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LAW COMMISSION OF INDIA

FIFTY-SEVENTH REPORT
BENAMI TRANSACTIONS

August 1973

GOVERNMENT OF INDIA
MINISTRY OF LAW, JUSTICE & COMPANY AFFAIRS

Chairman

P. B. GAJENDRAGADKAR

LAW COMMISSION
NEW DELHI—110001

Dated : the August 7, 1973.

My dear Minister,

I have great pleasure in forwarding herewith the 57th Report of the Law Commission on 'Benami Transactions'.

The circumstances in which the subject was taken up by the Law Commission are stated in the opening paragraph of the Report.

When the subject was taken up, a Questionnaire giving a brief resume of the present position, setting out the problem and putting forth the possible alternatives for reform of the law was prepared. After approval by the Commission, it was circulated to State Governments, High Courts, Bar Associations, Chambers of Commerce and other interested persons and bodies. The views expressed on the Questionnaire were studied, and a draft Report prepared on the subject. This was considered by the Commission, and the Report was revised in the light of the discussions.

With kind regards,

Yours sincerely,

P. B. GAJENDRAGADKAR

Shri H. R. Gokhale,
Minister of Law, Justice & Company Affairs,
Government of India,
NEW DELHI

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CHAPTER I

INTRODUCTION

1.1 **Genesis and scope of the Report.**—The question of prohibiting *benami* transactions has been taken up by the Law Commission on a reference made on the subject by the Union Government.¹

1.2 In the letter of reference sent to the Law Commission, it is stated :—

“The problem of property held *benami* has been causing concern to the taxing authorities for some time. The Select Committee on the Taxation Laws (Amendment) Bill, 1969 had also suggested that Government should examine the existing law relating to *benami* transactions with a view to determining whether such transactions should be prohibited. This suggestion was re-iterated in Parliament during the debate on the Taxation Laws (Amendment) Bill, 1971.”

Accordingly, the Law Commission has been asked to examine the matter and let Government have the benefit of its advise on the question of prohibiting the practice of holding property *benami*.

1.3 The letter addressed by the Government refers to the views expressed by the Select Committee on the Taxation Laws (Amendment) Bill, 1969. It appears that the Committee made the following comment² :—

“45. *Clause 43 (New Clause 34)*—As explained in paragraph 13, the Committee have decided to drop the new procedure for ‘recognition’ of partnership firms and to continue the existing procedure for registration of such firms with a few modifications.

During the course of the discussion of the modifications given effect to in this clause, it was suggested that Government should examine the existing law relating to *benami* transactions with a view to determine whether such transactions should be prohibited, and the Committee had agreed to this suggestion.”

1.4. During the debate³ on the ‘Taxation Laws’ Amendment Bill 1971, one of the Members⁴ commenting that the proposed amendment of the Income-tax Act was inadequate, observed as follows :—

“Even now, *benami* transactions are not debarred by law. A very drastic remedy is needed. That is the point that I am

1. Letter No. 2462/72/Adv. F, dated 20th December, 1972, of the Minister of Law to the Chairman, Law Commission.
2. Taxation Laws (Amendment) Bill, 1969—Report of the Select Committee (3rd August, 1970), page XVII.
3. Rajya Sabha Debates.
4. Shri T. N. Singh.

making. Merely saying that he will suffer in a certain way and that it will be discouraging the *benami* transactions is not enough. All *benami* transactions should be debarred under the law. And I want to know why it has not been done. Why do you want to encourage *benami* transactions indirectly by a supposed penalty or harm or by saying that the party may suffer because he has done that? Why not debar it completely?"

1.5 Meaning of 'benami transaction'.—Purchase or holding of properties in the name of another is known, in India, as a *benami* transaction. This custom has been recognised by Indian Courts for a long time. Literally, the word "*benami*" means 'without name'. The essential legal characteristic of these transactions is that there is no intention to benefit the person in whose name the transaction is made. The name of that person, popularly known as the 'benamidar', as the Privy Council pointed out,¹⁻² is simply an *alias* for that of the person beneficially interested. The *benamidar* has the ostensible title to the property standing in his name; but the beneficial ownership of the property does not vest in him but in the real owner.

1.6 Risk offset by greater advantage.—There is always a risk in giving or holding property in names different from those of the real owners. But still, *benami* transactions are resorted to in order to avoid the greater risks referred to below.^{2a}

1.7 Factors accounting for the origin of benami.—The practice of *benami* might have come into existence by reason of a number of factors:—

- (a) The Joint Hindu Family system and a desire to make secret provisions is one factor³ which might have led to the practice of *benami*.
- (b) Fraud on creditors might be another such factor. As Bhat-tacharya⁴ has observed:—

"Since its first establishment, the British Government, in the exercise of its legislative functions, have from time to time made attempts to check the inveterate practice obtaining in India of holding property by one person in the name of another. This practice, having its origin in the dishonest motive of defrauding creditors of their just and lawful dues, has had so large and widespread prevalence here that the legislature cannot altogether put an end to it by a drastic enactment declaring the practice absolutely illegal in all cases."

1. *Pether Perumal v. Muniandy*, (1908) I.L.R. 35 Cal. 551, 558 (Privy Council).

2. *Gurnarain v. Sheolal*, A.I.R. 1918 P.C. 140.

2a. See para 1.7(d), below.

3. West and Buhler, 'Hindu Law', (Fourth Edition), pages 157, 563.

4. K. K. Bhattacharya, Joint Hindu Family, (Tagore Law Lectures) (1884-85), pages 469, 470.

“Such a step would be attended with immense mischief. But, as the British Government by its revenue laws has retained in its hands the supreme control over the vast majority of landed property, there have been enactments¹ to discourage benami purchases at a revenue sale.”

- (c) Desire to evade taxes may be another motive of persons entering into *benami* transactions. The victim here is not individual, but the State. Nevertheless, it is a species of fraud.
- (d) Benami transactions might also have originated in a desire to avoid certain political and social risks. According to Pollock,² “Practices of this kind (*benami* practices) naturally grow up in a state of society where there is an appreciable risk, from one generation to another, of hostile conquest or confiscations. And, having regard to the political state of India before and after the short-lived prosperity of the Mogul Empire, I do not see the necessity of explaining the frequency of these transactions by some supposed innate love of secrecy in the minds of oriental owners of property. Neither is there anything surprising in the persistence of the habits of the kind after the reasons for them disappear. Our modern life is full of these survivals in things great and small. Again, it is quite natural for ingenious persons to discover that the means of concealment which formerly were a shelter from the strong hand of princes and adventurers can be turned in peaceful times to the less ambitious but not less lucrative end of baffling creditors.”

1.8 Judicial recognition of benami.—Whatever the factors which led to the practice of *benami*, there is no doubt that it has a firm footing in the legal system. Judicial recognition of the practice came very early in India. In one of the very early Calcutta cases,³ a purchase in the name of the wife's name was held to be “*Farzi*” (fictitious). It was held that the property vested in the person to whom the grant was actually made, and not necessarily in the person whose name was made use of.

1.9 Essence of benami transaction.—The various aspects of *benami* transactions, and the relevant statutory provisions, will be discussed in detail, later. At this stage, it is sufficient to state that the essence of

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- 1. The author cites several enactments to illustrate this proposition.
 - 2. Pollock, *Law of Fraud, misrepresentation mistake* (1894), page 83, 84.
 - 3. *Sheikh Bahadur Ali v. Sheikh Dhomu*, 1 Calcutta Sud. R. Diw. Rep. 250, 251, cited in Tyabji, *Muslim Law* (1968), page 396, foot note 1.
 - 4. (a) *Balanjyappa Chetty v. Arumugon Chetty*, (1864) 2 M.H.C.R. 26.
(b) *Bipen Beharee Chaudhry v. Ram Chunder Roy*, (1870) 14 W.R. 12, 15, (common form of *Benami*).
 - (c) *Tagore v. Tagore*, (1872) I.A. Supp. 47, 71 (“*Tagore Case*”).
 - (d) *Ravji v. Mahadev*, (1897) I.L.R. 22 Bom. 672.
 - (e) *Akbar Ali v. Mahomed Faiz Buksh*, (1871) 15 W.R. 12, 14.

benami transactions is the use of an *alias* in respect of the holding of property, usually, (but not always) with the object of concealing the real owner. Benami transactions are not confined to purchases, and can extend to other modes of transfer.

1.10 **Benami transactions common in India.**—It is not disputed that benami transactions are common in India. As the Federal Court observed¹—

“A practice has long been common in this country for intending alienees of land to take the document of transfer in the name of their friends or relatives, sometimes with a view to defeat the claims of creditors, sometimes with a view to avoid claims by other members of their own family, and sometimes to escape restrictions imposed upon them by Government Servants’ Conduct Rules etc.”

1.11 Sir George Farwell’s observations in the Privy Council² may also be quoted :—

“Down to the taluqdar’s death the natural inference is that the purchase was a benami transaction a dealing common to Hindus and Muhammadans alike, and much in use in India ; it is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our Common law, that where a feoffment is made without consideration the use results to the feoffer.”

1.12 In the leading case of *Gosain v. Gosain*³, Lord Justice Knight Bruce, delivering the opinion of the Privy Council, took the view that the English doctrine of advancement did not apply in India. He said—

“If then the person in whose name the purchase was effected had been a stranger in blood, or only a distant relative, no question could have arisen; he would have been *prima facie* a trustee, and if he desired to contend that the *prima facie* character of the transaction was not its real character, the burthen would have rested on him ; but the individual in whose name the present purchase was effected was the son, and at that time the only son, of the person who made the purchase, and whose money it was, and it has been contended that the circumstance changes the presumption, and that what would be the presumption in the case of a stranger does not exist between father and son ; that the presumption is advancement, and that, therefore, the burthen of proof is

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1. *Punjab Province v. Daulat Singh*, A.I.R. 1942 F.C. 38, 40 (Varadachariar J.)
 2. *Bilas Kunwar v. Desraj Ranjit Singh* (1915) I.L.R. 37 All. 557, 564, 565; A.I.R. 1915 P.C. 96.
 3. *Gopeekrist Gosain v. Gungapersaud Gosain* (1854) 6 M.I.A. 53.

shifted. Now, on this, as far as their Lordships can learn, there is no authority in Indian law, no distinct case, or *dictum*, establishing or recognising such a principle, or such a rule. It is clear that in the case of a stranger the presumption is in favour of its being a *benamee* transaction, that is a trust; but it is clear also that in this country, where the person in whose name the purchase is made is one for whom the party making the purchase was under an obligation to provide, the case is different; and it is said that that ought to be deemed the law of *India* also, not because it is the law of *England*, but because it is founded on reason and the fitness of things, if I may use the expression, or natural justice, that on such grounds it ought to be considered the law of *India*. Now, their Lordships are not satisfied that this view of the rule is accurate, and that it is not one merely *proprii juris*. Probable as it may be, that a man may wish to provide for his son to a certain extent, and though it may be his duty to do so, yet there are other considerations belonging to the subject; among others, a man may object to making his child independent of him in his life time, placing him in such a position as to enable him to leave his father's house and to die, leaving infant heirs, thus putting the property out of the control of the father. Various reasons may be urged against the abstract propriety of the *English* rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognising a purchase by one man in the name of another, to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances; but in *India* there is what would make it particularly objectionable, namely, the impropriety or immorality of making an unequal division of property among children. This might be more striking where there were more sons than one; but if the objection exists, it does not become less where there is only one son, for the father may have others, and in such a case the same objectionable consequences would follow as where several sons were in being."

1.13 **Legality of benami transactions.**—In itself, a benami transaction is not illegal, because "transfer of property", by its definition,¹ does not require that the transfer *in favour of one person* may not be *in the name of another person*.

1.14 **Propriety of benami transactions.**—As to the propriety of benami transactions, the Federal Court observed²:—

"A notion has sometimes prevailed in this country that all benami transactions must be regarded as reprehensible and

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1. Section 5, Transfer of Property Act.
 2. *Punjab Province v. Daulat Singh*, A.I.R. 1942 F.C. 40 (Varadachariar J.)

improper, if not illegal; but, as late as in 1915, Sir George Farwell, delivering the judgment of the Judicial Committee in 37 All. 557¹ spoke of them as 'quite unobjectionable' and as having their analogues in the English law; and Mr. Ameer Ali, delivering the judgment of the Committee in 46 Cal. 566², observed that 'there is nothing inherently wrong in it, and it accords, within its legitimate scope, with the ideas and habits of the people'. As indicated by the qualifying words 'within its legitimate scope', their Lordships' observations were clearly not meant to countenance transactions entered into for fraudulent or illegal purposes."

1.15 Resort to benami to commit fraud.—Every benami transaction is not harmless. Past experience shows that benami transactions have often been resorted to for furthering illegal or questionable objects, including the evasion of taxes. Benami transactions are sometimes also resorted to in order to defeat creditors.

1.16 Legislative inroads.—The legislature, realising this abuse of the practice of 'benami', has already made certain provisions to guard against the dishonest use of benami transactions.³

1.17 Legal and factual controversies.—Apart from these undesirable consequences of benami transactions, it may be noted that the recognition of this practice as a part of the legal system creates controversies, both legal and factual, in the actual application of the law in courts; and this itself leads to complexity and uncertainty⁴. It appears to us that such complexity and uncertainty is worth avoiding, if that can be done without causing any serious hardship.

1.18 Scope of rest of the Report.—The rest of this Report will, accordingly, be concerned with an analysis of certain aspects of benami transactions, so as to illustrate the legal and factual controversies referred to above,⁵ and with an examination of the justification for a change in the law, and the direction in which the change could be usefully made.

1. *Mt. Bilas Kunwar v. Desraj Ranjit Singh*, A.I.R. 1915 P.C. 96; 37 All. 557; 42 I.A. 202 (P.C.).

2. *Gur Narayan v. Sheo Lal Singh*, A.I.R. 1918 P.C. 140; 46 Cal. 566; 46 I.A. 1 (P.C.)

3. See Chapter 4, *infra*.

4. See para 6.21, *infra*.

5. Para 1.17, *supra*.

CHAPTER 2

BENAMI TRANSACTIONS IN GENERAL

2.1 Nature of a benami transaction.—The nature of a benami transaction has been described by the Judicial Committee of the Privy Council¹ thus—

“The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benami system, is and has been a common practice in the country..... The rule applicable to benami transactions was stated with considerable distinctness in a judgment of this Board delivered by Sir George Farwell.² Referring to a benami dealing, their Lordships say: “It is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our common law that where a feoffment is made without consideration the use results to the beoffer”.

“So long, therefore, as a benami transaction does not contravene the provisions of the law, the courts are bound to give it effect. As already observed, the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned, he is a mere trustee for him.....”

2.2 As between the benamidar and the real owner, the law fully recognises the ownership of the real owner, and disregards the benamidar. This, of course, is subject to certain statutory exceptions, which will be dealt with in due course.³

2.3 Principle that transaction is presumed to be for benefit of person providing money.—The principle is that where property is acquired in the name of one person but the purchase price is paid by another, a presumption arises that the transaction was one for the benefit of the person providing the money. Such cases are common in India where ‘benami’ transactions are recognised.

1. *Gurnarayan v. Sheolal Singh*, A.I.R. 1918 P.C. 140, 143.
2. *Bilas Kunwar v. Besraj Ranjit Singh*, A.I.R. 1915 P.C. 96 (Also see para 1.11, *supra*).
3. See chapter 4, *infra*.

In support of this general proposition, the undermentioned cases¹⁻⁶ may be cited:—

2.4 Benamidar representing the true owner.—In general, the benamidar fully represents the owner of the property in dealings with the third persons. In fact, that is the very object of benami transactions. The property stands “in the name” of the benamidar, and a third party would not be able to challenge his title so long as the real owner does not come in the picture. The cases mentioned in the footnotes illustrate or discuss the application of this principle.^{7/8/9}

At the same time, it is clear that the Benamidar cannot act in opposition to the real owner.¹⁰

2.5 Position as between real owner and third parties.—As to the position between the real owner of the property and third parties, ordinarily the real owner will not have an occasion to make any assertions about title. If, however, such a situation does arise, then law will have regard to the reality, and (disregarding the ostensible title of the benamidar), the law will allow the real owner to assert his ownership, as a general rule.

2.6 Statutory modifications of general principles.—The general position regarding benami transactions has been modified, or may, in practice, become modified, by reason of certain statutory exceptions, chief amongst which are the following :

- (i) Section 66, Code of Civil Procedure, 1908;¹¹
- (ii) Sections 41 and 53. Transfer of Property Act, 1882;¹²
- (iii) Section 281-A, Income-tax Act, 1961, as inserted by the Taxation Laws (Amendment) Act, 1972 (45 of 1972).¹³

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1. *Gopee Krist Gosain v. Ganga Prasad Gosain*, (1854-57) 6 M.I.A. 53 (P.C.) [See para 1.12 *supra*].
 2. *Bilas Kunwar v. Desraj Singh*, (1915) I.L.R. 37 All. 557; 42 I.A. 202; 19 C.W.N. 1207 (P.C.).
 3. *Nrityamoni Dasi v. Lakhan Chander Sen*, (1916) I.L.R. 43 Cal. 660; 20 C.W.N. 552 (P.C.)
 4. *Raja of Deo v. Abdullah*, (1918) I.L.R. 45 Cal. 909; 45 I.A. 97; 22 C.W.N. 891 (P.C.).
 5. *Gur Narayan v. Sheo Lal Singh*, (1919) I.L.R. 46 Cal. 566 (P.C.)
 6. *Promode Kumar v. Madan Mohan*, A.I.R. 1923 Cal. 228. 27 C.W.N. 305.
 7. *Murlidhar v. Paramanand*, A.I.R. 1932 Bom. 190 (Shingne J.).
 8. *Radhakrishnan v. Union of India*, A.I.R. 1959 Bom. 102, 104, 105 (Shelat J.).
 9. *Gur Prasad v. Hansraj*, A.I.R. 1946, Oudh 144, 145 (reviews cases).
 10. *Radhakrishnan v. Union of India*, A.I.R. 1959 Bom. 102.
 11. Chapter 4, *infra*. Also see 54th Report of the Law Commission.
 12. Chapter 4, *infra*.
 13. Para 4.3, *infra*, relating to section 281A, Income-Tax Act.

2.7 **Expression "Benami" not frequently used in statute law.**—As a matter of legal theory, benami transactions, though familiar to every Indian lawyer, do not figure in many statutory provisions; and, with a few exceptions to be presently noted,¹ the word 'benami' remains rather a stray visitor to the world of legislation, though a familiar figure in the judicial sphere.

2.8 **Section 82, Trusts Act—Resulting Trust.**—The most important provision which has the effect of giving a statutory footing to benami is in the Trusts Act² which creates a resulting trust.

2.9. **Uncertainty as to how far doctrine of benami survivors independently of the Trusts Act.**—It is not very clear whether the doctrine of benami should now be regarded as resting on this provision of the Trusts Act, or whether the doctrine is to be treated as independent of it. Judicial decisions relevant to benami, though they occasionally refer to the provision in the Trusts Act, do not usually proceed to deal specifically with the above question. It should be noted that if the former view is correct, then the title passes to the benamidar, though he holds the property in trust. If the latter view is correct, then title does not pass at all to the benamidar. The latter view appears to be favoured by Mulla³ and by some cases.⁴ The former view has the support of observations in some cases.⁵

2.10. In an Oudh case⁶, the Additional Judicial Commissioners discussed the case law on the subject, and the proposition was laid down that section 82, Trusts Act, appears to throw the burden of proof of benami on the person who alleges that the transaction is benami, while previously (i.e. before the Act) where one person paid the consideration, he could throw the burden of disproof on the other side.

2.11. **Views that section 82 alters burden of proof.**—According to another view⁷ "section 82, Trusts Act, though it may not have really altered the burden of proof, has made it much clearer than it was before that the burden of proof of establishing all the facts necessary to lead to the inference that a transfer was benami lies upon the person asserting it to be so."

1. Para 4.3. *infra*, relating to section 281A, Income Tax Act.

2. Section 82, Trusts Act.

3. *Cf.* Mulla, Transfer of Property (1966), Commentary on section 53, page 272.

4. Para. 2.12, *infra*.

5. Para. 2.13 and 2.15, *infra*.

6. *Raj Kunwar v. Rani Maharaj Kunwar*, A.I.R. 1925 Oudh 243.

7. *Sardar Jahan v. Smt. Afzal Begam*, A.I.R. 1941 Oudh 288, 292 (Yorks & Aggarwal 33).

2.12. In a Bombay case, Shelat J. made the following observations¹:—

“Now, it is true that under sections 80 and 82 of the Trusts Act a benamidar holds the property for and on behalf of the real owner in consequence of which there would be a resulting trusts in respect of the property in favour of “the real owner”. But then, it would be fallacious to urge from those sections that the legal ownership in such property vests in the benamidar as it does in the case of trustee. What those sections really mean is that a benamidar is in a fiduciary relationship with the real owner and therefore has all the obligations of a person in such fiduciary position towards the real owner. *A benamidar is no more than an ostensible owner of the property he holds benami, though his acts in certain circumstances would be binding upon the real owner.* That is because the real owner holds him out to third parties as an owner of the property. It is, however, impossible to say as in the case of a trustee that any right in the property either vests in him or that under section 13 and the sections following thereafter of the Trusts Act any obligations therein set out fall on him. *In Gur Narayan v. Sheolal Singh*, I.L.R. 46 Cal. 566: (A.I.R. 1918 P.C. 140(C)), their Lordships of the Privy Council *stated* that so long as a benami transaction did not contravene the provisions of the law the Courts were bound to give effect to it but they made it clear also that the benamidar has no beneficial interest in the property that stands in his name; he represents in fact the real owner and so far as their relative legal position is concerned, he is a mere trustee for him.”

2.13. There is an exhaustive discussion of the position in a Federal Court judgment.² We quote only the important portion:—

“It is true that the Indian law does not recognise an equitable ownership in the sense known to the English law, because we here do not, as in England, have two kinds of law or jurisdiction, viz., common law and equity; but on an analysis of the legal incidents involved, it will be found that for all practical purposes there is little or no difference between a beneficiary under the English law and a beneficiary under the Indian Trusts Act, so far as the substance of their rights is concerned. I may first point out that so far as the “rights and privileges are concerned, there is little or no difference between a beneficiary under an express trust and a beneficiary under a resulting or constructive trust, if we leave alone questions arising under the Limitation Act. Section 82, Trusts Act, which deals with benami transfers, occurs in the chapter

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1. *Radhakrishnan v. Union of India*, A.I.R. 1959 Bom. 102, 104, 105 (Shelat J.).
 2. *Punjab Province v. Daulat Singh*, A.I.R. 1942 F.C. 38-43 (Varadachariar J.)

beginning with section 80, which provides that an obligation in the nature of a trust is created in certain specified cases; and section 82 enacts that the transferee must hold that property for the benefit of the person paying or providing the consideration. Section 95 re-affirms the provision implied in section 80. In the case of express trusts, the Act describes the beneficiary's rights against the trustee as "beneficial interest or interest of the beneficiary." Under section 55, the beneficiary has, subject to the provisions of the instrument of trust, a right to the rent and profits of trust property and under section 56 the beneficiary, if there is only one and he is competent to contract, may require the trustee to hand over possession of the trust property to himself. This is almost a matter of course where, as in benami transactions, the holder of the legal title is only a bare trustee. Under section 58, the beneficiary, if competent to contract, may transfer his interest, and under section 69, every person to whom a beneficiary transfers his interest has the rights of the beneficiary in respect of such interest at the date of the transfer."

2.14. The following statement of the law is from a Madras case¹.—

"When a person acquires an interest in property with his funds in the name of another for his own benefit, the latter is called a benamidar. A benamidar is not a trustee in the strict sense of the term. He has the ostensible title to the property standing in his name, but the property does not vest in him but is vested in the real owner. He is only a name lender or an *alias* for the real owner. The cardinal distinction between a trustee as known to English law and a benamidar lies in the fact that a trustee is the legal owner of the property standing in his name and the *cestui que* trust is only a beneficial owner, whereas, in the case of a benami transaction, the *real owner has got the legal title though the property is in the name of the benamidar*.....If a mortgage stands in the name of a benamidar, the person for whom the mortgage was obtained could sue on the mortgage, and the same rule applies to other transactions except those forbidden by law. The benamidar has some of the liabilities of a trustee but not all his rights. When the benamidar is in possession of the property standing in his name, he is in a sense the trustee for the real owner."

2.15. In an Oudh case², however, it was observed—

"A benamidar holds the property as a trustee for the beneficiary³. The legal title in the property vests in him and not in

1. *Pitchayya v. Rattamma*, A.I.R. 1929 Mad. 268, 269 (Devadoss and Walsh JJ.)

2. *Gur Prasad v. Hansraj*, A.I.R. 1946 Oudh 144, 145 (Ghulam Hasan C.J.).

3. Emphasis supplied.

the beneficiaries. As a legal owner, a benamidar has the right to sue for possession against a trespasser. In 58 I.A. 279¹, the Privy Council remarked that Indian law does not recognise legal and equitable estates. According to that law there can be but one owner, and where the property is vested in a trustee, *the owner must be the trustee.*"

2.16. These decisions² show that the legal position is somewhat obscure as to the vesting of the title. They show the misconception that is likely to arise, so long as benami is recognised.

1. *Chhatra Kumari Devi v. Mohan Bikram Shah*, (1931) A.I.R. 1931 P.C. 196; 58 I.A. 279.

2. Para 2.15, *supra*.

CHAPTER 3

BENAMI TRANSACTIONS IN ENGLISH

3.1. Introductory.—In this Chapter, we propose to make a brief comparison of the Indian law in regard to benami with the English law on corresponding matters.

3.2. General rule in England.—The general rule in England is that where a person purchases property in the name of a third person, a trust “results” in favour of the purchaser (or his representative). This is not, however, an absolute rule; it is a presumption which varies according to the facts. There is an important difference as between conveyance to a relation (of the purchaser) and a conveyance to a person who is not a relation. In the former case, the presumption is that the purchaser did not intend to benefit the nominal transferee, and a trust results to the man who advanced the purchase money.¹

3.3. Purchase in another’s name a common form of resulting trust in England.—Purchase in another’s name has been described in England² one of the most important and common forms of resulting trusts. The rule is that where *real*³ or *personal*⁴ property is vested in a purchaser jointly with others or in another or other persons alone, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money; the beneficial interest in the property “results” to the true purchaser. The general principle of such trusts was established as long ago as 1788 in *Dyer v. Dyer*⁵ by Eyre C. B.

Section 82, Trusts Act is based on the same principle.

3.4. English rule based on presumption.—Primarily, the English rules on the subject are based on the intention of the parties.

Upon similar grounds i.e. on the ground of intention, where a man buys land in the name of another, and pays the consideration money,⁶ there is a resulting trust in his favour.

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1. *Dyer v. Dyer*, (1788) 2 Cox 92.
 2. Parker and Mellows, *Modern Law of Trusts*, (1966), page 101.
 3. *Dyer v. Dyer*, (1788) 2 Cox Eq. 92 (real property).
 4. *Re Scottish Equitable Life Assurance Society*, (1902) Ch. 282 (in respect of personal property).
 5. *Dyer v. Dyer*, (1788) 2 Cox Eq. 92, 93.
 6. *Rider v. Kidder*, 10 Ves. 360.

As has been stated.¹ "The clear result of all the cases, is" that "the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the name of others, without the purchaser; whether in one name or several; whether jointly or successively (successive), results to the man who advances the purchase-money. This is a general proposition, supported by all the cases, and there is nothing to contradict it. And it goes on a strict analogy to the rule of the common law, that, where a feoffment is made without consideration, the use results to the feoffor".

3.5. Supply of money basis of rule.—In truth, this rule has its origin in the natural presumption² in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than for that of another; and that the conveyance in the name of the latter, is a matter of convenience and arrangement between the parties, for other collateral purposes. The same doctrine is applied to cases where securities are taken in the name of another person, as, if A takes a bond in the name of B, for a debt due to himself, B will be a trustee for A for the money.³

3.6. Presumption rebuttable—Presumption of advancement.—The presumption which arises on a purchase in the name of another is rebuttable by parol or other evidence that the purchaser intended to benefit the other. Further, in certain circumstances there is a presumption the other way, namely, that there is no resulting trust. This applies where the person in whom the property is vested is the lawful wife or child of the purchaser or was a person to whom he stood in *loco parentis*.

3.7. Exception as to child based on moral obligation.—As regards the exception recognised in English law (in respect of cases where property is purchased by a parent in the name of a son), it has been stated⁴ that the moral obligation of a parent to provide for his children is the foundation of this exception, "since it is not only natural, but reasonable in the highest degree, to presume that a parent, by purchasing in the name "of a child, means a benefit for the latter in the discharge of this moral obligation, and also as a token of parental affection". The like presumption exists in the case of a purchase by a husband in the name of his wife and of securities taken in her name.⁵

1. *Dyer v. Dyer*, (1788) 2 Cox 92, 93 (Eyre C.B.).

2. Story, *Equity Jurisprudence*, (1919), page 507, para. 1201.

3. (a) *Ebrand v. Dancer*, 2 Ch. C. 26; s.c. 1 Eq. Abr. 382, pl. 11; 2 Mad. Pr. Ch. 101.

(b) *Lloyd v. Read*, I.P. Will. 607.

(c) *Rider v. Kidder*, 10 Ves. 366.

4. Story, *Equity Jurisprudence*, (1919), page 508, paragraph 1203.

5. *Dunbar v. Dunbar*, (1909) 2 Ch. 369, 101 L.T. 553.

3.8. Presumption of advancement also rebuttable.—However, just as the presumption of a resulting trust may be rebutted, so also may the presumption of advancement be rebutted; and it may be done in the same way by evidence of actual intention.

3.9. No rebuttal where fraudulent or illegal purpose.—There is yet a further restriction on the ability to adduce evidence in rebuttal of the presumption. This is that the transferor cannot rebut the presumption by evidence that the transfer was for a fraudulent or illegal purpose and the transferee intended to retain the beneficial interest. Accordingly, where a husband took a lease of land in his wife's name in order to protect the property from creditors, it was held that he could not adduce evidence to show that he did so for the purpose mentioned above.¹

It will be found that there were two relevant intentions in the above case.³ The first was the intention of the husband that the house and land should, so far as the beneficial interest was concerned, be and remain his. The second intention was that he put the land and house into his wife's name with a view to protecting it from his creditors in case he should get into financial difficulties.

The first intention was not given recognition because of the second.

3.10. In England, the principle applies also where the purpose of the transfer is to defeat revenue laws,—where English or foreign.² Equity will not assist a person who seeks to contravene revenue laws—whether English or foreign.

3.11. Purchase in name of stranger—English law.—So far as the purchase in the name of a stranger is concerned, the position is not different in England and in India. Under the Trusts Act,⁴ there is a resulting trust in this case.

3.12. Presumption where transfer in favour of relation and English law.—If the conveyance is to the wife or child of the purchaser, then the presumption (in England) is the other way, namely, that the purchaser intended to benefit the child or wife. This is known as the presumption of 'advancement'.⁵ This presumption displaces the presumption of resulting trust, on the logic that in view of the relationship

1. *Gascoigne v. Gascoigne*, (1918) 1 K.B. 223 (Intention to defeat creditors).

2. *Gascoigne v. Gascoigne*, (1918) 1 K.B. 223.

3. *Re Emery's Investment Trusts*, (1959) Ch. 410; (1959) 1 All E.R. 577 (Evasion of tax of friendly foreign country).

4. Section 82, Indian Trusts Act, 1882.

5. Para 3.6, *supra*.

between the true purchaser and the nominal purchaser, it may be presumed that a gift to the nominal purchaser was intended. This presumption of advancement is also rebuttable by evidence to the contrary, whenever the consideration for the purchase of property is advanced by another person.

3.13. **Indian law different.**—Where the purchase is in the name of a relation, the Indian law is the reverse of the English law. The provision in the Trust Act¹ as to resulting trusts continues to operate, and is not displaced² by a presumption of advancement as in England.³

The English presumption of advancement has not been applied in India on the ground that it is a rule of positive English law and not founded on natural justice.^{4,5}

Of course, evidence of intention could still be given to turn the scales,⁶ and it appears that very little evidence might suffice to turn the scale. But the initial presumption is as stated above.

1. Section 82, Trusts Act.

2. *Guran Ditta v. Ram Ditta*, (1928) 32 Calcutta Weekly Notes 871 A.I.R. 1928 P.C. 172.

3. Para 3.6 to 3.12, *supra*.

4. *Gopeekrit v. Gunga Prasad*, (1854) 6 Moore's Indian Appeals 53.

5. See also para 1.12, *supra*.

6. *Mohammad Sidiq v. Fakhar Jahan*, (1931) 59 I.A. 1, 15.16, 36 Calcutta Weekly Notes 137, 146 (P.C.).

CHAPTER 4

STATUTORY MODIFICATIONS RELEVANT TO BENAMI

4.1. **Statutory modifications of general principle recognising benami.**—So far, in India, two important statutory modifications of the general principle that the real owner is recognised by the law in place of the 'benamidar' have been made. The first is in the Code of Civil Procedure; the second is in the recent amendment of taxation laws. Certain other provisions are also of interest.

4.2. **Section 66 Civil Procedure Code.**—As regards the first, the relevant section¹ in the Civil Procedure Code (so far as is material) provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court, (in such a 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.

Similar provisions exist for revenue, sales and have a long history. Under Regulation 11 of 1822, the Government was empowered, by section 19 and 20, to cancel and annul *benami* purchases made at a sale for arrears of revenue. The next enactment upon the subject is contained in Act 12 of 1841, section 22 whereof provides that 'any suit brought to oust a certified purchaser as aforesaid on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs'.

It is unnecessary to refer to later versions of this provision.

It may be added that we have, in our Report on the Code of Civil Procedure,² recommended an extension of the principle of this provision so as to prohibit also the pleading of a *defence* based on 'benami' in such cases. This provision, it may be noted, is confined to sale certificates issued by courts. It does not prohibit 'benami' transactions in general.

4.3. **Section 281-A, Income-tax Act, 1961, inserted in 1972.**—So far as the recent amendment in Taxation laws is concerned,³ the effect of the amendment is not to prohibit 'benami', but to avoid its being

1. Section 66(1), Code of Civil Procedure, 1908.
2. 54th Report of the Law Commission (Code of Civil Procedure) (1973), paragraph 1-E, 53.
3. Taxation Laws (Amendment) Act, 1972.

made the basis of a suit unless compliance with the prescribed requirements is made. These requirements, broadly speaking, are intended to ensure that the taxing authorities concerned with income tax and wealth tax acquire knowledge of the transaction alleged to be benami.

4.4. The germ of such a provision is to be found in the Report of Professor Kaldor¹ on Indian Tax Reform. Professor Kaldor had made the following observations :—

“As regards benami transactions, my suggestion is that the benami holder should be asked to disclose the name of the beneficial owner at the time of the registration and in the event of his failing to do so (and declaring that he is not the beneficial owner himself) *he should be treated as the beneficial owner in law*. This provision is clearly “intended to deter a person from entering into a benami transaction just for the purposes of tax evasion. While it may be true that a certain amount of personal trust is involved between the benami and the real owners in all such cases, I seriously doubt whether the system could continue to exist but for the recognition of benami in common law. Even retention of the title deed would not protect the true owner in case the benami holder formally declared that he was the beneficial owner of the property; and in case the true owner protected himself further through I.O.U.s, mortgage deeds etc., this would call for (as indicated in para 93(g) (above) the same kind of disclosure

“It has been argued that the proposal would make it more difficult to defeat malafide transfers of property undertaken to prevent attachment of property in view of outstanding demands. I should be interested to know the number of cases in which the Revenue succeeded in breaking the benami through court action. My feeling is that the Revenue would gain far more from screening all benami transactions at the very outset than it would lose from any added difficulty in breaking the benami in the case of such fraudulent transactions.

4.5. A similar recommendation was made by the Administrative Reforms Commission,² also. Accordingly, the Government sponsored legislation through the Taxation Laws (Amendment) Bill, 1971 to discourage benami holding of property. Under the provision inserted as section 281A of the Income-tax Act, 1961, no suit shall be instituted in any court to enforce any right in respect of any property held benami unless the claimant has either disclosed the property in question or the income therefrom in connection with his wealth tax or income-tax assessments or given notice to the Income-tax Officer about the particulars of such property in the prescribed form.

1. Nicholas Kaldor, Indian Tax Reform (1956), pages 58-59, para. 104-105.
2. See Direct Taxes Enquiry Committee, Final Report, (Dec. 1971), page 66, para 2.231.

4.6. **Provisions in the Income-tax Act.**—The special case of the husband or father transferring assets to the wife or minor child (other than a married daughter) is dealt with by a more direct provision¹ in the Income-tax Act,—a provision which has been on the Statute Book for a long time.

There are also other provisions in the Income-tax Act,² designed to check the avoidance or evasion of tax (or its recovery) by fraudulent and other transfers.

4.7. **Section 41, Transfer of Property Act.**—We may also refer to provision relevant to Benami transfers in the Transfer of Property Act.³ The law of estoppel is enacted in section 115 of the Indian Evidence Act, and the leading case on that section falls equally under this provision of the Transfer of Property Act. In that case,⁴ the owner transferred property to his wife as benamidar. After his death, she mortgaged the property, her son assisting in the transaction and receiving the mortgage money. The son was held to be estopped from disputing the mortgage. If the provision in the Transfer of Property Act⁵ had been applied, the case would have been similarly decided on the ground that by the consent of the son, the mother was the *ostensible owner*.

4.8. Fraudulent transfers of property are dealt with by another provision in the Transfer of Property Act,⁶—namely, section 53.

4.9. With reference to section 53, Transfer of Property Act (fraudulent transfers), it may be noted that before that Act, there was in force,⁷ is Presidency towns,⁸ an English statute⁹ covering all types of property and all types of transfers.¹⁰ This English statute, was in harmony with the common law. The Transfer of Property Act, repealed this English Statute.¹¹ The present section 53 (if the Act) does not cover benami or sham transfers. But such transfers can be declared void independently of the section.

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1. Section 64, Income-tax Act, 1961.
 2. Sections 175, 178, 230A and 281, Income-tax Act, 1961.
 3. Section 41, Transfer of Property Act.
 4. *Sarat Chunder v. Gopal Chunder*, (1863) I.L.R. 20 Cal. 296, 19 I.A. 203 (P.C.)
 5. Section 41, Transfer of Property Act.
 6. Section 53, Transfer of Property Act.
 7. 13 Eliz. C-5.
 8. See I.L.R. 25 Bom. 202, 208.
 9. Cf. *Twynnes' case*, (1601) 3 Co Rep. 80 and Mulla's commentary on section 53, Transfer of Property Act.
 10. See, now, section 172, Law of Property Act, 1925 (Eng.).
 11. See Mulla's commentary on section 53, Transfers of Property Act.

4.10. **Principle well established.**—The principle underlying section 53 of the Transfer of Property Act is in accordance with justice, equity and good conscience, and has been held applicable even in areas where the Transfer of Property Act is not in force, or in cases¹⁻⁴ not covered by the language of the section.

4.11. **Section 84, Trusts Act—Transfer for unlawful purpose.**—Where any transfer of property is intended to effect an unlawful purpose, and the unlawful purpose is not carried out, the transfer can (subject to certain qualifications) be disregarded. This principle, which forms the basis of a specific provision⁵ (as to illegality) in the Trusts Act, is also relevant to the subject of benami transactions entered into for an illegal object. (Under a provision of the Transfer of Property Act,⁶ as transfer for an unlawful object is void).

4.12. **Principle.**—In a Calcutta case,⁷ Asutosh Mookerjee J. after referring to all the available Indian case law and discussing the English and American cases bearing on the subject, wound up his judgment with the following quotation from a decision of the Supreme Court of the United States.⁸

“The law leaves the parties to such contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses.”

This states succinctly the general rule as to the effect of illegality.

4.13. **Indian case law as to illegal transfers.**—The Federal Court of India⁹ and the Supreme Court,¹⁰ as well as the High Courts,¹¹ have had occasions to consider whether the beneficial owner ought to be allowed to recover from his benamidar when the latter proves that the

1. *Mt. Akaramunnisa v. Mustafann*, A.I.R. 1929 All. 238.
2. *Md. Ishaq v. Md. Yusuf*, A.I.R. 1927 Lah 420.
3. (a) *Abdul Hye v. Mir Mahomad*, (1883) J.L.R. 10 Cal. 616 (P.C.)
(b) *Chidambaram v. Srinivas*, (1914) I.L.R. 37 Mad. 227 (P.C.) (Moveable Property).
4. *Ramanathan v. Unnamalai*, A.I.R. 1942 Mad. 632.
5. Section 84, Trusts Act. [See para 4.15 *infra*]
6. Section 6(h)(2), Transfer of Property Act.
7. *Raghupati Chatterji v. Nari Shinga Hari Das*, A.I.R. 1923 Cal. 90.
8. *Bartles v. Coleman*, 4 Peter 184 (Baldwin J.).
9. *Punjab Province v. Daulat Singh*, A.I.R. 1942 F.C. 38, 40, 41 (1942) F.C.R. 67, 75, 76.
10. *Kadar v. Prahlad* (1960) S.C.J. 1072 A.I.R. 1960 S.C. 213;
11. See(a) *Quadir Baksh v. Hakam*, A.I.R. 1932 Lah. 503 (F.B.) (reviews cases);
(b) *Pranballav v. Tulsi bala Dassi*, A.I.R. 1958 Cal. 713, 725, para 114.

intention of the parties was to commit an illegality. The present position¹ seems to be that where the illegal object is not carried out or where other special reasons exist, the illegality will be disregarded.

The matter has also arisen before the Privy Council in appeals from other countries.^{2,3,4}

In these cases, it would be against the public policy to allow the defendant to violate his fiduciary relationship with the plaintiff.

“He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and laws. As Chancellor Walworth puts it: “Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of these persons, as against the other, from the consequence of their own conduct.”

4.14. **Position where illegal purpose not carried out.**—The Privy council⁵ dealt with the question why the maximum in *pari delicto* should not be applied where the illegal purpose is not carried out, in these words:

“The answer to that is that the plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud, and is seeking to make a title to the lands through and by means of it. And, despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, therefore, the purpose of the fraud having not only not been effected, but “absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederates to carry out the fraudulent scheme, and recovering possession of his property.”

4.15. In a Calcutta case, Bachawat J. stated the position thus,⁶ “In Indian law the transfer claiming that the transfer is void may sue to recover the property on the strength of his original title, and,

1. See para 4.14 *et sec Infra*.

2. *Sajjan Singh v. Sardara Ali* (1960) 1 All. E.R. 269 (P.C.).

3. *Chettiar v. Chettiar*, (1962) 1 All E.R. 494 (PC), commented on by Derrett in 11 I.C.L.Q. 864.

4. *Mistry Amar Singh v. Kulubra*, (1963) 3 All. E.R. 499 (P.C.).

5. *Petherpermal Chetty v. Muniandy Seervai*, (1908) I.L.R. 35 Cal. 550, 558, 559 (P.C.).

6. *Pranballav v. Tulsibala Dassi*, A.I.R. 1958 Cal. 713, 725, para. 114.

in general, he may be given relief though he is *particeps criminis*, in the following cases :

- (a) Where his case falls within one of the three exceptions recognised by section 84 of the Indian Trusts Act,—or
- (b) (i) Where public interest or the interest of third parties requires that the relief should be given, or (ii) where denial of the relief may defeat a legal prohibition, or (iii) where the transaction is such that it ought to be allowed to stand on grounds of public policy.

“Relief may be given upon such terms as the justice of the case may require.”

[Section 84 of the Indian Trusts Act recognises three exceptions to the rule denying relief to a *particeps criminis*. Where the owner of the property transfers it to another for an illegal purpose, the transferee must hold the property for the benefit of the transferor if (a) the illegal purpose is not carried into execution, or (b) the transferor is not as guilty as the transferee, or (c) the effect of permitting the transferee to retain the property might be to defeat the provisions of any law. The transferor is *prima facie* entitled to recover the property from the transferee if his case falls within one of these three exceptions.]

4.16. **The transfer of property under illegal Transactions—position in England.**—In England,¹ the prevailing view is that where property has been transferred under an illegal contract, and the parties have, in addition, observed all the formalities necessary for conveying title to the particular property concerned, then title to that property will pass, regardless of the illegality of the transaction.²

4.17. **Sections 422-424, Penal Code.**—The Indian Penal Code has also certain provisions³ punishing fraudulent deeds and dispositions of property. These are wide enough to cover *fraudulent* benami transactions.

1. (a) *Scarf v. Morgan*, (1838) 4M & W 270;

(b) *Taylor v. Chester*, (1869) 4 Q.B. 309;

(c) *Bowmaker Ltd. v. Barnet Instruments*, (1945) 1 K.B. 65 (C.A.).

2. See Hamson, “Illegal Contracts and Limited Interests”, (1949) 10 Camb. L.J. 249, 251 who describes it as “trite law”.

3. Sections 421 to 424, Penal Code.

CHAPTER 5

SUMMARY OF PRESENT POSITION

5.1. **Introduction.**—In this Chapter, we shall summarise the present position as to benami transactions.

5.2. **Summary of present position—in general.**—A few basic points concerning benami transactions may be stated, as follows:

- (a) Benami transfer or transaction means the transfer by or to a person who acts only as the ostensible owner in place of the real owner whose name is not disclosed;
- (b) The question whether such transfer or transaction was real or benami depends upon the intention of the beneficiary;
- (c) The real owner in such cases may be called the beneficiary, and the ostensible owner the benamidar.¹

ILLUSTRATIONS

'A' purchases property in the name of his relation 'B'. 'A' supplies the consideration and 'B' merely lends his name. 'A' is the beneficiary and 'B' his *benamidar*.

5.3. **Effect of benami transfer.**—The effect of a benami transfer is as follows²:—

- (a) A person does not acquire any interest in property by merely lending his name;
- (b) The *benamidar* has no beneficial interest though he may represent the legal owner as to third persons.³
- (c) A *benami* transaction is legal, except in certain specified situations.

5.4. **Statutory provisions re-enforcing benami.**—There are statutory provisions—(i) re-enforcing benami, or (ii) modifying it, or (iii) of a special nature. The Indian Trusts Act⁴ contains a general provision, under which, where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person who paid or provided the consideration. The effect of this provision is to *reinforce* the doctrine of *benami*.

1. Gour, Hindu Code (1938), page 726, para, 218.

2. Gour, Hindu Code (1938), page 726, para, 219.

3. See para 2.11 to 2.14, *supra*.

4. Section 82, Trusts Act.

A "resulting trust" arises in such cases; and it is not readily rebutted—as in England—by the presumption of advancement where the transfer is in favour of the wife or child of the person who provided the consideration. Rather, where the transfer is in favour of the wife or child, the courts are more ready to give effect to this provision (of the Trusts Act) than in other cases.

5.5. Statutory provisions modifying benami.—Recognising, however, the fact that *benami* transactions have often been resorted to for dishonest purposes, the Legislature has enacted provisions modifying the doctrine of benami. These provisions are to be found principally in the Code of Civil Procedure¹, and in the Income Tax Act.²

5.6. Provisions of a special nature wider than benami.—Then there are provisions of a special nature. Their scope and reach are wider than benami transfers, but they could apply also to benami. Under a provision in the Income-tax Act³, income from property transferred to a spouse or minor child⁴ (other than a married daughter) without consideration is deemed to be the income of the transferor. The scope of this is wider than benami transfers.

(There are also minor provisions⁵ in special laws as to the disclosure of benami dealings and the like).

5.7. Unlawful transfers.—A transfer of property for an unlawful object is void, by virtue of a specific provision in the Transfer of Property Act⁶. Recovery by the transferor of property transferred for an unlawful object is, however, permissible only in certain specified cases. Under a provision in the Trusts Act,⁷ where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution, or the transferor is not as guilty as the transferee or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.

5.8. Fraudulent transfers.—There is, in the Transfer of Property Act,⁸ also a provision empowering the Court to set aside transfers in fraud of creditors and transfers in fraud of subsequent transferees.

These provisions are not confined to benami transfers.

5.8. Civil Procedure Code.—There are also provisions in the Civil Procedure Code.

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1. Section 66, Code of Civil Procedure, 1908.
 2. Section 218A, Income-tax Act, 1961 inserted by Act 45 of 1972.
 3. Section 64, Income-tax Act.
 4. Also see para. 513, *infra*.
 5. E.g. Sections 247 to 250, Companies Act, 1956.
 6. Section 6(h)(2), Transfer of Property Act.
 7. Section 84, Trusts Act.
 8. Section 53, Transfer of Property Act.

5.9. Criminal liability.—So far as criminal liability is concerned, references may be made to the general penal provisions in the Penal Code punishing cheating,¹ and to the specific provisions in that Code² which punish certain fraudulent dealings with and disposition of property, including fraudulent dealings intended to defeat execution.³ These provisions are wide enough to cover fraudulent benami transactions, if the other ingredients of the relevant sections are satisfied. The relevant provisions⁴ is the section under which a person who dishonestly or fraudulently removes, conceals or delivers to any person, without adequate consideration, any property, intending thereby to prevent, the distribution of that property according to law among his creditors or the creditors of any other person, is punished.

5.10. Position with reference to different types of transfers.—A study of the various statutory provisions relevant to the subject will show that the position with reference to the different kinds of transfer may vary according as the transfer is—

- (1) to a wife or child⁵ (on the one hand) or to a person other than a wife or child;
- (2) for consideration or without consideration;
- (3) with the intention to transfer title or without such intention, and
- (4) for an honest purpose or to commit fraud.

5.11. Analysis of position in various situations.—For the sake of convenience, we would, at this stage, like to summarise the position with reference to various situations as follows:—

Transfer in favour of wife or child

- | | |
|---|--|
| (a) Transfer in favour of wife or child (whether or not with the object of transferring title to the wife or child) without adequate consideration. | Governed by section 64, Income-tax Act [Also see (g) below]. (No criminal liability unless the case falls within sections 415 to 424, Penal Code or section 206-207 of that Code). |
| (b) Transfer in favour of wife or child for consideration, but for a fraudulent purpose and not in good faith. | Governed by section 6(h) (2) and section 58, Transfer of Property Act. (Criminal liability if case falls within sections 415 to 424, Penal Code or sections 206-207 of that Code). |
| (c) Transfer in favour of wife or child for consideration, and with genuine object of transferring title to the wife or child. | Not covered by any provision. (No criminal liability). |

1. Sections 415, and 417, Penal Code.

2. Sections 421 to 424, Penal Code.

3. Sections 206 and 207, Penal Code.

4. Section 421, Penal Code.

5. Actually, section 64, Income-tax Act applies to a spouse or minor child other than a married daughter.

Transfer in favour of persons other than wife or child

- (d) (i) Transfer in favour of a person other than wife or child without consideration, but with the genuine object of transferring title and with no fraudulent purpose. Not covered by any provision. (No criminal liability).
- (ii) Transfer in favour of a person other than wife or child without consideration, and without intent to transfer title, but with no fraudulent purpose. Governed by section 281A, Income-tax Act. [See (g) below]. (No criminal liability).
- (iii) Transfer in favour of a person other than wife or child without consideration, with intent to transfer title, but for a fraudulent purpose and not in good faith. Governed by section 6(h) (2) and section 53, Transfer of Property Act (Criminal liability if case falls within sections 415 to 424, Penal Code or sections 206-207 of that Code).
- (iv) Transfer in favour of a person other than wife or child without consideration, without intent to transfer title and for fraudulent purpose. Governed by section 281A, Income-tax Act. [See (g) below]. Also section 6(h) (2) and section 59, Transfer of Property Act. (Criminal liability if case falls within sections 415 to 424, Penal Code or sections 206-207 of that Code).
- (e) Transfer in favour of person other than wife or child for consideration, with intent to transfer title, but for a fraudulent purpose and not in good faith. Governed by section 6(h)(g) and section 53, Transfer of property Act. (Criminal liability if case falls within sections 415 to 424, Penal Code or sections 206-207 of that Code).
- (f) Transfer in favour of person other than wife or child with consideration, but with genuine object of transferring ownership and with no fraudulent intent. Not covered by any provision.

General

- (g) Transfer in favour of any person benami (i. e. without consideration and with no genuine intent to transfer). Object of checking tax evasion substantially achieved by barring a suit instituted without informing the taxing authorities. See section 231A, Income-tax Act (inserted by Act 45 of 1972).

5.12. **Illustrations.**—A few illustrations will be useful.¹

- (i) A becomes heavily indebted to B who is expected to attach his property for the satisfaction of his debt. To screen it from B, A transfers some of it to C. The transfer is void.²

1. Some of the illustrations are taken from Gour, Hindu Code (1938), page 728, para. 220.

2. Section 53, Transfer of Property Act.

- (ii) A has innocently transferred his property to B who holds it for A, but getting involved in heavy losses, B compromises with his creditor C to whom he transfers the property X in satisfaction of his debt. A sues to eject C on the strength of his real title. C claims to be a *bona fide* purchaser from B without notice of A's title. A cannot eject C.^{1,2}

5.13. **Question of evasion of tax considered.**—As regards evasion of tax by benami transactions, the position is briefly this—

- (i) Where the real owner of the property is the husband or father and the benamidar is his wife or minor child (other than a married daughter), the general³ provision as to income from assets transferred directly or indirectly without adequate consideration by the husband or father would appear to be adequate for all practical purposes.
- (ii) Where the real owner is not the husband or father, the provision recently inserted in the Income Tax Act⁴ has the effect of securing that the benami transaction is disclosed to the Income Tax authorities. There does not, therefore, appear to be any serious gap so as to require further radical measures for checking evasion of direct taxes resulting from benami transactions.

1. Section 41, Transfer of Property Act.

2. As to public policy, see *Sheo Narayan v. Mata Prasad*, I.L.R. 27 All.73.

3. Section 64, Income Tax Act, 1961.

4. Section 281A, Income Tax Act, 1961.

CHAPTER 6

AMENDMENTS IN THE LAW

6.1. **Introduction.**—Having dealt with the present position, we propose in this Chapter to consider the amendments needed in the law.

6.2. It would appear that the various statutory provisions that have been enacted so far achieve the objects of checking tax evasion¹ and checking frauds on private creditors². If these provisions do not succeed, that may be mainly due to reasons other than defects in the law.

6.3. **Possible alternative for regulating benami transaction.**—Several possible alternatives could be thought of, with reference to prohibiting or regulating benami transactions for avoiding prejudice to private individuals or minimising litigation:—

- (i) Entering into a Benami transactions could be made an offence;
- (ii) A provision may be enacted to the effect that in a civil suit a right shall not be enforced against the benamidar or against a third person, by or on behalf of the person claiming to be the real owner of the property on the ground of benami; a similar provision could be made to bar defences on the ground of benami.

(This provision would be based on the principle on which the existing provisions in the Civil Procedure Code and the new provision in the Income-tax Act are based, but could be wider in scope and more radical).

- (iii) The present presumption of a resulting trust³ in favour of the person who provided the consideration may be displaced (as in England) by the presumption of advancement, in cases where the person to whom property is transferred is a near relative⁴ of the person who provided the consideration. (This would bring in the doctrine of advancement, so as to rebut the presumption of resulting trust under section 82 of the Trusts Act).

Whichever alternative is adopted, it may be desirable to make an exception for an acquisition made by the manager of a joint Hindu family in the name of one of the co-parceners, and similar cases.

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1. As to tax evasion, see Chapter 5, para. 5.2, *supra*.
 2. Chapter 4, *supra*.
 3. Section 82, Trusts Act.
 4. The expression 'near relative' could be suitably defined.

6.4. **Questionnaire.**—The Commission, in its questionnaire issued on the subject, invited views on the following questions:—

QUESTIONS

- (1) Whether, in order to check the evasion of direct taxes or other types of dishonest acts, it is necessary to prohibit benami transactions in toto or to regulate them by more stringent provisions than have been enacted so far
- (2) If so, which of the alternatives¹ mentioned above should be adopted?
- (3) If the alternatives mentioned above are not considered adequate or feasible, what other amendments in the law should be made with reference to benami transactions?

6.5. The questionnaire was circulated to State Governments, High Courts, Bar Associations, Chambers of Commerce and other interested persons and bodies.

6.6. **Views as to first alternative.**—The first alternative has received the support of one High Court,² two Judges of another High Court,³ two Judges of one more High Court,⁴ some Judges of another High Court⁵ and one State Government.⁶

6.7. Those who favour the first alternative—i.e. the imposition of a prohibition (in the sense of making the entering into benami transactions an offence)—, regard benami transactions as outmoded, or state that there is no place in modern times for such transactions, or state that there can hardly be a legitimate motive for such transactions. This group is, in number, smaller than the group which favours the second alternative or the third alternative.

6.8. The first alternative has, however, been opposed by the majority of the comments on various grounds. It has been stated that benami transactions are entered into for honest motives also, and not necessarily with the intention of evading taxes or defeating the claims of third parties. Secondly, it is stated that this is a deep rooted habit, and ought not to be prohibited by law, but restrictions may be imposed, wherever necessary. Thirdly, it has been emphasised that the prohibition may be difficult to enforce, as a benami transaction will not ordinarily come to light. Lastly, the view has been expressed that the provisions so far enacted are adequate to check the evasion of taxes or defeating the claims of third parties.

6.9 Thus, a retired High Court Judge⁷ has stated as follows:—

“However strongly one may disparage benami transactions from the above two points of view, there will be always need to

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1. These alternatives were the same as those mentioned in para 6.3 *supra*.
 2. S. No. 47.
 3. S. No. 42.
 4. S. No. 43.
 5. S. No. 48.
 6. S. No. 34 (No other lesser provision will have any effect, it is stated).
 7. S. No. 13.

provide for situations where one person advances money for a transaction *taken in the name of another with a genuine intention* to benefit the latter¹. After noting that a fresh look is necessary from the point of view of (i) vexatious litigations, (ii) tax-evasions, he suggests. "Such transactions should be allowed to prevail, and not barred *in toto*. If the operating motive is tainted by fraud, only then should legislation bar them."

6.10. A High Court Judge² has emphasised that benami transactions "have been prevalent in the country for a very long period, and it will be difficult to check these by legislation, so long "as one person will enjoy the confidence of another". In spite of legislation *benami* transactions may continue, and the benamidar may execute a deed in favour of the real owner subsequently at an opportune time."

6.11. Another High Court Judge,³ while noting that it is desirable to prohibit such transactions completely, has added it may not be possible to do so through legislation, "and more so where the real and the ostensible owner would combine against the law." He, therefore, thinks that "the law should go only that far where it would be effective. Only such legislation be made as may regulate the transaction and make it unremunerative for the ostensible owner to agree to act as the shield. The provisions should be such as may bring all benami transactions on the surface."

6.12. **Views as to second alternative.**—One High Court Judge has stated⁴ that the second alternative will help the ostensible transactions, and not the revenue. Government will not be able to proceed against the property. (He, however, is unable to suggest any other alternative).

6.13. Several persons and bodies have preferred the second alternative. To this category, for example, belong one High Court,⁵ some Judges of one High Court,⁶ one Judge of another High Court,⁷ two Judges of another High Court,⁸ one Judge of yet another High Court,⁹ one High Court Bar Association,¹⁰ and the Legal Remembrancer of a Union Territory,¹¹⁻¹² and two State Government.¹³

1. Emphasis supplied.

2. S. No. 30.

3. S. No. 30.

4. S. No. 43.

5. S. No. 38.

6. S. No. 30.

7. S. No. 39.

8. S. No. 43.

9. S. No. 47.

10. S. No. 35 (Jabalpur High Court Bar Association.) Also S. No. 16 (Kanpur Bar Association).

11. S. No. 22 (Legal Remembrancer, Chandigarh).

12. The above list is illustrative only.

13. S. No. 53 and S. No. 21.

It may, however, be mentioned that one of the High Courts¹ has emphasised that only benami transactions which contain an element of dishonesty or fraud, should be prohibited.

6.14. The Legal Remembrancer of a Union Territory, who favours, the second alternative, has added² these comments. "The only exceptions thereto may be made in the case of acquisitions made by a karta of the joint Hindu family for himself and the members of the joint Hindu family, by a guardian for the minor (if the minor is having a source of income) and by the trustee for the beneficiary of the trust."

6.15. **Views as to third alternative.**—Another group of replies³ favours the third alternative. Some of the replies in this group do not give detailed reasons but it would appear that so far as the question of evasion of taxes is concerned, they would regard the existing position as more than adequate.

Some of them favour⁴ both the second and the third alternatives.

6.16. **Views for maintaining present position.**—A considerable number of persons⁵ have expressed the view that the existing law is adequate enough, and an amendment or further addition is not required.

6.17. One High Court Judge has stated⁶ that it is enough if the provisions of certain sections of the Indian Trusts Act (sections 1, 82 and 96 are the important amongst them), are borne in mind and made applicable to persons of all communities.

6.18. **Alternative considered.**—Having discussed the present position and the trends of views expressed on the subject, we shall now proceed to indicate our own conclusion.

6.19. **General Observations.**—A few general observations may be in order, before the merits of the various possible alternatives are stated.

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1. S. No. 55.
 2. S. No. 22.
 3. (a) S. No. 13.
(b) S. No. 37 (Bar Association, Dhulia).
(c) S. No. 46.
(d) S. No. 52.
(e) S. No. 54 (District Bar Association, Alipore).
(f) S. No. 39.
 - 4.(a) S. No. 30.
(b) S. No. 33 (Southern Gujarat Chamber of Commerce).
 5. E.g. (i) S. No. 44.
(ii) S. No. 43.
(iii) S. No. 41 (Punjab & Haryana Chamber of Commerce).
(iv) S. No. 23 (Bar Association, Bankura).
(v) S. No. 13.
(vi) S. No. 46.
(vii) S. No. 40 (Bar Association, Silchar).
 6. S. No. 47.

At the outset, it may be stated that one of the important causes¹ which accounted for the origin of *benami* transactions has now ceased to exist. Thus, the importance of the joint Hindu (Mitakshara) Family has been reduced, after the enactment of the Hindu Succession Act. The joint family, in the strict sense of the co-parcenary, hardly existed among the Hindus governed by the Dayabhaga.

Experience shows that *benami* transactions are a highly fruitful source of bitter litigation. *Benami* transactions also lead to acrimony. Thus, when a *benami* transaction is resorted to for defrauding creditors, the true owner may be guided by the consideration that if the property can be saved from the clutches of the creditor, that by itself would be a gain, even if the *benamidar*, being the son or any other near relative, may ultimately succeed in effectively keeping the property as his own property. This leads to acrimony among the parties concerned when a controversy arises.

There is, therefore, a case for refusing legal recognition to the *benami* character of such transactions.

6.20. Object of checking evasion of taxes already achieved.—It may be noted that the object of checking evasion of taxes has been substantially achieved by the recent amendment² of the Income-tax Act.³ It may also be noted that transferees of property for value without notice are protected even now.⁴ What remains now is the question of minimising litigation arising by reason of factual controversies.⁵

6.21. Objective of avoidance of litigation.—There is also no doubt that as regards avoiding litigation, a more direct approach is needed. In this connection, we may refer to a Bombay judgment,⁶ where it was stated as follows:—

“It may be observed that in the modern society the present system which ties up the property and permits frauds to be committed has no place. If the Legislature has made great inroads in the matter of personal life of the people, we do not see why it cannot now change the joint family property law. Moreover, the law permitting and recognising *benami* transactions results in a lot of wasteful litigation and enables all sorts of frauds to be committed. Day in and day out, after years of transactions, suits are raised challenging the alienations of a father as being not for legal necessity..... Similarly, if a transaction is completed and money received, someone raises his head and says he is the

1. para. 1.7, *supra*.

2. Section 281A, Income-tax Act, 1961, as inserted by the Taxation Laws Amendment Act, 1971 (45 of 1972).

3. See summary of the position (para 5.11 and 5.13 *supra*).

4. Sections 95, 96, Trusts Act.

5. *cf.* Chapter 5, *supra*.

6. *Hasman Gani Ahmed Sahib v. Vidhadhar Krishnarao Mung* (Appeal No. 533 of 1968 from original decree, decided on 17-1-1969 by Patel and Wagle JJ.).

owner and often notice of such title is even falsely alleged. Is it now time that this branch of the law was reformed. This will reduce much wasteful litigation, and the Courts will be able to do better and more fruitful work."

6.22. **Tests for deciding whether a transactions is benami.**—It may, in this connection, be pointed out that in determining whether a transaction is *benami*, several factors, such as, motive, source of consideration, possession of the property and its enjoyment, and custody of title deeds, are the features whose effect, either severally or cumulatively, has to be considered.

6.23. **Various alternatives considered.**—In the light of the above observations, we proceed to consider the various alternatives.

6.24. **First alternative not likely to be effective.**—The first alternative referred to above, namely, the imposition of a criminal prohibition against benami transactions, is the most drastic alternative, but it is not likely to be more effective than the others. A prohibition backed by criminal sanctions would not, moreover, be desirable, unless the *mens rea* is also included in the provision to be enacted.

If this alternative is to be adopted, a provision could be enacted on the following lines:—¹

"Where property is transferred to one person for a 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 person paying or providing the consideration shall be guilty of an offence punishable with imprisonment upto three years, or with fine, or both.

Provided that this section shall not apply where the transferee is a co-parcener in a Hindu undivided family in which such other person is also a co-parcener, and it is proved that such other person intended to pay or provide such consideration for the benefit of the co-parceners in the family.

Exception.—Nothing in this section shall be deemed to affect section 66 of the *Code of Civil Procedure, 1908* or any provision similar thereto."

Yet another device for giving effect to the first alternative, with a requirement of *mens rea*, would be to have a law on the following lines:

"Where property is transferred to one person for a 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 person paying or providing the consideration shall,

1. A separate law will be needed.

if he has caused the transfer to be entered into with the intention of facilitating the evasion of any law, or defeating the claims of his creditors, or the creditors of any other person be guilty of an offence punishable with imprisonment upto three years, or with fine, or with both."

Yet another device to give effect to the first alternative would be to add a section in the Indian Penal Code as follows:—

"421A. Whoever, dishonestly or fraudulently causes to be transferred to any person, any property, for which transfer he has paid or provided the consideration, intending thereby to prevent, or knowing to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, or intending thereby to facilitate, or knowing it to be likely that he will thereby facilitate, the evasion of any law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

6.25. **Second alternative.**—The second alternative is less drastic than the first. In form, it could follow the existing statutory provision limiting the judicial recognition of benami transactions, such as, section 66, Code of Civil Procedure, 1908. But its scope would be much wider. The provision³ could be to the effect that no suit shall lie to enforce a right in respect of any property held benami, either against the person in whose name the property is held or against any other person, by or on behalf of a person who claims to be the real owner of the property on the ground that the person in whose name the property is held is a benamidar of the claimant. (If necessary, a defence can also be barred).

6.26. **Third alternative.**—The third is the least drastic alternative, and would make the matter depend on the intention of the parties,—with the qualification that a specific provision requiring the court to draw a rebuttable presumption of advancement in the case of near relatives will be introduced. The practical advantage of such a provision will be its elasticity.

Section 82, Trusts Act could be revised on the following lines:—

"Where property is transferred to one person for a 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:

Provided that the fact that the transferee is a near relative of such other person shall not, of itself, be regarded as a suffi-

1. This could be inserted as Section 421A in the Indian Penal Code.
2. This is not a draft.
3. This is only a very rough draft.

cient ground for drawing an inference that such other person did not intend to pay or provide such consideration for the benefit of the transferee,¹ and in such cases the court shall presume that such other person intended to pay or provide such consideration for the benefit of the transferee.”

6.27. Second alternative refusal to recognise Benami preferred.—

In our opinion, the simplest alternative would be the second alternative. The law should refuse to recognise the *Benami* character of transactions, without making them an offence. The law should, in effect, provide that where property is transferred *benami*, the *benamidar* will become the real owner. The result of such a provision will be that the fact that the *benamidar* did not provide the consideration, or that the consideration was provided by a third person, will not be a ground for recognising a person other than the *benamidar* as owner. To put the matter in broad terms, the doctrine of *benami* will, under the proposed amendment, cease to be a part of the Indian law.

It may be observed that in enacting the proposed provision, the legislature will carry, to its logical conclusion, the trend illustrated by provisions, such as, section 66 of the Code of Civil Procedure. The section in the Code is applicable to involuntary alienations, while the proposed provision will extend the same principle to voluntary transfers as well.

We think that this will be the simplest and most effective course, and is, therefore, preferable to others.

The amendment will bring out a change in the legal position in some of the situations² where, at present, the *benami* character is recognised.

6.27A. We are also of the view that it is not necessary to enact a prohibition attracting criminal penalties—which is the course suggested in the first alternative. Such a prohibition will have to be accompanied by a requirement of *mens rea*, thus narrowing down its scope and limiting its practical utility.

6.28. Exception recommended for certain cases.—While enacting the provision which we have recommended,³ it would be desirable to make exceptions in the case of acquisition made by a karta for himself and the members of the joint Hindu family, or by the trustees for the beneficiary of the trust and similar situations. In the case of a joint Hindu family, the ordinary situation arising in this connection would be where the property stands in the name of the manager or member, but *actually belongs to the whole family*. Here the member in whose name the property is held is himself a beneficiary. In the case of a trustee,

1. Exception for co-parceners etc. could be made.
2. Para. 5.11, categories (a) and (b) if there is no intent to transfer title, and categories (d)(ii) and (d)(iv).
3. Para. 6.27, *supra*.

the property would ordinarily stand in the name of the trustee, who is not beneficially entitled. The two situations are, thus, different; but the reason for making a combined exception for the two situations (and other similar situations) is the common one, arising from the fact that the section which we propose will bar a suit to enforce a right on the ground that the person in whose name the property is held, is not the real owner. In the situations to which we have referred, it is obviously desirable that this new section, if applied literally, would create a result which is the opposite of what is intended by the legal position as understood at present. Hence the need for an exception.

6.29. Exception for past transactions.—It is also necessary to make an exception for past transactions. The provision which we propose will be procedural in form, but will be substantive in its true character. We do not consider it desirable that it should apply to past transactions, because those transactions would have been entered into after keeping in mind the legal position as understood at present, namely, that the real owner can always enforce his rights against the benamidar. This position is now proposed to be reversed, and the reversal should not work in a manner which will defeat the intention of the parties who acted under the old law. Of course, those benami transactions which have been entered into with the object of carrying out fraudulent or illegal motives, and which therefore, fall within specific provisions enacted by the Legislature to prevent the abuse of the practice of benami¹, are governed by those specific provisions, and the bar against retrospective operation of the new provision will not affect the operation of those specific provisions.

6.30. Repeal of certain provisions.—As a consequence of our recommendation to abolish the doctrine of *benami*, section 82 of the Trust Act, section 281A of the Income-tax Act and section 66 of the Code of Civil Procedure, will become unnecessary and we, therefore, recommend that they should be repealed.

As regards provisions like section 53 of the Transfer of Property Act or section 64 of the Income-tax Act, their scope is much wider than benami transactions. These provisions could be pressed into service even in cases not falling within the doctrine of benami. For example, section 64 of the Income-tax Act applies even where the transfer to the spouse of the assets concerned is genuine, provided the transfer is not for adequate consideration or in connection with an agreement to live apart. We do not, therefore, think that they require any change in consequence of the new section which we are recommending.

6.30A. Saving for s. 53, T.P. Act or for transfers for an illegal purpose.—It may, of course, be necessary to introduce a saving for section 53 of the Transfer of Property Act, so that the fact that the real owner is to be debarred from enforcing his right against the benamidar (which is, in substance, the gist of

1. See Chapter 4 *supra*.

the proposed provision), should not be understood as standing in the way of setting aside a transfer by the real owner to the benamidar, if the transfer was made with intent to defeat or delay the creditors of the transferer and is thus attracted by section 53.

For similar reasons, it will be necessary to save the law relating to transfers for an illegal purpose.¹

6.31 Constitutional aspect of proposed provision.—In the course of our consideration of this question, we had occasion to examine a small constitutional issue, namely, whether the proposed provision prohibiting the real owner from filing a suit to enforce his right against the benamidar would conflict with the provision in Article 19(1)(f) of the Constitution. Under that article, all citizens have the right to acquire, hold and dispose of property. We have come to the conclusion that the proposed section will not be hit by that clause. In this connection, we may point out that Article 19(5) saves a law imposing reasonable restrictions on the exercise of any of the rights conferred by sub-clauses (d), (e) and (f) of clause (1), if the restrictions are in the interest of the general public.

6.32. Public interest requires that unnecessary litigation should be avoided; and if the law enacts provisions designed to achieve such object, it does not hinder the public interest. It advances it. The time of the citizens and of the agencies charged with the administration of justice should be devoted to more fruitful tasks than to the decision of questions arising by reason of the mere use of the name of a person who is not intended to be the owner of the property held in his name. If there is no compelling consideration for such use of the name of another person, we do not see any reason why such a practice should not be restricted. For these reasons, the restriction should be regarded as reasonable within the meaning of article 19(5).

6.33. Recommendation.—In the light of the above discussion, we recommend the enactment of a separate law containing the following legislative provisions:—

“1(1) No suit 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 be instituted in any court by or on behalf of a person claiming to be the real owner of such property.

(2) In any suit, 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 court by or on behalf of a person claiming to be the real owner of such property.

1. Section 6 (1)(2), Transfer of Property Act, and Section 48, Trusts Act.

- (3) Nothing in this section shall apply—
- (a) whether the person in whose name the property is held is a manager of, or a co-parcener in, a Hindu undivided family, and the property is held for the benefit of the co-parceners 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.
2. The following provisions are hereby repealed, namely,—
- (a) section 82 of the Indian Trusts Act, 1882;
 - (b) section 66 of the Code of Civil Procedure, 1908;
 - (c) section 281A of the Income Tax Act, 1961.
3. Nothing in this Act shall—
- (a) affect the provisions of section 53 of the Transfer of Property Act, 1882, or the law relating to transfers for an illegal purpose, or
 - (b) apply in relation to any property held benami at the commencement of this Act.”

This Report has not been signed by Mr. Justice V. R. Krishna Iyer. When the draft of the Report was fully discussed and approved by the Commission, Mr. Justice Iyer was a Member of the Law Commission and participated in the discussions. However, before the Report, as finalised and approved, could be typed for the signatures of the Members of the Commission, Mr. Justice Iyer left the Commission to join the Supreme Court. He has authorised us to state that he fully agrees with the approach and recommendations of the Report.

We desire to place on record our warm appreciation of the valuable assistance to have received from Mr. Bakshi, Member-Secretary of the Commission, in the preparation of this Report. At all stages of the study of this problem, Mr. Bakshi took an active part in our deliberations.

P. B. Gajendragadkar	<i>Chairman</i>
P. K. Tripathi	<i>Member</i>
S. S. Dhavan	<i>Member</i>
S. P. Sen-Varma	<i>Member</i>
P. M. Bakshi	<i>Member-Secretary</i>

DATED: NEW DELHI,
the 7th August, 1973.