



ORIGINAL RESEARCH PAPER

Law

STUDY ON APPARENT OWNER AS PER TRANSFER OF PROPERTY ACT, 1882: LEGAL PERSPECTIVE

KEY WORDS: Ostensible owner, Section 41 of TP Act, Capacity to transfer

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ABSTRACT

The word 'ostensible' can be explained as something that appears to be true but is not actually true. The ostensible owner of a property is thus cannot be a real owner of a property. He can merely represent himself as the real owner to the third parties or to the public at large. The ostensible owner of a property possesses all the rights of ownership in a property but without being the real owner of the same. These rights are acquired by him through the explicit or implied consent of the real owner. He is the full but unqualified owner and the real owner remains the qualified owner of the property. The doctrine of transferring a property by ostensible owner can be seen as an exception to the maxim "nemo dat quod non habet" i.e. no one has the power to confer a higher right on the property that is possessed by himself. The paper will be elaborating upon the concept ostensible owner and will be covering the rights and duties of the ostensible owner of a property in a detailed manner. The primary focus of the research work will be to focus on the justification and validation of the concept of ostensible owner and how such concept is supported by statutory and jurisprudential methods with the help of various conditions and specifications in form of principles and laws.

INTRODUCTION:

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 indicium 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. The real test is as to what is the source of the purchase money; the motive behind the same is to give a benami color to the possession of the property and as to who is enjoying the benefits of the property. This test for the real owner does not only differentiates between the real owner and the apparent owner of the property but also excludes the person who hold the possession of the property in a fiduciary capacity like agents, guardians etc. The general rule for transfer of property is that a person cannot transfer a property if he himself doesn't have a good title over it, but if the essentials of section 41 are fulfilled than such transfer can become voidable on the ground that the transferor was not in the capacity to make it. Hence section 41 is an exception to the above-mentioned rule. The intention of this section is to safeguard the purchaser from a situation where the real owner of the property tries to avoid the transfer on the ground that the transferor was not authorized to do so. Therefore, if the conditions of section 41 of the Act are met then it eliminates the probability of questioning a transfer of a property on the ground of the authority of the transferor. This section of the Transfer of property Act enacts the rule of estoppel against the real owner of a property who:

- Makes others believe that one individual has complete control over his property including the power of alienation.
- Although such person is not authorized for such alienation of the property.
- But the person alienates the property in the capacity of an ostensible owner.
- Such transfer is not a gift and is done for a value or consideration in exchange of the property.
- 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, i.e. the transferee is not aware of the actual/constructive notice of the facts.
- If the above conditions are fulfilled than the real owner of the property will be prevented by this section from question 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

Consent Of the Real Owner:

In order to succeed in the case of a bona fide purchaser, the express / implied consent of the real owner is very important to prove that the transferor is the ostensible owner of the said property. The consent of the real owner is the only thing that gives the ostensible owner a capacity to transfer the property hence such consent should be free and valid consent. Because the ostensible owner's possession is justified by the real owner's consent, and since that consent is so important, the real owner of the property should therefore be capable of giving consent for the transfer of the property and should have provided it voluntarily. The consent given on a mistake of fact may be justified but not the one based on a misunderstanding of legal standings. The transferor must establish that he or she was the ostensible owner with the real owner's implicit or express consent, but the transfer itself does not have to be with the true owner's consent.

Implied Consent:

The consent of the real owner need not be express or written; Section 41 also includes implied consent of the real owner. As aforesaid, the ostensible owner has to be in the possession of the property by the consent of real owner and has to hold himself out as the real owner of the property and allows others to deal with the property as his own. Such behavior and action of ostensible owner will amount to implied consent if the real owner is aware of the same. On the other hand, Negligence may also amount to implied consent. When two pardanashin women who have husbands, who are aware of the business, allows their brother to dissipate their share of the property, the brother is will be considered as the ostensible owner with the sisters' implied consent; however, when pardanashin women entrust the management of their property to male family members who deal with it without their consent, the consent cannot be assumed. Hence, the implied consent of the real owner can only be determined as true and valid when the real owner has the complete knowledge of the facts and circumstances with reference to the actions and representation of ostensible owner regarding the property.

Reasonable Care by Transferee:

It is absolutely essential as per section 41 to make sure that the transferee has taken due care like an ordinary man would

have taken. Even otherwise, in every case, it is the duty of the transferee to be vigilant for protecting one's rights and interests and do a proper due diligence of the property as an ordinary prudent person before getting engaged in the transfer. Sufficient care must be taken by the transferee of the property while inspecting the relevant documents and title of the said property. The section imposes a duty on the transferee to make regarding the capacity and title of the transferor. The transferee cannot acquit himself by stating that he entrusted such duty on his solicitor or merely relied upon the revenue entries¹⁷. To protect oneself from the charge of willful abstinence from reasonable inquiry and simultaneously protecting from the imputation of a constructive notice the transferee should show the initiation of such inquiry with the help of certain evidences like description of sale certificate, or the possibility of other sharers present in the case of a Joint Hindu Family.

Proper Inquiry

The transferee must make the inquiries like a reasonable and prudent person to safeguard his own interests. The reasonable care of transferee is subjective and has to be determined with reference to the facts and circumstances of every particular case before the court. The test for the transferee is the test of prudence but such test was properly applied or not can be a question that can also be raised in the second appeal of a case. It is also important for the transferee to inspect the capacity of the real owner of a property and not just the capacity of the ostensible owner as in certain cases the real owner of the property also don't have the capacity to transfer the property which results in a void transfer.

Transfer Not Voidable:

Section 41 of the Act makes the transfer as "not voidable" on the ground that the transferor did not have the authority to make it when the transferee has taken the reasonable care and has acted in good faith. Here the term 'voidable' does not mean that the entire dealing is not voidable. The section does not make the transaction null and void but only eliminates the power of the real owner to challenge the transaction on the ground of incapacity of the transferor, by making it not voidable. The transfer can stand voidable on different grounds but by the virtue of section 41, the real owner cannot challenge the same on the ground of transferor's incapacity.

Burden Of Proof:

Under this section, the burden of proving that the transferor is the ostensible owner and has all the indicia of an owner is on the transferee. The transferee has to prove that it is a benami transaction and the transferee is the ostensible owner. On the other hand, the transferee also has to prove that he has taken reasonable care and has purchased the property as a bona fide purchaser as per section 41. But if the transferee reports the existence of facts that are leading to a starting point of inquiry, which may further lead to the discovery of truth, on further investigation then the burden of proof shifts on the person. The transferee must show that he was not at fault while acquiring the property and that the burden of proof is shifted to the genuine owner.

CONCLUSION:-

The provisions of the Benami Transactions Act, 1988 apply to the theory and concept of ostensible ownership. Following a review of various case laws and the concept of ostensible ownership, we have come to the conclusion that Ostensible Ownership is a concept whose authenticity and validity are derived from ideas of equity and natural justice, particularly the theory of estoppels. It makes an exemption to the rule of "nemo dat quod non habet," allowing ostensible owners to transfer genuine ownership rights to bona fide transferees for grounds of equity. The concept of Benami transactions is heavily linked to ostensible ownership. Benami transactions are defined in the Benami Transactions Amendment Act of 2016. The restrictions of this Act do not apply in general bona

fide transactions if a person purchases property in the name of his wife or unmarried daughter.

REFERENCES

1. The Transfer of Property Act, No. 04, Acts of Parliament, 1882 (India).
2. The Transfer of Property Act, 41, No. 04, Acts of Parliament, 1882 (India).
3. Divyanshi Saxena and Gurusha Muniyal, Transfer of Property by Ostensible Owner, 3 Int. J. Law Mang. Humanities, 664 (2020).
4. Dhruvi Dharia, Ostensible Owner, ITJ.