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Benami Property Transactions and the Doctrine of Ostensible Ownership: A Comprehensive Critical Analysis of Section 41 of the Transfer of Property Act, 1882

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ABSTRACT

The interplay between the Prohibition of Benami Property Transactions Act, 1988 (as amended in 2016) and section 41 of the Transfer of Property Act, 1882 represents a critical intersection of public policy, property law and equity in Indian jurisprudence. The doctrine of ostensible ownership traditionally protected bona fide purchasers for value without notice, allowing real owners who permitted another to hold property ostensibly to be estopped from asserting their legal title. Legislative intervention through the benami legislation altered that equitable framework by prohibiting benami transactions and imposing statutory restrictions on re-transfer. This paper critically examines the statutory evolution, legislative intent and judicial interpretation governing ostensible ownership and benami property transactions in India. It analyses landmark judicial precedents in order to delineate the operational boundaries between legitimate ostensible ownership, such as valid trust arrangements, fiduciary relationships and genuine agency, and prohibited benami arrangements designed to evade taxation, defraud creditors or bypass statutory ceilings. The paper further evaluates the impact of the 2016 amendment on procedural safeguards, confiscation machinery and the constitutional controversy concerning retrospective application. Through a comparative legal analysis, the study underscores the necessity of balancing regulatory enforcement against fraudulent property holding with the protection of legitimate commercial dealings and equity.

Keywords: *Benami Property Transactions, Doctrine of Ostensible Ownership, Transfer of Property Act (Section 41), Equity and Estoppel, Fiduciary Obligations, Judicial Interpretation*

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I. INTRODUCTION AND HISTORICAL FOUNDATIONS OF OSTENSIBLE OWNERSHIP

A. The common law paradigm of *nemo dat quod non habet*

The cornerstone of property law across common law jurisdictions is captured in the maxim *nemo dat quod non habet*, which dictates that no person can transfer a greater title than that person lawfully possesses. In strict conveyancing theory, a deed, conveyance or mortgage executed by a transferor who lacks beneficial title does not of itself pass title, and the transaction is liable to be avoided at the instance of the true owner. While this cardinal rule safeguards rightful owners from unauthorised alienations by strangers or fraudulent actors, its uncompromising application frequently inflicts grave hardship on innocent third-party purchasers who buy property in good faith, relying upon registered public records, formal title deeds and physical possession.

In the absence of statutory exceptions, uncompromising enforcement of *nemo dat* would disrupt commercial stability, conveyancing and credit transactions. Buyers would remain perpetually vulnerable to hidden equitable titles, undisclosed trust arrangements and secret oral conveyances executed by prior owners. Legal systems were therefore driven to evolve doctrines protecting bona fide purchasers who rely upon the visible indicia of ownership, balancing the static security of the true owner's title against the dynamic security of commercial transactions enjoyed by good-faith transferees.

B. The genesis of equitable estoppel in English equity

To mitigate the harshness of the *nemo dat* rule and to maintain public confidence in commercial dealings, the English courts of equity formulated the doctrine of ostensible ownership, grounded in equitable estoppel. The core principle holds that where a person by words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces that other to act on the belief so as to alter their previous position, the former is precluded from averring a different state of things.

The foundational rationale governing immovable property was articulated by the Privy Council in *Ramcoomar Koondoo v. McQueen*.[1] The Judicial Committee laid down the enduring principle 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

[1] *Ramcoomar Koondoo v. McQueen*, (1872) 11 Beng. L.R. 46 (P.C.).

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he can overthrow that purchaser's case 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 a discovery of it.'

The ruling established three principles that shaped Indian property law: that equity protects the reliance interest of bona fide purchasers; that an owner who creates or permits a false appearance of ownership must bear the resulting loss; and that the true owner's right to reclaim property is conditioned upon the purchaser's lack of actual or constructive notice.

C. Codification of section 41 in the Transfer of Property Act, 1882

In codifying Indian property law in 1882, the legislature incorporated the equity of *Ramcoomar Koondoo* into section 41 of the Transfer of Property Act, 1882, which provides that 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 authorised 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.[2]

Section 41 operates as a statutory exception to the *nemo dat* principle. Rather than transferring title directly through an authorised grant, the section works by estoppel: it debars the true owner from asserting a superior beneficial title against an innocent purchaser because the true owner's own conduct, whether by active consent, passive acquiescence or culpable neglect, enabled the ostensible owner to effect the alienation.

II. Statutory deconstruction and constituent elements of section 41

Section 41 sets out cumulative statutory prerequisites that must be concurrently established by the party seeking its protection. The burden of proof rests on the transferee to demonstrate compliance with every condition. If any single element is unfulfilled, the exception fails and the general rule of *nemo dat* reinstates the true owner's title.

A. Ostensible ownership: definition, scope and exclusions

The threshold requirement is that the transferor be an ostensible owner, that is, a person who possesses the outer, visible indicia of absolute ownership, such as registered title deeds, revenue register entries, municipal tax assessments and physical possession, without holding actual beneficial or legal ownership of the property.

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[2] The Transfer of Property Act, 1882, § 41, No. 4, Acts of Parliament, 1882 (India).

Courts have repeatedly clarified who does not qualify. An ostensible owner is not a mere agent, caretaker, manager, holder of a power of attorney, tenant or trustee. Such persons hold derivative, limited or representative authority, and their capacity is disclosed on the face of the records or implied by their status. A third party dealing with an agent or a trustee is obliged to verify the precise scope of the authority conferred by the underlying instrument. Where the holder of a power of attorney sells property beyond the delegated mandate, section 41 offers no protection, because the attorney is an agent rather than an ostensible owner.

Similarly, in transactions concerning joint Hindu family property, a *karta* or a co-sharer who manages joint family assets is not an ostensible owner in respect of the undivided shares of the other co-sharers. A transferee purchasing joint family property from a single co-sharer cannot invoke section 41 to defeat the rights of non-consenting co-sharers unless the express or implied consent of those co-sharers is independently proved.

B. Nature of consent: express and implied

The second essential ingredient is that ostensible ownership exist with the consent, express or implied, of the persons interested in the immovable property. Consent is the linchpin of section 41, because it establishes the true owner’s responsibility for creating the misleading appearance of title.

Express consent arises where the true owner explicitly agrees, in writing or by verbal declaration, that the ostensible owner’s name be recorded as sole owner in public records and title documents. Implied consent is inferred from a continuous course of conduct, long-standing acquiescence, standing by during public dealings, or deliberate inaction. It requires proof that the true owner knew that another was dealing with the property as absolute owner and, despite full knowledge and an opportunity to object, chose to remain silent or inactive.

Consent must nevertheless be free and informed. Consent obtained through fraud, coercion, misrepresentation or undue influence does not satisfy section 41. Where the true owner was under a legal disability, such as minority or unsoundness of mind, during the period of ostensible ownership, no implied consent can be attributed.

C. Consideration and voluntary alienations

Section 41 restricts its protection to transfers made for consideration. Valuable consideration is an indispensable condition, and voluntary transactions, such as gifts and settlements unsupported by monetary or valuable exchange, fall outside the section. A donee under a gift deed who takes from an ostensible owner acquires no title, however innocent and however free from notice. Testamentary dispositions stand outside the statute altogether, since the Act confines a transfer of property to an act by which a living person conveys property to one or more other living persons.[3]

D. The dual threshold of reasonable care and good faith

The protection of section 41 is available only where the transferee satisfies a two-fold test: taking reasonable care to ascertain that the transferor had power to make the transfer, and acting in good faith. The requirements are distinct yet interdependent.

Good faith imports honesty of intention, freedom from fraudulent collusion and the absence of actual knowledge of the true owner's rights. Good faith alone is insufficient. A purchaser may act with complete personal honesty, but if grossly negligent or careless in conducting standard title checks, that purchaser fails the requirement of reasonable care. Reasonable care demands active and positive inquiry, and requires the transferee to undertake the due diligence that a prudent buyer would perform in an ordinary property transaction.

III. JUDICIAL EVOLUTION AND THE BENCHMARKS OF REASONABLE CARE

A. The indicia of a benami holding in *Jaydayal Poddar*

Guidance on identifying a benami holding, and so on identifying the person who is the real owner behind an ostensible one, was given by the Supreme Court in *Jaydayal Poddar v. Bibi Hazra*.[4] The Court held that the burden of proving that a sale is benami, and that the apparent purchaser is not the real owner, always rests on the person asserting it, and that the essence of a benami holding is the intention of the parties concerned. The Court set out six circumstances as a guide: the source from which the purchase money came; the nature and possession of the property after the purchase; the motive, if any, for giving the transaction a benami colour; the position of the parties and the relationship between the claimant and the alleged benamidar; the custody of the title deeds after the sale; and the conduct of the parties in dealing with the property after the sale.

These indicia are not a mechanical checklist. The Court was careful to state that they are not exhaustive, that their efficacy varies with the facts of each case, and that no absolute formula or acid test of universal application can be laid down. The source of the purchase money is the most weighty of the circumstances, but it is not by itself decisive.

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[3] *Id.* § 5.

[4] *Jaydayal Poddar v. Bibi Hazra*, A.I.R. 1974 S.C. 171 (India).

B. Revenue entries and root title

A recurring issue in title litigation is whether reliance solely on revenue registers, such as patta, chitta, khata or jamabandi, satisfies the requirement of reasonable care. It does not. The Supreme Court has held that mutation of a property in the revenue record neither creates nor extinguishes title, and has no presumptive value on title; it enables only the person in whose favour mutation is ordered to pay the land revenue.[5]

A purchaser who relies exclusively on municipal tax receipts or revenue entries, without verifying the registered sale deeds, searching the records of the Sub-Registrar and inspecting physical possession, therefore fails to exercise reasonable care. The weight that the courts place instead on the substance of the arrangement is illustrated by *G. Mahalingappa v. G.M. Savitha*, where a purchase in the name of a daughter was held benami on findings that the father had paid the purchase money, retained the original title deed, mortgaged the property to raise a loan for its improvement and paid the taxes on it.[6]

C. Notice, possession and the duty of inquiry

Knowledge of a competing claim defeats the protection of the section. In *Hardev Singh v. Gurmail Singh* the Supreme Court set out the ingredients of section 41, namely that the transferor be the ostensible owner, that he be so with the express or implied consent of the real owner, that the transfer be for consideration, and that the transferee act in good faith after taking reasonable care to ascertain the transferor's power to transfer. The Court declined to apply the section on the facts, the transferor having admitted that the sale was made in order to frustrate a pending claim, no public notice having been issued, and the purchaser having been aware of the litigation.[7]

The duty of inquiry extends to possession. Any person acquiring immovable property, or a share or interest in such property, is deemed to have notice of the title, if any, of any person who is for the time being in actual possession of it.[8] A purchaser who fails to visit the property, to inspect the occupation and to ask the occupant about the basis of that occupation is fixed with notice of whatever rights the occupant holds. Section 41 does not shield a buyer who turns a blind eye to obvious warning signs or omits customary inquiries.

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[5] *Sawarni v. Inder Kaur*, (1996) 6 S.C.C. 223 (India).
[6] *G. Mahalingappa v. G.M. Savitha*, (2005) 6 S.C.C. 441 (India).
[7] *Hardev Singh v. Gurmail Singh*, (2007) 2 S.C.C. 404 (India).
[8] The Transfer of Property Act, 1882, § 3, Explanation II, No. 4, Acts of Parliament, 1882 (India).

IV. Statutory conflict: section 41 and the benami legislation

A. Historical overlap between ostensible ownership and benami transactions

Property in India was historically purchased in the name of a family member, a wife, a child or a trusted associate while the purchase price was paid by another. Such arrangements were known as benami transactions, the term deriving from the Persian for 'without a name'. In early Indian jurisprudence benami transactions were recognised by the civil courts, and the doctrine of ostensible ownership under section 41 was frequently invoked to address alienations made by a benamidar to third-party buyers.

B. The legislative overhaul of 1988 and 2016

To combat tax evasion, the generation of unaccounted money and shadow holdings in real estate, Parliament enacted the Benami Transactions (Prohibition) Act, 1988.[9] That statute was substantially recast by the Benami Transactions (Prohibition) Amendment Act, 2016, which came into force on 1 November 2016 and renamed the principal Act as the Prohibition of Benami Property Transactions Act, 1988.[10]

The amended Act defines a benami transaction as an arrangement in which property is transferred to, or held by, one person while the consideration has been provided by another, and the property is held for the immediate or future benefit of the person providing the consideration. The definition expressly excepts property held by a *karta* or member of a Hindu undivided family out of the known sources of the family; property held by a person in a fiduciary capacity, including a trustee, executor, partner or director; property held in the name of a spouse or child out of the known sources of the individual; and property held in the name of a brother, sister or lineal ascendant or descendant where that person and the individual appear as joint owners and the consideration has come from the known sources of the individual. The definition further extends to arrangements made in a fictitious name, arrangements where the owner denies or is unaware of the ownership, and arrangements where the provider of the consideration is untraceable or fictitious.[11]

Section 3 prohibits entry into a benami transaction, and provides that a person entering into such a transaction on or after the commencement of the 2016 amendment is punishable under

[9] The Benami Transactions (Prohibition) Act, 1988, No. 45, Acts of Parliament, 1988 (India).
[10] The Benami Transactions (Prohibition) Amendment Act, 2016, No. 43, Acts of Parliament, 2016 (India).
[11] The Prohibition of Benami Property Transactions Act, 1988, § 2(9), No. 45, Acts of Parliament, 1988 (India).

Chapter VII of the Act.[12] Section 5 declares that any property that is the subject matter of a benami transaction is liable to be confiscated by the Central Government.[13]

Confiscation is not automatic. It follows a statutory process in which an Initiating Officer who has reason to believe that a person is a benamidar issues a show cause notice and may, with the prior approval of the Approving Authority, attach the property provisionally.[14] The matter is then referred to an Adjudicating Authority appointed by the Central Government, whose orders are appealable to an Appellate Tribunal established for the purpose.[15] Where an order of confiscation is made, the rights and title in the property vest absolutely in the Central Government free of all encumbrances, and no compensation is payable.[16] A person found guilty of the offence of a benami transaction is punishable with rigorous imprisonment for a term of not less than one year and not more than seven years, together with a fine which may extend to twenty-five per cent of the fair market value of the property.[17]

C. The apparent clash between civil protection and statutory confiscation

At first sight this machinery collides with section 41. On the civil side, a bona fide purchaser who buys from an ostensible owner after taking reasonable care is protected, and the transfer is not voidable. On the enforcement side, property adjudged benami vests in the Central Government upon confiscation, without compensation. The question is whether a third-party purchaser who acted in good faith and satisfied section 41 can resist confiscation under the benami legislation.

The statute itself supplies much of the answer, and this appears to have been overlooked in the debate. The confiscation provision does not apply to property held or acquired by a person from the benamidar for adequate consideration, prior to the issue of the notice under section 24(1), and without that person having knowledge of the benami transaction.[18] The Act therefore already contains a bona fide purchaser exception, and its three conditions map closely onto section 41: adequate consideration corresponds to the requirement of consideration, absence of knowledge corresponds to good faith, and the timing requirement fixes the point beyond which a purchaser is on notice. The residual gap is narrow but real, since the statutory exception is

[12] *Id.* § 3.
[13] *Id.* § 5.
[14] *Id.* § 24.
[15] *Id.* §§ 7, 30.
[16] *Id.* § 27(3).
[17] *Id.* § 53.
[18] *Id.* § 27(2).

framed in terms of the absence of knowledge and does not in terms import the positive duty of inquiry that section 41 imposes through the standard of reasonable care.

D. *Ganpati Dealcom* and the contested reach of the 2016 amendment

The constitutional dimension was addressed in *Union of India v. Ganpati Dealcom (P) Ltd.*, in which a three-judge bench of the Supreme Court held section 3(2) of the unamended 1988 Act unconstitutional for manifest arbitrariness and for violating Article 20(1), and held that the forfeiture provisions introduced in 2016, being substantive and punitive rather than procedural, could operate prospectively only and could not be applied to transactions entered into before the amendment came into force.[19]

That judgment no longer holds the field. On 18 October 2024 the Supreme Court allowed the Union's review, recalled the judgment in its entirety on the ground that the constitutional validity of a statutory provision cannot be adjudicated in the absence of a lis and a contest between the parties, and restored the civil appeal for fresh adjudication before a bench to be nominated by the Chief Justice of India.[20] The questions decided in 2022 are therefore open once more, and the temporal reach of the 2016 amendment awaits authoritative determination. Any analysis of the interaction between section 41 and the benami legislation must be stated on that footing, and the conclusions reached in the recalled judgment should not be treated as settled law.

V. A TITLE DUE DILIGENCE PROTOCOL FOR PRACTITIONERS

To ensure that a transaction satisfies the judicial standard of reasonable care under section 41, and is resilient against a claim under the benami legislation, practitioners may follow a structured protocol. The steps that follow reflect established conveyancing practice rather than statutory prescription.

A. Search at the Sub-Registrar's office

Thirty-year search. Conduct an unbroken title search at the jurisdictional Sub-Registrar's office for a period of at least thirty years. **Chain of title.** Verify parent deeds, previous sale deeds, partition deeds, gift deeds and release deeds to confirm an unbroken devolution of title. **Encumbrance search.** Obtain encumbrance certificates for the same period to confirm that no prior mortgage, court attachment or entry of *lis pendens* subsists.

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[19] *Union of India v. Ganpati Dealcom (P) Ltd.*, (2023) 3 S.C.C. 315 (India).

[20] *Union of India v. Ganpati Dealcom (P) Ltd.*, 2024 INSC 799 (India) (allowing the review, recalling the judgment of 23 August 2022 and restoring Civil Appeal No. 5783 of 2022 for fresh adjudication).

B. Public notice and media publication

Newspaper publication. Issue a public notice in two widely circulated dailies, one in the regional language and one in English. **Claims window.** Invite objections, claims, liens and charges from the public within a stated period, commonly fifteen days, before the agreement of sale is finalised. The practice carries evidentiary value in demonstrating inquiry, as the absence of public notice told against the purchaser in *Hardev Singh*.

C. On-site inspection and revenue verification

Physical inspection. Inspect the site to verify actual occupation and boundary demarcation, and question any occupant found in possession. **Revenue records.** Inspect the revenue records, including patta, chitta, adangal, khata and the field measurement sketch, remembering that these establish fiscal liability rather than title. **Utility and tax receipts.** Verify current utility connections and municipal tax receipts standing in the name of the vendor.

D. Financial traceability of consideration

Traceable banking channels. Ensure that the entire sale consideration is disbursed through traceable banking channels, whether by real time gross settlement, national electronic funds transfer or account payee cheque. Cash payment should be avoided, since a traceable trail of consideration is the most direct answer to an allegation that the purchase was funded benami, and adequate consideration is itself a condition of the statutory exception to confiscation.

VI. Conclusion and Legislative Recommendations

Section 41 of the Transfer of Property Act, 1882 remains an indispensable pillar of Indian civil jurisprudence, designed to maintain commercial confidence and to protect innocent purchasers against secret titles. The intersection between civil property protections and the benami legislation has generated real friction, though less than is sometimes supposed, since the benami statute contains its own protection for the bona fide purchaser for value without knowledge. The friction that remains is one of standards and of proof rather than of outright conflict, and it is sharpened by the fact that the leading constitutional authority on the temporal reach of the 2016 amendment stands recalled and the question is once again before the Court.

The following reforms are accordingly recommended.

Align the statutory exception with the civil standard. The exception to confiscation already protects a person who acquires from a benamidar for adequate consideration, before notice and without knowledge of the benami transaction.[21] It is framed, however, in terms of the absence

[21] The Prohibition of Benami Property Transactions Act, 1988, § 27(2), *supra* note 18.

of knowledge alone. Parliament should clarify that a transferee who has taken reasonable care within the meaning of section 41 of the Transfer of Property Act, 1882 satisfies that requirement, so that a single standard of diligence governs both the civil and the confiscation enquiries and a purchaser is not left to satisfy two differently worded tests on the same facts.

Integrate land records on a unified platform. State governments should accelerate the digitisation of land records and link revenue databases, registration portals of the Sub-Registrar and records of pending litigation into a single searchable platform, so that the inquiry the law expects of a purchaser can in fact be performed.

Require registration of powers of attorney and agreements to sell. Central and state legislation should mandate the registration of general powers of attorney, agreements to sell and equitable charges, in order to eliminate the secret arrangements from which ostensible ownership disputes arise. The need is underscored by the Supreme Court's holding that transactions in the nature of sale agreement, general power of attorney and will transfers do not convey title and are not a recognised mode of transfer of immovable property.[22]

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[22] *Suraj Lamp & Indus. (P) Ltd. v. State of Haryana*, (2012) 1 S.C.C. 656 (India).