LAW COMMISSION OF INDIA

# ONE HUNDRED THIRTIETH REPORT

ON

# BENAMI TRANSACTIONS - A CONTINUUM

1988

Tel. No. 384475

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LAW COMMISSION
GOVERNMENT OF INDIA
SHASTRI BHAVAN
NEW DELHI

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Shri B. Shankaranand,
Minister for Law and Justice,
Government of India,
Shastri Bhavan,
NEW DELHI.

Dear Shri Shankaranand,

You may kindly recall your letter dated July 22, 1988, by which the Law Commission was requested to take up the case of Benami Transactions (Prohibition of the Right to Recover Property) Ordinance No. 2 of 88 for detailed examination and give its considered views as early as possible so that the Bill to replace the Ordinance may be drafted on the basis of the recommendations of the Law Commission and get the same passed before the close of the Monsoon Session of Parliament. The letter of reference was received on July 22, 1988. Immediately thereafter, the Law Commission started looking into the various ramifications of the Ordinance including the extensive coverage, if any, that may be recommended. The Law Commission, of course, as you know, had the advantage of its earlier report (Fifty-Seventh).

Ordinarily, the Law Commission before giving its considered views, likes to develop a national debate for ascertaining the views of the society so as to make effective recommendations to be in tune with the mores of the day.

With the time constraint, it was not possible to follow this regular procedure of the Law

Commission. But it is anathema to the Law Commission to give its views as perceived by it only. To the limited extent of the time permitting, restricted debate with some outstanding personalities, who have made name in different walks of life, was undertaken. The Law Commission, to the extent, became well-informed. After collating all the material, the report has been drawn up.

I have great pleasure in sending this report today. In order to appreciate the width and coveragae of the report, I would request you to place the report of the Law Commission on the Table of the House while moving the Bill in the Parliament.

I am reasonably sure that it would help the Government of India, as stated in your reference letter, to draw up a comprehensive Bill for replacing the Ordinance.

With kind regards,

Yours sincerely,

(D.A. DESAI)

Encl: A Report

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# CHAPTER I

## INTRODUCTORY

1.1. The President of India, in exercise of powers conferred by clause (1) of article 123 of the Constitution, promulgated an Ordinance, styled as 'Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988', being Ordinance No. 2 of 1988, on May 19, 1988. It came into force immediately on promulgation.

1.2. The Ordinance in terms partially implemented the recommendations of the Law Commission of India relating to benami transactions.[1] It appears that the Minister of Law, Justice and Company Affairs, by his letter dated December 20, 1972, invited the Law Commission of India to examine the question of prohibiting benami transactions. The letter proceeded to recite '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. The suggestion was reiterated in Parliament during the debate on the Taxation Laws (Amendment) Bill, 1971.'.

1.3. Accepting the reference, the Law Commission undertook to examine the matter and let the Government have the benefit of its advice on the question of prohibiting the practice of holding property benami.

1.4. The Law Commission in its report analysed the nature of a benami transaction, its history as part of Indian legal system and its judicial recognition and concluded, after reference to the decision of the Federal Court,[2] that all benami transactions need not be regarded as reprehensible and improper and that there is nothing inherently wrong in it and it accords within its legitimate scope with the ideas and habits of people.[3] It was, however, further of the opinion that '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.'[4] After having examined legal and factual controversies attending upon benami transactions, a conclusion was reached as to what steps should be indicated for either prohibiting or regulating benami transactions with a view to minimising litigation. It may be mentioned here that the

guiding consideration of the Law Commission at the relevant time in formulating its recommendations was reducing litigation in the courts arising from benami transactions. It quoted with approval the observation that 'the law permitting and recognising benami transactions results in a lot of wasteful litigation....'.[5] This approach influenced to some extent its recommendations.

1.5. The Law Commission examined three alternatives. They may be extracted:

"(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 trust 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 relative 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).".

Ultimately, it was of the considered opinion that the first alternative was not likely to be effective and the third alternative, though least drastic, yet the whole thing would turn upon the intention of parties and, therefore, the practical advantage of such a provision will be its elasticity. In other words, it would equally be ineffective and accordingly recommended[6] the second alternative for implementation. In its view, the refusal to recognise benami transactions by denying a forum for the enforcement of rights based on benami and thereby making the benamidar the real owner would bring about a cessation of benami being part of Indian law. It also recommended certain consequential amendments.

1.6. The report was with the Government for about a decade and a half. Ultimately it appears that the Government of India resolved to implement the recommendations of the Law Commission. The Ordinance more or less bodily adopted the draft recommendation set out under the marginal note 'Recommendation'[7] with one important variation that while the Law Commission was of the opinion that it is necessary to make an exception for past transactions, as the provisions of the Ordinance stand, the President appears to have resolved to make them retroactive. The widespread belief held now is that the operation of the provisions of the Ordinance would be retroactive and even the past banami transactions would be governed by the provisions of the Ordinance if it becomes necessary for the parties to such past benami transactions to either file a 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 by or on behalf of the person claiming to be the real owner of such property or defend claiming right in respect of any property held benami whether against the person in whose name the property is held or against any other person. This understanding of the Ordinance has led to a debate in print media.[8]

The grievance therein stated is that 'such legislation cannot be enacted with retrospective effect for the person purchasing benami property before May 19 (date of the Ordinance) did so keeping in mind the laws relating to benami transactions prevalent at that time. How can the State snatch away his right to enforce his ownership of that property?'.[9]

1.7. Since the promulgation of the Ordinance, while broadly welcoming the attack on one of the court articulated institutions protecting unaccounted money, the pendulum has swung both the ways manifesting public reaction to this overdue legal reform. To cite only a few instances, one national daily published detailed, analytical and informative articles under the headings 'Benami Revolution may be Stillborn' and 'The Ordinance can prove Self-defeating',[10] and the other of which note may be taken is 'The Benami Ordinance (1) Another Paper Tiger and (2) Boon for Reducing Tax Burden'.[11] In between, such views as, 'Banishing Benami Holdings' and 'Welcome Ordinance'[13] have appeared.

1.8. The Ordinance was promulgated on May 19, 1988. In view of the provision contained in article 123(2)(a) of the Constitution, in order to perpetuate its existence, an Act replacing the

Ordinance will have to be put on the statute book within a period of six weeks from the reassembly of Parliament, failing which the Ordinance would cease to operate. The Parliament has reassembled. The process of replacing the Ordinance by an Act appears to have started.

1.9. On July 22, 1988 late in the evening, a communication was received from the Minister of Law, Justice and Water Resources setting out therein the circumstances leading to the promulgation of the Ordinance. In that very communication he referred to a communication from the Minister of Planning and Programme Implementation to the Prime Minister of India subsequent to the promulgation of the Ordinance and a decision of the Government of India to request the Law Commission to take up this question of benami transaction for detailed examination and to give its considered views as early as possible so that the Bill to replace the Ordinance may be drafted on the basis of the recommendations of the Law Commission and get the same passed before the close of the Monsoon Session of Parliament. The next three days were holidays and the office was closed. There was a certain constraint on the time available to the Law Commission, both as to its existence as also

to the time-frame within which a considered report can be submitted which may help the Government of India in drafting the Bill to be moved to replace the Ordinance. But the letter of the Minister of Law, Justice and Water Resources, after noticing that the Law Commission was very busy in finalising some of the reports, yet considered examination of the issue of benami transactions by the Law Commission very necessary 'in view of its importance and the reference of which will be a very progressive measure and can go a long way to curb the proliferation of black money in the country'. The Law Commission, with considerable maladjustment of its work schedule, in larger public interest offered its services. If the Law Commission had time at its disposal as desired by it, this subject has such vast dimensions that an indepth study could have been undertaken. But within the parameters of the reference and the constraint on time, as detailed a study as possible with the help of the research staff of the Law Commission and a limited debate has been undertaken in preparing this report. Keeping within the time schedule, this is the report.

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## CHAPTER II

## THE APPROACH

2.1. The history of freedom movement bears enough testimony to the twin goals promised on attainment of political independence: economic emancipation and social justice. Even then, while framing the Constitution and making the right to property a fundamental right, hindsight reveals that a grave error was committed in making the right to property a fundamental right. Social reconstruction and social justice measures, more or less undertaken in implementation of the Directive Principles of State Policy as set out in Part IV of the Constitution, floundered on the bed-rock of fundamental right to property. Measures after measures were invalidated on the ground that they violated fundamental right to property. The pendulum swung in one direction to such an extent that when the State enacted a legislation for replacing the management of a company which the directors had threatened to close down, the Court invalidated the legislation on the ground that the legislation authorised a deprivation of property of the company within the meaning of article 31 without compensation and thereby violated the fundamental right of the company guaranteed by article 31(2) of the

Constitution as it then stood.[1] The right to property where there was no deprivation but merely substitution of management thwarted an attempt to infuse life into an industrial undertaking which had become sick. From Maharaja Kameshwar Singh's case[2] to Womanrao's case[3] via the cases of Subodh Gopal[4], I.C. Golaknath[5], R.C. Cooper[6], Madhav Rao Scindia[7] and Kesavananda Bharati[8], the fundamental right to property enjoyed such an impregnable position that it almost nullified every attempt at social justice and social reconstruction. This resistence to change evoked a sharp reaction and a demand to abolish the right to property from the array of Fundamental Rights in Part III of the Constitution was stridently voiced. The protagnosists of private property went to the extreme length of saying that what is there to work in our Indian Constitution if the right to property is not accorded the status of a fundamental right. They even ignored the warning given by a former Chief Justice of India in one of his opinions that it was an error to place the right to property in the chapter on Fundamental Rights.[9] Even when the right to property was getting entrenched as a road block, a view was expressed in a dissenting opinion that: 'it is futile to cling to our notions of absolute

sanctity of individual liberty or private property and to wishfully think that our Constitution-makers have enshrined in our Constitution the notions of individual liberty and private property that prevailed in the 16th century when Hugo Grotius flourished or in the 18th century when Blackstone wrote his commentaries and when the Federal Constitution of United States of America was framed. We must reconcile ourselves to the plain truth that the emphasis has now unmistakably shifted from the individual to the community. We cannot overlook that the avowed purpose of our Constitution is to set up a welfare State by subordinating the social interest in individual liberty or property to the larger social interests in the rights of the community.'[10]. Yet it was canvassed that unless a human being develops a sense of belonging, he would hardly be able to put in his best effort to contribute to the national good or to the national cake. And unless, it was said, that the national cake is enlarged, what is there to distribute by way of social justice and what social reconstruction is possible? Private property from the point of view of these persons was sacrosanct. Ultimately a nation cannot be thwarted in its onward march when the right to property became an insurmountable road block. A surgical operation for the improved health of the

nation became an urgent necessity and right to property was removed from the array of Fundamental Rights by deleting articles 19(1)(f) and 31 from the Constitution.[11] The earlier approach led a jurist to state that in that approach there was something more than self-luminous judicial policy-making was at stake and that was, in one phrase, 'the economic development of India'.[12]

2.2. At the bottom of all this ambivalence was the judicial opinion expressed soon after the Constitution came into force that when Fundamental Rights and Directive Principles of State Policy stand in confrontation to each other, the Directive Principles have to yield supremacy to the Fundamental Rights and run subordinate thereto.[13] The ambivalence continued till the decision in Minerva Mills' case[14] where it was reiterated that Directive Principles specify the socialist goals to be achieved and these are to be achieved without abrogation of fundamental rights. How this is to be achieved in a case of confrontation is left unanswered? Directive Principles were considered by some commentators on our Constitution 'the humanitarian socialist precepts that were, and are, the aims of the Indian social revolution'.[15] At the other extreme end was the opinion by a member of the Constituent

Assembly that they were 'veritable dustbin of sentiment ..... socially resilient as to permit any individual of this House to ride his hobby horse into it'.[16] Read collectively, directive principles presented a picture of a society towards which the Government would, by affirmative action, strive to reach. It was always assumed that the Government was solely responsible for transformation of the society and the State was expected to play a vital role in the welfare of the people. It is true that ordinarily fundamental rights and directive principles have to stand in harmony with each other. But if there is a confrontation, the fundamental rights of individuals have to yield to the greatest good of greatest number as represented by the directive principles.

2.3. The Law Commission refers to this past history for a limited purpose that again it is dealing with private property in this report. It, therefore, wants to make its approach clear, specific and unambiguous.

2.4. Preamble to the Constitution promised that by effectively using the power conferred by the Constitution on various limbs of the Government, they will strive to set up a society in which will

permeate justice, social, economic and political, and furnish equality of opportunity assuring the dignity of the individual. Supplemented by Directive Principles, all the instrumentalities of the State were under a constitutional obligation to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life. The State shall further strive to minimise the inequalities in income and eliminate inequalities in status, facilities and opportunities not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.[17] In order to promote the welfare of people by transforming the existing social order into one in which justice, social, economic and political, shall inform all the institutions of national life, amongst others, the methodology was that the State shall direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in concentration of wealth and means of production to the common detriment.[18]

2.5. India is a socialist State. One of the fundamental requirements of a socialist State is to provide for social control of means of production. The control of means of production by few individuals results in creating a vested interest. It becomes in fact the starting point of exploitation by those who control the means of production of those who have to serve the controllers of means of production. Socialist State would presage an effective social order in which there would be equitable distribution of the national cake. Concentration of wealth represented by property in the hands of few would be a negation of a socialist State. Therefore, the State policy was to be directed towards the operation of the economic system in such manner as not to permit concentration of wealth in the hands of few because such concentration is generally presumed to be to the common detriment. Power of wealth is generally put to nefarious uses and its tremendous concentration must be deemed to be anti-social. Therefore, concentration of wealth has always to be curbed by effective State action. Property of every sort is a tangible manifestation of concentration of wealth.

2.6. By removing the protection of fundamental right on private property, first important step

was taken towards removing a road block in developmental programmes. The next step was to curb unlawful and nefarious uses of property.

2.7. In modern times, the word 'property' has acquired an extensive connotation. Land and anything attached to earth is described as immovable property. Movable property comprehends cash, shares in joint stock companies, debentures, fixed deposit receipts, bank accounts, jewellery and such intangible assets as patents and copyright, the last being described as intellectual property. Power of wealth may manifest itself in myriad types of property. Acquisition of shares would enable a person to control the company of which shares have been acquired by him. Deposits and other methods of financing industrial activity also allows wide control of the activity financed.

2.8. Right to property never belonged to the category of what are called 'natural rights'. It is a creation of law and the manner in which it is created, to the same extent it can be extinguished by law. Where, therefore, a legal system or a legal formulation or a statutory measure has extended all deserved protection to property, on the ugly and evil features of property becoming

manifest, the statute can withdraw the umbrella of protection. With the developing notions of social justice, a protection to a kind of property once considered valid and just may be withdrawn on the ground that the protection itself has become counter-productive.

2.9. Benami property is not the creation of a statute. It acquired legal respectability by judicial law-making. The earliest case to which reference was made in the earlier report of the Law Commission was of the year 1915. Quoting Sir George Farwell's observation that a benami transaction, a dealing common to Hindus and Mohammedans alike, is much in use in India. According to him, it was quite unobjectionable and has a curious resemblance to the doctrine of the English law' and tracing the history down to the later cases, the Law Commission concluded that benami has become part of Indian law.[19] The Law Commission recommended that it is time that benami ceases to be a part of Indian law because it was resorted to usually (but not always) with the object of concealing the real owner, fraud on creditors, desire to evade taxes as also to avoid certain political and social risks.[20] It was in 1973, that is, nearly a decade and a half back,

that the Law Commission recommended to the Government of India that benami should cease to be a part of the Indian law. This report was published and it was a notice to all benamidars as well as the so-called real owners that Government may contemplate enacting a legislation to put an end to benami as part of Indian law. As the present trend of thinking is that the proposed legislation replacing the Ordinance should be retroactive, a grievance may be made that the Government should not have acted abruptly without giving locus penitentia to those who entered into benami transactions when they were valid and would have no chance to set right their house. In the opinion of the Law Commission a notice of a decade and a half is more than adequate for this purpose and therefore, it is not necessary to grant any such indulgence.

2.10. The assumption that benami transactions only relate to immovable property does not bear scrutiny. Benami holders of shares of joint stock companies, benami or fictitious bank account holders, benami holders of fixed deposits in companies, name lenders for bearer bonds issuance of which was legitimated by a decision of the Supreme Court[21] an encouragement to benami in no uncertain measure, all these have contributed

today to defeating of tax laws, violation of social morality and concentration of property standing in the way of development programmes of the nation. The approach of the Law Commission accordingly is that benami transactions in respect of any property, including intangible property like the patents and the copyright, should be covered in the proposed legislation. The legislation must have extensive application as not to permit a single loophole for providing an escape route to any kind of property which can be held benami. And the entire gamut of umbrella of protection to benami must be completely, fully and effectively folded up. This is our approach and the various aspects are dealt with in the light of this approach.

2.11. This approach ensures that a withdrawal of the protection on fundamental right to property, coupled with total denial of any protection of any legal formulation to benami property, when put in juxtaposition, would at least go a long way in eliminating power of wealth as represented by property to the common detriment.

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## CHAPTER III

## THE COVERAGE OF THE STATUTE

3.1. As the question of benami transactions has been examined way back in 1973 by the Law Commission, the present effort is not to re-examine and re-write everything concerning benami. In fact this report may be treated as a further continuation of the recommendations made in the earlier report.

3.2. The first question that must engage our attention at once is the width and coverage of the proposed legislation. In order to encompass benami transactions concerning various types of property, the legislation should cover both movable, immovable, tangible and intangible property. Unfortunately every type of property, such as land, houses, shares, debentures, bonds, bank accounts, deposit receipts and negotiable instruments, is capable of being held benami. Therefore, it is equally legitimate to have an extensive coverage of the proposed legislation by encompassing property of every denomination.

3.3. The ruck lies in a constitutional conundrum whether land, both agricultural and urban, can be the subject matter of a legislation by Parliament in view of entry 18 in the State List. This

constitutional conundrum should not detain us in view of the fact that the proposed legislation in pith and substance would be covered by entry 6 in the Concurrent List. That is to say the legislation in pith and substance would be dealing with transactions of property or the transactional aspect of property. Therefore, indisputably Parliament would have power to legislate on the topic of Benami Transactions, whatever be the nature of the property covered by such transactions.

3.4. Should the legislation be only prospective or retroactive is the next important aspect to which we must address ourselves. The earlier report of the Law Commission clearly intended the legislation to be only prospective. It was so specifically indicated in the report. The Law Commission was of the opinion that 'the proposed legislation should not 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'[1]. When the Ordinance was issued, the past transactions were not excluded from its operation. In other words, it was retroactive in operation.

3.5. In the available time, the Law Commission held dialogues with retired Chief Justice of India, a sitting Judge of the Supreme Court, an eminent jurist, a former Minister of Law and Justice and a journalist who had contributed analytical articles on the topic covered by the ordinance. One of the views expressed during this debate by one of the participants was that in the past benami transactions were entered into, when benami was a part of the Indian law. Benami transactions came to acquire the legal affirmance by Judge-made law.

3.6. Two inter-connected questions arise in this behalf: (1) is there any provision in the Constitution which would put a fetter on the plenary power of the Parliament to enact law with retroactive operation; and (2) would such a retroactive legislation be invalid for any reason?

3.7. Articles 245 and 246 of the Constitution confer plenary power on the Parliament and State Legislatures to legislate on topics reserved for them in the Constitution. The power of the Parliament to legislate is traceable to articles 245 and 246 and the only constraint on the power is the one mentioned therein. There is no constraint either in article 245 or article 246 on

the plenary power of the Parliament to legislate retroactively in respect of the topics reserved for it under the Seventh Schedule. This plenary power is subject to the provisions of the Constitution. The Constitution is the conclusive instrument by which powers are affirmatively created or negatively restricted. 'The only relevant test for the validity of a statute made under article 245 is whether the legislation is within the scope of the affirmative grant of power or is forbidden by some provision of the Constitution.'[2]

3.8. Therefore, what falls for consideration is whether there is anything in the Constitution which puts a fetter on the power of the Parliament on its capacity to legislate even retroactively. Democratic culture abhores ex post facto legislation. To some extent it has been referred to in article 20(1). It provides that 'no person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence'. Art. 20 (1) prescribes a prohibition against ex post facto legislation in the field of criminal

law. Without further dilating on this topic, it can be concluded at once that ex post facto legislation may be violative of article 20, clause (1), but that article would not come in the way of Parliament to legislate retroactively in areas not covered by article 20(1). Shorn of embellishment, the plenary power of the Parliament to legislate conferred by articles 245 and 246 does not suffer a constraint against it legislating retroactively in field other than criminal law. Undoubtedly, any legislation to be valid must meet the test of Part III of the Constitution. That is not the problem at present. The only question that is being debated is: is there anything anywhere in the Constitution which would either put a fetter or a constraint on the power of the Parliament to pass a legislation making it retroactive in operation?

3.9. Could such a retroactive legislation be challenged on the ground that it invalidates transactions which were valid at the time of the entry into transactions? The constitutional validity of a statute depends entirely on the existence of legislative power and the express provision in article 13. Apart from that limitation, the Legislature is not subject to any other prohibition.[3] And it is judicially accepted

that the power of the Legislature to pass a law includes a power to pass it retrospectively.[4] A Legislature has the power, except in a matter for which there is prohibition like the one contained in article 20(1) of the Constitution, to make laws which are prospective in operation as well as laws which have a retrospective operation. There is no limitation on the power of the Legislature in this respect. Essentially it is a matter relating to the capacity and competence of the Legislature. Although most of the laws made by Legislature have a prospective operation, occasions arise quite often when necessity is felt of giving retrospective effect to the law.[5]

3.10. Retrospective operation of law in the field of election has been upheld. One Kanta Kathuria, holding the office of Special Government Pleader to represent the State of Rajasthan, contested an election to the State Legislative Assembly and was declared elected. His election was challenged, inter alia on the ground that he held an office of profit within the meaning of article 191(1) of the Constitution. The High Court set aside his election. During the pendency of his appeal in the Supreme Court, the State of Rajasthan amended the relevant provisions of the law declaring that the holder of the office of Special Government Pleader

was not disqualified from being chosen as, or for being, a member of the State Legislative Assembly. The Act was made retroactive and removed the appellant's disqualification retrospectively. Though there was a division of opinion amongst five Judge Bench hearing the appeal, all the Judges were, however, unanimous on the point that the Amendment Act had removed the disqualification of the appellant retrospectively. Hidayatullah, CJ., observed that it is well recognised that Parliament and Legislature of the States can make the laws operate retrospectively. He went so far as to say that any law that can be made prospectively can be made with retrospective operation except that certain kinds of laws cannot operate retrospectively. Election law is not one such case.[6] It is indisputable that the law removing benami transactions from Indian law can be prospectively made. For the same reason, it can as well be made retrospectively.

3.11. In the debate, a position emerged that at any rate a reasonable approach necessitates that all those who had entered into benami transactions in the past knowing them to be permissible under the law should be given locus penitentia ranging from three to six months, giving time to the real owner or owners holding beneficial interest in the

property held benami to reclaim the property and thereafter impose a total bar against entering into benami transactions in future.

3.12. When the Law Commission dealt with benami transactions in 1973, 'right to property' was Fundamental as set out in articles 31 and 19(1)(f). Validity of any legislation entrenching upon the right to acquire, hold and dispose of property was likely to be tested on the fundamental right enshrined in article 19(1)(f) and could be sustained on the only ground that the law imposes reasonable restrictions in the interests of the general public or for the protection of the interests of any Scheduled Tribe. It is not necessary to speculate on the possible outcome of the challenge but one can say confidently that the law prohibiting benami transactions could have been sustained in the interest of general public. That apart, articles 19(1)(f) and 31 both are deleted and, therefore, the constraint on the power of the Legislature in dealing with property subject to article 300A has disappeared.

3.13. Thus, even though the proposed legislation is not likely to violate any fundamental right, it was suggested that even to meet the test of

article 14, a rational approach demands that some time must be given to those who entered into benami transactions at the time when they were valid according to law in force. The Law Commission sees no justification for further extension of any time in this behalf. In fact, the Law Commission is in favour of making the Act retroactive to the same extent as the Ordinance today stands. Undoubtedly, benami became part of Indian law by Judge-made law. Legislature can always step in to nullify such Judge-made law. And the Legislature has power to pass such legislation with retroactive operation to nullify the effect of the judgment. To illustrate what is being asserted here, it may be pointed out that one K.L. Gupta challenged the election of the returned candidate Shri A.N. Chawla on diverse grounds, inter alia, contending that the returned candidate incurred an unauthorised expenditure in excess of the prescribed limit of Rs.10,000 in contravention of section 77 and thereby committed the 'corrupt practice' defined in section 123(6) of the Representation of the People Act, 1951. In an appeal against the dismissal of the petition by the Delhi High Court, the Supreme Court held that: 'in the first place, a political party is free to incur any expenditure it likes on its general party propagenda though, of course, in this area

also some limitative ceiling is eminently desirable coupled with filing of return of expenses and an independent machinery to investigate and take action. It is only where the expenditure is incurred which can be identified with the election of a given candidate that it would be liable to be added to the expenditure of that candidate as being impliedly authorised by him'.[7] The ratio decidendi of the judgment was that if a political party incurs expenditure for a particular candidate so as to benifit him, the expenditure so incurred by the political party is liable to be included in the expenditure incurred by him on the ground that it is authorised by him.

3.14. Quick upon the heals of the aforementioned decision, the Representation of the People Act, 1951, was amended by the Amendment Act of 1974 by which an Explanation was added to section 77 of the Act to the effect that notwithstanding any judgment, order or decision of any court to the contrary, any expenditure incurred or authorised in connection with the election of a candidate by a political party or any other association or body of persons or by individual (other than the candidate or his election agent) shall not be deemed to be, and shall not ever be deemed to have

been, expenditure in connection with the election incurred or authorised by the candidate or by his election agent for the purposes of the sub-section (underlining is ours). The language of the Explanation leaves no room for doubt that it would be retroactive in operation and if it is so, the effect of the decision in K.L. Gupta's case would be nullified. This retroactive operation of the expression was challenged even though the Amendment Act of 1974 was inserted in the Ninth Schedule. The Court in Indira Gandhi's case[8] unanimously upheld the validity of retroactive operation of the explanation added to section 77. There are a number of other decisions supporting this view. Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965 provided that the services of temporary Government servant who is not in quasi-permanent service shall be liable to termination at any time by a notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant. The period of notice shall be one month. It was settled by a catena of decisions that payment in lieu of notice must be forthwith i.e. simultaneous. In other words, order of termination of service must be accompanied, in the absence of notice, with a

pay packet for one month. If there is dichotomy between the two i.e. both the acts were not simultaneous, the order would be unsustainable. Subsequently, a proviso was added to rule 5 and brought into operation retrospectively with effect from May 1, 1965 and the retrospective operation of the rule was held valid [9].

3.15. Therefore, it is unquestionable that save the inhibition prescribed in article 20(1) of the Constitution, there is no constraint or fetter on the plenary power of the Parliament to enact a legislation making it retroactive in operation. If it is permissible, the Law Commission sees no justification for not making it so, nor for giving any locus penitentia to those who had entered into the transaction in the past.

3.16. Having given adequate reasons supported by the decisions of the highest court that the plenary power of the Parliament to legislate is not subject to inhibition that Parliament cannot retroactively legislate, it must further be spelt out clearly that any such inhibition, if read, would hinder the effectiveness of the Parliament to transform the society by rule of law. The Executive and the Legislature are under a constitutional mandate to take steps, consistent with its financial capacity and other resource

position, to translate into reality the Directive Principles set out in Part IV of the Constitution. Each such legislation, to specifically abrogate the rights of vested interests, to bring succour and cheer to the downtrodden and underdog would necessitate legislation impinging upon things done in the past. Zamindars acquired large zamindaries by devious methods and obtained the protection of foreign rulers by having a stamp of legality on such acquisitions. If Legislature could not legislate to abolish zamindari save on the pain of paying compansation because of the right to property being fundamental then, agrarian reform measures could never have been passed. No one can, therefore, be heard to say that when in the past they did certain things, entered into contracts, concluded transactions consistent with the legal position then obtaining, they could not be divested by de-recognising the transactions for the purpose of social reconstruction.

3.17 An alternative approach that emerged in the debate was that even conceding the plenary power of the Parliament to enact law with retroactive operation except in the area excluded by Art. 20(1), the retroactive operation is likely to violate article 14 as recently interpreted in number of important judgments.[10] Briefly stated,

this new dimension of article 14 is that in its width and coverage, it is not limited to cases of discriminatory classification but it has activist magnitude and it embodies a guarantee against arbitrariness. No attempt, it was said, should be countenanced "to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch."[11] It was said that what has been lawful for over three quarters of a Century, if invalidated today, could certainly be styled as arbirtrary and would violate article 14 If the new dimension of article 14, namely, anything arbitrary is violative of article 14 is invoked, that approach by itself without anything more make it regressive and would perpetuate vested interest which certainly was never intended. If in the field of property which has the inbuilt tendency to create a vested interest, the doctrine of arbitrariness could be invoked to

perpetuate concentration of property, the very new dimension of article 14 would effectively deprive Legislature of any power. And let it not be forgotten that concentration of property has always to be effectively dealt with by law. Therefore, any interpretation of article 14 in the light of its new dimension were to deny power to the Legislature to deal with concentration of property, the very doctrine of arbitrariness would perpetuate arbitrariness. Therefore, while attempting to disburse property for more equitable distribution in the society, article 14 with its new dimension cannot and would not stand in the way.

3.18. Therefore, viewed from either angle, the Law Commission is of the firm opinion that the legislation replacing the Ordinance should also be retroactive in operation and that no locus penitentia need be given to the persons who had entered into benami transactions in the past. They had notice of one and a half decades[12] to set their house in order. No more indulgence is called for.

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## CHAPTER IV

## BENAMI TRANSACTIONS AND MOTIVATIONS FOR THE SAME

4.1. If legislation were to be enacted on the lines of the Ordinance alone, a legitimate criticism would be voiced as to how the State or the society at large is benefitted by making an ostensible owner a real owner and depriving the real owner of his beneficial interest, both are parties to a benami transaction. Benami transaction generally implies that when one purchases the property in the name of other, the other being a name lender, and the purchaser did not propose to transfer beneficial interest to him, the name lender is a benamidar and the one who advances consideration is the real owner and also described as holder of beneficial interest in the property. It should, however, not be understood that benami transaction emerges only from a transaction of sale and purchase of property. In fact, in modern times and at least since the advent of the Constitution, when attempts were made to destroy vested interest in land by abolition of zamindari as well as abolition of estates and simultlaneously making the tiller the owner of the land, a large scale benami transactions have come into existence where

the real owner of land whose holding would exceed the ceiling prescribed under agrarian reform laws would permit the land to be held by the tiller without transferring ownership rights to him. Thereby, he succeeds in defeating the agrarian reform laws and perpetuates his holding. To illustrate, section 57 of the Bombay Tenancy and Agricultural Lands Act, 1948, provided that on the tillers' day - April 1, 1957 - the tenant shall become the owner of the land. The title was to be transferred by the operation of law and it became indefeasible subject to some of the provisions of the Act. Decades after the statute was in operation, a survey in Borsad taluk of Kaira district of Gujarat State revealed thousands of concealed tenancies. In the process, the holder defeated socially beneficent legislations - one, the aforementioned Act and another, the Act prescribing ceiling on agricultural holding. Same modus operandi was resorted to when Urban Land Ceiling Act came into force. In fact, knowledge of such situation probably led the Minister of Planning and Progamme Implementation to state in his letter dated May 25, 1988, which led to the present reference, that comprehensive legislation may be enacted 'to effectively checkmate the transactions in fictitious names or those in the names of dogs, cats and long dead persons, etc.'.

4.2. Benami transaction activities have thus encompassed all areas of property relationships. Whatever be the nature of the property, there can be a benami holder of it. An impression, therefore, requires to be removed that benami transactions are generally the outcome of sale and purchase of property.

4.3. The information so far collated in the preceding paragraphs would necessitate a serious question to be posed and answered. The question posed during the debate was that the Law Commission should not start with a belief, according to them not legitimate, that the motivation behind benami was always and necessarily illegitimate. It was said with emphasis that benami can be also for legitimate purposes. An illustration was given during the debate that take a case where 'A' not only intensely loves his wife but also holds the belief that she is the harbinger of good luck and, therefore, 'A' would like to buy the property or transfer the property with him to his wife without any intention of transferring any beneficial interest. Proceeding further, it was said that in order to establish his bona fides, 'A' would continue to show the property in his wealth tax

return or in his income-tax return and, therefore, any suggestion that the transaction was entered into with a view to defeating tax laws would stand negatived. It was, therefore, asserted that in such a case, to make wife an owner and deprive the real owner of the property would be irrational, apart from being more illegitimate than the illegitimate benami transaction itself. The Commission remains unconvinced. If 'A' loved his wife so intensely and believed her to be the harbinger of good luck, why should he not transfer the property to her for good and disclose the transaction? Such an hypothetical illustration cannot conceal the real fact that ordinarily benami transactions are entered into for various illegitimate purposes. The primary aim is to defeat the tax laws, such as wealth tax, gift tax and income-tax, as also estate duty when it was in force and which has come back in a different form. Continued benami transactions would have an impact on the same. Similarly, socially beneficent legislations were enacted both by the States and the Centre for equitable re-distribution of property and for removing inequalities in income, simultaneously with status and opportunity. And benami were entered into with the sole and avowed aim of defeating the same. Howsoever, one may dislike this, it cannot be wished away.

4.4. The Law Commission made numerous efforts by raising the question repeatedly whether there is any area in which if benami transaction operates, it would have the cover of legitimacy in the sense of justifiable social morality and in which to derive unjust enrichment was absent. Though the Commission struggled hard, it could not come accross any. It may be that the attention of the Law Commission may have escaped that rarest of rare case where benami may be treated as legitimate and justified socially and ethically and consistent with the mores of the day, yet the illegitimate area or the illegitimate motivation behind entering into benami transactions is so wide and so vast that small invisible area of so-called legitimacy may be ignored. Therefore, the Law Commission is of the firm opinion that benami transaction in any form in respect of any kind of property, tangible or otherwise, should be covered within the proposed legislation.

4.5. Before we conclude on this chapter, it is necessary to point out that certain tax laws have confirmed legitimacy on the benami transactions and derived benefit in the form of revenue collection from it. It was, therefore, said that if now all benami transactions are invalidated and

an all-enveloping prohibition is imposed, the revenue laws would suffer loss of revenue. Reference in this connection was made to section 27 of the Income-tax Act, 1962 dealing with income from house property. The various sub-sections of section 27 deal with transfer of property by husband to wife and vice versa. It also involves the case of impartable estate. The Law Commission is unable to appreciate how a total prohibition of benami transaction and the holder being made the real owner would defeat revenue laws. If one escapes, the other pays, and if it is suggested that the other may not be within the dragnet of the tax laws and that both would benefit by the prohibition and abolition of benami transactions. In the immediate future such effect may be produced but the long term interest would help in defending such spurious transactions between husband and wife. Section 22 may be read accordingly. But it was pointed out that where transfer of flats is prohibited either by the rules of the co-operative society which has built the flats or by the rules of authorities like the Delhi Development Authority, a modus operandi has come into existence whereby violating the law, the flat is sold and the purchaser would pay the amount and take an irrevocable power of attorney and enter into possession. It was further said

that the provisions of the Income-tax Act have recognised such transfers and treat the attorney as owner for the purpose of income-tax as per the provisions of the Finance Act, 1987. If the sole purpose of entering into such a transaction is the violation of existing law which has been passed after due consideration, it is time that no recognition is conferred and the law is allowed to take its own course. Even in the name of revenue loss, violation of existing laws cannot be protected.

4.8. The Law Commission would like to make it very clear that some of the provisions of the tax laws may become anachronistic because of the present approach of the Law Commission. This is inevitable. The tax laws were enacted at a time When benami was a part of Indian law. Such laws would have to conform to the changing legal order. Yet a further solution is offered in this behalf in the next chapter.

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## CHAPTER V

## THE COURSE OF FUTURE ACTION INDICATED

5.1. On the earlier occasion when the Law Commission dealt with the subject of benami transactions, a very limited attack was directed against benami transactions by merely refusing the assistance of the court machinery to recover benami property by the real owner. Briefly, the real owner of the property is precluded from instituting a suit or bringing an action in respect of any property held benami against the benamidar or against any other person. Similarly, defence based on any right in respect of any property held benami, whether against the benamidar or against any other person, was not to be permitted by the court. This is the legal position under the Ordinance. A glaring lacuna appears in this limited approach.

5.2. Let it not be forgotten that the benami transactions were never entered into between rank strangers. Generally the relationship between the real owner and the ostensible owner was one of confidence or they were near blood relations. When land was transferred with a view to defeating ceiling laws or socially beneficent legislation, the benamidar was generally a farm labourer, a

servant or a rent collector. In some of the cases, the benamidar was either a wife or a daughter or a very near blood relation. Encompassing the entire gamut of benami transactions, one thing that emerges unquestionably is that the real owner and the obstensible owner were either in a fiduciary relationship or blood relationship or close intimate friendship. If such persons were the parties to benami transaction, as between them, a litigation was generally not even conceived. The Ordinance which follows the report of the Law Commission of 1973 merely prohibits court action at the instance of the real owner against the benamidar or a defence based on benami on behalf of the real owner. If these close intimate friends/relations would not resort to court proceedings, the Ordinance does not even remotely affect them or their benami transactions. The Ordinance will remain 'a paper tiger', ineffective in every manner. It would be inane.

5.3. Further, in worldly ways it can be easily circumvented. If the benamidar chooses to re-transfer the property to the real owner, there is nothing in the Ordinance which will come in the way of benamidar re-transferring the property to the real owner. Coupled with this is the fact

that even after the Ordinance, there is no prohibition against entering into benami transactions. It is neither made illegal nor criminal. Therefore, the net effect would be that even after the Ordinance and even after the Act replacing the Ordinance is put on the statute book, benami transactions can be entered into with impunity and as and when necessary the Ordinance or the Act replacing it would be rendered inane by voluntary re-transfer of property by the benamidar to the real owner. Should the Legislature legislate to merely put on the statute book something which is toothless, meaningless and wholly empty?

5.4. It is idle to speculate that benami transactions were entered into without any specific motivation behind them. And primarily the motivation was illegitimate. One can go into the motivation of a benami transaction and one would discover an attempt either to defeat tax laws or socially beneficent legislations or occasionally to shield money obtained by corrupt practices used in acquiring property. If such were the motivations, it would be putting a premium on dishonesty to treat benami transactions as merely a problematic of civil law or transactional law. In fact, under the garb or the pretext of an

apparently innocuous transaction, the real purpose and motivation was wholly illegitimate. Now, undoubtedly, benami was a part of Indian law. But when the notion of legality is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law should permit lifting of the veil to ascertain the reality so as to unearth illegitimacy behind the transaction[1]

5.5. Viewed from this angle, one can confidently say that the real/beneficial owner on the one hand and the benamidar on the other were participes criminis. Both of them were participants in an activity apparently into a superficially viewed legal transaction but in reality and in substance into a criminal activity to shield the real owner from showing the property as his either in his wealth tax, income-tax or even the source of consideration with which the property was acquired. The real/beneficial owner and the benamidar share the same fraudulent intent and the same avowed intention of entering into a transaction tainted with criminality. Therefore, it can be said with confidence that they were participes criminis.

5.6. By the operation of the Ordinance, one of the two parties to the illegitimate transaction obtains an undeserved advantage. If, as the

Ordinance is understood, any action at the instance of the real owner against the benamidar in relation to the property held benami is excluded from the cognizance of the court, obviously for all practical purposes the benamidar vis-a-vis the real owner would become the owner of the property. And pro tanto the real/beneficial ownership of the real owner would be extinguished. To some extent this can be termed as unjust enrichment by the benamidar. Should the law permit it? That is the substantial question.

5.7. As the Ordinance stands, the benamidar cannot be deprived of property acquired benami by the real owner through the assistance of the court. Benamidar would for all practical purposes remain the owner and may be able even to transfer a good title, if he so chooses, to sell, mortgage or transfer the property. This unjust enrichment of the benamidar deserves to be dealt with by an appropriate provision. One can draw the analogy from the provision contained in section 269C of the Income-tax Act, 1961, which provides that if any immovable property of a fair market value exceeding one hundred thousand rupees has been transferred by a person to another person for an apparent consideration which is less than the fair market value of the property and the consideration

for such transfer as agreed to between the parties has not been truly stated in the instrument of transfer, the competent authority can start a proceeding under section 269C read with section 269D for the acquisition of such immovable property. Sections 269C and 269D on their own force will not apply to a benamidar. But an appropriate legislation may authorise competent authority under the tax laws to call upon the benamidar, the beneficiary of the Ordinance, to explain how and from where he had acquired the requisite fund for acquiring the property and if it is satisfactorily established that he was a mere name-lender without having invested a farthing in the transaction, a proceeding for acquisition of the property can be initiated. He is required to be paid nothing because he has invested nothing. This approach would to some extent strike at the illegitimacy of transactions and the acquisition of the property would be justified in larger national interest. Apart from this, people will think twice before lending their names.

5.8. There must be one more string to the bow. As pointed out hereinbefore, while the court assistance would be denied under the Ordinance to the real owner to recover the property transferred

benami from the benamidar, nothing would come in the way of the benamidar re-transferring the same property inter vivos to the real owner. Obviously, when such re-transfer takes place, the provisions of the Gift Tax Act can be invoked if it is done without consideration or for a consideration other than cash or service rendered or any apparently named consideration which is not paid. In such an event, the tax authorities must be empowered by a suitable provision to enquire into the legitimacy of the transaction. If it is satisfied that the attempt is to restore the property to the real/beneficial owner by a benamidar, the law should step in and interdict it from being done. If the real owner cannot recover property and the ostensible owner has no interest in the property, obviously a provision can be made for acquiring the property without payment of any consideration.

5.9. Along with the aforementioned two approaches, benami transaction should be prohibited by the proposed statute. Entering into a benami transaction should be made an offence. This aspect was examined by the Law Commission on an earlier occasion. It is not for a moment suggested that any prosecution should be launched for the benami transactions entered into prior to

the date of the Ordinance. That would fall on the touch-stone of article 20(1) of the Constitution. What is suggested here is that from the date of the legislation, a prohibition should be enacted against entering into benami transactions in future and if it is satisfactorily established, a punishment should be awarded. There should be no consideration for such transaction. Power of wealth, if not curbed, is likely to destroy the power of office. At all times, power of wealth and power of office stand in confrontation. It is absolutely necessary in the larger interests of the society to have an effective check on power of wealth. Benami represents a facet of power of wealth. It has to be curbed. Therefore, such transaction in future should be prohibited and a provision for punishment should be incorporated.

5.10. There was one suggestion that emerged in the debate referred to earlier which needs to be examined here. It was said with a certain amount of feeling that even after extensive amendment of Hindu Law and more scientific and generous rules of inheritence under the mohammedan Law, female heirs are at a comparative disadvantage in inheriting the property that should otherwise come to them. It was said that some exception should be made in favour of wife and daughter, more

particularly, unmarried daughter, where either the father or the mother would like to buy a property in the name of the unmarried daughter or the husband would like to buy the property in the name of his wife. The submission was that they are such near relations that any element of criminality cannot even be imagined amongst such intimate relations. Distinguishing the case of a son, it was said that he is bound to inherit the property of his father and, therefore, no exception should be made in his case. In view of the provisions of section 64 of the Income-tax Act, one is at a loss to understand how is the wife to be benefitted by becoming a benamidar in respect of some property, consideration of which is paid by the husband and transferred directly in the name of the wife. The case of an unmarried daughter may stand on a different footing. However, if any exception is to be made for a proprty held benami by a wife or unmarried daughter, in the opinion of the Law Commission, a presumption should be added that to the extent the wife or the unmarried daughter becoming a benamidar of a property purchased or transferred by the husband or the father, as the case may be, the doctrine of advancement, as understood in the English law, may be incorporated in the Indian law

and the husband or the father, as the case may be, will not be entitled to reclaim the property on the ground that either the wife or the unmarried daughter was a benamidar. This would at least establish that the husband or the father, as the case may be, was genuinely interested in conferring some benefit on the wife or the unmarried daughter, as the case may be. Beyond that, no exception need be considered with regard to prohibiting benami transactions in future.

5.11. There was one serious submission that there are provisions in the tax laws and in the company law which have recognised benami transactions and which also empower the authorities under the Act to proceed against the real owner, ignoring the umbrella of benami transaction. Numerous sections were brought to the notice of the Law Commission. It is unnecessary to reproduce them here. Let it be made distinctly clear that tax laws were enacted when benami was part of Indian law. Therefore, tax laws have to come up to the level where benami ceases to be a part of Indian law. However, even subject to that position, it should be distinctly made clear that the prohibition against benami is between the real/beneficial owners and the name-lenders. If the authorities under the tax laws are satisfied that a device has

been entered into to defeat the tax laws, it can proceed to recover tax demands ignoring the facade of apparent or real ownership, as the case may be.

5.12. It was emphatically stated before the Law Commission that there are provisions in the Indian Trusts Act, 1882, which, on their proper interpretation, spell out a trust in favour of the so-called real or beneficial owner of property. Apart from all other sections, it is worthwhile to refer to sections 81, 82 and 94 of the Indian Trusts Act. It may be mentioned that by the provisions of the Ordinance, section 82 of the Trusts Act has been deleted. But it has kept sections 81 and 94 untouched.

5.13. Section 81 provides that where the owner of property transfers or bequeathes it and it cannot be infered consistently with the attendant circumstances that he intended to dispose of the beneficial interests therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative. Illustration (a), section 81, reads as under:

> "(a) A conveys land to B without consideration and declares no trust of any part. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer

the beneficial interest in the land. B holds the land for the benefit of A.".

5.14. Numerous transfers of agricultural and urban land have been noticed wherein the sole object of the real owner was to defeat the agrarian and urban land reform and ceiling laws. The misuse and abuse of the provisions of the Trusts Act requires to be more specifically spelt out. In fact, the use of the word 'trust' brings to mind some kind of fiduciary relationship with confidence in the trustee to act in a manner useful to the beneficiary. This was the laudable object. How it is perverted may be stated. One Shri S. Jagannathan, recent recipient of Bajaj Award for public service, drew attention of the President of India to the abuse of the provisions of Trusts Act for augmenting the nefarious activities of the landlords who wanted to defeat land laws. A copy of his communication was sent by Banwasi Seva Ashram to the Law Commission pointing out the evil effects of 'benami transactions in land in Tamil Nadu by creating a large number of fake trusts'. In the list attached to Shri Jagannathan's letter, he has set out details of as many as 21 trusts involving thousands of acres of land. He has also specifically pointed out the names of landlords

who have used the facade of trusts for protecting their land holdings. He has also given another list in which benami transactions in the name of family members, friends and servants were entered into to defeat land laws. As the information is very useful, the whole of it is annexed to this report (Appendix I). Similarly, the Law Commission also received a copy of a letter by Pattaligal Pannai Ashram dated July 28, 1988, to the former Chief Justice Shri P.N. Bhagwati pointing out the misuse of benami transactions in land in the name of false or fake trusts for pseudo-religious services (Appendix II). This evil is well-known and does not need detailed discussion. In the view of the Law Commission, provisions of century old Trusts Act, of 1882 vintage when private property was sacrosanct are being abused since the advent of the Constitution to defeat the constitutional culture. The information herein supplied is revealing and a time has come to take effective action in this behalf, otherwise all socially beneficent legislation will meet its Waterloo at the altar of so-called sanctity of private property. Once the private property is being used, as pointed out earlier, to defeat social morality, the transactional law in respect of it becomes part of

public law and must be enforced accordingly.

5.15. Section 82 provides that 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 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. This section has been deleted by the Ordinance.

5.16. Section 94 provides that: 'In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be) to the extent necessary to satisfy their just demands'.

5.17. The Indian Trusts Act is of 1882 vintage. It was the hey day of laissez faire. Private property was sacrosanct. Every legal device was resorted to to protect property. Hence came the doctrine of the constructive or resultant trusts. These provisions are anachronistic in character. They provide an umbrella or shield for defeating

socially beneficent legislation or tax legislation. If A transfers the property, one fails to understand why he should not transfer the property including the beneficial interest therein. If A purchases property, one fails to understand why he should not purchase in his own name unless his intention is to keep secret the source of the consideration paid by him and that source may be tainted with criminality. Therefore, every conception that a transfer of property takes place either by purchase or by transferring without consideration and in the name of person who has no interest in the property save the name-lender, post-Constitution society and the constitutional legality should extend no protection to it. Therefore, all the three provisions will have to go with a specific section that where a person is recorded as a holder of property, it would provide conclusive evidence by the necessary legal presumption that he is the full owner of the property except in cases of mortgage which again must be by a registered instrument. And when it is said that one is a recorded owner of a property, it includes all kinds of property. To illustrate one point, if a shareholder is recorded as the owner of shares in the Register of Shareholders required to be maintained by the company under section 155 of the

Companies Act, it would be conclusive proof that he is the owner of the shares and nothing to the contrary shall be proveable in any proceeding nor any transfer without consideration shall be recognised except where it is by gift.

5.18. The last important aspect which must be dealt with refers to a glaring lacunae in administration of civil laws. Where anything done or omitted to be done is an offence, administration of criminal justice requires that there must be an enforcement machinery and there must be judicial branch enquiring into what is alleged to be an offence by enforcement machinery. The State is vitally interested in peace and harmony in the society. Administration of criminal law, therefore, presages that there must be a very effective implementation machinery of laws prescribing offences and punishments for them.

5.19. In the matter of tax laws, the State is equally vigilant. The tax laws bring in the revenue for oiling the machinery of Government. The revenue generated by tax laws is available for carrying on socially beneficent activities of a welfare State like ours. The usual well-noticed tendency in the society is not to pay taxes. Few

can assert as done by Justice Holmes that: "Taxes are what we pay for civilized society. I like to pay taxes, with them I buy civilization."[2] Today the most noticeable tendency is not to pay taxes. The State, on the one hand, is interested in generating maximum revenue and tax-payers are equally interested in paying the least, if not paying at all. Even when benami was part of Indian law, tax law and allied laws had taken recourse in their own way of ensuring due obedience of the tax laws. Therefore, there is an elaborate machinery set up under the tax laws for their effective implementation.

5.20. However, when one comes to civil laws, in general it can be said with confidence that there is nothing like a State machinery for enforcement of those laws. Parties whose rights are affected by statutes are left to fend for themselves to get relief by initiating action before fora set up for the same. The fora would not act on its own. Someone has to move it. Even when it comes to weaker sections of the society, civil laws ordinarily do not provide for enforcement machinery. In generally referring to civil laws, the labour laws are not included therein. To take an illustration, Transfer of Property Act contains numerous provisions. None can say that there is

some machinery for enforcement of the provisions of Transfer of Property Act. In an orderly development of society where the emphasis is on developmental planning for transformation of the society, it is equally necessary to have an enforcement machinery. The Law Commission would require an extensive research for suggesting an instrumentality for enforcement of civil laws. With the time constraint as has been spelt out in this case, it is not possible to undertake such extensive survey. It is equally impermissible not to touch the aspect at all.

5.21. What is meant by the Law Commission when it talks of machinery for enforcement of civil laws? Taking the present situation about benami transactions and the suggested remedies for their total prohibition, one cannot derive effective benefit from the legislation unless there is some machinery for enforcement of prohibition against benami transactions. Assuming that on the recommendation of the Law Commission, prohibition against benami transactions is imposed, if the benami transactions are not made penal, invariably people would enter into benami transactions because they have their own benefits. Unless the real owner and the benamidar fall out or the enforcement authorities under the tax laws come

across a position where tax law is defeated by benami transaction, no one would proceed to enquire into the legality or otherwise of tax law and get it declared illegal. Even under the socially beneficent legislation like ceiling on land, enacted with the wholesome object of equitable distribution of nature's munificence, namely, land, there is no effective machinery to checkmate defeating of these laws. Suppose, a landlord transfers a piece of land in the name of his own cultivator. For the purposes of record, the cultivator would be the owner. The landlord would benefit by escaping from the tentacles of ceiling laws and the cultivator would never be able to go against the landlord. This was adhered to when it was said that 'the real owner may just depend upon muscle po er for asserti g his rights. In fact, much of the land grab in this country has been done through muscle power and political patronage rather than by resort to courts of law.'[3].

5.22. Various aspects herein delineated do make out a good case for an enforcement machinery of even civil laws. Now it is not possible to set up a whole enforcement machinery of inspectors and superior officers. The Law Commission is of the opinion that time has come when involvement of

voluntary agencies in enforcement of laws would go a long way to spread constitutional culture of obedience to laws. And if the constitutional culture spreads, strife and confrontation in the society would be considerably minimised. Therefore, a beginning should be made in this case by authorising recognised non-governmental organisations being empowered to lay a complaint before a tribunal - a District Judge in each district should be declared as a tribunal for the purposes of this Act - pointing out the violation, namely, entering into a benami transaction. The tribunal must investigate the complaint. Legal aid authorities must assist the complainant in performance of his public duty. If the complaint is found to be frivolous, vaxatious or malicious, the tribunal would be justified in awarding suitable compensation to the party against whom complaint is made. This is in brief the outline of the method of enforcement of civil laws.

5.23. Another existing machinery already recommended by the Law Commission can be put to better use even in this behalf. In the report on Gram Nyayalaya,[4] the Law Commission recommended appointment of Liaison Officers attached to Gram Nyayalayas. For a detailed discussion of their role, the report may be studied. A duty may be

added to the duty list of these Liaison Officers that in their overall supervision of enforcement of laws in the rural areas, they must equally look at violation of prohibition of benami transactions. And authority should be conferred on them to lay a complaint in this behalf before the District Judge as Tribunal under this Act. A similar machinery may as well be set up for urban areas.

5.24. Indian Trusts Act deals with private trusts and trustees of such trusts. However, when it was found that there is an element of public trust in certain types of trusts, the concept of Charity Commissioner was brought in for supervision over management and tackling the irregularities in public trusts. Most of the States have enacted their laws for dealing with public trusts which include both charitable and religious trusts. However, the private trusts which are controlling enormous property were left untouched. The principle of benami resulted in legal concepts of constructive or resultant trusts. Now that benami is done away with, a question that faces us is whether the element of public law should also involve itself in supervising private trusts? If this is not done, benami may rear its ugly head in the form of trusts as pointed out in Appendices I

and II. Therefore, an officer, by whatever designation called, but partaking the characteristics of Charity Commissioner may as well be invested with power to investigate into the affairs of the private trusts where such trusts have afforded a shield and protection to impermissible benami transactions in future. This will be one additional method of supervising the enforcement of civil laws. According to the Law Commission, all these measures would provide comprehensive enforcement machinery for the law, which will replace the Ordinance.

5.25. The Law Commission recommends accordingly.

(D.A. DESAI)
CHAIRMAN

(V.S. RAMA DEVI)
MEMBER SECRETARY

NEW DELHI,

AUGUST 14, 1988.

## NOTES AND REFERENCES

### Chapter I


1. LCI, 57th Report on Benami Transactions, August 1973.
2. Punjab Province v. Daulat Singh, AIR 1942
3. LCI, 57th Report, para 1.14.
4. Ibid., para 1.15.
5. Hasman Gani Ahmed Sahib v. Vidhadhar Krishnarao Mung (Appeal No 533 of 1968) decided on 17.1.1969 by Patel and Wagle J.J. quoted in Para 6.21 LCI, 57th Report.
6. LCI, 57th Report, paras 6.24, 6.26 and 6.27.
7. Ibid. para 6.33.
8. Neena Vyas in The Statesman dated 4-6-1988, 'Benami Revolution May be Stillborn' p.7.
9. Ibid.
10. Neena Vyas in The Statesman, Delhi Edition, dated 4th and 5th June, 1988.
11. K.N.Balasubramanian in The Economic Times, New Delhi Edition, dated 22nd and 23rd June 1988.
12. Editorial, The Tribune dated 21st May, 1988.
13. Editorial, National Herald dated 23rd May, 1988.


### Chapter II


1. Dwarakadas Shrinivas v. Sholapur Spinning and Weaving Company Ltd, 1954 SCR 674.
2. 1952 SCR 89.
3. (1981) 2 SCC 362.
4. 1954 SCR 587.
5. (1967) 2 SCR 762.
6. (1970) 3 SCR 530.
7. (1971) 3 SCR 9.

Chapter II (contd)

8. (1973) Suppl. SCR 1.

9. Hidayatullah, J., in his concurring opinion in I.C.Golaknath case, see supra note 5.

10. S.R.Das, J., in his dissenting opinion in Subodh Gopal Bose's case, see supra note 4.

11. The Constitution (Forty-fourth Amendment) Act, 1978.

12. Dr.Upendra Baxi, The Little Done: The Vast Undone, 1967 Journal of Indian Law Institute, Vol.9, p.323 at 383.

13. State of Madras vs. Champakam Dorairajan, 1951 SC 226 1951 SCR 525.

14. (1980) 3 SCC 625.

15. Granville Austin, The Indian Constitution : The Cornerstone of a Nation, pp. 75-76.

16. T.T.Krishnamachari as quoted by Granville Austin Ibid

17. The Constitution of India, article 38.

18. Id . article 39(b) and (c).

19. Anyone interested in the history of development of law about benami transactions may see 57th Report of the Law Commission of India where most of the cases have been extensively quoted.

20. LCI, 57th Report, para 1.7.

21. R.K.Garg vs. Union of India (1981) 4 SCC 675.

Chapter III

1. LCI, 57t Report, para 6.29
2. Smt. Indira Nehru Gandhi V. Raj Narain, (1976) 2 SCR p. 436
3. Id., p. 437
4. Id., p. 438.
5. Id., p. 481.
6. Kanta Kathuria v. Manak Chand Surana, 1972 SCR 830.
7. Kanwar Lal Gupta v. Amar Nath Chawla, (1975) 2 SCR 259
8. Note No.2 above.
9. Raj Kumar v. Union of India,(1975) 4 SCC 13
10. E.P. Royappa v. State of Tamil Nadu,(1974) 4 SCC 3 at 38;

    Raman Dayaram Shetty v. International Airport Authority of India and Ors. ,(1979) 3 SCC 489:

    Maneka Gandhi v. Union of India, AIR 1978 SC 597;

    Ajay Hasia and Ors. v. Khalid Mujib Sehrawardi and others, (1981) 1 SCC 722.
11. Ajay Hasaj v. Khalid Mujib Sehrawardi and Ors, (1981) 1 SCC 722.
12. LCI 57th Report-Put them on notice in 1973. It is a a published document recommending abrogation of benami transactions.

Chapter V

1. United States v. Milwaukee Refrigerator Transit Company, quoted in Pennington's Company Law, 5th Edition, p. 58, in the context of lifting a veil of corporate entity to ascertain the reality.

2. Mc Dowell Co. Ltd. vs. Commercial Tax Officer, (1985) 3 SCR 791 at 809.

3. Mr. K.N.Balasubramanian in The Economic Times dated June 22, 1988, The Benami Ordinance (1) - Another Paper Tiger, p. 5, column 5.

4. L.C.I. 114th Report on Gram Nyayalaya.

Cable: Banwasi/ Ashram TURRA
BANWASI SEVA ASHRAM
Govind Pur (Via Turra)
Mirzapur (U .P.)

No. 4809/88-89 Date 13th July, 1988

My dear Justice Desai,

I am enclosing the copy of a letter written by Shri S. Jagannathan (Sarvoda leader) to the President of India regarding the Benami transactions of land in Tamil Nadu by creating a large number of Fake Trusts. Shri Jagannathan is a conscienceus social worker long connected with the Sarvodaya and Bhoodan movement was President of the All India Serva Seva Sangh for two terms, has lead a series of Satyagrahas to successfully distribute temple and trust lands to the landless in Tamilnadu. He had also made experiments with the help of NABARD and local banks to transfer land of the defunct trusts to the landless by way of bank purchase.

I am forwarding his letter to you to seek your valuable, advice in planning an effective administrative/ legal action for the peaceful transfer of Benami land to the actual tillers.

I shall be grateful for an early response in the matter.

With deep personal regards I remain,

Yours sincerely,
Sd/-
( Prembhai )

Justice Shri D.A. Desai,

His Excellency,
The President of India,
New Delhi.

Respected and Dear President,

Sarvodaya Movement, as well known to your Excellency, is engaged in the peaceful solution of the land problem for the past 30 years eversince Acharya Vinobaji started the Bhoodan Movement in 1951 and LAFTI is a registered organisation of Sarvodaya for a special experiment of distributing land to the landless poor through bank operations and Government participation, as a non-violent alternative to the conflicting situation in East Thanjavur due to the concentration of lands in a few hands and the highest percentage of landless labour in that area.

But during our search for the peaceful solution of the land problem we were very much worried and perturbed by the benami transactions in such a large scale throughout the country, corroding the society to a moral degradation and economic chaos denying justice to the poor. Corruption and Benami transaction are twin evils that have gripped the country to strengulation of all moral values. The recent ordinance promulgated about benami transaction (prohibition of Right to recover Property) uplifts and regenerates the Nation to great moral heights.

We submit our gratitude to the President for the ordinance promulgated at the most opportune time. We welcome whole heartedly the speedy pronouncement of the ordinance in order to instal the moral dignity and promote the economic welfare of the country by controlling and abolishing the benami transaction. Your bold step inspite of the Parliament not in session, to take

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immediate action in exercise of the power conferred by Clause (1) of 123 of the Constitution will be welcomed by all section as a wise and timely measure to raise the economic standard of the people, particularly the weaker section who will be benefited as benamidhars. The posterity will hail the ordinance as one of historic importance for the promotion of the welfare of the poor, if the ordinance is seriously taken up and implemented in the true spirit.

However it is our endevour to point out that there may arise some discrepencies in the implementation of the ordinance as several doubts and lacunae will arise which also should be attended to in the interest of the public.

a) The benamidhars who are close relations and friends will never comeforward to exercise their rights, vested on them by the ordinance, neither this servants will have the courage to claim their rights. The ordinance will be null and void by nobody exercising their rights.

a) The persons, who are benefitted by the ordinance as benamidhars may not belong to the category of the poor, as most of them engaged in professions such as doctors, engineers, business and industrial concerns etc. There should be a clause to the effect that the benamidhars benefitted by the ordinance should be below the poverty line or otherwise the lands of such benamidhars above the poverty line should be taken over by the Government for distribution to landless poor.

Therefore the Government should have a machinery to identify and list out the benamidhars in every state in order:-

a) To clarify among the benamidhars those who are below the poverty line.

b) To confirm ownership for those who are below the poverty line.

c) And to take away the other lands and distribute to the landless.

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3. Besides the benami transactions in individual names of close relations, friends and servants, the other glaring benami transaction by the land owners to escape from the Land Ceiling Act is transfer of lands in the name of religious and public trusts. The land owners assume the pseude posture of religious mind and public spirit, just to hoodwink the public and the Government. Such spurious trusts created in the name of schools, hospitals dharmashalas etc. should be taken over by Government for distribution to the landless.

A sample survey taken in 10 blocks of East Thanjavur where LAFTI is operating gathered by public information in the villages, some of them verified by the records from the concerned village officers, is enclosed herewith for your kind notice. All the trusts are only in name and the trust lands are misused for their own selfish ends. The endowment of landed property as trusts during these days of huge population and when the tillers are land hungry, is anti people and anti social. Therefore the lands under all trusts created eversince 1947, should be taken over and distributed to the poor.

We feel the ordinance will be a boon to the people for controlling and abolishing the benami transaction in the name of individuals and trusts. We hope the ordinance will have effective clauses to control and ultimately eliminate the benami transactions through notification or necessary rules there-on ahead of the Parliamentary Legislative procedures, for the projected points referred to in our appeal.

Thanking you

Yours sincerely,

Sd/- S. Jagannathan.

## A SAMPLE SURVEY OF THE NATURE OF BENAMI TRANSACTION IN THE NAME OF TRUST IN EAST THANJAVOR DIST. T. NADU.

| Sl. No. | Block | Village | Name of the trust | Extent acres | Remarks |
|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 |
| 1. | Thirumarugal | Ponnangudi Ettivazhkai | AKAS Education Trust. | 200 acres | The lands are cultivated by the family members as a single farm. Nothing is spent for the so called education trust. |
| 2. | do | Gopurasapuram Kattumavadi | K.P.M. Trust | 220 acres | Farm cultivation by the Family members. The lands are lying waste for the past two years. |
| 3. | Nannilam | Thandalam Cheyathmangai Thenbidakai | Madheenjyanachiyar Education Trust | 305 acres | The lands are cultivated through an agent and 200 acres are lying waste for the past two years. |
| 4. | do | Porayar | Thavasimuthu Nadaar Education Trust | 300 acres | All the lands are cultivated by the family members. Nothing spent for the Trust. |
| 5. | Kilvelur | Kariamangalam | Kanagasabhai Prllai Education Trust. | 125 acres | The Trustee Kanagasabhai Pillai passed away last year. Till his death the lands were lying waste. Only last year they were leased for cultivation. Before his death Kanagasabhai Pillai has Registered a will that Lands and other property are to be managed by Sri Mahalingam of Pollachi an industrialist. Not a single pie is spent for education purpose. |

| | | | | | |
|---|---|---|---|---|---|
| 6. | Kilvelur | Killukudi<br>Manalur | Thirunavularasu<br>Education Trust | 50 acres<br>18 acres | The clutivation of the lands are managed by one land lord by name Natarajan Pillai of Killukudi. Nothing is spent for any education purpose. |
| 7. | Kilvelur | Vallivaluam | Namely 18 trusts such as Dasiga High School Trust, Nagapattinam Policy Technic. Trust Valivalam Kanaga Hospital Trust and Vallivalam Choultry Trust, Vedapada Shala Trust Family Planning Trust. Nadhaswaram Trust etc. | 800 acres | For the high school and poly technic school regular grants and other concessions an received from the Govt. as any other school. The Trusts are only in name sake the account are not open for the public. The hospital only name sake. There is only one compounde No Doctor and no medicine. The Choultry Ved adasala Family Planning Trust are also only in name. Goshala is maintained for the family. Not for any public utility. All the 18 trusts for public services are only in name. |
| 8. | Nagapattinam | Ettukudi<br>Thirukuvalai | Vedaparayanam Trust | 60 acres | These land are under lease of big land owner There is no Vedaparayanam. |
| 9. | do | Keezhayur | Choultry Trust | 40 " | These lands are under the lease of big land owners. No Choultry is running. The Trust is only in name. |
| 10. | do | Periyathumbur | A.M.B. Dharma Choultry Trust | 80 " | Cultivated as a single farm no Choultry is maintained. |

| 1 | 2 | 3 | 4 | 5 | 6 |
|---|---|---|---|---|---|
| 11. | Nagapattinam | Chinnathumbur Animazhai Vazhakarai | A.M.B. Dharma Choultry Trust. | 170 acres | All the lands are cultivated as a one farm. No Choultry is functioning. |
| 12. | do | Chodayankottam. | Kamatchyaman Choultry Trust. | 70 " | These lands are cultivated by family members and not utilized for any choultry purpose. |
| 13. | -do- | Alamalai | Nilathuyatchiyamman Somavarathird Anna-Dhana Trust. | 168 " | All the lands are cultivated on lease by big land owners. No Annadhanam at any time. |
| 14. | -do- | Velanganni Alamalai Gramathumedu | Kailasathevar Choultry Trust | 300 " | No Choultry is maintained. The lands are cultivated by family members. |
| 15. | Koradacherry Block | Meppalam | Yazhapanam Visvalingam Vaideshwara Trust in Jaffna. | 86 acres | The land is in Mepalam near Thiruvarur, Thangavour Dist. but the temple is in Jaffna. Not a pie is spent for the temple. Two brothers, one living at Vallivalam the other at Jaffna made the trust. The brother Vallivalam was managing lands. Dispute arose between the brothers regarding the income from the land. The brother at Jaffna wanted his management of the lands. The brothers went to court. Now the case is pending in the Supreme Court for the past 21 years. A receiver i appointed by the Court and he is cultivating and enjoing lands. |

| | | | | | |
|---|---|---|---|---|---|
| 16. | Thiruthurai-poondi. | Manali | Annadhana Trust | 30 acres | The Turst land is managed by a big land lord Sundarsam Pillai. The Turst is not used for the purpose. |
| 17. | -do- | Kordiavinayager Nallur | Kodiavinayar Turst | 30 " | Cultivated by a big land lord Ramalingamudhaliyar. Nothing is used for the said purpose. |
| 18. | -do- | Alivalam | K.T.K. Estate Education Trust. | 150 " | Cultivated as a single farm. Not used for any trust. |
| 19. | -do- | Alivalam | Primary Health Centre | 150 " | -do- |
| 20. | -do- | Karumbiyar | Abishege Kattalai & Rajanga Kattalai | 120 " | Cultivated by land owners. Not used for any trust purposes. |
| 21. | -do- | | Thirupathi Annadhana Turst. | 2300 " | Shri Karupprih Mooppanar family has lands in 4 Taluks as follows. |

| Papanasam Taluk | Vilangaiman Tulk |
|---|---|
| 1. Sathyamangalam | 1. Ranganathapuram |
| 2. Utharani | 2. Nallur |
| 3. Verrancheri | 3. Killiyur |
| 4. Sarukkai | 4. Thenpathi |
| 5. Thirumbur | 5. Thirivenam |
| 6. Vezhkkai | 6. Poondi |
| 7. Poonanchari | 7. Saliamanagalam |
| 8. Umbalambadi | 8. Arukithupattu |
| 9. Salabokam | 9. Korukaipattu |
| 10. Manakkodu | 10. Manapathyyur |
| 11. Pattavarthi | |
| 12. Paruppur | |

Papanasam Taluk

13. Anumanallur
14. Pappanadu
15. Vengayakkalachari
16. Killimanagalam
17. Sozhangahatham
18. Bharathimadu.

2. Thiruvaiaru Taluk

1. Sembangudi
2. Villianallur
3. Viliangudi

Kumbakkonam Taluk.

1. Sundaraperumal Koil
2. Kabisthalam
3. Thiruvalanchuzhi
4. Pandapuram
5. Neelatha Nallur
6. Thiruvazhathurai
7. Chozhapuram
8. Veppathur.

There is a board at Kabisthalam in the name of Thirupathi Venkateshwara Annadhana Trust. Moopanar family members are heriditary life long trustees. No Annadanam is given such a large scale to possess 2300 acres. Beside this trust there are nearly 500 acres of coconut and Plantain cultivation, to escape the land Ceiling Act by the clause providing exemption for "Thope" (Garden). Also there are several benami transaction in the names of relatives and servants. Shri Karupaiah Moopanar family has in all 4100 acres. (Figures will have to be investigated in all the villages through the village officers.)

SAMPLES OF BENAMI TRANSACTION IN INDIVIDUAL NAME OF FAMILY MEMBERS, FRIENDS, SERVANTS ETC.

| | | | | | |
|---|---|---|---|---|---|
| *1. | Vedapathimangalam Kothur, Kulamankkam | V.S.Thiyagraja Mudhaliyar | 4000 acres | | V.S.Thiyagaraja Mudhaliyar established a Sugar mill and transfered the 4000 acres for sugar cane cultivation and a sugar can corporation was formed. All the lands are under the lease of the sugar can corporation. The sugar cane corporation failed to function successfully. At present the land are under the control of revenue department, and the lands are laid in waste for the past six years. The people in the concerned villages suffer without employment. |
| 2. | Kottur Block | Kunniyur | 52 acres | | The Kunniyur family has three brothers and their lands are under benami in the name of family members, friends and servants. Kunniyur family has got plots in four blocks of East Thanjavur. |
| | | Veerakki | 112 " | | |
| | | Alathur | 330 " | | |
| | | Ammanur | 35 " | | |
| | | Pambanthur | 80 " | | |
| | | Puzhuthikudi | 55 " | | |
| | | Idumbhaven Cultivable land in coconut grove | 250 " | | |
| | | cultivable land in Casurina grow | 250 " | | |
| | Muthupetti Block | Idumbavanam | 66 " | | |
| | Needamangalam | Melathangai | 250 " | | |
| | | Vergudi | 124 " | | |
| | Thiruthurai Pondi | Pappandur | 250 " | | |
| | | | 1854 " | | |
| 3. | Nagapattanam | Vazaokkur | V.K.K. Abdul Gaffar | 80 acres | Bemani in family members and cultivated one farm. |
| 4. | Thitruvarur | Vaippur | V.T.K. Raju Farm | 50 acres | Benami in family members and lying waste in 3 years |
| | -do- | -do- | V.T.K.Vijay Laxmi. | 30 acres | -do- |

| | | | | | |
|---|---|---|---|---|---|
| 5. | Thirumurangal | Kettumavadi | Raja Gopal Iyer | 360 acres | All the 360 acres are in Benami names of relatives, friends and servants. 50 acres are lying waste. |
| 6. | Nagapattinee | Panangudimuttam | Farook Marakkayar | 40 acres | In Benami all the 40 acres lying waste. |
| 7. | -do- | Alathur | Abdul Ahmed Khadav | 240 acres | Benami in the name of relatives and friends. At present lands are lying waste. |
| 8. | -do- | Akrapakkam | Nazeer Ahmed | 30 Acres | Lands lying waste |
| 9. | Thiruvarur | Vaippur | Captain Ahmed Routhar | 300 acres | The lands are under Benami & cultivated as one farm |
| 10. | Thiruthuriaipoondi | Pambathur | Swamynatha Mudaliyar | 50 acres | Under benami and cultivated as one farm |
| 11. | -do- | Munniyur Alathampadi | A.K.M. Pannai | 120 acres | Under Benami but cultivated as one farm |
| 12. | -do- | Palavanakudi | Shaik Abdul Khadar | 50 acres | Under Benami |
| 13. | -do- | Ammanur | Sethurathina Aiyer | 400 acres | Under benami but cultivates as one farm |
| 14. | Nagapattinam | Vazhakkai | A.M.B. Chandra-sekara Chettiyar | 75 acres | -do- |
| 15. | -do- | Keezhayur | Madaputam Rauthur | 60 acres | -do- |
| 16. | -do- | Kameshwaram | Parvathi Anni | 80 acres | -do- |
| 17. | Thiruthurajpoondi | Manali | Kungithapatham | 156 acres | -do- |
| 18. | -do- | Sathangudi | Thiruvarur V.S.Thiyagaraja Mudaliyar | 400 acres | This land was given to sugar cane corporation. But now remain uncultivated. |

| | | | | | |
|---|---|---|---|---|---|
| 19. | Thiruthuraipoondi | Manali | S.Sundarassampallai | 75 acres | Under Benami cultivated as one farm. |
| 20. | -do- | Kodiaya vinayaga Nallur | Thyagaraja Mudaliyar | 150acres | -do- |
| 21. | -do- | Alathampadi | A.K.M.K. Ilangovan | 290 acres | Under benami managed as one farm. |

"LAND BELONGS TO GOD ie. TO SOCIETY" - GANDHIJI

PATTALIGAL PANNAI ASHRAM
(Community Training Centre for Agri. Labour)
Valivalam P.O. 610 207, Thanjavur District,
Tamil Nadu, INDIA.

28th July, 1988

Dear Shri P.N. Bhagavatiji,

I am glad Shri Prembhai of Banwasi Seva Ashram wrote to you in connection with our representation to the President regarding the benami ordinance. This benami ordinance is just a bolt from the blue promulgated by the Central Government. Where was the demand for such an ordinance, which will not have any impact in the society. The Law Commission had strongly recommended for the Abolition of the benami transfers and Tamilnadu Government passed by an over whelming majority Benami Abolition Bill in 1982 which was vetoed by the center when it was sent for President's assent. The present ordinance is not for Abolition of the benami transfer but confirming the illegal transfers of the land owners, by bestowing ownership to the benamidhars. If the benamidhars is a landless poor below the poverty line, he should be given the ownership but benamidhars of non-cultivation class should not be given the ownership. After all neither the servant nor the close relation as the benamidhars will never claim for ownership. The ordinance will be nullified. This ordinance will be of significance if the Government takes the responsibility of publishing the benamidhars with the extent of land, survey number etc. and ownership bestowed only to those who are below the poverty line.

I had the opportunity to meet our President Shri R.Venkataramanji, Shri Bhardwaji, the Union Law Minister, and also Mrs. Sheila Dixit the Minister for Parliamentary Affairs. They were definite that the Government will not take such responsibility of publishing the names of benamidhars. They are of the view that only Voluntary agencies like Sarvodaya can take up the cause of educating and organising the Benamidhars. But unless the untill we know who are the benamidhars, it is not possible to educate or organise them.

The most glaring benami transactions in large extent of land are in the name of false trust, for religion, public services etc. Both the President and the Law Minister said that the benami trusts cannot come under the purview of the ordinance. It will have to be dealt with by a separate Act.

The Supreme Court a few months before declared 25 benami trusts created by Bodh Gaya Mahant as bogus and ordered 25000 acreas to be taken over and distributed to the landless. We have hundreds of such false trusts throughout the country and a sample survey of few cases in East Thanjavur is enclosed herewith for your information. I hope some of you who are interested in the public cause will take up the matter and file a suit against such benami trust in Supreme Court. We shall gather more informations of bogus trusts and send you in course of time. A press Conference was held at Madras on 26th July, 1988. Herewith enclosing my press statement and also what appeared in Indian Express on 26th July. We expect your early reply.

With kind regards,

Sd/-
S. JAGANNATHAN

Encls: aa.

Copies to:

Justice Shri D.A. Desai,
Justice Shri R.N. Mishra,
Prof. Upendra Baxi,
Shri Jose Werghese.

PRESS STATEMENT:

The Benami (Prohibition of Right to recover Property) Ordinance Sarvodaya Representation to the President.

A People's Movement is the only Remedy

During the early sixties the landlord lobby in the ruling party manoeuvred to provide all sorts of loopholes and exemption clauses to escape from the Land Ceiling Act that they managed to cover up all most all their lands by benami transactions and the surplus lands to come under the Act was very negligible. Since then the word "Benami" is of common usage especially in the rural parts to signify the immoral transfer of lands in the names of faithful servants, and close relatives and the worst of Benami is the cheat in the name of religious and public charitable trusts endowing large extent of lands.

There are hundreds of acres in the name of educational trusts but nowhere any trace of educational activities, similarly lands in the name of choultries and annadhanas Trusts but nowhere any form of choultry functioning or annadhanas offered, all cheat in the name of high sounding noble purposes. Where is the necessity of choultries and annadhanas; if the Tiller of the land is given the right of cultivation and enjoyment. A society of economic injustices and exploitation abounds with such enslaving and spoon feeding institutions of charity.

Herewith a sample survey of Trusts in some villages of East Thanjavur.

Thus the history of Land Ceiling Acts in the country has been a hoax of deception and failure.

Tamilnadu was the premier State to bring Benami Abolition Act in 1982 passed by an overwhelming majority in the State Assembly. But the powerful vested interests vetoed the Act when the Bill was sent for the President's assent. Again in spite of the Law Commission categorical recommendation for the abolition of Benami transactions, a Benami (Prohibition of Right to Recover Property) Ordinance confirming ownership to the Benamidhars was promulgated on May 19th of 1988.

Again the powerful influence of fuedalistic class has connived the promulgation of Ordinance to its own benefit.

The Benami Ordinance giving legal sanction to the Benami transactions ultimately benefit only the landowners. It is a well-known fact that the benamidhars neither the servants nor the close relatives will ever claim the right of ownership and the status quo will continue, nullifying the Ordinance.

Sarvodaya Movement has appealed to the President of India that the Government should take the responsibility to publish the list of Benamidhars in every state and confirm ownership only to the landless who are below the poverty line and the other benami lands should be taken over by the Government for distribution to the landless.

Sarvodaya has also requested that all the Trusts lands should be taken over for distribution to the landless. Hope the Government will provide the necessary legal sanction to this effect while the Ordinance will be placed before the Parliament for approval during the ensuing winter session.

But those who are in the helm of affairs of the Government are of the view that only Voluntary Organisations such as Sarvodaya Movement can educate and organise the benamidhars to claim their rights over the land.

Corruption and Benami transactions are the two evils strangling the country to moral degradation and economic chaos. A National Upheaval, organising People's Morchas against corruption of official bureaucracy in the block, taluk and district offices and people's non-violent occupation of all benami lands in the name of individuals and trusts will vitalise the Nation, with the raise of the people's power. All the political parties are after capturing power and counting on votes. But a People's Movement against the official corruption and Benami holdings of the vested interests is the crying need of the hour which will surely purify the polity of the country.

Sd/-
S. JAGANNATHAN
SARVODAYA MOVEMENT.

FRESH ORDINANCE ON BENAMI HOLDINGS URGED

Express News Service

Madras. July 25: All trust lands, in East Thanjavur especially, should be taken over by the Government of India through Presidential Ordinance as the Benami (Prohibition of Right to Recover Property) Ordinance issued in May 1988 does not bring within its ambit the 'benami' ownership by the trusts. Mr. S. Jagannathan, Chairman, Association of Sarvaseva Farms, has urged President R. Venkataraman.

In a representation handed over to the President he pointed out that the Benami Ordinance benefited only the landowners, who had clearly manipulated to vest the ownership of their lands with their close relatives and trusted servants. The status quo(of large-scale benami holdings)continued, thus defeating the very objective of the law.

The President was also requested to advise the Government to publish the list of "benamidhars' in each State, so as to find out the real owner of the lands; ownership must be vested only with the landless poor, and the surplus lands taken over by the Government.

Mr. Jagannathan said that he explained how in the name of trusts, big landlords had cleverly retained possession of the hundreds of acres of land, hoodwinking the people and the Government. These 'spurious trusts' created in the name of schools, hospitals, Dharmasalas, etc. should be taken over by the Government.

A "sample survey" conducted by his movement in East Thanjavur revealed that 21 different trusts 'owned' about 5,800 acres of wet lands, including 2,300 acreas by a trust in Kumbakonam, which is alleged to be a benami holding of a Cong.I bigwig.

Mr. Jagannathan, who is a member of the Land for the Tillers' Freedom said that he also met the Union Law Minister Mr.Bhardwaj and Mrs. Sheila Dixit, Minister for Parliamentary Affairs, and

requested them to make suitable amendments when the Benami Ordinance was taken up in Parliament during the coming monsoon session.

Meanwhile, his movement would mobilise public opinion throughout the State so that the individual 'owners' of the lands could be persuaded to avail of the Ordinance and take over the lands, without any fear. He was also planning to organise an all-party conference in Madras city sometime in August to chalk out measures to unearth the benami holdings.

He said that Tamil Nadu was the pioneer in bringing the Benami (Land) Abolition Act as early as in 1981, but the Centre did not arrange for the requisite Presidential assent to it. Again when the ordinance to end Benami land holdings was issued in May 1988, the "powerful influence of the feudalistic class" connived to dilute the law so as to cover only individual benami holdings and no t trust lands, he alleged.