

PGS NATIONAL COLLEGE OF LAW

TRANSFER OF PROPERTY ACT

UNIT-2

Q1. Under what circumstances transfer by an ostensible owner of immovable property binding on the real owner? Discuss.

Ans TRANSFER BY OSTENSIBLE OWNER

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. Sections 3, 5 and 8 of this Act came into force on 5th Sept. 1988 and the remaining sections on 19th May, 1988 and it extends to the whole of India According to Sec. 2 (a) of this Act "benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person. This Act provides that where a property is transferred *benami* (i.e. in the name of other), the person, in whose name the property is held, shall become the real owner.

an ostensible owner (*benamidar*) has become a real owner except where he is a co-parcener in a Hindu Undivided Family or, a trustee, standing in a fiduciary capacity. Accordingly, the law laid down in Section 41 of the Transfer of Property Act stands modified except where benamidar is a co-parcener or a trustee or a person standing in a fiduciary capacity.

LAW PRIOR TO BENAMI TRANSACTION ACT, 1988

In view of its academic importance and also because of its relevance for the areas not covered by this Act, the law incorporated in Section 41 of the Transfer of Property Act before commencement of the Benami Transaction (Prohibition) Act, 1988, is being discussed in the following lines.

Ostensible Owner.—Ostensible owner is a person who has all the indicia of ownership without being the real owner. An ostensible owner has all the indications of ownership and looks like owner of a property but is not its real owner. Without being an actual owner, such person has apparently all the characteristics of a real owner.

Where a person purchases property in the name of another person it is called a *benami* transaction. The person in whose name the property is purchased is called *benamidar*. A *benamidar* is an ostensible owner.

A person does not become ostensible owner if the real owner has entrusted him with where he holds a property as a professed agent or as guardian of minor's property or in any other capacity of fiduciary character.

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This section is applicable only where the transferor is an ostensible owner. But it is difficult to ascertain whether a person is ostensible owner or real owner because he has all the characteristics of a real owner except the intention to own the property. It is for the Court to establish whether the transferor was an ostensible owner.

following considerations must be taken into account while deciding whether a person is ostensible owner or not:

- (i) Source of the purchase-money i.e. who paid the price?
- (ii) Nature of possession after the purchase i.e. who had the possession?
- (iii) Motive for giving benami colour to the transaction i.e. why the property was purchased in the name of other person?
- (iv) Relationship between the parties i.e. whether the real owner and the ostensible owner were related to each other or were strangers or friends?
- (v) Conduct of the parties in dealing with the property i.e. who used to take care of and had control over the property?
- (vi) Custody of the title-deeds.

Transfer by Ostensible Owner. -Section 41 provides that where an immovable property is transferred by an ostensible owner with express or implied consent of the real owner, the transfer cannot be denied by the real owner provided the transferee in good faith has exercised reasonable care in finding out the transferor's power to make the transfer and the transfer is for consideration. 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.

Section 41 of the Transfer of Property Act provides an equitable remedy to a bona fide purchaser for value without notice. Validating the transfer made by an ostensible owner is also an exception to the general rule that no person can confer a better title to another, than he himself has.

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Essential Conditions for Section 41.-Following conditions are necessary for the applicability of this section:

- (i) There is transfer of an immovable property by ostensible owner with express or implied consent of the real owner,
- (ii) The transfer is for consideration,
- (iii) The transferee has acted in good-faith, and,
- (iv) The transferee has exercised reasonable care in finding out the transferor's power to make the transfer.

Express or implied consent of real owner.-The transfer of property must be made by an ostensible owner with express or implied consent of the real owner. However, whether the consent be express or implied, it must be a free consent. Where a *benamidar* obtains the consent of the real owner by fraud, force, coercion, the consent is not free and this section cannot apply. Similarly, if the real owner is incapable of giving consent (e.g. he is insane or minor,) his consent is no consent. If the real owner is minor is incapable of giving any consent.

Transfer is with consideration.-Section 41 is applicable only where the transfer by an ostensible owner is with consideration. It does not apply to gifts or gratuitous transfers. Therefore, the real owner is not precluded from denying a gift made by an ostensible owner. However, if the transfer is with consideration, it may be any kind of transfer of property e.g., it may be sale, exchange, mortgage or lease.

Transferee acts in good-faith.-It is necessary that transferee acts in good faith, i.e., he has purchased the property in the honest belief that transferor had power to transfer the property. Good-faith means bona fide intention.

Reasonable care of the transferee.-Good-faith or bona fide intention of the transferee is not enough. To attract the provisions of this section the transferee must also have exercised reasonable care in ascertaining the title and authority of the transferor. Reasonable care means that care which a man of ordinary prudence should take while making inquiries regarding the title of an immovable property. But it is not possible to lay down any general rule regarding the nature of enquiry to be made by the transferee which may be called as 'reasonable care' for all the cases. The standard of enquiry expected from the transferee depends upon the facts and surrounding circumstances which may vary according to the different circumstances of each case.

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Q2 Explain the Doctrine of Lis-Penders . How this doctrine is different from Res Judicata.

Ans Doctrine of lis pendens.-The law incorporated in Section 52 is based on the doctrine of lis pendens. 'Lis' means 'litigation' and 'pendens' means 'pending'. So, lis pendens would mean 'pending litigation'. The doctrine of lis pendens is expressed in the well-known maxim: **pendente lite nihil innovature**, which means 'during pendency of litigation, nothing new should be introduced'. Under this doctrine, it is provided that during pendency of any suit regarding title of a property any new interest in respect of that property should not be created. Creation of new title or interest is known as a transfer of property. Therefore, in essence, the doctrine of lis pendens prohibits the transfer of property pending litigation.

Provisions of Section 52.-The doctrine of lis pendens as laid down in Section 52 is given below:

- (a) During the pendency of a suit or proceeding.
- (b) property cannot be transferred or otherwise dealt with, and
- (c) if so transferred, the transferee is bound by the decision of the Court whether or not he had notice of the suit or proceeding.

Essential conditions for application of Section 52.-Following conditions are necessary for the application of the doctrine of lis pendens as given in Section 52:

- (1) There is a pendency of a suit or proceeding.
- (2) The suit or proceeding must be pending in a Court of competent jurisdiction.
- (3) A right to immovable property is directly and specifically involved in the suit.
- (4) The suit or proceeding must not be collusive.
- (5) The property in dispute must be transferred or otherwise dealt with by any party to suit.
- (6) The transfer must affect the rights of the other party to litigation.

When the above-mentioned conditions are fulfilled, the transferee is bound by the decision of the Court. If the decision of the Court is in favour of the transferor, the transferee has rights in the property transferred to him. If the decision goes against the transferor, the transferee cannot get any interest in the property.

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Pendency of suit or proceeding.-The section applies only where a property is transferred during pendency of litigation. Pendency of a suit is that period during which the case remains before a Court of Law for its final disposal.

Pendency in Court of Competent Jurisdiction - The suit or proceeding during which the property is transferred, must be pending before a Court of competent jurisdiction. Where a suit is pending before a Court which has no proper jurisdiction to entertain it, the lis pendens cannot apply.

Right to immovable property must be involved.-Another condition for applicability of this section is that in the pending suit, right to immovable property must directly and specifically be in question. The litigation should be regarding title or interest in an immovable property. Where the question involved in the suit or proceeding does not relate directly to any interest in an immovable property, the doctrine of lis pendens has no application.

Rights in movables.-The doctrine of lis pendens does not apply where the suit involves rights in movable properties.

Suit must not be collusive.-Lis pendens is inapplicable if the suit is collusive in nature. A suit is collusive if it is instituted with a mala fide intention.

Property is transferred or otherwise dealt with.-During pendency of suit, the property must be transferred or otherwise dealt with by any of the parties to suit. 'Transfer' includes sale, exchange, lease and mortgage. Thus, during pendency of suit if the disputed property is sold or given in exchange, is leased or is mortgaged either by plaintiff or by defendant, the doctrine of lis pendens shall apply on it.

Transfer affects the rights of any other party. The last condition for applicability of Section 52 is that the transfer during pendency must affect the rights of any other party to suit. The principle of lis pendens is intended to safeguard the parties to litigation against transfers by their opponents.

Effect of the principles of lis pendens. When the condition necessary for the applicability of this section are fulfilled the result is that transferee bound by the decision of the Court. For example, in a suit between A and B respecting title of a house if B transfers the house to C during pendency and the judgment is subsequently in favour of B., then C would be entitled to the house. But if the decree is passed against B, then it is binding not only on B but also on C with the result that C cannot get the house. Under this section C cannot take the plea that he had no notice of pending litigation. It may be noted that normally decree of a Court binds only

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the parties to the suit. But, under the principle of *lis pendens*, a person who purchases during pendency of the suit is also bound by the decree made against that party from whom he had purchased.

The effect of *lis pendens* is, therefore, that it does not prevent the vesting of title in the transferee but only makes it subject to the rights of the parties as decided in the suit. Section 52, therefore, does not invalidate the transfer but renders it subservient or subject to the rights of the parties to litigation. The words "so as to affect the rights of any other party thereto under any decree or order which may be made therein" suggest that the transfer pending *lite* is valid and good to the extent that it might conflict with rights established under the decree.

Lis pendens and *res judicata* are the Latin terms. It can be abbreviated as "*Lis pendens*". "*Lis*" means an action or a suit "*pendens*" means is continuing or pending. It is thus known that *lis pendens* means a pending action. More so, "*Lis alibi pendens*" means a suit pending elsewhere. "*Lis mota*" means a Court action that has set in motion.

One of the most common reasons for *lis pendens* is when a property goes into foreclosure if a lender feels that a foreclosure will be necessary, the notice forestalls any attempts to the property to evade foreclosure, inasmuch as the legal notice will turn up on a title search, *lis pendens* can also be led if anyone thinks that he has a legal claim to title of the property, or in any other circumstances.

Generally, buyers do not agree to purchase a property on a loan to buy the property because lenders are concerned foreclosed property, once the foreclosure is complete

The principle of *res judicata* is that when a matter is once decided by a court of competent jurisdiction it may not be reopened or challenged for a matter already adjudicated. It is being prevented by *res judicata* from multiple parties, final adjudication of the matter, former suit are some essential factors to attract *res judicata*. In a suit, court or competent courts in interest. *res judicata* is a judicial system, litigants are engaged in a suit cause of action same cannot be heard on the issues. In a case, **Digambara Rao Hanumanta Rao Deshpande vs Range Rao Reghunatha Rao Desai** was observed that the rule of *res judicata* prevails over *res judicata*. At the same time, the adjudication in the suit binding adjudication binding on the parties step further and lays down that whose judgment that may be made again cannot prevail over the effect of *res judicata*. The rule of *lis pendens* goes a step further and binds a party bound by the such a purchase was not in party to the action in hand. Mulling over all these facts a former view known that the doctrine of *lis pendens* cannot be cited *inter alia*.

Q3. The foundation of Doctrine of election is that no one can approbate or reprobate at the same time. Discuss it's illustrate.

Ans DOCTRINE OF ELECTION

Section 35 incorporates the doctrine of election. Election means choosing between two inconsistent or alternative rights. Under any instrument if two rights are conferred on a person in such a manner that one right is in lieu of the other, he is bound to elect (choose) only one of them. A person cannot take under and against the same instrument. Thus, where some money is gifted to A and in lieu of it A is required to transfer his house to B then A would not be allowed to retain his house and also take the gift. He cannot enjoy both. A will have to choose (i) either taking of the gift in which case he must transfer his house to B or (ii) retain his house in which case he must relinquish the benefit of gift. In the language of law, A shall be put to election. The doctrine of election is based on equitable principle under which a person may not be allowed to approve that part of an instrument which is beneficial to him and disapprove its that part which goes against him. No one can approbate and reprobate at the same time. In other words, where a person takes some benefit under a deed or instrument, he must also bear its burden.

The doctrine of election which is based on equity is applied to every species of instrument whether deed or will and to every kind of property movable or immovable.

Section 35 of the Act makes following provisions in respect of the rule of election :

- (1) Where a person professes to transfer a property not his own.
- (ii) and, in lieu of this transfer the transferor confers certain benefits upon the owner of the property and,
- (iii) the two things, i.e., transfer of property and conferring of the benefit forms part of the same instrument.

Then, the owner of property is bound to elect (choose) either to take the benefit and transfer his property or to retain his property and give up the benefit.

Transferor Professes to Transfer Property Not His Own.-Section 35 applies where a person professes to transfer the property of another person. 'Professes' means purports or makes contract. Since such person is not owner, he cannot transfer that property. But, he can contract

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or make arrangement for a transfer that property. But, he can contract or make arrangement for transfer of a property which he does not own.

It is not necessary that transferor should mention it in specific words that he is professing to transfer a property not his own. This is inferred by the Court from the facts of a particular case and from the language used in the instrument.

Benefit Conferred on the Owner of Property. The transferor must confer any benefit on the owner of property. It may be noted that the word 'owner' in this section has a very wide meaning. It includes a person having vested interest as well as contingent interest and also a person who has even reversionary or remote interest in the property. It is the owner of property who is put to election. Therefore, he must be given some 'benefit' in compensation of his 'ownership' in the property.

Part of the Same Transaction. The rule of election operates only when the 'transfer' and 'benefit' form part of the same transaction. By same transaction is meant that the transfer of property is to be made evidently only in lieu of the benefit. Thus where the 'benefit' and 'transfer' are interdependent and inseparable, they form part of the same transaction. There is no election if the two are independent transactions. However, it is not necessary that these two transactions are provided on one instrument.

Owner's Duty to Elect- The operative part of section 35 is that if a property is professed to be transferred and in the same transaction some benefit is given to the owner of property then such owner is under a duty to elect. By his election he may either accept the instrument with its all contents or reject it altogether. He has no option to accept only the beneficial part of instrument. Where he elects to accept the instrument, he is entitled to get the benefit; but he is bound to transfer his property. If he elects to reject the instrument he cannot claim benefit; but he may retain his property.

Mode of Election. Election may be express or implied. It is a question of intention of the owner of property who is given the benefit. He may express his intention in clear and specific words. Where election is express, it is final and conclusive. The intention of the owner may also be inferred from his acts or conduct. This is implied election.

Implied Election.-Election is implied when the owner of property (donee) (a) being aware of his duty to elect and (b) having full knowledge of the circumstances, accepts the benefit. Such election would mean that he has chosen in favour of the transaction.

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Requisition to Elect.-This is special procedure for expediting election. After the expiry of one year, if owner of property does not elect i.e. neither confirms nor dissents the transfer, the transferee may require him to make such election. And, if he does not elect, within a reasonable time after such requisition, he is deemed to have elected in favour of the transfer.

Suspension of Election. Where at the time of transfer, the elector (i.e. owner of property) is legally disabled, the election is postponed until such disability ceases or until the election is made on his behalf by a competent authority e.g. his guardian. Legal disability may be minority or lunacy of the elector. Thus, his duty to elect is suspended during his minority or lunacy unless the election is made by his legal guardian.

Election against transfer.-The owner of property whose duty is to make election has freedom to elect either for the transfer or against it. Where he elects against it i.e. dissents from the professed transfer, he forfeits his claim to the 'benefit' conferred on him. The benefit so conferred reverts back to the transferor or his representative. However, he can claim any other benefit which is given to him independently of the transfer under the same instrument.

Rights of Disappointed Transferee

When the owner of property elects against the transfer, the transferee to whom the property was professed to be transferred, cannot get the property. He becomes disappointed as he must have had some hope of getting the property. However, such disappointed transferee is not allowed to be a helpless person. He has following rights. (i) Where the transfer is gratuitous i.e. without consideration and the transferor dies or becomes incapable of making fresh transfer and,

(ii) Where transfer is with consideration, whether he is alive or dead at the time of election, the transferee is entitled to get a reasonable compensation from the transferor or his representative. "Reasonable compensation" means compensation equal to the value of property professed to be transferred.