

BENAMI PROPERTY LAW

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The Prohibition of Benami Property Transactions Act, 1988

As amended by

The Benami Transactions (Prohibition) Amendment Act, 2016

(w.e.f. 01.11.2016)

[Earlier known as the Benami Transaction
(Prohibition) Act, 1988]

SECTION - 82

(Indian Trusts Act, 1882)

Where property is transferred to one person for consideration paid or provided by another person, and it appears that such person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

SECTION - 81

(Indian Trusts Act, 1882)

Where the owner of property transfers or bequeaths it; and it cannot be inferred, consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

SECTION - 94

(Indian Trusts Act, 1882)

In any of the case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

SECTION - 66 (Civil Procedure Code)

No suit shall be maintained against any person claiming title under a purchase certified by the Court in such 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.

SECTION - 281A (Income Tax Act, 1961)

Effect of failure to furnish information in respect of properties held benami - No suit to enforce 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 instituted in any court by or on behalf of a person (hereafter in this section referred to as the claimant).....

Continued.....

SECTION - 281A **of the Income Tax Act, 1961**

.....claiming to be the real owner of such property unless notice in the prescribed form and containing the prescribed particulars in respect of the property has been given by the claimant within a period of one year from the date of acquisition of the property to the Chief Commissioner or Commissioner.

(OLD ACT)

THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988

Section 1(3)

The provisions of section 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 May, 1988.

(OLD ACT)

THE BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988

Section 2(a)

Benami transaction means any transaction in which property is transferred to one person for a consideration paid or provided by another person.

(OLD ACT)

SECTION - 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.

In continuation

**(OLD ACT)
SECTION - 3**

PROHIBITION OF BENAMI TRANSACTIONS

- (3)** Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years **OR** fine or with both.

- (4)** Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this section shall be **non-cognizable and bailable**.

(OLD ACT)
SECTION - 5
PROPERTY OF 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 shall be payable for the acquisition of any property under sub-section (1).

The New Act
(called as)

The Prohibition of
Benami Property Transactions Act, 1988
(notified to be effective from 01.11.2016)

Section 1(3)

The provisions of section 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 May, 1988.

New Act called as PBPT Act, 1988

Benami Transaction

Defined in Section 2(9) of
the PBPT Act 1988

Section 2(9)

'Benami Transaction' means :-

- A. A transaction or an arrangement -
- (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; **and**
 - (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by :

- B. A transaction or an arrangement in respect of a property carried out or made in a fictitious name;
- C. A transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;
- D. A transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious

Exception/Exclusions :-

- i. Property held by Karta, or a member of HUF for his benefit or the benefit of other members in the family.
- ii. Property held by a person standing in a fiduciary capacity for the benefit of another person and includes Trustee, Executor, Partners, Directors of a company or a depository under the Depositories Act, 1996 *and* any other person as may be notified by the central government for this purpose
- iii. Property held in the name of spouse or in the name of any child
- iv. Property held as joint owner in the name of brother, sister lineal ascendant or descendant
- v. Possession of any property taken or retained in part performance to a contract referred to in section 53A of the Transfer of Property Act, 1882.

FIDUCIARY CAPACITY

Section 88 of The Indian Trust Act

Advantage gained by fiduciary.- Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

Shri P.V. Sankara Kurup v. Leelavathy, (1994) (Supreme Court) 6 SCC 68

In execution a court auction for recovery of the arrears of rent, the suit property was purchased by the petitioner in his name. The expenses incurred for the litigation till obtaining the sale certificate were all credited to the account of respondent-plaintiff. For laying coconut grove the expenses incurred were credited to the account of the respondent. Thus the consideration for the purchase as well as the improvements of the property were met with the funds of the respondent for whom the petitioner was acting as an agent and power of attorney. He, thereby, obviously had acted in a fiduciary capacity as agent of the respondent. The sale certificate though ostensibly stands in his name but obviously he obtained it while acting as an agent and power of attorney of the respondent. The sale certificate thus was obtained without her knowledge and consent playing fraud on her. The facts manifest that the petitioner had purchased the property for the benefit of the estate of the respondent.

Shri P.V. Sankara Kurup v. Leelavathy, (1994) (Supreme Court) 6 SCC 68

In the light of the facts recorded earlier, it is clear 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 her consent. That apart under Section 88 of the Indian Trusts Act, 1882, an agent or other person bound in a fiduciary character to protect the interests of the principal and the former would hold the property for the benefit of the principal or the person on whose behalf he acted as an agent. The question of benami, therefore, does not arise, though Section 4 of the Benami Transactions (Prohibition) Act, prohibits such a plea. Sub-section (3)(b) provides that:

*“Nothing in this section shall apply,-
(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.”*

Shri P.V. Sankara Kurup v. Leelavathy, (1994) (Supreme Court) 6 SCC 68

Section 7 does not repeal Section 88 of Trust Act. When an agent was employed to purchase the property on behalf of his principal and does so in his own name, then, upon conveyance or transfer of the property to the agent he stands as a trustee for the principal. The property in the hands of the agent is for the principal and the agent stands in the fiduciary capacity for the beneficial interest he had in the property as a trustee. The petitioner has acted as an agent, as a cestui que trust, is a trustee and he held the property in trust for the respondent in his fiduciary capacity as an agent or trustee and he has a duty and responsibility to make over unauthorized profits or benefits he derived while acting as an agent or a trustee and properly account for the same to the principal.

Benami Property

As per Section 2(8) : It means

Any property which is the subject matter of a benami transaction and also includes the proceeds from such property;

Property

As per Section 2(26) : It means

“Assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property;”

BENAMIDAR

As per Section 2(10) : It means

A person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

Beneficial Owner

As per Section 2(12) : It means

A person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar;

Initiating Officer

As per Section 2(19) : It means

An Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of section 2 of the Income-tax Act, 1961.

Approving Authority

As per Section 2(4) : It means

An Additional Commissioner or a Joint Commissioner as defined in clause (1C) and (28C) respectively of section 2 of the Income-tax Act, 1961.

Adjudicating Authority

It means the Adjudicating Authority appointed u/s 7

(Though, No Authority is appointed u/s 7 so far, however AA appointed u/s 71)

Section 71

Adjudicating Authority
appointed u/s 6(1) of
the Prevention of
Money Laundering Act,
2002

Appellate Tribunal

To be established u/s 30 to hear appeals against orders of Adjudicating Authority

Though not yet established under section 30, however charge given u/s 71

Section 71

Appellate Tribunal
established u/s 25 of
PMLA to discharge the
function here.

“Administrator”

means an Income-tax Officer as defined in section 2(25) of the Income-tax Act, 1961

Brief Procedure:-

- The Initiating Officer (IO), if he has reason to believe that any person is Benamidar in respect of a property he may issue notice u/s 24(1).
(after recording reasons in writing)
- Notice to be sent to Beneficiary Owner also if his identity is known

- IO may make provisional attachment of a property upto a period of 90 days thereafter IO is obliged to :-

(i) pass an order for continuation of the provisional attachment of the property,
or

(ii) Revoke the provisional attachment of the property

(prior approval of Approving Authority is mandatory in both situations)

In case provisional attachment is continued, the IO shall within 15 days draw up a STATEMENT OF CASE and refer it to the Adjudicating Authority.

Hearing before Adjudicating Authority

Notice of hearing u/s 26 to be issued to Benamidar, Beneficial Owner, any interested Party (including a Banking Company) and any person who has made a claim in respect of the property.

The Adjudicating
Authority may suo
moto or on
application strike out
or add the name of
any party

The Adjudicating Authority to decide whether the property referred is Benami or not

If it is held to be Benami than attachment order to be confirmed

if it is not held as Benami, then attachment order to be revoked

The order to be passed by AA within one year from the end of the month in which reference/ statement of case/ documents received from IO.

Aggrieved Party
has right of
appeal before
Appellate Tribunal
u/s 30

Confiscation of
the property only
after the order
passed by the
Appellate Tribunal

Prohibition on re-transfer:-

As per Section 6(1)

The Benamidar shall not re-transfer the benami property as held by him to the beneficial owner or any other person and if it is done so, such transaction shall be deemed to be null & void.

Section 57

Any transfer made after the issuance of notice u/s 24 shall be ignored notwithstanding the provisions of Transfer of Property Act, 1882.

Further, on confiscation of the Property u/s 27, any transfer of the Property shall be deemed to be null & void.

No compensation
payable by the
Government on
acquisition or
confiscation of the
Benami Property.

No claim shall lie
against the Central
Government for
attachment or vacation
of attachment of the
Benami Property.

Liability for prosecution under chapter VII

As per Section 53 :-

A Person would be guilty of offence of Benami transaction and shall be liable for prosecution in following circumstances:-

- Where Benami Transaction is done in order to defeat the provision of any law or
- To avoid payment of statutory dues or
- To avoid payment to creditors

Following persons may be held guilty of offence of Benami Transactions u/s 53:-

- The Benamidar
- The Beneficial Owner
- Any person who abets or induces any person to enter into Benami Transaction.

Punishment

u/s 53

for being guilty of offence of
Benami Transaction :-

- Rigorous imprisonment
between 1 year to 7 years.
and
- Fine up to 25% of Fair Market
Value of property.

u/s 54

On furnishing false information / document:

- Rigorous imprisonment for 6 months to 5 years.
- Fine upto 10% of FMV of property.

Section 61

- Earlier : Non-Cognizable
Bailable
- Now : Non-Cognizable
(Non-Bailable)

Section 62

Offences by ‘Companies’:

‘Company’ includes :

- Companies
- Firms
- AOPs
- BOIs (whether Incorporated or not)

Section 62

- Person in charge and responsible to the company
- If contravention takes place with consent or connivance of or attributable to any neglect on the part of any Director, Manager, Secretary or any other officer.

Standard Operating
Procedures (SOP) on
implementation of
PBPT Act issued by
CBDT.

**Constitution of Benami
Property Units (BPUs):**
24 BPUs created across
the country under the
charge of Principle DIT
(Investigation)

Each BPU to consist of :-

1. Additional/Joint CIT
(Benami Prohibition)
2. Deputy/Assistant CIT
(Benami Prohibition)
3. ITO (Benami Prohibition)
4. Other Officials/Officers
(Benami Prohibition)

Functions of BPU

- A. All functions under the PBPT Act :-
Duties & functions of IO/AA and administrator
- B. Criminal Prosecution related monitoring and coordination functions under Black Money Act & Income-tax Act.

Guidance note issued by the CBDT on 2 Dec, 2016 to the officials to gather information:

The Board has advised its officers that while carrying out actions of searches, surveys, summons, etc they should also collect evidences, information which may be useful for PBPT Act on the following lines:-

- a) Identification and examination of legal/apparent owner(s) and beneficial/real owner(s) of the property, inter alia w.r.t. holding/transferring of the property and payment of consideration for such property.
- b) Whether the property is held/transferred for the immediate or future benefit, direct or indirect, of a person other than the person who has provided the consideration.
- c) Examination of the source of fund through which the property was acquired.

- d) Whether a transaction or an arrangement in respect of the property has been made in a fictitious name.
- e) Whether the apparent owner is not aware of or denies knowledge of the property? Such a situation may lead to classification of the property as benami property.
- f) A property where the person providing the consideration is not traceable or is fictitious may also be classified as benami property.

e) Upon identification of a property as benami property or in case where the investigating Officer has prima facie reason to believe that the property in question may be a benami property, the information, after the approval of the controlling officer, should be passed on to the Initiating Officer within a period of 60 days. The Initiating Officer, thereafter, may take necessary action u/s 24 and under other provisions of the Act.

Ingredients for
categorising a
property as Benami
Property under the
common law:-

Jay Dayal Poddar vs. BIBI
Hazra & Others
(dt. 19.10.1973 1974 AIR
171)

Followed again in

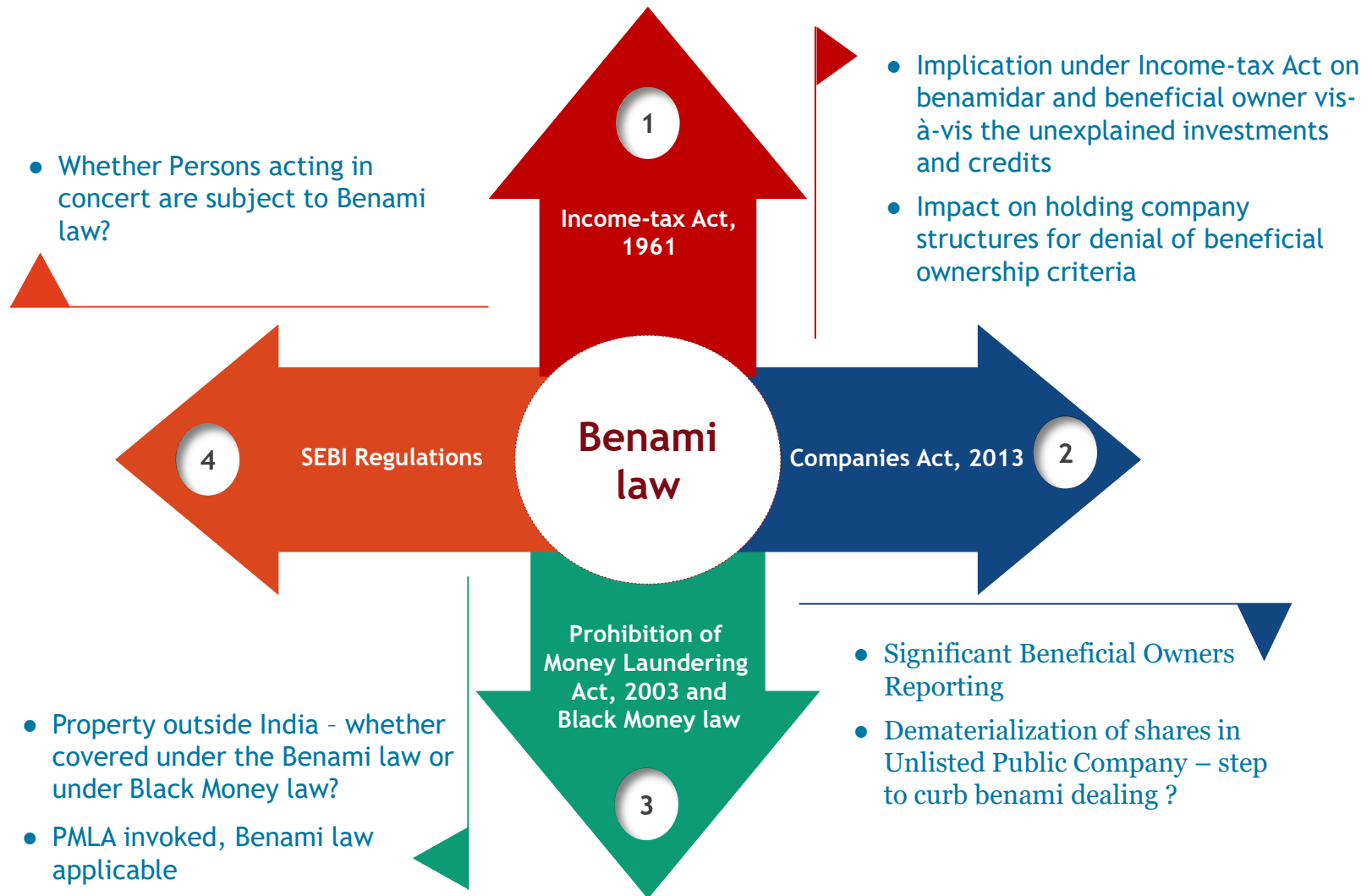
Rajinder Prasad Malik vs.
Shanti Devi Malik (AIR 2003
P&H 29)

It was held in the said judgment that though there is no absolute formula or acid test, however the courts are usually guided by following circumstances:-

1. The source from which the purchase money came;
2. The nature and possession of the property, after the purchase;

3. Motive, if any, for giving the transaction a benami colour;
4. The position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
5. The custody of the title deeds after the sale;
6. The conduct of parties concerned in dealing with the property after the sale;

Benami law - Interplay with other laws



Interplay with Income Tax Act

Whether provisions of Benami law can apply to the transaction covered under section 68 and 69A ?

01



Implication under section 56(2)(x) ?

02



Whether application of both the law is mutually exclusive or it can be cumulative also ?

04



Whether a transaction subjected to GAAR be also exposed to the Benami Law ?

03



Comparison & Interplay between PMLA & PBPT:

- Objective & Scope: Laundering of Crime Money and extends to whole of India
- Powers of Arrest, Search and Survey and Impounding of Documents and attachment of property without notice
- Area of operation: International
- Section 62 of PMLA makes officers liable for conviction and fine on illegal search, detention or arrest
- If PMLA is invoked, PBPT would most likely be applicable. But vice-versa not mandatory

Certain Unimagined
situations where
PBPT Act shall get
attracted.

Undisclosed investment in property :-

- a) Joint Ownership - Ratio found different from recorded in Title Deed;
- b) Name of any contributor not found in Title Deeds;

Title deeds recovered
during search
proceedings of other
persons

If possession of property
is with person searched

Jewellery found during search and explained to be belonging to some other persons.
(however A0 treats it as unexplained)

If Jewellery is found in
A's premises,
purchased in B's name
Interplay between
Income Tax Law &
Benami Law?

If AO taxes its income
u/s 69 in A's Hands

Then Benami law can
also be invoked

If AO taxes it in B's hand

Then Benami Law cannot
be invoked.

Loan/Share Capital
received admitted to
be bogus in the
statement recorded
during survey/search.

Goods sold in the normal course of business, but purchaser found to be part of racket of entry operators.

Cash recovered
by Police
interceptors
during transit

Suppose immovable property is transferred by 'A' to 'B'

Allegation of the department

'A' is Beneficial owner

'B' is Benamidar

Whether only Benami law shall get extracted or income tax law shall also get attracted?

If AO makes assessment of income in B's hands, then Benami Law cannot be enforced.

In that case, only one law shall get attracted.

If AO taxes it in A's Hands
Then Benami Law can
also be invoked.

'A' may be treated as
beneficiary owner

'B' may be treated as
Benamidar

Property gifted by 'A'
to 'B'

Whether only Income
Tax Law can be
attracted only or
Benami Law also

If AO invokes provisions of section 56(2)(x) of Income Tax Act,

Then Benami Law cannot be invoked

But if IO invokes Benami Law, then AO cannot invoke 56(2)(x)



Thank You