamidar of another was held to be justified :
- (i) Where evidence produced on behalf of B himself in the case relating to his assessment itself was sufficient to establish that B did not have any source of income so as to make investment in the contract business, there was no error in the finding of the ITO that B was a benamidar – **Uttamchand Jain v. CIT [1988] 173 ITR 298 (MP)**.
- (ii) In **ACIT v. Panchuram Deshmukh [2010] 133 TTJ 53 (Bilaspur – Trib.)** it was held that AO was justified in holding assessee as benamidar of one “T” and assessing the income computed in his case in T’s hands in view of the fact that AO observed that assessee, who was partner in a firm controlled by one “T”, was a man of no means; that huge funds were transferred to him from firm’s account and money withdrawn from assessee’s bank account went back to firm; and that despite huge

■ business, assessee's standard of living had not improved. In order to treat a person as benamidar of other person, the transaction has to be only an ostensible one without any intention to part with the beneficial interest. The first test is the source from which the consideration has come and the second test is who actually had enjoyed the benefits. In the instant case, the money was given by the firm and the benefits were retained which had gone to firm which was controlled by "T" and his close associates. The firm had been used for the same. All bank transactions were controlled by "T" and his close associates. Those circumstances showed that he assessee was benamidar of "T". In view of the factual and legal discussion, it was found that the money was indirectly invested by "T" and the fruit of business had gone back to him as well. Therefore, the income computed in the assessee's case was rightly held assessable only in the hands of the said "T" on substantive basis.

- (iii) Where wife, daughter, employees and friends of assessee were partner in a firm and in assessment proceedings of firm it was held to be bogus and spurious on ground that business of firm was managed by assessee with other partners who had no experience and said order was not challenged by firm, said firm wasw to be considered as benami of assessee and income derived by firm was to be assessable as income of assessee – **CIT v. G M Dharía [2000] 243 ITR 104 (Kar.)**

- (iv) Where wife of assessee has no independent income, acquisition made in her name will be treated as acquisition made by assessee – **M K Jha v. ITAT [2008] 303 ITR 81 (Pat.)**.

- (v) Where partners of assessee firm were members of HUF and business was also carried on from premises of HUF and partners were ignorant about business, finding that assessee-firm was benami of HFU was justified – **Paras & Co. v. CIT [1995] 211 ITR 914 (Raj.)**.

- In the following instances inference of a person being benamidar of another was held to be **NOT justified** –
- (i) Where property stood in name of assessee's minor son, loans taken for purchasing property were confirmed, no money was invested by assessee in purchasing the house and rental income was not used by assessee, addition of rental income in assessee's hands on the ground that minor son was his benamidar could not be said to be justified – **Zafrul Hassan Iraqi v. ITO [1998] 61 TTJ 387 (Jp-Trib.)**.
- (ii) Where assessee had produced profit and loss account and assessment orders of parties in whose accounts credits appeared in books of account of assessee and their bank accounts were duly verified by AO, it could not be said that those parties were not genuine and benamidar of assessee simply because the parties were not produced and their bank accounts were opened with introduction of one of the partners of assessee-firm – **Dimco Silk Mills v. ITO [1999] 107 Taxman 41**

■ (iii) Where the assessee's wife was made co-allottee of land and both the assessee and his wife equally shared cost and equally invested for construction of house which stood registered in joint names and by agreement among them wife was allotted two floors of house, it could not be said that the wife was benamidar of the assessee – **Vinayakrao D. Chaudhary v. ITO [1986] 15 ITD 180 (Nag.-Trib.)**

■ (iv) When the assessee with her technical background, carried on business in separate business premises employing labour, merely because her main transactions supported by bills and accounts, were with a company of which her father was a managing director she should not be said to be benami of her father or company – **Smt. Saroj Silsalewal v. ITO [1989] 44 Taxman 244 (Jp. Mag.)**.

■ (v) Where assessee's wife had been assessed for several years in respect of share income from a firm which had been granted registration, merely because during search of assessee's residence his wife stated that she did not know the name of firm and the share of profit therein though she admitted she was a partner, she could not be treated as assessee's benami so as to include share income in assessee's hands – **Guarishanker Omkarmal v. ITO [1990] 37 TTJ 353 (Ahd. – Trib.)**.

■ (vi) Merely because common cash book was being maintained by assessee and his wife and his mother-in-law for their separate business, the ladies could not be said to be benamidars of assessee when initial capital of ladies had already been accepted in their individual assessments and they had also been withdrawing money from the business – **ITO v. Nemichand Garg [1987] 23 ITD 309 (Jp.- Trib.)**.

■ (vii) Merely because business run by assessee was being conducted by him from same premises in which assessee's husband was also carrying on business, it could

- not be held, in absence of other material, that assessee's business was a benami one and that she was her husband's benamidar – **ITO v. Ghanshyambhai R. Thakkar [1996] 88 Taxman 65 (Mag.) / 56 TTJ 460 (Ahd. Trib.)**.
- (viii) Where third party evidence proved that assessee's wife carried on hundi business, ITO was not justified in treating business of wife as assessee's so as to make addition in hands of assessee – **Harbans Lal Gupta v. ITO [1990] 37 TTJ 636 (Delhi – Trib.)**.
- (ix) Where following dissolution of old firm and constitution of new firm assessee was not partner in new firm but treated his share in dissolved firm as loan to new firm and minor son of assessee was admitted to benefits of partnership of new firm and a gift received by minor from grandfather was contributed as capital by minor, minor could not be treated as benamidar of assessee – **Manaklal v. CIT [1980] 122 ITR 894 (MP)**

■ (x) Where partners of a firm were directors of assessee company and said firm was found genuine and granted registration and assessee was selling a product through firm, firm could not be treated as benami of assessee – **Pudinjerekara Agencies (P.) Ltd. v. CIT [1988] 173 ITR 637 (Ker.)**.

■ When is the 'benamidar' a mere name-lender?

■ **Answer:** In order to attract section 2(9)(A) of the Act, it must be established that the property is held or possessed by the benamidar and that consideration was paid by another person. If possession is not transferred to the benamidar and actually the consideration is paid by another person and the possession of the property is also taken by such other person, the transfer deed by which the property is shown to have been sold to the benamidar would be merely a sham document. It will go to show that the real intention of the parties was not to confer any right, title or interest on the benamidar. Section 2(9)(A) will apply only when both the conditions, i.e. the transfer of possession to the benamidar as well as the payment of consideration by a person other than the benamidar, are proved and it will not extend to a case where actually the possession of the property has not been transferred to the benamidar. In such a case, if a party pleads that there never was any intention to create any right in the named transferee and he was simply used as a name-lender, and is able to

■ prove that fact by some cogent and convincing evidence, the Court is obligated to return a finding that the deed was sham and did not affect the rights of such a person. Rather the real and ostensible title merge in one and the same person and the person in whose name the property is mentioned in the deed is a mere name lender – **Krishna Kumar v. Harnam Dass [1991] 56 Taxman 233 (Delhi)**.

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■ **Whether a person can be treated as benamidar of another merely because he is closely related to the other?**

■ **Answer:** A person cannot be treated as a benamidar merely because he is closely related,. The tests as required under the law are to be satisfied. It is to be shown that consideration for acquiring the property has flowed from the real owner who is enjoying income and usufruct of the property – **Uppal Builders v. DCIT [1997] 90 Taxman 246 (Delhi)(Mag.)**.

- **Whether job worker is benamidar of two client-firms merely because the partners of two firms are directors or shareholders in the company?**
- **Answer:** Where assessee-company was doing job work for two firms simply because the partners of the two firms were interested in the assessee company either as shareholders or directors that fact alone could not make them benami of the assessee company, particularly in the light of the fact that similar job work was done by assessee on similar terms on behalf of other parties also – **Jodhpur Woolen Mills Ltd. v. IAC [1997] 58 TTJ 712 (Jp.-Trib.).**

- **Whether a firm can be treated as benami of another merely because both firms had common partners and operated from the same premises?**
- Answer: Merely because two firms having common partners operated in same premises one could not be treated as benami of another when both firms had maintained separate accounts and profits earned by each firm were apportioned separately among respective partners – **ITO v. Nasinhbhai & Co. [1992] 60 Taxman 392 (Ahd.)(Mag.)(SMC).**

■ **What is meant by “known sources”? Does it mean “known sources of income” of the individual?**

■ **Answer:** No. “Known sources” should not be construed as “known sources of income”. The words “of income” were originally there in the Amendment Bill but were omitted at the time of passing of the Bill. In his reply to the debate on the Amendment Bill, the Finance Minister clarified in this regard in the Rajya Sabha as under:

■ “.... This is exactly what the Standing Committee went into. The earlier phrase was that you have purchased this property so you must show money out of your known sources of income. So, the income had to be personal. Members of the Standing Committee felt that the family can contribute to it, you can take a loan from somebody or you can take loan from bank which is not your income. Therefore, the word “income” has been deleted and now the word is only “known sources”. So, if a brother or sister or a son contributed to this, this itself would not make it benami, because we know that is how the structure of the family itself is

■ What is the definition of “child”?

■ **Answer:** There is no definition of “child” in the Prohibition of Benami Transactions Act, 1988. However, clause (31) of new section 2 as substituted by the 2016 Amendment Act provides that words and expressions not defined in this Act but defined in the Indian Trusts Act, 1882, the Indian Succession Act, 1925, the Indian Partnership Act, 1932, the Income-tax Act, 1961, the Depositories Act, 1996, the PMLA, 2002, the LLP Act, 2008 and the Companies Act, 2013 shall have the same meanings respectively assigned to them in those Acts. Accordingly, the definition of “child” in section 2(15B) of the Income-tax Act, 1961 would be applicable. The said section 2(15B) defines the term “child” in relation to an individual and gives an inclusive definition of “child”. In terms of section 2(15B), the term “child” in relation to an individual includes a step-child and an adopted child of that individual. Since the definition is an inclusive definition, the normal meaning of the term is important.

- The following judicial decisions clarify the ordinary meaning of the word “child”:
- i) The words “child or children” primarily mean, issue in the first generation only – sons and daughters – the exclusion of grandchildren or other remoter descendants” [per Lord Blackburn, *Bowen v. Lewis*, 54 L.J.Q.B. 68].
- ii) In Australia the phrase “child of the settler” [was held to exclude descendants beyond the first generation [*Re Williams, Queensland Trustees Ltd. v. Williams* [1950] Q.S.R. 148].

■ **Whether the term “child” would cover only minor children?**

■ **Answer:** No. It would cover sons and daughters of the individual of any age.

The words “any child of such individual” are used in item (iii) of sub-clause (A) of clause (9) of section 2. “Any” is a word which excludes limitation or qualification (per Fry L.J., *Duck v. Bates*, 12 Q.B.D. 79); “as wide as possible” (per Chitty J., *Beckett v. Sutton*, 51 L.J. Ch. 433). But its generality may be restricted by the subject matter or the context.

■ In view of the width of the expression “any”, the words “any child” will cover sons and daughters of any age.

■ **Whether married daughter will also be covered by the term “any child”?**

■ **Answer:** Yes. A daughter does not cease to be a “child” just because she gets married (*Murphy v. Ingram* [1973] Ch. 434). Also, the width of the word “any” in the phrase “any child” will take in its sweep married daughters of the individual as well.

- **Whether “child” would include “step-child”?**

- **Answer:** In view of the definition of “child” in section 2(15B) of the Income-tax Act, 1961 made applicable to the 1988 Act by section 2(31) of the 1988 Act, the term “child” shall include “step-child”. See also Q. on what is the definition of “child”?

■ **Whether “child” would include “adopted child”?**

■ **Answer:** Yes. In view of the definition of “child” in section 2(15B) of the Income-tax Act, 1961 made applicable to the 1988 Act, the term “child” would include an adopted child. See also Q. on what is the definition of “child”?

■ **Whether “child would include illegitimate child also?**

■ **Answer:** The word child would mean offspring of parentage. There may be legitimate or illegitimate child – **Sunderlal Chaurasiya v. Tejila Chaurasiya AIR 2004 MP 138, 143, Para 15.**

■ Where loans were given by parents as well as outsiders and minor sons purchased properties and sale deeds were registered in the names of minors, can they be regarded as Benamidars?

■ **Answer:** If parents held in purchasing property for their minor sons, there would be nothing wrong with it and minor sons cannot be treated as benamidar of the parent. Where the assessee had pointed out the source of income of his minor sons and both of them not only got loans from the assessee and his wife but they also got loans from three other independent persons and sale deed of the property was in the names of the minors and not in the name of the assessee, the Tribunal was right in holding that the evidence on record showed that the property was purchased by the minors and it belonged to them – **CIT v. Dr. Sohanlal [1998] 96 Taxman 168 / 234 ITR 581 (Raj.)**.

■ **Whether “cousin” will come within the scope of the term “brother” or “sister”?**

■ **Answer:** The terms “brother” and “sister” are not defined in the 1988 Act as amended by the 2016 Amendment Act. In **ITO v. Mahabir Jute Mills [198] 17 TTJ 49 (All.)** it was held that “brother” does not include “cousin”.

Therefore, it appears that the terms “brother” and “sister” will not include cousins.

■ **Whether step-brother or step-sister is covered within the term “brother” or “sister”?**

■ **Answer:** The terms “brother” or “sister” are not defined in the 1988 Act as amended by the 2016 Amendment Act. In **ITO v. Mahabir Jute Mills [198] 17 TTJ 49 (All.)** it was held that “brother is a male human being considered in his relation to another person having the same parent or having one parent in common.

■ Thus “half-brother” or “half-sister” is covered within the scope of the term “brother” or “sister” but not “step-brother” or “step-sister”.

■ **Whether half-brother or half-sister is covered within the term “brother” or “sister”?**

■ **Answer:** The terms “brother” or “sister” are not defined in the 1988 Act as amended by the 2016 Amendment Act. In **ITO v. Mahabir Jute Mills [198] 17 TTJ 49 (All.)** it was held that “brother is a male human being considered in his relation to another person having the same parent or having one parent in common. Thus, “half-brother” or “half-sister” is covered within the scope of the term “brother” or “sister”.

■ What is meant by lineal ascendant or lineal descendant?

■ **Answer:** These terms are not defined in the 1988 Act. However, clause (31) of section 2 as substituted by the 2016 Amendment Act provides that the words and expressions not defined in this Act but defined in the Indian Trusts Act, 1882, the Indian Succession Act, 1925, the Indian Partnership Act, 1932, the Income-tax Act, 1961, the Depositories Act, 1996, the PMLA, 2002, the LLP Act, 2008 and the Companies Act, 2013 shall have the same meanings respectively assigned to them in those Acts. Sections 24 and 25 of the Indian Succession Act, 1925 thrown light on these terms. Section 24 of the Indian Succession Act, 1925 defines Kindred or consanguinity as “Kindred or consanguinity is the connection or relation of persons descended from the same stock or common ancestor”.

- Section 25 defines “Lineal consanguinity” as “Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson and so downwards in the direct descending line.”
- Thus “Lineal descendant” or “lineal descendant” can be defined as the connection or relation between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson and so downwards in the direct descending line.”
- A son or grandson can be said to be a lineal descendant of his mother or grandmother respectively – **CIT v. Dhannalal Devilal AIR 1956 Raj 30, 32.**

■ **If an individual purchases property in the name of his mother/father/grandparent(s), will it be regarded as `benami transaction`?**

■ **Answer:** Yes. It will be covered within the scope of the term “benami transaction” as defined in sub-clause (A) of clause (9) of section 2 of the 1988 Act as substituted by the 2016 Amendment and will not get the benefit of exclusion in item (iv) of sub-clause (A). Exclusion from the definition of “benami transaction” in terms of item (iv) of sub-clause (A) is the subject to fulfillment of the following conditions –

■ (i) The property is held in the name of his brother or sister or lineal ascendant or descendant;

■ (ii) the names of brother or sister or lineal ascendant or descendant appear as joint owners in any document; and

■ (iii) the consideration for such property has been provided or paid out of the known sources of the individual.

- Parents / grandparents are lineal ascendants of an individual. However, property purchased by an individual in the name of his/her parents / grandparents (lineal ascendants) will not be regarded as benami transaction only if the name of parent / grandparent appears as joint-owner in sale deed along with that of the individual and the consideration is met by the individual from his known sources. Where the property is registered in the names of parent/grand parent and the individual's name does not appear as joint-owner in sale deed, then transaction will not fall within the ambit of the exclusion of item (iv) of sub-clause (A) and exclusion will benami will then be subject to the tests laid down by the courts as regards whether there was intent on the part of the individual to benefit his parent or grandparent. If the answer is yes, it will not be benami. If there was no intent on the part of individual to benefit his parent or grand parent, it will be benami.
- A son or grandson can be said to be a lineal descendant of his mother or grandmother respectively – **CIT v. Dhannalal Devilal AIR 1956 Raj 30, 32.**

■ **What would happen if the property is in the name of a Director, but the money has come from the company? Would the transaction be regarded as a benami transaction?**

■ **Answer:** When property is held by a person standing in fiduciary capacity for the benefit of another person towards whom he stands in such capacity, the transaction or arrangement will not be regarded as benami transaction [see item (ii) of sub-clause(A) of clause (9) of newly substituted section 2]. Item (ii) also gives an illustrative list of persons who would be treated as standing in fiduciary relationship to another and that list includes “director of company”. In view of this, where the director holds company’s property paid for by the company in his/her name as fiduciary for the company, transaction would be excluded from the scope of the term ‘benami transaction’. In this regard, the Finance Minister clarified as follows while replying to the debate on the Amendment Bill in Rajya Sabha:

■ “..... What would happen if the property is in the name of a Director, but the money has come from the company. Already in this Act there is an exception that if you hold it as a fiduciary of the company as a Director, then, it is not an offence. If you hold it as a trustee of a trust, it is not an offence. So fiduciary holding is allowed as an exception to benami

- **A holding company holds any shares in its subsidiary company in the name of its nominee to ensure that number of members in the subsidiary do not fall below the statutory limit. Is this benami transaction?**
- **Answer:** No. This is not a benami transaction as the nominee is a fiduciary for the holding company. Also, this fiduciary relationship is recognised in proviso to section 187(1) of the Companies Act, 2013 and such holding is permissible under the said proviso.



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