

The Benami Transactions (Prohibition) Act 1988

February 9, 2013

1. Short title, extent and commencement. –

- (1) This Act may be called the **Benami Transactions (Prohibition) Act, 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.

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.

COMMENTS

(I) The definition of "benami transaction" in clause (a) of section 2 is not restricted in its application to section 3 alone but also applies to Section 4 and 5 of Benami Transaction (Prohibition) Act, 1988. Parliament has conveyed its intention that the word benami transaction is not confined to one section alone and also that the definition would contain only one category tripartite of benami transaction. The parliament has chosen to confine the definition to one category only. The idea was to make the intention abundantly clear that parliament did not want to encircle the second category i.e. bipartite or sham transaction; Bhargavy P. Sumanthykutty v. Janaki Sathyabhama, AIR 1995 Ker 42.

(ii) The **Benami Transactions (Prohibition) Act, 1988** is a piece of prohibitory legislation and it prohibits benami transactions subject to stated exception. A retrospective operation is not be given to a statute so as to impair existing rights or obligations. The presumption against retrospective operation is strong in cases in which the statute if operated retrospectively would prejudicially affect vested rights or the illegality of the past transactions, or impair contracts, or impose new duty, or attach new disability in respect of past transactions or consideration already passed and as defined in section 2(a) a transaction must be benami irrespective of its date of duration, i.e. the Benami Transactions (Prohibition) Act, 1988 is retrospective of its date or duration, i.e. the Benami Transactions (Prohibition) Act, 1988 is retrospective in operation; Mithilesh Kumari v. Prem Behari Khare, AIR 1989 SC 1247.



(iii) The principal governing the question whether a transfer is benami transaction or not may be summed up: (1) the burden of showing that a transfer is benami transaction lies on the person who asserts that it is such a transaction; (2) if it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary; (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money, and (4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motive governing their action in bringing about the transaction and their subsequent conduct etc; *Raj ballav Das v. Haripada Das*, AIR 1985 Cal 2.

(iv) The onus to prove that the transaction was benami is on the person who sets it. Mer suspicion is no evidence to hold any transaction to be benami one, but should be proved by direct evidence; *Drigpal Singh v. Wife of Laldhari Ojha*, AIR 1985 Pat110; see also *Ram Narayan Dubey v. State of Bihar*, AIR 1989 NOC 65 (Pat); *Rahul Amin v. Chabbahan Bibi*, air 1986 Cal 366; *Urmila Dasi v. Probodhy Ch. Ghosh*, AIR Cal 383.

(v) Property as per the definition in Benami Transaction (Prohibition) Act, 1988 would include any right or interest in such property and hence the right to purchase under the hire purchase agreement entered into by the second defendant with the third defendant or its predecessor in interest shall certainly come within the ambit of property; *B. Rajagopal Reddy v. Padmini Chandrasekaran*, AIR 1990m Mad 353.

(vi) Before the promulgation of the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance and even before the Benami Transactions (Prohibition) Act was passed, two kinds of transaction were recognized by the courts in India. The first kind of benami transaction was called the real benami transaction in which when 'A' sells a property to 'B' but the sale deed mentions 'C' as the purchaser. Here the real owner is 'B' and 'C' is only the benamidar. The second class or kind of transaction is the sham transaction in which one person purports to transfer his property to another without intending to pass the title to the transferee. This second type of transaction was 'loosely' called benami transaction. In the first type of transaction since there are three persons involved, it is also referred as tripartite benami transaction. The fundamental difference between the two categories of transactions is that in the former there is an operative transfer resulting in the vesting of title in the transferee, whereas in the latter there is no operative transfer and the transferor continues to retain title of the property notwithstanding execution of the documents; *Bhargavy P. Sumathykutty v. Janaki Sathyabhama*, AIR 1995 Ker 42.

3. Prohibition of benami transactions-

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

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

(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 (2of 1974), an offence under this section shall be non-cognizable and bailable.

COMMENTS

(I) Sub-section (2) of section 3 of the Benami Transactions (Prohibition) Act, 1988 contemplates that when a property is purchased by a person in the name of his wife, there is a reputable presumption that the property had been purchased for the benefit of the wife. The first respondent has not let in any satisfactory evidence to rebut the presumption that the petition mentioned property was purchased for the benefit of the petitioner. Therefore it has been held that the transaction is not a benami transaction and that the first respondent is not the real owner of the petition mentioned property; *Rajam Ammal v. P.K. Pillai*, AIR 1991 Mad 310.

(ii) Sub-section (2) of section 3 of the Benami Transactions (Prohibition) Act, 1988 will not save acquisition of property in the name of wife of a coparcener by the by the joint family as it is a benami transaction; *Rameshwar Mistry v. Babulal Mistry*, AIR 1991 Pat 53.

(iii) Sections 3 and 4 of the Benami Transactions (Prohibition) Act, 1988 have to be read together and understood together. They are not disjunctive provisions in a comprehensive legislation intended to prohibit benami transactions. Both section 3 and 4 are complementary to each other to achieve the same object i.e. prohibition of benami transactions, *Ouseph Chacko v. Raman Nair*, AIR 1989 Ker 317.

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 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 by or on behalf of a person claiming to be the real owner of such property.

(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.

COMMENTS

(i) Sub-section (1) of section 4 has no application to the claim made in the suit as this is not a suit filed by or on behalf of defendant No.1 against defendant No.2 or the legal representatives of defendant No..2, instead it is a suit filed by a third party for specific performance of the suit contract against the real owner as well as benamidar, *Murlidhar Bapuji Valve v. Yallappa Lalu Chaugule*, AIR 1994 Bom 358.

(ii) The defence raised by the contesting respondents that the transaction of the sale under the sale deed dated 9th October, 1957 executed in favour of the appellants was a benami transaction is prohibited in view of section 4(2) of the Benami Transactions (Prohibition) Act, 1988; *Duvuru Mohand Reddy v. Alluru Nagi Reddy*, AIR 1994 SC 1647.

(iii) The defence taken by the defendant that the plot in fact was purchased by him in the name of his brother i.e. the plot was purchased benami, cannot be allowed by virtue of section 4 (2) of the Benami Transactions (Prohibition) Act, 1988; *Om Prakash Rawal v. Justice Amrit Lal Bahri*, AIR 1994 HP 27.



(iv) Under section 88 of Indian Trusts Act, an agent or other person bound is in a fiduciary character to protect the interest of the principal and the former would hold the property for the benefit of the principal or the person in whose behalf he acted as an agent. Held that a real purchaser is the respondent, the petitioner as an agent and power of attorney had purchased the property but ostensibly had his name entered in the sale certificate fraudulently and without consent of the principal and the question of benami does not arise though section 4 prohibits such a plea; *P. V. Sankara Karup v. Leelavathy Nambiar*, AIR 1994 SC 2694.

(v) A coparcenery is purely a creature of law and it cannot be created by act of parties whereas a composite family is the result of an agreement express or implied. There are incidents to the constitution of a composite family, but all incidents are consequences of the agreement between the parties. Held that exception is section 4(3) could not be attracted in the present case of an alleged composite family; *B. Rajagopal Reddy v. Padmini Chandrasekharan*, AIR 1990 Mad 353.

(vi) On coming into force of the Benami Transactions (Prohibition) Act, defence raised for the proof of the fact that the property held by a person is in the capacity of a benamidar is expressly prohibited. Neither the court is permitted in law to consider such defence nor to record its findings. Held that the Income-tax Deptt. would be prohibited from raising a defence that the suit property held by the wife is benami and the real owner is her husband; *Smt. Khateeja Bai v. Union of India*, AIR 1994 NOC 136 MP.

(vii) The plaintiff cannot lay any claim in view of section 4 to the house on the ground that they stand in the name of step mother benami for her deceased father, *Baghyavathi v. Lakshmikathammal*, AIR 1993 Mad 346.

(viii) The burden of showing that a transfer is a benami transaction lies on the person who asserts that is such a transaction. The governing principal for determining the question whether a transaction is benami or not is to be proved by showing that the purchase money came from a person other than the person in whose favour the property is transferred. The intention of the person who contributed towards the money has to be inferred from the circumstances and the relationship of the parties and the motive governing their action in bringing about the transaction and their subsequent conduct; *Mahinder Singh v. Pardaman Singh*, AIR 1992 Del 357.

(ix) In view of section 4, there is a total prohibition against any suit based on benami transaction and the plaintiff-respondent is not entitled to get any decree in such suit or in appeal, an appeal being a continuation of suit and in the present case the appeal was pending before this court. In a suit for recovery of benami property if any appeal is pending on the date of coming into force of section 4 the appellant court can take into account the subsequent legislative changes; *Om Prakash v. Jai Prakash*, AIR 1992 SC 885.

(x) Section 4 of the Benami Transaction (Prohibition) Act, must be taken to relate to section 2 of the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988. It is clear that in spite of the recommendation of the Law Commission of India to bar institution of suits only, the Ordinance making authority has thought fit to bar other proceedings also and has also provided in express words barring of all claims and actions to enforce the right of a person alleging to be the real owner against the benamidar. The Legislature by using the expression 'shall lie' made departure from the usual expression 'shall be instituted' clearly demonstrate its resolve to regulate all such suits, claims or actions also which would be lying in the court on the date of its commencement; *Urmila Bala Dasi v. Probodh Chandra Ghosh*, AIR Cal 283.

(xi) The expression any property held benami is not limited to any particular time, date or duration i.e. the Benami Transactions (Prohibition) Act, 1988 is retrospective in operation. Once the property is found to have been held benami no suit, claim or action to enforce any right in respect thereof shall lie. Sub-section (2) of section 4 similarly nullifies the defences based on



any right in respect of any property held benami. Section 4 in its sweep envisages past benami transaction also within its retroactivity. In this sense the Act is both a penal and a disqualifying statute. Held that as the appeal was pending in Supreme Court on commencement of the Benami Transactions (Prohibition) Act, 1988, the matter becomes sub-judice and thereafter the 'Supreme Court' had seisin of the whole case and the decree passed by the lower courts annihilated and the suit dismissed; *Mithilesh Kumari v. Prem Behari Khare*, AIR 1989 SC 1247.

(xii) The benamidar before the enactment of Benami Transactions (Prohibition) Act, 1988 could not have any right, title and interest in the property which the benamidar could convey. By the principle of fictional relation back as propounded by the Supreme Court in *Mithilesh Kumari*, the benamidar should be deemed to have title to the property on the date he executed the deed or release. Held that Surendra Kumar was the benamidar and in point of act on the date of execution of the deed of release he had no right or interest in the property; *Ratanlal Bansilal v. Kishorilal Goenka*, AIR 1993 Cal 144.

(xiii) It has been held that the suit is not hit by sections 2 and 4 of the Benami Transactions (Prohibition) Act, 1988 as the plaintiff has not alleged that the defendant No 1 i.e. one of the partners was or is a benamidar or that the money was paid by the plaintiff or that the property was purchased in the name of the defendant No.1 as benamidar apart from that the under section 14 and 15 of the Partnership Act, a partnership can acquire assets in the name of partners and these sections have not been deleted by the Benami Transactions (Prohibition) Act, 1988; *Md. Hasan Hashmi v. Smt. Kaberi Roy*, AIR 1993 Cal 70.

(xiv) Section 4 takes into its ambit the right of a real owner vis-à-vis ostensible owner. The prohibition under section 4(1) and (2) does not prohibit the right of a third party to get a declaration. The third party has the right to raise the contention that someone was the real transferee and the sale deed was only executed in the name of the transferee who was a benamidar, *Gopal Bariha v. Satyanarayan Das*, AIR 1991 Ori 131.

(xv) Section 2 of the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 relates to section 4 of the Benami Transaction (Prohibition) Act, 1988 and according to section 2 of the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988, action means a civil proceeding commenced by "writ" or in such other manner, as may be prescribed by rules of court but does not include a criminal proceeding, therefore the term "action" is wide enough to take in an appeal or a second appeal; *Velayudhan Ramkrishan v. Rajeev*, AIR 1989 Ker 12.

(xvi) 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 and as a sham transaction or bipartite transaction is not a benami. Section 4 does not apply to such a transaction; *Ouseph Chacko v. Raman Nair*, AIR 1989 Ker 317.

(xvii) Section 4 and 7 of the Benami Transactions (Prohibition) Act, 1988 relate to sections 2 and 4 of the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988. Both section 7 of the Benami Act and section 4 of the Benami Ordinance repeal section 82 of the Trusts Act keeping section 81 of the Trusts Act intact. Keeping in view section 81 of Trusts Act nominal transactions are not intended to be covered and are not hit by section 4; *B. Rayudu*, AIR 1989 AP 290.

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 be payable for the acquisition of any property under sub-section(1)

COMMENTS

Section 5 of the Benami Transactions (Prohibition) Act, 1988 applies only to tripartite or benami transactions and not to bipartite or sham transactions, for if it had been so, the property covered by bipartite transactions would also be liable to be acquired without compensation or payment of any amount and the Legislature too has not declared it as opposed to public policy and prohibit the same prospectively; Bhargavy P. Sumaathykutty v. Janaki Sathyabhama, AIR 1995 Ker 42.

6. Act not to apply in certain cases.-

Nothing in this Act shall affect the provisions of Section 53 of the Transfer of Property Act, 1882 (4 of 1882), or any law relating to transfer for an illegal purpose.

COMMENTS

The object of the Benami Transaction (Prohibition) Act, 1988 is vest ownership rights in benamidar as against the real owner. It is not the intention of the Benami Act to protect such person from the creditors who allege diversion of funds by such persons in a fraudulent manner in order to escape their liability to the creditor. Therefore when it is alleged that the diversion of funds (movable property) by defendant No. 1 in favour of the other defendant was fraudulent and illegal section 6 of the Act Protects such a claim from the applicability of section 4; M/s PNB Finance Ltd. v. Shital Prasad Jain, AIR 1991 Del 13.

7. Repeal of provisions of certain Acts.-

(1) Sections 81, 82 and 94 of the Indian Trusts Act, 1882 (2 of 1882), section 66 of the Code of Civil Procedure, 1908 (5 of 1908), and section 281 A of the Income-tax Act, 1961 (43 of 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 (43 of 1961), in the State of Jammu and Kashmir.

8. Power to make rules.-

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the authority competent to acquire properties under section 5;

(b) the manner in which, and the procedure to be followed for, the acquisition of properties under section 5;

(c) any other matter which is required to be, or may be, prescribed

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be



comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

9. Repeal and saving. –

(1) The Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 (Ordinance 2 of 1988), is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

