

Evolution of Benami Transactions: Critical Analysis Relation to TPA

Monika Jain*

Ph. D Holder, Senior Advocate, Delhi High Court, New Delhi, India

Abstract

After surgical strike on black money, government has warned Benami property holders that his subsequently footstep would be alongside them. Benami property would be the major step towards eradicating black money and corruption. Benami transactions in its total are easier said than done to eradicate from the society, because of the very nature of the relationship between parties who enter into such kind of transaction. Benami transactions are decontamination themselves by not being controlled only to transaction between real owner and benamdar, it has customized itself to many other forms like money laundering. Benami transaction is prototypical part of transfer of property, meager passageway of fundamental legislations like Prevention of Money Laundering Act, 2002 is not enough but its impact on Transfer of Property. The Benami Transactions (Prohibition) Amendment Act, 2016 is a modified version of older Benami Transactions (Prohibition) Act 1988. Benami transaction is approved out with the aim to conceal the real source of money. Benami Transaction tried to control transactions; on the other hand, it could not comprehend the entity of the Act to its fullest because it failed to consider all forms of Benami transactions. Benami transactions in object, it tries to achieve that is hiding the illegal source of money. Benami transaction is broadened it can comprise other forms of dealing with black money as healthy like money laundering.

Keywords: Benami, Black Money, Transaction, Transfer, Property, Society, Money.

***Author for Correspondence** E-mail: advmonikajain@gmail.com

PROLOGUE

A number of rights are present which are recognized as human rights or straightforward rights because they are very fundamental for the survival of human being and live and development of a human to its fullest. Right to property was never considered one of these normal rights because it was a construction of act [1]. The Benami Transactions (Prohibition) Amendment Act 2016 imposes draconian cost on persons looking for to escape the law by holding property by unlawful means. However, the strike of the law, if factually interpreted, also unfavorably affects above suspicion persons who enter into authentic transactions. We have analyzed the statutory provisions in element and explained how they should be interpreted so that the intention of the legislature is met even as avoiding destitution to legitimate transactions. Fundamental Rights of Indian Constitution provides immunity of Art. 13 of the Indian Constitution [2], Right to property as a fundamental right is one of the constitutional

blunders. Social freedom and equal allocation of wealth were one of the objectives to be achieved after independence and to that effect, instruction ideology of State Policy was evolved and located under Part IV of the Constitution [3]. Constitution was deteriorating to fulfill the guarantee of social liberation and equality of distribution. It was in direct disagreement of social nature of the state as envisaged by the Preamble. Right to property as a fundamental right was detached from Fundamental Rights by deleting Art. 19(f) and Art.31, Right to property was a formation of decree and to attain the goal of social equal sharing of resources, it became necessary to use the tool of law to control the allotment of resources, property being one of the most renowned wealth.

Meditation of such property was a Benami transaction which would allow a person to hold real ownership rights of by transferring ownership for namesake to someone else. To identify the problem itself and after much

reflection Benami Transaction (Prohibition) Act, 1988 was passed to successfully undertake Benami transactions. The property law because freshly there have been much manifestation on the law to begin Benami transactions. The aim of these provisions of Benami Transaction (Prohibition) Act, 1988 in right of Transfer of Property Act, 1882, To understand how Benami Transaction (Prohibition) Act, 1988 and Amendment 2016 has impacted transfer of property.

THE LEGAL SPIRIT OF BENAMI TRANSACTIONS

Benami Transactions revolves approximately the strange feature that there is no purpose of benefitting that person in whose name the property is transacted. The person in whose name property is transacted is called Benamdar which is simply an assumed name for a person in whose name valuable ownership of property in fact vests [4]. There are many factors which lead to the put into practice of Benami communication. Considering the nature of the transaction though these transactions are not for eternity detrimental, whenever they go beyond rightful extent, they can have catastrophic belongings. Thus, there were certain Benami transactions, which were recognized, as unlawful and thus punishable [5].

1. Joint Hindu family
2. Rip-off on creditors.
3. Tax escaping.
4. Social and political risks of abolition.

CONCEPT OF BENAMI TRANSACTION

Benami Transaction Amendment Act, 2016 Act, the term "**Benami Property**" U/S 1(8) has been defined as under:

- A Benami Property means any property which is the
- subject matter of a Benami transaction
- Also includes the proceeds from such property.

The definition of property under 2016 Act includes assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal [6].

Benami Transaction Amendment Act, 2016 U/S 1 (9) of the term "**Benami Transaction**"

has been defined as under: A Benami Transaction means-

- a transaction or an arrangement-
- where a property
- is transferred to, or is held by, a person,
- the consideration for such property has been provided, or paid by, another person;
- 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 [7]:

Sec. 41 dealing with property transactions by the apparent owner with the third party and fraudulent transfer of property by transferors to the transferee to defeat or delay the creditors of the transferor. Whether a transaction is Benami or not is a prejudiced question unreliable according to situation of the container. However, in a case of Jayadayal Peddar v. Bibi Hazra, Supreme Court had laid downward subsequent tests [8].

- Source of the purchase of money.
- Character of possession of the property after the purchase.
- Purpose, if any for Benami transaction.
- The relationship between the parties.
- The real owner and the ostensible owner were related to each other.
- Conduct of the parties in dealing with the property
- Custody of the title deeds after the sale.

BENAMI TRANSACTION (PROHIBITION) ACT VS. TRANSFER OF PROPERTY ACT

Section 4 of Benami Transaction (Prohibition) Act, 1988 states that,

- (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 became whether against the person in whose name the property is held or against another 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" [9].

DIFFERENCE BETWEEN SEC. 41 AND SEC. 53 OF TRANSFER OF PROPERTY ACT, 1882

Section 6 of Benami Transaction (Prohibition) Act, 1988 and Amendment Act 2016 provides that Section 53 of Transfer of Property Act, 1882 which secures welfare of creditors next to overcome and any law connecting to transfers for a prohibited point which also includes Section 41 of Transfer of Property Act [10].

Section 41, Transfer of Property Act, 1882 and Its Implications

Section 41 of Transfer of Property Act, 1882 deals with notion of ostensible owner the section states that, Transfer by ostensible owner. Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith" [11]. Sec. 41 allows a person to buy property in the name of another as an ostensible owner then why the purchase of property in the name of another person is prohibited under Benami Transaction (Prohibition) Act, 1988.

Sec. 41 is to defend the interest of blameless third parties who with reasonable care and in good faith enter into a transaction with the ostensible owner, where the real owner was himself failed to protect his or her interest by impliedly or explicitly authorizing the ostensible owner to transact [12]. To benefit protection of Sec 41 next are the situation:

1. The chief state is that the person who is transferring the property should be an ostensible owner. There should be approval from the real owner, which can be implied or express form.
2. The ostensible owner should get some consideration in return of the property.
3. Reasonable care has to be taken by the transferee about the authority of transferor to the property and the transferee had acted in good faith.

4. This section is applicable only to transfer of immovable property and not in the case of movable property [13].

‘Ostensible Owner’ vs. ‘Benamdar’

Sec 41, there are indications of ownership in hands of transferor like name, entries in records etc. In adding together to so as to, he or she has apparent and unconditional complete authority to deal with the property as a real owner. This authority is given by the real owner through explicit declaration or implicit through conduct. Ostensible owner represents the real owner in the transactions [14].

Sec 41 of Benami Transaction (Prohibition) Act, 1988

Principle of common law that means that a person cannot confer a better title than he himself holds. Concept of ostensible ownership, the drawing conclusion is that ostensible ownership derives its legitimacy from the ideas of equity and natural justice the doctrine of estoppels. Benami Transactions (Prohibition) Act, 1988 an ostensible owner has become a real owner except in certain situations.

Section 53, Transfer of Property Act, 1882 and its Reflections

This section rationale that is the shield of transferee who acts in good faith, pays due consideration and to whom property has been transferred and creditor to defeat or wait whom property has been transferred [15].

Fraudulent Transfer

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

2. Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made" [16].

Sec. 53, TPA, 1882 vs. Benami Transaction (Prohibition) Act, 1988

Sec. 53 is that is a property transfer between transferor and transferee has to be valid transfer and it cannot be a fictitious or sham transaction. In a situation where there is no real intention of the actual transfer of property and real intention is the satisfaction of some ulterior motive beneficial to the transferor [17].

Sec. 53 is Exempted as of Requirements of Benami Transaction (Prohibition) Act, 1988

Benami transaction, there is the real owner who is a beneficiary and name lender. However, Benami Transaction (Prohibition) Act, 1988 eliminated this dissimilarity by creation name lender as a real owner, miserly real owner his beneficial interest. However, there are certain circumstances in which the blow of such transaction is not just limited to undeserved enhancement of benamdar at the cost of benefit of beneficiary but strength lead to causing damage to the third person [18]. To steer clear of such option Sec 53 is exempted where deceitful transfer between transferor and transferee should not affect creditor. Consequently, to safeguard the interest of guiltless third-party Sec 53 is an exception carved in sec. 6 of Benami Transaction (Prohibition) Act, 1988.

Crash on Sec 41 of Transfer of Property Act, 1882

Sec. 41 differentiates between ostensible owner and real owner, this difference is on the other hand eliminated by Benami Transaction (Prohibition) Act, 1988 by construction benamdar real owner and partial extent of the transaction allowable under Sec. 41 to only when the transaction is an exception to Benami transaction as per the provisions of the Act that is to comprise the operation in the name of wife or unmarried daughter, in

fiduciary capacity to create the trust or as a coparcener in Hindu Undivided Family property [19]. The scope of Sec. 41 is expanded as per the provisions of Benami Transaction (Prohibition) Bill, 2015. In adding up to the above-mentioned exception, new Bill seeks to relax obtainable exceptions.

- Sec. 3(2) of Act of 1988, an exception is drawn only in favor of wife whereas [20];
- Sec. 2(9) (iii) of Bill uses word 'spouse' thus, expanding the scope of Sec. 41 even further [21].
- Sec. 2(9) (iv) expands the exception to brother and sister or lineal antecedents and descendants where names of benamdar and real owner are as 'joint-owners' [22].

RE-TRANSFER OF LABEL TO REAL OWNER IS BANNED

Prior to the passage of Benami Transaction (Prohibition) Act, 1988 bench was positive of Benami transactions in a wisdom that if a real owner goes to court to claim ownership title, after due proceedings court would award the same. Sec. 4 Benami Transaction (Prohibition) Act, 1988, prohibited such an action against benamdar [23]. Benami transactions because a standard relationship between real owner and benamdar was fiduciary or was of supremacy as a result, it was scarcely possible for benamdar to go alongside real owner's wish and avoid retransfer of property. Therefore, although the legal suit was prohibited retransfer of property could have been done without going to court. Sec. 6 of the Bill states that,

1. No person, being a benamdar shall re-transfer the Benami property held by him to the beneficial owner or any other person acting on his behalf.
2. Where any property is re-transferred in contravention of the provisions [24].

BENAMI TRANSACTIONS IMPLICATIONS AND COMPLICATIONS

Benami transactions are one of the disreputable conducts to deal with black money assassination answerability of economy. These transactions force into economy back money from side to side movement and reserves, Corruption prevalent in Indian society and other societies.

- Tax evasion
- Black money
- Defeating land ceiling laws:

What are The Complications connected by means of Benami Transactions?

Benami transaction is not forever a straight incorrect. It is so long-winded with supplementary factors that it why to like other wrongs, both civil and criminal it is very difficult to isolate and completely get rid of from the society. Subsequent are the complications allied with Benami transaction and reasons why Benami Transaction (Prohibition) could not be whole accomplishment.

- **Section 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” [25].
- Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfer or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both [26].
- Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both [27].
- Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment

or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both [28].

- No suit shall be maintained against any person claiming title under a purchase certified by the court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims and in any suit by a person claiming title under a purchase so certified, the defendant shall not be allowed to plead that the purchase was made on his behalf or on behalf of someone through whom the defendant claims [29].
- Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner. The section provides that no suit shall be maintained against the certified auction purchaser on the ground that the purchase was made on behalf of the plaintiff unless he can prove that the name of the said purchaser was inserted in the sale certificate fraudulently or without his consent [30].

CONVENTIONAL SCHEME AND AUTHORITY

Benami transaction capacity not constantly is illegitimate in India; there is an age-old system of buying property in names of close relatives and family members. Not unavoidably these families are HUFs and they have the indisputable goal of buying property in someone else's name because of some institution or family custom or simply as a symbol of friendliness. The legislation non-discriminately brings all the connections in its region.

NEGATIVE IMPACT OF ACT

It is a standard perform in Indian families, predominantly Hindu families, which may not

be technically Hindu Unlimited Families, where elders donate considerable funds out of their Public Fund, gratuity, lifelong savings which can by no means be termed as black money or even to circumvent any other accountability. Yet if the immovable property is purchased in the name of a younger member of the family under an authentic impression, they will also have a right to the property as well as a right to live in them. Benami Act, such bonafide contributors of finances misplaced all their rights in the property and even to protect a claim. The registered owner, who is a younger member of the family, has thrown out the real owner, who is generally an elderly person or parents, from the property by invoking Section 4 of the Act as it was made effectual on second thoughts.

BENAMI TRANSACTION AMENDMENT ACT, 2016 AND ITS SHORTFALL

The planned amendment in the Section 2(9) (iv) of Bill provides that a property detained by any person in the name of his brother or sister or ascendant or descendant has been kept out of the definition of became property only if his her name also appears as joint owner in such property [31]. This definition or exception is not only confusing since such a transaction will, even otherwise, not be became due to appearance of name of the real owner as joint owner, but will also be of no help to such elderly members of the family who had contributed fully or substantially for purchase of property in the name of their son, daughter, brother and sister in the past without inclusion of their names as joint owners in the property documents. Such transactions, even though done even prior to coming into force of the 1988 Act, will still be termed as Benami and such elderly persons and blood relations will still be deprived from not only claiming or enforcing their rights in such property but also from contesting any claim in a suit or legal proceedings as sub-sections (1) & (2) of Section 4 have been retained in their original shape. This is not only self-contradictory in itself but also contrary to laws like the Senior Citizen Act, 2007. *G Mahalingappa v. GM Savitha*, an old father from South India, who purchased a property in the name of his infant daughter because she was born under an

favorable nakshatra under a belief he would prosper by this, was dragged right up to the Supreme Court by the same daughter after she grew up and the apex court even commented upon this unfortunate part of the case [32].

Benami Transactions are Tricky to Observe

Benami transactions are scarcely entered into with total strangers. Frequently, they are entered into with family members or some good friend with whom a person shares a fiduciary affiliation. Benami transactions take place is property-owner and tenant or master and his servant where the relationship is influenced by other considerations like fear of losing his or her job [33].

Benami Transaction and its relation to Money Laundering

Benami transaction is approved out with the aim to conceal the real source of money. Benami Transaction tried to control transactions; on the other hand, it could not comprehend the entity of the Act to its fullest because it failed to take into account all forms of Benami transactions. Benami transactions in object its tries to achieve that is hiding the illegal source of money. Benami transaction is broadened it can comprise other forms of dealing with black money as healthy similar to money laundering.

As per Sec. 3 of Prevention of Money Laundering Act, 2002, "Offense of money-laundering.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of the offence of money-laundering" [34].

CONCLUDING ANNOTATIONS

- Benami transactions are fundamentally involves the transfer of property.
- Benami Transaction (Prohibition) Act, 1988 unsurprisingly has some impact on Transfer of Property Act, 1882.
- The impact of this Act on Sec. 41 and Sec 53 of Transfer of Property Act, 1882. Benami transaction as defined in Benami Transaction Act is different from that mentioned in Sec 41.

- The difference between real owner and ostensible owner and thus limiting the scope of Sec. 41 which talks about two separate owners that are real and ostensible to exceptions provided to Benami transactions in Benami Transaction (Prohibition) Act, 1988.
- Sec. 6 of Benami Transaction (Prohibition) Act, 1988 draws exemption in favor of Sec. 53, so as to put aside concentration of creditors which would not have been saved or else.
- Sec. 6 of Benami Transaction Act carves out the exception in favor of Sec. 53 extremely openly; in the same way, unambiguous condition stating imperfect range of Sec. 41 subsequent to the channel of Benami Transaction Prohibition Act should be made so as to do away with uncertainty.
- Benami Transaction (Prohibition) Act, 1988 envisages a medicine for that; on the other hand, if not appropriate civil machinery is put into action it will not be probable.
- Benami Transactions Act of 1988 failed to transport in this machinery which was later tried to be brought in by a variety of Bills which failed, latest being introduced in 2016.
- Benami transactions in its total are easier said than done to eradicate from the society, because of the very nature of the relationship between parties who enter into such kind of transaction.
- Benami transactions are decontamination themselves by not being controlled only to transaction between real owner and benamdar, it has customized itself to many other forms like money laundering.
- Benami transaction is prototypical part of transfer of property, meager passageway of fundamental legislations like Prevention of Money Laundering Act, 2002 is not sufficient but its impact on Transfer of Property.
- It is an occasion when some elasticity requirements to be brought in the longstanding characterization of Benami transaction.
- To say over and over and incorporate aptitude to get to the bottom of troubles arising out of Benami transactions in an

additional outward appearance as well as.

- This is not probable but within comprehensive revise and lawmaking will to set up capable equipment.

REFERENCES

1. 130th Report of Law Commission of India, Benami Transaction (1988)
2. Art. 13, Constitution of India, 1950
3. Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789 (Supreme Court of India)
4. Darashaw Jivaji Vakil, The Transfer of Property Act, 1882, 389 (2nd edn., 2004).
5. 57th Report of Law Commission of India, Benami Transactions (1973)
6. Sec 1(8) Benami Transaction Amendment Act, 2016
7. Sec 1(9) Benami Transaction Amendment Act, 2016
8. Jayadaya Peddar v. Bibi Hazra, AIR (1974) S.C.171
9. Sec. 4, Benami Transaction (Prohibition) Act, 1988.
10. Sec. 6, Benami Transaction (Prohibition) Act, 1988.
11. Sec. 41, Transfer of Property Act, 1882.
12. Dr. G. C. Bharuka, Mulla's Transfer of Property Act, 1882, 274 (10th edn., 2006)
13. Shantilal Mohanlal Shah, Principles of the law of transfer, 69 (1980)
14. Section 41 of Transfer of Property Act, 1882
15. Section 53, Transfer of Property Act, 1882
16. Sec. 53, Transfer of Property Act, 1988.
17. Sec. 53, Transfer of Property Act, 1988.
18. Sec. 53, Transfer of Property Act, 1988.
19. Sec. 41, Transfer of Property Act, 1988.
20. Sec. 3(2), Benami Transaction (Prohibition) Act, 1988.
21. Sec 2(9)(iii), Benami Transaction (Prohibition) Bill, 2015.
22. Sec. 2(9)(iv), Benami Transaction (Prohibition) Bill, 2015.
23. Sec. 4, Benami Transaction (Prohibition) Act, 1988.
24. Sec 6, Benami Transaction (Prohibition) Bill, 2015
25. Section 82, Indian trust Act
26. Section 421 of Indian Penal Code
27. Section 422 of Indian Penal Code
28. Section 424 of Indian Penal Code
29. Section 66 of Civil Procedure Code, 1908

30. Section 66 of Civil Procedure Code, 1908
31. 130th Report of Law Commission of India, Benami Transaction (1988)
32. Mahalingappa v. GM Savitha, 2005(6) SCC441
33. 130th Report of Law Commission of India, Benami Transaction (1988)
34. Sec. 3 of Prevention of Money Laundering Act, 2002.

Cite this Article

Monika Jain. Evolution of Benami Transactions: Critical Analysis Relation to TPA. *National Journal of Real Estate Law*. 2018; 1(2): 5–12p.