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RESEARCH ARTICLE

LEGISLATION ON BENAMI TRANSACTIONS IN INDIA – A CRITICAL STUDY

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ABSTRACT

Benami Transactions (Prohibition) Act, 1988 is an Act of the Parliament of India that prohibits certain types of financial transactions. The act defines a 'benami' transaction as any transaction in which property is transferred to one person for a consideration paid by another person. Such transactions were a feature of the Indian economy, usually relating to the purchase of property (real estate), and were thought to contribute to the Indian black money problem. The act goes on to ban all benami transactions and the right to recover property held benami. The Act came into force on 5 September 1988. Although benami transactions are now illegal, the act had limited success in curbing them. Updated versions were therefore passed in 2011 and 2016, seeking to more comprehensively enforce the prohibitions. In 1973, the Law Commission of India after studying various Acts and prevailing benami system, recommended formulating an Act to tackle the issue. Accordingly, the Benami Transactions (Prohibition) Act, 1988 was enacted by the Parliament which came into force on 19 May 1988. However, due to various deficiencies in the Act, the rules required for operationalizing the Act were not framed. To address these deficiencies, several years later, in 2011, the Government of India introduced "Benami Transactions (Prohibition) Bill, 2011 and 2015" After attacking black money by demonetisation announced on November 8th 2016 of high value currency notes, Prime Minister Narendra Modi is all set to take on 'Benami' properties to check corruption. In his last Mann Ki Baat of the year 2016, Modi said the Government will soon operationalise a strong Law to effectively deal with 'Benami' properties. "We will take action against 'benami' property. This is major step to eradicate corruption and black money… We are going to take action against the properties which are purchased in the name of others (Benami). That is the property of the Country," said the Prime Minister Narendra Modi. The Government has already enacted the Benami Transactions (Prohibition) Amendment Act, 2016 which provides for rigorous imprisonment of up to seven years, and a fine which may extend to 25 per cent of the fair market value of the Benami property. It also empowers the Government to confiscate deposits of people using others accounts to convert unaccounted wealth into white money. But it seems it has not deterred the corrupt from amassing benami properties. This paper brings out whether the Legislation given in 2016 would really serve the required purpose for which it is made.

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INTRODUCTION

In 1973, the Law Commission of India after studying various Acts and prevailing benami system, recommended formulating an Act to tackle the issue. Accordingly, the Benami Transactions (Prohibition) Act, 1988 was enacted by the Parliament which came into force on 19 May 1988. However, due to various deficiencies in the Act, the rules required for operationalizing the Act were not framed. To address these deficiencies, several years later, in 2011, the Government of India introduced "Benami Transactions (Prohibition) Bill, 2011 and 2015".

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After attacking black money by demonetisation announced on November 8th 2016 of high value currency notes, Prime Minister Narendra Modi is all set to take on 'Benami' properties to check corruption. In his last Mann Ki Baat of the year 2016, Modi said the Government will soon operationalise a strong Law to effectively deal with 'Benami' properties. "We will take action against 'benami' property. This is major step to eradicate corruption and black money… We are going to take action against the properties which are purchased in the name of others (Benami). That is the property of the Country," said the Prime Minister Narendra Modi. Benami Transactions (Prohibition) Act, 1988 is an Act of the Parliament of India that prohibits certain types of financial transactions. The act defines a 'benami' transaction as any transaction in which property is transferred to one person for a consideration paid by another person.

Such transactions were a feature of the Indian economy, usually relating to the purchase of property (real estate), and were thought to contribute to the Indian black money problem. The act goes on to ban all benami transactions and the right to recover property held benami.[1] The Act came into force on 5 September 1988. Although benami transactions are now illegal, the act had limited success in curbing them. Updated versions were therefore passed in 2011 and 2016, seeking to more comprehensively enforce the prohibitions. The Government has already enacted the Benami Transactions (Prohibition) Amendment Act, 2016 which provides for rigorous imprisonment of up to seven years, and a fine which may extend to 25 per cent of the fair market value of the Benami property. It also empowers the Government to confiscate deposits of people using others accounts to convert unaccounted wealth into white money. But it seems it has not deterred the corrupt from amassing benami properties. This paper brings out whether the Legislation given in 2016 would really serve the required purpose for which it is made.

The Benami Transactions (Prohibition) Amendment Act, 2016, designed to curb black money and passed by parliament in August, came into effect on 1st of November 2016 Tuesday. An amendment of the 1988 Benami Transactions Act, the new Law provides for up to Seven years imprisonment and fine for those indulging in such transactions, whereas the earlier Law provided for up to Three years of imprisonment or fine or both. The person on whose name the property has been purchased is called the benamidar and the property so purchased is called the benami property. The person who finances the deal is the real owner. The PBPT Act prohibits recovery of the property held benami from benamidar by the real owner. Benami in Hindi means "without name". So, a property bought by an individual not under his or her name is benami property. It can include property held in the name of spouse or child for which the amount is paid out of known sources of income. A joint property with brother, sister or other relatives for which the amount is paid out of known sources of income also falls under benami property. The transaction involved in the same is called benami transaction. As a usual practice, to evade taxation, people invest their black money in buying benami property. The real owners of these properties are hard to trace due to fake names and identities. The person on whose name the property is purchased is called benamidar. The benami transactions include buying assets of any kind movable, immovable, tangible, intangible, any right or interest, or legal documents.

Legislation on benami transactions: The first Act against benami properties was passed in 1988 as the Prohibition of Benami Property Transactions Act, 1988. To curb black money, the Modi Government in July 2016 decided to amend the original Act. So after further amendment, Benami Transactions (Prohibition) Amendment Act, 2016 came into force on November 1, 2016. The PBPT Act defines benami transactions, prohibits them and further provides that violation of the PBPT Act is punishable with imprisonment and fine. The PBPT Act prohibits recovery of the property held benami from benamidar by the real owner. Properties held benami are liable for confiscation by the Government without payment of compensation.

Affect of benami transactions on people and need for tough law: Rather than hoarding the black money in cash, the tax evaders invest their accumulated illegal money in buying benami properties. The whole process affects the revenue generation of government hampering growth and development of the state. Since the percentage of tax payer in the country is a dismal low, the Government fails to successfully implement its policies and schemes due to lack of resources. A tough Law against benami properties is the need of the hour to check corruption. People keeping 'benami' properties to evade taxes will get up to seven years rigorous imprisonment and fine, as per a new law aimed at checking black money in real estate sector. President Pranab Mukherjee has recently given assent to the Benami Transactions (Prohibition) Amendment Act, 2016 and it has been notified by the government, officials said on Tuesday. The Law has strict provisions to confiscate benami properties and stiff penalty for entering into such transactions, they said. A transaction is considered as benami (meaning nameless) 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.

In these cases, the property is held for the immediate or future benefit, direct or indirect, of the person who has provided its payment. The Benami Transactions (Prohibition) Amendment Bill, 2015 was introduced in Lok Sabha on May 13, last year by Finance Minister Arun Jaitley. It was then referred to the Standing Committee on Finance which gave its report on April 28th 2016. Lok Sabha passed the bill on July 27th 2016 and Rajya Sabha gave its nod on August 2nd 2016. As per the new Law which has amended Benami Transactions Act of 1988, whoever is found guilty of the offence of benami transaction shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall also be liable to fine which may extend to 25 per cent of the fair market value of the property. Under the old Law, the penalty for entering into benami transactions is imprisonment up to three years, or a fine, or both. The Act also has a provision of penalty for providing false information.

Any person, required to furnish information under this Act, knowingly gives false information to any authority or furnishes any false document shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to five years and shall also be liable to fine which may extend to 10 per cent of the fair market value of the property, the Law said. However, no prosecution shall be instituted against any person under this Law without the previous sanction of Central Board of Direct Taxes. The new Law will check domestic black money especially in real estate sector, officials said.[2]

Benami Transactions (Prohibition) Amendment Bill 2015: Punishment has been increased to seven years for those who have invested in benami properties and five years for those who knowingly give false information to others into such transactions. The former will have to pay a penalty of 25% of the fair market value of the benami property and those who give wrong information are liable to pay 10% of the fair value of the property, says a Law firm. What this means is that a property worth Rs 1 crore will attract a penalty of Rs 25 lakh and seven years of imprisonment.

[1] The Benami Tansaction (Prohibition) Amendment Act 2016 (No.43 of 2016).

[2] The Economic Times, "Smart Things to know about Benami Transaction", 28th November2016 pg. 3.

The outcome is not only loss of asset but also penalty and punishment. So, someone who bought property in the name of his peon, driver or anybody unrelated to him and invested in agriculture property in their name, there is no escape. What was the modus operandi? The benamidar would keep the original documents in person and execute a power of attorney that allows them to sell whenever the price appreciates. This mode of buying property was most common in case of agriculture land and urban properties bought under the name of shell companies. Usually cash was used to buy such properties but now after November 8th 2016 with a ban on Rs 500 and Rs 1000 notes, most commonly used denomination for investing in real estate, the Government is perhaps warning people that they should not use their black money in investing in properties that are not in their name, says a real estate expert.[3]

With the Income Disclosure Scheme ending on September 30th 2016 this year, it may be difficult for people who bought such properties to exit without serious consequences, a non-brokerage real estate research, property research and data analytics firm, says that the new law could mean that the number of land transactions and investments in luxury apartments will come down drastically. It is important to note that the realty market was dominated by land transactions when it was at its peak in 2006 to 2007 and 2011-2012. Almost 30% of transactions were in benami properties but that number has come down considerably since then, especially since the market has been stagnant for some years and investor interest has gone down. Currently, exposure of benami properties is not more than 5% to 10%, he says. The Government now needs to track incomes earned from agriculture which is very high, adding to this if black money goes away, property prices could see a sharp correction. S K Pal, Supreme Court Lawyer, says that exits from benami properties will now become extremely difficult and people would prefer to lose wealth and relinquish such properties because of the penalty and the punishment it will attract. “Many would much rather relinquish his interest or rights over the property because the cons are so high. A power of attorney is a legal piece of document but now the driver and peon in whose name the property may have been bought will have to declare their source of income from which such properties were bought and their inability to do so may lead to more people relinquishing their interest in such properties going forward,” he says.[4] First, a benami transaction is one where a property is held by one person and the amount for it is paid by another person. Therefore, in a benami transaction, the name of the person who paid the money is not mentioned. Directly or indirectly, the benami transaction is done to benefit the one who pays. These are not Benami Transactions 1. Property held under the name of spouse or child, for which the amount is being paid through a known source of income.

- A joint property with brother, sister or other relatives for which the amount is paid out of known sources of income.
- Property held by someone in a fiduciary capacity; that is, transaction involving a trustee and a beneficiary.

Assets of any kind movable, immovable, tangible, intangible, any right or interest, or legal documents.

[3] 58th Report of the Standing Committee on Finance on the BTP Bill 2011.

[4] Times of India, “Cabinet approaches new Act to deal with Benami Transactors”, July 21st 2011 pg.3.

As such, even gold or financial securities could qualify to be benami. It is being done to curb on black money. People with unaccounted income will sure have a tough time ahead. As for the general public, it won’t be much of an issue if their transactions are Legal. The report stated that the Act defines a *benami* transaction, as a transaction where in a property is held by or transferred to a person, but has been provided or paid by another person. The definition also includes property transactions where i) a transaction been made under a fictitious name; ii) the owner is not aware or denies knowledge of the ownership of the property; iii) the person providing the property is not traceable.

Authorities incharge: According to the government release, there are four authorities who will conduct inquiries or investigations i) Initiating Officer, (ii) Approving Authority, (iii) Administrator, and (iv) Adjudicating Authority. An Initiating Officer can issue a notice to any *benamidar* on suspicion. The officer may then hold the property for 90 days from the day the notice was issued, subject to permission from the Approving Authority.

Upon the end of the 90 day period, the Initiating Officer may pass an order to continue holding the property following which; he/she may refer the case to the Adjudicating Authority. The Adjudicating Authority will then examine all the documents and evidence, and then pass an order on whether the property will be held as ***benami***. Based on this order, the Administer will receive and handle the property subject to conditions as prescribed. A Joint /Additional Commissioner of Income-tax, an Assistant / Deputy Commissioner of Income-tax, and a Tax Recovery Officer would be notified to perform the functions and exercise the powers of the Approving Authority, Initiating Officer and Administrator, respectively.

Appellate tribunal: An Appellate Tribunal will hear appeals against any orders passed by the Adjudicating Authority while appeals against orders of the Appellate Tribunal will go to the high court. The Tribunal has a maximum time period of one year, from the last day of the month in which the appeal is filed, to hear and finally decide the appeal.

The Appellate Tribunal will consist of a Chairperson and at least two other Members of which one shall be a Judicial Member and other shall be an Administrative Member stated the report. People planning to park their unaccounted wealth in real estate in the names of their drivers, maids or through shell companies, probably using demonetised notes of Rs 500 and Rs 1000 are in trouble, especially after prime minister Narendra Modi’s warning that more anti- graft steps are on the anvil and after the stringent Prohibition of Benami Property Transactions Act (PBPT Act) came into effect this month. Under the Act, a transaction is named ‘benami’ if property is held by one person, but has been provided or paid for by another person. It also prohibits recovery of the property held benami from benamidar by the real owner. Benami properties are liable for confiscation by the Government. People caught with benami properties could end up with up to seven years of rigorous imprisonment and pay a significant fine. Additionally, the properties will be confiscated. A person could also face rigorous imprisonment for up to five years for knowingly giving false information and will have to pay a fine of up to 10% of the market value of the property.

Conclusion

Benami Transactions (Prohibition) Act, 1988 is an Act of the Parliament of India that prohibits certain types of financial transactions. The act defines a 'benami' transaction as any transaction in which property is transferred to one person for a consideration paid by another person.

Such transactions were a feature of the Indian economy, usually relating to the purchase of property (real estate), and were thought to contribute to the Indian black money problem. The act goes on to ban all benami transactions and the right to recover property held benami. The New Law with increased transparency title risks will be minimized and buyer confidence during a residential property transaction will get a boost. A fresh breath of professionalism will be ushered in.

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