



INDIAN JOURNAL OF  
LEGAL REVIEW

VOLUME 5 AND ISSUE 9 OF 2025

INSTITUTE OF LEGAL EDUCATION



## INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN – 2583-2344

(Open Access Journal)

Journal's Home Page – <https://ijlr.iledu.in/>

Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>

Volume 5 and Issue 9 of 2025 (Access Full Issue on – <https://ijlr.iledu.in/volume-5-and-issue-10-of-2025/>)

### Publisher

Prasanna S,

Chairman of Institute of Legal Education

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

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## STUDY OF BENAMI TRANSACTION IN ACCORDANCE WITH INDIAN CONSTITUTION

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**BEST CITATION** – SONA.V.R, STUDY OF BENAMI TRANSACTION IN ACCORDANCE WITH INDIAN CONSTITUTION, *INDIAN JOURNAL OF LEGAL REVIEW (IJLR)*, 5 (10) OF 2025, PG. 347-352, APIS – 3920 – 0001 & ISSN – 2583-2344.

### ABSTRACT

Benami is that when a one person transfers a property and where other person will pay the money who doesn't have any connection with the property. In simple terms one person will held the property and money comes from the other person Firstly the term "Benami" is a urdu term which mean that "without name". The main purpose of the benami transaction is to often hide the real owner of the property which actually leads to money laundering, tax evasion, fraudulent transfers etc. To rectify and to keep in path government passed Benami Transaction (Prohibition) Act, 1988. In this paper will be mentioned about how this prohibition act is effective and also Section 3(2) of Benami Transaction Act. In this following paper will be witnessing the unconstitutionality of section 3(2) of Benami Transaction and Prohibition Act in the case of Union of India v. Ganapati Dealcom Private Limited, the objectives of 57<sup>th</sup> law commission 1973, Prohibition of right to recover property under the purview of section 4 of benami transaction and prohibition act, will be discussing about 2016 amendment in benami transaction, burden of proof which plays the crucial part in the legislation and last but not the least the suggestion part where will be denoting on how to aid the benami transaction and particular deeds supporting the property. If any illegality occurs how the remedies of such act paves the way to the immediate seizure and confiscation should be enforced and how to strengthen the international cooperation.

**KEYWORDS** – Benami, Money laundering, Fraudulent Transfer, Prohibition, Prohibition.

### INTRODUCTION

Benami Transaction involves a transfer which includes immovable property where here the actual beneficial owner is not the one whose title is not original in the official documents. Here the transaction is to conceal the true owner's identity where someone else's name is used to hide the real beneficiary's ownership. Here the key aspects to be noted is that there is a hidden ownership where the true owner is not the one who legally register as the owner. Benami transaction are often used for tax evasion, money laundering, or to hide assets from creditors or government. The legality denotes here is that The Benami Transactions (Prohibition) Act, 1988 and its specialized

amendments aims to penalize and prevent these transactions through this legislation. The penalties here is that any individuals who involved in benami transaction can face with imprisonment and fine which includes a fair market value from the property of the owner. The properties held benami are subjected to confiscation by the government.

### UNCONSTITUTIONALITY OF BENAMI TRANSACTION

Under Section 3(2) of Benami Transaction and Prohibition Act 1988 states that it originally penalizes the individuals who enter in to benami transactions where they will be awarded with imprisonment or fines. In 2022 Supreme court judgement in the case of Union of India v.

Ganpati Dealcom Private Limited, where it declared that Section 3(2) and 5 of Benami Transactions Act are unconstitutional and it is manifestly arbitrary. Further it was held that Section 3(2) of Benami Transactions (Prohibition) Amendment Act 2016 violates Article 20(1) of Indian Constitution and Section 5 of the Benami Transaction Act it was held that in rem forfeiture provision under the Act was punitive and could only be applied prospectively.<sup>356</sup>

The legal implication of the Benami Transaction is that this particular transaction is an agreement where the property which is transferred or held by the person but the consideration for the transfer is made by the another person who then holds the property for the present or future benefit of the person who paid the consideration. Furthermore the transaction deemed to be benami when the person shown as owner either not aware about the ownership or denies the same. Section 5 of the Benami Transactions Act actually lacked sufficient safeguard mechanism where in any individual could defend his own title in these basic criteria these lack so where it stated that Section 3(2) and Section 5 of the Act actually unconstitutional in nature.

The 2016 Amendment brought in the aspect of retrospective application which states under Section 3(2) that three years imprisonment accrue for all transactions thus in the case of Ganpati, that the particular section is violative as per Article 20 (1) of Indian constitution which is nothing but which protects individuals from committing any offence which is violation of law in force at the time of the commission of the offence. In the case where the respondent holds out a Andhra Nationalized bank and Andhra Bank Financial Services Limited was overlooked by the other respondent where here the petitioner runs a subsidiary bank namely Canara Bank, here they dropped a Mutual fund investment scheme for the public and other companies to involve in this scheme in that way

the respondents approached the petitioner bank. After few years some irregularities took place in the transaction where Reserve Bank of India set up a committee known as 'Jankiraman Committee' to look in to the transactions and submit the report based on that transaction. Where that committee discovered the serious irregular transaction activities emerging with the government as well as private securities here the respondents states that the petitioner is aware of the transaction and they issue certificates also for the irregular transaction. When comes to the application of Benami Transaction Act under which section 4 and 13 states that the respondent not able to make any claim or bring an action to enforce any right where the respondent can't be allowed to take any defence. Even assuming that the Benami Transaction as bar on transfer of the respondents properties. In a transfer involving benami transaction, three parties are involved. The benamidar may be a party therein. In this case, the parties to the transactions are public sector undertakings being scheduled banks and their subsidiaries. A presumption would, thus, arise that they would not encourage any benami transaction nor would involve themselves therein. In a situation of this nature and, in particular, having regard to the fact that a disclosure was made by the Respondent Nos. 3 and 4 in their applications for allotment of CANGIGO; that the same were filed on behalf of the Respondent No. 2 herein, the intention of the parties was not to enter into a benami transaction. The Benami Transaction Act is not a piece of declaratory or curative legislation. It creates substantive rights in favour of benamidars and destroys substantive rights of real owners who are parties to such transactions and for whom new liabilities are created by the Act. A statute which takes away the rights of a party must be strictly construed.<sup>357</sup>

<sup>356</sup> [www.legal500.com/unconstitutionality](http://www.legal500.com/unconstitutionality)

<sup>357</sup> Canbank Financial Services Ltd v. The Custodian & Others, AIR 2004 SC 5123

The<sup>358</sup> proceedings initiated against a company which was registered as per the norms of Companies Act 1956, and where the petitioners filed a writ petition under the circumstance of the Prohibition of Benami Transactions Act, and here the respondents are benamidars who are not actual owners of the properties which is exclusively dealt under the section 24(3)<sup>359</sup> and 24(4)(a)(i)<sup>360</sup> of the Act. According to the petitioners the benami transactions were sought to be prohibited and where the Act were said to be amended in the year 2016.

### PROHIBITION OF RIGHT TO RECOVER PROPERTY

The prohibition of right to recover property held benami is exclusively dealt under Section 4 of the Act where here it states that this particular section has no application made to the claim where this is not a suit filed by the defendant rather it is filed by the third party for specific performance of the suit against the real owner. Coming in to the force of the Benami Transaction Prohibition Act, 1988 the defense raised the proof of the fact that any property held by a person is in the capacity of the benamidar which is expressly prohibited. Nothing in the section apply where the person whose name the property held as a coparcener in the undivided joint family and the property held for the benefit of the coparceners in the family and when the person whose name is held as a trustee or other person standing in a fiduciary capacity and the property held for the benefit of another person. In the operation of the Section 4 of the Act it is said that it doesn't violate or discriminate the Article 14 of the constitution a real owner who has already been

allowed defence on that ground prior to coming into operation of Section 4(2) cannot be said to have been given a better treatment as compared to the real owner who has still to take up such a defence and in the meantime he is hit by the prohibition of Section 4(2). Equally there cannot be any comparison between a real owner who has filed such suit earlier and one who does not file such suit till Section 4(1) comes into operation.<sup>361</sup>

This<sup>362</sup> batch of writ petitions assail their proceedings which is initiated by the respondents and said enactment for attachment and confiscation of properties which were acquired prior to the enforcement of the Benami Transaction Amendment Act, 2016 where these petitions were seen as per the light of the case Ganpati Dealcom Supreme court decision, the contentions namely state that coming to the 1988 act, section 3 and section 5 where they should be separately analysed firstly the absence of mensrea creates a harsh provision which is having strict liability where even 130<sup>th</sup> law commission report didn't expressly rule out the mensrea. Secondly ignoring the essential ingredient of beneficial ownership exercised by the real owner contributes to making the law even more stringent and disproportionate with respect to benami transaction the forfeiture in his money reacted that it had criminal sanctions in it which handed down the absence of the procedural guarantee and which particularly showed him the innocence but the court doesn't accept that view. Where here the order stated that some of the provisions can be maintainable but where some petitions should be quashed.

In the case of Channaraj Hattiholi<sup>363</sup>, the senior learned counsel of the petitioners states that the provisions of the Amendment Act 2016 has been held to have prospective effect by the Apex court, where section 3(2) of the unamended act of 1988 is declared as unconstitutional for being manifestly arbitrary

<sup>358</sup> Shri.Bhimappa Shivappa Mullur v. The Initiating officer, AIR 111414 W.P. 2019

<sup>359</sup> Where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally the property in the manner as may be prescribed, for a period not exceeding ninety days from the date of issue of notice under sub-section (1).

<sup>360</sup> The Initiating Officer, after making such inquires and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice under sub-section (1),-(a)where the provisional attachment has been made under sub-section (3), -(i)pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under sub-section (3) of section 26; or

<sup>361</sup> Mithilesh Kumari v. Prem Bihari Khare 1 SCR 621

<sup>362</sup> Jaladi Prasuna & ors v. Union of India, W.P 3706/ 2022

<sup>363</sup> W.P N0, 14512/ 2021

accordingly the section 3(2) of the 2016 Act is also said to be unconstitutional which is violative against Article 20(1) of the Constitution.

The effect given to real title where here the benami transaction is not a offence or crime of it is lawfully acquired through the respective fund, for instance where A has brought a property in the name of B and B subsequently chooses to say that he is the real owner and it is quite competent to A to bring a suit against B to establish his title and to recover possession of the property from B, and it is proved that the purchase money came out of A's funds, the court will pass a decree declaring that A is the real owner and direct B to deliver possession of the property to A. Similarly if property is bought by A in B's name and C, a creditor of A subsequently obtain a decree against A and it is competent to C to show that the property really belongs to A, and it is fact is proved the property may be attached and sold to satisfy C's decree. However now after the recent legislation no such suit can be brought or no such defence can be taken. However in England there is an exception when a person is made by a person in the name of his child or wife though with his own money. In such a case the transaction is presumed to have been made by the way of advancement or gift to the child or wife and the burden lies on the person who alleges it. However this exception is not recognized in India where in this country even when any transaction made in the name of wife or child it is presumed that it is the person who bought the land is the owner of the appropriate property. However this rule of Indian law does not apply to transaction where both parties are English, not even if they were born in India, though the transaction may have taken place in India and the property may be situated in India<sup>364</sup>. The deposit by a Hindu of his own money in a bank in the joint names of himself and wife, and on the terms that it is to be payable to either or the survivor, does not on his death constitute a gift by him to his wife. There

is a resulting trust in his favour in the absence of proof of a contrary intention there being in India no presumption of an intended advancement in favour of a wife.<sup>365</sup>

The constructive notice opines in it that it is the duty of a purchaser in whose name the property stands but also to ascertain who is in actual possession of the property at the time of the sale to him. If he fails to do so and it turns out that the real owner and not the benamidar was in possession and receipt of the rents of the property he or she will be deemed to have constructive notice of the fact that the benamidar was not the real owner. Thus if in the case where A was in possession, A would be entitled to have the sale set aside.<sup>366</sup> Where a collusive decree is obtained by a benamidar against the real owner with the object of defrauding the creditor, the decree is binding on the real owner even if no creditor has been defrauded. The reason is that where a person has suffered judgement to pass against him, the matter is then placed beyond his control.

#### KEY PROVISIONS OF 2016 AMENDMENT

The Benami Transactions (Prohibition) Amendment Act 2016 strengthens the authentic law by prohibiting benami transactions which involves holding or transferring property in another person's name to conceal the real name. The key provisions are:

- (i) Prohibition of Benami Transactions which dealt under section 3 of the Act which actually prohibits any person from entering in to the transaction. For violating this provision include imprisonment which is up to 7 years and the fine is nothing but 25% of the property's market value.
- (ii) Confiscation of property which exclusively dealt under Section 5 that any property subject to benami transaction can be confiscated by the central government where the government can take the possession by the administrators.

<sup>364</sup> Pantan v. Administrator-General, AIR 1926 ALJ 158

<sup>365</sup> Guran Ditta v. Ram Ditta, AIR 1928 PC 172

<sup>366</sup> Mancharji v. Kongseo, 1869

(iii) Adjudication and Appeal where the 2016 Amendment Act establishes an adjudicating authority to investigate suspected benami properties and an appellate tribunal is set up for appeals against the decisions of the adjudicating officer.

(iv) When comes to role of the tax authorities where section 20 of the Act empowers the income tax authorities to investigate and take action on benami transactions. This include the power to seize and confiscate the benami properties.

(v) The exceptions here its included are the property which is held in the name of the spouse or child where the property is purchased using the individual's known sources of law and joint ownership where contributors are known and account for their contributors.

#### BURDEN OF PROOF

In a benami transaction case, the burden of proof generally falls on the party alleging the transaction is benami, they must demonstrate that the property is held by one person who is the benamidar but it is truly owned by another person who is nothing but a beneficiary where here the burden is not absolute but it requires providing the mere evidence. For instance, A purchases property in the name of B, and subsequently sues B for a declaration that he is the real owner of the property, the burden heavily lies on him to show that he is the real owner. In other words that the person who appears as the owner on the face of the deed is not the real owner. The court should view benami transactions and they should require a strict proof of his title before holding that B is merely a benamidar and courts should not decide up on mere suspicion but up on legal grounds established by evidence. When<sup>367</sup> evidence on neither side is wholly convincing and when the evidence given and withheld is open to adverse criticism, the court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the

motive which could govern their actions, and their subsequent conduct.

#### 57<sup>th</sup> REPORT OF LAW COMMISSION 1973

The key findings of the 57<sup>th</sup> Report of law commission,

(a)The law commission report acknowledged that when the property is held on one person its need not to be recognized as a wrongdoing.

(b) This report also recognize that the benami transactions can be used to evade tax and defeat the creditors.

(c) The report concluded that while some benami transactions may be legitimate to some extent where the misuse warranted measures to regulate and prohibit them to minimize the illegal transactions related to benmai.

(d) The law commission also recommended that instead of full or outright, a more nuanced approach of eradicating the benami transaction could be adopted.

(e) Lastly, the report emphasized the clear legal proceedings to determine the validity of the benami transaction.

#### CONCLUSION

Benami transactions, which involve holding property in another person's name without their knowledge, are illegal under the Benami Transactions (Prohibition) Amendment Act, 2016. Consequences for individuals involved in these transactions include potential imprisonment for up to 7 years and hefty fines, which can be as high as 25% of the property's fair market value. Additionally, the benami property can be confiscated without any compensation to the real owner. Where the burden of proof rests on the individual who wants to prove the title of the deed and here evidence should be taken in to note and that speaks volumes than other mechanisms. Recent Supreme Court judgments have clarified aspects of the law while addressing issues of retrospective and constitutional validity. While challenges persist, the legal framework

<sup>367</sup> Dalip Singh v. Chaudhain, AIR 1938 Mad 8



surrounding *Benami* transactions continues to evolve to combat tax evasion, money laundering, and fraudulent asset diversion effectively. As the judiciary and legal experts grapple with these issues, it is essential to strike a balance between enforcement and fairness in addressing *Benami* transactions in India.

