

MECHANISM OF AN ACT-EXPLAINED

What is an Act/Legislation?

“Natura non facit vacuum, nec lex supervacuum”

(Nature makes no vacuum and the law nothing purposeless)

The functioning of an Act resembles a human body where all its parts work together to keep us alive and fit, free from diseases and illnesses. Different body parts do different activities such as mind controls all our activities, heart purifies blood and ensures its circulation in the entire body, liver converts food into nutrients for different body parts and so on with the ultimate aim to keep a human body alive and active.

Similarly, every Act is the result of thoughtful deliberations of the Legislatures and evolves over a long period of time considering the prevailing socio economic needs and in accordance with the Directive Principles of State Policy as provided in Articles 36 to 51 of the Constitution. It is enacted by a competent law making body after following the procedure prescribed in the Constitution of India. Every part, every word of an Act is designed to achieve these socio economic purposes.

An Act is a well drafted codified law enacted by the competent Legislature after thoughtful deliberations. Every Act has a definite and well drafted scheme for its enforcement. It is divided into different chapters to give effect to the objects sought to be achieved by its enactment.



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MECHANISIM OF AN ACT/LEGISLATION

(Illustrated through The Prohibition of *Benami* Property Transactions Act, 1988)

The Prohibition of *Benami* Property Transactions Act, 1988 is based on the 130th report of the Law commission of India titled "*Benami* transactions – a Continuum." In this report the Law commission had *inter alia* recommended the inclusion of the following provisions-

- 1- *Benami* transactions should cover all kinds of property
- 2- Entering into a *Benami* transaction should be declared an offence subject to certain exceptions.
- 3- As the right to recover property held *benami* results into undue enrichment of the benamidar, this act prohibits the right to recover property held *benami* as both the *benamidars* and the true owner are all participants to a criminal transaction. Therefore, the properties held *benami* are confiscated.

The mechanism of an Act is divided into various parts as under-

- A- Introduction and Statement of objects and reasons
- B- Preamble
- C- Preliminary
- D- Interpretation of words appearing in the Act
- E- Other provisions to give effects to the scheme of the Act



A- Introduction and Statement of objects and reasons

- It is provided in the very beginning of every Act
- This part contains the background facts and historical developments leading to the enactment of the particular Act
- It reflects the mind of the statute makers behind its enactment

- **Introduction**

Benami transactions abused and defrauded public revenues. The Parliament inserted section 281A in the Income-tax Act, 1961 barring the institution of suits in relation to *benami* properties. However, it failed to prevent such transactions. The President promulgated the *Benami* Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 on May 19th, 1988

- **Statement of objects and reasons**

Summarizes the objects and reasons for which the *Benami* Transactions (Prohibition) Act, 1988 was enacted by the Parliament.



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B- Preamble

- Every book of *Tibetan Buddhism* opens with a very short poem. You comprehend the entire book if you understand the poem as it conveys its entire wisdom
- Preamble means **an introductory statement in a Constitution, statute, or other document explaining the document's basis and objectives**
- The aims and objectives sought to be achieved by the enactment of **The Prohibition of Benami Property Transactions Act, 1988** are succinctly provided in its Preamble which reads as under-

“An Act to prohibit *benami* transactions and the right to recover property held *benami* for matters connected therewith or incidental thereto---“



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C- Preliminary

- Section 1 of an Act introduces us to the preliminaries and contains the following-
 - **Short title i.e. the name of an Act**
Section 1(1) of this Act reads-
"This Act may be called the Prohibition of Benami Property Transactions Act, 1988
 - **Extent of its application**
Section 1(2) reads-
"It extends to the whole of India except to the State of Jammu and Kashmir"
 - **The date of its coming into force**
Section 1(3) reads-
The provisions of sections 3, 5, and 8 shall come into force at once, and the remaining provisions of this Act shall deemed to have come into force on the 19th day of May, 1988



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D- Interpretation of words appearing in the Act

- Generally, Section 2 of every Act defines various words for administering the scheme of a that Act
- The application of its particular definition is restricted to the particular Act only unless otherwise provided
- These definitions are precise and specific taking into account the general objects sought to be achieved by the Act
- The given definitions of specific words are to be applied while administering the scheme of that Act

Example-

Let us see the dictionary meaning and the definition of the word **attachment** as provided in Section 2 (5) of The Prohibition of *Benami* Property Transactions Act, 1988 (The Act)

Dictionary meaning	Definition as provided in Section 2(5) of The <i>Benami</i> Act
<ul style="list-style-type: none">• Add-on• Accessory• Extra• Part• Addition• Affection• Connection• Regard	<p>“attachment” means the prohibition of-</p> <ul style="list-style-type: none">• Transfer• Conversion• Disposition <p style="text-align: center;">or</p> <ul style="list-style-type: none">• Movement of property <p>✓ by an order issued under this Act</p>



E- Other provisions to give effects to the scheme of the Act-

From Section 3 onwards, an Act is further divided into various Chapters to give effects to the objects sought to be achieved by its enactment

SCHEME OF THE *BENAMI* ACT

S No	Broad Scheme	Section							
		From	To						
1	Provides name, date of its commencement and extent of its application	1							
2	<ul style="list-style-type: none"> • Defines various terms for the administration of the Act • The definitions and expressions of specified allied Acts are applicable to the scheme of the Act 	2							
3	Prohibits <i>benami</i> transactions	3	6						
4	Authorities under the Act and their powers	7	23						
5	Attachment, Adjudication and Confiscation	24	29						
6	<ul style="list-style-type: none"> • Appellate Tribunal, its establishment and Appeals etc. • Bars jurisdiction of other Courts to entertain any suit or proceedings in respect of the exercise of powers by Initiating Authority, Approving Authority, Adjudicating Authority or Appellate Tribunal (S 46) 	30	49						
7	Special Courts for trial of offences under the Act	50	52						
8	Offences and Prosecution Note Previous sanction of the Central Board of Direct Taxes is to be obtained for institution of prosecution before the designated Special Courts in the following circumstances- <table border="1" style="margin-left: 20px; margin-top: 10px;"> <thead> <tr> <th>Nature of offence</th> <th>Section</th> </tr> </thead> <tbody> <tr> <td>Entering into <i>benami</i> transactions</td> <td>2, and 53</td> </tr> <tr> <td>Furnishing false information or false document</td> <td>54</td> </tr> </tbody> </table>	Nature of offence	Section	Entering into <i>benami</i> transactions	2, and 53	Furnishing false information or false document	54	53	55
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Entering into <i>benami</i> transactions	2, and 53								
Furnishing false information or false document	54								
9	Miscellaneous provisions	56	72						

The Prohibition of Benami Property Transactions Rules, 2016

The provisions contained in section 68 of this Act empower the Central Government to make rules for carrying out the provisions of this Act by notification in the Official Gazette. The summary of these rules is as under-

Rule	Provide for
1	Provides for the name and the date of commencement of these rules
2	Defines certain terms and provides that the meanings of the words and expressions defined in the following Acts and the rules made there under shall be applicable in administration of these rules- <ul style="list-style-type: none">• Indian Trusts Act, 1882• The Indian Succession Act, 1925• The Indian Partnership Act, 1932• The Income-tax Act, 1961• The Depositories Act, 1996• The Prevention of Money-Laundering Act, 2002• The Limited Liability Partnership Act, 2008• The Companies Act, 2013
3	Determination of price in certain cases (Unquoted equity shares)
4	The Income-tax Authority, or other authority or agency as prescribed in section 285BA(1) of the Income-tax Act, 1961 are required to electronically submit a copy of statement received by them on or before fifteen days from the end of the month in which such statement is received by them to the- <ul style="list-style-type: none">• Initiating Officer, or• To such authority or agency authorised by him
5	The Initiating Officer to make provisional attachment of any property in the manner provided in the Second Schedule of the Income-tax Act, 1961
6	Confiscation of property
7	Receipt of confiscated property by the Administrator
8	Management of confiscated property by the Administrator
9	Disposal of confiscated property
10	Form of Appeals to the Appellate Tribunal

EVOLUTION OF THE PROHIBITION OF THE BENAMI PROPERTY TRANSACTIONS ACT, 1988

- 1- The Select Committee of the Parliament while considering the Taxation Laws (Amendment) Bill, 1969 made the following remarks-

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

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

- 2- During the debate in **Rajya Sabha** on the **Taxation Laws (Amendment) Bill, 1971** Sri **T N Singh**, one of the Members commented that the proposed amendment to the Income-tax Act was inadequate. He proceeded to comment-

“Even now, benami transactions are not barred by law. A very drastic remedy is needed. That is the point that I am making. Merely saying that he will suffer in a certain way and that it will be discouraging the benami transactions is not enough. All benami transactions should be debarred under the law. And I want to know why it has not been done. Why do you want to encourage benami transactions indirectly by a supposed penalty or harm or by saying that the party may suffer because he has done that? Why not debar it completely?”

(Para 1.4, 57th Report of the Law Commission, August 1973)

- 3- The Union Law Minister sends letter number 2462/72/Adv F dated 20-12-1972 to the Law Commission of India seeking its advise on the question of prohibiting the practice of holding *benami* property. The operative part of the letter read-

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

- 4- The Law Commission issues a questionnaire giving a brief resume of the prevailing position, setting out the problem and putting forth the possible alternatives of the law to State Governments, High Courts, Bar Associations, Chambers of Commerce, and other interested persons and bodies.

It included the following questions-

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

Their views were considered and a report was prepared for enactment of a dedicated Act

- 5- A comprehensive report being the fifty –seventh Report of the Law Commission of India based on these recommendations was sent by its Chairman, Sri P B Gajendragadkar (The seventh Chief Justice of India *i e* 1-2-1964 to 15-3-1966) vide his letter dated August 7th, 1973
- 6- The President of India promulgates an Ordinance **Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988** on May 19th, 1988
- 7- The Law Commission sends its One Hundred Thirtieth Report on Benami Transactions to the Union Law Minister vide letter dated 14-8-1988
- 8- The Parliament enacts the **Benami Transactions (Prohibition) Act, 1988** w.e.f 5-9-1988
- 9- The Benami Transactions (Prohibition) Amendment Act, 2016 is enacted w.e.f August 10th, 2016
- 10- Section 3 of the Amending Act changes the nomenclature of the Act to **The Prohibition of Benami Property Transactions Act, 1988**
- 11- It came into force w.r.e.f 19-5-1988 except the following sections which came into force on 5-9-1988-

Section	Provides for
3	Prohibition of <i>benami</i> transaction
5	Confiscation of the property held <i>benami</i>
8	Composition of the Adjudicating Authority

How to read and understand Statutory provisions (Sections)

“-----the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different then when the statute is looked at without the glasses provided by the context. With those glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.”

Reserve Bank of India v. Peerless General Finance Company Limited

(1987) 61 Comp cases 663



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SOME IMPORTANT DEFINITIONS OF THIS ACT

PROPERTY S 2(26)

1- Means assets of any kind, whether-

- ✓ Movable, or
- ✓ Immovable
- ✓ Tangible, or
- ✓ Intangible
- ✓ Corporeal, or
- ✓ Incorporeal

2- It includes-

- Any right, or
- Interest, or
- Legal documents, or
- Instruments
- ✓ That evidence title to or interest in the property

3- The converted form of any property where such property is capable of conversion

4- Proceeds from the property

TRANSFER S 2(29)

It includes-

- ✓ Sale
- ✓ Purchase, or
- ✓ **Any other form of transfer of-**
 - Right
 - Title
 - Possession, or
 - Lien

The scheme of the Act provides that the meanings of the words and expressions defined in the following Acts and the rules made there under shall be applicable-

- Indian Trusts Act, 1882
- The Indian Succession Act, 1925
- The Indian Partnership Act, 1932
- The Income-tax Act, 1961

- The Depositories Act, 1996
- The Prevention of Money-Laundering Act, 2002
- The Limited Liability Partnership Act, 2008
- The Companies Act, 2013

BENAMIDAR S 2(10)

- A person or fictitious person in whose name the *benami* property is transferred or held
- It includes a person who lends his name

BENEFICIAL OWNER 2(12)

- A person
- Whether his identity is known or not
- For whose benefit the *benami* property
- Is held by a *benamidar*

BENAMI PROPERTY S 2(8)

- Any property which is the subject matter of a *benami* transaction, and
- Proceeds from such property

BENAMI TRANSACTION S 2(9)

1- A transaction or arrangement (Sub-clause A)

- Where a property is transferred to a person when the consideration for such property is provided or paid by another person-
- Where a property is held by a person when the consideration for such property is provided or paid by another person-

And

- The property is held by another person for the immediate or future, **direct or indirect** benefit of the person who provided the consideration

These provisions are, however, not applicable when the property is held by-

- A *Karta* or a member of an HUF for the benefits of the HUF, and **the consideration for such property is paid out of the known sources of the HUF**
- A person in his **fiduciary capacity** for the benefit of another person in his capacity as such. It includes-
 - ✓ A trustee
 - ✓ Executor
 - ✓ Partner

- ✓ Director of a company
 - ✓ A depository or a participant as an agent of a depository under the depositories Act, 1996
 - ✓ Any other person as may be notified by the Central Government for this purpose
- An individual in the name of his **spouse** or any of his child when the consideration is paid out of the known sources of the individual
 - A person in the name of his **Brother, or Sister, or lineal ascendant or descendant** when-
 - ✓ The individual appears as the joint owner in any document, and
 - ✓ The consideration is paid out of the known sources of the individual

2- When a transaction or an arrangement in respect of a property is carried out or made in a fictitious name (Sub-clause B)

3- Where the owner of the property is not aware of, or denies knowledge of such ownership (Sub-clause C)

4- Where the person providing the consideration is not traceable or is fictitious (Sub-clause D)

Note

These provisions are not applicable in respect of a transaction in immovable property where part performance of such transaction is made as covered under section 53A of **The Transfer of Property Act, 1882**. The relevant extract of these provisions is quoted below-

“Part performance.- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in the part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract, ----

However, the following conditions have to be satisfied-

- ✓ Consideration for such property has been provided by the person to whom the possession is allowed but the person granting the possession continues to hold ownership of such property
- ✓ Stamp duty for such transaction or arrangement has been paid, and
- ✓ The contract has been registered

Attachment S 2(5)

- **The following may be prohibited under the Act in respect of a property by issuing an order under the Act-**
 - ✓ Transfer
 - ✓ Conversion
 - ✓ Disposition, or
 - ✓ Movement



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