

# Ostensible Owner

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# Ostensible Owner

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- Ostensible owner is a person who has all the *indicta* 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 characteristics of a real owner.

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- Thus, a person may have possession and enjoyment of the property and may also have his name entered in the official records but even then he may not be the real owner of that property.

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- Such situation may arise where for some reasons a person purchases property in the name of another person. 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.

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- Where some property was purchased by a father in the name of his minor son the *Calcutta High Court* held that sons were ostensible owners because minor sons had no means to acquire property and they were not intended by the father to be real owners of property. [**Girindra Nath Mukerjee vs. Soumen Mukerjee AIR (1988) Cal. 375**]

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- It is strange to find that a person provides money and intends to have a property for himself but purchases it in the name of some other person. However, such practice has been common in India and elsewhere. Two apparent reasons may be attributed to such purchases.

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- First, the persistent belief of the Indians, which the author finds among the Hindus, that if a property stands in the name of a female (wife or mother in general) it would be more beneficial as property is believed to be *Luxmi* (the goddess of wealth). Secondly concealment of money earned illegally or evasion of income-tax.

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- A person does not become ostensible owner if the real owner has entrusted him with temporary control over the property but for some specific purpose or where he holds a property as a professed agent or as guardian of minor's property or in any other capacity of fiduciary character. A manager cannot be treated as ostensible owner even though his name is entered in the Municipal records as a real owner. [Muhammad Sulaiman vs. Sakina Bibi MR (1922) All 392]



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- *Karta* of a joint Hindu family is also not an ostensible owner of the joint family property. Similarly, a trustee or manager of an idol is not an ostensible owner of the endowed property held by him. [**Thakur Krishna vs. Kanhayalal AIR (1961) All 206**]

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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.

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- *In Jayadayal Poddar v. Bibi Hazra, AIR (1974) SC 171* the *Supreme Court* observed that whether a person is an ostensible owner, is a subjective question to be decided on the basis of facts and circumstances. The Court observed further that following considerations must be taken into account while deciding whether a person is ostensible owner or not:

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- (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?

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- (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.

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- The burden of proof that a transaction is *benami*, lies on the person who claims that he is the real owner. Where, on the basis of facts produced **before** the Court, the claimant failed to prove that he was real owner and the **person** in whose name the property stands is merely a **name-giver**, **the** claimant **cannot** be regarded **as** real owner of the property.

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- 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.

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- Essential Conditions for Section 41
- Following conditions are necessary for the applicability of this section:
- (1) There is transfer of an immovable property by ostensible owner with express or implied consent of the real owner,
- (2) The transfer is for consideration,
- (3) The transferee has acted in good-faith, and,
- (4) The transferee has **exercised reasonable** care in finding out the transferor's power to make **the transfer**.



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- 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. In other words, the real owner is precluded or estopped from denying the transfer on the ground that the transferor was an unauthorised person.

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- Thus, the law incorporated in this section is similar to the rule of estoppel given in Section 115 of the *Evidence Act 1872*. Section 115 of this Act 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.

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- In this sense, 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 the general **rule** that no **person can confer a better** title to another, than he himself has.

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- **Section 41 in the Contemporary Context of Bangladesh**
- Transfer of property by ostensible owner is valid under Section 41 of the Transfer of Property Act, 1882 though subject to certain conditions. But it has certain drawbacks. However, in the light of reality its significance cannot be ignored outright. For this reason it is yet to be repealed.

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- But the application of this section has almost become impossible due to the Land Reforms Act, 2023, newly inserted sections 53C and 53E (inserted in 2004) to the Transfer of Property Act, 1882 and the Registration Act, 1908. The Land Reforms Ordinance, 1984 has prohibited benami transactions from 14<sup>th</sup> April, 1984.

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- Section 53D provides that no immovable property under registered mortgage shall be re-mortgaged or sold without the written consent of the mortgagee, and any re-mortgage or sale made otherwise shall be void.
- To what extent the application of S. 41 is possible in the above circumstances no decision of Supreme Court is found.

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- But benami transaction happened before 14<sup>th</sup> April, 1984 is still valid and effective. Section 82 of the Trust Act, 1882 says that Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or provided the consideration.