

19 SCOB [2024] HCD 165

HIGH COURT DIVISION  
(Civil Revisional Jurisdiction)

Civil Revision No. 9213 of 1991

Civil Revision No. 87 of 1987

Md. Abdul Wadud Khan being dead his  
heirs: Mahmud Nadir Abdullah Khan  
and others

....Plaintiff-Respondent-Petitioners

Vs.

Md. Kamrul Islam Khan and others

.... Defendant-Appellant-O.P.s

Ms. Salina Akter, with

Mr. Uzzal Bhowmick, Advocates

....For the petitioners

None appears

....For the opposite parties

Heard on: 26.10.2022

Judgment on: 14.02.2023

Present:

Mr. Justice Md. Zakir Hossain

Editors' Note:

In this case question arose as to whether the plaintiff was a *benamder* of his father as the respondents claimed. The trial court found that the plaintiff was not a *benamder* but the Appellate Court reversed the decision. High Court Division, however, discussed the laws relating to benami transaction and then assessing the evidence on record, came to the conclusion that as per the rules of preponderance of evidence it has been proved that plaintiff was not *benamder* of his father and consequently, set aside the judgment of the Appellate Court.

Key Words:

Section 81 and 82 of the Trusts Act, 1882; Land Reforms Ordinance, 1984; benami transaction; Rules of preponderance of evidence

Section 81 and 82 of the Trusts Act, 1882:

It cannot be denied that the benami transaction was custom of the Country and it was recognized as customary law till Land Reforms Ordinance, 1984 was promulgated. In 1882, the practice of benami transaction received legislative recognition under section 81 and 82 of the Trusts Act, 1882. ... (Para 14)

In this case, the onus of establishing that the transaction is benami, is on the defendants, where it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. ... (Para 16)

On perusal of the oral and documentary evidences, it appears that as per the Rules of preponderance of evidence, the contention of the plaintiff's possession is heavy in weight but the learned District Judge on slipshod statement held that the joint possession of the plaintiff and the defendants without sifting the documents in entirety. The original documents are lying with the plaintiff and produced from the custody of the plaintiff and those were admitted as evidence without any objection from the defendants' side. The burden of showing that the alleged transfer is banami transaction has not been

**discharged by the defendants' side. Undisputedly, the father of the defendants in his lifetime did not take any legal action against the transaction nor he filed any suit for declaration that the plaintiff was his benamder. Considering the surrounding circumstances, the relationship between the parties and intention and subsequent conduct of Naybullah Khan, it is as clear as daylight that 94 years ago, Naybyllah Khan took settlement of the suit land for the benefit of his eldest son *i.e* the plaintiff for the purpose of the welfare of his son. ... (Para 25)**

## JUDGMENT

**Md. Zakir Hossain, J:**

1. At the instance of the petitioners, the Rule was issued by this Court with the following terms:

*“Let the records of the Case be called for and a Rule issue calling upon the opposite parties to show cause as to why the judgment and decree complained of in the petition moved in Court today should not be set aside or such other or further order or orders passed as to this Court may seem fit and proper.”*

2. Facts leading to the issuance of the Rule are *inter alia* that the predecessor of the instant petitioners being plaintiff filed Other Class Suit No. 405 of 1978 before the Court of the learned Munsif (now Assistant Judge), Naogaon for declaration of title in the suit land as mentioned in the schedule to the plaint.

3. The plaintiff's case, in short, is that the suit property was the khas land of the Ex Zaminder. The plaintiff took settlement of the same by dint of amalnama (Exhibit-1) in the year of 1333 B.S. The zaminder instituted the Rent Suit No. 582 of 1951 against the plaintiff for arrears of rent wherein the plaintiff paid up the demand by challan (Exhibit-3). Accordingly, S.A khatian was prepared in the name of the plaintiff and thereafter, the plaintiff used to pay rent to the Government. But unfortunately, at the time of Revisional Settlement Operation, the suit land was recorded in the names of both the plaintiff and the defendants. On the basis of the objection petition filed by the plaintiff, the Revenue Officer corrected the MRR and accordingly, recorded the entire land in the name of the plaintiff. But since the plaintiff lived far away from the suit land, the defendants managed to record their names in the RS khatin along with the name of the plaintiff though the plaintiff is the absolute owner of the suit land. He has exclusive possession therein and the RS record created cloudy over the suit land, therefore, the plaintiff constrained to file the aforesaid suit. The defendant contested the suit by filing joint written statements denying the material allegations set out in the plaint contending *inter alia* that the suit is not maintainable in its present form.

4. The defendants' case is that their father was a Government service holder and he took *pattan* of the suit land from Brikutsha Estate to this plaintiff as his *benamder* from his own fund for his own benefit. The plaintiff who was minor had no independent source of income and he did not take *pattan* and pay rents. During his life time, Naybullah Khan possessed the suit land. He died in 1974 leaving behind the plaintiff and the defendants as his legal heirs. The suit land was correctly recorded in the finally published RS khatian. The plaintiff has got

no exclusive title and possession in the suit land. And, therefore, the defendant prayed for dismissal of the suit.

5. On the pleadings, the learned Munsif, Naogaon was pleased to frame the following issues:

- (i) *Is the suit maintainable in its present form?*
- (ii) *Has the plaintiff got any cause of action to file the suit?*
- (iii) *Has the plaintiff any exclusive right, title and possession in the suit land?*
- (iv) *To what reliefs, if any, is the plaintiff entitled?*

6. After conclusion of the trial, the learned Munsif was pleased to decree the suit. Challenging the legality and propriety of the judgment and decree of the learned Munsif, the defendant-opposite parties preferred Title Appeal No. 81 of 1984 before the Court of the learned District Judge, Naogaon. Upon hearing, the learned District Judge was pleased to allow the said Title Appeal No. 81 of 1984 and as such, set aside the judgment and decree of the Trial Court. Impugning the judgment and decree of the learned District Judge, the petitioners moved this Court and obtained the aforesaid Rule.

7. The Civil Revision was originally filed being No. 87 of 1987 at Rangpur Session and later on, it was renumbered as Civil Revision No. 9213 of 1991.

8. Ms. Salina Akter, the learned Advocate alongwith Mr. Uzzal Bhowmick for the petitioners, submits that the learned Munsif after considering the evidence on record rightly held that the plaintiff is the owner and possessor of the suit land and the learned District Judge turned down the decision of the judgment and decree of the Trial Court holding the view that the original owner of the suit land is Naybullah Khan and he purchased the suit land in the name of the plaintiff as benamder in the name of the plaintiff from his own fund. The learned District Judge also held that S.A record was prepared in the name of the plaintiff on the basis of the tenants; ledger of the Ex-land receiver and the plaintiff paid up rent to the Government and S.A stood in his name. The learned District Judge further held that during the revisional settlement operation, the suit land was recorded in the name of the plaintiff and the defendants according to their respective shares.

9. She refers *ratio and obiter* of different judgments reported in 49 DLR (AD) 73, 51 DLR (AD) 81, 55 DLR (HCD) 412, 8 BLT (HCD) 171 and 11 BLT (HCD) 26.

10. None appears to oppose the Rule.

11. The trial Court after considering the entire materials on record held that the plaintiff has got the suit land by way of settlement and he has been possessing the same by paying rent and SA Operation was duly prepared in the name of the plaintiff, but the contention of the defendants is that their father took settlement of suit land from his own fund in the *benami* of the plaintiff; therefore, *onus* lies upon them but they hopelessly failed to discharge the burden of proof that their father took settlement in the name of the plaintiff as his *benamder*. After considering the evidence on record, the trial Court held that the plaintiff has title and possession in the suit land and accordingly, decreed the suit. It is true that father of the plaintiff and defendants did not challenge the settlement made in favour of the plaintiff during his lifetime. The Appellate Court held that Naybullah Khan was a government service holder and he took settlement of the suit land on 18<sup>th</sup> Jaistha, 1333 BS in the benami of his eldest son Abdul Khan who was at the time a minor boy of 6/7 years of age without any

independent source of income or having any independent fund of his own. It is also stated by the Appellate Court since R.S. Khatian was jointly recorded in the name of the plaintiff and defendants; therefore, Appellate Court held the view the predecessor of the plaintiff Nayeb Ullah took settlement of the suit land showing the plaintiff as his benamdar.

12. Now the pertinent issue is whether the impugned judgment and decree is liable to be interfered with by this Court.

13. Heard the submissions advanced by the learned Advocates for the petitioners along with materials on record with care and attention and seriousness as it deserves. I have also meaningfully waded through the legal position critically involved in this case.

14. It cannot be denied that the benami transaction was custom of the Country and it was recognized as customary law till Land Reforms Ordinance, 1984 was promulgated. In 1882, the practice of benami transaction received legislative recognition under section 81 and 82 of the Trusts Act, 1882.

15. The principles governing the determination of the question whether a transaction is a benami transaction or not, may be summed up thus:

- i. *The burden of showing that a transfer is a benami transaction, lies on the person who asserts that it is such a transaction.*
- ii. *If it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary.*
- iii. *The true character of the transaction is governed by the intention of the person who has contributed the purchase money.*
- iv. *The question as to what his intention was, has to be decided on the basis of-*
  - (a) *the surrounding circumstances,*
  - (b) *the relationship of the parties,*
  - (c) *the motives governing their action in bringing about the transaction, and*
  - (d) *their subsequent conduct, etc.*

16. In this case, the onus of establishing that the transaction is benami, is on the defendants, where it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts.

17. In case of *Nurjahan Begum v. Mahmudur Rahman* 34 DLR (AD) 61 traced the history of benami transaction and also the law propounded by the Privy Council for the following conclusions:

*“In a benami transaction source of purchase money is an important criteria (sic) but it is not conclusive. The initial presumption in the case of a transfer concluded by a registered deed is in favour of the person whose name appears as the transferee in the deed, but this presumption is rebuttable. Source of consideration money though an important criteria in a benami transaction but in the absence of an unambiguous ownership consideration of other relevant circumstances become important in a case where ownership is disputed. The disputed question of benami cannot be determined only on the consideration of source of consideration money,*

*and it becomes incumbent for the Court to fall back upon the surrounding circumstances of the transaction, the position of the parties and the relationship to each other. The motive which could govern their actions, but their subsequent conduct including their dealings and the enjoyment of the property become relevant factors for consideration. In the case of **Bilas Kunwar vs. Desraj Ranjit Singh (1915)** LR 42 IA 202 the Privy Council while adopting the principle laid down in Gopeekrist Gossain's case, that the criterion in benami cases is the source of money with which the consideration was paid, made an important qualification, in that the source of purchase money is only to be the criterion in the absence of all other relevant circumstances. Among other circumstances possession of the property has been held to be very important. Privy Council in **Imambandi Begum vs. Kamleshwari Pershad (1886)** LR 13 IA 160 held as under:*

*"Where there are benami transactions and the question is who is the real owner, the actual possession or receipt of rents of the property is most important"*

18. In the case of **Ram Narain vs. Mohammad Hadi (1898)** LR 26 IA 38 the Privy Council laid stress on the factum of possession of the property and the collection of rents. Incidentally, it may be mentioned that in a disputed case of benami, custody of the documents is a relevant factor to be considered:

19. The Supreme Court of India in **Jaydayal Podar vs. Bibi Hazra (1974)** 2 SCR 90 had summed up the principles governing determination of benami transaction to which I have respectful approval, in the following words:

*"It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is, that a deed is a solemn document prepared and executed after considerable deliberation and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances; (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour, (4) the position of the*

*parties and the relationship, if any between, the claimant and the alleged benamder, (5) the custody of the title deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale."*

20. It appears from the record that the father of the plaintiff; Naybullah Khan took settlement of the suit land in favour of the plaintiff-petitioners in 18 Poush, 1333 B.S and S.A record was prepared in the name of the plaintiff and the plaintiff also paid rent to the Government as well as zamindar. It also appears from the record that the plaintiff's father; Naybullah Khan left this transitory world on 11.01.1974. During his life time i.e within 46 years, Naybullah Khan did not file any suit for declaration that the plaintiff was his benamder nor he raised any question as to the transaction made by him in favour of the plaintiff. S.A khatian was prepared from 1956 to 1962. At that time Naybullah was alive, but he did not raise objection as to S.A khatian. It also appears that all the original documents were produced from the custody of the plaintiff and these documents were admissible as evidence. It is true that the R.S khatian was prepared in favour the plaintiff-petitioners and the defendants jointly and as such, created cloud over the stainless title of the suit land and therefore, the plaintiff was constrained to file a suit for declaration of title and to make a negative declaration that the defendants are not the owners of the suit land. It also appears that since the plaintiff failed to pay rent to the zaminder, the zaminder started rent suit against the plaintiff for realization of the rent in the year of 1951 being Rent Suit No. 582 of 1951 and the plaintiff paid rent to the zaminder. It also appears that during R.S operation, the plaintiff filed objection against the attestation khatian or field survey (মাঠ জরিপ) operation and upon hearing the objection, which were sustained and accordingly the name of the defendants included in the attested khatian had been struck down; but eventually, in collusion with the concerned officials of survey department, the defendants got their names recorded jointly and therefore, the plaintiff was constrained to file the aforesaid suit. Though, for the sake of argument, it is taken as granted that Naybullah Khan got settlement in favour of the plaintiff but his conduct implies that he took settlement for the benefit and welfare of his son; Md. Abdul Wadud Khan.

21. P.W-2, Md. Abur Rahman was 62 years old man. He is a cultivator by profession. He also clearly stated that the plaintiff has been possessing the suit land through bargadar and he unequivocally states that he knows the suit land for 40 years. He admitted that he has no land within the contiguous land of the suit land, but his own land is nearby the suit land. He is an independent and reliable witness. His evidence amply supported the possession of the plaintiff and there is no apparent reason to disbelieve his evidence.

22. P.W-3, Md. Hurmat Ali Mollik clearly spelt out in his evidence that he has been possessing the suit land during last 30 years as the bargadar of the plaintiff.

23. D.W-2, Sheikh Md. Nazmul Haque is a man of 70 years old. In his evidence, he clearly states that he does not know who cultivates the suit land as bargadar.

24. D.W-3, Kamal Uddin Tarafdar states that the father of the defendants used to possess the suit land through bargadar. But none of the bargadars was examined. Therefore, they are not competent witnesses and their evidence does not inspire any confidence.

25. On perusal of the oral and documentary evidences, it appears that as per the Rules of preponderance of evidence, the contention of the plaintiff's possession is heavy in weight but the learned District Judge on slipshod statement held that the joint possession of the plaintiff and the defendants without sifting the documents in entirety. The original documents are lying with the plaintiff and produced from the custody of the plaintiff and those were admitted as evidence without any objection from the defendants' side. The burden of showing that the alleged transfer is banami transaction has not been discharged by the defendants' side. Undisputedly, the father of the defendants in his lifetime did not take any legal action against the transaction nor he filed any suit for declaration that the plaintiff was his benamder. Considering the surrounding circumstances, the relationship between the parties and intention and subsequent conduct of Naybullah Khan, it is as clear as daylight that 94 years ago, Naybyllah Khan took settlement of the suit land for the benefit of his eldest son *i.e* the plaintiff for the purpose of the welfare of his son which is apparent from the subsequent conduct of the Naybullah Khan that means during his lifetime *i.e* in the span of 43 years did not take any legal action challenging the legality and propriety of the settlement rent suit, S.A khatian and other acts of possession, therefore, the learned District Judge without considering the ramification of the law of banami transaction from boarder perspective illegally held that since Naybullah Khan took settlement from his on fund, therefore, the transaction was benami transaction.

26. The learned District Judge failed to appreciate that as soon as R.S record was jointly prepared in the name of the plaintiff and the defendants, the plaintiff was constrained to file the suit for declaration as the joint record of right created cloud over his title in the suit land. Therefore, it can be said that the learned District Judge without considering the materials on record and convoluted question of legal position involved in this case most illegally set aside the finding of the trial Court without assigning cogent reason and most illegally allowed the appeal and as such, the same is liable to be turned down to secure the ends of justice.

27. My penultimate conclusion is that the presumption that the settlement took in favour of the plaintiff for his benefit has not been rebutted by the defendants adducing cogent and reliable evidence. Accordingly, I find substance in the Rule and therefore, the Rule deserves to be made absolute.

28. In the result, the Rule is made absolute, however, without passing any order as to costs. The impugned judgment and decree of the Appellate Court is hereby set aside and restored those of the trial Court.

29. Let a copy of the judgment along with LCRs be transmitted to the Courts below at once.