

BENAMI TRANSACTION:
FROM THE OLD CONCEPT TO THE NEW BILL

Nishi Shah¹

ABSTRACT

Benami transactions have been practiced in Indian even before the advent of Britishers. It was a legally recognised concept then. It was not considered harmless. However, eventually these were often used to resort to furthering illegal or questionable objects, including the evasion of taxes. Benami transactions were sometimes also resorted in order to defeat creditors. The practice gradually became rampant. Hence, a proper Legislation was required to curb the benami activities to ultimately curtail the illegal objects of the real owners. Thus, an Ordinance was introduced in 1988 followed by the 1988 Act. However, this 1988 Act, i-e, the current Act, hasn't had effective provisions and implementation. A need to have a better Legislation was thus felt. By clearing the 2015 Amendment Bill, the implementation of the provisions to control Benami transaction is hoped to be achieved efficiently. The paper thus seeks to analyse the meaning of Benami Transactions and what colour it has taken over these years.

¹ Gujarat National Law University (4th Year)

BENAMI TRANSACTION: FROM THE OLD CONCEPT TO THE NEW
BILL

Benami Transactions: What is it?

Purchase or holding of properties in the name of other is known as a Benami Transaction in India. This custom has been recognised by India Courts for a long time. Literally, the word “benami” means ‘Without Name’. The essential legal characteristic of these transactions is that there is no intention to benefit the person in whose name the transaction is made. The name of that person, popularly known as ‘Benamidar’, as Privy Council pointed out, is simply an alias for that of the person beneficially interested. The Benamidar has the ostensible title to the property standing in his name; but the beneficial ownership of the property does not vest in him but in the real owner.²

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 a benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property there under. 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 later case, there is no operative transfer from the transferor to the transferee at all and the title rests with the transferor notwithstanding execution of the conveyance.³

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. It is only in the former case that it would be

² Pether Perumal v. Muniandy, (1980) I.L.R. 35 Cal. 551, 558 (Privy Council); Gurnarain v. Sheolal, AIR 1918 PC 140

³ The Transfer of property Act, Mulla, 11th Edn

necessary when a dispute arises as to whether the person named in the deed is the real transferee or not, to enquire into the question as to who paid the consideration for the transfer. But in the latter case, 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.⁴

The principle underlying the benami transaction is that where a property is acquired in the name of one person but the purchase price is paid by another, a presumption would arise that the transaction was one for the benefit of the person providing the purchase money.⁵

Position under the English Law

Under the English law, when real or personal property is purchased in the name of another person, a resulting trust is presumed in favour of the person who is proved to have paid the purchase money in the character of the purchaser.⁶ It is, however, open to the transferee to rebut that presumption by showing that the intention of the person who contributed the purchase money was for the benefit of the transferee and that the transferee should himself acquire the beneficial interest in the property.⁷ There is, however, an exception to the above rule of presumption, popularly known as the 'doctrine of advancement' under the English law, which requires the court to presume that the purchase is for the benefit of the person in whose favour the legal title is transferred even though the purchase money may have been contributed by another person. The doctrine of advancement is, however, not in vogue in India. The counterpart of the English law of resulting trust referred to earlier is the Indian concept of benami transactions.⁸

However, if the conveyance is to the wife or child of the purchaser, then the presumption under the English law is the other way round, namely, that the purchaser intended to benefit the child or wife. This is known as presumption of 'advancement'. The presumption displaces the presumption of resulting trust, on the logic that in view of the relationship between the

⁴ Bhim Singh v Kan Singh, AIR 1980 SC 727; Meenakshi Mills, Madurai v. Commissioner of Income Tax, Madras, 1956 SCR 691

⁵ Ibid

⁶ Dyer v Dyer, (1788) 2 Cox 92

⁷ Rider v Kidder, 10 Ves. 360

⁸ Ibid

true purchaser and the nominal purchaser, it may be presumed that a gift to the nominal purchaser was intended.⁹

However, Indian Law was earlier different on this point. Where the purchase was in the name of a relation, the Indian law was the reverse of the English law.¹⁰ The provision in the trust act, as to resulting trusts continued to operate, and was not displaced¹¹ by a presumption of advancement as in England.

In itself, a benami transaction is not illegal, because “transfer of property”, by its definition, does not require that the *transfer in favour of one person may not be in the name of another*.¹²

Every benami transaction is not harmless. However, Past experience shows that benami transactions have often been resorted to for furthering illegal or questionable objects, including the evasion of taxes. Benami transactions are sometimes also resorted in order to defeat creditors.

First Step towards Prohibition: The Ordinance

In order to overcome such illegal objects, “Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 was promulgated by the President on the 19th May, 1988 in order to implement the recommendations of the Fifty-seventh Report of the Law Commission. The Ordinance was promulgated by the President in exercise of the powers conferred upon him by clause (1) of Article 123 of the Constitution.¹³

The provisions of the Ordinance received a mixed response, being half hearted measure and not effective to tackle the problem completely. Originally the Ordinance provided that no suit, claim or action to enforce any right in respect of any property held benami shall lie and no defence based on any right in respect of any property held benami shall be allowed in any suit, claim or action. It, however, provided two exceptions, i-e (1) regarding property held by a coparcener in a Hindu Undivided Family for the benefit of the Coparceners and (2) property held by a trustee or other person standing in fiduciary capacity for the benefit of another person. The Ordinance did not define (1) “Benami Transactions” or (2) “Property”, nor

⁹ 57th Law Commission Report.

¹⁰ Section 82, Trusts Act

¹¹ Guran Ditta v. Ram Ditta, (1928) 32 Calcutta Weekly Notes 871 AIR 1928 P.C. 172

¹² Section 5, Transfer of Property Act

¹³ GUPTA, Commentaries on Benami Transactions (Prohibition) Act, 1988 with loopholes, Lacunae and remedies.

imposed any prohibition on entering into a benami transaction after the commencement of the Ordinance and declared it as an offence punishable with imprisonment or fine or with both. The Ordinance also did not provide any exception in respect of transactions entered into by the husband or father for the transfer of properties in the name of wife or unmarried daughter for their benefit, the principle based on the English doctrine of advancement. Originally, the Ordinance repealed only section 82 of the Indian Trusts Act, 1882, Section 66 of the Code of Civil procedure and section 281A of the Indian Trusts of the Income-tax Act, 1961. It also did not provide as to whether the Ordinance would be prospective or retrospective in operation.¹⁴

Keeping in view the above lacunae in the ordinance, the Law Commission was requested to examine the subject in all its ramifications so that the Bill to replace the Ordinance may be brought out as a comprehensive law on Benami Transactions touching all the relevant aspects and on the basis of the 130th Law Commission Report containing certain recommendations “Benami Transactions (Prohibition) Bill, 1988 was introduced in the Rajya Sabha on the 31st August, 1988 and received the assent of the president of India on the 5th Day of September, 1988.

This is an important piece of social legislation which not only seeks to abolish the age—old concept of benami and the judicial acceptance of the doctrine by putting a bar on the right to recover property held benami by a real owner, but also declares a benami transaction as illegal with penal consequences and also makes all properties held benami liable to be acquired by the Government without payment of any compensation. Thus, the provisions of the Act which is claimed to be a part of the schemes of social engineering, where avowedly the benefit of the community or public at large is the sole consideration, can be said to be a fraud on State’s power of eminent domain of his valuable right to property.¹⁵

The Act of 1988: Major Changes

The parliament enacted (Prohibition) Act, 1988 prohibiting benami transactions under section 3(1), and making them punishable under sec. 3(3). The prohibition does not, however, apply to the purchase of a property by a person in the name of his wife or unmarried daughters and it shall be presumed, unless the contrary is proved, that the said property had been purchased

¹⁴ Ibid

¹⁵ Maharao Sahib Bhim Singhji v Union of India, AIR 1981 SC 234; cf. Waman v Union of India, AIR 1981 SC 271; Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd., AIR 1983 SC 239.

for the benefit of the wife or the unmarried daughters. Benami transaction is defined under s 2(1) so as to mean any transaction in which property is transferred to one person for consideration paid or provided by another person. Nothing in the benami transactions (Prohibition) Act shall affect the provisions of sec. 53 of the TP Act as has been laid down in section 6. The Supreme Court also held that the Benami Transaction (Prohibition) Act is a piece of prohibitory legislation, and prohibited benami transactions subject to stated exceptions and makes such transactions punishable, and also prohibits the right to defences against recovery of benami transactions as given in the act.¹⁶

All the properties held benami will be subject to acquisition by such authority, in such manner and after following such procedure, as may be prescribed by rules under the proposed legislation. As a result of the provisions of the Ordinance and the prohibition of entering into benami transactions, the benamidar would be acquiring the rights in the property by the mere lending of his name and without investing any money for the purchase of such property held benami. Sec. 81, 82, 94 of the Indian Trust Act, 1882, were also repealed.

Loopholes under the present Act

The short preamble of the Act does not convey the clear intention of the Legislature behind the present enactment which is preceded by an Ordinance promulgated by the President, nor does it convey the objectives it seeks to achieve. Therefore, on the question of validity of this Act perhaps the Court has to go into the facts and circumstances as well as the executive thoughts, deliberations and actions. Reports of the Law Commission on the Bill which became the Act in question are of obvious relevance of its meaning.¹⁷

According to the Report of the law Commission the Act is envisaged at curbing illegal and nefarious uses of property. But due to ill-conceived drafting the Act is found to suffer from the following lacunae and conflicts with other existing statute- (1) The traditional concept of 'benami transaction' has undergone a radical change whereby certain transactions which were held and considered as 'benami' will cease to be considered so. For example, any purchases of property in the name of wife or unmarried daughter will now be presumed as an advancement or gift, which has, however, been made rebuttable. By making the presumption for advancement in favour of wife and unmarried daughter rebuttable by taking out such

¹⁶ Akhilesh Kumari & Anor v. Prem Behari Khare AIR 1989 sc 1247, P 1253; Ouseph Chacko & anor v. Nair Raghavan AIR 1989 Ker 317 (a sham transaction cannot be treated as a new class of benami transaction under sec 4 of the Benami transaction (Prohibition) Act, 1988); Judah v. Abdool (1874) 22 WR 60

¹⁷ Francis Bennion, Statutory Interpretation, 1984 Edn., p. 526

transactions from the mischief of clause (a) of section 2 of the Act by the exclusionary provision of section 3(2) of the said Act and consequential immunity from prosecution u/s 3(3), such a transaction, although intended to be a gift, may now be resorted to as a benami in order to circumvent the provision of the Gift-Tax Act and the Income-tax Act to avoid payment of gift-tax upon clubbing of the income from the transferred assets.

Further, a host of innocent transactions which were infact never intended to be benami were now made Vulnerable to this Act.

Why the new Bill?

The Benami Transactions (Prohibition) Act, 1988 came into force immediately after its enactment and still remains in force. The Act concentrated on prohibition of the benami transactions and thus curbed the practice of benami. To this extent the objective and purpose of bringing in the Act were fulfilled.

It should be noted here that though the power to make rules was available to the Central Government under the Benami Transactions (Prohibition) Act, 1988, no rules could be prescribed due to procedural infirmities.

The second Administrative Reforms Committee stated in its 2007 report that:-

“...unfortunately, in the last 18 years, Rules have not been prescribed by the government for the purposes of sub-section (1) of Section 5, with the result that the government is not in a position to confiscate properties acquired by the real owner in the name of his benamidars. The wealth amassed by corrupt public servants is often kept in ‘Benami’accounts or invested in properties in others’names. Strict enforcement of the Benami Transactions (Prohibition) Act, 1988, could unearth such properties and make property accumulation difficult for corrupt officers and also work as a deterrent for others. Steps should be taken for immediate implementation of the Benami Transactions (Prohibition) Act, 1988”.¹⁸

During the process of formulating the rules for implementing certain provisions of the Act, it was found that the provisions of the aforesaid Act were inadequate to deal with the benami transactions as the Act, inter alia,—(i) did not contain any specific provision for vesting of confiscated property with the Central Government; (ii) did not have any provision for an

¹⁸ The Second Administrative Reforms Committee in its fourth report presented in January, 2007 on Ethics in Governance inter-alia stated on Prohibition of Benami Transactions.

appellate mechanism against an action taken by the authorities under the Act, while barring the jurisdiction of a Civil Court; (iii) did not confer the powers of the Civil Court upon the authorities for its implementation. To remove these infirmities, several consultations were held with the Ministry of Law and Justice.

It was later realized that it would not be possible to remove the infirmities by making few amendments but a fresh legislation would be required to comprehensively deal with all the issues.¹⁹

Further, matters of procedure relating to its administration, notice of hearing to parties concerned, service of notice and orders, powers of the competent authority relating to gathering of evidence etc. had to be provided; and the word 'wife' needed to be replaced with the word 'spouse' and property purchased in the name of certain other family members was to be allowed under the Act.²⁰

Hence, a comprehensive Legislation was needed to replace the Benami Transaction (Prohibition) Act, 1988 in order to prohibit holding of property in benami and restrict right to recover or transfer any property held benami and also to provide a mechanism and procedure for confiscation of property held benami. Thus, came into picture the Benami Transactions (Prohibition) Bill, 2011.

The Benami Transactions (Prohibition) Bill, 2011

The Benami Transaction (Prohibition) Bill, 2011 was introduced by the Ministry of Finance on August 18, 2011 in the Lok Sabha in order to seek prohibition of the benami transactions. The Bill seeks to replace the existing Benami Transactions (Prohibition) Act, 1988.²¹

- The bill provides that all sorts of benami property arising out of prohibited benami transactions are liable for confiscation by the Central Government and such property shall vest absolutely in the Central Government without paying any compensation. It prohibits the right of the Benamidar to recover the property that is held benami.
- It prohibits benami transactions by any person, except in the cases where they are entered into in the name of spouse, brother or sister, or any lineal ascendant or descendant.²²

¹⁹ The Standing Committee on Finance, Fifty-Eighth Report, The Benami Transactions (Prohibition) Bill, 2011; pg. 7, < <http://www.prsindia.org/uploads/media/Benami/Benami%20Bill%20SC%20report%202012.pdf>> accessed on June 1, 2015

²⁰ Ibid, pg. 8

²¹ Benami Transactions (Prohibition) Bill, 2011

- It provides that the Adjudicating Authority and the Appellate Tribunal established under the Prevention of Money-Laundering Act, 2002 shall respectively be the Adjudicating Authority and the Appellate Tribunal for the purposes of this Bill and any person aggrieved by an order of Adjudicating Authority may prefer an appeal to the Appellate Tribunal and further provides that any party aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court on any question of law.²³
- It also provides the power to the Central Government, in consultation with the Chief Justice of the High Court, to designate one or more Courts of Session as special Court or Special Courts for the purpose of the Bill.
- It also provides penalty for entering into prohibited benami transactions and for furnishing any false documents in any proceeding under the Bill
- It will also make consequential amendments in the Prevention of Money-Laundering Act, 2002.²⁴

Loopholes in the proposed Bill

India ratified the United Nations Convention against Corruption (UNCAC) in the year 2011. The Legislature seeks to address the International Convention against Corruption (adopted by the General Assembly of the United Nations) to prevent corruption and black money through the Bill.

However, that there is no reference in the Bill to the mandate derived from United Nations Convention against Corruption (UNCAC). The reference to this UNCAC should be made in the Bill to make it clear that the various provisions of the Bill have an international basis.²⁵

The definitions in any legislation are important for effective implementation and achievement of the objectives enshrined in the Acts. However, the present Bill fails miserably on this count. For instance, the relevant terms such as “transaction”, “arrangement”, “consideration provided or paid” have not been defined in the Bill. Further, the terms namely, “trustee”, “executor”, “partner”, “agent”, “director of a company or legal adviser” have neither been defined nor added by way of explanations in the Bill. Though some of these terms have been widely used in other laws and many of these terms have been used without specifically

²² Ibid.

²³ Benami Transactions (Prohibition) Bill, 2011 < <http://www.prsindia.org/billtrack/the-benami-transactions-prohibition-bill-2011-1911/> >

²⁴ Ibid.

²⁵ The United Nations Convention Against Corruption.

defining them, the Committee feel that specific definition of these terms in context of the Bill will remove ambiguity and leave no scope for misinterpretation and obviate delegated legislation. The Government should thus review the definition clauses of the Bill, so as to include proper definitions for every relevant term in the Bill itself.²⁶

The definition of “property” in Clause 2(p) of the Bill is loosely worded and leaves much scope for misinterpretation. For instance, it is not clear as to whether the benami property or proceeds thereof that has been transformed or converted, in part or in full, into other property be treated as property. There is a need to bring in more clarity by modifying Clause 2(p) 20 for achieving convergence with the UNCAC. The definition of the term “property” thus should be rephrased.

unlike the Prevention of Money Laundering Act, 2002, the proposed Act has no separate chapter dealing with obligations of any officer or authority of the Central Government or State Government or a local authority to render assistance for all or any of the purposes specified in sub-clause (1) of clause 9, particularly for registering and maintaining books of account and other documents and furnishing information under Clause 10. It should also be noted that the term “record / documents” has not been defined in the Bill. Similarly, the manner and procedures to be prescribed for maintaining books of account and other documents as well as furnishing of information in such a way that it provides all information particularly source of property to facilitate unearthing benami transactions have also not been indicated in Clause 10 of the Bill.

As regards punishment for prohibited benami transactions, the maximum punishment of imprisonment of two years has been proposed in the Bill which is lesser than the maximum punishment of imprisonment of three years under the existing Act i.e the Benami Transactions (Prohibition) Act, 1988. There is no merit in the reasons advanced by the Ministry for reduction of period of imprisonment. The proposed Act has a number of provisions for speedy disposal of cases like Appellate Tribunal and Special Courts. As pointed out by the Second Administrative Reforms Commission, stiffer punishment should be provided so that it would work as a deterrent for others. It is therefore recommend that the

²⁶ The Standing Committee on Finance, Fifty-Eighth Report, The Benami Transactions (Prohibition) Bill, 2011; pg. 7, < <http://www.prsindia.org/uploads/media/Benami/Benami%20Bill%20SC%20report%202012.pdf>> accessed on June 5, 2015

maximum punishment of imprisonment of three years under the existing Act i.e. the Benami Transactions (Prohibition) Act, 1988 should be retained in the proposed law.

Lastly, Ministry's view on benami transactions in the name of the close relatives being treated as non-prohibitive doesn't hold good. Placing a transaction under non-prohibitive list amounts to helping a culprit whose primary goal is to get the property out of the legal net. The argument regarding deterrence advanced by the Ministry does is not satisfied. This long list of exempted and non-prohibitive transactions does not go well with the real objective of the proposed law viz. to curb the menace of benami transactions. The Government should accordingly look into the entire gamut of exempted as well as non-prohibitive list of transactions and make it minimal as far as possible so that no unscrupulous element could circumvent the provisions of the law.²⁷

The 2015 Amendment Bill

When the 2011 Bill was referred to the Standing Committee for its opinion, in its report, it stated that instead of strengthening the Benami Transactions (Prohibition) Act, 1988, the Government enlarged the scope of exemptions from the purview of the Benami Transactions by way of new bill. The Committee also found credence in the view expressed by the National Institute of Public Finance and Policy (NIPFP) on exemption being proposed for a number of categories, as it would severely restrict the operation of the proposed law, thereby affecting the achievement of the avowed objective of prohibiting the benami transactions.²⁸

This 2011 Act, However, Lapsed with the dissolution of the 15th Lok Sabha. Thus came in picture the Benami Transaction (Prohibition) amendment Bill, 2015 which was recently cleared by the Cabinet. This new Bill has been framed after the keeping in mind the recommendations of the standing Committee, and is much more comprehensive than the 2011 Bill. But, still, it is not enough to curb the benami practices. Allowing Benami Properties still to be held in name of spouse and other lineal descendent should be removed as this proposition would not help limit the Benami Transactions.²⁹

²⁷ Ibid.

²⁸ ²⁸ The Standing Committee on Finance, Fifty-Eighth Report, The Benami Transactions (Prohibition) Bill, 2011; pg. 17-18 <

<http://www.prsindia.org/uploads/media/Benami/Benami%20Bill%20SC%20report%202012.pdf> >

²⁹ Changes in Benami Act will block black money in reality: Jayant Sinha <

<http://economictimes.indiatimes.com/news/politics-and-nation/changes-in-benami-act-will-block-black-money-in-realty-jayant-sinha/articleshow/46555243.cms> >

Conclusion

The Ordinance which was promulgated on 19th May, 1988 to prohibit the right to recover the property that was held benami and for the incidental matters was eventually replaced with the Benami Transactions (Prohibition) Act, 1988 in order to curb Benami transactions. But this Act lost its purpose over a period of time as no rules for implementation of this Act were made. The question here is why the Government went into a slumber after promulgation of Ordinance in a hurry and enactment of law to prohibit benami transactions. The Committee addressed the Act as being kept in “Cold Storage” even after the recommendation for its implementation were made by the Second Administrative Reforms Commission in 2007.

Even after taking such a long time for introducing the Benami Transactions (Prohibition) Bill, 2011 to repeal the Benami Transactions (Prohibition) Act, 1988 with a view to enacting a comprehensive legislation to deal with benami transactions, the Bill has failed to live up to the mark and provide for speedy and Effective Changes. With the advent of the new bill, which has more stricter and clear norms, it is equally important that the effective implementation be brought out as well, otherwise, there will be absolutely no point in bring out newer and better legislations.