IMPLICATIONS OF THE BENAMI AMENDMENT ACT FOR THE REAL ESTATE SECTOR IN INDIA

Abstract

The paper explores the implications of the Benami Transactions (Prohibition) Amendment Act, 2016 (hereinafter referred to as BTPAA, or simply as the Amendment Act), for real estate in the post-RERA era. *Benami* transactions enable the financer to enjoy the fruits of the property but to wriggle out of fulfilling the concomitant legal and fiscal responsibilities. Apart from the BTPAA, a multitude of enactments and policy decisions that directly impact the real estate sector have come into effect almost simultaneously, *e.g.* the Real Estate Act, 2016 the GST regime and demonetization. Economic trends post-BTPAA not only demonstrates a dampening of prices and shrinking of businesses; but also a reduction of unsold stock and inventory. However, digitization of land records and a robust land-titling system, under the overarching regulatory system put in place by the Real Estate Act, could increase market confidence. The paper offers a conceptual framework to simplify the web of factors relating to the impact of the BTPAA on the real estate sector, thus providing a useful framework for further study.

I Introduction

EXACTLY SIX months after the Real Estate (Regulation and Development) Act, 2016[1] (hereinafter referred to as RERDA) came into effect, and precisely one week before the significant announcement on demonetization was made, the Benami Transactions (Prohibition) Amendment Act, 2016[2] came into force on November 1, 2016. But perhaps due to the developments in the aftermath of demonetization that monopolized newspaper column space and media airwaves, the BTPAA did not receive as much public attention as it ought to have.

This paper, seeks to explore the implications of the BPTAA for real estate in India in the post-RERDA era. Most *benami* transactions are in relation to real estate, and are connected with black money, however with the advent of the Amendment Act, the scope of benami transaction has been widened and the punishment as well as the penalties have been made more stringent. Arora opines, "Real estate is a capital intensive asset class and….one of the main avenues for investment of unaccounted money in India."[3] It can therefore be said that the BPTAA lies at the cusp of the RERDA and the demonetization decision, both figuratively and literally.

The word *benami* is a peculiarly Indian term; no English word properly captures the full sense of the Hindi word. English words like 'anonymous', 'proxy' or 'false nomenclature' are misleading, and do not provide the correct connotation; that is why

1 Act No.16 of 2016.

2 Act No.43 of 2016.

3 Surabhi Arora, "Impact of New Benami Transactions Act on Real Estate". *Economic Times, ET* Realty, Aug. 25, 2016, *available at* : https://realty.economictimes.indiatimes.com/realty-check/impact-of-new-benami-transactions-act-on-real-estate/1745 (last visited Sep. 20, 2020).

when Parliament passed the original Act in 1988, it chose to use the word *benami* in the title as well as in the body of the text. The literal meaning of *benami* is 'without name', and it has come to mean 'in another's name'.The Merriam-Webster dictionary defines *benami* to mean: [4]

> made, held, done, or transacted in the name of another person; used in Indian law to designate a transaction, contract, or property that is made or held under a name that is fictitious or is that of a third party who holds the property as ostensible owner for the principal or beneficial owner.

Neither does the original Act of 1988, nor does the detailed amendment of 2016 define the term *benami*. They both simply assume that the word is understood by everyone in general. What the Act of 1988 does define is a *benami* transaction, and not *benami* itself. As is pointed out by Rana and Malhotra, "There are many forms of transactions where people prefer to deal in another person's name instead of their own."[5] The intentions of such offenders include (i) tax evasion; (ii) circumventing of land ceiling laws; and (iii) investment of unaccounted wealth. This is the conventional wisdom, and appears in most of the literature. But Khare adds an insightful dimension; she points out two other reasons why *benami* transactions have traditionally found favor in India – one is in order to commit a fraud on creditors, hiding away wealth that could be seized in insolvency proceedings; and the other is the compulsions in Hindu Undivided Families (HUFs) to sometimes invest 'secret profits'.[6] By this is meant that, with the best of intentions, the *Karta*, or head, of an HUF may not want all the family members to know about the actual value of assets held, lest they make unreasonable demands, or demand division of the assets, or threaten the unity of the joint and undivided family through personal greed. *Benami* transactions have been seen as anathema in the modern state, because through such a transaction the financer[7] manages to enjoy the fruits of the property but simultaneously manages to wriggle out of fulfilling the concomitant legal and fiscal responsibilities.

The precise and full impact of the BTPAA on the real estate sector would be difficult to discern for two reasons: (i) In less than the four year period that the BPTAA has been in operation, not much has been put in the public domain by way of authoritative facts and figures by reliable and concerned agencies engaged in its implementation. The sporadic reports that have appeared in the media are insufficient to present a

4 Merriam-Webster Dictionary. *Available at*:https://www.merriam-webster.com/dictionary/benami (last visited on Sep. 30, 2020).

5 Lucy Rana and Sanchi Malhotra, "Benami Transactions (Prohibition) Amendment Act, 2016" *Mondaq* (Jan. 3, 2017)*, available at:* https://www.mondaq.com/india/real-estate/554572/benami-transactions-prohibition-amendment-act-2016 (last visited on Sep.30, 2020).

6 Deepa Khare, "A Study of the Benami Transactions (Prohibition) Amendment Act, 2016, Feb. 13, 2018, *available at*: http://itatonline.org/articles_new/a-study-of-the-benami-transactions-prohibition-amendment-act-2016/ (last visited on Oct. 22, 2020).

complete picture, and are at best preliminary and tentative (though we shall refer to them to give an indicative impact); and (ii) There have been a multitude of recent enactments, legislation and policy decisions that directly impact the real estate sector that have come into effect almost simultaneously, *e.g.* the RERDA, the Goods and Services Tax (GST) regime and the demonetization. While it cannot be denied that the BTPAA would also have impacted this sector, the time period is too short and the data too scanty to do a sensitivity analysis to isolate and separately identify the impact of the BTPAA to enable a conclusive deduction about the extent to which it is specifically responsible for the changing trends in the real estate sector.

It is for these reasons a restrictive analysis of the implications is undertaken rather than saying anything definitive about the impact. However, an attempt has been made to devise a conceptual framework which identifies the principal stakeholders, agents, policies and enactments, and simplifies the web of factors that come into play in their relationship insofar as the impact of the BTPAA on the real estate sector is concerned, providing a useful framework for further study.

II Historical framework and perspective

The Benami Transactions (Prohibition) Act was enacted as far back as in 1988.[8] But it was not without a long history of almost two decades that led up to it. Prior to this, there were a number of Acts that touched on the issue, among them the Indian Trusts Act of 1882,[9] the Income Tax Act of 1961,[10] the Transfer of Property Act of 1882,[11] the Code of Civil Procedure of 1908,[12] and the Indian Penal Code of 1860.[13] The problem was that in the era when these were drafted, *benami* transactions were considered to be traditional and acceptable as a customary practice. For example, section 5 of the Transfer of Property Act, 1882, does not prohibit transfer of property in the name of one person for the benefit of another; and sections 81 and 82 of the Indian Trusts Act, 1882, extended legislative recognition to *benami* transactions. As a result, there emerged a catena of judgments holding *benami* dealings legitimate so long as the provisions of any statute were not defeated. Referencing most of the literature on the BTPAA would indicate that it has three broad objectives: (a) to expedite the procedures indicated in the main Act of 1988; (b) to designate a hierarchy of authorities to deal with such procedures; and (c) to stipulate more stringent punishment for offenders.

7 The term 'financer' is deliberately used to connote someone who, in a particular instance, provides the finance for a specific purpose, as opposed to a 'financier' who is a person or an organization whose business it is to provide finance to enterprises.

8 Act No. 45 of 1988.

9 Act No. 2 of 1882.

10 Act No. 43 of 1961.

11 Act No. 4 of 1882.

12 Act No. 5 of 1908.

13 Act No. 45 of 1860.

"In other words, the [amendment] makes the erstwhile Act more executable and practicable." [14]

An important judgment of the Supreme Court in *Om Prakash Sharma* v. *Rajendra Prasad Shewda*[15] delivered on October 9, 2015, made reference to a landmark precedent case, namely *Jaydayal Poddar (Deceased) through L. R.s* v. *Bibi Hazra,* and declared in no uncertain terms:[16]

> The burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned, and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises, as a substitute for proof.

Thus a strict burden of proof continued to rest on the state, making it difficult to control such transactions. No doubt these proxy transactions were qualified, but they were not banned outright; and if the real owner asserted title, courts would have to disregard the ostensible *benamidar* and grant title to the actual payer, notwithstanding the *benami* nature of the purchase.[17]

A need was therefore felt to bring about absolute prohibition, and the government referred the matter to the Law Commission, which in its 57th Report on Benami Transactions submitted in August 1973, observed that while there was need to bring clarity on the issue due to the wasteful litigation arising from the various judicial pronouncements on various provisions of various statutes that touched on *benami* transactions, opined that there was a general feeling that *benami* was a deep-rooted habit which may be restricted, but not prohibited altogether.[18]

However, the matter continued to remain one of public debate, and 15 years later in 1988 the government took the unusual step of promulgating a brief ordinance prohibiting *benami* transactions, and then referring it to the Law Commission to propose the contents of the Act which would have to replace the ordinance within six weeks

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14 *Supra* note 5.

15 (2015)15 SCC 556.

16 (1974) 1 SCC 3, para 6-7, *available at*:https://www.legalauthority.in/judgement/om-prakash-sharma-at-o-p-joshi-vs-rajendra-prasad-shewda-4125 (last visited on Oct.14, 2020).

17 *Supra* note 6.

18 *Ibid.*

of Parliament reconvening. Khare informs us that in its 130th Report on Benami Transactions – A Continuum, submitted in 1988, the Law Commission, in a path-breaking departure from its earlier stand:[19]

> formed an opinion that in most of the cases the motivation [for benami] is illegitimate. The honest purposes are very, very rare and therefore, in principle, the new legislation should be made applicable to all *benami* transactions irrespective of the intention. The law should be based on the presumption that all such transactions are entered into for illegal purposes.

The result was the Benami Transactions (Prohibition) Act of 1988. It was one of the briefest Acts on the statute books, consisting of barely nine sections. It banned *benami* transactions altogether, making exceptions only for purchases made in the names of wife or unmarried daughter. It declared that an alleged owner could not sue for ownership of the property from the person in whose name it stood. It made the offence punishable by imprisonment without the requirement of *mens rea*, and it repealed the conflicting provisions of the Indian Trusts Act, 1882 the Code of Civil Procedure, 1908 and the Income Tax Act, 1961.

Whereas the enforcement machinery was not delineated, leaving it to delegated legislation, *i.e.,* rules to be made under the enactment, to be framed subsequently. And that proved to be is undoing, since the rules were never framed. Apparently, this was not for want of trying. It emerges that several drafts were indeed made, but none of them could get finalized due to widely divergent views on the subject, the government itself admitting to lacunae and pitfalls.[20]

III The Amendment Act and the exemptions

The Benami Transactions (Prohibition) Act of 1988 could not achieve the desired objective hence BTPAA was introduced to widen the definition of *benami* transactions to include 'arrangements'. Legally speaking, this would imply that a transaction which may not have concluded or an 'understanding' which not have been documented would still be covered under the prohibited category.[21] Even transactions carried out in fictitious names or by persons who are untraceable have been categorized as *benami*. While mostly tightening up things, the Amendment Act also loosens things in some respects, *e.g.,* to the exceptions mentioned in the original Act, others have been added: now properties purchased *benami* in the names of brothers, sisters or any lineal ascendant or descendant

19 *Supra* note 6 at para 10.

20 *Supra* note 8.

21 Sreya Bharand Barnik Ghosh, "Benami Transactions Prohibition Act - A Study in Comparison" (Jan. 2, 2017), *available at*: https://www.lakshmisri.com/News-and-Publications/Publications/Articles/Corporate/benami-transactions-prohibition-act-a-study-in-comparison (last visited on Sep. 30, 2020).

are exempted, as are purchases made in a fiduciary capacity, or by the *karta* of an HUF. A glaring loophole seems to be the power retained by the government to extend exemptions to religious or charitable trusts of its choice.[22] Stringent punishment of imprisonment up to seven years and fine extending to 25% of the value of the property has been prescribed for both, the actual purchaser as well as the *benamidar* who aids and abets the perpetrator. The property is also liable to be confiscated.

The BTPAA provides for the appointment of initiating officers for conducting inquiries; approving officers to grant approval for prosecution; adjudicating authorities to decide the matters; an appellate tribunal to hear appeals; and administrators to receive and manage the confiscated properties. BPTAA contains 71 sections in contrast to the original Act. Thus, it is quite apparent that the BTPAA, by and large, overcomes most of the lacunae in the original Act and constructs a formidable mechanism for the effective implementation of the Benami Act.

IV Implications for real estate: Framework for analysis and evaluation

The nature of the real estate sector is such that there are multifarious factors that influence it in varying degrees. And whereas it is relatively easy to identify these factors, it requires a far more complex exercise to accurately determine the quantum of their separate influences. This would, as has already been mentioned, be possible only through a sensitivity analysis, for which hard numeric data is required on all the parameters, preferably over a reasonably significant period. It is too early to meaningfully undertake such an exercise. However it would be useful to understand the complex interplay between the principal stakeholders and agents, and the chief factors and directional flow of sequential events and outcomes in the scenario emerging from the impact of the BTPAA on the real estate sector by reducing these to a schematic diagram. Such a diagram is presented in Figure 1 placed in the appendix, with an attempt to depict both, the near-term impact as well as the long-term impact.

The primary impact of the BTPAA is on restricting the avenues of purchase of property, which sets off a ripple effect, shrinking volume of sales, which in turn results in a negative impact on the business interests of real estate developers, contracting them. However, this buyer-builder relationship is also influenced by the shrinking cash economy which, apart from the BTPAA is the outcome of other fiscal and monetary policies of the government, such as GST and demonetization. The liquidity crunch faced by developers is at once a consequence and a cause of fewer project launches and inability to completion projects in a timely manner. Basically, this loop becomes a vicious cycle. Fewer launches also result from the inability of developers to use land they had acquired *benami* due to the BTPAA as well as the stringent transparency requirements of RERDA while applying for registration.

22 See BTPAA, s. 58 (1).

Arora observes: "It is very evident through [an analysis of] past trends that private equity and NBFCs are chasing only a few premium developers to provide debt or equity, and staying away from non-metros and small developers due to transparency issues in [real estate] transactions."[23] This was the situation pre-BTPAA and pre-RERDA. It is reasonable to expect that when the traditional cash sources of financing both buyers and builders are choked off due to, in part at least, the BTPAA, formal financing channels through Banks, NBFCs (Non-Banking Financial Companies) and other FIs (Financial Institutions) would witness an increased off-take. However, this can only be expected in the medium to long term. In the near term, the liquidity pressure coupled with high interest rates and dwindling sales present lenders, particularly NBFCs, with an unattractive scenario, and they continue to shy off.[24] Traditionally, the refinancing route is the preferred one for realtors to access, since it is considered safer by lending companies because it is presumed that the first lender has done the due diligence. In the post-RERDA era, the regulatory authority shoulders some of this burden of due diligence, and RERA-registered projects should therefore stand a better chance of accessing refinancing from NBFCs once interest rates soften. Should such an increase in financing of buyers and builders through formal channels actually take place, it would result in a huge clean-up of the real estate sector, auguring well for its long-term health.

If this is accompanied by speedy completion of digitization of land records and a robust land-titling system, the entire sector reinforced and regulated in a post-RERDA scenario, a virtuous cycle is set into motion in which market confidence can be expected to increase, paying rich dividends to all stakeholders.

The assumptions and expectations on which this conceptual framework is based would have to be tested by obtaining data over a few years on, inter alia, actual sales, bookings, volume of unsold stock, project launches, project completions, housing loans availed, real estate projects financed and FDI in real estate. The impact of Covid-19 would also have to be factored in, which would add another layer of complexity that is beyond the scope of this paper.

V Impact on real estate

Real estate is considered as one of the main avenues for the investment of unaccounted money in India. This Act has brought transparency in the real estate sector by adding a correct title to the property. Buyer's confidence has increased as they will be buying at a reasonable price from the real owner of the property. Also, the lender's confidence has increased as there will be no multiple ownerships, unknown ownership, and false

23 See *supra* note 3.

24 *News analysis, "Debt Refinancing Gets Tough for Realtors", Economic Times, Indore/Bhopal edn. 9(Oct. 20, 2018).*

ownership now. Great optimism about the prospective positive effects of the BTPAA on the investment climate in India in general and in real estate in particular has been observed however the results will take a while to manifest themselves, and will be dependent on the level and extent of implementation of the BTPAA in the field. Also an apprehension in the short term it would have an adverse impact on real estate transactions volume and real estate prices.[25]

The coming into effect of the BTPAA and the demonetization announcement in the same week cannot be attributed to mere coincidence. From the policy perspective these would better be seen as components of a concerted design. It is a moot point whether demonetization achieved its objectives or not, but that is not the subject matter of this paper. What is relevant to us is that the effects of BTPAA cannot be evaluated in isolation from it. Citing the Reserve Bank of India monthly bulletins, Nataraj had observed that "the construction sector is seen to be badly affected [by the demonetization move] as the growth in third quarter fell from 6 per cent to 3.4 per cent and in Q4 the growth appeared negative. The financial, real estate and professional service sector is hit hard."[26] It must be noted that Nataraj made these observations in the context of demonetization, but she glosses over the fact that the BTPAA became effective in the same week as demonetization was announced. It cannot, therefore, be assumed that effects in the real estate sector are the exclusive result of demonetization. At best we could say that these could be seen as the combined effect of a range of factors, among them demonetization, RERDA and the BTPAA. Since then, the RBI has released figures for the entire financial year. The difficulty is that in showing the components of Gross Value Added, the Central Statistics Office (CSO) clubs real estate with financial and other professional services.Though the reports that appeared in various sections of the press in the months after the BTPAA was enacted were generally released by government agencies such as the Press Information Bureau (PIB) and the Income Tax Department, the figures reported were often inconsistent, and sometimes contradictory. It would be more reliable, therefore, to go by what the government reported to Parliament. On July 26, 2017 the Rajya Sabha was informed that the government had established 24 *Benami* Prohibition Units (BPUs) across the country for the purpose of implementing the BTPAA; and that properties worth over Rs 800 crores were under attachment in more than 230 *benami* transactions following the BTPAA. Also, a further 170 cases were under investigation.[27]

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25 *Supra* note 3.

26 See *supra* note 16.

27 *PTI news report,* "Benami Properties Worth Rs 800 crore Attached: Centre", *Economic Times,* July 26, 2017, *available at:* https://economictimes.indiatimes.com/news/politics-and-nation/benami-properties-worth-over-rs-800-crore-attached-centre/articleshow/59776940.cms (last visited on Sep. 22, 2020).

On September 16, 2017 this figure was updated to declare that the total number of properties confiscated went up to 286 by July 31, 2017 and then within a month surged to 381 by August 31, 2017. The total value of seized properties was put at Rs 1353.38 crores. The maximum number of confiscated properties was in Tamil Nadu (66), followed by Rajasthan (62) and Mumbai (58). However in terms of value, the largest volume was seized in West Bengal (Rs 478.87 crores) though the number was a mere 28. A further 627 cases were under investigation.[28]

All this seems to have had its effect on dampening prices of real estate all over the country. A market overview released by realty data analytics firm Prop Equity indicates that there was a downward plunge in prices, especially in Chennai and Kolkata. It also says that new project launches across nine key cities - Gurgaon, Mumbai, Noida, Kolkata, Hyderabad, Bengaluru, Pune, Chennai and Thane - dropped by 22% between the second and third quarter of 2018. The silver lining is that unsold stock reduced by 3% during the same period. While new launches fell from 42,120 to 32,870, unsold stock came down from 6.37 lakh units to 6.17 lakh units.[29] This an indication that genuine home buyers continue to make purchases while speculative investors (into which category *benamidars* usually fall) have reduced.

VI Conclusions and suggestions

In conclusion, one can say that since most *benami* transactions are in relation to real estate, and are connected with black money, and that the BTPAA was followed by swift and decisive action in the field, there has been an undeniable impact on the real estate sector, dampening prices, shrinking demand and an overall downswing post-November 2016. However it is difficult to pinpoint these effects as being the sole result of the BTPAA. Considering that there have been a multitude of Acts and fiscal and monetary policy decisions that came into effect almost simultaneously, *e.g.*, the RERDA, the GST regime and demonetization, the exact extent of the impact attributable solely to the BTPAA cannot be determined with a reasonable degree of certainty at this stage. However, with the passage of time and the accumulation of more data, hopefully this may become possible.

Furthermore, while the real estate sector has experienced a general decline, the volume of unsold stock has actually come down during the past year, indicating that the genuine homebuyers continue to make purchases while speculative investors (into which category *benamidars* usually fall) have reduced. This augurs well for the future, and it is expected

28 Suchetna Ray, "Benami Act Impact: Taxman Seizes 381 Properties worth Rs. 1300 cr in 9 Months", *Hindustan Times,* Sep. 16, 2017, *available* at: https://www.hindustantimes.com/india-news/benami-act-impact-taxman-attaches-381-properties-worth-rs-1300-cr-in-9-months/story-CzG0j2lWEcUW4gFz21XbkO.html (last visited on Sep. 22, 2020).

29 Prop Equity Report, *available at*: http://beta.propequity.in/PressRoom/RealEstateoverviewQ3report_10October2018_Large.jpg (last visited on Sep. 22, 2020).

that in the medium term the greater transparency brought into the real estate sector as a result of the new dispensation in terms of cleansing and regulation may enhance builder-credibility and customer-confidence.

In order to make both, the BTPAA more effective as well as the real estate sector more transparent and malpractice-free, the following suggestions are advanced:

(i) India lacks a proper and reliable property title system. Action towards establishing this should be taken up in a concerted manner;

(ii) The process of digitization of land records should be speeded up, and the land records database should be linked to property sale registration database, such that a sale of property triggers an instantaneous mutation process in property title; and

(iii) The BTPAA should be made applicable to properties held abroad as well, thus reducing the incentive to channel black money into foreign real estate holdings.

Insofar as further research is concerned, it is suggested that the conceptual schematic model presented in this paper could be used for a more precise evaluation as more data becomes available on actual sales, bookings, volume of unsold stock, project launches, project completions, housing loans availed, real estate projects financed and FDI in real estate, in the coming years.

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