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# BENAMI TRANSACTIONS

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BY

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# INTRODUCTION

I do not wish to write a long preface. I wish merely to explain the history of my subject, the scope and plan of this diseertation, and the objects I have in view.

The aim of any dissertation may be summarised as follows, viz., to draw attention to a particular aspect of the law; to raise issues and pinpoint certain anomalies in it; to offer constructive criticism; to disselt and ' lay bare' shortcomings in it; to trace the development of certain concepts; to act as a catalyst for other researchers by generating their interest in a particular field." If this dissertation succeeds in fulfilling any one of the above, then I would claim that my attempt in this field is justified.

I would at this juncture advance my reasons for choosing this particular topic. First, there has been no work or research as far as I know concerning ' benami transactions' in Kenya or East Africa. Secondly, since no research has been done it is as a result an untrodden area, an unexhausted field and as such provides an opportune opportunity for originality.

The dissertation will centre on various aspects of the benami transactions. In order to understand any concept in any discipline, it is mandatory for any researcher to undertake an in-depth study of the background of the concept. Thus I propose in this dissertation to trace the history and development of this concept, this

concept is normally atributed to the Indian Sub-Continent and it is from that premise that my research will begin.

The next step will be to examine the nature and objects of the benami institution. This will involve amongst other things looking at the characteristics of a benami transaction, how they are created, how they are proved and the legal effect of a benami transaction.

A section will be devoted to trace the development, recognition and application of this doctrine in Kenya. This will involve an examination of the religious, cultural social, political and legal set-up which influenced or paved the way for the application of this (benami) institution in this Country. In India, benami practices are accepted as being part of the customs of that country and hence customary law is involved to justify the legal recognition of this institution. Further, in 1882 the institution received legislative recognation when the Indian Trust Act was passed. In so far as Kenya is concerned the Judges have been vague, they have not specified or mentioned authorities which support the recognition and application of this doctrine in Kenya. In effect, they have made general statements that this (benami) was part of Kenya law because it was part of the personal laws of the Hindus and Muslims in India, and by the same token was part of the personal laws of the Muslims and Hindus of Kenya. Is this the correct position? Is there any legal basis for the application of this doctrine in Kenya? Is it part of the received laws of Kenya which by virtue of section 3 of the Judicature Act is Kenyan law?

These are some of the questions which this dissertation will seek to answer.

Special attention will be directed to elucidate the position of this doctrine in Islam, and to examine the basis if any for its application under Islamic law. This would involve a tentutive research into sources of Islamic law, mainly the 'Quran','Hadith' of the prophet or 'Sunna'; 'Fatwa' that is legal opinion and Islamic text-books generally in an effort to extract the truth as regards the docrtine of benami and its status in Islamic jurisprudence. I have particularly looked at this aspect of benami transactions in Islam, for various reasons which amongst others is the state of confusion prevailing in the recognition and application of the institution of benami in Countries with Muslim subjects. Secondly, being a Muslim, I find myself capable and morally oblidged to put the 'record clear'.

The doctrine of benami in its operation is affected by a number ofother concepts for example the doctrine of estoppel, resjudicate etc. It is also within the scope or purview of this dissertation to analyse the benami doctrine and its 'relation' with these other concepts.

I also propose to draw a comparison between this doctrine and other similar institutions in other legal systems such as the English Trust, Customary Law Trust and the trust notion under Islamic law including the wakf. This would help in enhancing our understanding of this concept (benami) as through comparisons with other

institutions would it be more apparent to note the distinctions, qualities and peculiarities of the benami institution viz-a-viz the other institutions in the various legal systems.

Finally, any research would be incomplete if one does not indulge in an examination of the merits and demerits of the subject in question. It will therefore be obligatory for me to analyse the advantages and shortcomings, if there are any, of benami transactions. And the dissertation would conclude with inferences, suggestions and recommendations deduced from my study of this concept.

# CHAPTER ONE

## HISTORICAL BACKGROUND

Since the word " Benami" is a technical word, it is opportune that I begin my analysis by a definition or explanation of what the term " Benami " entails. To this end, I will consider what leading text writers have to say. Nathuni Lal in his book " Law of Benami Transactions " [1] stated:

" The word benami is of Persian origin made up of two words " be " and " nam" meaning " no name", that is nameless or fictitions."

Mulla D.F., in his book " Principles of Hindu Law" [2] reiterates the same explanation as the above, for he says:

" The word benami is a Persian compound word, made up of "be" which means without and "nam" which means name. It means literally without a name, and denotes a transaction effected by a person without using his own name, but in the name of another."

This definition by Mulla is the accepted definition as far as Kenya is concerned, for it is expressly quoted and followed by Justice Harris in the important case, as far as benami transactions are concerned, in Kenya of Shallo v Maryam. [3] Thus as far as the meaning of

benami is concerned it is generally accepted that the word stems from the Persian language and that it means nameless, fictitious or a sham.

A benami transaction can arise in two principle situations viz., (1) where a person buys property in the name of another for his own benefit with no intent to make that other the beneficiary thereof, and (2) where a person buys the property in his own name but consequently transfers it into the name of another person but retains the beneficial interest therein.

Benami transactions are not confirmed to purchases only by one person in the name of another it can also involve leases, mortgages etc.

There are two main parties in a benami transaction, namely a 'benamidar' or benamidar and 'benamidee'. The benamidee is the beneficial owner that is the person to whom the property in question belongs (the real owner) Further he normally provides the consideration to buy the property in question. The benamidar on the other hand is the person in whose name the property is purchased. He has no beneficial interest in the property. He is in effect a party to the transaction in name only.

The concept of benami is a peculiar feature of India's jurisprudence thus any detailed discussion of this topic has to be examined from that premise. It is very difficult if not impossible to trace the precise period or time when this concept first emerged. But for purposes of this dissertation it will suffice to say that the concept is of ancient origin. D. Derett,

in his book " Introduction to modern Hindu Law "[4] comments:

> " Benami transactions, that is to say purchases and transfers in the name or nominally for the benefit of,or other than the real beneficial owner, are of great antiquity in India."

And, Nathuni Lal, in his book[5] states, in the preface to the first edition that:

> " The exact inception of the practice of benami is not known but it is agreed at all quarters that the system has been in vague from time immemorial .....In India, Benami has been commonly practised both by Hindus as well as Mohamedans since the olden times".

Thus the benami doctrine is of such ancient original so as to pass the test laid down by Sir Henry Maine to qualify being a well established custom and therefore a law. (Sir Henry Maine was of the view that law is the customs of the people - he belonged to the Historical School of jurisprudence. Benami concept falls squarely in this category as the doctrine started as a custom and has now been given legal recognition). In fact it was stated in the case of Kali Mohan v Bhola Nath[6] that benami transactions are a custom of the country (India) and must be recognised till otherwise ordered by law.

After the British Colonised India in the eighteenth century and established their legal system, the notion of benami came to be noticed by the courts as early

as 1778 in the case of Deodam Tilluck Seol v Gori Hari Deu[7], where in Mr. Justice Hyde's Notes, the doctrine is stated as follows:

" In mere personal demands, such as Bengal Bonds, the courts have upon considerations determined that the action may be brought in the name of the person whose name is on the instrument, though it should be proved that he had no real interest in it. And the court had so far complied with the general practice in this country of using the names of other persons in mere personal demands, that is, in many cases the plaintiff and recovered on a note not in his own name but in other name, giving evidence that the transaction was really his; such for instance that the money lent was his, and that he took the bond in the name of another."

This in fact is one of the earliest cases where the doctrine was recognised.

Further in Mahranee Bussunt Comaree v Bullubdeb[8] which took place in 1840 it was said:

> " as far as evidence goes, for there was no proof of the deed, the transaction is simply a benami one, in the name of the complainant but in truth, for the benefit of another. It may be for religions purposes, but the question whether the court will recognise a benami trusteeship ' a trust upon a trust does not arise. It being once established, then that the transaction is benami, the circustance of the receipt being in the name of the complainant proves nothing, that being in accordance with benami usage."

Moreover, the Judicial committee of the privy council in the case of Gopee Krist Gosain v Gunga Prasad,[9] authorise authoritatively stated:

> " It is very much the habit in India to make purchases in the name of others, and they must be recognised, and effect given to them by courts except so far as positive enactments stand in the way and direct a contrary course."

The above cases depict the development and recognition of benami transactions in India, and it is clear that they were to be recognised subject to statute law and if they are inconsistent with any written law the courts will declare them invalid.

Similar sentiments were again expressed by the privy council in the case of Mst. Bahuns Koonwar v Buhoree Lal,[10] where it declared that:

> " It is well known that benami purchases are common in India, and that effect is given to them by the courts according to the real intention of the parties. The legislature had not, by any general measure, declared such transactions to be illegal, and therefore they still must be recognised and effect given to them by courts, except so far as positive enactments stand in the way and direct a contrary cause."

In 1882 the concept of benami was sanctioned by the Legislature in India, when the Indian Trust Act was enacted.[12] Sections 81 " and 82 deal specifically with the nbenami doctrine. Another Act, the Indian Transfer of property Act of 1882, by analogy, can be said to have given legislative recognition to the notion of benami in that section 41 provides:

> " Where, with the consent, express or implied of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration the transfer shall not be voidable on the ground that the transferor was not authorised to make it:

provided that the transferee after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

In India the concept of benami transactions is a ' common ' practice and thus one can with a certain measure of certainity arrive at the conclusion that the aim of this enactment among others was to overcome certain problems that can arise in benami situations. Mulla D.F., comments in respect of this section that " where a benamidar (ostensible owner)[13] sells mortgages or otherwise transfers for value property held benami by him without the knowledge of the real owner, the real owner is not entitled to have the transfer set aside, unless the transferee had notice actual or constructive that the transferor was merely a benamidar". Therefore as is seen from the foregoing, a benamidee may only recover the property ( by setting aside the transfer) if he can prove that the third party had direct or constructive notice as the existence of circumstances which ought to have put him on an inquiry which if instituted would have led to the discovery of the real title. For example, it is the duty of a purchaser not, merely to ascertain in whose name the property stands, but also to ascertain who is in actual possession of the property at the time of the sale to him. If he fails to do so, and it turns out that the real owner, and not the benamidar, was in possession and receipt of the rents of the property, he will be deemed

to have constructive notice of the fact that the benamidar was not the real owner.[14]

At this stage it is important to note that the benamidar is a name lender, he has certain rights and duties which will be analysed in a later chapter (III).

This covers the development of benami transactions in India. The law and the courts recognise and apply the benami concept to the present day. At this juncture it is important to note that this concept of benami is common to both the Hindus and Muslims in India. Mulla says:[15]

> " The practice of putting property into a false name, that is, the name of a person other than the real owner is very common in this country, and it exists as much among Hindus as among Mohamedans..... Benami transactions among Mohamedans are mare commonly known as furzee".

In so far as Kenya is concerned, it is apparent that the notion came (to Kenya) with the Indians. The Indians first came to Kenya at about the time of the construction of the Kenya - Uganda Railway in 1897. The history of the Hindu Family law application in Kenya will help to reveal the development, recognition and application of the benami doctrine in Kenya.

Since the concept of benami forms part of the personal law of the Hindus.

In this respect, the first ordinance which marks the application of Hindu family law in Kenya is the

1897 Order-in-Council which applied the 1865 Indian Succession Act to Kenya.[16] The 1865 Act was enacted to apply to Christians in India. Section 331 of this Act made it clear that the Act did not apply to Hindus, Muslims and Buddhists. However, in Kenya this Act was applied to all, that is, Christians, Muslims, Hindus and Buddhists.

This was a mistake, which was realised in 1898 and as a result the Secretary of State for the colonies made an order in council[17] to rectify the mistake. This order did three things:

1. It restored section 331 to the Indian succession Act and consequestly the Act was no longer applicable to Muslims; Hindus and Buddhists;

2. It provided that the Hindus' matterss of succession would be governed by the Hindu wills Act of 1870, and;

3. It provided that the Probate and Administration Act of India would apply to Kenya in respect of of probate and administration matters.

This was in effect saying that the Hindus were to be governed by their own personal laws. Thus benami doctrine is part of the law of Kenya because it is a part of the Hindu family law and the 1898 Order-in-Council is the legislative basis of this doctrine.

In so far as the Muslims are concerned, the 1897 Order-in-Council also provided that the Muslims were to be governed in personal matters by the Islamic law, and the case of Shallo v Maryam[18] forms the basis of the application of this doctrine

In so far as the Muslims are concerned, the 1897 Order-in-Council also provided that the Muslims were to be governed in personal matters by the Islamic law, and the case of Shallo v Maryam[18] forms the basis of the application of this doctrine to Muslims in Kenya. (N.B. chapter two deals specifically with the position of the doctrine in Islam and the chapter considers whether the benami notion is part of the Muslim personal law).

The concept first received judicial recognition in Kenya in 1942. This was inrespect of a civil case; In the matter of a vesting order of the properties held by Amto alias Amar Kaur the deceased wife of Jagat Singh s/o Atma Ram.[19] Jagat Singh deposed that he had, out of his own moneys bought properties in the name of his wife, then dead, and he sought a declaration that the properties were held by her as his nominee and for a vesting order. Sheriden Chief Justice, taking into account that the parties were Hindus, and that there was no intention on the part of the husband to give the properties to the wife beneficially, made a vesting order as prayed.

This case was followed in 1951 by the case of the Estate of Lalitaben.[20] Here a Hindu husband, claimed

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that he had bought, out of his own money, certain property in the name of his wife, who had subsequently died and he sought an order that she had held it as nominee for him and a vesting order. An order was made as prayed.

It is important to note that in neither of these cases was it held that any presumption of advancement to the wife was raised, nor was any evidence called to rebut such a presumption. It is my contention that it was generally agreed, as can be deduced from the judgement, that the transactions in these cases were benami and this is why no evidence was called to rebut the presumption of advancement.

The concept was first specifically applied in the case of Bishen Singh Chadha v Mohinder Singh and Another.[21] In this case a Sikh father purchased land in the name of his infant son. After sometime the son contracted to sell the same to a third party. The father brought this action to claim the land alleging that the transaction was benami. The son argued that he was the beneficial owner and that the doctrine of advancement should be applied. The court held, that " no presumption of advancement arises in Kenya in favour of a Sikh son of a Sikh father by reason of the father having paid the

purchase price of property situate in Kenya and and taken a transfer thereof in the name of the son.[22] The court was of the view that the transaction was a benami and the son was a mere benamidar.

This case was followed by the case of Shallo v Maryam,[23] which is the first case in independent Kenya to recognise and apply the doctrine. In this case the plaintiff brought an action against his ex-wife, praying for an order declaring him to be the owner of certain premises in Mombasa which were purchased by the plaintiff in the name of the defendant during the subsistence of their marriage. He further claimed the transfer of the premises to himself, the parties were Muslims and the plaintiff claimed that he provided the purchase money for the premises and that the purchase in the name of the wife was a benami transaction; alternatively that there was a resulting trust of the property in his favour with no presumption of advancement to the defendant. The court upheld the contentions of the of the plaintiff, viz., that the transaction in question was a benami and that the notion of benami formed part of the Kenya Muslims personal law as it was a part of the personal law of the Muslim of India; secondly that the presumption of advancement did not apply.

The above is briefly the history, development and application of the doctrine in Kenya. The case of

Shallo v Maryam, thus is the basis for the application of this doctrine to Muslims in independent Kenya. At this stage it is appropriate to pose the following question, viz, what are the objects and causes of benami transactions?

Most writers are of the view (which is incidentally also shared by judges) that the main object of benami transactions is to perpetrate fraud. Mulla D.F., in his book ' Principles of Hindu Law' declares:

> " But many transactions (Benami)[24] originate in fraud; and many of them which did not so originate are made use of for a fraudulent purpose; more especially for the purpose of keeping out creditors who are told when they came to execute a decree, that the property belongs to the fictitious owner, and cannot be seized."25

Sir George Campbell, late judge of the calcutta High court takes the same view as Mulla in respect of the object of benami transactions for he states:

> " benami transactions have invariably their genesis in dishonest and fraudulent desire...."[26]

This at first appears to be a contradictory atance, for the judges are more or less certain that benami trasanctions are used as a clock to anhance fraud and in a way explain the courts carefull approach in cases dealing with benami transactions. But, nevertheless the courts recognise the validity of benami transactions. However, this is because there is no law which bars or

out laws benami transactions, for it is not an offence to buy property in the name of another person.

But it is important to note that the court will not enforce such a transaction where there is a dishonest or fraudulent intent.

Further, in many instances, the object of benami transactions has been found not to be for the sole purpose of fraud but for other lawful purposes. Sir Fredrick Pollock[27] very ably and convincingly stated:

> " With regard to the morality of such benami proceedings, all honest men, both in the East and West, are agreed. No honest European who knows anything of business will pretend that the practice of benami system is unknown in the Western countries. Conveyance forms after the old fashion are no longer possible in England, but collusive and friendly bills of sale over stock-in-trade or other movable property are far from uncommon and I am much mistaken if something very like benami does not go on among professional land agents, to who land is merely a commodity of speculative purchase and sale, and whose floating liabilities often exceed their available resources."

Thus, contrary to the popular view that benami transactions are used to mask fraud, there are some justiable lawful objects and a discussion of the causes which lead to the evolution of the benami doctrine will suffice to demonstrate this even more clearly. As earlier stated, the concept of benami is a peculiar feature of the Indian sub-continent and as such it is imperative that we study the Hinu society to ascertain the reasons

which led to the development of the doctrine.

In the Hindu Society, the family was charateristically patriarchal. Each family was a complete unit in itself controlled by the eldest living ascendant who was called the 'Grihpati'. He exercises control over those who were under him, and their property. Thus all the property of the family regardless of who acquired it, stood in the name of the ' Grihpati' who owned it absolutely. With the advent of modernism this set up was slightly changed as individualistic concepts began to crop up. The practice of the 'Grihpati' owning all the family property absolutely was also affected but was still maintained in a different shade, viz., the property was still bought in his name but he didn't own it absolutely, instead it belonged to the whole family,.In this Hindu family set-up the notion of benami developed, since the interest of individuals in the family were not separated e.g. a husband not distinguishing his interest from those of his wife or his son, bought property in their names.

The desire to keep one's property in the family hands in perpetuity for one's descendants' benefit is another reason which led to the development of the system of benami. One achieved this goal by making settlements for religious or

charitable purposes. A provision of property for religious or charitable purposes is not affected by the rule against perpetuity.

Since if a Hindu buys property in the name of his wife or son, thew property (beneficial interest) is not vested in the wife or son but in himself.

Similarly, if he buys property in the name of an idol ( which is religious under Hindu law) whom no one except himself has the right to worship, the property then, is not the property of the idol but the property of the person who purchased it. And as an end-result he sucures the property to remain in the family in perpetuity.

The Hindu Community was essentially a male dominated community. Women had a limited role to play and in fact it was belived that a woman's place is at home. With the advent of colonialism certain systems were introduced in India, which amongst others included the 'Parda System'. This system required the owners of property (land) to appear before the courts of Justice, in Revenue Courts, in the office of the collector and before the Registrar in connection with such property. Women who owned property but who could not appear in such public places because of the 'taboo' which restricted female participation in such matters, put their property in their husbands or other close relatives names who appeared as the

'owners' of the property whenever the need arose.

Again, a closer study of the Hindu Community reveals another reason that led to the creation of benami transactions. The Hindu Community is essentially a class community, with the priests 'Brahins' ranking highest and the 'untouchables' lawest. There were also the landlords or "Zamindars" and peasants. The peasants, normally cultivated the landlord's lands on tenure basis. At times one 'Zamindar' would take land from another on tenure basis, which was regarded as a subordinate tenure normally given to peasants. So in order to avoid the indignity and shame that accompanies the holding of such subordinate tenure, the 'Zamindar' would take the subordinate tenure in the name of his servant or relative, who held the land in name while all the benefits that a accured from the land went to the 'Zaminandar'.

India's past history, again reveals yet another reason that led to the development of the benami concept.[28] In the words of Sir Fredrick Pollock.

> "Practice of this kind naturally grew up in a state of society where there was an appreciable risk from one generation to another, of hostile conquest or confiscation. And having regard to the political state of India before and after the short-lived prosperity of the Moghul Empire, there is no wonder at the frequency of the transaction by some supposed innate love of secrecy in the minds of oriental owners of property."

Mulla[29] gives two other reasons that led to the practise of benami, namely:

"This practice (benami) has arisen partly from superstition - some persons and some names being

considered as lucky and others as unlucky. Partly also the practice is due to a desire to concel family affairs from public observation".

Some other minor reason advanced is, the fact that some people naturally do not like to have any dealings with the court or government offices, so they fall back on this notion with a view to avoid difficulties, where the benaminder appears as the apparent owner in court or before other government afficials to represent him, in relation to his property.

This concludes the discussion of the causes that led to the development of the benami concept, and one can justifiably arrive at a conclusion that fraud is not the only reason to the evolution of this concept. Next, will be an examination of the circumstances in which the presumption of benami is evoked in Kenya and India.

As far as Kenya is concerned, two cases throw light in respect of the situations where the doctrine may be evoked. The case of Bishen Singh Chadha v Mohinder Siggh and Another,[31] whose facts appear above, the court in this case was of the view that in cases involving Hindus where a father buys property inthe name of the son a rebuttable presumption of benami can be imputed. The second case, is that of Shallo v Maryam[32] where the court was of the view that between a husband and wife

property bought in the name of the wife resulted in a rebuttable presumption of benami in favour of the husband. Provided it be established that the husband was the source of the purchase maney.

The same position pertains in India, for in the case of Sura Lakshmiah v Kathandarama,[33] Sir John Edge stated:

> " There can be no doubt now that a purchase in India by a native in India of property in India in the name of his wife unexplained by other proved or admitted fact is to be regarded as benami transaction, by which the beneficial interest in property is in the husband, although the ostensible title is in the wife."

This position was restated in a number of other cases for example, in the case of Mohamed Azim V Saiyid Mohamed[34] where the court held that " Where it is once established that the saurce of purchase money follows from the husband for the trasaction standing in the name of the wife, the transaction is benami"

As regards purchase of property in the name of the son,by a Hindu father in India, the presumption of Hindu law is in favour its being a benami. If the son denies that this was a benami purchase and alleges that it was the intention of the father that he should be the beneficial owner, then the burden of proof, lies on him to prove the intention. As far as the purchase in

the name of a daughter is concerned, the position is not very clear, there are some contradictory decisions; some holding that such purchase is benami other declining to hold so.[35][36] Lastly, purchase of property in the names of relatives, for example grandchild, nephew, sometimes also raises the presumption that the purchase is benami.

In order to prove the existence of a benami, one has to establish certain facts, such as intention of the parties to create a benami transaction. Intention of the parties is used as a 'yardstick' to determine whether a given transaction is or is not benami. This is a common approach of the courts; for the courts, in any transaction be it contract, insurance, or any other, construe the facts and circumstances in such a way as to give effect to the parties intentions.

Another important fact to take into consideration in determining whether a benami exists is the source of purchase money. In this respect we have to consider as between the two adversary parties, who supplied the money used in the purchase of the property. The importance of the source of money cannot be underestimated and one can note this from the Kenyan case of shallo v Maryam where the court was greatly influenced to reach at the decision it came to by this fact. In Dharam das v Shyama Sundri Devi[37], a Privy council decision, it was said by Lord Campbell:

> " What has been relied upon, with regard to a portion of the property has been chiefly that it is purchased in the name of one member of the family and that there are receipts in his name respecting it.... We have heard from the highest authorities,from the authority of Sir Edward East, and Sir Edward Ryan, that the criteriom in these cases in India is to be considered from what source the money comes with which the purchase money is paid".

However, we should note that the source of purchase money is not conclusive evidence of a benami nor is it necessary for it to be established for a court to find or to arrive at the conclusion that a benami exists. In other-words a benami can exist independently of the source of the purchase money.

Motive is another important factor to take into account in determining whether a particuler transactions is benami. It is not normal for a person to purchase property in the name of another, thus motive would display the nature of the transaction.

Possession of the property in question is yet another factor to take into account. This is well illustrated by the case of Shallo v Maryam, which is another fact that the court took into account in arriving at its conclusion, for Harris J., stated:[38]

> ".....the premises were let to occupying tenants from whom the plaintiff, as from that time, collected the rents, in addition to which he paid the rates and the cost of repairs. The plaintiff said he spent money received for his own purposes, while the defendant said he brought the money home

> and they both spent it. It is clear that he never accounted to her for the rents, nor did she suggest that she had asked him to do so, and he said that he collected the rents solely on his own behalf as owner and issued receipts therefore in his own name but marked "a/c Maryam' because the property was in her name".

Thus possession, actual or constructive and control of the property is thus an important test in determining whether a purchase is benami or not as is illustrated by the above passage.

Another thing to be looked at which is also specifically mentioned in the case of Shallo v Maryam is the conduct of the parties. Therefore the previous and subsequent conduct of the parties in relation to the property is relevant to establish the existence of a benami transaction.

It goes without saying that the position of the parties and their relation to one another is also fundamental in so far as benami transactions are concerned. There are certain situations (in respect of Hindus and Muslims) where a benami is presumed such circumstances as earlier discussed in this chapter e.g. between husband and wife, father and son etc. Thus if a person is alleging a benami transaction in respect of property held by another person and there is no nexus or connection between the two of them, the court will certainly not presume a benami, furthermore it will take evidence of high probative value, (direct evidence)

to establish a benami in such a situation.

Lastly, it is also essential to know who has the title deed of the property in question to determine whether a transaction is benami. In most cases the beneficial owner usually but not necessarily keeps the documents with him to establish his claims even though the documents bear the name of the benamidar.

From the foregoing discussion, it is hoped that a concise description of the history and development of the concept of benami has been given, that the term 'Benami' has been adequately explained (what it entails); that the situations where the benami notion is presumed and the factors that establish a benami have been effectively discussed. In the next chapter, the benami doctrine will be examined in relation to its status or position in Islamic jurisprudence.

## FOOTNOTES

1. Second edition, 1971 at pg. 3
2. Fourth edition, 1924 at pg. 512
3. 1967 E.A. 409 ( H.C.)
4. 1963 edition at pg. 524.
5. Supra
6. 7 W.R. 138.
7. 1778 Molton's Decisions 249.
8. Fulton's Rep. 383
9. 6 M.I.A. 53
10. 14 M. I.A. 496.
11. Section 81 provides: "Where the owner of the property transfers or bequeaths it, and it cannot be inferred, consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative."
12. Section 82 provides: " 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 considerations for benefit of the transferee, the benefit of the person paying or providing the considerations."
13. Brackets my own.
14. See, Sriniwasacharya v Yamanasani (1911)35 Bombay 269.
15. Supra
16. Excluding the application of section 331 of the same Act.
17. Number 22 of 1898
18. (1967) E.A.L.R. 409
19. Civil case No. 117 of 1942, Unreported.
20. Civil case No. 864 of 1951, Unreported.
21. (1956) 29 K.L.R. 20
22. Supra, at pg. 21

23. Supra
24. Brackets my own
25. Supra, at pg 512
26. Nathuhilal "Law of Benami Transactions" pg. 4
27. Law of Fraud & Misrepresentation pg 37
28 Law of Fraud & Misrepresentation pg 42
29. Supra at pg 512
30. Brackets my own
31. Supra.
32. Supra
33. A. I. R. (Mad) 1925 P. C. 18
34. A. I. R. (oudh) 1931 177
35. see Chunder Nath v Kristo Kumal Singh, 15 W. R. 357
36. see Narayah v Krishna, 8 Mad 214
37. 13 M. I. A. 929
38. Supra at pg. 414

# CHAPTER II

## THE BENAMI DOCTRINE : ITS STATUS IN ISLAMIC JURISPRUDENCE

In this chapter, I will look at the benami concept from the Islamic perspective. I will seek to determine whether such a concept exists under Islamic law or not. First, I will look at this concept within the framework of the existing law and practice of the courts.

My analysis will begin from the Indian Sub-continent as this concept is widely applied and is a deminant feature of this area.

First, I would analyse whether the concept is applied and recognised by Muslims in India.

Mulla D.F., in his book " Principles of Hindu law,"[1] throws light on this issue, for he says:

> " The practice of putting property into a false name, that is the name of a person other than the real owner, is very common in this country (India) and it exists as much among Hindu as among Mohamedans..... Benami transactions among Mahomedans are more commonly known as furzee transactions".

This is the view taken by other text writers on Hindu law such as Derrett, D.M., and Nathuni Lal[2] in his book" Law of Benami Transactions" where at page 3 he concedes that:

> " Among the Mohammadans it (benami) is commonly known by the name of Ism farzi"

NB Iem farzi and furzee, mean the same thing, which is, putting property under a false name, and the two words are used interchangeable.

Thus as is seen from the above, the concept of benami is a common feature among the Muslims in India. Further in India, the concept has been given legislative recognition by virtue of the India Trust Act (sections 8) and 82) and also implicitly by the Indian Transfer of property Act of 1882 (section 41). These two statutes apply to Hindus and Muslims and therefore this reflects its (benami) predominance in India..

In so far as the application of this concept is concerned, it has been applied to Muslim parties by the courts. The privy council in the ease of Bilas Kunvar v Desray[2] applied the notion of benami to a muslim party. The privy council in this case sought to determine whether a purchase of property by a Hindu in the name of his Muslim mistress was a benami transaction or was intended to be a gift to her, In their judgement their Lordships stated:

> " It (benami transaction) is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase-money, and this again follows the analogy of our common law that where a feoffment is made without consideration the use results to the feoffer. The exception in our law by way of advancement in favour of wife or child does not apply in India: Gopeekrist v Gungapershad,[3] but the relationship is a circumstance which is taken into consideration in India in derermining whether the transaction is benami or not".

Their Lordships concluded that on the evidence the purchase was a benami transaction. In this case, we thus see that the benami concept was held to apply between a non-Muslim and a Muslim party.

The second case to be considered is the case of Siddoqa v Abdul Jabbar[4]. In this case a Muslim widow instituted a suit against the son of her deceased husband ( who had also been a Muslim) for partition of her half share in the house of her deceased husband. She established her claim on the basis of a gift-deed in her favour by her husband, But the house was found to be vested in the defendant as benamidar for his father in the matter of form or relief, to which the plaintiff was entitled. It was held that there must be a declaration that the house and the site move, particularly described in the plaint were rested in the defendant as benamidar on trust for the persons claiming through the widow's husband, it must be followed by another declaration that the plaintiff was beneficially entitled under the said trust to one half of the said house and site ~~under~~ the by virtue of the transfer to her and to a further one eighth share of the said house and the site as an heir of the deceased husband. In this case we see that the notion of benami was held to apply between Muslim parties.

A number of other cases establish this, such as the cases of Sayyed Uzhar Ali v Bibi Latif Fatme[5] and

and Mohammad Hussain Khan v Mustafa Hussain Khan.[6] The position in India as is seen from the foregoing is that the concept of benami is recognised, practised and applied by Muslims in India and by the Hindus.[7]

Coming to this country (Kenya), what is the status of the concept of benami in so far as its recognition and practice by Muslims is concerned; and its application by the courts? This concept was first applied to Muslim parties in 1967 in the case of Shallo v Maryam.[8] Apparently, this is the only case in Kenya dealing with the issue of benami between Muslims.

The parties in this case were Muslims and were married in June, 1948. The marriage subsisted until march 1965 when the plaintiff divorced the defendant as per Muslim ' sheria' that is, the Islamic law. During the marriage the parties had acquired certain property which was the subject of this suit. Mr. Shallo filed this suit against his ex-wife, Maryam, for an order declaring him to be the owner of the property alleging that he had bought the same with his own money. He further claimed the transfer of the premises to himself. The property was bought in the name of the wife, and the husband claimed that this was a benami transaction. There was a conflict of evidence as to the source of the money used to purchase the property ( house). This was vital as the source of money would influence the court in its determination as to whether this was a benami transaction. This court held that thi s

was a benami transaction as the purchase of the premises was paid for by the plaintiff. It was further held that:

> " In general Mohammedan law in East Africa is the same as in India; therefore the rebuttable presumption that the purchase of land by a person in the name of another creates the latter a benamidar applies between Muslims in Kenya as it does in India." 9

Thus the position in Kenya with respect to the benami concept in respect of its application to Muslims is regarded to be the same as the Indian position.

It is my intention now to determine whether such a concept 'really' exists under Islamic jurisprudence. Hitherto, all the text writers and the cases mentioned in the foregoing discussion just mention haphazardly that the concept of benami is recognised and applied to ' Mohamedans' in India. They don't categorically pinpoint the authority for the recognition or the basis of this doctrine under Islamic sharia' (law). The authorities, it seems, have concluded that it (benami concept) is part of the Islamic law as it is recognised and applied by the Mohammedans in India. Is this really so?; Has the concept any foundation in Islamic law?

Islamic law comprises of four main bodies, viz.,

1. The Quran[10] which is the primary source of Islamic law and Islamic teachings;
2. The ' sunna'[11] of the prophet Mohammed (P.B.U.H.), for beside his position as a medium of revelation the prophet was responsible for explaining the Quranic verses, demonstrating the practical

Quaranic rules and answering questions of the companions. He was the leader of the community, the commander of the army and the supreme judge. His explanations, orders. decisions and advices (which comprises the sunna) were observed and followed by the Muslims as binding commandments and final advice.

3. Al-ijima - consensus of the Waliis, that is learned men.

4. Al-Qiyas or ijtihad which means an exhaustive attempt made by a qualified jurist (al-mytahid) to reach a legal decision on issues affecting his community, and which are not clearly decided upon in the Quran and the sunna of the prophet. But such decision should be based on the spirit of Islam.

The Quran as earlier stated is the most important or fundamental source of Islamic law. A close analysis of the Quran reveals that such a concept is not mentioned either directly or indirectly. The Quran infact recognises the institution of 'trust'which it discusses in detail but not that of benami.

In so far as the doctrine of trust is concerned chapter IV of the Quran verses 2, 5, and 6 authoritatively establishes thus. N.B. - for this purpose I will use the English translation of the Quran by Abdullah Yusuf Ali, which is recognised as one of the best English translations by both Muslim and non-Muslims, scholars.

Verse 2 states:

"To Orphans restore their property (when they reach their age) Nor substitute (Your) worthless things, for (their) good ones; and devour noth their substance (by mixing it up)

with your own. For this is indeed a great sin"

This verse is appealing to individuals (trustees) who look after the property of orphans to act equitably and dutifully to the trust. Then, verse 5 declares:

> "To those weak of understanding, make note over your property, which God hath made a means of support for you, but feed and cloth them herewith, and speak to them words of kindness and justice."

Commenting on this verse, Abdallah Yusuf Ali says:

> "Your property: ultimately all property belongs to the community, and is intended for the support of you i.e. the community. It is held in trust by a particular individual. If he is incapable he is put aside but gently and with kindliness. While his incapacity remains the duties and responsibilities devolve on his trustee even more strickly than in the case of the original owner; for he may not take any of the profits for himself unless he is poor, and in that case his remuneration for his trouble must be on a scale that is no more than just and reasonable".

This verse establishes that where an individual is incapable of holding property for any reason whatsoever, then the trustee who holds the property on his behalf must do so with a good conscience and equity.

Lastly, verse 6, again reiterates the trust principle with respect to orphans. It calls upon the believers to act as faithful trustees in respect of orphans' properties. Thus the Quran lays down that a trust may be created and imposes a strict duty of care on trustees which duty is based on morality justice and equity.

Moreover, the reasons that led to the development of the benami doctrine viz, the parda system; the class structure, of the Indian society which was divided e.g. into 'Zamindars', Brahmins, peasants etc; the partriarchal nature of the Hindu community where the eldest male ascendant 'Griphati' was considered to have power over the other members of his family and their property and India's past history - the instability which forced individuals to devolve properties in other peoples name as the future was so insecure.



N.B. - For more details see chapter I of this dissertation.

All these are characteristics which are peculiar to the Hindu Community in India and the Muslim society from the olden times was not and upto the present day is not synonymous with the Hindu Community here. Hence the reasons or the factors which led to the evolution of this concept are not present in the Muslim Society and therefore it was impracticable for such a doctrine to evolve. It is the contention of the author of this dissertation, that the benami concept is a peculiar feature of India only!

The other sources of Islamic law that is the Hadith or 'Hindithist sunna of the prophet,'Al - ijima' and 'Al-Qiyas' also reveal a negative result in so far as the existence of the concept of benami is concerned.

In an effort to solve the issue of determining the basis of the benami concept in Islamic law, a number of eminent Muslim Scholars were interviewed, including the Chief Kadhi of Kenya Sheikh Nassor Mohammed Nahay, who apparently is the highest authority in this country in so far as Muslim matters are concerned. The Chief Kadhi conducted a detailed analysis of the Islamic law and he came to the conclusion that there is no such concept in Islam. He conceded that Islam recognises the institution of trust and wakf but not that of benami. He further expressed his surprise at the decision reached by the court in the case of Shallo v Maryam, saying that it was decided in ignorance of the Muslim 'Sharia'. The Chief Kadhi said:

> "This practice has arisen in India party from superstition and partly from the desire to conceal family affairs from public observation. This is a local custom, and a custom is not recognised in Islam if it is contrary to the Islamic principles and its spirit. Islam is against superstition and sham transactions. So this doctrine is not recognised in Islam".

Other Muslim scholars including Sheikh Mohammed Bakari[12] Ustadh Said Hassan[13] and Sheikh Harith Swaleh[14] all concurred with the Chief Kadhi's conclusion. Sheikh Harith Swaleh advanced the following reasons:

> "The Quran does not contain such a concept, and nor do the other sources of Islamic law. Therefore there is no basis of applying this concept to Muslims not withstanding that Muslims in India recognise such a concept" he added "Muslims follow the 'Sharia ' bot other Muslims".

The other two, were unamimous in that both were of the view that there is no such concept in Islamic jurisprudence It is my conterition, therefore that the notion of benami has no basis in Islamic law.

It is also important to note that there isn't a single textbook on Islamic law discussing this concept, and all that is mentioned of this concept and its relevance to Muslims is only found in Hindu law texts.

Coming back to the case of shallo v Maryam we see that:[15]

> " Counsel for the defendant sought to distinguish the decision in Bishen Singh's case 16 on the ground that it decided merely that the system of holding land benami is applicable to members of the Sikh Community in Kenya, and he contended that the system has no application to Muslims except in India..17

With respect, I fully agree with learned counsil's contention that the benami principle has no application to Muslims except in India.

The case of Bishen Sigoh Chadha v Mohinder Singh and another[17] involved a Sikh father and his son. The father brought this suit claiming certain plots which stood in his son's name to be his. He prayed for a declaration that the defendant held the plots in trust for him and an order to transfer the same to him. The defendants contended that the transfer of the plots by the plaintiff to him, was made by way of advancement and they in fact

relied on the presumption of advancement. The Court had to decide whether a presumption of advancement in Kenya in favour of a Sikh son of a Sikh father by reason of the father having paid the purchase price of property and taken a transfer thereof in the name of the son arose. The answer given by the court was negative, that is, no such presumption arose. In the course of his judgement O'Connor C.J., made the following remarks (which are however obiter):

> "There is a long line of cases of unimpeachable authority to the effect that the presumption of intended advancement of a son which English Equity applies to a purchase by a father of property in the name of his son, is not part of the general law of India. In India, both among Hindu and Muslims the practice of purchasing property in the names of others is frequent. These transactions are called benami (i.e. without name 'or' fictitious name') transactions"[18]

The learned Chief Justice, then quoted the case of Bilas Kunwar v Desraj Ranjit Singh[19] to support what he had stated. Sir George Farwell Said in this case:[20]

> " The natural inference is that the purchase was a benami transaction, a dealing common to Hindus and Mohamedans alike, and much in use in India.

The learned Chief Justice, concluded that:[21]

> " The Indian cases established beyond doubt that a presumption of advancement of the son would not arise in India by reason of a father having purchased property in India in the name of his son. This seems to apply not only to Hindus, but also to Mohamedans and other natives of India",

Turning again to the case of Shallo v Maryam, the learned Judge declares:[22]

" He (referring to the counsel for the defendant) was unable, however, to cite any authority in support of these propositions, and indeed, apart from Bishen Singh's case (whose facts are given above) where admittedly the views of the learned Chief Justice as to the application of benami to Muslims were to some extent obiter in as much as none of the parties was a Muslim, I have not been referred to any authority which either lays down that the principle of benami applies as between Muslims in Kenya or negatives that proposition."

This is precisely because there is no such authority as the concept of benami has no basis in Islamic law. We also note that even though the learned Judge declared that the sentiments expressed by the learned Chief Justice in the case of Bishen Singh Chadha v Mohinder Singh and another, were obiter in that none of the parties was a Muslim, nevertheless he very much relied on this on this case to reach his decision.

The learned Judge further continued and stated that [23]

" Mohammedan law in East Africa is the same as in India...."

Mohammedan law in East Africa, with respect, differs from that of India. This is because the two peoples, of East Africa and India come from different sociological communities. The Muslims of India, before the advent of Islam were Hindus when they converted to Islam, this did not mean that they cut themselves away from their original set-up. Thus while they were Muslims, they still retained some of their old Hindu traditions and customs, which were incorporated into Islam. The benami concept is such a Hindu custom, which over the ages was

incorporated into Islam by the Muslims of India.

Infact the Privy Council in one case realised that Muslims in India incorporated certain Hindu values into Islam. The case of Nathu v Halimabhai[24] serves to illustrate this. The original action was brought in the High Court of East Africa by the widow of a 'Memon' ( who are Muslims from India) claiming an eighth share in her deceased husband's estate as per Islamic law of succession. The High Court established that succession to intestate estates of Memons in India was governed by Hindu law, even though the Memons were Muslims and hence Hindu law wasto apply. On appeal to the court of Appeal for Eastern Africa, the appeal was allowed a and this decision was reversed in favour of the Mohammedan law. The Administrator of the estate appealed to the Privy Council. The Privy Council held:

> "When a Hindu family, being themselves Muslims emigrate from India and settle among Muslims the presumption arises that they have accepted the law of the people whom they have joined, if their actions are as such as to raise the inference that have cut themselves off from their old environments".

Thus implicity by this decision, the Privy Council is recognising that a different law other than Islamic law would have applied if the parties were in India, even though the parties were Muslims. Therefore this case illustrates that the Muslims in India do not strictly adhere to the 'pure' Islamic law.

Two other cases also illustrate that the law governing Muslims of Hindu origins may be different from the Islamic law generally applied to other Muslims. The first case is the case of Jafferali Bhaloo Lakha and others v The standard Bank of South Africa.[25] The appellants in this case were Ismailia Khojas who are Muslims of Hindu origin. One of the issues to be determined was which law of succession governed the Ismailia Khojas. The Privy Council held.[26]

> " Khojas in matters of simple succession and inheritance are governed by Hindu law, within certain strict limits which are not to be extended".

The second case is that of : In the matter of the trusts of the will of Premji Dhanji.[27] In this case too, one of the issues was the determination of the law of succession applicable to an Ismailia Khoja, who was a Muslim. De Lestang J. held:[28]

> " Although it would appear that Ismailia Khojas were original Hindus who were concerted to Islamism about half a century ago they are not Hindus any more as they now practice the Mohamedan Religion. Because owing to their origin they are still governed in matters of succession and inheritance by Hindu customary law...."

But in so far as the 'pure' Islamic law derived from the Quran and 'sunna' of the prophet is concerned, then I must concede that the Islamic law of East Africa

and India is the same.

In Kenya we have three different sociological communities of Muslims, namely the African Muslims; The Arab Muslims and the Indian Muslims. With regard to the Indian Muslims the concept of benami may be held to apply to them as it applies to Muslims in India. It forms part of their personal laws and is carried by them to countries where they hold property but in respect of the other two groups of Muslims, the concept has no application whatsoever. Moreover, by virture of the case of Nathu v Halimabhai[29], if the actions of the Indian Muslims in Kenya are such as to raise the inference that they have cut themselves off from their old enviroments, then a presumption arises that they have accepted the law of the people whom they have joined, in this case Muslims of East Africa of Arab and African Origin. Then Islamic law as applying to the Muslims in East Africa will also apply to them, and which will render the non-recognition of the practice of benami even to this group of Muslims in Kenya.

The case of Shallo v Maryam was therefore decided per incuriam as Islam does not recognise the institution of benami. Furthermore this case was purposted to have been decided as per Islamic law but in reality it was decided against the spirit of Islamic law, for to quote from the Quran, it is said that in order to avoid dispute

any transaction be written as the documents will be used as evidence in case of doubt. But this 'Quranic' law was negleted by the court in this case verse 282 of chapter II of the Quran states:

> " And do not disdain to write down your transactions small or great; this finds favour in the sight of God and provides evidence better to avoid doubts and dispites among you".

According to the basic documents in this case, the property belonged to Maryam but the court went ahead and declared that the transaction wea benami and that the property belonged to the husband!

Further the Quran enjoins in chapter II verse 229 of the Quran that:

> " A divorce is only permissible twice; after that, the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you, men, to take back any of your gifts from your wives."

The Quran thus, is enunciating a doctrine which is more analogous to the presumption of advancement than to that of benami.

Notwithstanding this law from the Quran, the learned Judge, allowed the husband to take back what he had given to the wife under the 'umbrella' of the benami concept. Thus the judgement in shallo v Maryam clearly went against the spirit and the law of Islam.

In the next chapter, I will examine the nature of the benami institution; the legal effect of a benami transaction; the rights and duties of the parties to such a transaction; the concept of benami and its relation to other doctrines such as the doctrine of estoppel, rejudicata and lastly the circumstances in which the courts do not give effect to the real title in a benami transaction.

## FOOTNOTES - CHAPTER 2

1. Fourth edition, 1924, 512.
2. (1915) 42 I.A. 202 at 203; 37 All 557, at 564 -565
3. (1854) 6 M.I.A. 53 at P.79.
4. (1942) All 478.
5. 13 M.I.A. 232
6. A.I.R. (1946) 85
7. It is contended that the benami concept is a Hindu concept see GospeeKrist Gosain v Gungar persaud (1854) 6 Mov. I.A. 53 P.C; 19E.R.20
8. (1967) E.A. 409 (H.C.)
9. Supra at pg. 413
10. Muslim Holy Book
11. This comprises the actions, behaviour and deeds of the Holy Prophet Mohamed (S.A.W) which are also part of the Isla,ic jurisprudence.
12. Lecturer at the Faculty of Arts, University of Nairobi
13. Head teacher at the 'Madrasatul-Najah' - Muslim School at Lamu, who teaches the Islamic sharia law in this school.
14. A Muslim scholar, graduate of the Omduman Islamic University at Khartoum and Al-Azhar University, Cairo, Egypt.
15. Supra at pg. 413
16. (1956) 29 K.L.R. 20
19. Supra.
18. Supra at pg 21
19. (1915) 42 I.A. 202 ( P.C.)
20. Supra at pg. 205
21. Supra at pg. 23
22. Supra at pg. 413
23. Supra at pg. 413
24. 6 K.L.R. 113 ( P.C.)
25. 11 K.L.R.I, P.C. Appeal No. 38 of 1927
26 Supra at pg. 3
27. 24 (1) K.L.R. 40

## CHAPTER III

## THE NATURE AND OPERATION OF A BENAMI TRANSACTION

The object of this chapter is to give a concise i analysis of the concept of benami. This concept in its operation is affected by a number of other principles, which principles and their effect on benami transactions will be analysed in this chapter.

The fundamental attribute of a benami transaction is that there should be a real purchaser as well as an apparent or nominal purchaser and the real purchaser should be capable of enforcing the rights like a beneficiary in a trust against the apparent owned. In such a situation the apparent owner is referred to as the benamidar. The benamidar has no beneficial interest in the property that stands in his name, he is only a representative of the real owner or beneficial owner (benamidee) and so far as their legal status is concerned, he is like a mere 'nominee' for him.

The legal effect of such a transaction is that, since the benamidar is merely a trustee for the benamidee (real owner) and represents the real owner as far as the legal position is concerned, he the real owner is subject to all the rights and obligations which would bind the benamidar.(Thus the benami relationship may be equaled to that of a Principal and Agent Relationship). This is well discussed by the Privy Council in the case of Guru Narayan v Sheolal Singh I when it stated:

> " The system of acquiring and holding property and even of carrying on business in the names of others than those of the real owners, usually called the benami systen, is and has been a common practice in the country (India)[2] As already observed

> the benamidar has no beneficial interest in the property or business that stands in in his name; he represents, infact, the real owner, and so far as their relative legal position is concerned, he is a mere truetee for him. Their lordships find it difficult to understand why, in such circumstances; an actinn cannot be maintained in the name of the benamidar in reapect of the property although the beneficial owner is no party to it. The bulk of judicial opinion in India is in favour of the proposition that in the proceeding by or against a benamidar the person beneficially entitled is fully affected by the rules of resjudicata. With this view their lordships concur. It is open to the latter to apply to be joined in the action, but whether he is made a party or not, a proceeding by or against his representatives in its ultimate result is fully binding on him".

Thus in the absence of evidence to the contrary, it is to be presumed that a suit instituted by a benamidar, or, where he defends a suit, is done so with the full authority of the real owner, and any result or outcome will be binding upon the real owner. This is illustrated by the case of Shangara v Krishnan.[3] In this case, the plaintiff(s) bought a house in another person's name, which was a benami purchase. The defendant, Krishnan was in possession of the house at the date of purchase. The benemidar sued the defendant to recover possession of the house, but the suit was dismissed. The plaintiff, alleging that he was the real owner, and that the benamidar was negligent in the conduct of the suit against the defendant, sued the defendant to recover possession. It was found as a fact by the court that the suit by the benamidar against the defendant was instituted with the knowledge of the plaintiff(real owner) The court held that the plaintiff is bound by the decree in the first suit, as if he himself had instituted the suit and the suit is resjudicata.

Consequently, the legal effect of a benami transaction is to bind, in the absence of evidence to the contrary, the real owner for all acts of the benamidar, that is, the real owner is accountable for all the deeds or misdeeds of the benamidar, in relation to the subject matter of the ' benami' in question.

Any legal relation in law creates certain obligations and duties on the parties involved, and the 'benami' relation is not an exception. The parties involved in a benami transaction, namely the'benamidar'and the 'benamidee' have certain rights and duties to fulfill arising from the transaction.

Since to the 'outside world', a benamidar appears to be the owner of a benami purchase, or the subject matter of a benami transaction, and the responsibility of the property is on him, then, if the subject matter of the transaction is interferred with by another party, he has the duty to sue in his own name on behalf of the benemidee. For example he can sue for damages, ejectment, claim of ecsement or maintain suits arising out of title to immovable property. This is illustrated by the case of Guru Narayanr v Sheolal Singh[4], which has been quoted above, and the relevant part is viz.,

" As already observed, the benamidar has no beneficial interest in the property or business that stands in his name; he represents, infact, the real owner, and so far as their relative legal position is concerned, he is a mere trustee for him. Their lordships find it difficult to

> understand why, in such circumstances, an action cannot be maintained in the name of the benamidar in respect of the property although the beneficial owner is no party to it.

Another case insupport of this contention is the case of Vartheswara v Srinivasa.[5]

It is also important to note that a benamidar can institute a suit on a contract entered into, in his name. This is evident from the case of Ramanuja v Sadagopa,[6] where a benamidar lent money to another party on a piomissary note, but the note was made in the benamidar's name, it was held that the benamider is the proper person to sue upon it. If the benamidar fails or refuses to sue for example when the benami property is interferred with, then on the authority of the case of Kishore Banwari v Ajit Kumar,[7] the benamidar can maintain a suit. In this case the benamidar intimated that he would prosecute a certain suit but ultimarely failed to do so and withdrew. On a suit by the real owner, the court held that the real owner was entitled to have the order of withdrawal vacated and continue the suit further.

Conversely any proceedings by a third party relating to the transaction may be brought against the benamidar, that is, he can be sued in his own name. This is illustrated by the case of Guru Narain v Shirlal Singh.[8]

Consequently arising from this proposition, it follows that a benamidar has a right of appeal on behalf of the beneficial owner as was established by the cases of Bachha Singh v Gajadhar [9] and Vadiam v Umrao Singh[10]. The benamider also has a right to execute any judgement arising from any such suit.

The benamidar in a benami transaction is under a duty to comply with the wishes of the benamidee. If for example, a benamidar can maintain a suit against a third party, but the benamidee is reluctant, then the suit will not be maintainable. This was established by the case of Maung San Da v Maung Chan Tha". There is no similar duty on the part of the benamidee, that is, he is not under a duty to comply to the wishes of the benamidar.

Where the benamidar, incurs some expenses relating to the benami property, which expenses were incurred for the benefit of the benamidee, then the benamidar has a right to be reimbursed by the benamidee. This is established by the case of Subbammal v Muthu Pathan,[12] where a benamidar executed a morgage instrument in respect of some property and subsequently discharged the morgage at his own expense. The benamidee refused to repay the benamidar his expenses, when the benamidar instituted this suit, the court held that the benamidar could be regarded as having paid the mortgage debt as a mere volunteer and thus was entitled in equity to have it declared that the amount paid by him was a charge on the property.

The benamidar cannot institute a suit against the real owner, claiming title and possession but he can maintain a suit against all other persons. He also cannot sue to setaside a sale under decree passed against the real owner on the ground that he was not a party.

Apart from duties and rights arising between a benamidar and a benamidee, the benamidar also has obligations in respect of third parties. For example, where a benamidar, having held himself out as the owner of the benami property, and a third party as a result of that misrepresentation and bonafide makes payment in connection of the benami property on the understanding that he would be repaid by the benamidar, then the benamidar would not be able to plead that he is only a benamidar and that the third parties should look elsewhere for a remedy or discharge of the debt due to them.

Similarly, the benamidee has certain obligations or duties in respect of third parties. If he holds someone out as the 'owner' of his property, and then a third party in good faith, for value and without notice purchases the benami property in question from the 'benamidar', then the'benamidee'cannot claim from the 'bonafide' third party purchaser. This is made clear by the Indian Transfer of Property Act of 1882, section 41, which states:-

> " Where, with the consent, express or implied of the persons interested in immovable property a person is the ostensible owner of such property and transfers the same for consideration the transfer shall not be voidable on the ground that the transfer was not authorised to make it: provided that the transfer, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

Thus the benamidee is under a duty to inform third parties dealing with 'benami' property, the exact position pertaining, otherwise he may not be able to recover. However he may be able to recover from a third party if he can establish that the third party had constructive or direct notice of the real title or that there were certain factors which should have put him on an enquiry, which if undertaken would inevitably have led to the finding of the real title.

In so far as the remedies which a 'benamidee' may have as against a 'benamidar' who has acted contrary to the real owner's wishes, for example, where he disposes the property without the permission of the beneficial owner, the position is not clear, and as far as I know there are not any decided cases on this issue. But it is likely that a benamidee may be able to get damages against the benamidar, as the position of a benamidar as has been stated in the foregoing cases[13] is analogous to a trustee under a trust, therefore the benamidee may presumably successfully claim damages for breach of the trust. The benamidee may also have the equitable remedy of tracing against the benamidar. If the benamidar disposes the property to a third party who is not a

bonafide purchaser for value without notice, then the benamidee may trace the same if it is possible.

After examining the rights, duties and obligations created by a benami transaction in relation to the parties to such a transaction and also that of third parties, it is also important to look at, and examine the situations where a court will not enforce a benami transaction. The first situation is illustrated by the following quotation from the case of GopeeKrist v Gunga Prasad,[14] where the Judicial Committee of the Privy Council stated:-

> "It is very much the habit in India to make purchases in the name of others, and they must be recognised, and effect given to them by courts except sofar as positive enactments stand in the way and direct a contrary cause".

Secondly, where the reason which resulted or led to the formation of benami transaction was to perpetiate frauld, as far example, where it is intended to defiaud the creditprs of the beneficial owner and this intention has been fulfilled, then in this situation the benamidee, in case of conflict or misunderstandin with the benamidar will not be allowed to recover the property from the benamidar if the benamidar refuses to handover the property. This is because the courts will not help the beneficial owner, since he is tainted with illegality viz, defrauding creditors. But if the fraudulent intention is not accomplished then the benamidee may recover his property from the benamidar. The Indian Trusts Act of 1882, expressly

provides for this, Section 84 declares:

> "Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not guilty as the transferee, of the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for benefit of the transferor."

By the same token, the court will not enforce a benami transaction where to doso will inflinge the rights of innocent third party purchasers, who have contracted bonafide, for value and without notice.[15] In this situation the court will not set the purchase aside, unless the third party had notice that the seller was merely a benamidar and had no such authority.

Lastly, the court will not enforce a benami transaction in a situation where to do so will be against 'public policy'. It is not within the province of this dissertation to give an analysis of what the term 'public policy' entails. But suffice to say that public policy is an 'unruly horse', as one emminent judge stated. So the effect of this is to give the courts a very wide discretion either to uphold or set aside such transactions. An illustration is the case of Shyam Lal v Chakilal.[16] In this case the plaintiff had at one time been a "patwari" of a village( a public officer equivalent to Chief in Kenya). Whilst occupying this position he bought certain properties within his area, and since such a transaction was forbidden by the rules of the Board of Revenue he had purchased

the properties in the name of his uncle whose heirs refused to hand over the profits, as a result he instituted this suit. The trial court decided the suit infavour of the plaintiff. On appeal, the lawer appellate court revised the judgement of the trial court and dismissed the suit. On further appeal to the High Court, it was held that it was the duty of a ' patwari' to keep impartially the accounts of Zamindari (land lords) and tenants or between Zamindais with conflicting interests. Further, that a patwari cannot do his duty properly in his area if he has an interest. Thus the transaction was held to be against public policy and the dismissal of the suit by the lawer appellate court was upheld.

The principle of benami in its operation and application is affected by the operation of other doctrines, thus it is imperative that an examination of these doctrines be undertaken to determine their effect viz-a-vizthe benami principle. The first doctrine, which has hitherto already been mentioned in this chapter, to be considered would be the doctrine of 'Resjudicata'.

A case which establishes the applicability of the resjudicata doctrine in benami transactions is that of Guru Narayan v Sheolal Singh, where the privy Council said:[17]

> " The bulk of judicial opinion in India is infavour of the proposition that in the proceedings by or against a benamidar the person beneficially entitled is fully affected by the rules of resjudicata".

It follows that in a benami transaction a ruling or decision against a benamidar is resjudicata against the real owner, a number of cases prove this, for example Khubchand v Narain;[18] Nanak Chank Mihir Saleh[19] and Inderjeet v Suraj,.[20] The decision in the proceedings will bind the real owner as if the suit had been instituted by the real owner himself. It is also important to note that the operation of the doctrine (resjudicata) extends only to the character in which the suit is brought and as to the rights declared by the decree between the parties.

Another doctrine which has a bearing on benami transactions is the doctrine of estoppel. The Kenya Evidence Act,[21] provides in Section 120 for the doctrine of estoppel, where it is stated:

> "Where one person has, by his declaration, act or ommission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

In order to give a clear concise discussion on this particular issue, viz, the application of the doctrine of estopped in a benami transaction, it is essential that one has to have a general view of ' estoppel' which would help to throw light on this particular issue.

"Estoppel has been defined in strouds Judicial Dictionary Estoppe cometh of a French ward estoupe, from whence the English ward stopped, and it is called an estoppel or conclusion, because a man's act or

acceptance stopped or closeth up his mouth to allege or plead the truth".

Estoppel has been regarded as a part of the law of evidence, but is more correctly viewed as a substantive rule of law as is seen in the case of Canadian and Dominions Sugar Company Limited v Canadian (West Indies) steamships limited.[22] An estoppel is said to exist when a perty to legal proceedings is precluded from alleging or proving that a fact is otherwise than it has been made to appear. This was laid down by Bramwell L.J., in the case of Simm v Anglo American Telegraph Company.[23]

There are three kinds of estoppel, namely:

1. Estoppel by matter of record, or quassi record, that is by the judgement of court of record or other tribunal heving jurisdition in the matter.

2. Estoppel by deed. A clear statement of fact in a deed and all other parties admitting its truth is binding upon the party making it and;

3. Estoppel in pais. Where one has either by words or conduct willfully endeavoured to cause another to believe in a certain state of things which the first knew to be false and if the send believes in such state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist. This was established as far back as 1837 in the case of pickard v scars.[24]

The last two are relevant to our present discussion, and can arise in a benami transaction in situations where (a) A third party purchases a benami property

from a benamidar, relying on the deed which is in the name of the benamidar thus believing him to be the real owner; in good faith for value and without notice, then, the benamidee would be estopped from pleading that the vendor was a mere benamidar. Secondly

(b) Where the third party is aware that the person in whose name the property stands is a benamidar, but the benamidee by his conduct or action 'holds out' the benamidar as having authority to deal with a sell the property and when he does sell the property, to a third party, then the benamidee will be estopped from pleading that the vendor was a benamidar,

Further, the first two (of the 3 kinds of estoppel) are sometimes referred to as technical estoppels as distinguished from equitable estoppels or estoppel in pais. An estoppel by record is the preclusion to deny the truth of matters set forth in a record, whether judicial or legislative,and also to deny the facts adjudicated by a court of competent jurisdiction while estoppel by deed are regulated by well established rules. But it would be next to impossible to prescribe a rule of universal application in regard to what are called estoppels in pais, depending as they do on the particular circumstance of the case.

As regards estoppel by conduct or representation, the essential elements giving rise to an estoppel were laid down by lord Tomlin in the case of Greenwood v Martins Bank, which are as follows:-

" (a) A representation or conduct amounting to a representation intended to induce a cause ofconduct on the part of the person to whom the representation was made;

(b) An act or ommission resulting from the representation, whether actual or by conduct, by the person to whom the representation was made;

(c) Detriment to such person as a consequence of the act or omission."

This principle of estoppel by representation or conduct was recognised by the courts of chancery as early as the 17th Century in the case of Gale v Lindo,[26] and has been consistently acted on. It was originally set forth in Pickard v Sears.[27]

"is a rule whereby a party is precluded by some previous act to which he was party or privy from asserting or denying a fact."

The basis of the modern doctrine of equitable estoppel is the principle that a person applying for am equitable remedy must be prepared or may be forced, to act in an equitable manner himself, that is, it is based on the maxim that " He who seeks equity must do equity". This was forcefully explained by Lord Denning in the case of Moorgate Mercantile Company Limited v Twitchings[28] when he quoted Dixon J., in the case of Grundt v Great Boulder Pty Gold Mines Limited,[29] when he put it in these words:

" The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations".

The doctrine of equitable estoppel is thus based upon the grounds of public policy, fair dealing, good faith and justice and its purpose is to forbid one to speak against his own act, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon. The doctrine of estoppel springs from equitable principles and the equities in the case. Applied to benami transactions, the doctrine of estoppel is used to thwart injustice and inequity in situations which will be analysed later on, all in all, the doctrine of estoppel is used to ensure that there is fair dealing" in such transactions.

At this juncture it is important to note that the onus of proving an estoppel lies on him who pleads it.

An examination of situations in which the doctrine of estoppel may be pleaded will suffice to indicate the application and effect of this doctrine viz-a-viz benami transactions.

Estoppel can be pleaded by a benamidar in a benami transaction. This is possible in a situation where a benami transaction had been undertaken for a fraudulent purpose and this fraudulent purpose has been in fact fulfilled either completely or substantially. In this situation due to public policy, the real owner is barred from recovering the benami property from the

benamidar if the benamidar pleads the doctrine of estoppel. But where the fraudulent purpose is not fulfilled or does not materialise them the real owner is entitled to the benami property and the benamidar who agreed to be party to the fraud, cannot claim the property upon the intended fraud. 30
This point is illustrated by the case of Mani v Gunesh. In this case, a house was the subject matter of the suit. The plaintiff claimed he was the beneficial owner of the house and that the defendant was the benamidar. He petitioned the court for the equitable remedy of declaration. The plaintiff further alleged that the sale-deed in the nameof the defendant and the collusive decree obtained by him against the plaintiff were collusive and fraudulent transaction whose aim was to avoid the plaintiff's creditors. The lawer court established as a fact that the sale-deed was a benami transaction and that the decree was a collusive one, and it upheld the plaintiff's claim. The defendant appealed and the High Court reversed the decree granted to the plaintiff by the lawer court, holding that the original plaintiff now respondent was estopped from asserting his title and further that having been a party to the decree, he was bound by it.

Another situation where estoppel may be pleaded is between the real owner and third parties. The third parties in this situation may be either creditors or

purchasers. If a person (Benamidee),holds out another (benamidar) as the owner of certain property while in fact he is not the real owner, and the benamidar utilises the property to raise funds from creditors, then such a person will not later on be allowed to claim that he is the 'real owner' and thus deny the truth of the representation he had earlier made. The case of Satyanarain Murthi v Teteli Pyadayya[31] is in point. In this case the defendant was the head of a Hindu Family known as the "Karta". By his conduct and representation he led the plaintiff to believe that his wife, the benamidar was the real owner of the property in question. He further, persuaded the plaintiff to advance money to her on the security of the benami property. When the plaintiff, subsequently claimed his money or alternatively his lieu on the property the defendant claimed he was the real owner and that his wife was merely a benamidar. The court held that the defendant cannot deny the truth of the representation and assert title in himself, as his conduct and representation estopped him.

In so far as third parties purchases are concerned,[32] this has already been discussed and as such there is no need to repeat. Further, the third party's position in respect of any purchase of immoveable property is fortified by the provision of the Indian Transfer of property Act of 1882, section 41.

It is importamt to note that the purchaser must be innocent if there is direct notice or constructive notice or if there existed circumstances which ought to bave put him on enquiry and which had he pursued would have led to the discovery of the title, then the third party purchaser cannot rely on estoppel, as is illustrated by the case of Bindoo Bashinee v Peare Mohun Bose.[33] In this case, a purchaser, bought certain property from a Hindu woman whose husband was still alive at the maternal time. The court held that he was not a bonafide purchaser without notice, that is, he was not an innocent purchaser. This is because in India the position of the wife in respect of dealing with property, ought to have put the purchaser on enquiry and that it amounted to constructive notice and since he ignored the notice, then it was to his own detriment.

But where a purchaser is "innocent", then the court will uphold a plea of estoppel, if it is pleaded by such a purchaser, as in the case of Sarat v Gopal.[34] In this case, the mother of the defendant had executed a deed of mortgage. This deed of mortgage was asserted by her son the defendant. When the terms of the mortgage were not satisfied, and the plaintiff (the mortgage ) took action, the defendant claimed in his defence that the mother had no title to the property

as she was only a benamidar for her deceased husband. The court held that the defendant, was estopped from so claiming by his representation (arresting the deed).

From the foregoing, it is apparent that the doctrine of estoppel is very important, since through it a real owner is barred in certain circumstances from disputing the actions of his benamidar.

Another important concept which has a bearing on benami transactions is the notion of partnership. In India, as earlier stated, where property is acquired in the name of one person and the money is advanced by another, and there is no intention to benefit the person in whose name the property is acquired, then this transaction would be a benami transaction. The same is true of partnerships. For where the property is purchased from the funds of a partnership but in the name of only one partner without any intention to benefit such partner solely, then such a partner will only be deemed to be a benamidar for the partnership and holding the property in that capacity for the firm. The case of In re Adarji[35] illustrates this point, it involved a partnership. The partners insured their lives with an insurance firm, and the 'premium' was paid out of the partnership money. One of the partners subsequently died, and the court held, when petitioned, that the other can apply fork letters of administration.

Lastly, it is also appropriate to note that the benami doctrine has some resemblance to the law of agency in situations where the agents contract on behalf of an undisclosed principal. Because under agency, as in benami transactions, where an agent enters into a contract on behalf of an undisclosed principal without indicating that he is contracting as an agent, he will be personally liable. Consequently a third party will have a right of action against both the principal and agent as he has in a benami transaction against the benamidee and benamidar. Moreover, technically the benamidar like the agent is deemed as the representative of the benamidee, and their actions if authorised will bind the principal and benamidee respectively.

Thus from the fore-going it is apparent that the benami doctrine is affected in its application and operation by some other doctrines, which culminate in the courts refusal in certain circunstances to enforce these transactions; that the benami doctrine is in some respects anologous with other legal relationships and; that this realationship like other legal relationships creates certain rights and duties. The next chapter will deal with a comparison of the benami concept with other concepts such as the English Trust, Waqf and trust under Islamic jurisprudence and customary law trust. It will also dwell on the advantages and disadvantages of this concept.

## FOOTNOTES - CHAPTER 3

1. A.I.R. (1918) 140
2. Brackets my own
3. (1891 ) 75 Mad. 267.
4. Supia
5. (1919) 42 Mad. 348
6. (1904) 82 Mad. 205
7. A.I.R. (1938) Cal. 874
8. 46 Cal. 566.
9. 28 All. 44.
10. 21 All. 380
11. A.I.R. 1930 Rang 130
12. 13 M.L.J. 228
13. A.I.R. (1918) 140, Supia
14. 6 M.I.A. 53
15. This is discussed in detail further on in this chapter, when dealing with the doctrine of estoppel.
16. 22 All 220
17. Supra
18. 3 All 812
19. A.I.R. (1924) Lah. 702
20. A.I.R. (1940) Pat. 211
21. Chapter 80 Laws of Kenya.
22. (1947) A.C. 46, 56.
23. (1879) 5 Q.B. 188, 202.
24. (1837) 6 A & E. 469
25. (1933) A.C. 51
26. (1687) 1 Vern 475
27. Supra
28. (1975) 3 All E.R. 314
29. (1937) 59 C.L.R. 674
30. 5 N.L.R. 146

31. A. I. R (1943) Mad. 459
32. Supra
33. 6 W. R. 312
34. I. L. R. (1893) 20 cal 296 P. C.
35. A. I. R. (1931) BOM 428

# COMPARISON OF THE BENAMI DOCTRINE AND OTHER ANALOGOUS LEGAL RELATIONSHIPS

## CHAPTER 4

From the foregoing chapters it is apparent that the benami concept is in certain respect anologous with other legal relationships. A comparison of this concept with the other legal relationships would be fruitful, since apart from distinguishing the benami concept from these relationships, it would also in the process serve to illustrate clearly the characteristics peculiar to a benami transaction and those which are common to the other relationships. From this viewpoint it would also be possible to pinpoint the shortcomings of the benami concept and its advantages if any.

The first legal relationship which is going to be considered and compared with the benami concept is the concept of 'trust' in English law. A trust is a relationship which subsists when a person called the trustee, is compelled by a court of equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons, of whom the trustee himself, may be one and who are called 'cestui que trust' or beneficiaries, or for some object permitted by law, in such a way that the real benefit of the property accrues not to the trustee as such, but to beneficiaries or other objects of the trust.

There are two classifications of trusts, viz., (1) Express trusts and (2) Trusts created by operation of law. Express trusts arise from acts of parties whether settlor or testator. These trusts can be created in a number of ways and these methods depend largely on when the decision to make the trust is taken, that is, the trust can be created by intervivos or by a will. These methods are-

(a) It is possible for a trust to be created by a person where he declares himself a trustee during his lifetime intervivos;

(b) He can also, while he is alive dispose the property intervivos to trustees to hold for beneficiaries; and

(c) last by a will.

In this category, one will find such species of trusts as secret trusts and charitable trusts. At this juncture it is also appropriate to mention the implied trust. This arises where the intention of the settlor to set up a trust is presumed from his words, actions or conduct by the court.

Trusts created by operation of law are divided into (a) Constructive trusts, this is imposed in situations where a person in a fiduciary position obtains an advantage from which it would be unconscionable for him to make some private gain. Therefore the courts in exercise of their equitable jurisdiction require him to hold his advantage as trustee, so as to prevent him from getting away with inequitable fraud. The circumstances where the constantructive trust will be imposed is not 'open and shut', but generally the circumstances can be categorised

into two groups, namely (1) a constructive trust is imposed in situations where there is unauthorised profits by trustee or fiduciary; and (ii) to prevent fraud.

(b) Resulting trusts. The term 'resulting trust' is used to denote three difined situations, first, where a man purchases property and has it conveyed or transferred into the name of another or the joint names of himself and another when the beneficial interest will normally, as it is said, result to the man who put up the purchase money; secondly, where there is a voluntary conveyance or transfer into the name of another or likewise there is primafaecie a resulting trust for the grantor; and thirdly where there is a trusfer of property to another on trusts which leaves some or all of the equitable interest undisposed of. Again there is a resulting trust, whether the reason is that there is no attempt to dispose of part of the equitable interest, as where property is given to trustees on trust for 'A' for life, and nothing is said as to what is to happen after 'A's death, or that a purported disposition fails, as where a declared trust is void for uncertainty.

The classic statement of the law, was stated by Eyre C.B. in Dyer v Dyer[1] when he said:

> " The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers

> and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive- results to the man who advances the purchase money."

Even though Dyer v Dyer refers only to interest in land, the principle has always also been applied to pure personalty.[2]

It is contended that the benami concept is more analogous to the express and resulting trusts. This is evident in that like the benami concept, a resulting trust in certain circumstances arises in situations where a person buys property in the name of another but retains the beneficial interest thereto. Further, the trust concept and the benami doctrine as is apparent from the foregoing, have one common characteristic in that both concepts are founded on duties arising from the ownership of property based on confidence or trust and accepted by the nominal owner (trustee/benamidar) for the benefit of another person (the beneficiary/ benamidee), that is in both concept, the property is vested in the names of people who are not the actual owners.

There is a further similarity between the two concepts in so far as the matters concsidered in establishing the existence or non-existence of either of them is concerned and the methods used of proving by evidence such existence. In both cases the sources of the purchase money is a dominant factor taken into

account in establishing whether there is a resulting trust or a benami purchase. Intention of the person who advances the purchase money is also another factor common to the establishing of both concepts.[3] The position of the parties and their relation to each other is yet another factor as is the conduct of the parties.[4] However, some factors, for example, possession of the property and title deed of the same, is only relevant in proving the existence or non-existence of a benami transaction and therefore is peculiar to a benami.[5] Lastly, both concepts have a common basis in so far as the way they can be proved by evidence is concerned in that both can be established by parole evidence.[6]

At this juncture it is appropriate to mention that whilst the resulting trust in England is affected by the operation of the presumption of advancement, for example in the situation of a father and a child, that is, the father buys property in the name of the child, then the child is deemed to be the beneficial owner. In India in a similar situation in the absence of evidence to the contrary, purchase in the name of a child, of property, by a father is deemed to be a benami purchase. Thus the presumption of advancement would not operate where the benami doctrine applies.[7]

Coming to the duties and obligations of a benamidar and a trustee, there is a marked difference in this respect. The duties of the trustee in respect of the

trust property may be characterised as 'demanding ' whilst those of the benamidar in respect of a benami purchase are more lax. This is evident from the fact that whilst a benamidar incurs no obligation or liability if he does not protect the property standing in his name, the trustee is liable for neglect in safeguarding the interest of the trust by not taking such reasonable care as a prudent man would take. Further, the duties of the trustee are well defined and laid down which duties as earlier intimated are very rigourous as compared with those of a benamidar. The trustee's duties include the duty not to devicite from the terms of the trust; duty not to profit from his trust; duty not to delegate the trust; duties in relation to information, accounts and audit; etc. On the otherhand, the benamidar has no such duties as duty in relation to information or duty not to profit from the benami holding.

However, in respect of certain other obligations, the duties are similar, for example instituting a suit in their own names and being sued in their own names; the duty to comply with the wishes of the benamidee as that of the trustee not to deviate from the terms of the trust; and, the right to be reimbursed by the benamidee or from the trust property by the trustee when they incur expenses relating to the

property and for the benefit of the benamidee or beneficiary.

The major differences stem from the nature of the legal systems in which the two concepts operate namely, the English legal system and the Hindu system of law Whilst the English system recognises that in the same property there could be two contemporaneous estates, the legal and equitable estate, under Hindu jurisprudence there is no distinction between legal and equitable estates, there being only one estate in a single property. Thus the'trustee' notion strictly speaking cannot arise under Hindu law as the set up which gives efficacy to such a notion is lacking. To illustrate the differences between the two concepts, the judgements of two Indian cases will be quoted. In Pitchayya v Rattama and another,[8] where Devadoss J., stated:

> " A benamidar is not a trustee in the strict sense of the term. He has the ostensible title to the property standing in his name but the property does not vest in him but is vested in the real owner. He is only a name lender or an alias for the real owner. The cardinal distinction between a trustee as known to English law and a benamidar lies in the fact that a trustee is the legal owner of the property standing in his name and the cestuique trust is only a beneficial owner, whereas in the case of a benami transaction, the real owner has got the legal title though the property is in the name of the benamidar. It is well settled that the real owner could enforce his remedy in respect of property standing in the name of a benamidar without reference to the latter... The benamidar has some of the liabilities of a trustee but not all his rights.... It is well settled now that a benamidar can sue in his own name. He can give a discharge to an obligor, who, not knowing the real nature of the transaction, bonafide pays him the

amount due from him. The benamidar incurs no obligation if he does not protect the property standing in his name, A trustee is liable for neglect in safeguarding the interest of the trust....A benamidart has no interest at all in the property or transaction standing in his name." (unlike a trustee)". 9

Then there is the case of Prokash Chandra Ghose and others v Mahima Ranjan Chakravarty and others,[10] where Chakravartti J., said:

" ....It is a complete mistake to judge the status of a benamidar by reference to the strict conception of an express trustee. When the judicial committee in 46 I.A.I. observed that a ' Benamidar represents in fact the real owner and so far as their relative legal position is concerned, he is a mere trustee for him, they did not, we apprehend, intend to lay down that the benamidar was a person charged with the administration of a trust and that he held an office for the incidents of which the law of trusts was to be looked to..... It is only in the limited sense of holding the property, standing in his name, for the benefit of the real owner and of appearing to the world in the latter's place and stead that a benamidar seems to have been called a trustee. There is no question of performing any other function. It seems to us to be impossible in the very nature of things that a trust of this character should as a matter of law, be limited to the lifetime of the trustee. The essence of benami is secrecy. What is done is that property belonging to one person is placed in the name of another, with every appearance of the latter being the true and full owner, which involves that, to external appearance, the property will descend as a matter of course along the line of the ostensible owner until and unless the real owner or his heirs choose to0 disclose their interest and terminate the a appearanse. So long as that is not done and, the real owner goes on maintaining the appearance of the benamidar's ownership, there must be an ostensible succession in the line of the ostensible owner, and an heir of the benamidar will represent the property and personate the true owner just as his predecessor in-interest did".

From the above we see that under a benami transaction, when the benamidar dies, then the benami property vests in his successor. While under a trust on the death of the sole trustee the property vests in his personal representatives who thus hold for the beneficiaries and are therefore in a sense trustees, but personal representatives do not become full trustee, subject to the trust instrument they may appoint trustees, themselves or others, unlike in a benami transaction where the successor of the benamidar becomes a full representative of the benamidee on death of the benamidar.

From the foregoing, it is clear that the institutions of benami and that of a trust, are distrinct each having its own legal consequences, viz., in a trust the property vests in the trustee while in a benami transaction, the real owner has got the legal title though the property is in the name of the benamidar. Further each concept creates certain duties and obligations on the parties concerned some of which ( the duties) are common to both.

Another concept which is analogous to the benami notion, is the Islamic law concept of a trust. This is tacitly recognised in the Quran which goes ahead to give illustrations of when a trust should arise. This has been discussed in detail in chapter II. The Quran does not set up the specific requirements for the

creation of a trust, but it only sets out the general requirements that a trust may be created where an individual is incapable of holding his pr property and the rights and duties of the trustee and beneficiary are based on ethics or morals. But the duties and responsibilities of the trustees in regard to the trust property are generally more strict than even thôse placed on the owner. This is in contra-distinction with the situation in a benami transaction where the duties and responsibilities of the benamidar are not as strict. For example where a third party intereferes with a benami propeaty the benamidar may not take action and the benemidee is compelled to take action personally, on the other hand in respect of a trust under Islamic law the trustee is compelled to take action.

At this stage, I will also examine the concept of 'Wakf' under Islamic law as it is similar to the benami notion in certain respects. A wakf is:

> ".....the tying up of the substance of a thing under the rule of the property of Almighty God, so that the proprietary right of the wakf 11 becomes extinguished and is transferred to Almighty God for any purpose by which its profits may be applied to the benefit of his creatures" 12

A wakf is a variation of the trust concept under Islamic law, but it differs from the trust in that the wakf is a religious institution, while a trust is not. Secondly, a wakf is not terminable while a trust may be terminated. Thirdly, a wakf exists in

perpetuity, since the wakf property belongs to god and the endowment is irrevocable and permanent while under the Islamic trust law there is no necessity for the property to be 'tied' in perpetuity. Lastly, in a trust the testator or settlor can take an interest but in a wakf the person who creates the wakf, known as the wakif is not entitled to take any benefits under the wakf property.

There are two views prevailing as to the valid constitution of a wakf, namely (1) a dedication by way of wakf is complete by the mere declaration; delivery of possession or appointment of 'mutawallis' ( one who looks after wakf property) is not essential. This is the view prevailing in India; and (2) a wakf is not complete unless there is a declaration accompanied by the delivary of possession and appointment of mutawallis. This view holds in other countries for example Saudi Arabia, Oman and Kenya.

From the above, it is apparent that the position of the 'mutawalli' is analogous to that of the benamidar under a benami transaction in that in both relationships the property does not vest in the person who 'appears' to be the owner of the property in question. However, there are distinctions, for example, the primary purpose of making a wakf is to acquire the pleasure of god unlike in a benami transaction the puposes of

which are normally temporal.

At this stage it is appropriate to examine the merits and demerits of this concept (benami). This concept has come under a lot of criticism for its potentiality of being used for fraudulent purposes. Nathuni Lal, in his book 'Law of Benami Transaction' stated:[13]

> "In cases of more than one, it has been found that benami transactions have been resorted to with a view to defraud the creditor."

Mulla D.F., is alo of the same view for he declares:[14]

> " But many transactions(benami)[15] originate in fraud; and many of them which did not so originate are made use of fora fraudulent purpose; more especially for the purpose of keeping out creditors who are told when they come to execute a decree, that the property belongs to the fictitious owner and cannot be seized."

Apart from the views of these two notable writers, a number of cases elaborate the use of this concept for fraudulent purposes, for example, the cases of Punjab v Daulat,[16] in this case the intention of the parties was to effect a fraud on the government as a result the court declined to recognise or accept that the transaction in question was merely benami; Then in the case of Gorinda v Kishun,[17] where the benamidee (beneficial owner) made the transfer to benami; to defraud his creditor and; lastly there

is the case of Chettair v Chettair.[18] This case was concerned infact with a benami transfer. The benamidee intended to deceive the Government, though his hope of profiting from the transaction were very minimal. The court held that he could not recover the land he had trnasferred.

There has been even legislative intereference to curb the propensity of the benami concept from being used for fraudulant purposes. This is evident from section 41 of the Indian Transfer of Property Act. ( this section has been discussed in various places in this dissertation) Thus this is the greatest disadvantage of the benami concept.

Moreover, the reasons which led to the development of this concept are no longer existent or cannot be justified. The reasons which have been fully discussed in chapter one, viz., that the Hindu family was characteristically patriarchal; this has been overtaken by modern developments; the parda system is no longer existent in India; nor is the role of women curtailed they now play an important role in modern India, this is evident in that they even have a women Prime Minister presently! The other reasons for example superstition or some names being considered luckier than others, do not hold water in this modern world.

It is also important to note the socio-economic 'atmosphere' in which the doctrine developed. It is apparent from the foregoing that the notion of benami is basically a Hindu concept. I am making this statement without prejudice but it is common knowledge that the Hindus or Asians generally are a people who rarely fulfill their promises, this can be verified in the way they avoid their creditors. Further, they are a people who are known for their notorious character of avoiding the payment of taxes. Hence with the aid of the doctrine of benami, they were able to escape their legal duties (avoiding creditors and payment of taxes) by holding out others as owners of property. It is therefore desireable that the recognition and application of the doctrine in Kenya be strictly controlled or restructed.

The advantage or to put it in otherwords the useful purpose served by the benami concept, is that it makes it possible for one to hold property (nominally) for another person in situations which warrant such a relationship as for example where the beneficial owner is very sick or is insane thus preserving the property of the beneficial owner, Yet another disadvantage which relates to the benami doctrine is the difficulty of tracing the law relating to such transactions. Due to the nature of the subject (benami) the law relating to it is not readily found in one place but is scattered over a number of are as.

## CONCLUSION AND RECOMMENDATIONS

In so far as Kenya is concerned, the benami doctrine may justifiably be applied to the Hindus, as the law relating to benami transactions, comprises part of the personal laws of the Hindus, and the 1898 order-in-council is the legislative foundation of the application of this doctrine in Kenya.

On the otherhand, with respect to the Muslims the position is not crystal clear as that of the Hindus. There is no authority to support the application of this doctrine to Muslims. It is the view of the author if this dissertation, that there is no such concept as the concept of benami under Islamic law. The author's contention is not unsupported. First there is no mention specifically or by analogy of such a doctrine in the saurces of Islamic law viz., the Quran, Hadith of the prophet or 'sunna' Ijtihad and 'Al Quiyas.' Neither is there any mention of such a concept in theyleading Islamic texts, the only mention of this concept is to be found in Hindu law texts. Furthermore, the opinions of people versed in Islamic law also concur with the views of the author that there is no such concept under Islamic law.

Arising therefrom, it ~~normally~~ follows that the case of shallo v Maryam,[19] was decided per incuriam. (The parties in this case were Muslims and not Indians.) The court

in this case did not specifically pinpoint their authority for the application of this doctrine to to Muslims, except that it relied on general 'sweeping' statements of some textwriters, which statements are unsupported by any Islamic law authority,save that it (benami concept) is practised by Muslims in India. It is contended that this is no justification for the application of this doctrine to Muslims elsewhere. This is because the Muslims in othercountries for example in Kenya have a different historical and social background from the Muslims in India. The main reason which led to the application of the doctrine to the Muslims in India is due to the fact that the Muslims of India prior to their conversion to Islam were substantially 'Hindus' and their conversion to Islam not withstanding, they still retained some of their customs of which benami forms part, further examples can be seen in successim, where Muslim Indians were held to be governed by Hindu law and not Islamic law of succession see the cases of Lakha v the Standard Bank of South Africa[20] and In Re Premji Dhanji[21] ( for facts see chapter two of this dissertation). It is also important to note that this is the first case in Kenya, where the concept had been applied to Muslim parties.

It should thus be clearly laid down the authority (if any) for the application of this concept to the sections of Kenyan Community to remove the unfortunate confusion now prevailing as to the application of this

doctrine in Kenya. We have also noted the propensity of this concept to be used for fraudelent purposes, therefore it would be adviseable for the application of this concept to be tacitly custailed or discouraged. Furthermore, the reasons that led to the development of this concept in India were or are omniously not present in Kenya to justify the application of this doctrine to non-Hindu Communities. It is as such an 'alien' concept which has no 'roots' in Kenya.

The case of shallo v Maryam, also serves to illustrate the dangers inherent in situations where the judges are not versed in the relevant law to apply, particularly personal laws. For example in this case (with respect) the confusion of applying the benami concept to Muslim parties wouldn't had arisen had the learned jdge been proficient in Islamic law. Therefore it is adviseable for judges in such cases to try the issues at stake with the aid of those proficient in that particular field.

From the foregoing discussion relating to the nature of the benami transaction, it is clear that the law relating to benami transactions is in a status of confusion. For example, some cases establish that the benamidar is a mere trustee of the beaamidee,[22] while

in some other cases this has been held not to be so.[23] An examination of the decisions which relate to the duties and obligations of parties to a benami transaction reveal that this sphere of the benami doctrine is in a chaotic state for the duties are very ill-defined.[24] Further, there are no decisions which authoritatively lay down the mechanisms of creating a benami transaction. Hence it is time that the legislature intervened both in Kenya and India by providing rules for the creation and operation of the benami doctrine. The rights of the parties thereunder should be laid down in no uncertain terms. These measures would render the benami notion more certain and would effectively minimise its propensity of being used for illegal purposes.

## FOOTNOTES

1. (1788) 2 cox Eg. cas. 92 at p. 93
2. See the venture (1908) P.218, C.A; shephard v carturight (1954) 3 All E.R. 649.
3. Willis v Willis (1740)2 Atk.71 in respect of trusts and Lachha Reddi v Venkamma A.I.R.(1956) Andhara 225.
4. See Heseltine v Heseltine (1971)IALL E.R. 952 and Shallo v Maryam (1967) EA 409 and Bishen Singh Chadha v Mohinder Singh and another (1956) 29 K.L.R.20.
5. See, Saibala v Jitendra Hozra A.I.R. (1962) Orissa 74.
6. See Iteard v Pilley (1869) 4 ch. App.548 in respect of trusts and Abdul v Arlin A.I.R.(1926) Rang. 94, with regard to benami.
7. Bishen singh Chadha v Mohinder Singh and another (1956) 29 KLR 20.
8. A.I.R. (1929) Madias 268 at pg.269
9. Brackets my own
10. A.I.R. (1947)cal.320
11. Person who creates a wakf.
12. Ameer Ali, i 336
13. Second edition, (1971) at pg. 7
14. Principles of Hindu law, 9th edn. at 512
15. Brackets my own
16. A.I.R. (1942) F.C. 38
17. (1900) 28 cal. 370
18. (1962)I ALL E.R.49
19. (1967) E.A.409
20. 11 K.L.R.1
21. 24 (1) K.L.R. 240
22. Guru Narayan v Sheolal Singh A.I.R. (1918)P.C. 140
23. Pitchayya v Rattama and another A.I.R. (1929)Madias 268
24. See Prokash Chandia Ghose and others v Mahima Ranjan

Chakravarty and others A.I.R. (1947) Cal.320; Bilas Kumar v Desraj Ranjit Singh 42 I.A. 242; Kishore Banvari v Ajit Kumar Nandi A.I.R. (1938) Cal.874 Kamta Singh v Chaturbhuj A.I.R. (1929) Pat. 664 and lastly Kumar Narendra Nath v Midnapur Zamindary Co. Ltd., A.I.R. 1940 Cal. 115,

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