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OSTENSIBLE OWNER: A MERE REPRESENTATIVE OR MORE THAN THAT?

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ABSTRACT

In RamcoomarKoondoo, a case concerning the transfer, by an ostensible owner, it was stated that the plaintiff can't reclaim the property from the third party and that, according to the law, the transfer was an authentic transfer. But who is an ostensible owner? And what is its use in current legal system?Thepaper examines the concept of 'ostensible ownership' in the light of the provision given under the 'Transfer of Property Act', 1882, ('the Act') and explores how it is governed and what are its essential components. It also examines the powers of the receiver of the property in making a transaction from an ostensible or apparent owner, depending on the degree to which the ostensible or apparent owner is entitled to that asset and obligationto determine that the person transferring was competent to transfer and be made in good conscience. It involves the concept of 'ostensible ownership'and who are the real owners and ostensible ownersduring the transfer. It also points out the use of ostensible ownership in our current legal system. The paper hence considers both the concept and usage of ostensible ownership in earlier times and in current times.

INTRODUCTION

The Act was passed to simplify the transfer or any transaction of property and to make it available to the general population. With respect to atransfer that must be followed, the Act sets down some general principles. The ostensible owner's transfer of property is an idea that has been assimilated to ensure the privileges of innocent third parties vis-à - vis the property's owner.

WHO IS AN OSTENSIBLE OWNER?

Ostensible means 'apparent' or 'seeming'. An ostensible or apparent owner is someone who, apparently or seemingly, seems to be the owner, although he is not, in reality.

Example: A woman who owns the property and allows her husband to deal with it. For paying the taxes, the husband's name is entered into the revenue or financial records, and property-related matters are finalized. Here, ostensible or apparent owner is the husband, while wife is the actual owner.

An ostensible owner for the transactions isn't the true or actual owner but can pose as the actual owner to the outsider i.e. the third party.¹ He has gained the right through the deliberate negligence or approval of the property's real owner thereby rendering him an apparent owner.

Example: An individual who has traveled to another country for certain years and has given the estate to his relative for utilizing it for rural purposes and for every other reason as he may esteem fit. In this situation, ostensible or apparent owner is the relative of the family and in the circumstance that, during that period, he sells the estate to an outsider, the real owner after his return, cannot claim his estate and state that the relative was not allowed to transfer his property.

"An ostensible owner is who has the ownership indicia, for instance, title, proprietorship, or entries and records that show ownership."²

In the above-noted case, the daughters succeeded in their father's property after the demise of their widowed mother. Regardless, they permitted a fatherly agnate, who was considered as a person of the family, to claim control of the property from that point onwards and permitted him to enter in an agreement to sell a bit of the property, and they permitted him to do as such, provided that the oldest of them lived with him; others were also not far away and had relationships of interest with them. The paternal agnate was held to be the property's ostensible or apparent owner by the daughters' tacit consent.

TRANSFER OF A PROPERTY BY AN OSTENSIBLE OR APPARENT OWNER

Where an individual is the property's ostensible or apparent owner, with either the express or tacit consent of persons involved in immovable property, and transfers it for some consideration,

¹*KannashiVershi v. RatanshiNenshi*, AIR 1952 (Kutch) 85.

²*Dambar Singh v. Jawitri*, (1907) I.L.R. 29 All 292.

the transfer will not be invalid as the transferor has not been allowed to do so:providing that the transferee, ensuing to finding a way to decide whether the transferor is authorized to transfer, had acted as per great confidence.³

This concept was used in the RamcoomarKoondoo⁴ case.

For this situation, the plaintiff who had acquired the land by the method of a will came to realize that another person had just bought this property in her name and consequently sold this property to a third individual, by causing him to believe that he had good title over that property. The entire transaction was a 'benami' transaction but was not known to anybody aside from the individual who sold the property. The plaintiff filed the case against the third person for the recuperation of the land possessionhowever the committee stated that:

“It is the concept of natural equity, that must be universally accepted, that when one man permits another to keep up himself as an owner of a property and a third individual buys it for consideration from anostensible owner in the conception that, that man is the actual owner, the person who thus permits the other to maintain our property shall not be allowed to regain his secret titleunless hetopples that of the buyer by proving that he had clear notice of the real title or anything that amounts to constructive notice, or that there were conditions that could have placed him on an investigation that would have contributed to its discovery if prosecuted.”

It was along these lines held that the plaintiff can't reclaim the property from the third party and that,according to the law, the transfer was an authentic transfer. These terms used for this circumstance can be found in the Act, which deals with the ostensible owner, i.e. under Section 41.

However, there are following exceptions to this. One of them is, that, if the true owner permits another to hole himself out as real owner a third person who (a) deals with the other person after

³The Transfer of Property Act 1882,(Act 4 of 1882), s. 41.

⁴*RamcoomarKoondoo v. John and Maria McQueen*,(1872) 11 Beng LR 46.

taking due care to determine that a transferor has the right or authority to transfer; and (b) behaves in good faith and, as against the true owner, securing good title of the property.

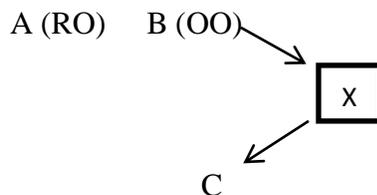
EXEMPTION TO THE RULE OF ‘*NEMO DAT QUOD NON HABET*’

The guideline in section 41 is an exemption to the general principle that an individual can't pass on a superior title of a property than the title he himself has i.e. ‘*nemodat quod non habet*’. There is a well-recognized exception to this concept that if the actual owner, as by endowing him with the title documents or in another manner, a third individual who, after due inquiry, deals or engages in with that other individual in a bona fide manner may, rather than the real owner, gain a good or decent title of the property. This section depends on the rule that where a blameless person has to suffer from fraud because of a third party i.e. an outsider, the loss ought to be with respect to the individual who made or could have forestalled the opportunity for fraud and that, in such situations, the difficulty is brought about by strict authorization of the general principle that nobody can present a higher or better right on the property than he has.

IMPORTANT POINTS

1. The property should be immovable.
2. Consent can either be expressed consent or implied consent.
3. Caveat emptor should govern the individual, purchasing the property.
4. The transferee is responsible for behaving in good faith.
5. The person purchasing the property should take a reasonable or due care to know that the ostensible or apparent owner has the power or authority to transfer.

Example: If A is the actual or real owner (RO) and B is ostensible owner (OO). X is the property and C is the transferee.



The following arrangement will not be voidable only because B is ostensible owner.

ESSENTIAL INGREDIENTS OF SECTION 41

In Hardev Singh's⁵ case, the court observed the following essentials:

1. Immovable property's transfer is necessary.
2. The transfer or the transaction must be done by the ostensible or apparent owner.
3. The transfer or the transaction must be done with consideration.
4. The transfer must be done along with the assent of the real proprietor.
5. The transferee should act with good faith.
6. The transferee has taken reasonable or due care to know that the ostensible or apparent owner has the power or authority to transfer.

A. Consent from the real owner

The reason for this section is to secure the rights or privileges of the innocent third party who had bought the property when the real owner was himself to blame by not protesting the transfer.⁶

For this case, it was noticed that where court has to pick between two innocent parties, it will ensure the privileges of that party who had by no fault of his own has suffered. The other party who had the alternative to stop it or because of whose carelessness this has happened won't be secured.⁷

But a fundamental prerequisite is that the owner should have the capability to give the consent⁸ and that consent should not be acquired from any unlawful act.

On account of minors, despite of whether the ostensible owner guarantees that he has the permission of the minor; it will be held as no consent, as the minors don't have the capability to give the consent.⁹ In *Satyanarayana Murthi vs. Pydayya*¹⁰, it was expressed that the consent or

⁵*Hardev Singh v. Gurmail Singh*, AIR 2007 SC 1058.

⁶*Lickbarrow v. Mason*, (1787) 5 Term Rep 683.

⁷*Root v. French*, (1835) 13 Wendell 570.

⁸*Sambhu Prasad v. Mahadeo Prasad*, AIR 1933 All 493.

⁹*Abdulla Khan v. Bundi*, (1912) ILR 34 All 22; *Gadigeppa v. Balangauda*, AIR 1931 Bom 561.

permission of the real proprietor was not needed and that it may likewise be the situation that the true owner had no information of the transfer.

Example: If A is the actual or real owner and B is the ostensible owner, now if C wants to buy property X, then he will talk to B but B cannot transfer because if he transfers then the property would come back to A. So, what is important is the real owner's consent or permission.

The consent in such transactions can either be:

1. Express

2. Implied

Express consent

The term "express consent" refers to permission granted specifically.

Implied consent

The 'implied consent' or 'tacit consent' may be obtained from the real owner's conduct or actions. Implied consent is where the real owner knew the ostensible owner would deal with the property and he did not stop. It isn't necessary that the owner needs to give express consent or in writing.¹¹ In this way, where someone else is managing the estate or property of the real proprietor, even if the property was his own, and the real proprietor knows about it, at that point, it would be considered as implicit consent with regards to the real owner.¹²

B. Consideration

Consideration is an absolute necessity in the event of a transfer by an ostensible owner. He can't give away the property or an estate as a gift. As it has likewise been given in the Contract Act¹³ that consideration is a required component/element of any contract and the transfer of any property by an apparent owner is only done in contract form. Likewise, it has been given in S.

¹⁰ AIR 1943Mad459.

¹¹ Dr. Poonam Pradhan Saxena, *Property Law* 181 (LexisNexis, Nagpur, 2nd edn, 2011).

¹² *Sara Chunder v. Gopal Chunder*, (1893) ILR 20 Cal 296.

¹³ The Indian Contract Act, 1872 (Act 9 of 1872).

¹⁴ that anything not explicitly characterized in this act will be deduced from the definitions given under the Contract Act.¹⁵

C. Proper inquiry

The transferee must prove that enquiries were held by him as a reasonable prudent man for the protection of his own interests. Now, whether the transferee had carried out proper investigations prior to the purchase is a question of fact, however, it may be clear from the finding that the transferee conducted a thorough and fair investigation in order to acquire the compliance of the legal provision as a matter of law.¹⁶ So, what is important is that proper inquiry must be conducted by the transferee.

In *Layak Ram vs. Dharamwati*¹⁷, court stated that the transferee should act like a prudent person and should not only inquire from the revenue records.

D. Reasonable care

Reasonable care, also known as due care, is the level of concern and caution that a fairly reasonable and rational individual would use in comparable circumstances.

In *Gurcharan Singh vs. Surjit Kaur*¹⁸, the transferee should take reasonable care.

Reasonable care can be described as the care which a sensible and conventional man would have taken. He has an obligation to check the transferor's title.¹⁹

Like in *Nageshar Prasad*²⁰ case, when there was a mistake regarding the owner's name in the financial reports. The name was written of some other individual and the actual owner had already made a complaint about this error. The individual whose name was in the financial records consequently sold it to a third individual and the third individual without making appropriate inquiries took away the estate and the actual owner afterward objects to it. The third

¹⁴The Transfer of Property Act, 1882 (Act 4 of 1882), s. 4.

¹⁵*Supra* note 17.

¹⁶*Parbati v. Kashmiri Lal*, AIR 1956 Cal 69.

¹⁷AIR 2010 P&H 95.

¹⁸AIR 2006 P&H 18.

¹⁹*Kanhu Lal v. Palu Sahu*, (1920) 5 Pat LJ 521.

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

person, according to the court, did not take proper care expected of him and therefore would not be protected by this provision.

E. Good faith

Good faith simply means that, after all the best possible investigations performed by transferee; he should have genuinely believed that the ostensible or apparent owner is the true or actual owner. To ensure his own interests, the transferee ought to act honestly and in compliance with good faith as well as ensure that he made inquiries to affirm his faith. He can't bear to ignore true facts such as a defect in title or be guided by misconceptions. Subsequent transferee acting bonafide with due care shall be covered even if the immediate purchaser had notice of apparent ownership.²¹

WHO ARE NOT OSTENSIBLE OWNERS?

The following are not ostensible owners:

- (i) A professed agent or manager,
- (ii) A menial servant in the occupation of the property,
- (iii) A mortgage, being the limited-interest owner,
- (iv) An idol's trustee or manager, because the idol is not a human being and isn't capable of consenting,
- (v) In the occupation of joint family residential property, a co-sharer,
- (vi) A donor who has not reserved to himself power of revoking the deed of gift,
- (vii) A joint family manager who is only allowed to alienate family property if necessary or for the good of the estate.

TRANSFEROR SHOULD BE OSTENSIBLE OWNER DURING THE TRANSFER

²¹*PunendruNarh v. Hanut Mull*, AIR 1940 Cal 565.

The section enacts a rule, which is a form of estoppel, but that falls short of S.115, Evidence Act. In the circumstance that the transfer is proven to be done with consent of the true or real or actual owner, the following case would be managed in section 115, and the true owner would be estopped despite knowing that the transferee made no inquiries as to whether the transferor was competent of making the transfer, a requirement which is basic for the operation of this section.²²

EXTENT OF THE RIGHTS OR POWERS OF TRANSFEREE

The rights or powers of a person to whom property is conveyed (i.e. the transferee) in making a transaction from an ostensible or apparent owner also depend on the degree to which the ostensible or apparent owner is entitled to that asset. In *Surjit Kaur*²³ case, the widow of the owner had control as an ostensible owner over his properties, but it is limited to life interest only. The transferee's right to buy the property from her would be co-extensive with her and would thus cease to exist in her lifetime.

DUTIES OF TRANSFEREE DURING TRANSACTION

In addition to mentioning the significance of the powers of the ostensible owner, Section 41 also emphasizes the transferee's intent that the transferee must perform during the transaction. It provides that a transfer by an apparent owner cannot be prevented on the basis that the person transferring was not allowed, therefore subject to the condition that the transferee should take due care to determine that the person transferring was competent to transfer and be made in good faith before claiming the transfer's benefit.²⁴

BURDEN OF PROOF (BOP)

The BOP is on the transferee to establish that the ostensible owner was actually the transferor and had the permission to vend the property. He must prove that while taking the property, he acted in good conscience and reasonably. The proviso of Section 41 imposes on the transferee an obligation of acting reasonably in good faith, thus the BOP falls on him.

²²*Supra* note 2.

²³*State of Punjab v. Surjit Kaur*, JT (2001) 10 SC 42.

²⁴*Supra* note 6.

USE OF OSTENSIBLE OWNERSHIP IN CURRENT LEGAL SYSTEM

As given under S. 41 of the Act, the law which relates to the transfer is now entitled to Benami Prohibition Act.²⁵

According to Sec.2 (a) of Benami Prohibition Act, benami transactions are those transactions in which the entity is transferred to any other person for consideration that has been paid by some other person. This Act provides that if any property is transferred benami, the individual for whom the property or estate is held will turn into property's real or actual owner.

For this situation, the property isn't limited to a particular period, date, or span, for example the Benami Prohibition Act has retrospective application. When the property is benami, no suit, allegation, or action to impose any right or privilege in respect of it will lie.

Section 3(2) of the Act²⁶ states that if the property is in the person's name, he shall be the owner and there will be no distinction between an actual owner and an ostensible owner. However, two exceptions were there:

1. Fiduciary Relationship- Eg. Trust, the person who is the trustee would remain a trustee.
2. Coparcenary- Coparcenary will not end.

Section 4(3) of the Act²⁷ Section 4(3) of the Act said that purchasing any property in someone else's name is an offense and is punishable. There were two exceptions:

1. A husband can buy property in name of wife and not vice versa.
2. Father can buy property in the unmarried daughter's name.

Section 41²⁸ exists even after the Benami Transaction Act because of the cases that still exist.

In Mithilesh Kumari²⁹ case, Supreme Court noted that while Section 4(1) is isn't explicitly made retrospective, by law, by implication, tends to be retrospective by all accounts and will stretch

²⁵The Benami Transactions (Prohibition) Act, 1988 (Act 45 of 1988).

²⁶Ibid.

²⁷Ibid.

²⁸The Transfer of Property Act, 1882 (Act 4 of 1882).

out to all forthcoming proceedings wherein the right to property supposedly held benami is being referred to. Thus, to claim that new legislation is applicable to old transactions have failed to prove ground and therefore should be dismissed and submitted.

The defendant's defense in *Om Prakash*³⁰ was that the estate i.e. a plot was actually bought by him in brother's name, i.e. it was bought benami, which cannot be permitted under the Benami Prohibition Act.

PLEA OF BENAMI TRANSACTIONS WHETHER TO BE HERITABLE BY HEIRS OF ACTUAL OWNER

The ostensible owner doesn't hold any intrigue or claim to any property in a benami transaction. The claim lies with the actual owner. On his demise, fundamentally the property stays as an estate of the real proprietor and becomes liable for an inheritance according to the law of succession by which parties are governed. Accordingly, a legal heir to a real owner is permitted by law to contend that the property for the sake of the extensible owner is just a benami transaction and can set up its title of the actual owner to claim succession. In order to allow the plea of benami to be raised as a defense or prosecution, the lawful and legitimate plea of benami shall comply with the qualifying conditions in the Benami Prohibition Act. In all such cases, the heirs of the benamidar are entitled, in any event, to lay down the benami plea and to claim the properties of the ostensible owners in the event that they, in any event, meet the essential prerequisites of the limitation law.³¹

CONCLUSION

The Act has done a reasonable job by safeguarding the interests of innocent third parties. The ostensible owner has the authority or right to engage into transactions for property's owner, provided by the owner. Also, there is a burden to show that the person transferring is the ostensible or apparent owner. He also has to act in a bona fide manner and inquire properly about the transfer status, and be vigilant. It may be observed that the ostensible or apparent owner may be a true owner, except, where a coparcener in HUF or a trustee. To conclude, ostensible or

²⁹*Mithilesh Kumari & Anr v. Prem Bihari Khare*, (1989) 1 SCR 621.

³⁰*Om Prakash Rawal v. Justice Amrit Lal Bahri*, AIR 1994 HP 27.

³¹*T. Jayamma v. Devamma*, AIR 2004 Kant. 96.

apparent owner is someone who, apparently or seemingly, seems to be the owner, although he is not, in reality but the concept of apparent owner has been in decline with the introduction of the Benami Act³², which states that the individual for whom the property or estate is held will turn into property's real or actual owner. So the ostensible owner has no role in current legal system.



³²*Supra* note 25.