



**INSIGHTS INTO THE PROHIBITION OF  
BENAMI PROPERTY TRANSACTIONS ACT,  
1988 (AS AMENDED)**

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ICAI

# CRUX OF THE BENAMI ACT



## Chapter II – Prohibition of Benami Transactions

Section 3 - Prohibition of benami transactions

Section 4 - Prohibition of the right to recover property held benami

Section 5 - Property held benami liable to confiscation

Section 6 - Prohibition on re-transfer of property by benamidar



## Chapter VII – Offences & Prosecution

Section 53 - Penalty for benami transaction

Section 54 - Penalty for false information

## WHAT IS BENAMI...

- Purchase or holding of properties in the name of another is known as a benami transaction, in India.
- The other person is called the Benamidar
- Literally, benami means 'without a name' [Persian – *बेनाम*]
- Essentially legal characteristic of these transactions is that there is no intention to benefit the person in whose name the transaction is made
- The benamidar has an ostensible title to the property standing in his name, but the beneficial ownership to the property does not vest in him, but in the real owner.





# WHY IT HAPPENED - CAUSES

Fraud on Creditors

Hindu Undivided Family system

Religious beliefs or Superstitions

Tax Evasion

Avoiding Certain Political and Social Risks

Tackling 'Socialistic' Principles of Land Redistribution

## IT WAS THERE BEFORE...

*“Even now, benami transactions are not debarred by law. A very drastic remedy is needed. That is the point that I am making. Merely saying that he will suffer in a certain way and that it will be discouraging the benami transactions is not enough. All benami transactions should be debarred under the law. And I want to know why it has not been done.*

*Why do you want to encourage benami transactions indirectly by a supposed penalty or harm or by saying that the party may suffer because he has done that? Why not debar it completely?”*

Shri T N Singh, in the Rajya Sabha, on Taxation Laws Amendment Bill, 1971 ...

Parliament  
debating  
whether to  
abolish the  
Benami  
traditions, in  
1971

# WELL-ENTRENCHED OLD AND DEEP JUDICIAL ROOTS...

*“The practice has long been common in this country for intending alienees of this land to take document of transfer in the name of their friends or relatives, sometimes in view to defeat the claim of creditors, sometimes in view of defeating other members of their family and sometimes to escape restrictions imposed upon them by Government’s Conduct Rules etc.”*

**-Panjab Province v. Daulat Singh, A.I.R. 1942 F.C. 38 (Federal Court)**

A person purchased property in the name of his wife, and the same was held to be fictitious and therefore invalid.

- Sheikh Bahadur Ali v. Sheikh Dhomu, 1 Calcutta Sud. R. Diw. Rep. 250, 251, in Tyabji, Muslim Law (1968)<sub>6</sub>

## WELL-ENTRENCHED OLD & DEEP JUDICIAL ROOTS...

Pitchayya vs. Rattamma,  
A.I.R. 1929 Mad. 268,  
269 [Devadoss and  
Walsh JJ.]

“When a person acquires an interest in property with his funds in the name of another for his own benefit, the latter is called a benamidar. A benamidar is not a trustee in the strict sense of the term. He has the ostensible title to the property standing in his name, but the property does not vest in him but is vested in the real owner. He is only a name lender or an *alias* for the real owner. The cardinal distinction between a trustee as known to English law and a benamidar lies in the fact that a trustee is the legal owner of the property standing in his name and the *cestui que* trust is only a beneficial owner, whereas, in the case of a benami transaction, the *real owner has got the legal title though the property is in the name of the benamidar*.....If a mortgage stands in the name of a benamidar, the person for whom the mortgage was obtained could sue on the mortgage, and the same rule applies to other transactions except those forbidden by law. The benamidar has some of the liabilities of a trustee but not all his rights. When the benamidar is in possession of the property standing in his name, he is in a sense the trustee for the real owner.”



# GETTING LAW COMMISSION INTO THE 'ACT'...

**“The problem of property held *benami* has been causing concern to the taxing authorities for some time. The Select Committee on the Taxation Laws (Amendment) Bill, 1969 had also suggested that Government should examine the existing law relating to benami transactions with a view to determining whether such transactions should be prohibited. This suggestion was re-iterated in Parliament during the debate on the Taxation Laws (Amendment) Bill, 1971.”**

TERMS OF REFERENCE SENT TO THE LAW COMMISSION BY THE UNION  
GOVERNMENT, 1971



# POSITION OF BENAMI TRANSACTIONS IN LAW THEN (1971)...

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Section 5 of the Transfer of Property Act, 1882 did not prohibit 'transfer in favor of one person may not be in the name of another person'

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So long as a benami transaction did not contravene the provisions of the law, the Courts were bound to give it effect.

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Benamidar was a mere trustee for the beneficial owner

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One who paid the consideration was the beneficial owner

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Benami transactions intended for fraudulent purposes were hit by criminal & civil liabilities including under the Penal Code and Transfer of Property Act *ibid*

# POSITION OF BENAMI TRANSACTIONS IN LAW THEN (1971)...

- Section 82 of the Indian Trusts Act, 1881 dealt with benami transfers specifically
- It said that the transferee must hold the property for the benefit of the person paying or providing the consideration

## CHAPTER IX

### OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS

**80. Where obligation in nature of trust is created.**—An obligation in the nature of a trust is created in the following cases.

**81.** [*Where it does not appear that transferor intended to dispose of beneficial interest.*] Rep. by the *Benami Transactions (Prohibition) Act, 1988 (45 of 1988), s. 7 (w.e.f. 19-5-1988).*

**82.** [*Transfer to one for consideration paid by another.*] Rep. by s. 7, *ibid.* (w.e.f. 19-5-1988).



## POSITION OF BENAMI TRANSACTIONS IN LAW THEN (1971)...

Section 66 of the Civil Procedure Code, 1908 stipulated that no suit shall be maintained against any person claiming title under a purchase certified by the Court, (in such a 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 – restricted to Sale certificates issued by Courts

# POSITION OF BENAMI TRANSACTIONS IN LAW THEN (1971)...

- Section 281-A of the Income-tax Act, 1961 stipulated that no suit shall be instituted in any court to enforce any right in respect of any property held benami unless the claimant has either disclosed the property in question or the income therefrom in connection with his wealth tax or income-tax assessments or given notice to the Income-tax Officer about the particulars of such property in the prescribed form no. 53.
- It was not intended to prohibit 'benami', but to avoid its being made the basis of a suit unless compliance with the prescribed requirements is made, to ensure that the taxing authorities concerned with income-tax and wealth tax acquired knowledge of the transaction alleged to be benami.

Where the real owner is not the husband or father, the provision recently inserted in the Income Tax Act<sup>4</sup> has the effect of securing that the benami transaction is disclosed to the Income Tax authorities. There does not, therefore, appear to be any serious gap so as to require further radical measures for checking evasion of direct taxes resulting from benami transactions.



# CONSULTATIVE OPTIONS BEFORE THE LAW COMMISSION...

## Outlaw Benami

- Outdated
- No legitimate motive



## No support in civil suits

- Exception to HUF, Trust
- Benami will cease to be part of Indian law



## No presumption as to Trust

- Will cause upheaval
- Existing law sufficient



# LAW COMMISSION 57<sup>TH</sup> REPORT RECOMMENDATIONS (1973)...

There was a case for refusing legal recognition to benami transactions

Objective of checking tax evasion greatly achieved – section 281-A *supra*

Law permitting benami transactions resulted in lot of litigation

No legal backing to benami transactions recommended, prospectively

Section 82 of the Indian Trusts Act, 1881, Section 66 of the Civil Procedure Code, 1908 and Section 281-A of the Income-tax Act, 1961 to be repealed

**If benami needed to be banned, a separate law was needed**  
***Mens rea* to be included in the new law (malafide intent)**

On the 19th May, 1988, the President had promulgated the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988. The Ordinance was promulgated to give effect to the recommendations of the Law Commission contained in its 57th Report. It is true that the Government had taken some time for the acceptance and the implementation of the recommendations of the Law Commission. But at the same time, Government had not been keeping quiet. In fact as early as 1978, steps were taken to introduce a Bill to give effect to the recommendations of the Law Commission. But as there was stern opposition to such a measure, the proposal was not brought out. As it was necessary to prohibit the recovery of property transferred benami with immediate effect, the promulgation of the Ordinance became necessary.

The Ordinance barred the right of the true owner to file a suit in respect of any property held benami and also provided that no defence based on such a right would be allowed in any suit, claim or action. Exceptions were provided only to properties held by a coparcener in a Hindu undivided family and by a trustee on behalf of a beneficiary.

The Law Commission, while justifying the provisions of the Ordinance, had recommended that it is necessary to make the entering into benami transactions as an offence to give teeth to the provisions of the Ordinance. It also felt that as most of the benami transactions are entered into for the purpose of defeating tax laws, ceiling laws, etc., both the parties to the transaction are equally guilty and as such, the Ordinance should not make one of the parties to obtain an undue advantage, that is to say, to retain the property. It has, therefore, suggested that in addition to making the entering into benami transactions an offence, it should also provide for the acquisition of the properties from the benamidar.

# EVOLUTION OF THE LAW – PART I – 1988 VERSION





# SHORTCOMINGS IN THE 1988 VERSION...

Powers of a civil court have to be conferred on the authorities under the Act.

Specific provisions have to be introduced for vesting of acquired property with the Central Government.

An appropriate appellate structure has to be defined, while barring jurisdiction of a civil court against an action taken by the authorities under the Act.

Matters of procedure relating to its administration, notice of hearing to parties concerned, service of notice and orders,<sup>16</sup> powers of the competent authority relating to gathering of evidence etc. have to be provided.



# EVOLUTION OF THE LAW – PART II – 2016 VERSION

A new bill was brought in 2011 rectifying the drawbacks *supra*.



In the Repeals and Savings clause, a specific sub-clause had been included, so as to ensure that any benami transaction which had been undertaken by any person between the year 1988 and the date the proposed Bill coming into force, was also covered under the new legislation.



The Ministry of Law was of the opinion that aforesaid provision was unconstitutional in view of Article 20 of the Constitution, and therefore, could not be included in the repeals and savings. Therefore no action would be possible on any such transaction which occurred between 1988 and the date of repeal of the 1988 Act.



It was therefore suggested by the Ministry of Law, that it would be advisable to comprehensively **amend** the existing Benami Transactions (Prohibition) Act, 1988, so that the offences committed during the last 26 years were also covered.



# EVOLUTION OF THE LAW – PART II – 2016 VERSION

- 72 Sections
- Confiscation vs Acquisition
- Rules were notified
- Introduced in Lok Sabha on May 13, 2015
- Referred to the Parliamentary Standing Committee for consideration and recommendations April 28, 2016
- Passed in Lok Sabha (July 27), Rajya Sabha (August 2)
- Received Hon'ble President of India's assent on August 10, 2016

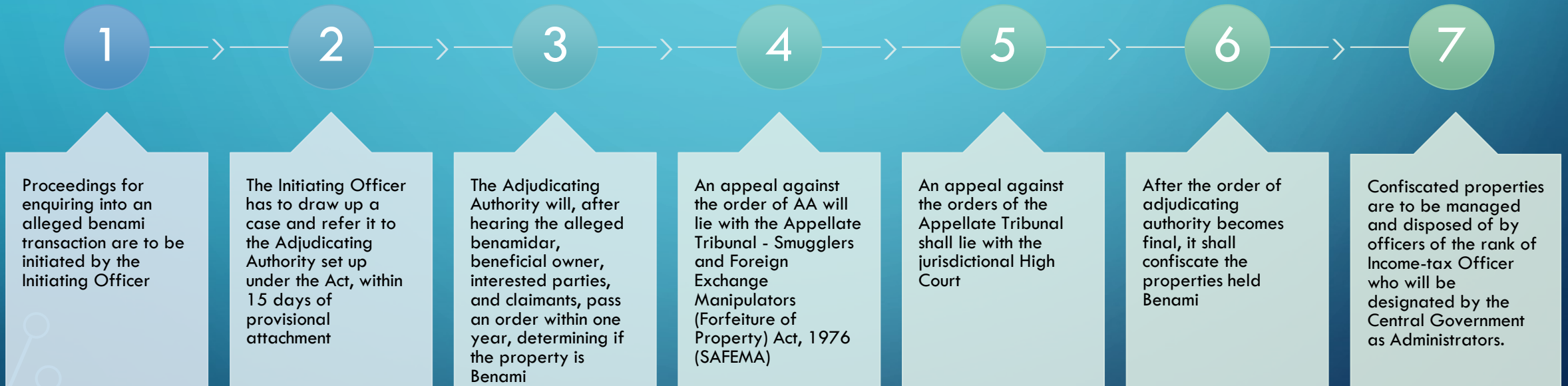
# THE 2016 VERSION CAN ONLY HAVE PROSPECTIVE EFFECT...

UOI vs. Ganpati Dealcom Pvt Ltd [CA 5783 of 2022]

benami; provisions of the 1988 Act, were never operationalized since the rules and procedure required to be framed under Section 8 of the said Act bringing into existence the machinery for implementation of the 1988 Act, were never notified – therefore, although the 1988 Act was part of the statute book, the same was rendered a “dead letter”, and all transactions and properties alleged ‘benami’, carried out / acquired between the period of 19.05.1988 and 01.11.2016, were deemed to have been accepted by the Government as valid ‘vesting rights’ in the parties to such alleged transactions; *ergo*, the Central Government, having waived its right of implementation and operationalisation of the 1988 Act for the period prior to 01.11.2016, cannot now do so indirectly by way of retrospective operation of the 2016 Amendment Act.

- Company purchased property in May 2011
- In November 2017, the AA provisionally attached this property under Benami law
- Hon’ble Calcutta High Court held the Benami Act of 2016 did not have retrospective application as it was a new and substantive legislation with widened definition of benami property and benami transaction
- For retro action i.e. applicability to transactions before November 1, 2016, a provision to that effect must have been specifically provided in the Act – not there

# EVOLUTION OF THE LAW – PART II – 2016 VERSION - PROCEDURAL PART





THANK YOU FOR YOUR PATIENT HEARING...

YOURS TRULY

CA IP KARTHIK NATARAJAN

-SIGNING OFF