# IN THE SUPREME COURT OF BANGLADESH
## APPELLATE DIVISION

**PRESENT:**

**MS. Justice Nazmun Ara Sultana.**
**Mr. Justice Syed Mahmud Hossain.**
**Mr. Justice Muhammad Imman Ali.**
**Mr. Justice Mohammad Anwarul Haque.**

**CIVIL PETITION FOR LEAVE TO APPEAL NOS.2080-2081 OF 2010.**
(From the judgment and order dated 26.04.2010 passed by the High Court Division in First Appeal No.322 of 2003 and First Appeal No.343 of 2003)

S. N. Kabir. ..... **Petitioner.**
(In both the cases)

**-Versus-**

Mrs. Fatema Begum and others. ..... **Respondents.**
(In both the Cases)

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| **For the Petitioner.** (In both the cases) | : | Mr. Mahmudul Islam, Senior Advocate, instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record. |
| **For Respondent No.1.** (In C. P. No.2080/10) | : | Mr. Abdul Wadud Bhuiya, Senior Advocate, instructed by Mr. Md. Zainul Abedin, Advocate-on-Record. |
| **For Respondent No.1.** (In C. P. No.2081/10) | : | Mr. Mahbubey Alam, Senior Advocate, instructed by Mr. Md. Zahihur Islam, Advocate-on-Record. |
| **Respondent No.2.** (In both the cases) | : | Not represented. |
| Date of Hearing | : | **The 16th February,2014.** |

**J U D G M E N T**

**SYED MAHMUD HOSSAIN,J:** Both the civil petitions for leave to appeal are directed against the judgment and order dated 26.04.2010 passed by the High Court Division in First

Appeal No.322 of 2003 heard analogously with F. A. No.343 of 2003 dismissing the appeals and affirming the judgment and decree dated 05.08.2003 passed by the learned Joint District Judge, Second Court, Dhaka in Title Suit No.270 of 2002 and judgment and decree dated 17.09.2003 passed by the learned Joint District Judge, Third Court, Dhaka in Title Suit No.149 of 2002 rejecting the plaints of both the suits.

Both the civil petitions for leave to appeal arising out of the common judgment and order between the same parties and involving common question of law and fact having been heard together are disposed of by this single judgment.

The facts leading to the filing of both the civil petitions for leave to appeal, in brief, are :

The plaintiff instituted Title Suit No.149 of 2002 and Title Suit No.270 of 2002 for declaration that he is the owner of the suit property and that the defendant-wife is his benamdar and is not the owner thereof. The plaintiff's case, in short, is that he married defendant No.1, Mrs. Fatema Begum who is a simple house wife had no source of income and dependent on the plaintiff-husband. The plaintiff being an industrialist and with motive to get income tax relief purchased the suit property being urban property in the "benami" of defendant No.1 and that the plaintiff purchased the suit property with his own money and he has been residing in the suit property with his family treating the same as his own property. Defendant No.1 knew that the plaintiff purchased the suit property in the "benami" of defendant No.1

who was claiming ownership of the suit property at the behest of her father and brother. Hence, the suit has been filed by the plaintiff for declaration of title in the suit property.

Defendant No.1 contested the suit by filing an application under Order VII Rule 11(d) of the Code of Civil Procedure for rejection of the plaint, contending, inter alia, that under the provision of section 5 of the Land Reforms Ordinance,1984 (hereinafter referred as "the Ordinance"), the suit of the plaintiff is barred as benami transaction is prohibited.

The plaintiff filed written objection against defendant's application for rejection of the plaint. His case is that the suit property is urban property and that the Land Reforms Ordinance,1984 has been promulgated with the object to reform the land relating to land tenures, land holding and transfer with a view to maximizing production and ensuring a better relationship between land owners and bargaders and the provisions of the entire Ordinance are relating to agricultural and cultivable land holding and transfers and not relating to urban land, and the provisions of section 5 of the said Ordinance do not apply to non-agricultural urban land transfer, and the application of defendant No.1 for rejection of the plaint is liable to be rejected.

The trial Court by the judgments and orders dated 17.09.2003 and 05.08.2003 rejected the plaints of both the suits.

Being aggrieved by and dissatisfied with the judgments and orders dated 17.09.2003 and 05.08.2003 passed by the trial Court, the plaintiff preferred First Appeal Nos.322 and 343 of 2003 before the High Court Division. The learned Judges of the High Court Division, upon hearing the parties in both the appeals, by its judgment and order dated 26.04.2010 dismissed both the appeals.

Feeling aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the plaintiff has filed these civil petitions for leave to appeal before this Division.

Mr. Mahmudul Islam, learned Senior Advocate, appearing on behalf of the leave-petitioner in both the petitions, submits that if the Land Reforms Ordinance,1984 is considered as a whole, it will appear that prohibition of benami transaction of "immoveable property" applies only in respect of agricultural land and that the High Court Division having considered the provision of section 5 of the Ordinance in particular, came to the finding that section 5 of the Ordinance applies to both agricultural and non-agricultural land. He further submits that section 5 of the Ordinance undoubtedly relates to agricultural land and the purpose of the Ordinance is to maximize production and to that end, provision has been made for stable and satisfactory relationship between agricultural land owners and bargaders and the expression "immoveable property" cannot be said to be unambiguous and there is a doubt as to whether in dealing

with agricultural land, the legislative authority at all intended to bring non-agricultural land within the mischief of section 5 of the Ordinance and as such, the impugned judgment should be set aside.

Mr. Abdul Wadud Bhuiyan, learned Senior Advocate, appearing on behalf of respondent No.1 in Civil Petition for Leave to Appeal No.2080 of 2010 and Mr. Mahbubey Alam, learned Senior Advocate, appearing on behalf of respondent No.1 in Civil Petition for Leave to Appeal No.2081 of 2010, on the other hand, support the impugned judgment delivered by the High Court Division.

We have considered the submissions of the learned Senior Advocate, perused the impugned judgment and the materials on record.

Benami transactions which have been in vogue in the Indian Sub-Continent for centuries denote a transaction which is done by a person without using his own name, but in the name of another. Acquiring and holding property and even carrying on business in names other than those of real owners or in fictitious names did not contravene any provision of law and therefore, Courts had given effect to such transactions. In benami transaction, the Benamdar has no beneficial interest in the property or business that stands in his name. He only represents the real owner as his trustee. In benami transactions, the presumption is that a person who pays money is the real owner and not the person in whose name the property is purchased. Earlier men purchased

properties in benami to cajole or shield themselves against the creditors. There was also the need for defrauding by making secret transactions. Fear of confiscation also led to benami holdings. Besides, these arrangements were aimed at evading the law.

This old age practice was given a go-by by section 5 of the Land Reforms Ordinance,1984. Before addressing the submissions of the learned Advocate for the petitioner, it is necessary to go through the provision of section 5 as incorporated in Chapter-3 of the Ordinance under the caption "Prohibition of Benami Transaction of Immoveable Property" as under:

> "5.(1) No person shall purchase any immovable property for his own benefit in the name of another person.
>
> (2) Where the owner of any immovable property transfers or bequeaths it by a registered deed, it shall be presumed that he has disposed of his beneficial interest therein as specified in the deed and the transferee or legatee shall be deemed to hold the property for his own benefit, and no evidence, oral or documentary, to show that the owner did not intend to dispose of his beneficial interest therein or that the transferee or legatee hold the property for the benefit of the owner, shall be admissible in any proceeding before any Court or authority.
>
> (3) Where any immoveable property is transferred to a person by a registered deed, it shall be presumed that such person has acquired the property for his own benefit, and where consideration for such transfer is paid or provided by another person it shall be presumed that such other person intended to pay or provide such consideration for the benefit of the transferee, and no evidence, oral or documentary, to show that the transferee hold the property for the benefit of any other person or for the benefit of the person paying or providing the

> consideration shall be admissible in any proceeding before any Court or authority."

The expression "immoveable property" is to be construed in its proper context to ascertain whether the expression is clear and unambiguous. In order to construe "immoveable property" as mentioned in section 5 of the Ordinance, all the sections of the Ordinance are to be considered. The expression immoveable property cannot be considered in isolation in the context of section 5 of the Ordinance. For proper construction, the preamble and the short title of the Ordinance are also to be considered. The preamble of the Ordinance runs as under:

> "Whereas it is expedient to reform the law relating to land tenure, land holding and land transfer with a view to maximising production and ensuring a better relationship between land owners and bargadars."

If the preamble is considered in isolation, then the submission made by Mr. Mahmudul Islam carries much force. Now let us see what role is played by the preamble in construing a statue.

According to ***Maxwell*** "when possible, a construction should be adopted which will facilitate the smooth working of the scheme of the legislation"-***Interpretation of Statutes*** 12th edition at page 201.

In the case of ***Attorney General vs. H.R. H. Prince Earnest Gugustus of Hanover (1957) All E.R. Pg.49, Law Lord Viscount Simonds*** observed that as under:

> "For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy."

On the one hand, the proposition can be accepted that "…….it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms."

"I quote the words of ***CHITTY,L.J.,*** which were cordially approved by ***Lord Davey in Powell V. Kempton Park Racecourse Co., Ltd(1)([1899] A.C 143 at p.185).*** On the other hand, it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity in order to bring in the aid of the preamble. It means only that the elementary rule must be observed that no one should profess to understand any part of a statue or of any other document before he has read the whole of it. Until he has done so, he is not entitled to say that it, or any part of it, is clear and unambiguous."

In the case of ***Amin Jute Mills Vs. Bangladesh 29 DLR(SC)85,*** it has been observed paragraphs 9 and 11 as under:

"It is now well-recognized, in this regard that although there was previously some difference of opinion among the distinguished jurists in England, the long title of an Act which is set out at its head giving the general purpose of the Act as well as the preamble of an Act which also recites the main object of the Act are part of the Act. One of the basic rules of interpretation of a statute is that to understand the meaning of a particular provision of an Act one is to read the Act as a whole each part shedding light on the other and the following observation of Lord Wright in the case of ***Jennings Vs. Kelly decided by the House of Lords and reported in 1940 A.C. 206 same case (1939) All. E.R. 464*** may be referred in this connection."

"The proper course is to apply the broad general rule of construction, which is that section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest."

".....If the words of a substantive provision of an Act are precise and unambiguous then the meaning thereof should not be restricted and controlled by taking recourse to the title or preamble of the Act. Lord Halsbury, L.C. in his speech in the case of Powell Vs. The Kempton Park Race Course Company Limited (1899) A.C. 143 at page 157 clearly stated the law in this regard in the following words;

> "Two propositions are quite clear-one that a preamble may afford useful light as to what a statute intends to reach, and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment."

Lord Davey dwelt on this question further in his separate speech in the same case and made the following observation at page 185 of the Report:

> "undoubtedly'....I quote from Chitty L.J.'s Judgment words with which I cordially agree...it is a settled Rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms.....There is however another Rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to

> bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and defeat the general intention of the Legislature."

In the case of ***Anwar Hossain Chowdhury Vs. the Government of Bangladesh, 41 DLR (AD)165,*** this Division in paragraph 489 of the report quoted with approval the observation of the Indian Supreme Court in the case of ***Sreemoti Indira Gandhi Vs. Rajnarain reported in AIR 1975 (SC)2299*** as follows:

> "The preamble, though a part of the Constitution is neither a source of power nor a limitation upon that of the ideological aspirations of the peoples……"

From the cases cited above, it appears that the preamble cannot control the meaning and expression when the meaning of the expression is clear and ambiguous. The aid of the preamble can be taken if the meanings of the words to be interpreted are not clear and ambiguous.

Having gone through the preamble, we find that the preliminary object of the legislative authority is to bring about reformation of the lands in rural area. The preamble must be read with sub-section (1) of section 1 which provides that this Ordinance may be called the Land Reforms Ordinance,1984. The legislative authority was conscious in not using the word "agriculture" before Land Reform Ordinance. What is important to note here is that the word "land" has not been defined in section 2 of the Ordinance.

But in clause-(c) of section 2 'barga land' has been defined. Had the legislative authority the intention to deal with agricultural land only, it would not have defined "barga land".

Sub-section (1) of section 5 of the Ordinance provides that no person shall purchase any immoveable property for his own benefit in the name of another person. Sub-section (2) of section 5 of the Ordinance provides that where the owner of any immoveable property transfers or bequeaths it by a registered deed, the presumption would be that he has disposed of his beneficial interest therein and the transferee or legatee shall be deemed to hold the property for his own benefit and that no evidence either oral or documentary to show that the seller did not intend to dispose of his beneficial interest therein or the transferee or legatee holds the property for the benefit of the owner and that such evidence shall not be admissible in any proceeding before any Court or authority. Sub-section (3) of section 5 provides that where any immovable property is transferred to a person by a registered deed, it shall be presumed that such person has acquired the property for his own benefit and no oral and documentary evidence to show that the transferee holds the property for the benefit of another person paying

or providing the consideration shall be admissible in any proceeding before any Court or authority.

The language of section 5 of the Ordinance is plain and unambiguous and it is remarkable by itself. This section must be read in conjunction with sub-section (1) of section 1 of the Ordinance, which provides that this Ordinance may be called the "Land Reforms Ordinance." While describing the (naming) Ordinance, the legislative authority was conscious in not using the word "agriculture" before the word, 'land'. This Ordinance has been divided into six chapters. Chapter-1 containing sections 1 to 3 relates to preliminary; chapter-II containing section 4 relates to limitation on acquisition of agricultural land; chapter-III comprising section 5 relates to prohibition of benami transaction of immoveable property; chapter-IV comprising sections 6 and 7 relates to homesteads in 'rural area', chapter-V consisting of sections 8-18 relates to agricultural land and resolution of dispute between the land owners and bargadars and chapter-VI containing sections 20, 21 and 22 relates to miscellaneous. Having gone through all the sections of the Ordinance, in general, and section 5, in particular, we are of the view that there is no scope for reading the words 'rural area' in section 5 of the Ordinance. From the cases cited before, it appears that the preamble cannot be used to control the

enactments themselves where they are expressed in clear and unambiguous terms. The aid of preamble can only be taken when the meanings of the words to be interpreted are not clear and unambiguous. Therefore, the words 'immoveable property' occurring in section 5 of the Ordinance include both agricultural and non-agricultural properties. There is no scope for encroaching upon the domain of legislature by importing the words 'rural area' in section 5 and addition of such words will amount to legislation by the judiciary which is not at all permissible.

The Supreme Court of Pakistan in the case of ***Md. Ismail Vs. the State, 21 DLR (SC)161 observed in paragraph 15*** that the function of the Court is interpretation, not legislation in the following terms:

> "15. The purpose of the construction or interpretation of a statutory provision is no doubt to ascertain the true intention of the Legislature, yet that intention has, of necessity, to be gathered from the words used by the Legislature itself. If those words are so clear and unmistakable that they cannot be given any meaning other than that which they carry in their ordinary grammatical sense, then the Courts are not concerned with the consequences of the interpretation however drastic inconvenient the result, for, the function of the Courts is interpretation, not legislation."

The Indian Supreme Court in the case of ***Commissioner of Income Tax, Kerala Vs. Tara Agencies*** reported in

(2007)6 Supreme Court Cases 429 held in paragraph 58 of the report (P.447) as follows:

> "58. ***In Union of India Vs. Deoki Nandan Aggarwal,*** a three Judge Bench of this Court held that it is not the duty of the Court either to enlarge the scope of legislation or the intention of the legislature, when the language of the provision is plain. The Court cannot rewrite the legislation for the reason that it had no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there."

From the cases cited above, it appears that the function of the Courts is interpretation, not legislation and that Courts cannot add words to a statute or read words into it which are not there.

Before promulgation of this Ordinance, the benami transactions were prevalent both in rural, urban or municipal areas. It was the intention of the legislative authority that the system, if prohibited, would be prohibited both in rural and urban or municipal areas. Though most of the provisions of the Ordinance relate to rural areas, that will not alter the meaning of the provisions of section 5 which cannot be restricted to rural areas only.

Because of benami transactions, multifarious litigations crop up across the country. Moreover, the persons having the possession of black money take advantage of benami transactions by purchasing property in the names of their nearest relatives and such transactions increase corruption in the society. So, the legislative authority had the

intention to say good-bye to benami transactions once and for all.

Benami transactions have been prohibited in India by the Benami Transactions (Prohibition and the Right of Recovery Property) Ordinance,1988 followed by the Benami Transactions (Prohibition) Act,1988 and therefore, in India benami transactions are not permissible both in rural and urban areas. We, however, got rid of benami transactions by the Land Reforms Ordinance,1984.

The findings arrived at and the decision made by the High Court Division are based on proper appreciation of law and fact.

In the light of the findings made before, we do not find any substance in these civil petitions for leave to appeal. Accordingly, both the petitions are dismissed.

**J.**

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**The 16th February,2014.**

**/rezaul.B.R./.**