



## Preliminary

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\*Ins. by Act 43 of 2016, sec.2 (w.e.f. 1-11-2016, vide S.O. 3289(E) dated 25th October, 2016)

### SECTION 1 – SHORT TITLE, EXTENT AND COMMENCEMENT

- [(1) This Act may be called the Prohibition of Benami Property Transactions Act, 1988 (45 of 1988).]
- (2) It extends to the whole of India<sup>2</sup>[xxx].
- (3) The provisions of sections 3, 5 and 8 shall come into force at once, and the remaining provisions of this Act shall be deemed to have come into force on the 19th day of May, 1988.

### COMMENTARY

#### Section 1(1) – Short title

The title “Prohibition of Benami Property Transactions Act, 1988” was substituted for the old title, i.e. The Benami Transactions (Prohibition) Act, 1988 with effect from 1st November, 2016.

Structure—The amended Act comprises 72 sections as compared to only 9 sections in the Principal Act.

#### Section 1(2) – Extent and applicability of the Act

Now the Act extends to whole of India. On 9th August, 2019, The Jammu and Kashmir Reorganisation Act, 2019 has been enacted and Jammu and Kashmir is no longer a State and in its place, two new Union territories have been formed, namely Union territory of Ladakh and Union territory of Jammu and Kashmir.

Till 30/10/2019, the State of Jammu and Kashmir existed, so the PBPT Act, 1988 did not apply to the State. During that period, Section 281A of the Income Tax Act, 1961 applied to Jammu and Kashmir. With effect from 31/10/2019, the PBPT Act, 1988 applies to the Union Territories of Jammu & Kashmir and Ladakh, also.

1. Subs. by Act 43 of 2016, sec.3, for sub-section (1)(w.e.f. 1-11-2016, vide S.O. 3289(E), dated 25th October, 2016). Sub-section(1), before substitution, stood as under “(1) This Act may be called the Benami Transactions (Prohibition) Act, 1988.”
2. Words “except the State of Jammu and Kashmir” omitted by the Jammu and Kashmir Reorganisation Act, 2019 (34 of 2019), dated 9-8-2019, w.e.f 31-10-2019 vide S.O. 2889 (E), dated 9-8-2019.

**Section 1(3)—Commencement – The Act coming into force**

- (i) The following three sections came into force on 5th September, 1988 when the Act received the Presidential assent—  
Section 3: Prohibition of benami transactions  
Section 5: Property held benami liable to confiscation  
Section 8: Composition of authority
- (ii) The other provisions of the Act shall be deemed to have come into force on 19th May, 1988.

*Notes* - As per the literal meaning of section 1(3), sections 3, 5 and 8 became operative from 5th September, 1988 and other sections are deemed to have become operational from 19th May, 1988.

At the same time, it is relevant to mention here that the old (Principal) Act of 1988 contained only 9 sections and the new Amended Act, 1988 has 72 sections. Thus, the larger question is whether the amended (in the year 2016) Act is applicable with effect from 1st November, 2016 or it is applicable from the year 1988. An alternate view is that the old/unchanged provisions are effective from the year 1988 and the new/amended provisions are applicable with effect from 1st November, 2016.

A section of the writers are of the view that most of the new sections are procedural, yet many provisions are substantive and have far-reaching consequences. For example, it has been pointed out that in section 5, provision for confiscation of property has been substituted in place of acquisition of benami property. Similarly, there are some sections which deal with appeal to Appellate Tribunal and High Court, so how could these sections become operational from the year 1988 (retrospectively).

Some of the case laws, which are relevant to this issue, are as under:

- *Mithilesh Kumari Vs Prem Bihani Khare*, (1989) 177 ITR 97(SC).
- *Narinder Kumar Jain Vs Munisubrat Dass Jain*, (1990) 181 ITR 305 (SC).
- *R Rajagopal Reddy Vs Padmini Chandrasekharan*, (1995) 213 ITR 340 (SC).
- *Gangacharan Vs C Narayanan*, (2000) 242 ITR 126 (SC).

It is pointed out that in section 1(3), use of the words “shall be deemed to have come into force on the 19th May, 1988”, except sections 3, 5 and 8, clearly indicates that the Amended Act, 1988 intended to give retrospective effect to such other provisions.

Furthermore, the Hon’ble Finance Minister had also during the debate in Parliament declared that they had amended the old (Principal) Act comprehensively instead of bringing a new Act with the intention that people indulging in benami transactions between 1988 and 2016 do not escape unpunished considering the larger public interest.

Moreover, section 3(3) and sections 53 to 55 (Chapter VII) relating to penal provisions categorically indicate that these penal provisions are applicable

for the persons entering into benami transactions on or after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, i.e. with effect from 1st November, 2016. It also indicates that rest of the provisions are deemed to be operative from the year 1988 itself.

The issue of retrospective application of the provisions, which are brought through 'The Benami Transactions (Prohibition) Amendment Act, 2016 (except the penal provisions in sections 3(3), 53 and 54) is debatable in nature.

The date of coming into force of the provisions of the PBPT Act, 1988 –

- (i) As far as the Union Territories of Jammu & Kashmir and Ladakh are concerned, the PBPT Act, 1988 is applicable w.e.f. 31/10/2019. Thus w.e.f. 31/10/2019, the PBPT Act applies to the whole of India.
- (ii) As far as the rest of India is concerned, in view of the Supreme Court judgment in the case of Ganpati Dealcom Pvt. Ltd. (2022), the effective dates would be as under:
  - Section 3(1) is applicable from 05/09/1988.
  - Section 4 is applicable w.e.f. 19/05/1988.
  - Section 3(2) has been declared unconstitutional by the Apex Court.
  - Sections 8 to 17 have been omitted w.e.f. 01/07/2021.
  - Sections 54A and 54B are effective from 01/09/2019.
  - The rest of the sections are effective from 01/11/2016.
- (iii) The Hon'ble Apex Court, on a review petition filed by the Union of India, recalled its judgment in the Ganpati Dealcom case. The Hon'ble Court held that since there was no challenge to the constitutional validity of the unamended provisions of the PBPT Act, 1988, the review petition was to be allowed and the impugned judgment has to be recalled.

## **SECTION 2 – DEFINITIONS**

In this Act, unless the context otherwise requires,-

- (1) "Adjudicating Authority" means the Adjudicating Authority [referred to in section 7];
- (2) "Administrator" means an Income Tax Officer as defined in clause (25) of section 2 of the Income-tax Act, 1961 (43 of 1961);

<sup>1</sup> Subs. by Act 43 of 2016, sec.4, for section 2 (w.e.f. 1-11-2016), vide S.O. 3289 (E), dated 25th October, 2016). Section 2, before substitution, stood as under:  
"2. Definitions-In this Act, unless the context otherwise requires,-

- (a) "benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person;
- (b) "prescribed" means prescribed by rules made under this Act;
- (c) "property" means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property".

2. Substituted in place of 'appointed under section 7' w.e.f. 01/07/2021, by the Finance Act, 2021.

- (3) "Appellate Tribunal" means the Appellate Tribunal established under section 30;
- (4) "Approving Authority" means an Additional Commissioner or a Joint Commissioner as defined in clauses (1C) and (28C), respectively, of section 2 of the Income tax Act, 1961 (43 of 1961);
- (5) "attachment" means the prohibition of transfer, conversion, disposition or movement of property, by an order issued under this Act;
- (6) "authority" means an authority referred to in sub-section (1) of section 18;
- (7) "banking company" means a company to which the provisions of the Banking Regulation Act, 1949 (10 of 1949), applies and includes any bank or banking institution referred to in section 51 of that Act;
- (8) "benami property" means any property which is the subject-matter of a benami transaction and also includes the proceeds from such property;
- (9) "benami transaction" means—
  - (A) a transaction or an arrangement—
    - (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
    - (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—
      - (i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;
      - (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;
      - (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;
      - (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint owners in any document, and the consideration for

such property has been provided or paid out of the known sources of the individual; or

- (B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or
- (C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;
- (D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious.

Explanation-For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882, if, under any law for the time being in force,-

- (i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;
  - (ii) stamp duty on such transaction or arrangement has been paid; and
  - (iii) the contract has been registered.
- (10) "benamidar" means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name;
  - (11) "Bench" means a Bench of the Adjudicating Authority or the Appellate Tribunal, as the case may be;
  - (12) "beneficial owner" means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar;
  - (13) "Board" means the Central Board of Direct Taxes constituted under the Central Boards of Revenue Act, 1963 (54 of 1963);
  - (14) "director" shall have the same meaning as assigned to it in clause (34) of section 2 of the Companies Act, 2013 (18 of 2013);
  - (15) "executor" shall have the same meaning as assigned to it in clause (c) of section 2 of the Indian Succession Act, 1925 (39 of 1925);
  - (16) "fair market value", in relation to a property, means-
    - (i) the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and
    - (ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with such manner as may be prescribed;
  - (17) "firm" shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932 (9 of 1932) and shall include a limited

liability partnership as defined in the Limited Liability Partnership Act, 2008 (6 of 2009);

- (18) "High Court" means—
- (i) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
  - (ii) where the Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain;
- (19) "Initiating Officer" means an Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A), respectively, of section 2 of the Income-tax Act, 1961 (43 of 1961);
- (20) "Member" means the Chairperson or the Member of the Adjudicating Authority or the Appellate Tribunal, as the case may be;
- (21) "notification" means a notification published in the Official Gazette and the expression "notified" shall be construed accordingly;
- (22) "partner" shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932 (9 of 1932), and shall include—
- (a) any person who, being a minor, has been admitted to the benefits of partnership; and
  - (b) a partner of a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008 (6 of 2009);
- (23) "partnership" shall have the same meaning as assigned to it in section 4 of the Indian Partnership Act, 1932 (9 of 1932), and shall include a limited liability partnership formed and registered under the Limited Liability Partnership Act, 2008 (6 of 2009);
- (24) "person" shall include-
- (i) an individual;
  - (ii) a Hindu undivided family;
  - (iii) a company;
  - (iv) a firm;
  - (v) an association of persons or a body of individuals, whether incorporated or not;
  - (vi) every artificial juridical person, not falling under sub-clauses (i) to (v);
- (25) "prescribed" means prescribed by rules made under this Act;
- (26) "property" means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion

into some other form, then the property in the converted form and also includes the proceeds from the property;

- (27) "public financial institution" shall have the same meaning as assigned to it in clause (72) of section 2 of the Companies Act, 2013 (18 of 2013);
- (28) "Special Court" means a Court of Session designated as Special Court under sub-section (1) of section 50;
- (29) "transfer" includes sale, purchase or any other form of transfer of right, title, possession or lien;
- (30) "trustee" means the trustee as defined in section 3 of the Indian Trusts Act, 1882 (2 of 1882);
- (31) words and expressions used herein and not defined in this Act but defined in the Indian Trusts Act, 1882 (2 of 1882), the Indian Succession Act, 1925 (39 of 1925), the Indian Partnership Act, 1932 (9 of 1932), the Income-tax Act, 1961 (43 of 1961), the Depositories Act, 1996 (22 of 1996), the Prevention of Money-Laundering Act, 2002 (15 of 2003), the Limited Liability Partnership Act, 2008 (6 of 2009) and the Companies Act, 2013 (18 of 2013), shall have the same meanings, respectively, assigned to them in those Acts.

#### **COMMENTARY**

##### **Section 2(1)-"Adjudicating Authority" means the Adjudicating Authority referred to in Section 7.**

Sections 7 to 17 of the Act deal with the composition, eligibility, procedure, service conditions and removal, etc., of the members of Adjudicating Authority. However, till 30th June, 2021, the Adjudicating Authority appointed under the P.M.L.A., 2002, was also functioning as the Adjudicating Authority under the P.B.P.T., Act, 1988.

As per the Finance Act, 2021, the Adjudicating Authority under the provisions of P.B.P.T. Act, 1988 stands abolished w.e.f. 1st July, 2021 and in its place, the Competent Authority authorised under sub-section (1) of section 5 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, shall become the Adjudicating Authority to exercise jurisdiction, powers and authority conferred by or under this Act."

##### **1-2. Section 2(2)-"Administrator" means an Income Tax Officer as defined in clause (25) of Section 2 of the Income-tax Act, 1961 (43 of 1961).**

The Income Tax Officer appointed as per the provisions of Income-tax Act, 1961 can work as the Administrator under this Act. The main role/ duty of the Administrator is to manage the property, confiscated under the provisions of this Act, as prescribed by the rules of this Act. In brief, the Administrator would be responsible for the proper identification of the confiscated property, receiving the property and managing the property including the disposal of the said property in the manner, prescribed by the rules.

**1-3. Section 2(3)-"Appellate Tribunal" means the Appellate Tribunal established under Section 30 of the Act.**

In Chapter V, sections 30 to 48 deal with the formation, eligibility criteria, procedure, powers, removal, etc., relating to Appellate Tribunal. The Central Government, as per section 30 shall, by notification establish an Appellate Tribunal to admit and hear the appeals filed against the orders of the Adjudicating Authority. A bench of Appellate Tribunal may be constituted by a chairperson and at least two members. The chairperson may be a sitting/retired judge of a High Court. Out of two members, one shall be a judicial member and the other member shall be an Administrative Member.

At the moment, there is no Appellate Tribunal established by the government for performing the duties under this Act. However, the Central Government under section 71 of the Act, has notified the Appellate Tribunal established under section 25 of the Prevention of Money Laundering Act, 2002, to discharge the functions of the Appellate Tribunal under the Benami Act.

**1-4. Section 2(4)-"Approving Authority" means an Additional Commissioner of Income Tax or a Joint Commissioner of Income Tax as defined in clauses (1C) and (28C), respectively, of Section 2 of the Income-tax Act, 1961.**

The Initiating Officer who is of the rank of Assistant Commissioner of Income Tax/Deputy Commissioner of Income Tax is required to get approval of the Approving Authority before conducting an enquiry or before passing the order for provisional attachment of the benami property. Accordingly, the Approving Authority has to be higher in rank to the Initiating Officer. The government appoints Joint or Additional Commissioner as the Approving Authority for discharging the relevant functions under the Benami Act.

**1-5. Section 2(5)-"Attachment" means the prohibition of transfer, conversion, disposition or movement of property, by an order issued under this Act.**

In common parlance attachment means restriction on the part of the owner of the property like he/she cannot transfer, mortgage or sell the property. The attachment is effected by way of passing an order by competent authority. There is provision of provisional attachment under section 24(3) in this Act. Here under section 24(3), the Initiating Officer can provisionally attach the property held benami after taking prior approval of the Approving Authority. Then the Initiating Officer (within four months) has to pass an order u/s 24(4) of the Act for continuation of the provisional attachment or revoking the attachment. Thereafter, the matter has to be referred to the Adjudicating Authority and the Adjudicating Authority in turn may confirm or revoke the attachment order passed by the Initiating Officer.

**1-6. Section 2(6)-"Authority" means an authority referred to in sub-section (1) of Section 18.**

In section 18(1), the following are declared as authority for the purpose of this Act:

- (a) The Initiating Officer;
- (b) The Approving Authority;
- (c) The Administrator; and
- (d) The Adjudicating Authority.

The Initiating Officer is of the rank of Assistant Commissioner or Deputy Commissioner of Income Tax. He initiates the enquiries, issues notice under section 24(1) and passes provisional attachment order under section 24(3) of the Act after prior approval from the Approving Authority has been received. The Approving Authority is of the rank of Joint/ Additional Commissioner of Income Tax. An Administrator is usually an Income Tax Officer and he is responsible for managing the confiscated property. The Adjudicating Authority comprising one Chairperson and at least two members is responsible for adjudication of the matters like attachment of benami property referred to them by the Initiating Officer.

**1-7. Section 2(7)-"Banking Company" means a Company to which the provisions of the Banking Regulation Act, 1949 (10 of 1949), apply and includes any Bank or Banking Institution referred to in Section 51 of that Act.**

As per the provisions of the Banking Regulation Act, 1949, "banking company" means any company which transacts the business of banking in India. "Banking" means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, order or otherwise.

**1-8. Section 2(8)-"Benami Property" means any property which is the subject-matter of a Benami Transaction and also includes the proceeds from such property.**

As per section 2(8), "benami property" means any property which is the subject-matter of a benami transaction and also includes the proceeds from such property. For example, when a person purchases a house property in the name of his brother-in-law, in this case the house property is sold (transferred to) to that person's brother-in-law but the consideration for the same has been provided by that person. In this case, the house property is the subject-matter of the benami transaction as the brother-in-law is holding the property for the benefit of that person.

However, the origin of benami property is a benami transaction, so if a benami transaction has not been entered into, then there will be no benami property. Similarly, without benami property, there would be no benami transaction.

Benami properties are held by the owners through proxies. The benami property is purchased in the name of or held in the name of a person who neither paid for it nor actually enjoys it.

It is relevant to mention here that the application of the provisions of the Benami Act is not confined to immovable properties alone. The property in Benami Act is defined in section 2(26) and it means assets of any kind whether movable or immovable, tangible or intangible, corporeal or incorporeal and also includes any right, interest or legal documents/instruments showing title/interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property.

Thus under the new definition, shares and securities and intellectual property can also be considered as benami property. This widening/expansion of the definition by the 2016 amendment clearly reflects the concern/intent of the legislature to intensify the efforts to curb the benami transactions.

As per the new definition if a property is subject-matter of benami transaction and this property is sold/ transferred for a certain consideration, then such sale (monetary) consideration would also be considered as benami property.

If a benami property is located abroad then as per the Finance Minister's clarification, it would be covered under Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015 and not under Benami Act. Furthermore, the Fugitive Economic Offenders Bill, 2018 also contains the provision of confiscation of benami property, situated abroad, owned by the fugitive economic offender.

There would be situations where only part of the property would be treated as benami property. The Finance Minister replying to the debate in Rajya Sabha on 2nd August, 2016 clarified that if there is a 20 storeyed building, 10 floors are held in benami names, then only 10 floors would be treated as benami and the same would be acquired (confiscated).

### **1-9. Section 2(9)-Benami Transactions**

*Meaning of Benami Transaction:-Consider the following illustrations to understand the concept of Benami Transaction.*

When

- a person "A" purchases a property in the name of "B" and "B" holds the the property for the benefit of "A" or
- when a person "A" purchases a property in the name of "B" who is a fictitious person or
- when a person "A" purchases a property in the name of "B" and "B" is unaware or does not have knowledge of such ownership
- when the property is in the name of "B" and the consideration is paid by "A" and "A" is not traceable,

then this transaction is known as benami transaction, the person "B" in whose name the property is purchased (transferred/held) is known as benamidar and the person "A" who paid the purchase consideration is termed as beneficial owner.

The property, which is the subject-matter of benami transactions, is treated as the benami property.

When a person "A" for some reason does not wish to purchase a property in his name and rather chooses to purchase the property in the name of his trusted employee "B". Accordingly, "A" pays the purchase consideration of the property to the seller and the property is transferred/registered in the name of "B". In this case, "A" is beneficial owner, "B" is the benamidar and the subject property is benami property.

However, it is relevant to mention here that the motive of the person paying the purchase consideration is equally important. In the above-mentioned illustration, the beneficial owner pays the purchase consideration for his own benefit and all the fruits like rent, appreciation in the value of property in future will be enjoyed only by him. It can be assumed that he is purchasing the property in the name of "B" not out of charity or not for the purpose of extending permanent benefit to "B" in fact he does the benami transaction for his own conveniences/benefit, for example, he might be using his unaccounted money for this purpose or might be purchasing the property secretly to cheat his family members or his creditors.

On the other hand, if the purchaser does not intend to get any immediate or future benefit and he has done this transaction to extend permanent benefit to "B", then this transaction would no longer be a benami transaction and it would take the character of a gift transaction.

In common parlance, benamidar is also known as "name lender" or the "ostensible owner", as he is not the real owner. In fact, he holds the property for the benefit of the "real owner" and allows his name to be used for ownership purpose.

Thus, the essential legal characteristic of benami transactions is that there is no intention to extend or grant the benefit to the person in whose name such transaction is made. The name of such person (benamidar) is merely an alias for the person beneficially interested. In this manner, the property/cash, shares, fixed deposits, debentures and bank accounts, etc., are held by someone for someone else.

#### *1-9-A. Comparison of old and new definitions of "Benami Transaction"*

<b>Definition as per Old (Principal) Act</b>	<b>Definition as per New (Amended) Act</b>
1. (a) "Benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person.	1. (a) "Benami transaction" means a transaction or an arrangement-Where a property is transferred to, or is held by a person and the consideration for such property has been provided or paid by another person. And the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration.

Definition as per Old (Principal) Act	Definition as per New (Amended) Act
	(b) Thus, an arrangement is also included in the new definition though arrangement is not defined anywhere in the Act, yet in common parlance it means an agreement between two or more parties to carry out the planned transaction in a particularly agreed manner.
2. Property is transferred to one person. Here the definition sticks to transfer of property from one person to another only.	2. Property is transferred to or is held by a person. Thus apart from transferred, the word "held" is also added/ included. Though the word "hold" is meant as the actual possession invested with legal title ( <b>Hari Ram Vs Babu Gokul Prasad</b> , AIR 1991 SC 427). However, it may also include those transactions, where purchase consideration is almost paid and possession is also handed over to the ostensible owner, though the title is yet to be transferred.
3. The condition stating the intention of the beneficial owner was not specifically or explicitly mentioned in the old (Principal) Act, although the contemporary judicial decisions more or less supported the new condition in respect of the intention of the beneficial owner.	3. A new condition in the form of section 2(9)(A)(b) has been added- "The property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration". Thus, there is an added condition, for a transaction to be treated as benami. The intention of the beneficial owner is equally important now. Accordingly, only those cases where the benamidar is holding the property for the benefit of the person paying the consideration will be considered for benami transaction.
4. The old (Principal) Act had no provision for the cases where the benamidar or beneficial owner (ostensible) is non-existent or fictitious and the owner is not aware of or denies knowledge of such ownership.	4. Three new categories, viz. sections 2(9)(B) to 2(9)(D) have also been added. Thus, the cases where the benamidar or beneficial owner is non-existent/ fictitious have also been included in the purview of benami transaction. Further the cases where the owner (ostensible) of the property is not aware of or denies knowledge of such ownership are also included in the new definition.

Definition as per Old (Principal) Act	Definition as per New (Amended) Act
<p>5. The exceptions mentioned in the old Act were similar to the ones mentioned in the new Act. It was mentioned that the criteria of the benami transaction shall not apply to the purchase of property under section 3(2) of the old Act, which related to the purchase of property in name of wife or unmarried daughter. Further it also related to the securities held by depository as registered owner or held by a participant as an agent of depository.</p> <p>Moreover, the provision for prohibition of the right to recover property held as benami shall not apply in the following cases as per section 4(3):</p> <p>(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or</p> <p>(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.</p>	<p>5. To provide relief to the genuine/<i>bona fide</i> cases, four exceptions have been provided to section 2(9)(A)-</p> <p>(i) Where a property is held by a Karta or a member of HUF, then it is necessary that the property is held for the benefit of the Karta or other members of HUF - and the consideration is provided or paid out of known sources of HUF.</p> <p>(ii) Where a property is held by a person in a fiduciary capacity for the benefit of the other person towards whom he stands in such capacity, for example when a trustee holds the property for the benefit of the beneficiaries of the trust.</p> <p>(iii) Where the property is held by any person in the name of his/her spouse or his/her child and the consideration for such property has been paid by the individual from his/her known sources.</p> <p>(iv) Where the property is held by any person in the name of his brother/sister or his lineal ascendant/descendant and where the name of the brother/sister or ascendant/descendant appears as joint owners in any document and the consideration for such property has been paid/ provided out of the known sources of the individual.</p>
<p>6. Section 6 of the old (Principal) Act does not apply in certain cases - "Nothing in this section shall affect the provisions of section 53 of the Transfer of Property Act, 1882, or any law relating to transfers for an illegal purpose".</p>	<p>6. As per the explanation to section 2(9), the Power of Attorney transactions in immovable properties shall also be excluded from the ambit of benami transactions. The Finance Minister in Rajya Sabha on 3rd August, 2016 had clarified that the properties which are transferred in part performance of a contract (under section 53A of the Transfer of Property Act) have also been kept out as per the recommendation made by the Standing Committee.</p>

Definition as per Old (Principal) Act	Definition as per New (Amended) Act
7. The old definition did not cover sham transactions where possession is not given to the benamidar. The Courts also held the view that sham transactions are not covered under the Benami Act. The words “property is transferred to” in the old definition meant transfer of both the title and possession of the property.	7. In the new definition, the words are “the property is transferred to or is held by”, which includes cases of both transfer of title only and transfer of both title as well as possession. Thus, as per the new definition, now it is of no relevance whether possession of the property is given or not given to the benamidar.

Considering the issues discussed in the above table, it is apparent that the new amended definition is more detailed and balanced. In addition, the new definition is a little restrictive in nature in view of the added condition in respect of the intention of the person paying the purchase consideration. Thus, both the conditions are to be satisfied simultaneously as per the new amended definition of the benami transaction.

Furthermore, as per the earlier definition and contemporary case laws, sham transactions are excluded from the purview of benami transactions. However, as far as the new definition is concerned, no such distinction prevails any further. The comparison with sham transactions would be discussed in detail separately. If we read the wordings of new definition [section 2(9)(A)(a)] carefully, then as per the literal or plain meaning, it covers both the situations where title is transferred to the benamidar or simply possession (held) of the property is handed over to the benamidar. Thus, now it makes no difference, whether the possession lies with the title holder or with the person who paid the (purchase) consideration.

However, in both these situations, it is necessary that the purchase consideration has been provided/ paid by a person other than the person in whose favour the property has been transferred with or without possession.

**Property acquired/held in the name of close relative – Whether benami or not?**

Sl. No.	Relation with the individual	Whether the provisions of Benami Act are attracted?
1.	Spouse (husband/wife)	No, subject to the condition that the consideration is paid out of known sources of the individual.
2.	Child/Step child	No, subject to the condition that the consideration is paid out of known sources of the individual.
3.	Brother/Sister	No, subject to the condition that the consideration is paid out of known sources of the individual.

Sl. No.	Relation with the individual	Whether the provisions of Benami Act are attracted?
4.	Cousin	Yes
5.	Father/Mother	No, subject to the condition that the property is registered in the name of the individual as joint owner in any document and the consideration is paid by the known sources of the individual.
6.	Grandfather/ Grandmother	No, subject to the condition that the consideration is paid out of known sources of the individual.
7.	Grandson/ Granddaughter	No, subject to the condition that the consideration is paid out of known sources of the individual.
8.	Daughter-in-law/Son-in-law	Yes
9.	Brother's wife/Sister's husband	Yes
10.	Nephew/Niece	Yes
11.	Spouse's brother /sister	Yes
12.	Father's brother/sister	Yes
13.	Mother's brother/sister	Yes

#### ***1-9-b. Transaction or Arrangement***

The term "transaction or arrangement" has not been defined in this Act. As per section 2(31), the words and expressions used herein and not defined in the Act but defined in the allied Acts like Indian Trusts Act, etc., shall have the same meanings, respectively, assigned to them in those Acts.

However, it is noticed that none of the above referred laws has defined these terms. As per the Oxford English dictionary, "transaction" means an instance of buying or selling, the action of conducting business. It also means an exchange or interaction between people. In simple words, a transaction involves two or more parties and it means supply of goods, services or property in exchange for money.

Similarly, arrangement has also not been defined in this Act or other Acts mentioned in section 2(31). However, "arrangement" in common parlance means an agreement between two or more parties to carry out the planned transaction in a particularly agreed manner.

#### ***1-9-c. "Paid or Provided"***

In the old as well as in the new definition, the words used are paid or provided, or provided or paid (new definition), which will have same meaning. The word "paid" is quite simple and needs no further analysis.

The word "provided" in common parlance means made arrangement, in other words provided may include own funds as well as funds received

from near & dear ones or from bank. Further, this issue has been categorically dealt with by the Hon'ble Apex Court in the case of *Pawan Kumar Gupta Vs Rochiram Nagdeo*, (1999) 4 SEC 243, AIR 1999 SC 1823. The Hon'ble Court observed as under–

The word “provided” in section 2(a) of the Benami Transactions (Prohibition) Act cannot be construed in relation to the source or sources from which the real transferee made up the funds for the sale consideration. The words “paid or provided” are disjunctively employed in the clause and each has to be tagged with the word “consideration”. The correct interpretation would be to read it as “consideration paid or consideration provided”. If consideration was paid to the transferor then the word “provided” has no application as for the said sale. Only if the consideration was not paid in regard to a sale transaction, the question of providing the consideration would arise. Any other interpretation is likely to harm the interest of persons involved in genuine transactions, e.g., a purchaser of land might have availed himself of loan facilities from banks to make up purchase money. In such a case it cannot be said that since the money was provided by the bank it was a benami transaction. So even if the appellant had availed himself of the help rendered by his father Pyarelal, for making up the sale consideration that would not make the sale deed a benami transaction so as to push it into forbidden area envisaged in section 3(1) of the Act.

***1-9-d. Intention of the beneficial owner***

As per the definition of “benami transactions” as provided in the Principal Act, almost all transactions where consideration is paid by a person other than transferee would be treated as benami transactions. However, there are certain situations, like where a person pays the major part of the consideration through bank loan or loan from a family member or from a business associate, where there is no justification for treating such transaction as benami transactions. Moreover, there are many case laws decided by various High Courts or by the Apex Court, which also support this view. In this background, the Ministry of Finance explained the importance of the intention of the beneficial owner in the following manner–

“ ... The circumstances in which another person pays or provides the consideration to the transferee for being passed on to the transferor may be manifold. A person may provide consideration money to the transferee out of charity or under some jural relationship such as creditor and debtor or the like. The final relationship between such other person and the transferee has nothing to do or may have nothing to do with the jural relationship between the transferor and the transferee. The intention of the other person paying or providing the consideration is in substance the main factor to be considered and is of great importance. If that other person really intends that he should be the real owner of the property then only the transferee may be characterized as a benamidar, whether the transferee is a fictitious person or a real person having no intention to acquire any title by means of

the transfer. It was perhaps for this very reason that the intention of the person actually paying or providing consideration to the transferee was incorporated as an essential element in the provisions of section 82 of the Indian Trusts Act. It would appear to be unreasonable to rest the provisions relating to benami transactions on the payment or provision of consideration alone by a person other than transferee. To have such a provision in sweeping language may make the Act unworkable in actual implementation. The actual payment or provision of consideration has been made the dominant factor, but by itself it may have no real substance unless the person providing the consideration does so with the intention of actually benefitting himself.

In view of the above, it is proposed that the payment alone by the other person should not be the only consideration for deciding a benami transaction, rather intention of the other person paying or providing the consideration should be considered for deciding a benami transaction. Therefore, to hold a transaction or an arrangement as benami, it is proposed to provide an additional test that the benamidar should be holding the property for the benefit of the person providing the consideration... " (Para 2.10 of the 58th report of the Parliamentary Standing Committee on Finance).

Accordingly, the old definition was amended and sub-clause (b) was added in section 2(9)A (as under)–

“(b) The property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration”.

Thus after adding this sub-clause (b) in the new definition, now both the conditions, i.e. payment of purchase consideration by a person other than the transferee and the property being held by the transferee for the immediate or future benefit of the person paying the consideration, have to be satisfied simultaneously if a transaction for purchase of property is to be considered as a benami transaction.

Thus, if the person paying the consideration intends that he himself will be the real owner of the property, then only the transferee/ostensible (on paper) owner will be considered as a mere benamidar (name-lender) and the transaction would be categorized as a benami transaction. Accordingly, the intention of the person paying/ providing the consideration would be equally important factor to be considered in such transactions. To conclude with, a benami transaction is one where one buys a property in the name of another, without an intention to benefit the other.

Further, certain transactions as mentioned in section 2(9)(A)(i) to (iv) and also in explanation to section 2(9) have been excluded from the scope of benami transactions. By virtue of these exclusions in the new definition (2016), every transaction, where purchase consideration is paid by person other than the transferee would not necessarily be treated as benami transaction.

Furthermore, the abovementioned legislative intention behind the enlarged new definition of the benami transaction has been introduced to keep it in line with the decided case laws on this issue.

***1-9-e. Immediate or future benefit***

In the definition, the words “immediate or future benefit” are used. These words are not defined in the Act. These words are also not defined in the allied Acts mentioned in section 2(31). Accordingly, these words need to be understood by their general meaning.

The property is held for the benefit of the person paying the consideration, so the immediate or future benefit would depend upon the intention of the person paying the consideration. Immediate benefit may accrue in form of acquisition of property by usage of unaccounted money or in the form of rental income. The future benefit may accrue in the form of appreciation in the value of the property in the long run. There can be several examples of immediate or future benefit depending upon the circumstances of the case.

***1-9-f. Direct or indirect benefit***

Again the words “direct or indirect benefit” are not defined in the Act or in the allied Acts mentioned in section 2(31). The property is held for the benefit of the person, paying the consideration, so the direct or indirect benefit depends upon the intention of the real owner paying the purchase consideration.

In the case of *Bhim Singh Vs Kan Singh*, AIR 1980 SC 727, the Hon’ble Apex Court held that the true character of the transaction is governed by the intention of the person who has contributed the purchase money. Besides, the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct, etc.

In simple terms, as an example, the rental income accruing to the benami property would be a direct benefit and the appreciation in the value of the property in the long run would be an indirect benefit accruing to the beneficial owner. There can be numerous other examples.

***1-9-g. Characteristics of Benami Transaction***

As we have discussed so far, benami means without any name. It is the kind of transaction where the person who pays for the property does not buy it in his/her name, even though he remains the real owner. The property is held for the direct or indirect benefit of the person who pays for it.

Let us consider the following case to understand the concept of benami in a better manner—

In the case of *Bhim Singh Vs Kan Singh*, AIR 1980 SC 727, the Hon’ble Apex Court observed that to determine the question, whether a transfer is a benami transaction or not the following points are important to consider—

- (i) The burden of proving that a transfer is a benami transaction lies on the person, who asserts that it is such a transaction;
- (ii) If it is established that the purchase money came from a person other than the person in whose name the property has been transferred, the purchase is *prima facie* assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary;
- (iii) The true character of the transaction is governed by the intention of the person, who has contributed the purchase money;
- (iv) The question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct.

In addition to the above criteria, the Courts have also laid down some other criteria, which are as under:

- (i) the source from which the purchase money came;
- (ii) the nature and possession of the property, after the purchase;
- (iii) the position of the parties and the relationship, if any between the claimant and the alleged benamidar;
- (iv) the custody of the title deed after the sale;
- (v) the conduct of the parties concerned in dealing with the property after the sale.

The above list is not exhaustive and it may be considered as illustrative only.

#### ***1-9-h. The ingredients of Benami Transaction***

- (i) Purchase consideration is paid by a person other than the transferee: This is one of the essential ingredients, which is present in old as well as in new definition.
- (ii) The intention of the real owner is not to benefit the benamidar:

Every transaction where the purchase consideration is paid by a person other than the transferee cannot be considered a benami transaction. The intention of the real owner is equally important, and accordingly in a benami transaction, a person buys property from his own sources but in the name of another person without the intention to extend the benefit to such other person. In the old definition, this idea of holding the property for the benefit of the person providing consideration was not included.

However, in most of the cases, the Courts held that the intention of the real owner is of paramount importance in deciding whether a transaction can be categorized as a benami transaction. In the new definition, the sub-clause (b) has been specifically added to section 2(9)(A)-"the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration".

(iii) Possession of the property with the benamidar:

Several Courts have differentiated between benami transaction and sham transactions. Subsequently, it was held that sham transactions do not come under the purview of Benami Property Act. In a sham transaction, a property is sold but the transferor does not intend to pass on the title to the transferee or there is no intention to create any right in the transferee, though the purchase consideration is paid by some other person.

In the case of *Krishan Kumar Vs Harnam Dass*, (1991) 56 Taxmann 233 (Delhi), the Hon'ble Delhi High Court held that if possession of the property is taken by the real owner and the consideration is also paid by the real owner, the sale deed would merely be regarded as a sham document. Thus, possession of the property with the benamidar was also considered as an essential condition for treating the transaction as a benami transaction.

However, the new definition has been widened to consider benami transaction as a transaction or an arrangement. In the earlier definition, the words used were "transferred to", while in the new definition, the words used are "transferred to or is held by". In common parlance, "held" conveys possession and both the words are used distinctively, so it is not necessary that title as well as possession should lie with the benamidar, as word "or" is used between the words "transferred" and "held".

Furthermore, almost all the Court decisions relating to sham transactions are prior to the year 2016, when the new definition was introduced. Moreover, it is a matter of common knowledge that in many cases though the title is in the name of the benamidar, the real owner uses the property for residential or business purpose. Thus, this ingredient of possession with the benamidar defies logic and cannot be accepted as essential particularly with the advent of the new definition.

Lastly, section 2(10) defines the "benamidar" which also includes a person who lends his name. Thus, now a mere name lender is also treated as a benamidar so the sham transaction is no longer excluded from the purview of a benami transaction.

### ***1-9-i. Types of Benami Transactions***

This topic has also been covered while comparing old and new definitions of benami transactions. However, the same is again defined in the following four categories of transactions–

#### **CATEGORY "A" TRANSACTIONS**

(A) a transaction or an arrangement–

- (a) Where a property is transferred to, or is held by a person, and the consideration for such property has been provided, or paid by, another person; and

- (b) The property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration.

Thus, in simple terms, benami transaction is a transaction where the consideration for the purchase of property has been provided/ paid by one person and the property is transferred to or held by another person. This part (sub-clause (a)) is common in old as well as new definitions of benami transaction. Then to exclude *bona fide* property transactions from the ambit of benami, sub-clause (b) was added in the new definition. Accordingly, it is also necessary that the property is held for the immediate or future benefit of the person, who has provided the consideration for the said property.

For example, if person "A" purchases a property in "B"'s name and "B" holds the property for the immediate/future benefit of "A", then this transaction would be classified as a benami transaction. However, if "A" provides a loan (on interest) to "B" and "B" partly from own sources and partly from loan taken from "A" purchases the property and "B" holds the property for his/her benefit, in that case because of sub-clause (b),

i.e. the intention of the person paying the consideration (earning interest on loan), this transaction would not be treated as a benami transaction.

It is also important to clarify here that in usual circumstances (except the exceptions, which would be discussed below) the colour (whether it is white or black) of the purchase consideration is not relevant in deciding whether a particular transaction would be treated as a benami transaction. It is true that usually unaccounted (black) money is used in benami transactions but sometimes just to defeat a particular law (like Land Ceiling Act or Tribal Act) an immovable property is purchased in the name of other persons, though the purchase consideration is paid from the accounted for sources.

#### *Exclusion from benami transactions*

- (i) When the property is held by Karta or a member of HUF–

This exception is available subject to the following two conditions:

- The property is held for his benefit or for the benefit of other members of the family.
- The consideration for such property has been provided/paid out of the known sources of the HUF.

The expression "known sources" would be defined in detail separately. However, in brief, "known sources" is a wider term than known sources of income, for example, for purchasing a property, the other members like brother, sister, son and daughter can also contribute.

Further, one can take a loan from someone or he can even take a loan from a bank.