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TRANSFER BY OSTENSIBLE OWNER SECTION 41

AUTHORED BY - CHANCHAL RANI

Introduction

‘Property’ acts as one of the most indispensable needs of human life. In India, the right to property was provided as a fundamental right under Article 31, but it was abrogated by the 44th Constitutional Amendment Act, 1978 and subsequently replaced by Article 300A, which made it a constitutional right instead.

Possession, contract, title documents, and other methods can be used to transfer properties from one person to another for consideration. Various laws have been created to guarantee the seamless transfer of property, whether it is movable or immovable. The Transfer of Property Act (‘the Act’) was enacted in 1882 to codify and harmonise all of the existing customary rules regarding the transfer of property. It solely deals with the transfer of property inter-vivos, that is, between living persons.

The principle of an ostensible owner performing the transfer of property was established to defend the rights of innocent third parties against actual property owners, it is codified under Section 41 of the Act. Innocent third parties’ rights are protected by this principle. It also discusses the different components and requirements that must be met in order for the plaintiff to profit from this concept, as well as its implementation in several case laws both before and after India’s independence.

Meaning of Ostensible Owner

The term ostensible can be explained as something that appears to be true but is not actually true. An ostensible owner is a person who has every indicia of ownership of a property but is not actually the real owner of it. An ostensible owner of a property is a person whose name appears on the records and is in the possession of the property but he/she never intended to own the property.

Principle

The principle is that of the two innocent persons or equally guilty persons if the law has to

make its choice as to whom to penalise, the law will choose the person whose indiscretion has enabled the fraud and favours him who is in possession.

The rule in this section is based upon the doctrine of estoppels 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 overthrow that of the purchaser by showing that either he (the purchaser) had a direct notice, or something which amounted to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an inquiry which, if prosecuted would have led to a discovery of it –

Ram Coomar v. McQueen 18 WR 166.

An exception to the ‘Nemo Dat Quod Non Habet’ rule

The rule enunciated in Section 41 acts as an exception to the general principle that a person cannot transfer a superior title to property than what he holds i.e. ‘Nemo Dat Quod Non Habet’. Section 41 is a well-accepted exception to this general principle. If the real owner, for example, entrusts a particular person with the title papers in any reasonable manner and makes him an ostensible owner, then a third party who (after appropriate investigation) trades with such an ostensible owner in a bona fide manner might obtain a valid title to the property as against the real owner.

Ram Coomar v. McQueen

Facts:

Alexander Macdonald, who lived in Calcutta, and lived with his mistress, Bunnoo Bebee had two children by her, Alexander Macdonald, who is dead; and Maria, one of the respondents, who married Mr. McQueen, the other respondent.

The land, which is perpetual leasehold, at a fixed rent, was conveyed in August 1831 by the then proprietor in the name of Bunnoo Bebee by a deed of sale, and with consideration of Rs. 130.

The deed was registered, and thereupon the zamindar granted a fresh pottah to Bunnoo Bebee, at the fixed rent of Rs. 35. The possession of the land and the buildings did not appearing to be

with Macdonald, the father.

But it is clear that, after his death, Bunnoo Bebee resided on the property for some time. Later, she left the property and started receiving rents from the tenants. Then, in June 1843, she sold the property to Ramdhone Koondoo, and conveyed it to him by a deed of sale. The consideration she obtained was Rs. 945.

At the time she sold, she made a surrender to the zamindar of the leasehold interest, and a fresh pattah was granted to the purchaser, under which undisputed possession was held for 24 years. During that time the purchaser erected considerable changes upon the land, and increased the value to such an extent that the property is valued Rs. 40,000 at the time of institution of suit. Bunnoo Bebee died before the commencement of the present suit but there is a contest as to the time of her death as well. It was material only as regards the price at which she sold the land was Rs 945 while the original price having been Rs. 130 when the lease was bought by Macdonald.

He then built a house upon it, and let it to the male respondent, who, having married the female respondent, remained in possession, and having failed to pay the rent, Ramdhone brought an action of ejectment in the Supreme Court, which, being undefended, resulted in judgment against the casual ejector, and possession being obtained. Soon afterwards, Bebee Bunnoo being dead, the respondents brought the present suit as devisees in remainder to eject Ramdhone's family.

The Calcutta High Court decided in favour of Macqueen whereupon Ram Coomar, son of Ramdhone who was then substituted in the place of his father, approached in appeal to the Privy Council.

Issues

1. Whether the property was of Macdonald's?
2. Whether it came by his will to Maria Mcqueen?
3. Whether the appellants purchased bona fide for valuable consideration without notice?

Judgment

The answer of the appellants is that their father purchased the estate of Bunnoo Bebee without any notice of the benami title, and that they are entitled to hold it, notwithstanding there may

have been, originally, a resulting trust in favor of Macdonald. It certainly would require a strong case, to be established on the part of the respondents, to defeat a possession for so long a period, of property for which full value had been given to the person in the apparent ownership of it. The burden of proof lies very strongly on them in such a case. They have of course to establish, in the first instance, the fact that the purchase was really made by Macdonald, and with Macdonald's money, on his own behalf. The respondent failed to produce the evidence for this. Moreover, after Macdonald's death, Bunnoo Bibee treated the property as part of the estate of Macdonald. Their Lordships held that the appellants have established their right to hold the property against the benami title.

(It was there by held that the plaintiff cannot take back the property form the third party and that the transfer was a legitimate transfer in the eyes of the law. This wordings used in this case can be seen in the S. 41 of the Act which deals with Ostensible owner.)

Ratio of the Judgment:

“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 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 discovery of it. For invoking Sec. 41 the following conditions have to be satisfied:

- (1) the transferor is the ostensible owner
- (2) he sold with the consent, express or implied, of the real owner,
- (3) the transfer is for consideration and
- (4) the transferee had acted in good faith taking reasonable care to ascertain that the transferor had power to transfer.

Unless all the above conditions are satisfied, the person claiming the benefits would not be entitled to the same.

Ingredients of Section 41

The ingredients of sec. 41 are:

- i. The transferor is the ostensible owner
- ii. He is so by the consent, express or implied, of the real owner
- iii. The transfer is for consideration
- iv. The transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer.

Hardev Singh v. Gurmail Singh (2007) 2 SCC 404.

Proof necessary –

In order to succeed in a plea of bona fide purchaser, under sec. 41 of the Transfer of Property Act, it is to be proved, that the transferor is ostensible owner. That he is so with the consent, express or implied, of the real owner. That the transfer is for consideration, and that the transferee has acted in good faith taking reasonable care to ascertain that the transferor had the power to transfer.

Consent of real owner

In the case of Seshumull M. Shah v. Sayed Abdul Rashid AIR 1991 Kant 273 it has been held that in every case, where a transferee for valuable consideration seeks protection u/s 41 of the TPA, the transferee must show that the real owner had permitted the apparent owner either by express words, consent or conduct to transfer the property in favour of the transferee. In other words, it must be shown that with the consent of the true owner, the ostensible owner was able to represent himself as the owner of the property to the purchaser for value without notice.

For the application of this section it is essential that the consent of the true owner to the possession of the ostensible owner must continue up to the date of the transfer; but it is not necessary that the transfer itself should be with the consent of the owner.

Minors

Principles of equitable interest contained in this section does not affect minor's interest. Where the alienation is made by the ostensible owner of a minor's property. It is impossible for the latter to give his assent, either expressly or by implication hence this section does not apply.

Reversioner

Since a Hindu female (holding a life-estate) cannot transfer any property without legal necessity, it follows that if she orally transfers a portion of the property to a reversioner and

puts him in possession, such reversioner cannot be called an ostensible owner with the consent of the female or of the other reversioners.

Benami transactions

The Benami Transaction (Prohibition) Act of 1988 states that when the transfer of a property is done benami (that is, under the name of some other person), the person who holds the property becomes the real owner. The benamidar is only a trustee for the real owner and merely acts as a representative. If a property is acquired in the guise of a benamidar and the indicia of ownership are entrusted to him, the real owner can only overcome the impact of alienation by demonstrating that it was done without his consent and that the buyer was aware of it. No litigation, actions, or claims to enforce any right concerning the property held benami against the person in whose name the property is held, or any other person claiming to be the real owner of the property, is allowed under the Act.

In other words, following the implementation of the Act, the real owner is no longer able to reclaim the property from the benamidar by instituting any legal suit. The argument of being the real owner is likewise unsustainable.

However, the Act offers certain exemptions when the provision of Section 41 do not apply:

1. When the person in whose name the property is held acts as a coparcener and that property is being held for the benefit of all coparceners in the Hindu Undivided Family, or
2. Where the person in whose name the property is held is a trustee or some other person acting in a fiduciary position and the property is held for the benefit of another person towards whom he acts as a trustee or in a similar capacity. Excluding the cases where he is a coparcener in a Hindu Undivided Family or a trustee acting in a fiduciary capacity, an ostensible owner or benamidar will become the real owner. Therefore, except if benamidar is a coparcener or a trustee acting in a fiduciary position, the provision established by Section 41 of the Act stands to be modified.
- 3.

Benamdar

The expression “benami/transaction” as understood in law represents a transaction where a person buys property with his money, but in the name of another person, or buys property in his own name, but subsequently transfers it in the name of another person, without any intention

in either case to benefit such other person.

Benami Transaction, proof of

The Supreme Court noted in **Jayadaya Poddar v. Bibi Hazara (1974)**

that whether a person is an ostensible owner is a subjective matter that depends on specific facts and circumstances. When determining whether a person is an ostensible owner or not, the following factors must be considered:

1. Who paid the price, or who paid the purchasing money?
2. Who held possession following the purchase, i.e. who owned the property?
3. The motive for acquiring the property in a benami fashion i.e. why was the property acquired in the name of someone else?
4. Relationship between the parties, i.e., whether the real and ostensible owners were familiar with each other or not?
5. The parties' conduct in managing the property, i.e. who used to look after, oversee and manage the property?
6. Who had custody of the title deeds?

Principles for determining benami/transaction

The principle on the basis whereof determination of the question as to whether a transaction is a benami or not depends upon a large number of factors which have been considered by the Supreme Court in *Thakur Bhim Singh v. Thakur Kan Singh* (1980) 3 SCC 72.

Voidable

This section does not say that a purchaser from the ostensible owner who purchases with notice of the real title acquires no title. He acquires a title which is voidable at the instance of the real owner, and until his purchase is avoided, he cannot deal with the property.

Transfer by ostensible owner, when not valid

The general rule of law is undoubted, that no one can transfer a better title than he himself possesses; *nemo dat quod non habet*. However, this rule has certain exceptions and one of them is, that the transfer must be in good faith for value, and there must be no misrepresentation or fraud, which would render the transactions as void and also that the property is purchased after taking reasonable care to ascertain that the transferee has the requisite power to transfer the said land, and finally that, the parties have acted in good faith, as is required under sec. 41 of the TPA, 1882.

Good Faith

No more enquiry than to ascertain that the seller's name was recorded in revenue papers does not constitute acting in good faith.

Fiduciary relationship, whether based on trust or confidence

In determining whether a relationship is based on trust or confidence, relevant to determining whether they stand in a fiduciary capacity, the court shall have to take into consideration the factual context in which the question arises for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case.

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