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TRANSFER BY OSTENSIBLE OWNER

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ABSTRACT

Investment in property is renowned kind of investment that everybody is doing nowadays. But many people own their property in the name of other person. When real owner authorises any person to hold his property on his behalf, the person apparently owning the property is termed as an “ostensible owner”. Ostensible owner is not the real owner but an apparent owner but shows himself as real owner while dealing with the transactions with third party. Ostensible owner is not the real owner but an apparent owner but shows himself as real owner while dealing with the transactions with third party. The general rule is that the no person can transfer a right or greater title to another than what he himself possess. The principle is based on legal maxims “*nemo plus juris*” and “*nemo dat quod non- habet*” i.e. no one can transfer better title than he himself has.

The major focus of this paper will be revolving around Section 41 of Transfer of Property Act, 1882 which is transfer by ostensible owner. Benami Transactions (Prohibition) Amendment Act, 2016 and its salient features as well as its impact over the benami transactions will also be discussed in this article.

Keywords: Ostensible owner, benami, transactions, third party, consent.

INTRODUCTION

Ostensible owner is an apparent owner and transactions done by him is dealt under Section 41 of Transfer of Property Act, 1882. There are certain essentials given under Section 41 to be fulfilled in order to be an ostensible owner.

*Ramcoomar Koondoo Vs John McQueen*¹ In this case the court held that “*It is a principle of natural equity, which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can*

¹ Ramcoomar Koondoo Vs John McQueen, (1872) 11 Beng LR 46.

overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it”.

OSTENSIBLE OWNER

Supreme Court in the landmark judgment of *Jayadayal Poddar v. Bibi Hazra*² held that whether a person is an ostensible owner or not should be decided on the basis of circumstances and facts of the case. In this judgement the court decided that the following considerations must act as a test while deciding that a particular person is an ostensible owner or not:

- I. Source of the purchase money i.e. who paid the price?
- II. Nature of possession after the purchase, i.e. who had the possession?
- III. What was the motive for giving benami color to the transaction, i.e. why the property was purchased in the name of other person?
- IV. What is the relationship between the parties, i.e., whether the real owner and ostensible owner were related to each other or were friends or strangers?
- V. Who used to take care of the property and who had control over the property?
- VI. Custody of title deeds.

The following persons do not come under the category of ostensible owners because either they are qualified owners or restricted owners:

- I. A licensee in the possession of property³.
- II. A menial servant in occupation of the property⁴.
- III. A *mahant* of math's property⁵.
- IV. A manager in the possession of the property⁶.
- V. A co- sharer in occupation of joint family property⁷.
- VI. A professed agent⁸.
- VII. A donor who has not reserved to himself any power of revocation of the gift deed⁹.

²Jayadayal Poddar v. Bibi Hazra, A.I.R. 1974 S.C.171.

³ Chunilal Khemani v. Nilmadhab Barik., (1925) 41 Cal LJ374: A.I.R. 1925 Cal 1034.

⁴ *Id.* at 2.

⁵ Basdeo Gir v. Jugraj Parshad., 1949 Oudh WN 156.

⁶ Mohd. Suleman v. Sakina Bibi., (1922) 44 All 282.

⁷ Lakshmi Bai v. Ravji, (1949) A Kutch 34.

⁸ Damdar Singh v. Javitri, (1907) 29 All 282.

⁹ Aukumma v. Narsaya,(1947) AM 127.

VIII. A manager or trustee of an idol¹⁰.

A minor's guardian who transfers the property of a minor cannot be treated as ostensible owner with the consent of the minor, for the minor by the reason of the disability of infancy, cannot give his consent. The doctrine of estoppel does not apply to minors¹¹.

PROVISION UNDER TRANSFER OF PROPERTY ACT, 1882

According to Section 41¹² of the act “Where, with the consent, express or implied, of the persons interested in immoveable 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 simpler words,

- I. Where with the consent of the real owner (person interested in the property);
- II. Another person who is the ostensible owner of that immovable property;
- III. Transfers that property for consideration;
- IV. Such transfer shall not be voidable, by the real owner on the ground that the transferor was not authorized to transfer that property;
- V. Provided that the person to whom such transfer was made took reasonable care to find out that transferor had the power to make the transfer or not and acted in good faith.

Essential Requirement of Section 41

A transfer to fall under the ambit of transfer by ostensible owner under Section 41 must fulfill the following essential requirements:

(A) Consent from the real owner

It is required that the transfer of property must be made by the ostensible owner with the express or implied consent of the real owner and that consent should not be obtained by coercion, force, fraud or undue influence practiced by the ostensible owner on the real owner of the property. The consent may be either express or implied. A consent is said to be express when it is given in words, either spoken or written. Where the consent is given by conduct,

¹⁰ Ratan Sen v. Suraj Singh, 2003 (4) RCR (civil) 23 (P&H).

¹¹ Sadiq Ali Khan v. Jai Kishore, (1928) 30 Bom. L.R. 1346.

¹² The Transfer of Property Act, 1882, § 41, No. 4, Acts of Parliament, 1882 (India).

it is implied consent. In *Gurcharan Singh v Punjab State Electricity Board Patiala*¹³ it was held that it is impossible for minor to give consent expressly or impliedly.

It was held that where the owner authorises his attorney by a power of attorney sell his property, which the attorney sold by the registered deed, it was held that a suit for injunction was barred by section 41¹⁴.

Implied consent

Where the real owner remains silent or acquiesces knowing that the ostensible owner is dealing with his property as his, such silence or acquiescence amounts to the implied consent. Mere silence would not amount to implied consent¹⁵. Negligence may amount to implied consent¹⁶.

(B) Consideration

The protection under this section is given only when transfer is for consideration. If transfer is gratuitous in nature *i.e* without any consideration, then this section will not apply. The principle of transfer by ostensible owner is inapplicable in case of gifts and other transfers effected without any monetary consideration¹⁷.

(C) Reasonable Care & proper enquiry

Reasonable care means such care as an ordinary man of business would take¹⁸. A duty is imposed on transferee to inquire into the title of the owner. In the case of *Nageshar Prasad v. Raja Pateshri*¹⁹ there was an error in the revenue records. The real owner already made a complain that the name registered under revenue records was of someone else. The person in whose name the records were registered sold the property to the third party and third party without making proper inquiry took the property and real owner objected this transfer. The court held that there was a lack of reasonable care on the part of transferee and that is why no protection under section 41 will be given to him. The standard of enquiry expected by the transferee depends upon the circumstances and facts of the case. Mere good faith is not sufficient, the purchaser must proof that he has made reasonable enquires²⁰.

¹³ *Gurcharan Singh v Punjab State Electricity Board Patiala*, AIR 1989 P&H 127.

¹⁴ *Samay Singh v Hukum Singh Chauhan*, AIR 2007 (NOC) 2054 (Utr).

¹⁵ *Ghulam Ahmed v Bashir Ahmed*, AIR 1960.

¹⁶ *Sita Ram v Raj Narayan*, AIR 1934 Oudh 283.

¹⁷ *Atal Shrivastava v Devprasad*, AIR 2012 Chh 117: 2012 (1) CGBCLJ 411.

¹⁸ *Kanhu Lal v Palu Sahu*, (1920) 5 Pat LJR 521.

¹⁹ *Nageshar Prasad v. Raja Pateshri*, (1915) 265, (20 Cal WN).

²⁰ *Khawaja Afzal v. Mohammad Saheb*, (1936) Nag 177.

(D) Good faith

The fourth essential is that the transferee has acted in good faith. Good faith means *bona fide* intentions, i.e, the transferee has acted honestly and has real belief that ostensible owner is the real owner. In simpler words, where a purchaser, purchases a property after due enquiry and took reasonable care and honestly believed that the seller was the real owner of the property, he will be protected under section 41. But where the purchaser knows that the person from whom he is purchasing the property is ostensible owner and not the real owner of the property, the transferee could not neglect that fact²¹.

Burden of Proof

The burden of proof lies on the transferee he has to prove that he has acted with reasonable care and in good faith and he has done proper enquiry as regard to the title of the transferor. He has to further prove that the transferor is the ostensible owner and not the real owner. Then the onus is shifted to the party who wants to defeat the transferee's title to show that there was something which called for attention and inquiry.

When any person purchases a property pays the price for it and does not purchase in his own name but in the name of another person, that person in whose name the property is purchased is known as "*benamidar*" (ostensible owner).

Benami Transactions

When any person purchases a property pays the price for it and does not purchase in his own name but in the name of another person, that person in whose name the property is purchased is known as "*benamidar*" (ostensible owner).

BENAMI TRANSACTIONS (PROHIBITION) AMENDMENT ACT, 2016

Prohibition of Benami Property transactions Act, 1988 was the first act which dealt with the benami properties. The main purpose of the act was to keep track on benami transactions as well as it was passed with the objective of curbing black money. This Act only had 9 clauses and dealt with benami transactions in narrower sense. In July 2016 Government of India decided to amend the act and make it more stringent. After the amendment the new Benami Transactions (Prohibition) Amendment Act, 2016 came into force on November 1, 2016. It has 71 clauses and deals with benami transactions in detail.

The amended act defines the benami transactions and prohibits the benami transactions this

²¹ Laxman Sakharam Salvi And Others vs Balkrishna Balvant Ghatage, [1955].

act further discusses about the punishment in respect to the violation of the provisions mentioned in the act. This act has a retrospective effect.

According to the Benami Transaction (Prohibition) Act, 2016 where the property is transferred in *benami* (i.e in the name of another person), the real owner will be the person in whose name the property is held. It further provides that “*No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property*”²².

Conditions prior and after the Benami Transactions (Prohibition) Amendment Act, 2016

Under the old benami law, the properties which were benami in nature for which the consideration had to be paid, only those properties were acquired by the government. But after the amendment of 2016 in benami laws, once the property is declared to be benami in nature it will automatically vest in the government without payment of consideration.

Under the new benami law, innocent buyer can also be penalised. For instance, “A” was to buy a house from “B” but later on finds out that the house was benami property and “B” is the benamidar holding the property on the behalf of the real owner who has actually paid the consideration for purchasing that property, the said house could be attached by the government even though “A” has paid the consideration out of known sources.

Categories of Benami Transactions

Section 2(9) of Benami Transactions (Prohibition) Amendment Act, 2016 benami transactions are defined under four categories following are the categories

Category A: Transaction or an arrangement where the consideration is paid by the person other than the transferee or the benamidar under whose name is property is held.

A transaction to fall under the ambit of this category has to fulfil certain conditions:

- There is a transaction or an arrangement, in the property held by benamidar.
- Consideration is paid by the person other than the benamidar.
- Benamidar is aware of the arrangement or transaction and does not deny to it.

²² Benami Transaction Act, 1988, § 4, No. 45, Acts of Parliament, 1988 (India).

- Property is held by the benamidar for the immediate or future benefit, direct or indirect, of the person who has provided the consideration²³.
- The possession of the property is with the benamidar.

Exceptions to this category-

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

- I. Where *benamidar* (in whose name the property is held) is a coparcener in a Hindu Undivided Family and the purpose behind, is the benefit of the coparceners in the family.
- II. Where the property is held in the name of spouse or child.
- III. Where property is by individuals in joint name of brother/sister/self or linear ascendant or descendant.
- IV. Where the person in whose name the property is held is a trustee or other person standing in fiduciary capacity.

Category B: Where transaction is carried or made in a fictitious name

Category C: Transaction or arrangement in respect of property is benami transaction if owner is not aware of, or denies knowledge of, such ownership.

Category D: Transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

For the purpose of deciding whether a transaction is *benami* transaction or not, the motive of the person advancing the consideration for the transaction is the significant factor. In *Nand Kishore Mehra v. Sushila Mehra*²⁴, it was held by the Supreme Court that where a person purchases a property in the name of his unmarried daughter or his wife he can claim the property later, but he has to prove that the property was not purchased for their benefit.

Benami Transactions and Section 41 of Transfer of Property Act, 1882

Section 3 of the Benami Transactions (Prohibition) Amendment Act, 2016 imposes a prohibition on benami transactions on the contrary section 41 of Transfer of Property Act, 1882 allows such transfer, indicating that section 41 is subject to the provisions mentioned under Benami Transactions (Prohibition) Amendment Act, 2016.

²³ Benami Transaction Act, 1988, § 2 (9) (a), No. 45, Acts of Parliament, 1988 (India).

²⁴ *Nand Kishore Mehra v. Sushila Mehra*, JT 1995 (5) SC 130: A.I.R. 1995 SC 2145: 1995 (1) SCC 519

CONCLUSION

In a nut shell, doctrine of transfer by ostensible owner states that an ostensible owner is an individual who is not the real owner of the property and shows that he is the real owner of the property while dealing with third party. If the consent of real owner is involved in the transfer done by ostensible owner, then later he will be estopped from taking action against the ostensible owner. The doctrine expects transferee to do enquiry as to the title of the transferor by acting honestly and under good faith with reasonable care.

Transfer by ostensible owner or benami transactions both are similar in nature. With the increase in benami transactions new amendment was made in old beanami laws in 2016. The Benami Transactions (Prohibition) Amendment Act, 2016 prohibits the benami transactions and imposes a stringent punishment on those who violate the provisions of the act. Since the act came into effect around 140 cases regarding benami properties have been noticed of having worth around 200 crores²⁵. Despite of the amendment made in the laws regarding benami transactions there is still many cases reading the same are rampant in India.

Suggestions:

With the continuous development in the society as well as in technology many people come up with new and different ideas regarding holding benami properties, in these circumstances the laws regarding the benami transactions should be made more stringent and should amend from time to time.

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²⁵ Press Information Bureau, Government of India, Ministry of Finance,
<https://pib.gov.in/newsite/PrintRelease.aspx?relid=159882> (last visited Jan. 7,2022).