

Regulatory Alert

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Supreme Court holds that benami law provisions cannot be applied retrospectively

The Hon'ble Supreme Court¹ of India has rendered the provisions relating to prosecution and acquisition of benami property under The Prohibition of *Benami* Property Transactions Act, 1988 (the unamended 1988 Act) as unconstitutional for being manifestly arbitrary. It further held that the amendments made in 2016 are substantive in nature and its retroactive application would violate Article 20(1) of the Constitution of India.

Legislative Background

- The Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 ("1988 ordinance") was promulgated on 19th May, 1988 which barred the real owner of property from enforcing any right in the Benami Property. The Ordinance did not provide for prosecution and acquisition of property by the Government.
- Subsequently, the Benami Transactions (Prohibition) Act, 1988 ("the unamended 1988 Act") was enacted on 5th September, 1988 which criminalised the act of entering into benami transactions and provided for imprisonment (section 3) and acquisition of benami property by the

¹ In case of Union of India v. M/s. Ganpati Dealcom Pvt Ltd (Civil Appeal No. 5783/2022, arising out of Special Leave Petition (Civil) No. 2784/2020)



Government (section 5) in addition to continuation of barring the real owner to bring civil suit for claiming right in the property.

- The provisions which were part of the ordinance were given continuing effect and came into force from 19th May, 1988 whereas remaining three provisions (namely, sections 3, 5 and 8) came in force from the date of the Bill receiving the presential assent i.e. 5th September, 1988.
- The unamended Act consists of 9 sections. Section 8 empowered the Central Government to make rules to carry out purposes of the Act. The unamended Act did not prescribe the authority competent to acquire property from the benamidar as also the procedure for its acquisition was left to the delegated legislation.
- Until 2016, no Rules/ procedures were prescribed and such inconclusive Act was never implemented and remained a dead letter of law.
- Benami Transactions (Prohibition) Amendment Act, 2016 (“the 2016 Amendment Act”) was enacted to overhaul the unamended 1988 Act which came into force on 1st November 2016.
- The 2016 Amendment Act made radical changes to the unamended 1988 Act by turning the 9 sections Act into an Act comprising of 72 sections bifurcated into 8 chapters.
- By way of amendment, not only the definition of “benami transaction” (being the very scope of the Act) was changed but also the consequences of entering into a benami transaction was modified.
- Under the unamended 1988 Act, a transaction would qualify as a benami transaction merely on the ground that consideration for transfer of property was paid by the person other than the one in whose favour it is transferred.
- The essential element that the property must be beneficially enjoyed by the real owner in order to constitute the transaction as benami was not present in the unamended 1988 Act which got incorporated into the definition vide the 2016 Amendment Act.
- The definition of benami transaction was widened to cover within its ambit not only “transactions” in benami property but also “holding” of benami property. The definition of benami property was also widened to cover proceeds from such benami property.
- The unamended 1988 Act provided for imprisonment of a term up to three years without there being any requirement of an element of *mens-rea* to constitute it as an offence. This got incorporated after 28 years i.e. vide the 2016 Amendment Act, through an amendment in section 3 read with newly incorporated section 53, applicable for benami transaction entered into after 1st November, 2016 which makes entering into benami transaction an offence only when such transaction is entered into for defeating the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors.



- The 2016 Amendment Act also lays down procedure for confiscation of benami property.
- In this context, department have issued notices after 2016 to several persons, applying the amended act, to transactions carried out prior to the date of amendment act coming into force.

High Court Order challenged before Supreme Court

- The question of retroactive applicability of such amended provision was raised before the Calcutta HC in **Ganpati Dealcom Pvt. Ltd. v. Union of India**² where alleged benami transaction was entered into in 2011 whereas action of attachment of property was initiated under the amended provisions of the Act.
- The High Court quashed proceedings initiated by authority, holding in favour of assessee, on following grounds.
 - The 2016 Amendment Act is a substantive legislation. Its retroactive application should have been provided under the Act and in its absence, it is not applicable for the period prior to 1st November, 2016.
 - In terms of protection enshrined under Article 20(1) of the Constitution of India, an amendment to the definition of benami transaction cannot be given retrospective impact. Article 20(1) provides that if an act is not an offence at the time of its commission, it cannot

be made an offence subsequently through retrospective amendment.

- Though the unamended 1988 Act was on the statute book, its provisions were never operationalised since the rules and procedure required to be framed under it were never notified, rendering the said legislation as a “dead letter” and all alleged benami transactions prior to 1st November, 2016 were deemed to have been accepted as valid transactions.

Proceedings before Supreme Court

- Against the said Order of the Hon’ble High Court, the government preferred an appeal before the Supreme Court.

Contention of the government

- The 2016 Amendment Act is the consolidating Act which was brought in to remedy the mischief of lack of procedure to enforce proceedings against benami transactions and a procedural law can be applied retrospectively.
- The legislative intent for bringing amendment instead of bringing an entirely new law was to ensure that no immunity is granted to persons who engaged in benami transactions while the pre-amended Act was in operation.
- By way of amendment, the procedure is laid down to implement the unamended 1988 Act and no offence is sought to be newly defined by virtue of the provisions of the 2016 amendments. As the old law

² APO No. 8/2019,WP No. 687/2017, 421 ITR 483 (Calcutta)[12-12-2019]



recognised the benami transaction as contrary to law, no substantive law is being made now.

- Confiscation is not a punishment and it is a civil liability, and its retrospective application is not hit by Article 20(1).

Contention of the Assessee

- The 2016 Amendment Act was not intended to be retrospectively applicable as the same was not explicitly stated.
- Parliament deemed it fit to leave it to the Central Government to enforce the 2016 Amendment Act from an appointed date to be notified in official gazette
- Prospective application of the 2016 Amendment Act is indicated from the fact that distinct penalties have been provided for offence committed prior to the amendment coming into force vis-à-vis offence committed after the amendment.
- Definition of benami transaction has been widened and therefore scope of the offence has been substantially broadened. It is well settled principle of law that any enactment which substantially affects the rights of people cannot be applied retrospectively. The assessee relied on the Supreme Court decision in **case of CIT v. Vatika Township Pvt. Ltd (2015) 1 SCC 1**.

Ruling of the Supreme Court

- Supreme Court observed that in order to answer the question whether the 2016 Amendment Act is retroactive or prospective, it is to be determined whether the unamended 1988 Act is constitutional in the first place.

- Supreme Court evaluated whether criminal provisions of the unamended 1988 Act which tried to create a strict liability without adequate safeguards could have remained in the statute book for 28 years.
- Supreme Court observed that Indian jurisprudence has grown to be a jurisdiction having 'substantive due process'. Constitutionality of statutes can be tested both on procedure and substantive nature of statute based on Articles 14, 19 and 21 of the Constitution.
- Supreme Court observed that the provisions under the unamended 1988 Act do not expressly contemplate *mens-rea* which is an essential ingredient of a criminal offence.
- The statute either expressly or by necessary implication excludes *mens-rea*. However, the mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil which by itself is not decisive of the question as to whether element of a guilty mind is excluded from the ingredients of an offence.
- Supreme Court analysed the history of practice of benami transactions in India. It observed that judiciary established the general principal that under the law, the real owner is recognised over the ostensible owner except with certain statutory limitation.
- Supreme Court referred to the 57th Report (1973) of the Law Commission which mentioned both the alternatives - civil and criminal, and found that making benami



transactions a criminal offence would not be effective as *mens-rea* needed to be established and suggested for a less stringent civil remedy - to bar the real owner from claiming any right in the property, without making it an offence. This aspect was re-examined by the Law Commission in its 130th Report issued in 1988 wherein also element of *mens-rea* was not given a go by. Therefore, absence of concept of *mens-rea* creates a harsh provision having strict liability. Concept of *mens-rea* was brought in the statute after 28 years through section 53 of the amended Act for offences committed after the amendment became effective.

- An essential ingredient for a transaction to be regarded as benami, as evolved through judicial precedents, is that the property is to be held for the benefit of the real owner. However, such ingredient was excluded from the definition without any reason or principle identified by the legislature for doing so. This essential ingredient was brought into the statute, by amending definition of benami transaction through section 2(9)(A)(b) of the Act.
- Supreme Court observed that requirement of Article 20(1) of the constitution is that a law needs to be clear and not vague and it should not have incurable gaps which are yet to be legislated.
- The criminal provision under section 3(1) of the 1988 Act has serious lacunae which could not have been cured by judicial forums even through harmonious interpretation. It is overly broad, harsh and manifestly arbitrary, thereby violating requirement of “substantive due process”.
- With respect to section 5 of the unamended Act, Supreme Court observed that it was conceived as a half-baked provision which did not provide for adjudicatory mechanisms, standard of proof, vesting of property into Central Government and left it to be prescribed through delegated legislation. With respect to these gaps, Supreme Court remarked that gaps left in the unamended 1988 Act were not merely procedural, but essential and substantive. Such inconclusive law can never be permitted to be valid under Part III³ of the Constitution of India. Supreme Court observed that such an overbroad provision was manifestly arbitrary as the open texture of law did not have sufficient safeguards.
- Supreme Court observed that the unamended 1988 Act was merely a shell, lacking the substance that a criminal legislation requires for being sustained. Supreme Court ruled that section 3 and 5 of the unamended Act were unconstitutional from their inception.
- As sections 3 and 5 of the unamended 1988 Act are considered as unconstitutional since its inception, the

³ Part III of the Constitution of India deals with fundamental rights.



argument of the Government that only procedural gaps were filled by amendment does not sustain. It leads to the conclusion that amendment in 2016 creates new provisions and new offences and therefore penal provisions cannot be applied retrospectively in light of Article 20(1) of the constitution of India.

- With respect to the contention of the government that amended Section 5 providing for confiscation of property operates under civil law and therefore not punitive in nature and is hence not hit by Article 20(1) of the Constitution for its retrospective application, Supreme Court observed
 - Amended provisions create a confiscation procedure which is distinct from the procedure contemplated under the CrPC⁴ which is not merely procedural
 - It has altered substantive rights of evidentiary standards from “beyond reasonable doubt” to “preponderance of probability”.
 - Independent provisions of forfeiture, distinct from criminal prosecution, need to be utilised in a proportionate manner, looking at the gravity of offence (e.g. crime relating to drugs cartel, terrorist activity, etc.)
 - Amended definition of benami property and benami transaction includes sham transaction, fictitious transactions and attached the taint to the proceeds of property as well.

These can not be equated with as enforcing civil obligations.

- The amended law manifests an *in-rem* forfeiture wherein the taint of entering into benami transactions transposes to the property and it becomes liable for confiscation. If law allows confiscation of property, even in situations where holding of such property is not dangerous, merely to condemn the method of transfer or holding, which was once a recognised form of property holding in India, such retroactive utilisation of confiscation provision would characterise itself as penal.
- Having held that criminal provisions in the unamended 1988 Act were arbitrary and incapable of application, retroactive application of confiscation proceeding would tantamount to punitive punishment, in the absence of any other form of punishment.
- As government did not operationalise sections 3 and 5 of the unamended Act, legislative intent was to ensure that ostensible owner continue to have ownership of property and having crystallised such right for 28 years, it can not be taken away retroactively, as that would be unduly harsh and arbitrary.

Conclusion

- In conclusion, the Supreme Court held that:

⁴ The Code of Criminal Procedure, 1973



- Section 3(3) (imprisonment) and section 5 (confiscation) of the unamended 1988 Act is declared as unconstitutional for being manifestly arbitrary
- Criminal prosecution or confiscation proceedings for transactions entered into prior to the date of enforcement of the 2016 Amendment Act cannot be initiated or continued. All such proceedings shall stand quashed
- The 2016 Amendment Act was not merely procedural, rather it prescribed substantive legislation
- Amended Section 5 being punitive in nature can only be applied prospectively
- Constitutional validity of independent confiscation proceedings as contemplated under the 2016 Amendment Act is left open for adjudication in appropriate proceedings

Dhruva Comments

The 2016 Amendment Act amending the definition of benami transaction and benami property to cover within its scope, even the holding of benami property and proceeds from such property, together with section 1(3) of the unamended 1988 Act which provides that all sections except sections 3, 5 and 8 shall come into force from 19th May, 1988 have raised serious doubts on its retroactive applicability.

This is a welcome decision which has made clear that the unamended 1988 Act was an inconclusive, still-born legislation and no action can be taken either to prosecute or to confiscate property for transactions entered into prior to date of enforcement of the 2016 Amended Act.

The decision also reinforces that an element of *mens-rea* is an essential ingredient before an act is considered as an offence and its exclusion has to be express or by necessary implication.

This decision would call for evaluation of validity of certain other statutes that seek to either define the offence or widen the scope of the offence or increase the criminal liability of such offence, retrospectively being violative of Article 20(1) of the Constitution of India.

This decision reinforced that provisions of law must adhere to “substantive due process” and provide enough safeguards while providing wide powers to the authority.

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