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AN DETAILED ANALYSIS OF OSTENSIBLE OWNER UNDER TRANSFER OF PROPERTY ACT, 1882.

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ABSTRACT

The concept of a transfer made by an “ostensible owner” under the Transfer of Property Act 1882, holds significant importance in the Indian legal system. An ostensible owner is an individual who appears, by consent of the true owner, to the true owner, to be the owner of property and has the power to transfer it, though they are not the actual owner. This section aims to balance the rights of the real owner and the protection of bona fide purchasers who act in good faith without notice of the true ownership. Under Section 41, if an ostensible owner transfers the property for value and the transferee acts in good faith after taking reasonable steps to verify the title, the law deems such a transfer as valid. This principle promotes the security of property transaction by ensuring that the transferee is not adversely affected by hidden ownership claim. For the protection to apply, certain conditions must be met: (1) consent from the real owner, (2) the ostensible owner has a semblance of ownership, (3) the transfer is made for valuable consideration, and (4) the transferee acted in good faith. The doctrine of transfer by ostensible owner draws its roots from equity principles, ensuring a balance between the rights of the actual owner and the interests of bona fide purchaser. This doctrine is essential in cases where the real owner, by their conduct or negligence, enables an ostensible owner to appear as the rightful owner to third parties. The main aim of the paper is to focus on the ascertainand validation of the concept of ostensible owner and how it is supported by statutory and jurisprudential methods with the help of various conditions and specifications in form of principles and laws.

Keywords – Ostensible owner, Section 41 of Transfer of Property Act, Benami Transaction, Nemo dat quod habet, Capacity to transfer.

1) INTRODUCTION:

The concept of “**Transfer by Ostensible owner**” is covered by these two board principles.

1. **Nemo dat quod non-habet** which means no one has a higher right over property than what he possesses.
2. **Nemo plus Juris and alium transferee potest qum ipsa habet** which means no person can transfer a title or right over the property greater than what he has. “**Ostensible**” means “**apparent**” or “**seeming**” In other words, a person may have possession and enjoyment of property, and his name may be entered in official records, but he may not be the true owner of that property.

Section 41 of Transfer of Property Act, 1882 plays a pivotal role in safeguarding the interests of Bonafide purchasers in property transactions. It addresses situations where a person, who is not the true owner of a property, transfers the property to another individual under false impression or representation that they hold ownership. This provision ensures that a transferee who buys property in good faith and for consideration, believing the transferor to be the rightful owner, acquires a valid title, despite the transferor's lack of ownership.

This section 41 runs as follows¹:

“Transfer by Ostensible owner”- *Where, with the consent, express or implied of the person 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 the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.*

i.e. Suppose A is the real owner of property but he allows B to hold himself out to the world as the owner. Then if B as such ostensible owner transfers the property to C who is a bonafide transferee for consideration and without notice of A's title, C acquires a good title to the property. The ostensible owner B, though he himself did not have valid title, is able to transfer a good title to C.

The essence of this section is to prevent the wrongful loss of property rights to innocent purchasers who is misled by a representation of ownership. This section operates on the

¹ The Transfer of Property Act, 1882

principles of estoppel and good faith, offering protection to the transferee while simultaneously discouraging fraudulent claims to property. Though this provision, the law acknowledges that individuals who, by their conduct or representation, allow others to believe they possess ownership rights should not be permitted to deny those rights to unsuspecting party who acts in reliance on that belief. To understand the section better it is pertinent to elaborate on the essential conditions of section 41 to know who may avail of its benefits.

2) **SCOPE OF SECTION 41:**

Section 41 deals with a case where rights of innocent parties come into conflict.

This section sets forth the conditions under which protection is accorded to the bona fide purchaser for value. It is a settled principle of law that when the agreement is ambiguous or vague on any aspect, oral evidence can be adduced but when the agreement is specific and definite in its term, no oral evidence can be let in. Protection under sec 41 is available to a transferee acting in good faith after making reasonable enquiry. A transfer by ostensible owner will not be protected under sec 41 unless reasonable care and ordinary prudence on the part of the transferee is established. Transferee seeking protection u/s 41 must show that apparent ownership was created by real owner.

3) **ESSENTIAL CONDITIONS OF SECTION 41:**

1. **Transfer by ostensible owner:**

- i. The transferor must be an ostensible owner, which means he appears to be the owner but does not have an actual title to the property. The true owner has given him the apparent authority to deal with the property.
- ii. **Guru Narain Das v. Gur Tahal Das²**: This case discusses the concept of ostensible ownership and how a person who holds himself out as the owner can affect third party interests.

2. **Consent of the Real Owner:**

- i. The real owner must give express or implied consent to the ostensible owner to represent himself as the true owner of the property.
- ii. **Madhukar v. Sangram (1987)**- The Supreme Court held that the real owner's consent, whether expressed or implied, is essential for a transfer by an ostensible

² AIR 1952 SC 225

owner.

3. Consideration for Transfer:

- i. The transfer must be made for consideration, if the transfer is gratuitous, the protection under section 41 does not apply, as the element of exchange of value must be present. (gift)
- ii. **Sundaram Chettiar v. Ramaswami Pillai**³- The court ruled that section 41 applies only to transfers made for valuable consideration, emphasizing that gratuitous transfers are excluded.

4. Transferee's Good Faith:

- i. The transferee must act in good faith, which implies that they must genuinely believe the ostensible owner to be the real owner.
- ii. **Din Dayal v. Rajaram (1935)**- This case established that the transferee's good faith is crucial to protect the transfer, the buyer should have no reason to doubt the authority of the ostensible owner.

5. Reasonable Inquiry by Transferee:

- i. The transferee must have conducted reasonable inquiry regarding the ownership of the property before proceeding with the transfer.
- ii. **Mohammed Shafi v. Mohammed Noor (1949)**- The court observed that a transferee who fails to inquire about the ostensible owner's title cannot claim protection under Section 41.

6. Transfer Must Be Valid and Within the Ostensible Owner's Power:

- i. The transfer should fall within the power that the ostensible owner appears to possess. It must not exceed the apparent authority given by the real owner.
- ii. **Hiralal Agrawal v. Rampadarath Singh (1969)**- The court clarified that the ostensible owner could only make transfers within the authority granted by the real owner.

4) LEGAL PRINCIPLES UNDERLYING IN SECTION 41:

i) PRINCIPLE OF EQUITABLE ESTOPPLE:

This Section applies the principle of estoppel by representation, wherein the real owner cannot reclaim the property after allowing the ostensible owner to make a valid transfer to a third party. Section 41 operates on the principle of estoppel, meaning that the real owner is barred from

³ AIR 1930 Mad 927

challenging the transfer if they allowed the ostensible owner to present themselves as the true owner. Under Indian law, equitable estoppel is codified in Section 115 of the Indian Evidence Act, 1872⁴, which states:

“When one person has, by his declaration, act or omission, 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.”

This Section of the Transfer of Property Act enacts the rule of estoppel against the real owner of a property who:

1. Makes other believe that one individual has complete control over his property including the power of alienation.
2. Although such person is not authorized for such alienation of the property.
3. But the person alienates the property in the capacity of ostensible owner.
4. Such transfer is not gift and is done for a value or consideration in exchange of the property.
5. The transferee acts in a total bona fide manner and takes reasonable care to ascertain that the ostensible owner has the capacity to transfer such property.
6. If the above conditions are fulfilled then the real owner of the property will be prevented by this section from questioning the validity of such transfer on the ground of the capacity of the ostensible owner to transfer such property, i.e. whether the ostensible owner was competent to transfer the property or not.

ii) **DOCTRINE OF HOLDING OUT:**

a) **EFFECT OF SALE BY AN OSTENSIBLE OWNER:**

A transferee from the ostensible owner is protected against the real owner under the doctrine of holding out embodied in Section 41 of Transfer of Property Act. This section deals with a case where the rights of two innocent parties come into conflict. If a property is owned by A, but B is allowed by A to appear as the owner in the eyes of the public, and taking advantage of this B sells the property to a bona fide purchaser, then the question arises whether A can recover the property from such purchaser. Since the owner rendered the fraud possible by holding out B as the owner, he has to suffer. For this doctrine of holding out to apply the following conditions should be satisfied:

⁴ THE INDIAN EVIDENCE ACT, 1872- SECTION 115

1. The transferor should be the ostensible owner of the property.
2. The ostensible owner should be holding the property with the consent, express or implied, of the real owner.
3. The transferee should have paid consideration and acted with reasonable care and good faith. The onus is upon the transferee to show that he is a purchaser in good faith without knowledge of the real state of the title: *Suraj Rattan v. Azambad TeaCo.* (1965)⁵.

When these conditions are satisfied, the transferee from the ostensible owner protected against the claims of the real owner. This doctrine of holding out was recognized by Privy Council in **Ram Coomer v. Mcqueen.** (1872)⁶. In that case the property was purchased by Macdonald but the sale deed was taken by him in the name of his mistress Bunno Bibee. Bunno Bibee, is said to be benamidar a lender of her name for the transaction. So, as between Macdonald and Bunno Bibee ownership is only in Macdonald. X purchased the property from Bunno Bibee believing her to be the owner. He took possession. There was no objection by Macdonald. Later on Macdonald executed a will under which he bequeathed this property to the plaintiff. The plaintiff brought the suit to recover the property from the heir of X who had died by that time. The Privy Council described Bunno Bibee as the apparent owner, i.e., ostensible owner. She made the transfer for consideration. The purchaser was diligent, had made reasonable enquiries and had acted in good faith. In the circumstances, said the Privy Council, the purchaser's title cannot be impeached and the transfer set aside simply because the transferor was not the real owner. The doctrine of holding out thus cured the infirmity in the title.

The doctrine of holding out has been embodied in S. 41 of the Transfer of Property Act.

This section is not applicable to involuntary transfer like auction sales, case where alienation is made by an ostensible owner of property belonging to a true owner who is a minor, who cannot give his assent either expressly or by implication.

In **Phool Kuer v. Prem Kuer** (1952)⁷- a Hindu widow made a surrender of her limited estate in favour of A who was not the nearest reversioner. A sold the property to B. On the widow's death, the reversioner sued for possession of the property. B claimed that he was protected by the provisions of Section 41 of the Transfer of Property Act. The Supreme Court held that in

⁵ S.C. 295.

⁶ IA. SUP. VOL. 40

⁷ S.C.207

cases where a person who had allowed another to occupy the position of an ostensible owner has a limited estate, the provisions of Section 41 apply only during the lifetime of the limited owner. Section 41 is not available to protect transferees against the claims of reversioner for the reversioners do not claim in their own right and are not affected by the rule of estoppel on which Section 41 is based.

5) Exceptions To The Rule Nemo Dat Quod Non Habet (No One Gives Who Possesses Not):

For competency to make a transfer, the transferor should have title to the property or authority to transfer it. The general rule, therefore, arises that no man can confer a better title than that which he himself has. This is expressed in the maxim Nemo Dat quod non habet.

a) **Exceptions to the rule:** To the rule that no person can confer better title than what he has exceptions are recognized on equitable grounds. These exceptions are founded upon the principle of estoppel or election.

- 1) By the doctrine of holding out a bona fide transferee from an ostensible owner gets a good title to the property as against the true owner.
- 2) By the doctrine of estoppel feeding the grant a transfer is made to operate upon the subsequently acquired interests of the transferor and thus enables the transferee to acquire more than what the transferor could convey at the date of the transfer.
- 3) A person acquires a better title than the transferor when he can invoke the doctrine of election against the true owner of property.

6) Benami Transaction⁸ And Section 41 Of Transfer Of Property Act,1882:

Benami Transactions can often involve an attempt to disguise the true ownership of property. While Section 41 of the Transfer of Property Act can sometimes protect a transferee from title issues in cases of good faith transactions, this protection does not extend to benami transactions because these transactions are inherently designed to conceal the true ownership. In benami transaction, the true owner (beneficial owner) is the one who holds the beneficial interest, and such transactions are illegal under Benami Transactions (Prohibition) Act, 1988, and 2016 amendments. The Act is designed to curb such practices, as they are often used to evade taxes, launder money, or conceal the real ownership of assets.

⁸ Benami Transactions (prohibition) Act, 1988

1. **Tests of Benami ownership:**

The following are the test of benami:

- 1) Source of purchase-money. (A paid the consideration. So B is only benamidar).
- 2) Possession of the property. (If A retains possession, though property is in B's name, B is presumably a benamidar).
- 3) Relationship of parties.
- 4) Pecuniary circumstances of transferee.
- 5) Motive for transaction. (e.g. To put the property beyond the reach of creditors).
- 6) Custody of Title-deeds.
- 7) Previous and subsequent conduct of parties.

Nature of proof stated in **Valliammal v. Subramanyam and others**.⁹ If A buys property in the name of B, B (the transferee) is called a Benamidar. As between A and B, A is the real owner and can recover from B. B is the ostensible owner so far as the outside world is concerned. Burden of proof lies on person who claims the transaction to be benami. Although the Benami Transaction (Prohibition) Amendment Act, 2016 has provided certain exceptions to the said rule which are as follows:

- i. The property held by a Karta or any member of an HUF and such property is held for the benefit or gain of the other members of such HUF and the same is purchased by a known source of the HUF will not amount to a Benami transaction under the Act.
- ii. A person who purchases property in the name of his spouse or any child is not subject to the benami transaction restriction.
- iii. The property that is held by a person in the capacity of a trustee for the benefit of another person will not amount to a benami transaction/property.
- iv. When the property of a person is jointly held by the brother, sister, lineal descendant or antecedent and the consideration for the same is paid by a person who is a known individual to the owner.

The mentioned exceptions are the areas that are governed by the section 41 of the Transfer of Property Act, 1882.

⁹ AIR 2004 SC. 4187

CONCLUSION:

In Conclusion, Section 41 of the Transfer of Property Act, 1882 plays a pivotal role in safeguarding the rights of bona fide purchasers who acquire property from someone who may not have ownership or authority to transfer the property. This section provides protection to innocent buyers by allowing them to retain ownership, even if the seller does not possess clear title or the right to transfer the property. However, the protection is not absolute and is contingent upon the buyer meeting specific conditions, such as acting in good faith and without notice of the seller's lack of authority.

Section 41 of the Transfer of Property Act and the Benami Transactions (Prohibition) Act interact in a way that addresses the legality of property transactions and the protection of bona fide purchasers. Section 41 ensures that a person who purchases property in good faith, without notice of a prior claim, enjoys protection against any subsequent challenges to the title. This principle aligns with the Benami Transaction (Prohibition) Act, which aims to prevent property held under benami arrangement from being transferred in such a way that it appears as a legitimate transaction. Despite its positive implications, challenges regarding the application of section 41 persist, particularly concerning the determination of "notice" and the scope of "good faith" courts have been tasked with interpreting these elements on a case-by-case basis, which sometimes leads to inconsistencies. As such, section 41 continues to evolve through judicial interpretations, shaping the framework of property law in India.

In conclusion, while Section 41 strengthens the legal fabric surrounding property transactions, its effectiveness hinges on the proper application of its provisions and judicial oversight to ensure fairness and justice in cases involving defective transfers.

REFERENCE:

- 1) Transfer of Property Act, 1882- Bare Act.
- 2) Transfer of Property Act- G.C.V. Subba Rao
- 3) Law of Transfer of Property- V.P. Sarathi
- 4) The Transfer of Property Act-Dr. R. K. Sinha
- 5) The Indian Evidence Act, 1872- Bare Act.
- 6) Benami Transactions (Prohibition) Act, 1988.