

CRITICAL ANALYSIS OF BENAMI TRANSACTION PROHIBITION ACT

Written by *Surabhi Vats*

4th Year BA LLB Student, Jindal Global Law School

INTRODUCTION

The word Benami means anonymous or nameless. Benami transaction means that the person who pays for the property is not the person who owns or holds the property¹. The person in whose name the property is transacted is called as the Benamidar. The benamidar just lends his name for the title deed, the person who funds the consideration for the property and holds interest in the property is called the real owner. The Benami Transactions (Prohibition) Act was enacted in the year 1988 to prohibit all benami transactions. However this Act was not comprehensive enough and failed to make an impact therefore the legislature amended the primary act in 2016. The Benami Transactions (Prohibition) Amendment Act, 2016 (“Act”) exempts some cases from the scope of Benami transactions. This paper critically analyses various provisions of the amended act and its impact on the society.

CRITICAL ANALYSIS- BENAMI AMENDMENT ACT 2016

The Amended Act in Section 53(2) stipulates that whosoever is found guilty of the offence of benami transaction will be imprisoned for seven years, which makes it a serious offence. However, the offence has not been made cognizable. The intention of the law is not made clear

¹ Bharuka, G. (2006). The transfer of property by act of parties . In *Mulla- Transfer of property act* (pp. 293. S41). Lexis Nexis.

with such a provision. As, on one hand the offence has been made strict by rigorous imprisonment of seven years, and on the other it has been made a non-cognizable offence.

One of the major critique of the Act is that it provides undue powers to the initiating officers. However, this is not true. Section 18(1) of the Act mentions various stages of authorities which are, the Initiating Officer; the Approving Authority; the Administrator; and the Adjudicating Authority. This shows that all the powers do not vest with the initiating officer only. The accused can appeal to the adjudicating authority against the confiscation of their property. Also, Section 22(2) states that initiating officer will have to take the approval of the approving authority within a period of 15 days from initial impounding and will also have to take the approval for extending the period of initial retention. Section 24(1) stipulates that if the Initiating officer has reasons to believe that a particular property is benami then, he will have to issue a notice to the person to show cause why the property should not be treated as a benami property. Thus, the Act has made provisions to check the powers of the initiating officer, it does not concentrate powers in just one hand. And it also gives time and opportunity to the accused to appeal and prove that the property is not benami in nature.

Section 58(1) of the Act exempts property relating to charitable or religious trusts from the operation of the act. Giving such a wide exemption can be dangerous, as such properties might be used on the pretext of tax invasion. Members of such charitable or religious trusts can indulge in benami transactions, dodge the authorities and escape confiscation. The Act also exempts property brought in fiduciary capacity from the purview of benami transactions. This exemption is inappropriate as directors of companies can take undue advantage of the same. In India most of the companies are run by families, brothers; sisters and wives are made partners and directors. In such a scenario the directors of the companies often buy property in name of the company. In such cases, the individuals involved in benami transactions can also easily escape confiscation. The purchase of property by any person in the name of his wife or unmarried daughter have been saved and there is a presumption that the property has been purchased for the benefit of the wife or the un-married daughter. However, such a presumption is invalid as the real owner can buy the property in the name of wife or daughter without having an intention to benefit them. Therefore, the exemptions given are unnecessary.

After passing of the Benami transaction Amendment Act 2016, the scope of Section 41 of Transfer of Property Act, 1882 has become very limited. The object of Section 41 of Transfer of Property Act is to protect the interest of the innocent third parties who with reasonable care and in good faith enter into a transaction with the ostensible owner, where the real owner through explicit declaration or implicit through his conduct authorizes the ostensible owner to transfer the property². After the passing of Benami transaction Act, the real owner has become ostensible owner except in some cases. The transferee who buys the property from the ostensible owner cannot take advantage of Section 41 except when the ostensible owner is the wife or unmarried daughter or someone in fiduciary relation with the real owner. As these are considered to be exceptions to benami transactions. In various case laws it has been observed that the motive behind the benami transaction must be proved³. However, this will be to the disadvantage of the transferee or the person alleging the transaction to be benami. As they will not only have to prove that their rights are being violated but will also have to prove the motive behind such a transaction, which is a difficult task to do. Thus it would be difficult for such individuals to get justice.

Darashaw Vakil's commentary on Transfer of Property Act states that the payment of consideration is the primary test for determining whether the transaction is benami or not⁴. If the ostensible owner is able to show that they had sufficient means for purchasing the property then it would not be considered as a benami property⁵. This presumption seems to be flawed, as there would be situations wherein the individual might have the capacity to buy a particular property but that does not necessarily mean that they would invest in that property. For instance, if an individual has the capacity to buy Audi Q7 that does not mean that he or she would invest their "capacity" to buy the same. Thus, there can be a possibility of benami transaction happening even if the ostensible owner is capable of buying the property.

² Id. at. 293.

³Vakil, D. J. (2009). Transfer by ostensible owner . In D. J. Vakil, Darashaw J Vakil's commentaries on the transfer of property act (pp. 420. S-41). Lexis Nexis.

⁴ Id.

⁵ Id.

The Benami transaction Act will significantly impact the real estate industry. It might deter real estate developers from acquiring land parcels in benami names. Rich investors, who wish to park unaccounted wealth, usually undertake benami transactions in real estate, to dodge tax authorities and to earn a decent return on investments. With a strong law the incidence of benami property ownership is likely to decline with more realistic and rationalized real estate prices. With no more inflated prices of real estate properties, the dreams of a common man to buy a house could be achieved with ease.

Banks and non-banking financial companies take a long time in scrutinizing before approving a loan. This could be because of the rise in cases of bank debts and faults. However, after the Amendment Act, the banks will lend with more confidence as they would be more assured of the property's legality. Individuals will be deterred from indulging in benami frauds because of harsh punishment clause of the act.

CONCLUSION

There are certain provisions of the Act which are a bit problematic as discussed above. Whereas there are various provisions which make sure that the powers of the authorities are not limited in the hands of the few. Certain exemptions are given in the act which are unnecessary for instance exempting religious or charitable institutions, property bought in fiduciary relationship and bought in the name of wife or daughter.

The Act limits the scope of Section 41 of Transfer of Property Act. It can be to the disadvantage of the transferee or the individual who buys benami property, for reasons discussed above.

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.