

Benami Law – SC Judgement decoded

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The Hon'ble Supreme Court has given its verdict in case of Union of India & Anr. Vs. M/s Ganpati Dealcom Pvt. Ltd. (Civil Appeal No. 5783 of 2022 [Special Leave Petition © No. 2784/2020])

This much awaited judgement has been delivered by the then Chief Justice of India, Hon'ble Justice N. V. Ramana on August 23, 2022.

There is an impression that it resolves the issue of applicability of 2016 Act being retroactive but the reading of the judgement leaves number of issues yet to be settled by the courts in due course. The court has not given any verdict on the amendments made by 2016 Act. The judgement has not given any view on the extended meaning of 'benami transactions' and how it will affect the existing benami properties and has left this issue open. In my view, this judgement has only limited application to **transactions which were 'benami' under the old law and rights have accrued or vested in the benamidar** as the court has held the old provisions of acquisition as unconstitutional.

As observed, the issue before the court was :

“This case involves a tussle between the normative and positivist positions regarding the nature of a crime and punishment. Treating the Constitution as a flag post, a result of tussle is sought in the following deliberations.”

The judgement further highlights in para 4, the legal question before it as under:

“The short legal question which arises for this Court's consideration is whether the Prohibition of Benami Property Transactions Act, 1988 [for short 'the 1988 Act'], as amended by the Benami Transactions (Prohibition) Amendment Act, 2016 [for short the '2016 Act'] has a prospective effect.”

Having gone into the background of benami transactions, law commission reports and extant law, the Hon'ble apex court discussed at length the provisions of 1988 Act before coming to the amendment Act of 2016. It also took upon itself the task of judicial review of the 1988 Act. The observations made by the apex court on 1988 Act may be summarised as under:

- i. The law chose to include only **tripartite benami transactions**, while bipartite/loosely described as benami transactions, were left out of the definition. (Para 14.1)
- ii. The definition given in 1988 Act **does not capture the essence of benami** transactions as the broad formulation includes certain types of legitimate transactions as well. (Para 14.2)
- iii. Section 3 puts forth a prohibitive provision. Further, it intended to criminalise an act of entering into a benami transaction. (Para 14.4)
- iv. Section 5 which provided for acquisition of benami property was never utilised as it was felt that there was requirement of additional statutory backing to make the law effective (Para 14.6)
- v. Para 14.10 which highlights the background for holding some of the provisions of 1988 as unconstitutional is as under:

“14.10 Reading Section 2(a) along with Section 3 makes one thing clear – the criminal provision envisaged under the aforesaid provisions does not expressly contemplate *mens rea*. Under the Indian jurisprudence, the law on the subject is fairly well settled. It has been subjected to the judicial scrutiny of this Court on several occasions. It does not call for a detailed discussion and is enough to restate the principles. ***Mens rea* is an essential ingredient of a criminal offence.** Doubtless, a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England –and also accepted in India – to construe a statutory provision creating an offence in conformity with common law rather than against it, unless the statute expressly or by necessary implication excluded mens rea. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil which by itself is not decisive of the question as to whether the element of a guilty mind is excluded from the ingredients of an offence. *Mens rea* by necessary implication may be excluded from a statute only where it is absolutely clear that implementation of the object of the statute would otherwise be defeated. [refer Nathulal v. State of Madhya Pradesh, AIR 1966 SC 43]”

- vi. The Court observed that 1988 law was envisaged on the touchstone of **strict liability**.
- vii. In para 14.15, the court highlighted the larger constitutional question as under:

“14.15 Returning to the discussion at hand, there is no doubt that the unamended 1988 Act tried to create a **strict liability offence** and allowed separate acquisition of benami property. **This begs the question whether such a criminal provision, which the State now intends to**

make use of, in order to confiscate properties after 28 years of dormancy, could have existed in the books of law. Other than the abuse and unfairness such exercise intends to bring about, there is a larger constitutional question about existence of such strict provisions without adequate safeguards.”

Act of 2016 is retroactive or prospective

To answer the above question, the court held that it is inevitably tied to an intermediate question as to **whether the 1988 Act was constitutional** in the first place. The arguments which was taken on behalf of the Union of India was that 2016 Act was a **mere gap filling exercise**. Hence, the court became more concerned with the constitutionality of the old law. The Court dealt with at length its powers of judicial review and constitutionality of any provisions.

In Para 15.22 of its order the court held section 3 (finally in conclusion para 3(2) is referred) and 5 of the 1988 Act as unconstitutional from their inception. Para 15.20 and 15.21 are relevant to be reproduced which is as under:

15.20 In any case, such an inconclusive law, which left the essential features to be prescribed through delegation, can never be countenanced in law to be valid under Part III of the Constitution. The gaps left in the 1988 Act were not merely procedural, rather the same were essential and substantive. In the absence of such substantive provisions, the omissions create a law which is fanciful and oppressive at the same time. Such an overbroad provision was manifestly arbitrary as the open texture of the law did not have sufficient safeguards to be proportionate.

15.21 At this stage, we may only note that when a Court declares a law as unconstitutional, the effect of the same is that such a declaration would render the law not to exist in the law books since its inception. It is only a limited exception under Constitutional law, or when substantial actions have been undertaken under such unconstitutional laws that going back to the original position would be next to impossible. In those cases alone, would this Court take recourse to the concept of ‘prospective overruling’.

Section 3(2) and 5 which are held to be unconstitutional are as under:

3. Prohibition of benami transactions

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

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 subsection (1).

Sub-section (3) of section 3 provides for punishment after the coming into force of the 2016 Act has not been touched.

However, interestingly, in para 15.23 of the order, the court specifically saved the civil consequences as provided in 1988 Act and stated "Having said so, we make it abundantly clear that the aforesaid discussion does not affect the civil consequences contemplated under section 4 of the 1988 Act, or any other provisions."

Para 4 which provides for civil consequences is as under:

4.Prohibition of the right to recover property held benami(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on 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 allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(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.

With due respect to the Hon'ble court, the court failed to recognise that such an act will amount to undue enrichment of the benamidar as the real owner cannot claim his property in a suit. Law commission has thought of such a situation and so the provision of acquisition was made which for want of some gaps has been held to be unconstitutional by the Hon'ble court. This provision having been held to be of civil nature has been held to be constitutional. Now section 6, which is inserted by 2016 amendment Act, prohibits re-transfer of benami property by benamidar to the beneficial owner or any other person acting on his behalf. So in

my view this provision will continue to prohibit such retransfer even to properties acquired prior to amendment.

2016 Act and the areas still open for judicial consideration

The court observed that the definition of benami transaction, which is the heart of the entire 1988 Act, has undergone a metamorphosis. In para 16.2 of the order, the Hon'ble court has highlighted the major changes under the definition as under:

- (i) Expansion of the definition from arm's length transactions contemplated under the 1988 Act, **to arrangements and schemes.**
- (ii) **Additional ingredient of benefits flowing to the real owner**, a lacuna pointed in the earlier part, under 1988 Act, is included in terms of Section 2(9)(A)(b).
- (iii) Expansion of the ambit through Section 2(9)(C), to those properties **where benamidar denies knowledge of such ownership.**
- (iv) Expansion of the ambit through Section 2(9)(D), wherein the person **providing the consideration is not traceable or is fictitious.**
- (v) Expansion from recognition of only tripartite transactions under 1988 Act, **to also include bipartite transactions.**

Having noted that the act of 1988 has undergone a metamorphosis, the court did not deal with it any further.

I wish to quote para 17.38 and 17.39 of the order which gives the background for the final conclusion:

“17.38 When we come to the present enactment, history points to a different story wherein benami transactions were an accepted form of holding in our country. In fact, the Privy Council had, at one point of time, praised the *sui generis* evolution of the doctrine of trust in the Indian law. The response by the Government and the Law Commission to curb benami transactions was also not sufficient as it was conceded before this court **that section 3 and 5 of the 1988 Act, in reality, dehors the legality, remained only on paper and were never implemented on ground.** Any attempt by

the legislature to impose such restrictions retroactively would no doubt be susceptible to prohibitions under **Article 20(1) of the Constitution.**

- 17.39 Looking at from a different angle, continuation of only the civil provisions under section 4, etc., would mean that the legislative intention was to ensure that the ostensible owner would continue to have full ownership over the property, without allowing the real owner to interfere with the rights of benamidar. If that be the case, then without effective any enforcement proceedings for a long span of time, **the rights that have crystallized since 1988, would be in jeopardy. Such implied intrusion into the right to property cannot be permitted to operate retroactively, as that would be unduly harsh and arbitrary.**”

The court gave its final verdict in para 18 as under:

18.1 In view of the above discussion, we hold as under:

- a) **Section 3(2) of the unamended 1988 Act** is declared as unconstitutional for being manifestly arbitrary. Accordingly, **Section 3(2) of the 2016 Act** is also unconstitutional as it is violative of Article 20(1) of the Constitution. (Section 3(2) provides for punishment for benami transactions prior to coming into force of 2016 amendments).
- b) In *rem* forfeiture provision under 5 of the unamended Act of 1988, prior to the 2016 Amendment Act, was unconstitutional for being manifestly arbitrary.
- c) The 2016 Amendment Act was not merely procedural, rather, prescribed substantive provisions.
- d) In *rem* forfeiture provision under Section 5 of the 2016 Act, being punitive in nature, can only be applied prospectively and not retroactively.
- e) Concerned authorities cannot initiate or continue criminal prosecution or confiscation proceedings for **transactions entered** into prior to the coming into force of the 2016 Act, viz. 25.10.2016. As a consequence of the above declaration, all such prosecutions or confiscation proceedings shall stand quashed.

f) As this court is not concerned with the constitutionality of such independent forfeiture proceedings contemplated under the 2016 Amendment Act on the other grounds, the aforesaid questions are left open to be adjudicated in appropriate proceedings.

In Para 17.28 of the order also the apex court has left open the **question of proportionality of separate confiscation procedure** prescribed in 2016 Act.

Authors' view

- ✓ The above decision of the court will apply to 'transactions' which were in the nature of 'benami transaction' in the original 1988 Act.
- ✓ Where any or some rights have accrued to the benami holder of property.
- ✓ The civil consequences as provided in Section 4 will continue to apply even post the 2016 Act and the interpretation of the aforesaid section as given in the R. Rajagopal Reddy Case, continues to apply. In this decision, it was held that sub-section (1) of section 4 can only be applied to suit claim, or action to enforce any right in property held benami against person in whose name such property is held or any other person, if such proceedings is initiated by or on behalf of a person claiming to be the real owner thereof after coming into force of sub-section (2) and not to pending proceedings as held in earlier decision of two judge bench.
- ✓ It has not dealt with the effect of expanded definition of 'benami transactions' as noted by the hon'ble apex court which includes 'arrangement' and holding of property. **In my view, this issue is left open because of clause (f) of conclusion.**
- ✓ What will happen to properties held under 'power of attorney' or through unregistered agreements. In my view, this decision will not help such cases as such agreements otherwise also did not give any right to the holder of the property after the amendments in Transfer of Property Act and the Registration Act.
- ✓ Transactions or arrangement in respect of property carried out or made in a fictitious name will also not get any benefit of this decision as the property has not vested in anyone. The judgement will give protection only to those cases where some right has accrued or vested in benamidar as per old law or the recognised custom as the prosecution and acquisition both has been

held to be unconstitutional and the 2016 Act cannot fill the procedural gaps.

- ✓ Similarly, in cases where the owner himself is not aware or denies the ownership, this decision may not help as it cannot be said that the owner was having any vested right in the property.

In nutshell, I am of the view that the decision of the apex court will come to help only those which were 'benami properties' under the old law and no action of acquisition were taken in old law. The decision does not deal with the new definitions and has not dealt with the constitutionality of the new provisions and has left open the matter in clause (f) of para 18 of the conclusion. The court has also left open the proportionality of separate confiscation procedure prescribed under the 2016 Act.

This decision has left unanswered more than to have resolved the issue.