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How new benami law can penalise genuine deals

The broad sweep of the benami law may rope in unintended genuine transactions of innocent property holders

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The law prohibits entering into benami transactions. If a property is held benami, it can be confiscated by the central government. Photo: Mint

A law that's often overlooked by many people but which can have far-reaching implications is the Prohibition of Benami Property Transactions Act, 1988. It was

recently amended and, in its present form, it can have deadly consequences in cases of violation, even if unintended. The law is administered in the initial stages by the income tax authorities, who can initiate proceedings under it if they notice any violations.

The law prohibits entering into benami transactions. If a property is held benami, it can be confiscated by the central government. Further, a penalty of 25% of the fair market value of the property can be levied on both the benamidar and the real property owner, besides a punishment of rigorous imprisonment for 1-7 years. There is also a prohibition on re-transfer of the property held benami from the benamidar back to the real owner.

A **benami transaction** is one where the property is held in one person's name, but the funds for acquisition have been provided by another person, for whose benefit the property is held. Therefore, the property is not held in the name of the real owner, but in somebody else's name.

Most people are under the impression that these provisions apply only to persons trying to hide their properties, and not to genuine properties acquired out of disclosed funds. That is not true; even a property acquired using disclosed funds in a genuine transaction may be treated as benami. Certain exceptions have been provided—property held by a person on behalf of his or her spouse or child, by a karta or member of an HUF (Hindu Undivided Family) on behalf of the HUF, by a partner on behalf of the partnership firm, by a director on behalf of a company, by a trustee on behalf of the beneficiaries of a Trust.

Property can be held in the name of a brother or sister or any other lineal ascendant or descendant, only if it is held jointly with the real owner. Therefore, owning a property and holding it in the name of a daughter-in-law, or in the name of a grandchild, is not permissible. Fortunately, adding the name of a spouse for convenience, though the entire funds are being paid by the acquirer, does not attract the provisions of this law.

Often, a few friends may pool resources and acquire a property for the purpose of appreciation, with an understanding that the sale profits will be shared among them. If such a property is held in the names of only one or a few of the friends, and not all, such a property would also be regarded as benami. Similarly, land aggregators often acquire properties in their own names on behalf of companies, who provide the funding for the land acquisition, with an understanding that the land will be transferred to the company after completion of acquisition and conversion. Such transactions may also be regarded as benami. There could be various other such instances of otherwise normal transactions being hit by this law.

Whenever a **property** is being acquired, one has to be careful in analysing the source of funds, and ensuring that the property is held in the name of the person for whose benefit the property is being acquired. One also has to keep in mind that this law applies not just to immovable property, but to any type of asset.

The intention of the law is very clear, and laudable—to ensure that persons acquiring undisclosed properties do not hold them in the names of their relatives or friends. This is one of the prongs in the attack against black money and corruption. Unfortunately, the law does not restrict itself to cases of properties acquired out of undisclosed funds. It applies to all cases where the property is held in another person's name, unless it is covered by one of the exceptions.

Therefore, it is likely that the broad sweep of the law will rope in unintended genuine transactions of innocent property holders, who may not be aware of the amended law. The fact that the income tax authorities have the power to initiate proceedings also has the risk of the law being misused to intimidate genuine taxpayers. While there is a safeguard in the form of an approving authority, it is an additional or a joint commissioner, and not even of the rank of a commissioner. A more robust safeguard to prevent misuse is essential, given the draconian nature of the consequences.

One hears that there are many cases where this law has been invoked, and which are in the adjudication process. It is inevitable that there will be many more cases in the future. It would be interesting to see how the judicial thinking on this law evolves, as the cases come up before the courts.

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