

ISSN: 2582-2942



LEXFORTI

Legal Journal

Vol-II Issue- I

October, 2020

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of LexForti Legal Journal. The Editorial Team of LexForti Legal Journal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of LexForti. Though all efforts are made to ensure the accuracy and correctness of the information published, LexForti shall not be responsible for any errors caused due to oversight otherwise.



EDITORIAL BOARD

Editor in Chief

Rohit Pradhan
Advocate Prime Dispute
rohit@lexforti.com

Editor in Chief

Sridhruti Chitrapu
Member | CiArb
sridhruti@lexforti.com

Editor

Nageshwar Rao
Professor (Banking Law)
47+ years of scholarly experience

Editor

Dr Rajanikanth M
Assistant Professor | Management
Symbiosis International University

Editor

Foram Thakar
Assistant Professor | LJ School of Law



EDITORIAL BOARD

Editor

Nandita Reddy
Advocate Prime Dispute

Editor

Romi Kumari
Student Editor

Editor

Shubhangi Nangunoori
Student Editor



ABOUT US

LexForti Legal News and Journal offer access to a wide array of legal knowledge through the Daily Legal News segment of our Website. It provides the readers with latest case laws in layman terms. Our Legal Journal contains a vast assortment of resources that helps in understanding contemporary legal issues. LexForti Legal News and Journal also offers Certificate courses. Whoever register for the course is provided the access to the state of the art E-portal. On completion of all the module and Test, candidate will be given Certificate of Accomplishment of Course. Be sure to make the most of it. LexForti Legal News and Journal is also proud to announce that we have made India's first Legal News android application which contains Daily Legal News, Legal Journal and Certificate Courses, everything in 4 MB.



Transfer by an Ostensible Owner

Miriam Solomon

ABSTRACT

The author of this article intends to cover the basis of the implication of Section 41 of the Transfer of Property Act of 1882. In order to truly appreciate this, this article will cover who is an ostensible owner, who falls under the definition of an ostensible owner and its implications, through the relevant Act(s) and with a look into cases that have occurred relating to the same, along with a brief comparison with other jurisdictions.

INTRODUCTION

According to the Oxford Dictionary, ostensible is defined as appearing to be true, but not necessarily so. This word is said to have its first usage around the mid-18th century. It is derived from the word “*ostensibilis*”, which is part Latin and part French, from Latin “*ostens*”- meaning stretched out to view and from the French verb “*ostendere*”, wherein “*ob*” means in view of and “*tendere*” means to stretch.¹ Legally speaking, an ostensible owner is a person who seems to be the owner, but in reality, he is not. In other words, he has all the features or benefits that come along with being a real owner.² However, this does not mean that is unlawfully occupying the property. This is because it is backed or supported by the real owner being aware of the display of such behaviour.³

For example, the husband of the owner of a property, after obtaining her consent, started to deal with the property as though it were his- by recording his name in the revenue documents, deciding upon who gets to be the tenant or not, etc. Herein the husband is the ostensible owner, as it seems as though he was the owner of the property, while the real owner was his wife.⁴

However, for the purposes of this act, guardian of a minor’s property, managers⁵, and kartas do not fall under the category of ostensible owners.

From the above, we see how Section 41⁶ that states the transfer of property of ostensible owners shares similarities to the rule of estoppel given under Section 115 of The Indian Evidence Act, 1872.⁷

¹ Oxford Dictionary, URL link: <https://en.oxforddictionaries.com/definition/ostensible>.

² *Kannashi Vershi v. Ratanshi Chauban*, AIR 1952 Kutch 85.

³ *Sonal Singh v. Hukum Singh Chauban*, AIR 2007 (NOC) 2054 (Utr).

⁴ DR POONAM PRADHAN SAXENA, PROPERTY LAW, (Lexisnexis, 28th ed, 2011).

⁵ *Muhammad Sulaiman v. Sakina Bibi*, AIR (1922) All 392.

⁶ Section 41, Transfer of Property Act, 1882: “Where, with the consent, express or implied, of the persons 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 that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

⁷ Section 115, Indian Evidence Act, 1872: “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

WHO FALLS UNDER THE DEFINITION OF AN OSTENSIBLE OWNER?

It becomes difficult to determine whether a person is the real owner or just an ostensible owing to the fact that he has all the characteristics of a real owner, barring the intention to own the property. Therefore, the court decides this, based on the facts and circumstances of the case.

The Supreme Court has laid down the following criteria to be looked into while deciding such a matter⁸:

- The source of the consideration during purchase.
- Nature of possession after the purchase, in terms of who had possession.
- Motive behind such a transaction.
- Relationship between the parties (the real owner and the ostensible owner).
- Conduct of the parties in dealing with the property (eg. In terms of took care of the property).
- Custody of the title deeds.

In cases now, they have given maximum weightage to the intention and source of consideration paid for the transaction.⁹ The other factors only have relative weight when it comes to the burden of proof that the transaction was transacted by an ostensible owner lies, on the person who claims that he is the real owner¹⁰.

WHAT ARE BENAMI TRANSACTIONS AND HOW DID THE BENAMI ACT COME INTO EXISTENCE?

Fundamental Rights are those that rights that are considered the very basic requirements of a human, to lead one's life. The right to property was never considered one of these natural rights because it was a creation of statute.¹¹ Still, after India's independence, it was one of the Fundamental Rights granted under the Indian Constitution, and falling under the ambit of Article 13.¹²

representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

⁸ *Jaydayal Peddar v. Bibi Hazra*, AIR (1974) S.C.171.

⁹ *Radheysbam v. Maharaj Bahadur Singh*, AIR 1982 Cal (571).

¹⁰ *Mahinder Singh v. Pardaman Singh*, AIR 1992 Del 357.

¹¹ 130th Report of Law Commission of India, Benami Transaction (1988).

¹² Article 13, Constitution of India, 1950: Laws inconsistent with or in derogation of the fundamental rights being considered as void.

However, the right to property as a fundamental right was removed as a Fundamental Right by removing Articles 19(f) and 31, in order to achieve the goal of social equal distribution of resources. With property being one of the most prominent resources, it became necessary to regulate the distribution of resources. Therefore the lawmakers deemed it necessary to get rid away of ways in which property was concentrated with a few hands.¹³

One of the most prominent means of this concentration was a “Benami” transaction- a transaction which would allow a person to hold real ownership rights but could ownership for namesake to someone else. The word Benami was derived from Persian and means ‘without a name’¹⁴.

There a Benami transaction is defined as “any transaction in which property is transferred to one person for a consideration paid or provided by another person.”¹⁵ Benami therefore implies holding properties in the name of another, similar to how one would think of guardianship of property (of course, they are different concepts).

History shows Courts questioning the validity and injustice that came along with Benami such as when the court pronounced:¹⁶

“The practice has long been common in this country for intending alienees of this land to take document of transfer in the name of their friends or relatives, sometimes in view to defeat the claim of creditors, sometimes in view of defeating other members of their family and sometimes to escape restrictions imposed upon them by Government’s Conduct Rules etc.”

This proved to be counter-effective to acts that aimed at redistribution of land such as the Zamindari Abolition Act, Land Ceiling Act, etc. This led to the circulation of illegal money and thus affected the economic and social growth of those who were downtrodden. It took many years to identify what the problem itself was and after much deliberation Benami Transaction (Prohibition) Act, 1988 was passed to effectively tackle Benami transactions.¹⁷

Although this Act’s objective was to deal with the problem of increased Benami transactions, it was hardly able to control such transactions effectively due to the lack of initiative of the government, rules to implement certain sections, etc. and hence remained largely inoperative.¹⁸ Thus, the Benami

¹³ Siddhi Kudalkar, *Benami Transaction Prohibition Act And Its Impact On Law Relating To Property*, URL link: http://racolblegal.com/benami-transaction-prohibition-act-and-its-impact-on-law-relating-to-property/#_ftnref2.

¹⁴ Darshan Kadu , *What are Benami Transactions in India*, India Today (2005).

¹⁵ Section 2(a) , Benami Transaction (Prohibition) Act, 1988.

¹⁶ *Panjab Province v. Daulat Singh*, AIR 1942 F.C. 38.

¹⁷ Siddhi Kudalkar, *Benami Transaction Prohibition Act And Its Impact On Law Relating To Property*, URL link: http://racolblegal.com/benami-transaction-prohibition-act-and-its-impact-on-law-relating-to-property/#_ftnref2.

¹⁸ Naresh Mukherjee, *But That’s Not Mine!*, URL Link:

http://www.telegraphindia.com/1110928/jsp/opinion/story_14562807.jsp

Transaction (Prohibition) Bill, 2015 was introduced in order to establish ‘authority’ to confiscate became property.

ARE ALL BENAMI TRANSACTIONS ILLEGAL?

Benami transaction isn’t illegal per se, because the Section 5¹⁹ does not have a compulsory precondition that states that ‘the transfer in favour of one person may not be in the name of another person’. Thus, Courts are bound to give effect to such transactions if they are within legitimate scope (this necessarily excludes fraudulent and illegal transactions), as they are not violative of the law.²⁰

It becomes important to note here that this section is an exception to the general rule of *nemo dat quod non habet*, i.e. a person cannot transfer a better title than he himself has in the property transferred.²¹

Now, in order to avail the protection guaranteed under Section 41²², there are certain criteria that need to be met:²³

- The transferor of the property is the ostensible owner.
- He has the consent of the real owner of the property- either expressed or implied, the apparent ownership must have been permitted by the real owner (who is capable of giving his consent, and with free will).
- There was some form of legal consideration during the transfer.
- The transferee acted in good faith, taking reasonable care and ensuring that the transferor in the first place had power to do so- reasonable meaning that an ordinary man of ordinary prudence would have taken.

IS A BENAMDAR AND AN OSTENSIBLE OWNER THE SAME?

In the case of an ostensible owner, there are indications of ownership in hands of transferor such as title deed, entries in records etc., alongside having apparent and unconditional complete authority to deal with the property as a real owner, which is given by the real owner. Therefore the ostensible owner represents the real owner in the transactions.²⁴

¹⁹ Section 5, Transfer of Property Act, 1882.

²⁰ *Bilas Kumar v. Besraj Ranjit Singh*, AIR 1916 P.C. 96.

²¹ SANDEEP BHALLA, LAW OF OWNERSHIP AND TRANSFER OF PROPERTIES IN India (2017).

²² Section 41, The Transfer of Property Act, 1882.

²³ *Ibid.*

²⁴ *Kannashi Vershi v Ratnashi Nenshi*, [1952] A.I.R. 85.

However, in the case of a Benami transaction, a Benamdar is merely a name lender and unconditional authority rests with a person who provides the consideration (in the case of an ostensible owner, actual authority rested with him). This difference was also elucidated by the Supreme Court:²⁵

“Two kinds of Benami transactions are generally recognized in India. Where a person buys a property with his own money but in the name of another without any intention to benefit such other person, the transaction is called Benami. In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner.

The second case which is loosely termed as Benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner.

The difference between two kinds of Benami transactions lies in the fact that in former case there is an operative transfer from the transferor to the transferee though the transferee holds the property for the benefit of the person who has contributed the purchase money, in the latter case, there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance.”

Post the enactment of the Benami Transactions (Prohibition) Act, 1988, an ostensible owner is a real owner except in certain situations, which restricted the scope of application of section 41. Ultimately, the transferee, who purchases the property from the ostensible owner, cannot take the benefit of section 41 unless the ostensible owner is the wife or unmarried daughter of the real owner.²⁶

LANDMARK JUDGMENTS (AND ITS RELEVANCE)

International: *Twyne's Case*²⁷

Initially, taking physical possession of tangible personal property was necessary before a person could be certain that his claim was, and would remain, superior to that of others. This principle was affirmed in the case of personal property in 1601 in this case.²⁸

In this case, a person had purported to sell some sheep, but continued to take care of them and treated them as his own. The court had pronounced the transaction fraudulent, on the ground that it was wrong to sell goods and still keep possession of goods. The sale in itself wasn't at question, because

²⁵ *Bhim Singh v. Kam Singh*, AIR 1980 SC 727 (732).

²⁶ AVTAR SINGH, THE TEXTBOOK ON TRANSFER OF PROPERTY ACT, 1882, 125 (2nd ed., 2009)

²⁷ (1601) 76 ER 809.

²⁸ Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 299-321, (The Journal of Legal Studies, Vol. 13, No. 2, 1984).

the transaction would have been valid had the property been physically transferred at the time of the sale.

The problem with retention of possession (ostensible ownership) ultimately seems to return to a legal rule, governing information as a means of reducing uncertainty. Hence, creditors would be concerned about a debtor trying to get credit by passing off things as his, which really isn't his. Twyne's Case provides a legal rule that allows such assurance to be given. The system illustrated in Twyne's Case depended on a very simple legal rule and hence on minimal government intervention: to obtain priority in an asset over third-party claimants, an individual needed, in addition to the consent of the prior owner, to take physical possession of the asset.

The principle that secret interests in property possessed by someone else are void has shaped the entire law of security interests in personal property.²⁹ The common justification for the principle is that those who rely on the debtor's assets, such as the debtor's other creditors, need an easy way to tell what property the debtor owns. The easiest way to accommodate these parties is to hold transfers of property ineffective against third parties unless possession is also transferred. With this rule, a party knows that no one else has a superior interest in property in the debtor's possession.³⁰

Therefore a system of notice-filing that sorts out property claims among those who have or seek property claims, could would ensure any claims on the property that exist, come to light.³¹

Indian: *Ramcoomar Koondoo v. John and Maria McQueen*³² case

In this case, the plaintiff, inherited the property under dispute, by a will. She came to know that someone else had already purchased this property in her name and sold it to a third party, with a false misconception that he had the title over it. 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

²⁹ Peter F. Coogan, *Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice"*, (47 Iowa L. Rev. 289, 289, 1962).

³⁰ Douglas Baird & Thomas Jackson, *Possession And Ownership*, (Stan L. Rev., 1983).

³¹ Douglas G. Baird, *Notice Filing and the Problem of Ostensible Ownership*, 53-67, (The Journal of Legal Studies, Vol. 12, No. 1, 1983).

³² (1872) 11 Beng LR 46.

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 thereby held that the plaintiff could not take back the property from the third party and in the eyes of the law, the transfer was a legitimate transfer, which is what section 41 essentially states.

CONCLUSION

Section 41 of the Act has reasonably managed to protect the interests of the innocent third party. Although this section may seem to be lopsided, favouring the third party, such a situation usually only arises, if the real owner is at some fault. Further, it also places the third party with a duty during the purchase of the property and the necessary requirements put by law to keep a check on the misuse of this section by the ostensible owner and the third party. In this sense, it also protects the interests of the real owner.

On the other hand, the 2016 Act is a comprehensive law which not only provides for the mechanism and process for attachment and confiscation of the Benami property, but has also enacted the administrative structure for proper implementation of such provisions. In addition to this, it also widened the ambit of Benami Transaction alongside mandating for more stringent punishment. By the 2016 Act, the Government of India has made its intentions abundantly clear that the Benami transactions occurred during the intervening period of 1988 to 2016 are not going to be spared.³³

³³ Vijay Pal Dalmia, *Benami Transactions In India And Analysis Of The Provisions Relating To Attachment And Confiscation Of Property Under The Benami Transactions (Prohibition) Amendment Act, 2016*, URL link: <http://www.mondaq.com/india/x/661234/White+Collar+Crime+Fraud/Benami+Transactions+In+India+And+Analysis+Of+The+Provisions+Relating+To+Attachment+And+Confiscation+Of+Property+Under+The+Benami+Transactions+Prohibition+Amendment+Act+2016>.