

Technical Analysis of the Benami Transactions (Prohibition) Amendment Act, 2016

Madhukar Goyal

PHD, FCA, CS (Professional Programme), M.COM, LLB, CCNPO (ICAI), UGC- Net (Commerce)
Chartered Accountant
“Sansmriti”, 12-A/Iii, Shree Ganeshpuram,
P.O. - Rku, Bareilly, Up, India

Abstract: After Demonetization, Indian government focuses to curb black money is Benami Properties. Due to relaxed provisions, it became part of a normal business to do certain things in the name of tax planning or to circumvent the laws. Consequently, possibility arises that a person would enter into a Benami Transaction without even realizing the same.

However, with the increased compliance, government effort to curb black money and provision of mandatory rigorous imprisonment for guilty, it is extremely critical to understand the meaning & implications of a Benami Transaction.

History & Introduction

Transactions of benami nature were not illegal because property transfer law never required about any transfer in the name of one person may not be in favour of another person (benamidar). Most important provisions giving a statutory sanction to Benami transaction were sec 81 & 82 of the Indian Trust Act 1882, which so provided that in case of any such transfer where the beneficial owner did not intend to transfer his interest of beneficial nature in the person holding title of a property, then such transferee must hold the property for the benefit of the person paying or providing the consideration. Thus, consequence of such Benami transactions was that as per Trust Act there emerged a “Resulting Trust” whereas the benamidar held the property in trust for and on behalf of the real/beneficial owner. As much as even such transfer constituting Benami transaction even though for illegal purpose, still constituted a Resulting Trust and even the illegality of purpose (if the illegal object is not carried out) did not place the real/beneficial owner out of his beneficial ownership in the property and the benamidar even in such case held the property in trust for and on behalf of the real/beneficial owner.

Govt. has introduced a law which has given a sudden jolt to the real estate sector. But the fact is, it is not only the real estate sector which would be affected by this law but it would have an impact on all types of properties be it movable or immovable. This law is called the Benami Transaction Act. Although, It is not a new act and it was originally created way back in 1988 but it was only the recent amendment brought in 2016 which has made a complete overhaul of this act and has made it really strong. But, of course, you might be thinking right now; what is it? How does it affect me? Why should I concern about it? Well, you'll get to know all these things by the end of this article.

Doctrine of Benami

The term ‘Benami’ existed as a concept which was common and customary prevalent from ancient time as a permitted form. The Courts observed about system of acquisition & holding the property in the name, other than real owner called Benami System, is quite common system. It is quite unobjectionable. The Courts observed that there is nothing inherently wrong in Benami. It accords ‘within its legitimate scope’ ideas and habits of people.

The law was enunciated by Courts approving Benami by observing that so long as the provisions of any statute are not defeated, the Courts are bound to give effect to it. The Benamidar has no beneficial interest, he represents the real owner and holds the property or business in trust for him. The principle was that if the property is purchased in the name of a person but the consideration was paid by another, the presumption would prevail that the transaction was for the benefit of the person who paid the consideration.

In general, Benamidar would fully represent as owner in dealings with third person. The third person would not be able to challenge his title so long as the real owner does not come into the picture. Ordinarily the real owner will not have any occasion to make assertions about his title. But if situations arise, the Courts would have to regard to the reality and disregard the ostensible title of Benamidar allowing real owner to assert his ownership. This was called Doctrine of Benami enunciated by the judge made law.

The most important provision giving statutory footing to benami is in the Trust Act which creates resulting trusts. Section 82 of the Trust Act provided that if a property is purchased in name of one person and the consideration is paid by some other person, there is resulting trust in favour of the person who paid the consideration.

What Is Benami Property

The meaning of Benami in Hindi is without name. It means a property bought by an individual not under his or her name but at somebody else's name is known as benami property. Benami Property includes every property held in the name of third person like children or spouse and the amount for that property is paid by known sources of income. Furthermore, the property bought by brother, sister, or any other relative and where the amount is paid from the known sources of income. The transaction involved in the same is called benami transaction. People invest their money in buying benami property to evade taxation. Furthermore, the true owners of these properties are hard to find due to fake identities and name. The person on whose name the property is bought is called 'benamdar'. The benami transactions include buying any kind of assets — movable, immovable, tangible, intangible, any right or interest, or legal documents. Background The first Benami Transaction act came in India in the year 1988, although the concept of benami property is not alien in India. Till then there were various judgements on benami transactions. In the previous Benami Act all the aspects of benami property were not covered. Thus the act was not repealed but amended. The reason of the amendment was given in the 28th report of Standing Committee on Finance. It was believed by the Ministry of Law, that if the Act of 1988 will be repealed than no action would be possible to take on the cases held between 1988 and amended Act. That's why it was preferred to amend the Act rather than repealing it. Aadhar and Benami Property to find a real beneficiary of the benami property is Herculean task and that is the reason the act has yet not been implemented in India. To speed up this process the government has come up with the idea of providing cash rewards up to Rs 1 crore to the secret informers. But it is expected that the success rate will be low because of the fear that the some rogue employees from the agencies will leak the details about the informer.

Similarly income tax rules are not fetching big information. So the best way to catch these property holders is to link the property with aadhar card number. The main advantage of this strategy is that the tax authorities will get all the information about 'legal owner' of the property. The property deals which are on fictitious name will be stuck easily. Also these hoarders register their property in other person's name like on their servant's name. It will become easy to find out the legal owners of the property once the aadhar card is linked with property. Then the legal owner shall have to show his sources of income for buying the property. Glimpses of the Act The purpose of the amendment is to seek the amended definition of the benami transactions, establishing adjudicating authority and appellate tribunals and to amend the penalties for the transactions.

Why do People Enter into Benami Transaction

There can be several reasons why people enter into a benami transaction. Usually people who enter into a Benami transaction are those who have money earned from unknown sources i.e. black money. Thus, to utilise the black money, people enter into benami transactions where the transaction is made in the name of another person but the consideration is paid by the person out of his black money.

The Benami Transaction has been defined as –

A transaction where the legal owner and payer of a property transaction are two different persons.

As per the revised provisions, a Benami transaction is:

1. A transaction where a property is transferred to or held by one person for direct or indirect, immediate or future benefit of another person, who has provided or paid the consideration, except when
 - i.) An HUF is purchasing a property in the name of a Karta, or any other member from known sources;
 - ii.) A person is holding the property in a fiduciary capacity (e.g. trustee, executor, partner of a partnership firm, director of a company, a depository participant, etc.);
 - iii.) An individual is purchasing a property in the name of his spouse or any child provided the consideration is paid out of the known sources;
 - iv.) Any person is purchasing a property in the name of his brother or sister or lineal ascendant or descendant, where he is one of the joint-owners, provided the consideration is paid out of the known sources; or
2. A transaction carried out in a fictitious name; or
3. A transaction where the owner of the property is not aware of or denies knowledge of such ownership;
4. A transaction where the person providing the consideration is not traceable or is fictitious.

Enquiry in Benami Transactions

The authorities establishes four authorities who will conduct inquiries regarding benami transactions are-

- i. Initiating Officer (i.e. Assistant Commissioner of Income-Tax or a Deputy Commissioner of Income-Tax).
- ii. Approving Authority (i.e. Additional Commissioner of Income-Tax or a Joint Commissioner of Income-Tax);
- iii. Administrator (Income Tax officer);
And
- iv. Adjudicating Authority.

The following people shall be guilty of the offence committed under Benami Transaction Act-

•Beneficial owner

•Benamidar

•Any other person who abets or induces any person to enter into benami transaction.

The offences are non-cognizable and non-bailable.

In cases where the price has not been certain the party shall have to pay fair Market Value price that the property would ordinarily fetch if sold in an open market. Politics and Benami Property Benami properties are next on PM's target.

Penalty or Consequences of a benami transaction:

Anyone found guilty of entering into a Benami transaction would be liable for both financial penalty and imprisonment:

1. Financial Penalty of up to 25% of the fair market value of the property
2. Rigorous imprisonment for minimum of 1 Year to maximum of 7 year.

If anyone gives incorrect information or explanation in response to any inquiry to any authority

1. Financial penalty up to 10% of the fair market value of the property and
2. Rigorous imprisonment of minimum 6 months to maximum of 5 years.

Salient Features of the Benami Transactions (Prohibition) Amendment Act:

A. Consequences of entering into a prohibited benami transaction:

(a) 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, in such cases the beneficial owner, benamidar and any other person who abets or induces any person to enter into such benami transaction, 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 a fine which may extend to twenty five percent of the fair market value of the property .

(b) A benami property shall also be liable for confiscation by the Adjudicating Authority.

B. Procedure for determination and related penal consequences in the case of a prohibited benami transactions:-

(a) Proceedings for enquiring into an alleged benami transaction are to be initiated by the Initiating Officer;

(b) The Initiating Officer will refer the case to the Adjudicating Authority set up under the proposed Bill;

(c) The Adjudicating Authority, after providing an opportunity of being heard to the alleged benamidar, the beneficial owner, any interested party including a banking company and any other person who makes a claim in respect of the property, will pass an order within one year, holding the property to be a Benami property or otherwise;

(d) An appeal against the order of Adjudicating Authority will lie with the Appellate Tribunal set up under the proposed Bill;

(e) An appeal against the orders of the Appellate Tribunal shall lie with the jurisdictional High Court;

(f) After the order of adjudicating authority becomes final, it shall confiscate the properties held Benami;

(g) Confiscated properties are to be managed and disposed of by officers of the rank of Income-tax Officer who will be designated by the Central Government as Administrators.

C. Other Provisions:

(a) The powers of civil court will be available to authorities under the Act.

(b) Miscellaneous provisions for service of notice, protection of action taken in good faith, etc.

(c) The Central Government to be empowered to make rules for the implementation of the legislation.

The above discussion may appear academic in view of the Law on Benami now being on Statute book. However, the discussion brings us to the debate that has undergone and the different views emerged in the process. That would surely help us to understand the law that now exists and enable us to effectively deal with the implementation of the provisions in substance and spirit.

Constitutional Validity

As discussed above, the Law Commission Reports have extensively dealt with the Constitutional Validity of then proposed Benami Act. It provides a crucial hint to look into the Constitutional validity of the subject statute. The validity may be seen from two perspectives. One the basic charge of Benami being relating to restriction or prohibition in respect to the property and second, the consequence of confiscation of that property.

Right of Property even though not a fundamental right, is a constitutional right and is subjected to authority of law as per Article 300A under the Constitution. The authority of law implies that the law must be a valid law in force as per the Constitution. In the context of removal of 'Right of Property as a fundamental right, Courts have held that "Right of Property" as per Article 30 was distinguishable and mutually exclusive from "Right of Freedom" relating to Property under Article 19(1)(f).

However Right of Freedom (Article 19) was interwoven with freedom of speech, expression, trade, business etc together which are subject to Article 19(5) providing test of reasonableness of restriction in the public interest. The law depriving of property has to meet the test of reasonable restriction thereon in public interest.

The restriction for such transaction is explained as to avoid certain underlying illegal motives mainly tax evasion and others like fraud of creditors etc. The restriction is also tested on the touchstones of ensuring equitable distribution of property as against the concentration of wealth in the hands of few. If one takes a view that the law provides for absolute prohibition, then in cases where there is no illegality and are genuine, the restriction seem to be unreasonable and arbitrary. As discussed in above par as, the test of reasonableness being justified for avoiding concentration of wealth, is not founded on any concrete ground.

This is supplemented with further rationale that the existing legal framework is sufficient and can be broadened or tightened up so as to tackle the menace of benami where bonafide cases may be allowed to prevail. The consequence of Benami is a creation of an offence liable for prosecution and confiscation. If severe consequences are framed, the test for such fixation must also provide a strong footing. Going by the definition Section of Benami, if it takes within its sweep benami transactions without the test of illegality, the charge is fixed liable for action of prosecution and confiscation.

That's where the un-reasonability creeps in and is tested weighing the objectives to be achieved as above on one side and other repercussions along with the alternative options available on the other side.

In the context of confiscation, the consequence is a punishment in addition to prosecution. The provision for acquisition and payment of compensation in the earlier Act of 1988 has been replaced by confiscation leaning towards harsher consequence. It is very vital to identify the specific act which is fixed under the Act. The act relates to transferring or holding a property in the name of other person.

What is considered as an offence is the Act or intention of transferring the property. The property itself is not the subject matter of any charge. There lies a significant distinction between the two. The Benami Act does not make any charge against the property as such nor draws any relation between the "transfer of property" with the "property" as from legal source or illegal source.

What is sought to be curbed is the specific act with underlying illegal purpose of tax evasion or other civil frauds. There appears no rationale in the further punishment of confiscation. The object of punishment to act as a deterrent may be achieved with prosecution. The punishment of confiscation therefore appears to be unreasonable. The confiscation does not address the underlying illegality in all eventualities. E.g if Benami transaction is done to defraud creditors, the confiscation would further put the creditors in worse condition.

If a person is trying to prejudice an interest in the property of a family member while creating Benami, the interest of such person is perpetually prejudiced after confiscation. Even a situation of tax evasion can be tested. If a person with the intention to avoid tax, transfers the property in the name of other, the underlying tax evaded is the mischief. The confiscation of the entire property becomes disproportionate as compared to the extent or degree of mischief.

The punishment of confiscation of properties are provided in respect of the properties which are harmful per se. e.g Contraband goods or any other property whose existence can be dangerous to public. The property in Benami per se cannot be called dangerous which ought to be removed from its existence.

The deprivation of property for the public purpose must lay down the effective appropriation of the property. If concentration of wealth is the anxiety as commented in the Law Commission Report, the effect of

the legislation must be to deprive property from those few hands and ensure equitable distribution amongst the deprived ones. There appears no such mechanism in the Act to provide for such distribution.

If the provisions of Benami Act 2016 are considered to be targeting black money, the provisions like 68,69 etc as also recent General Anti Avoidance Rule is fully equipped to address the evil. The Income Tax Act has provisions has effective powers like search, seizure, survey, reassessment to find such mis chiefs and set right the evasion.

In certain situations, the consequences under both the Act ie Benami and Income Tax may operate and the person shall be punished for the same offence twice under two statutes. The question of 'Double Geopardy' also may arise and has to be tested within the meaning of Article 20 of the Constitution. Clause 60 of the Act reads as under: "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". Clause 67 of the Act reads as under: "The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force".

It is clearly evident from the above that the provisions under Clause 60 and Clause 67 are self-conflicting. Even though amendments by way of deletion of provisions in Trust Act and Civil have been made, the provisions of Indian Penal Code, Prosecution provisions under Income Tax Act are still operative. It is therefore possible that the consequences under different acts would follow at the same time.

Critical Analysis

Besides the discussions of the Constitutional validity which would take its own turns, the Law needs to be looked upon for our close study. Let us turn to the Law that has now appears on statute books and critically analyse the important principles.

Conclusion

The basic purpose of this act is to reduce generation and utilization of black money in our country. Rather than holding black money is cash people prefer to invest their money in benami property. The main motive to for this investment is to save money. Basically this whole process is hampering the growth and development of the state. Since the percentage of tax payers in the country is getting low. And the government fails to implement such policies and schemes because of lack of resources. A tough law against benami properties is the need of the hour to check corruption.

The present effort runs through the every possible turn till the Law comes finally on the statute book. At every turn, it faces same set of questions as to the legal v illegal purpose, absolute prohibition v tainted prohibition, New Benami Act v Existing legal framework etc. There is every possibility that the same set of questions might continue further during the execution or implementation of the Act.

Thus, overall there are certain loopholes in the Act like every other law. The impact of the Act cannot be same on everyone. It might have a positive impact on individuals who plan to invest in real estate, due to price rationalization. On the other hand, it might have a negative impact on those who might want to invest in real estate to utilize the unaccounted money. Therefore, there cannot be a straitjacket analysis of the Act, it is subjected on the individual who is affected by the same. The judiciary will have to interpret these loopholes for better implementation of the Act

References

- [1]. [http:// http://lawmin.gov.in/](http://lawmin.gov.in/)
- [2]. [http : //www https://doj.gov.in/](http://www.doj.gov.in/)
- [3]. [http:// http://legalaffairs.gov.in/](http://legalaffairs.gov.in/)
- [4]. [https:// http://legislative.gov.in/](http://legislative.gov.in/)
- [5]. <https://www.india.gov.in/official-website-ministry-law-and-justice-0>
- [6]. <https://resource.cdn.icai.org/47590bosfinal-p6d-cp7.pdf>
- [7]. <http://kb.icai.org/pdfs/PDFFile5b45a758141363.54136012.pdf>
- [8]. The Law and Practice of the Prohibition of Benami Property Transaction Act, 1988.