

IMPLICATIONS OF THE BENAMI TRANSACTION PROHIBITION ACT 2016 ON REAL ESTATE BUSINESS: TRANSPARENCY IN REGULATING INFORMAL CAPITAL INVESTMENT

Kalpana M¹ & E. Ajitha^{*2}

1. Assistant Professor, School of Law, Vel Tech Rangarajan Dr.Sagunthala R & D Institute of Science and Technology, Avadi, Chennai, India
2. Associate Professor, School of Law, Vel Tech Rangarajan Dr.Sagunthala R & D Institute of Science and Technology, Avadi, Chennai, India

Abstract

While exploring socio-economic growth and property jurisprudence, the concepts that would strike our knowledge are benami ownership and the real estate business. Owning property in the name of another person for the benefit of the person paying consideration is termed a sham transaction. The judicial requirement forced the legislative assembly to design a separate law for benamidar ownerships from the Transfer of Property Act 1882, which resulted in the Benami Transactions (Prohibition) Act, 1988. It is pertinent to note that sham transactions were not prohibited per se; many past legislations and judicial decisions have upheld the validity of these transactions, considering the intention of the parties. The ostensible transaction was needed for promoting business growth, where the actual owner of the property cannot deal with all the business property alienation, which helped in economic growth. The power was misused by a few people with wicked intent, in the form of sham transactions resulting in significant financial losses through tax evasion, defrauding creditors, and violations of land ceiling laws.

This ultimately gained the attention of the legislation to curb its further growth. This paper has attempted to evaluate the impact of this act on the Real Estate business, which serves as the primary source for capital investment through Parallel Economy Funds (black money). In India, it is easy to invest unofficial money in the real estate business as this Act does not apply to properties owned abroad. When this anti-socio act combines with benami transactions, the government is defrauded with immense effect. Though various factors affect the real estate sector post 2016, this paper aims to clarify the impact of the Benami Act on this sector. The vital research objective is to suggest a mechanism to curb this anti-social act and promote economic growth. Changing from Presumptive Title System (PTS) to the Conclusive Title System would help in maintaining transparency in the title deed. The findings of this paper could be used for future research purposes.

Keywords

Ostensible Ownership, Benami Transaction, Real Estate Sector (RES), Parallel Economy Funds (PEF), Fiduciary Relationship, Presumptive Title System (PTS), Conclusive Title System, Enforcement Mechanism

1. Introduction

Property jurisprudence has been consistently stressed to distinguish between ostensible ownership and benami transactions, as these concepts involve the divergence between the actual owner and the name lender. The concept of ostensible ownership is legally recognised, which parallels protects the rights of bona fide purchasers acting in good faith. In contrast, benami transactions were in existence from the pre-colonial period, viewed with suspicion. In modern law, these kinds of transactions are prohibited in all means as it carried anti socio offensive intentions like tax evasion.

The Indian Real Estate sector was threatened by unaccounted transactions, i.e., the purchase of property through black money. It is a prevalent practice of the southern registration office that undervalues the property. A part of genuinely earned income is paid towards the guideline value of the property, and the balance is paid through black money. The tax would be paid based on the guideline value, and the remaining (current market value) of the property would be collected through cash, which most often would be black money. These are general practices of the real estate sector where both the buyer and the seller benefit. We could witness a hidden corporate corruption that consumes the economic growth through tax evasion. In India, the Market Value of the Property (MVP) is revised once a year. The buyer always sells the property based on the current MVP. The difference amount is paid through black money, which in turn results in the payment of lesser government duty. In order to eradicate this practice Revised Circle Rate (RCR) has to be maintained. RCR is a situation where a transfer in title over the property through sale takes into account only the current market value of the property.

2. Statement of the Problem

As the Transfer of Property Act could not address the consequences of sham transactions, the Benami Transaction Prohibition Act, 1988, was enacted; yet many benami transactions remained prevalent in India. Many lacunae in the Act were further addressed

in Parliament to ensure its effective implementation, which eventually led to the 2016 Act. These types of transactions initially had their legal recognition based on the requirements of the business sector. The parallel economy was growing rapidly as these types of transactions were widely used to evade taxes, defraud creditors, and circumvent the land ceiling laws.

The real estate business is exposed to huge amounts of black money by anonymous investors, thereby disrupting the economic stability and governance. Thus, there is a need to correlate the concept of sham transactions and real estate business to determine its impact on economic downfall. There is a need to shift from the current practice of the Presumptive Title System to the Permanent Title System, which would help eradicate ambiguities regarding title to the property.

Therefore, the core problem of this research paper is to analyse the impact of the Benami Transaction Act on the real estate business, to identify the negative factors that contribute to parallel economic growth.

3. Objective of the Study

The ultimate objective of this study are as follows:

- To analyse the legislative perspective for separating benami transaction from the purview of ostensible ownership covered under Transfer of Property Act
- To examine the judicial view on benami transaction prohibition act
- To evaluate the impact of the Benami Transaction Prohibition Act on the real estate business

4. Research Methodology

Research methodology refer to the overall strategy and techniques used by the author for completing this research paper. Basically, this research has been based on secondary data like parliamentary reports, judicial precedents, and legislative enactments, which ensures source reliability and

credibility of this research work. The numerical data have been represented through a pie chart for better comparison.

4.1 Scope of the Study

The ultimate focus of this research paper is to analyse what amounts to benami transactions, in parallel, analysing the socio-economic impact of Benami Transactions (Prohibition) Amendment Act, 2016 on the real estate business. This paper even provides scope for understanding the lacuna in the said Act and the mechanism that the government could adopt for better revenue administration by amending Real Estate (Regulatory and Development) Act, 2016 as well.

5. Ostensible Ownership: foundational concept

Ostensible ownership is where the actual owner of the property himself authorises the other to act as the ostensible owner. This concept is governed by the legal maxim “nemo dat quod non habet,” meaning “no one can transfer what they do not possess”. In India, this doctrine is officially recognized under Section 41 of the Transfer of Property Act, 1882, which incorporates a justifiable principle designed to protect the interests of bona fide transferees. For example, during business, trade, and commerce, the actual owners cannot perform all the property transactions. Delegating the power to deal with business property would help in promoting the business efficiently. Thus, vesting of ownership image on someone who is not the actual owner is permitted under this Act.

Under Section 41, the essential conditions are;

- i) The transferor must be an ostensible owner;
- ii) Such ostensible ownership must be with the acquiescence of the real owner, co-sharers, or any person who claims an interest in the immovable property
- iii) The transfer must be for consideration;
- iv) The transferee must act in good faith; and
- v) The transferee must have taken reasonable care to ascertain the authority of the transferor.

The legal position has been clarified in the

leading cases, such as *Ramcoomar Koondoo v. Macqueen* (1872), where the Privy Council held that equity protects a purchaser who relies on the apparent ownership created by the real owner. Similarly, in *Jumma Masjid, Mercara v. Kodimaniandra Deviah* (1962), the Supreme Court emphasised the necessity of good faith and reasonable care.

5.1 Benami transactions and its legal applications

The term benami is derived from the Persian words “be” (without) and “nami” (name), literally meaning “without a name.” A benami transaction refers to an arrangement where the name mentioned in the property documents will not be the same as the identity of the person who actually paid the consideration. Such transactions trace its historical roots in India and were traditionally recognised under customary practices, particularly to protect family assets or avoid social and political uncertainties.

Further, there were two types of transactions that were recognised before the act came into force: tripartite and bipartite benami transactions. In the first case, the seller sells the property, but the purchaser purchases the same in the name of another person. For example, A being the seller, B being the purchaser, and C being the name mentioned in the title deed. So there are three parties involved. The second type is considered a sham transaction as the transferor transfers the property without the actual intention of transferring the title or possession of the property. It was clearly admitted by the parliament that the definition would cover tripartite transaction and not bipartite transaction unless otherwise proved.

Under Indian law, the actual meaning of a benami transaction includes the following transactions:

- (i) Property is held in the name of one person, whereas the consideration is paid by another person
- (ii) The property is usually held for the current or future benefit of the person who actually pays the consideration
- (iii) The property is held in the fictitious name of a person,
- (iv) The arrangements of the property are in such a manner that the benamidar is unaware of the

title to the property or denies such title.

(v) A transaction where the person who provides the source of consideration is unknown or fictitious.

Apart from the conditions provided by the legal framework, various other factors have been judicially suggested by various legal forums to evaluate whether the transaction falls under the purview of benami transactions. They are as follows:

(i) The benamidar lends his name alone without acquiring actual possession of the property. In such cases, the source of purchase money is questioned to know whether the benamidar is the actual owner or just a name lender.

(ii) The nature and possession of the property help in determining the intention of the parties. If the beneficial owner remains in the possession of the property even after the transfer of other legal stands, it raises a question to test the nature of such a transaction.

(iii) The intention of the parties must be considered to give a transaction a benami colour. For example, a transfer under a trust to an educational institution with an intent to benefit the economically backward community and remain the trustee of the property is valid unless the contrary is proved.

(iv) The relationship between the actual owner and benamidar must be understood. The act itself provides exception to fiduciary relationships, karta for the benefit of the joint family, father in the name of the children, and husband in the name of the wife.

(v) The custody of title deeds must be with the transferee in case of bonafide transfer of property. But in case of sham transactions, the transferor himself retains the title deeds without transferring actual possession of the property.

Before the legislative enactment of Benami Transactions (Prohibition) Act, 1988, benami transactions were not illegal per se. Such as purchasing property in the names of spouses, children, or relatives for convenience, security, or customs, were allowed to protect parties' interests and intentions. The real owner is entitled to his title unless otherwise proved, such as by estoppel or fraud. Estoppel is a situation where the owner cannot claim back his property even if he proves the position of the

benamidar. The judicial decisions like *Valliammal vs. Subramaniam*¹¹ concentrated on the intention of parties, the source of consideration paid for the property, the custody of title deeds, etc.

To curtail the misuse of benami transactions, the legislature had enacted the Benami Transactions (Prohibition) Act, 1988, which was later strengthened by the Benami Transactions (Prohibition) Amendment Act, 2016. These enactments prohibit benami transactions, bar the right to recover benami property, and provide for confiscation by the State. The 2016 Amendment had taken initiatives to introduce definitions, mechanisms for adjudicating property held as benami, and criminal proceedings, resulting in a strict law to have effective implementation. The identified motive behind benami transactions is tax evasion, concealment of black money, avoidance of creditors, fear of land ceiling laws, and laundering of illicit funds. This causes a great impact on economic transparency and accountability of public revenue. The *UOI vs. Dealcom* (2022) judgement had clarified that any transaction done before 1st November 2016 will not be affected by this act and, in fact, be a valid transaction.

The limitations of the benami transactions are as follows:

(i) Property held in the name of the Karta for the benefit of joint family members would not amount to a benami transaction even though the consideration amount was paid out of the sources of Hindu undivided family.

(ii) Any person holding property under a fiduciary capacity is valid, as the intent or purpose of such a transaction is clear and genuine. For ex, a trustee, partner, director of a company,

(iii) Purchase of property in the name of some relations is exempted under this act, such as spouse, children, whereas the source of money is paid by the husband or father, respectively.

(iv) Joint ownership in the name of brother or sister or lineal ascendant or descendant, whereas the source of money being paid by one of the owners or both would fall under the exception.

5.2 Impact on Real Estate Business

Purchasing property through benamidars with the intention of evading taxes, deceiving creditors, and

breaking land ceiling regulations is another facet of economic crime. In the past, binamidar would typically be the family member acting in the family's best interests. Hindu Undivided Families (HUF) were generally required to make covert investments in order to keep the HUF intact. Consider the following scenario: Karta, the Head of HUF, handles the family's assets by investing funds in a family member's name. They felt that investments in land would yield a good return compared to other capital investments. The linking of Aadhaar, PAN, bank account of the Karta helps in identifying his financial capacity in purchasing property in the name of the family member. There are situations where the purchaser acts as a benamidar or the person paying consideration is fictitious. The government has to maintain a public domain linking the details of the buyer and seller. In case of any discrepancy, a warning will be sent to the Income Tax Department, quoting the income level of the purchaser and the actual value of the property. This would help in curbing binami transactions. This would further help in eradicating biparte and triparte benami transactions. The Act has failed to identify binamidars and the beneficiary, as there is no proper mechanism for tracking income and payment by the buyer. Further, poor identity verification at the registrar's office. Thus there is a need to incorporate a legal provision in Real Estate (Regulatory and Development) Act, 2016 the would mandate the promoters as well as the developers to disclose the details of the beneficial owner.

Hurdles faced by the real estate sector because of benami transactions are as follows:

(i) Inability of the developers to use the land acquired from Benamidars. This is because of the fear that the central govt would confiscate the property in case of any discrepancy.

(ii) Transparency is required by the Real Estate Regulatory and Development Authority for registration. The RERA approval had made it mandatory for the developers to maintain clear title deeds.

(iii) Private equity and NBFCs, that is, National Banking and Financial Institutions, encourage only premium developers rather than small developers, basically because of the transparency in the title

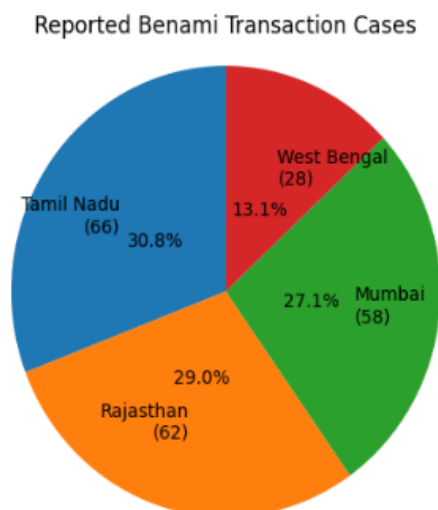
deed before the act. Fictitious property transactions face problems in getting financial assistance. Because of this, other small financing institutions benefited. Further, refinancing is considered safer as the first lender would have done proper due diligence.

5.3 Lacuna with respect to the Benami transaction prohibition Act

(i) No initiative by the authority to publish the details of the so-called Benamidar and Benami property through public domain. There is no proper record of criminal prosecution, details of confiscated property, or the value of such property. These are more likely related to political background, where it becomes difficult to bring out the identity of the beneficiary or the benamidars involved. The parliamentary discussion on the report shows the number of Benami transactions and the amount that has been confiscated through Benami transactions post 2016. The pie chart is the representation of recorded cases post 2016. The report dated 26.07.2017 stated that 24 benami prohibition units have been set up as a step towards an enforcement mechanism. Over Rs. 800 crores worth of properties have been attached out of 230 benami transactions. A further 170 cases are under investigation. The Prime Minister, through his speech on the 71st Independence Day, had confessed that the income tax filing returns have risen from Rs. 5.43 crores to Rs. 6.84 crores, approximately. The Act has resulted in 50% increase in payment of indirect taxes. The report even shows that Rs. 1.37 Lakh Crore amount has been retrieved as tax evasion.

(ii) Implementation of various acts like the Real Estate Regulatory and Development Authority, GST, has also resulted in a greater impact on the real estate business. These factors are beyond the scope of this paper.

Figure - 1



Source: Secondary Data

It is to be noted that India currently follows the Presumptive Title System, which literally means not guaranteeing ownership by registration, but it is presumed that one whose name is in the title deed is considered the owner unless otherwise proved. The name recorded on the revenue records or the title deed is only considered as evidence of ownership and not conclusive proof, and the same can be challenged in court. Conclusive Title System is a type of title system that guarantees title over the property, and does not provide the chance of challenging it even in court unless proved to be fraudulent. So this can be achieved by:

(a) maintaining records of title and details of the property through the proper public domain

(b) The transacting parties must have linked their Aadhaar and PAN so that the earning capacity can be verified. This must be ensured by RERA as well by mandating the parties to integrate pan,

aadhar and bank account.

(c) This act must also apply to properties owned overseas, which might be accomplished by outlining the specifics of Indian nationals who use Binamidar to purchase property overseas. Treaties between the nations that allow them to deal with Binami transaction properties are essential for accomplishing the Act's goals. In order to assess an individual's financial capabilities, the signing party nation must be prepared to uphold transparency when disclosing information on Indian citizens and the investments they have made there. Finally, if it is not possible to attach properties obtained through benamidars in other countries, one of the primary strategies should be the attachment of an equivalent amount of assets in India. One of the primary goals of the treaty must be the attachment of an equivalent amount of assets in India if the properties obtained through benamidars in other nations cannot be attached.

5.4 Enforcement Mechanism

The noteworthy aspect of the Benami Transaction Act is that, according to section 3, the offense is subject to criminal culpability. The criminal liability of a person for committing sham transactions that do not fall under the exceptions is punishable with 3 years imprisonment, a fine, or both. Further, Chapter VII of the said Act specifies the offence and its corresponding criminal liability. This outlines the penalties for engaging in benami transactions, giving false information, disregarding notice, etc. The legal mechanisms had been covered in Chapter IV of the Act, which talks about the attachment, adjudication, and confiscation of the property held under the same transactions.

Table - 1

AUHTORITY	QUALIFICATION	POWERS AND FUNCTIONS
Administrator	Income tax officer	Manages and disposes of confiscated property, and has the power of forcible possession of property.
Approving Authority	Additional commissioner or Joint Commissioner	Sanction the action of the Investigating Officer
Initiating Officer	Assistant Commissioner or Deputy	Issue notice, attach property with the approval of the approving authority, investigate, and gather

	Commissioner	information and evidence.
Adjudicating Authority		Makes a final decision as to whether the property falls under benami and decides on the attachment of the property
Member	Chairperson or member of the Adjudicating authority or Appellate Authority	Investigation assistance
Judicial member	Member of Indian Legal Service+ Additional Secretary	Appellate Tribunal
Administrative member	Member of the Indian Revenue Service, Post of Chief Commissioner of Income Tax	Appellate Tribunal

Source: Secondary Data

Section 27 of the Act lists the exclusions to the confiscation and vesting of benami property. This clause will not impact the rights of legitimate later buyers who were unaware of the benami transaction. All encumbrances on the aforementioned property would fall to the Central Government upon the issuance of a confiscation order. It is important to remember that such confiscation would result in no compensation. This clause conceals the reality that any interest established over the property with the intention of undermining the purpose of the act will be deemed void. The government cannot be sued by any party that feels wronged by the court's ruling.

The need for this mechanism is to protect the government and enable economic growth through proper tax payment and maintaining land ceiling laws, etc. On the other hand, the innocent benamidars are cautioned to know their rights.

6. Suggestions and Conclusion

When society was unaware of the impact of benami transactions, the parliament had to legislate laws to educate people on the need to curb their further growth, as it had been hindering economic growth. But through this research paper, I have attempted to evaluate the impact of the act on the real estate sector. The undervaluation of real estate properties has resulted in a great amount of tax

evasion and laundering of black money through benamidars. This kind of business practice had resulted in a reduction of government revenue, violation of land ceiling laws, and the creditors being defrauded. The Prohibition of Benami Property Transactions Act 1988 had revised its provisions for its effective implementation through an amendment in 2016. Though it had mentioned the intention that falls under the purview of this Act, providing exceptions as well. As most of the benami transactions could be evidenced in the real estate sector, there was a need to modify the enforcement mechanism of both RERA and sham transactions for better financial transparency of the government. Additionally, it could be evidenced that an increase in filing income tax returns has proved that the act has impacted the real estate sector positively. Further, the Real Estate (Regulation and Development) Act, 2016, has enacted various guidelines for the promoters as well as the builders to maintain proper title records of the property. Benami properties are filtered out during RERA verification, as it does not encourage suspicious properties but there is no specific legal provision to address this issue. More strict implementations would help in a transparent real estate business. This would result in an increase in market confidence as well as dividends to the stakeholders. Thus linking the PAN and Aadhar with the property records would prove the

effectiveness of the enforcement mechanism, and the same should be accessible by the public through the government, a certified online domain. The govt must take initiative to publish records of the property confiscated as benami property, the market value of such property, and the person involved in such sham transactions. This could create fear even in the minds of reputed politicians and the public to commit benami-type crimes. The general public can witness the transparency of the administrative authorities if it could extend its enforcement even to the properties acquired abroad. Thus, integrating the concept of benami and the RERA Act would help in retrieving the economic growth and improve the socio-economic standard of the country.

ision to address this issue. More strict implementations would help in a transparent real estate business. This would result in an increase in market confidence as well as dividends to the stakeholders. Thus linking the PAN and Aadhar with the property records would prove the effectiveness of the enforcement mechanism, and the same should be accessible by the public through the government, a certified online domain. The govt must take initiative to publish records of the property confiscated as benami property, the market value of such property, and the person involved in such sham transactions. This could create fear even in the minds of reputed politicians and the public to commit benami-type crimes. The general public can witness the transparency of the administrative authorities if it could extend its enforcement even to the properties acquired abroad. Thus, integrating the concept of benami and the RERA Act would help in retrieving the economic growth and improve the socio-economic standard of the country.

References

- [1] Bailey vs. Barnes 1884 (1) Ch. 25, 35
- [2] (1872) 11 Beng. L.R. 46 : 52 I.A. Supp. 40, 43
- [3] Bhargavy P. Sumathykutty vs. Janaki Sathyabhama AIR 1995 Ker 42
- [4] Jaydayal Poddar & anr vs. Mst. Bibi Hazra

& ors, A.I.R 1974 SC. 171 (173)

- [5] Amrit vs. Gurcharan, A.I.R. 1934 All. 226; Sahdev vs. Usman, A.I.R. 1939 Pat. 462
- [6] Rajinder Prasad Malik vs. Shanti Devi Malik, AIR 2003 P & H29
- [7] Pawan Kumar Gupta vs. Rochiram Nagdeo AIR 1999 SC 1823
- [8] Valliammal vs. Subramaniam
- [9] PTI news report, "Benami Properties Worth Rs.800 crore Attached: Centre", Economic Times, July 26, 2017, <https://economictimes.indiatimes.com/news/politics-and-nation/benami-properties-worth-over-rs-800-crore-attached-centre/articleshow/59776940.cms?from=mdr>
- [10] <https://archive.pib.gov.in/independenceday2018/EnglishFactsheet2017.aspx>