

Course Name- LL.B 4th sem
Subject- TPA
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Concept- Sec-41 Ostensible Owner

Introduction

The Transfer of Property Act, 1882, was passed with the purpose of making transfer of property easier and makes it accessible to the population at large. This Act lays down certain general principles as to transfer of property which has to be followed. Transfer of a property by and ostensible owner is such a concept which was incorporated to protect the rights of innocent third parties vis-à-vis the property owners. This principle was first used in the much celebrated case of Ramcoomar Koondoo v. John and Maria McQueen by the Judicial Committee.

Ramcoomar Koondoo v. John and Maria McQueen case

In this case, the plaintiff who had inherited a property by way of a will came to know that someone else had already purchased this property in her name and subsequently sold this property to a third person, by making him believe that he had good title over that property. The whole transaction was a 'benami' transaction but was not known to anyone except the person who sold the property. The plaintiff sued the third party for recovery of the possession of the land but the committee 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 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.”

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

S. 41 of the Act.

Section 41 of the Act deals with ostensible owner and it has been defined as:

“Transfer by Ostensible Owner: Where, with the consent, express or implies, of the persons interested in immovable property, a person is the ostensible owner of such property and transfer the same for consideration, the transfer shall not be voidable on the grounds that the transferor was not authorized 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.”

- The section lays down certain requirements to avail the benefit of this section. They are:

- The primary condition is that the person who is transferring the property should be ostensible owner.
- There should be consent from the real owner, which can be implied or express form.
- The ostensible owner should get some consideration in return of the property.
- Reasonable care has to be taken by the transferee about the authority of transferor to the property and the transferee had acted in good faith.

It goes without saying that this section is applicable only to transfer of immovable property and not in case of movable property.

‘Ostensible owner’

Ostensible owner is not the real owner but who can represent himself as the real owner to the 3rd party for such dealings. He has acquired that right by the willful neglect or acquiesces by the real owner of the property thereby making him an ostensible owner. A person who has gone abroad for some years has given his property to his family relative for making use of it for agricultural purpose and for all other purposes as he may deem fit. In this case the family relative is the ostensible owner and if during that period he sells the property to a third party, then the real owner after coming back cannot claim his property and say that the person was not authorized to transfer his property. An alternative case can be when the property is in wife’s name but husband used to take care of it and the other dealings related to the property. If the husband thereby sells this property, the wife cannot claim her property back. Or as in the **Mohamad Shakur v Shah Jehan**, in which the real owners lived in a different village, and had authorized a widow to use the property as she liked and afterwards she sold it. The real owner lost the case and the transfer was a valid one.

Further it can be explained that since ostensible owner is not a real owner of the property, he has no authority to make the transfer. But under the circumstances laid down in this section, the transfer is binding upon the real owner; it cannot be denied by him. Thus the law incorporated in this section is similar to the rule of estoppel given under section 115 of The Indian Evidence Act. Which provides that where a person by his declaration or act permits another person to believe a thing to be true and to act upon such belief, he shall not be allowed later on to deny the truth of that thing.

Exception to rule Of Nemo Dat Quod Non Habet

The rule enunciated in this section 41 is an exception to the general rule that a person cannot convey a better title than he himself has in the property. i.e., **Nemo dat quod non habet**. To this general principle there is a well-recognized exception that if the true owner, as by entrusting him with the documents of title or in some other way, a third person, who (after due inquiry) bona fide deals with that other, may acquire a good title to the property as against the true owner. This section is based on the principle that where one of the two innocent persons must suffer from the fraud of the third party, the loss should fall on him who has created or could have prevented the opportunity for the fraud and that in such cases hardship is caused by the strict enforcement of the general rule that no one can confer a higher right on property than he himself possesses.

Consent from the real owner

The main purpose of this section is to protect the rights of the innocent third party who had purchased the property, when the real owner was himself at fault by not protesting the transfer. But a necessary requirement is that the real owner should have the capacity to give the consent and that consent should not be obtained from any unlawful act. In the case of minors, even if the ostensible owner claims that he has the consent of the minor, it will be held to be no consent as minors do not have any capacity to give the required consent. And it was laid down in the case of **Satyanarayana Murthi vs. Pydayya**, that consent need not be taken from the true owner and it might also be the case that the true owner had no knowledge of the transfer.

The consent in such transactions can be express or implied.

Implied Consent

Implied consent can be made out from the conduct of the real owner. It is not required that the real owner has to give express consent or give his consent in writing. Therefore, where another person is dealing with the property of the real owner, as if the property was his own, and the real owner knows about it, then it will be said to be implied consent on the part of the real owner. In the case of **Shamsher Chand v Bakshi Meher Chand**, it was held that if a party is not aware of his rights or is silent about them, then in such case it cannot be said that the real owner had consented to the transfer of the property. It is required that a person who is not aware of his rights could never have consented to that and such a transaction will not be valid. It is not stated in the section that the real owner must have actually consented to the transfer, because if that was the case, then the real owner could never have made any objection to such transfer. It is just that the real owner is unaware of this transaction or is negligent. Silence may amount to consent if the silence on the part of real owner leads the third party to believe that the ostensible owner is the real owner of the property. But in the case of **Gurucharan Singh v. Punjab State Electricity Board Patiala**, where the land in contention was transferred to someone else and such person had perfected his right to the property by paying the money. The new owner which is the real owner had not taken the possession of the land and the previous owner after having waited for 12 years, sold the land to third party. The real owner then comes forward and claim his right over the land and the court said that the real owner was a minor at the time of transfer of land and therefore could not take the possession of the land and therefore it would not amount to silence on the part of the real owner as he could never have consented to the transfer. Therefore the subsequent transfer was held to be invalid.

Consideration

Consideration is a must if there is a transfer by ostensible owner. He cannot give away the property as a gift. As it has also been provided in the Indian Contract Act, 1872 that consideration is necessary component of any contract and transfer of property by an ostensible owner is done by way of contract only. Also it has been provided in S. 4 of the Act that anything not expressly defined in this act shall be deduced from the general definitions given under the Indian Contract Act, 1872.

Reasonable Care

Reasonable care can be understood as the care which a reasonable and ordinary man would have taken. He has a duty to check the title of the transferor. Like in the case of **Nageshar Prasad v. Raja Pateshri** where there was an error in the revenue records regarding the name

of the owner. The name written was of some other person and the real owner had already made a complaint about this error. The person whose name was in the revenue records subsequently sold it to a third person and the third person without making proper inquiries took the property and the real owner afterwards objects to it. The court held that the third party has not taken reasonable care which was required of him and therefore he will not be protected by this section. The advice of solicitor will not be enough to prove that the third party has taken reasonable care in determining the title of the property. The third party is required all the available documents which can possibly give some more information regarding the title of the property and these documents may include police registers, municipal registers apart from other documents.

There is also a safeguard for the real owner. In the case of **Mathura v. Ambika**, where the real owner had sold the property to another person and got it registered before the transfer by the ostensible owner could be registered, then it was held that the transfer by the real owner would be held valid as he has a greater title over the property than the ostensible owner and the rights of third person who had purchased this property from the ostensible would not be protected under this section.

Proper Inquiry

As a person is required to make reasonable inquiries, sometimes it is difficult to make out what will amount to proper inquiry. The courts in India have held that this being subjective, it will depend on the facts and circumstances of each case and it can also be the case that what amounts to proper inquiry in one case may not called proper inquiry in another case with completely different facts. If the transfer is by Mahomedans, it is a required of the purchaser to inquire if there is any female heir also. In many cases it is such that only males transfer the property without taking the consent of the females and this will not be a valid transfer because they also have a share in the property and therefore the third person has to inquire about such things. The ultimate test that is that the “transferee should show that he acted like a reasonable man of business and with ordinary prudence.”

Good Faith

Good faith simply means that the transferee should have honestly believed that the ostensible owner is the true owner after all the proper inquiries conducted by him. But where after proper inquiries the transferee has knowledge that the person selling him the property is not the real owner but only the ostensible owner, the transferee cannot neglect true facts. This is because of the fact that a person cannot take advantage of his own negligence and then claim protection of this act. The rights of real owner also need to be safeguarded against such persons.

Burden of Proof

The burden of proof is on the transferee to prove that the transferor was actually the ostensible owner and had the consent to sell the property. Also he has to prove that he actually acted in good faith and had taken all reasonable care that was required from him while taking the property. This is because he has to prove that he was not at fault while taking the property and to shift the burden on the real owner. Alternatively, to shift his burden, he can also prove that the transferor did not allow the transferee to know the real facts and tried everything to suppress the facts.

STATUTORY CHANGE

The law relating to transfer by an ostensible owner as given in section 41 of the act is now subject to the provisions of the Benami Transactions (Prohibition of the Right to Recover Property) Act, 1988.

According to Sec.2(a) of this act “benami transactions” means any transaction in which property is transferred to one person for a consideration paid or provided by another person. This act provides where a property is transferred benami, the person in whose name the property is held, shall become the real owner.

Here any property held benami is not limited to any particular time, date or duration i.e. the Act, 1988 is retrospective in operation. Once the property is found to have been held benami no suit, claim or action to enforce any right in respect thereof shall lie.

Sec.4(1) of the Act lays down 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.

Further Sec. 4(2) of the Act provides that –No defence based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

In **Om Prakash Rawal v. Justice Amrit Lal Bahri**, the defence taken by the defendant that the plot in fact was purchased by him in the name of his brother i.e. the plot was purchased benami, cannot be allowed by virtue of section 4(2) of the Benami Transactions (Prohibition) Act, 1988..

As by way of an exception to the above-mentioned rules, section 4(3) provides that that now an ostensible owner has become a real owner except where he is a coparcener in a Hindu Undivided Family or a trustee. Accordingly the law laid down in section 41 of the Transfer of Property Act stands modified except where benamidars is a coparcener of a trustee or a person standing in a fiduciary capacity. Besides the above mentioned two exceptions the provisions of this Act do not apply, also in usual bonafide transactions where person purchases property in the name of his wife or unmarried daughter. Section 3(2) provides that there is no prohibition on such transactions and it shall be presumed unless the contrary is proved that the said property had been purchased for the benefit of the wife or unmarried daughter.

Case Law

Shafiquallah v. Samiulah -The owner of a property died and thereafter the possession of his property was with his illegitimate sons who were not entitled to the legal title of the property. The legal heirs of the owner filed a suit against the illegitimate sons to recover the property. However the illegitimate sons sold the property to a third party, claiming themselves to be ostensible owners. The court held that the illegitimate sons had no consent of the actual owner whether express or implied to be ostensible owners of his property. Hence section 41 cannot be invoked.

Nirvas Purve v. Mst. Tetri Pasin -A husband while leaving for pilgrimage entered his land in the revenue records under his wife's name. He subsequently allowed her to mortgage the land. When the husband left, the wife sold the land to a third party and the purchaser paid off the mortgage. The court held that the husband cannot recover or redeem the land from the purchaser, provided the purchaser has acted in good faith and has taken reasonable care to ascertain the title of the land.

Conclusion

Section 41 of the Act has done a fair job in protecting the interest of the innocent third party. Though this section may seem to be a bit biased towards the third party but this is mainly if the real owner is himself at some fault. No one can simply say that he has now acquired the property and he cannot be evicted now. The third party has to take a lot of care while purchasing the property and these necessary requirements have been put by law itself to check the misuse of this section by ostensible owner and the third party. This, in a way protects the interest of the real owner also.