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Transfer of Property by Ostensible Owner

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ABSTRACT

The doctrine of ostensible owner has been laid down under section 41 of the Transfer of Property Act, 1882. The term ostensible signifies something which is not real or true in nature and therefore the term ostensible owner can be understood as someone who is not the real owner yet represents as one during the transfer of the property to which he is an owner to.

The Doctrine of Ostensible Owner was established to protect the rights of 3rd party to whom the property was to be transferred to. The Doctrine of Ostensible owner is based on 2 maxims, i.e., Nemo dat quod non habet and nemo plus juris and alium transferee potestquam ipsa habet. However, there are certain essentials that needed to be fulfilled in order to be called as an ostensible owner. Every transfer authorized by an ostensible owner is valid according to section 41 of the transfer of property act.

Under this project, the research tries to adapt a detailed study about section 41. The research tries to unveil the nuances related to ostensible owner. The project had deeply analyzed landmark cases such as Ramcoomar Koondoo V. John and Maria McQueen and Jaya Dayal Poddar Vs Bibi Hazra to understand the origin of the doctrine and tests established by court to confirm the essentials of the doctrine. The project has also unravelled the understanding of each term associated to the topic as well as analyzed the essentials to fulfill the doctrine.

After reading the project, the reader will attain high knowledge of Section 41 as well as intricacies related to it.

Keywords: *Ostensible, owner, essentials, consent, implied, express, Transfer, Valid, rights of third party.*

I. INTRODUCTION

The provision of ostensible owner has been laid down under section 41 of transfer of property act 1882. The transfer of property act was established in order to make transfer of immovable property easy, accessible and uniform considering the large population.

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Moreover, the concept of ostensible owner (which means assumed or pretend to owner) was established in order to protect the rights of innocent third person party in a transfer.

According to **Section 41³ of the Act**, “Where, with 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 authorized 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 simpler words, section 41 states that,

1. With the consent (be it express or implied) of the person whose interest lies in the immovable property,
2. Another person who is an ostensible owner of the same property
3. Transfers the said property in exchange of consideration
4. Such transfer shall not be declared voidable on the ground that the person was not authorized to do it
5. Provided that the person to whom such transfer was made took reasonable care and acted in good faith.

The concept of transfer by ostensible is based on 2 principles:

1. **Nemo dat quod non habet:**

According to this principle, no one has the right or power to confer or present a higher right over the property than what he himself actually possess.

2. **Nemo plus juris and alium transferee potest quam ipsa habet:**

According to this principle, no person can transfer a title or right over the property greater than what he actually himself has. The transfer which is made by the ostensible owner underlines the principle of holding out.

Under the following paper, the research would further work upon the intricacies related to transfers made by ostensible owner, the essentials for such transfers and an evaluation between Section 41 of transfer of property act and Benami contract.

³The Transfer of Property Act, No. 4 of 1882, § 41.

II. RAMCOOMAR KOONDOO V. JOHN AND MARIA MCQUEEN CASE

The concept of transfer by ostensible owner was first established in the much celebrated and landmark case of **Ramcoomar Koondoo Vs John McQueen**⁴.

Facts:

Alexander Macdonald lived in Calcutta with his mistress Bunno Beebee and 2 children. Maria married McQueen both of them being respondent of the case. The land in question was given as sale deed out to bunno beebee. After the deed, it could not be said with certainty whether Alexander lived on the said property. After death of Alexander, Bunno Beebee did live on that property for a while and later rented it out. Later, Bunno Beebee sold the property to other party where the other party raised certain buildings. Bunno Beebee died after this and the person (Ramdhoone) who built building on the property let it out to respondent. The landlord (Ramdhoone) here filed a case against tenants due to non-payment of rent. Later this, the respondent also brought a suit against Ramdhoone (now appellant Ramcoomar son of Ramdhoone) to eject his family from the property.

Issues:

- 1) *Whether the property in question was of Macdonald's?*
- 2) *Whether the property came by his will to the respondent Maria McQueen?*
- 3) *Whether the appellants in the question had purchased bond fide for valuable consideration without any notice?*

Arguments raised:

The appellant denied the existence of any express or constructive notice about the title of bunno Beebee. The respondent stated that the duty of appellant to take notice regarding every fact and circumstances relating to the property was not fulfilled in the current case.

The appellant contented that his father bought property from Bunno Beebee without receiving any notice about her having Benami title over the property and from the side of respondent it needs a stronger case to defeat the title after them having such long procession over the property.

Judgement:

The court held that, *"It indeed is a principle of natural equity which should be applied that where one person allows an another person to hold himself as an owner of property and a*

⁴Ramcoomar Koondoo Vs John McQueen, (1872) 11 Beng LR 46.

third person buys it, for consideration, from the ostensible owner under the belief that he is actually the real owner should not at all be permitted to recover under a secret title, unless and until he can overthrow that the notice, or something similar to which can amounts to constructive notice which must have to put him upon under an enquiry, that, if it would have been prosecuted then it would have led to a discovery of it”.

Under this case it was held that the appellant cannot take back the property from the third party since the sale of the property was valid in eyes of law. Through this case, the concept that arose from this case can also be witnessed under section 41 of the transfer of property act.

III. MEANING OF OSTENSIBLE OWNER

The term ‘ostensible’ means ‘apparent’ or ‘something which is seeming’. The person ostensible owner is known as a person who appears or seems to be the owner of immovable property in question even though he in reality is not the real owner of the property in question. The provisions of transfer by ostensible owner are mentioned under the section 41 of the Transfer of Property Act, 1882.

Ostensible owner in simpler sense is not even the real owner but someone who can represent oneself as the real owner of the property in question to the 3rd party under the dealings. The ostensible owner has attained that right over the property in question by certain wilful neglect or acquiesces from the real owner of the said property in question thereby making him a seemed or ostensible owner.

If a person who has gone outside the country for certain years and had given his property to his family relative for making use out of it for assuming an agricultural purpose and for any other purposes that may deem fit to him or the circumstances. Under this case the family relative of the person who went abroad are the ostensible owner and in case if during that period, the family relative sells the property said property in question to any third party, then the real owner (here the one who went abroad) after coming back cannot claim his property that he gave to his family relative or cannot state the sale of property since it was authorized by him therefore the transfer is not valid.

Another example to understand the concept can be when the property in question is under the wife’s name however the husband used to take care or was in charge of the property as well as the other dealings which were related to the property in question. In this case, if the husband in future sells off this property in question then the wife cannot claim her property back.

In the case of *Mohamad Shakur v Shah Jehan*⁵, where the real owners of the property lived in a different village from the property and they had authorized a widow to use the said property in question the way she liked and afterwards in future she sold the said property in question. Under this case, the real owner lost the claim over the property and the transfer was held valid.

Jaya Dayal Poddar Vs Bibi hazra:

Under the case of **Jaya Dayal Poddar Vs Bibi Hazra**⁶, where the circumstances of the case revolved around the question of ostensible owner, the supreme court gave few tests to determine whether the person was ostensible owner or not. The tests were as follows:

1. **Test 1** is to search the source of the money. The money in question is the one through which the purchase of property had taken place. The test is to find out that whether the source (i.e. the person from whom the money is taken) his name is in the documents of the property or whether some other person's name is involved in it or present in the document. In simpler words, it is to be proven that the money for purchase came from some other than the person in whose name the purchase was actually made.

2. **Test 2** is to determine the intention. Under test 2 it is to be determined whether the person whose name is mentioned in the document does really have an intention to purchase the property or not.

3. **Test 3** is the most essential test of all to determine whether a person is ostensible owner or not. In order to establish this test, one needs to find out who in reality is enjoying the benefit of the property. Is it the person who purchased the property or someone else? Here the term enjoyment of the property must be understood well. Mere residence or possession does not constitute to be enjoyment of the property however the right to transfer, right to give on lease, right to get consideration for same are the wider aspects for the terminology of enjoyment of property.

If the person who is enjoying the property is not the same person whose name is given in the legal authoritative document then in that case, the chances of property in possession of ostensible owner who is completing the wishes or task of real owner is more.

4. **Test 4** is more of a concluding one. Under this test it is to be verified about the reason why the property was bought under the name of ostensible owner and not the real owner. The test seeks the reason behind the aspect of the ostensible owner.

⁵Mohamad Shakur Vs Shah Jehan, 63 IC 125.

⁶Jaya Dayal Poddar Vs Bibi Hazra, (1974) 1 SCC 3(India).

IV. ESSENTIALS DURING TRANSFER BY OSTENSIBLE OWNER

The following conditions are necessary for taking the benefit of Section 41⁷-

- (1) The transfer must be done by an ostensible owner,
- (2) There should be express or implied consent of the real owner at the time of the transfer of property to the ostensible owner.
- (3) The ostensible owner must get some consideration in return of the transfer.
- (4) The transferee of the property must have acted in good faith, taking reasonable care in ascertaining that the transferor has the power and authority to make the transfer.
- (5) This section is only applicable to immovable property.

V. ROLE OF CONSENT

The main rationale of Section 41⁸ is to protect the rights of the innocent third party who had purchased the property when the real owner was himself at fault by not protesting the transfer.⁹ But a necessary requirement is that the real owner should have the capacity to give the consent¹⁰ and that consent should not be obtained from any illegal or unlawful act. In the case of minors transfer, even if the ostensible owner asserts that he has the consent of the minor, it will be held to be of no consent as minors have no such capacity to give the required consent.¹¹ This was established in the case of *Satyanarayana Murthi vs. Pydayya*¹², that consent need not be taken from the real owner and it might also be the case or possibility that the true owner had no such knowledge of the transfer. The consent must be a real consent. It must not have been obtained by fraud, coercion, force or undue influence¹³ practised by the ostensible owner on the real owner of the property. The consent can be express or implied in such transactions.

Express and Implied Consent

In cases, where the consent is given in words, either spoken or written, it is an express consent. Where the consent is given by a manner of conduct, it is implied consent.¹⁴

The consent is defined as implied where the real owner has knowledge of the fact that the

⁷ Transfer of Property Act, No. 4 of 1882, § 41

⁸ The Transfer of Property Act, No. 4 of 1882, § 41

⁹ *Lickbarrow Vs. Mason*, (1787) 5 Term Rep 683.

¹⁰ *Sambhu Prasad Vs Mahadeo Prasad*, [1933] A.I.R. 493 (All).

¹¹ *Abdulla Khan v Bundi*, (1912) ILR 34 All 22; *Gadigeppa Vs Balangauda*, [1931] 741 (ILR 55 Bom).

¹² *Satyanarayana Murthi Vs. Pydayya* [1943] A.I.R. 459 (Mad)

¹³ The Indian Contract Act, 1872, Act No. 9 of 1872., §14.

¹⁴ AVTAR SINGH & HARPREET KAUR, TEXTBOOK ON TRANSFER OF PROPERTY ACT, 6th ed.

ostensible owner is dealing with the real owner's property as his own but the real owner remains silent or acquiesces. Such acquiescence or silence in this case amounts to consent. But in the situations where the real owner is himself not aware of his ownership rights, his silence will not amount to his consent. In such a case, his silence would not exclude him from claiming that the transfer is made by an unauthorized person. The real owner will be entitled to avoid the sale and Section 41 will not come to the protection of the transferee.¹⁵

It is not required that the real owner of the property has to give express consent or give his consent in writing.¹⁶ Hence, where another person is trading with the property of the real owner, as if the property was his own, and the real owner has knowledge about it, then it will be said, as an implied consent on the part of the real owner.¹⁷

Attestation does not imply consent by itself. However, if it is manifested that the attestation took place in circumstances which involved the knowledge of the real owner or consent of him to the transaction, it may be regarded as an implied consent.¹⁸

In the case of *Shamsher Chand v Bakshi Meher Chand*¹⁹, it was held that, if the party in transaction is not responsive or aware of his rights or is silent about them, then in such cases it cannot be said that the real owner had given consent to the transfer of the property. It is prerequisite that a person who is not aware of his rights could never have consented to that and such a transaction will not be valid.²⁰

Consideration

Consideration is one of the essential if there is a transfer by ostensible owner. The property cannot be given away as a gift. If the transfer is done without consideration, i.e., gratuitous, this section will not apply. The Indian Contract Act, 1872 states that consideration is necessary component of any contract and transfer of property by an ostensible owner is done by way of contract only. Also Section 4 of the Transfer of Property Act states that anything not expressly defined in this act shall be deduced from the general definitions given under the Indian Contract Act, 1872.

Reasonable Care

Reasonable care means such care as a man of ordinary prudence would take in his own case. Reasonable care is to be expected from everyone who demands to have purchased free from a

¹⁵ Ibid

¹⁶ DR. POONAM PRADHAN SAXENA, PROPERTY LAW

¹⁷ *Sara Chunder Vs. Gopal Chunder*, (1893) ILR 20 Cal 296

¹⁸ *Tarabag Khan Vs. Nanak Chand*, (1932) 138 IC 263 : AIR 1932 Lab 566

¹⁹ *Shamsher Chand Vs. Bakshi Meher Chand*, AIR (1947) Lah 147

²⁰ *Gulam Ahmed Vs. Basheer Ahmed*, [1960] A.I.R. 99 (Mad)

really existing right.²¹ There exists no possibility to mention any general rule of enquiry which may be called reasonable care for all the cases. The standard of enquiry expected from the transferee depends upon the circumstances and facts of each case.

In the case of *Mathura v. Ambika*²², the real owner sold the property to another person and got it registered before the transfer was made by the ostensible owner could be registered. It was held that the transfer made by the real owner would be considered valid as he has a superior title over the property than the ostensible owner in this case. The rights of the third person who purchased this property from the ostensible would not be safeguarded under this section.

Proper Inquiry

Proper inquiry as observed by the courts in India held that this being subjective, it will depend on the facts²³ and circumstances of each case. It can also be the case that what amounts to a proper inquiry in a specific case may not be called as proper inquiry in the another case with completely dissimilar facts.

In the case of *Azima Bibi v Shamalanand*²⁴, the transfer was made by Mahmomedans. The court held that the purchaser is required to inquire if there is any female heir also in the family. As in certain cases only males transfer the property without even taking the consent of the females. It will not be considered as a valid transfer because they also have a share in the property. Thus, the third person has to inquire about such things.

The ultimate test is that the, “transferee should show that he acted like a reasonable man of business and with ordinary prudence.”²⁵

Good Faith

Good faith means the *bona fide* intention, i.e., the transferee had acted sincerely and honestly that the ostensible owner was the real owner after all the enquiries are made by him.²⁶

In cases, where after the proper inquiry is done and the transferee has knowledge that the person selling him the property is not the real owner but only the ostensible owner, the transferee cannot neglect true and real facts.²⁷ A person cannot because of his own negligence claim protection of this act. The rights of real owner need to be ensured and protected against

²¹ *Zungabai Vs. Bhawani*, (1907) 9 Bom LR 388

²² *Mathura v. Ambika* (1914) 993 (All) LJ

²³ *Abdul v. Nawab*, [1949] A.I.R. 17 (Assam)

²⁴ *Azima Bibi v Shamalanand*, (1913) ILR 40 Cal 378.

²⁵ *Fazal Husain vs Muhammad Kazim And Ors.*, [1934] A.I.R. 193 (All).

²⁶ *Layak Ram v. Dharmavati*, [2010] A.I.R. 95 (P&H).

²⁷ *Laxman Sakharam Salvi And Others vs Balkrishna Balvant Ghatage*, [1955] A.I.R. 190 (Bom).

such persons. The rule of law states that, "*he who seeks equity must do equity*". Thus, the protection of this section will be accessible only for that person (transferee) whose own conduct is just, fair and equitable.²⁸

Burden of Proof

The burden of proof lies on the transferee to prove that the transferor was actually the ostensible owner and had the consent to sell the property.²⁹ The person has to prove that he genuinely acted in good faith and had taken all reasonable care that was needful from him while taking the property.³⁰ The transferee has to prove that he was not at fault while taking the property and also to shift the burden on the real owner.

VI. BENAMI TRANSACTIONS (PROHIBITION) AMENDMENT ACT, 2016

This Act prohibits the transfer by an ostensible owner (referred as Benami Transactions) and has made it illegal and unlawful with certain exceptions.

As per Section 2(9)³¹ "benami transaction" means,—

(A) a transaction or an arrangement— (a) where a property is being transferred to, or is held by, a person, and the consideration for such property has been provided, or is paid by, another person; and

(b) the property is being held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

There is a total prohibition against the real owner affirming his ownership rights against the benami owner.³² The property which is held and owned in the name of the benami owner is liable to be acquired by the government through a competent authority (appointed under the Act for this purpose) without paying any remuneration whatsoever³³. The burden of proof lies on the person who sets up the Benamidar.

Exceptions under the Act

According to Section 2(9) A (b) under The Benami Transactions (Prohibition) Amendment Act, 2016, Benami transactions is prohibited, but there are a few exceptions to this rule-

²⁸ AVTAR SINGH & HARPREET KAUR, TEXTBOOK ON TRANSFER OF PROPERTY ACT, 6th ed.

²⁹ Ram v. Muktinath, (1956) A.I.R. 154 (Assam).

³⁰ Gurbaksh Singh v Nikka Singh, (1963) 1 SCR 55 (Supp).

³¹ The Benami Transactions (Prohibition) Amendment Act, 2016 No. 43 Of 2016

³² Rai Sunil Kumar V. Thakur Singh, Air (1984) Pat 80.

³³ Thakur Krishna v. Kanhayalal, AIR (1961) All 206.

- The property which is held by a Karta or any other member in a Hindu Undivided Family and the property is held for the gain or benefit of the other coparceners of the family and the remuneration or consideration of which is given by the known sources of HUF will not amount to a Benami transaction.
- The property that is held by a trustee or other person who, in a fiduciary capacity has the benefit of another person for whom he has a trustee. This will not amount to a Benami transaction. Fiduciary capacity means, being in a position of a trustee and being in a position where the person can be affirmed to have duties of good faith, confidence, trust and transparency and one who must exercise a high standard of care in managing another person's property or money
- The prohibition on benami transactions does not apply to an individual who buys property in the name of his spouse or in the name of any child. But the consideration has to be paid by the known provenances of the individual.
- Where the person's property is held jointly by brother or sister or lineal ascendant or descendant and the consideration is paid by the known sources of the individual.

These exceptions are governed by Section 41 of The Transfer of Property Act, 1882 as these are not included in the definition of Benami Transactions under the Section 2(9) A of Benami Transactions (Prohibition) Amendment Act, 2016.

VII. CONCLUSION

The theory and concept of ostensible ownership is subjected to the provisions of Benami Transactions Act, 1988 (Which is now, Benami Transactions Amendment Act, 2016). After analyzing different case laws and concept of ostensible ownership, we reach to the conclusion that, Ostensible Ownership is a concept that derives its authenticity and legitimacy from the ideas of equity and natural justice, meticulously the doctrine of estoppels. It holds an exception to the doctrine, "nemo dat quod non habet" as it does, for reasons of equity, allow ostensible owners to deliver the rights of true ownership to the bone fide transferees.

Ostensible ownership is irretrievably linked with the concept of Benami transactions. Benami transactions are defined under the Benami Transactions Amendment Act, 2016. The provisions of this Act do not apply, in usual bona fide transactions where person purchases property in the name of his wife or unmarried daughter. Therefore, after the passing of the Benami Transactions Act, the scope of application of Section 41 has become very narrow.
