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Changing dimensions of right to property with special reference to benami transactions

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Abstract

Property, as a legal and social institution, has different forms in different cultures and legal systems. Property means any external thing over which the rights of possession, use and enjoyment are exercised. Most of the modern Constitutions have conceded the concept of right to property. It is recognised as inherent right in most of the democracies and it acquired universal protection under Article 17 of the Universal Declaration of Human Rights, 1948. Earlier, the property got protection in the context of Fundamental Rights under Article 19(1) (f) of the Constitution of India, 1950 while its practical aspect was in Article 31. After the Constitution (Forty-fourth Amendment) Act, 1978 it was dropped from Fundamental Rights and became Constitutional Right under Article 300A. Illegal transfer of property is common in India from time immemorial which is an economic, political as well as social smudge. Experiences had shown that such transactions were entered in India for no apparent reason and with the passage of time it took a very dangerous shape. To plug out these illegal activities, Indian Parliament passed various statutory provisions which touching all the facets of property like concealing the real property, defrauding the creditors, evasion of tax etc. Similarly, the Indian higher judiciary in several important decisions has discussed different facets of the property rights of citizens available under the Constitution and other legislations. So in this paper, an attempt has been made to discuss these changing dimensions of property in the present scenario especially in the context of benami transactions.

Keywords: Constitution, property, demonetisation, black money, benami property, money-laundering, corruption etc.

Introduction

The Civil liberty is the essence of human life and a prerequisite of citizenship¹. The Constitution of every country awards to its citizens a great amount of civil liberty which assimilates a number of fundamental rights². Blackstone asserted that security of the person is the first, freedom is the second and property is the third exclusive and inherent right of every human being³. Property as a socio-economic institution, immerse variety of forms in different cultures and legal systems⁴. It is not a term of art, but it has been used in variety of senses⁵ and includes all those legal rights which are germane for human personality⁶. It is the legal domain which contains the idea of ownership⁷. As far as the right to property is concerned, the Constitution of India, 1950 confers on its citizen's freedom to acquire, hold and dispose of the property but under some limitations.⁸ Originally, property got protection in the context of fundamental rights under Articles 19(1)(f)⁹, 19(5)¹⁰, 26(c)¹¹ (d)¹² and 3113 of the Constitution of India, 1950. Similarly, in the context of right to property, some other relevant provisions are also contained under Union, 14 State¹⁵ as well as the Concurrent List¹⁶ in the Seventh Schedule of the Constitution. Here it is very important to note that fundamental right to property granted by Articles 19(1)(f) and 31 has been reshaped six times respectively through the 1st 4th, 17th, 25th, 42nd amendments of the Constitution of India, 1950. Ultimately, the 44th Constitutional Amendment, 1978 expunged Articles 19(1)(f) and 31 from the Chapter of Fundamental Rights of Part III and inserted it under Article 300A¹⁷ under a new Chapter IV of Part XII of the Constitution¹⁸. In India, transactions for purchasing, selling, transferring creating an interest in immovable property and transmission of title in respect of a property are governed by several laws, rules and regulations. However, property can be transferred by different modes viz., sale, gift, will, exchange, lease, mortgage etc. It is relevant to note that with the passing of time, the mode for the transfer of property has been changed.

Sometimes, these modes have also been used for the violations of statutory provision under the law. So, changing dimensions in the society gives the birth to new buzzwords *i.e.*, demonetisation, black money, benami property, money-laundering, corruption etc. Correspondingly, the Indian higher judiciary has played admirable role in the elucidation of statutory provisions relating to right to property according to the changing needs of the society.

Kinds of property

The expression property is a term of wide connotation. It is not only the subject matter of ownership, but also includes the dominium over it. The term property is indicative and descriptive of every possible interest which carries some value and the right of ownership may be exercised on it [19]. The word 'property' is derived from the Latin term "*proprietor*" which means a thing owned with absolute right of possession, enjoyment and disposition [20]. On the other hand, property in its comprehensive sense includes all legal rights of a person except his personal rights, which constitute his status or personal condition [21]. Broadly, property is divided into two genres *viz.*, corporeal property and incorporeal property.

Corporeal Property

Corporeal property is also known as tangible property because of its physical presence in the world and it includes material things as well. Corporeal property has two species *viz.*, moveable and immovable. Moveable property includes property of every stripe except immovable property? [2] In other words, moveable property comprises standing timber, growing crops and grass, fruit upon and juice in trees, and property of any description, except immovable property [23]. On the other hand, immovable property includes land, benefits arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth [24]. It does not include standing timber, growing crops or grass [25], but includes land, building, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefits to arise out of land and things attached to earth or permanently fastened to anything which is attached to the earth? [6] *Prima facie* anything permanently attached to the land, or to something else which is itself attached to the land is a fixture. Hence, it is a part of the land and pass automatically with the land upon transfer [27]. The major difference between both law is that Rights over immovable are determined by the *lex situs*; rights over moveable are not governed by that law [28].

Incorporeal Property

In common parlance, incorporeal property is an intangible property that consist intellectual or conventional property and also includes all those things which can be legally protected [29]. It has two kinds namely, rights *in re propria* and rights *in re aliena*. Rights *in repropria* are those rights of ownership in one's own property as are not exercised over material objects. However, in some cases, ownership of some non-material things produced by human skills and labour is recognised as property *i.e.* patent, copyright, trademark, design, geographical indication etc. On the other hands, rights *in re aliena* are known as encumbrance rights. Encumbrance rights embrace the right of a specific user, as opposed to ownership rights, which are the rights of common users. Encumbrances prevent the owner from

exercising specific rights over his property, such as a lease, servitudes, securities, trust, and so on [30].

Property: Constitutional Framework

The Constitution of India recognises the institution of private property with certain reservation. Simultaneously, it contains allegiance to the people for securing social order based upon social and economic justice [31]. The aspiration for the assurance of fundamental property rights can be founded at the time of the Magna Carta, 1215 [32]. The core of the commitment to socio-economic progress lies in the shape of fundamental rights and directive principles in the national movement for Independence. The fundamental right to property has caused much trouble and prompted numerous litigations between the government and the people for the protection of right to property. The reason behind this confrontation is that the Central and State Governments have passed various statutory enactments to regulate property rights.

The worst affected fundamental right to property as Article 31 [33] guarantees has been altered through numerous amendments *viz.*, the 1st amendment [34] added two explanatory Articles 31-A and 31-B to the Constitution along with ninth Schedule; the 4th amendment [35] substituted clause (2) [36] and inserted clause (2-A) [37] to Article 31 and enlarged the scope of ninth schedule; the 17th amendment [38] further expatiated the definition of 'estate' in clause (2) of Article 31A; and the 25th amendment [39] amended Article 31(2), added clause (2-B) and also inserted a new Article 31C. In the 42nd amendment [40] Article 31C was substituted by the words "the principles specified in clause (b) or clause (c) of the Article 39" for the words "all or any of the principles laid down in Part IV of the Constitution" and finally 44th amendment [41] deleted the entire Article 31 along- with 19(1)(f) and inserted Article 300A [42] to the Constitution of India, 1950.

Changing dimensions of property

The changing dimensions *viz.*, demonetisation, black money, money laundering, corruption, benami property etc., are the vibrant words in the Indian economy, has impacted the life of people across the country. To check these illegal activities and to curb bribes, terrorism funding, gambling, unaccounted income, etc., the following terminology used in this context.

Demonetisation

Demonetisation is a process of stripping a currency unit of its status as a legal tender. In other words, demonetisation is activity of withdrawal of a particular form of currency from circulation and a new currency replaces the old currency. The term demometisation derived from French word '*de*' means reverse and Latin word '*moneta*' means money. It describes as an action under which a currency is deprived of its legal status of money [43]. The demonetisation is a financial affair undertaken in the context of excessive money supply causing hyperinflation and instability in the economy [44]. The transactions of purcha sing and selling the propert y definitely are affected by the demonetisation as it has traditionally seen a very high involvement of black money in cash transactions. Cashless transactions will force the buyers and sellers to declare the actual cost of transaction thereby increasing the registration charges in turn the income of the government and it attacking

corruption, black money and counterfeit currency ^[45].

Black Money

The black money is tax -evaded income, referred to illegal money earned from illegal sources which has not been disclosed to the government ^[46]. In common parlance, it refers to money that is not fully legitimate in the hands of the owner. The National Institute of Public Finance and Policy (hereinafter read as NIPFP) ^[47] defined black income as "the accumulation of taxable income that is not reported to the tax authorities. "Therefore, in general term, black money is used to describe the concealed income or unaccounted for money involved in secret transactions or undisclosed wealth ^[48]. It is very relevant to mention here that the Wanchoo Committee Report ^[49], described the phenomenon as "invasive cancer in the country's economy that, if not checked in time, will undoubtedly lead to its destruction. " Black money originated from illegal activities that are prohibited by law *viz.*, crime, drug trafficking, terrorism, and corruption, racketeering, trafficking in counterfeit and contraband goods, smuggling, production and trade of narcotics, forgery, illegal mining, illegal felling of forests, illicit liquor trade, robbery, kidnapping, human trafficking, cheating and financial fraud, embezzlement, drug money, bank frauds, and illegal trade in arms etc. all of which are punishable under the legal framework of the State ^[50]. Generally, tax evasion leads to create black money. The major concern of the use of black money for purchasing property is its distortionary effects on prices. This causes significant welfare losses due to widespread evasion of taxes on transfer of immovable properties and denial of the vast majority of the population from access to affordable prices. Under section 22 of the Income Tax Act, 1961 the legal owner in whose name the property stands pays the tax. In India, the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 makes various provisions to tackle the problem of black money. The Act aims to restraint black money, unrevealed foreign assets, and income by charging tax and penalising such income ^[51].

Money Laundering

Money laundering allows crime by permitting criminals to hide and legitimise proceeds derived from illegal activities ². The term "Money laundering "originated from Mafia Ownership of Laundromats ^[53] in the United State. ⁵ It is a term used to describe investment or other transfer of money flowing from racketeering, drug transactions and other illegal source into legitimate channels so that its origin cannot be traced. It has also been defined as "the use of money derived from illegal activity by concealing the identity of the individuals who obtained the money and converting it to assets that appear to have come from a legitimate source ^[55]. In the context of property transactions, the money laundering embrace some very usual characteristics *viz.*, complex loans or credit finance, non-financial professionals, corporate veils, manipulation of the appraisal or valuation of a property, monetary instruments, mortgage schemes, investment schemes and financial institutions etc. In India, the illegal activities in relation to money laundering have been controlled by the Prevention of Money Laundering Act, 2002. The Act stipulated that anyone who engages, assists, or is actually involved in any task or activity incorporating the proceeds of crime and projects it as untainted property is guilty for the offence of

money-laundering ^[56] and shall be liable for punishment by rigorous imprisonment for a term of not less than three years, but which can be enhanced to seven years and shall also be liable for fine upto five lakh rupees ^[57].

Corruption

Corruption is a world-wide phenomenon and no country is free from the trap of corruption and bribery. It is growing factor and has been steeped into every sphere of human life. The demonic lust, greed for power and wealth and the desire to lord over the poor and the weak, got unleashed and uncontrolled, witnessing concentration of power and wealth in few hands and the vast multitude languishing in poverty. This distortion in India economy by cancerous corruption is clearly determined to investment and growth ^[58]. Corruption in purchasing property can be depicted as pervasive without effective means of control and found in statutory as well as in customary systems ^[59]. It can take the form of small bribes that need to be paid to register property, change or forge titles, acquire land information, process cadastral surveys, and generate favorable land use plans etc. ^[60] Corruption is usual transpire in circumstances where money investments create new opportunities for illicit enrichment and used to purchase property, lease land, or undertake development initiatives in land and infrastructure etc. ^[61] The Indian Penal Code, 1860 ^[62] and the Prevention of Corruption Act, 1988 ^[63] which is amended by the Prevention of Corruption (Amendment) Act, 2018 contains some legal provisions to control the crucial effects of corruption in India. Beside this, the Benami Transactions (Prohibition) Amendment Act, 2016, the Prevention of Money Laundering Act, 2002, the Foreign Exchange Management Act, 1999 (hereinafter read as FEMA), the Foreign Exchange Regulation Act, 1973 (hereinafter read as FERA), the Right to Information Act, 2005 etc., make some relevant provision to curb the illegal activities of corruption. It is also important to note that India is a signatory to the UN Convention against Corruption, 2003 (hereinafter read as UNCAC) which covers a wide range of acts of corruption and also proposes certain preventive policies at world level.

Benami Transactions

The word "Benami" is derived from Persian word 'be ' (without) + 'nam ' (name) that means *no name* or nameless or fictitious. This word is also synonym of word *Farzi*. In common parlance, *Benami* means without name and purchase or holding properties on the name of other person (called the Benamidar) is known as *benami* transactions ^[64]. Therefore, *Benamidar* ^[65] is a fictitious person to whom the *benami* property is transferred and *benami* property assigns to any property which is the subject of *benami* transactions and also comprises the proceeds from such property ^[66]. Thus, *benami* transactions are not limited to only immovable property, but also include movable property. Illegal transfer of property is common in India from time immemorial. Experiences had shown that such transactions were entered in India for no apparent reason ^[67] and with the passage of time it took a very dangerous shape. Under the land reforms laws when ceiling was imposed on property, the concept of *benami* transactions ⁶⁸ came into existence and such types of transactions were held to protect from it. In every society, there are some very common social, political, economic, cultural and psychological causes which led to the origin as well as use of *benami* transactions *viz.*,

love and affection with a person in whose name transactions is made; desire to hold lot of wealth for the luxury of future generations; to avoid the restrictions imposed by law on acquiring more than specified property; to defeat the claim of creditors; to evade the tax on property; provide benefit to such other person, whose name transferor does not want to disclose such as concubine and illegitimate child. In this backdrop, to prohibit the illegal transfer of property, the Indian Parliament had enacted the Benami Transactions (Prohibition) Act, 1988. It would be relevant to mention here that now this law has been replaced by the Benami Transactions (Prohibition) Amendment Act, 2016. After the enforcement of this Act of 2006, from November 1, 2016 to January 29, 2019, the Income Tax Department has confiscated assets worth of 6,900 crore under the anti-benami transactions laws in India ^[69]. Identically, the President of India on June 15, 2017 had passed an order and directing the Union and State Governments to complete the process of digitalisation of land records, mutation records, sale and purchase records including land (agriculture and non-agriculture), houses etc., from the year of 1950 and such process should be complete by August 14, 2017. Similarly, the Delhi High Court on October 15, 2019 sought the response of the Unique Identification Authority of India (hereinafter read as UIDAI) on a plea seeking linking of movable and immovable property documents of the citizens with their Aadhaar Number to curb corruption, black money generation, *benami* transactions etc. ^[70].

Judicial Perspective

Justice has been defined by Plato as the virtue of an individual and sometimes as the virtue of State. The administration of justice meant the determination of what is just, because the punishment of criminals and a proper administration of law are foundation on which all the civilized society are built ^[71]. The subject matter of property rights was discussed by the Supreme Court for the first time in the case of *Chiranjit Lal Chandhary v. Union of India* ^[72] and held that the right of ordinary share-holders to vote at a general meeting can be considered as property that can be acquired, disposed of or taken possession of under Article 19(1)(f). Again the honorable Supreme Court in the case of *Guru Datta Sharma v. State of Bihar* held that as a legal concept, property is the sum of bundle of rights and in the case of tangible property would include the right of possession, the right to enjoy, right to destroy, the right to retain, the right to alienate and soon. Again in the case of *State of West Bengal v. Subodh Gopa* ^[73] the Apex Court observed that to acquire, hold and dispose of property is inherent and natural right of every citizen which is referred under Article 19(1)(f) of the Constitution of India, 1950. Similarly, the Supreme Court of India in *State of Haryana v. Mukesh Kumar* ^[75] observed that the right to property is not only a Constitutional and Statutory right, but it is also contemplated as a human right. Likewise in the 7 case of *K.T. Plantation Pvt. Ltd v. State of Karnataka* ^[16] the Supreme Court again ruled that forcibly removing a person from his private property without due process of law would be a violation of both a human right as well as a constitutional right available under Article 300A of the Indian Constitution. Again the final court of appeal in the case of *Vidaya Devi v. State of Himachal Pradesh* ^[17] held that a citizen's right to private property is a fundamental right and state cannot acquire it without any public purpose

as well as by following the due procedure and authority of law. The court also held that the government cannot trespass into the private property of a citizen for the purpose of claiming ownership of the land on the basis of 'adverse possession'. Apart from these, in several other important judgments *viz.*, *State of Mizoram v. Dr. C. Sangnghina* ^[18], *Syriapushpam v. Sulochna*, *79 Smt. P. Leelavathi v. V. Shankaranarayano Rao* ^[80], *Shiv Shnakar Prasad Singh v. State of Bihar*, ^[81] *P. Chidambaram v. Directorate of Enforcement* ^[82], *Union of India v. Gautam Khaitan*, ^[83] *Justice K.S. Puttaswamy (RETD) v. Union of India* ^[84], etc., the Indian judiciary has interpreted the statutory provisions concerning the various issues of property and resolved the matters within constitutional framework.

Conclusion

From the above-said discussion, it is crystal clear that property as a legal right embraces possession or wealth collectively with strong connotations of ownership. It refers to the complex juristic relationships among human beings with respect to things owned by them. On the other hand, property law deals with the allocation, use and transfer of property which reflects the economy, family structure, and politics in which it is found. With the advancement of society, the concept of property has been changed through unanticipated manners which give birth to new controversial concepts of demonetisation, black money, money laundering, benami transaction etc., which are considered as social smudge. Even though, the remarkable steps have been taken by the Indian government to control these types of activities through several legislations, but a large amount of government inputs are required at grass root level in the context of implementation. So, it is need of the hour that serious flaws in laws, lacunas in the enactments, implementation hindrances etc., should be removed by the Indian Parliament within an appropriate legal framework and some serious steps should be taken by the government in order to achieve the constitutional goals concerning the right to property.

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10. /d., art.19(5)-Nothing in the above clauses shall prevent the State from making any Law in the interest of the general public.
11. /d., art.26-Freedom to manage religious affairs-Subject to public order, morality and health, every religious denomination or any section thereto shall have the right-(c) to own and acquire movable and immovable property; and.
12. /d., art.26(d) to administer such property in accordance with Law.
13. /d., art.31
 - No person shall be deprived of his property save by authority of Law.
 - No property, movable or immovable including any interest in, or in any company, owning any commercial or industrial undertaking, shall be taken possession of, or acquired for public purposes under any Law authorising taking of such possession or such acquisition, unless the Law provides for compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which and in the manner in which, the compensation is to be determined and given.
 - No such law as is referred to in clause 2 made by the legislature of the state shall have effect unless such law has been reserved for the consideration of the President, has received his assent.
 - If any Bill pending at the commencement of this Constitution in the legislature of the state has, after it has been passed by such legislature, been reserved for the consideration of the President and has received his assent then, notwithstanding anything in the Constitution, the Law so assented to shall not be called in question in any Court on the ground that it contravenes the provisions of clause 2.
 - Nothing in clause 2 shall effect (a) The provisions of any existing law other than a Law to which the provisions of clause (6) applies or (b) the provisions of any Law which the state may hereafter
 - i. For the purpose of imposing or levying any tax or property
 - ii. For the promotion of public health or the prevention of danger to life and property or
 - iii. In pursuance of any agreement entered into between the government of the Dominion of India or the government of India and government of any other country or otherwise, with respect to property declared by law to be evacuee property.
 - Any Law of the state enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification, and there upon, if the President by public Notification also certifies, it shall not be questioned in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provision of sub section (2) of section 299 of the Government of India Act, 1935. '
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The above said entry has been omitted by the Constitution (Seventh Amendment) Act, 1956.
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16. /d., the Concurrent List, Entry 42- Acquisition and requisitioning of property. The above said entry has been substituted by the Constitution (Seventh Amendment) Act, 1956.
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