

Benami property deals: Apex court rules against raking up old cases

How the Supreme Court's decision on the applicability of the benami prohibition Act helps avert administrative mishap

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Several stakeholders in the real estate industry and individuals facing retrospective proceedings for alleged benami transactions were anxiously awaiting the Supreme Court's recent verdict in *Union of India vs Ganpati Dealcom Pvt Ltd*. The apex court in the *Ganpati Dealcom* case was posed with the question whether the Prohibition of Benami Property Transactions Act, 1988, as amended by the Benami Transactions (Prohibition) Amendment Act, 2016, has a retrospective or prospective application. This article traces the developments on the jurisprudence surrounding benami transactions.

Unaddressed issue

The Hindi word "benami" roughly translates to "without a name". Hence, benami in the context of a property typically implies that the property is purchased in the name of a person (*benamidaar*) who otherwise does not hold a beneficial interest in the property. In *Jaydayal Poddar vs Bibi Hazra*, the apex court outlined a host of factors for determining whether a transaction is benami or not. These include, among others, the source of money, nature of possession post purchase, motive of the purchase, relation between parties involved in the transaction, and the custody of the title deeds post purchase.

Over the years, benami transactions have weaved themselves into the fabric of the Indian economy. The proliferation of benami transactions in India can be attributed to several reasons including (i) secret provisions for families within a Hindu joint family system; (ii) mitigation of socio-economic risks; (iii) defrauding creditors; and (iv) evasion of taxes.

A valid law?

In 1988, the Prohibition of Benami Property Transactions Act was enacted to criminalise benami transactions. The Supreme Court in the *Ganpati Dealcom* case opined that the 1988 Act did not capture the essence of a benami transaction as its definition was worded too broadly to include legitimate transactions as well. Further, it also noted that the 1988 Act did not have any crystallised procedure for initiation or continuance of proceedings against people indulging in benami transactions.

The language of the 1988 Act, as per the apex court, also ignored the aspect of *mens rea* (guilty mind or attribution of criminal intent)



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— a vital concept in criminal law. It observed that merely because the object of the law was to eradicate a social evil, the necessity of criminal intent could not be dispensed with in an offence.

The Supreme Court, while discussing the anomalies in the 1988 Act, opined that it was unconstitutional on account of manifest arbitrariness. The apex court concluded that no law could have incurable gaps to be filled by judicial pronouncements. It acknowledged that the 1988 Act was more of a law that remained on paper and never implemented on the ground. Even otherwise, the apex court opined, the implementation of the 1988 Act would have deleterious consequences, putting at risk the housing colonies and benami allotments of flats by government authorities that were regularised from time to time.

Retrospective or not?

In 2016, the Benami Transactions (Prohibition) Amendment Act was enacted. It introduced detailed provisions and the mechanism relating to the attachment, adjudication, and confiscation of benami property. While defending the retrospectivity of the 2016 Act in the *Ganpati Dealcom* case, the Union of India argued that the 1988 Act was a valid enactment which lacked the procedure to effectuate proceedings against benami transactions. As such, it is a settled norm that a procedural law can be applied retrospectively, and the bar against retrospective applica-

tion only holds for law dealing with substantive rights.

It was submitted that to rectify the defect of lack of procedure, the 2016 Act was introduced as an amendment. The Union of India contended that substantive provisions pertaining to benami transactions being a criminal offence were already in place since the enactment of the 1988 Act. The legislative intent for introducing the 2016 Act as an amendment was to ensure that no immunity was granted to individuals who engaged in benami transactions while the 1988 Act was operational.

To counter the submissions of Union of India, the respondent in the *Ganpati Dealcom* case argued that the 2016 Act could not be treated as retrospective in application as the aspect of retrospective applicability was never dealt with expressly. Further, it was pointed out that the 2016 Act carved out distinct penalties for benami transactions made after the enactment of the 2016 Act. The respondent relied on the decision of the apex court in the Commissioner of Income Tax (Central)-I, New Delhi vs *Vatika Township Pvt Ltd* case to argue that any enactment which substantially affected the rights of people could not be applied retrospectively. Therefore, as per the respondent in the *Ganpati Dealcom* case, the 2016 Act could only have prospective application.

Balancing act

Taking the arguments for both sides into consideration, the apex

court opined that since certain provisions of the 1988 Act pertaining to criminalisation of benami transactions (Sections 3 and 5) were held to be unconstitutional, the 2016 Act could only have created new provisions and new offences. Therefore, there was no question of retroactive application. It was held that the 1988 Act was "stillborn". By amending a stillborn law and giving it a wider scope, the legislature could not have infused new life into the dead provisions. Therefore, as far as the provisions under the 2016 Act are concerned, they would only have prospective application. The apex court held that the continued presence of an unconstitutional law or the claim that such a law was not challenged did not change the fact that the law was unconstitutional.

Confiscation of property

On the procedure for confiscation of benami property, the apex court held that the 2016 Act had the effect of altering substantive rights of the evidentiary standard from that of "beyond reasonable doubt" to "preponderance of probabilities". It held that such a change in the threshold for evidence could not be deemed to be merely procedural. If the procedure and threshold for confiscation under the 2016 Act were to apply retrospectively, the apex court opined, then the rights that have crystallised since 1988 would be in jeopardy. Hence, the Supreme Court concluded that the authorities

cannot initiate or continue criminal prosecution or confiscation proceedings for transactions predating the 2016 Act, which came into force on October 25 that year. As a consequence, all proceedings initiated under the 2016 Act for alleged benami transactions predating October 25, 2016, were quashed by the Supreme Court.

By holding the 2016 Act as a prospectively applicable law, the apex court has taken all transactions dating October 5-25, 2016, away from the ambit of the 2016 Act. Thus, individuals facing retrospective proceedings for their involvement in alleged benami transactions made before October 25, 2016, can breathe a sigh of relief. The decision introduces much-needed clarity on the scope and applicability of the provisions of the 2016 Act and averts a major administrative mishap. It is well known that a lot of benami cooking gas, water and electricity connections and housing allotments were regularised by government authorities from time to time. If the provisions of the 2016 Act were applied retrospectively, many such benami connections and allotments risked facing proceedings. It is believed that the prospective application of the 2016 Act is unlikely to encourage benami transactions as the authorities are still empowered to initiate proceedings for benami transactions made after October 25, 2016.

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