IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISI inconvenience ON
(Civil Revisional Jurisdiction)
Present
Madam Justice Kashefa Hussain

Civil Revision No. 1819 of 2016

Mahfujua Begum
.....petitioner
-Versus-
Abdul Aziz and others
…… Opposite parties

Mr. Md. Mahbubur Rashid, Advocate
…… For the petitioner
Mr. A.K.M Enayetullah Chowhdury, Adv
…… For the Opposite Parties

Heard on: 16.05.2023, 28.11.2023,
03.12.2023, 04.12.2023 and
Judgment on 11.12.2023

Rule was issued calling upon the opposite party Nos. 1-5 to show cause as to why the impugned Judgment and decree dated 08.03.2016 passed by the learned Special Judge, Comilla in Title Appeal No. 293 of 2011 allowing the appeal and reversing the judgment and decree dated 04.07.2011 passed by the learned Joint District Judge, 2nd Court, Comilla in Title Suit No. 08 of 1985 dismissing the suit should not be set aside and or pass such other or further order or orders as to this court may seem fit and proper.

The instant petitioners as plaintiff instituted Title Suit No. 08 of 1985 in the court of Joint District Judge, 2nd court, Comilla inter alia praying for declaration of title in the property and also with the further prayer that the defendants Nos. 1-4 are the

benamder of defendant No. 5 impleading the instant opposite party as defendant in the suit. The trial court upon framing issues, adducing evidences and taking depositions etc. pursuant to trial dismissed the suit by its judgment and decree dated 04.07.2011. Being aggrieved by the judgment and decree of the trial court the plaintiff in the suit as appellant filed Title Appeal No. 293 of 2011 which was heard by the Special Judge, Comilla. The appellate court upon hearing the parties however allowed the appeal by its judgment and decree dated 08.03.2016 and thereby reversed the judgment and decree passed by the trial court earlier. Being aggrieved by the judgment and decree of the appellate court the defendant in the suit filed a civil revisional application which is presently before this court for disposal.

The plaint's case inter alia is that the original owner of C.S. Khatian No. 11 and 249 of S.A. Khatian No. 12 and 277 along with others land was one Mohoram Ali Dhupy who subsequently died leaving behind one son namely- Amir Ali Dhupy and five daughters namely – Piarjan Bibi, Easha Bibi, Ramon Bibi, Maherjan Bibi and Mirsa Bibi. That Amir Ali Dhupy was only owner in possession of suit land and the daughters of Mohoram Ali Dhupy were living in their husband's houses so they were not owner in possession in the suit land along with other land. That further case of plaintiffs is that defendant No. 5 is a rich man in Comilla town and he has car and

oil business. That the defendants Nos. 1 and 4 are the daughters and defendant No. 2-3 are the sons of the defendant No. 5. That the father of the defendant No. 1-4 purchased the suit land along with other land on 16.03.1984 vide several deeds as Benami transaction from the daughters of Mohoram Ali Dhupy. That at the time of purchase of the land the age of the defendant No. 1 was about 14 years. That the said Benami transaction has been made by the vendor infavour of the defendant Nos. 1-4 and wife of defendant No. 5 only for depriving the Government's income tax as well as other taxes. That further case of the plaintiff is that the defendant No. 5 purchased 30 decimals of land from the successor of Amir Ali Dhupy and established a Petrol Pump by name and style "M/S Abdul Wahid and sons" by filling earth therein. That defendant No. 5 subsequently transferred 30 decimal lands along with the aforesaid Petrol Pump to the plaintiffs in the year 1982 vide two sub-kabala deeds within the knowledge of the defendant Nos. 1-4. That actual price of the suit land was Tk. 3,00,000/-(three Lac) but defendant No. 5 purchased four stamps of Tk 1,10,000 (one lac ten thousand) for ill motive. That thereafter the defendant No. 5 using the name of his Benami daughter defendant No. 1 filed Pre-emption Case No. 73 of 1984 and 21 of 1984 before the learned 3rd Munshif Court and the court of 3rd Joint District Judge, Comilla. That defendant Nos. 1-4 never purchased the land and they have no capacity to

purchase the land. That the plaintiffs have been owning and possessing the suit land and established a Petrol Pump by name and Style “M/S Abdul Azid and Sons” purchasing the same from the defendant No. 5. That the defendants have no title and possession over the suit land. Hence the suit.

That the defendant No. 1 contested the suit by filing written statement contending, inter alia that the suit is not maintainable in its present form and manner, suit is bad for defect of parties, suit is barred by limitation and principle of estoppel, waiver and acquiescence. That the Specific case of the defendant No. 1 is that the original owner of C.S. khatian No. 11 & 249 of S.A. Khatian No. 12 & 277 along with other land was one Mohoram Ali Dhupy who subsequently died leaving behind one son namely –Amir Ali Dhupy and five daughters namely Piarjan Bibi, Easa Bibi, Ramon Bibi, Mitsha Bibi and Maherjan Bibi jointly transferred their shares to Abdul Alim and Abdul Quayum on 16.03.1964, defendant Nos. 2-3 respectively and delivered possession thereof. That the aforesaid Ramon Bibi also transferred her share to Most. Badorar Nessa on the same date. That the aforesaid Mirsa Bibi also transferred her share to Mahfuza Begum (present petitioner) and Mursheda Begum on 16.03.1964 and delivered possession thereof. That further case of the defendant No. 1 is that the aforesaid purchaser Most Badorer Nessa subsequently died leaving behind one Husband Moulavi

Abdul Wahid two sons namely Abdul Alim and Abdul Quayum and three daughters namely- Momtaz Begum, Mahfuja Begum and Mursheda Begum and thus they had been owning and possessing the case land along with other land but aforesaid Moulavi Abdul Wahid behind the back of the petitioner and others transferred 0.30 acre land to the third party strangers Abdul Aziz, Md. Najir Ahmed and Md. Monjil Ahmed vide two sub kabala deed on 05.04.1982 and 10.04.1982 respectively. For this reason the petitioner as plaintiff filed pre-emption case being No. 73 of 1984 and 21 of 1984 against the stranger purchaser Abdul Aziz, Md. Nazir Ahmed and Md. Monjil Ahmed and others. That mother of defendant No. 1 Bodorer Nessa by selling out her inherited land from her father and out of the money of her Mohorana purchased a Motor Car for business purpose and she paid tax in her own name. That the defendant Nos. 1-4 are the sons and daughters of said Badorer Nessa who earned some money and gift from their ceremony of “Akika” and “Khatna” respectively and the said money was invested by their mother in her business and developed the funds and she purchased the case land in their name from their own fund and as such, the suit is liable to be dismissed with cost.

The trial court framed issues, witnesses were examined by both sides and both parties produced documents marked as exhibits.

Learned advocate Mr. Md. Khalilur Rahman appeared for the defendant petitioner. While learned advocate for the opposite party initially appeared in the civil revision praying for time and the matter which was made heard in part on 16.05.2023 but however subsequently they did not appear in the civil revision although the matter has been regularly appearing in the cause list since several weeks.

Learned Advocate Mr. Md. Khalilur Rahman for the petitioner submits that the trial court upon proper appraisal of the facts and evidences came upon its finding but the appellate court upon total misapplication of mind reversed the correct finding of the trial court and erroneously allowed the appeal and therefore caused great injustice the petitioner. He submits that the crux of the issues in the instant suit is whether by way of kabala deeds the defendant No. 1-4 gained title to the suit land including whether the defendants Nos. 1-4 were only benamder of their father defendant No. 5 and not the actual owners. He submits that the trial court correctly examined the source of income of the defendants Nos. 1-4 and their mother Bodorer Nessa through which source of purchase money they purchased the suit land. He argues that it is an essential ingredient in a suit where a deed is challenged as benami transaction to prove the source of purchase money. He submits that the trial court categorically discussed the source of purchase money of the defendants Nos.

1-4 but however the appellate court did not carefully examine the finding of the trial court and gave erroneous finding that the defendants Nos. 1-4 could not show the source of purchase money. He submits that the defendants No. 4 at the time of purchase of the land were minors. He argues that the issue of source of purchase money in the plaint is discussed elaborately by the trial court including the source of income of Badrunnessa the wife of defendant No. 5 Abdul Wahid and mother of defendant Nos. 1-4 and further discussed the source out of which money the defendants Nos. 1-4 although minors could buy the land as minors. He submits that it is evident from the findings of the trial court and also from the plaint that Badrunnessa the mother of defendant Nos. 1-4 had a separate source of income and invested the money in different ways while the defendant No. 1-4 also received money by way of gifts on different occasions including আকিকা ceremony. He submits that the trial court correctly found that there are no evidences that the defendant No. 5 Abdul Wahid the father of the defendants Nos. 1-4 bought and purchased the property out of his own money. He points that it is also a settled principle that in the absence of any cogent evidences regarding the intention of executing a sale/purchase deed or kabala deed whatsoever it shall be presumed that the person or persons in whose favour the kabala deed is executed that the property is being purchased for the

interest and benefit of the transferees whatsoever in the property. He argues that however in the instant case the plaintiff could not produce any cogent evidences to establish his allegation that the transaction was a benami transaction and not a genuine transaction between the transferor and transferee. In support of his contention he relies on a decision reported in 21 BLD(Ad) 2001 and also relied on the decision in F.A. 112 of 2011 with Civil Rule 362 (F)/2011 passed by a Division bench wherein this Bench was the author judge. He also relies on the decision in case of Sontosh Kumar Dey Vs. Hiron Chandra Dey and others reported in 15 BLD (1995) page-221. He particularly relies on the decision of 21 BLD (AD) 2001 and on particular principle expounded in that decision laying out the ingredients of a benami transaction including some other ingredients. He submits that however none of those ingredients of benami transaction were found in the instant case.

He next argues that it is needless to state that although the plaintiff filed the suit challenging the impugned deed as a benami deed but however the plaintiff were not at all a party to such deed and has no relationship with the defendant whatsoever. He submits that the proper party to challenge the deed might have been the defendant No. 5 Abdul Wahid the father. He submits that only the defendant No. 5 himself could challenge the deed upon persuading that the land was actually bought out of his own

funds and own interest and not in the interest nor from their funds. He submits that since the defendant No. 5 is the appropriate party to challenge the impugned deed consequently since the defendant No. 5 did not ever challenge the deed as a benami transaction therefore evidently the property was purchased in the interest of the title deed holders and not in the interest of the defendant No. 5.

He assails that the plaintiff did not at all come with clean hands since they only filed the instant title suit after a preemption case was filed by the defendant No. 1 wherein the present plaintiff are preemptees and opposite party in such preemption case. He submits that the plaintiff in this suit filed the instant title suit only to defeat the purpose of the preemption case since the instant plaintiffs are strangers in the land in the said preemption case. He contends that the appellate court upon misapplication of mind did not even evaluate these relevant factors and therefore the judgment of the appellate court suffers from infirmity. He concludes his submissions upon assertion that the judgment of the trial court ought to be upheld and that of the appellate court be set aside and the Rule bears merits and ought to be made absolute for ends of justice.

I have heard the learned Advocate for the petitioner and perused the application and materials including the two

judgments. I am of the considered view that for purpose of adjudication of this matter it is adequate enough to concentrate and confine attention to the issue of some deeds being a benami transaction as alleged by the plaintiff opposite party in the suit. For purposes of determining the intention of the deeds as to whether the transaction was a benami transaction or not I am also inclined to rely on the principle expounded by our Apex Court reported in 21 BLD (AD) 2001 page-99 wherein the ingredients of a benami transaction is laid as under:

> "Considerations in determining benami transactions (i) the source from which the purchase money came, (2) the nature and possession of the disputed property after the purchase (3) the motive for giving the transaction a benami color, (4) the position of the parties and the relationships between the claimant and the alleged benamder, (5) the custody of the title deeds and (6) the conduct of the parties concerned in dealing with the property after the purchase."

I have also perused the case of Sontosh Kumar Day Vs. Hiron Chandra Dey and ors reported in 15 BLD 1995 page-221 and the relevant portion is reproduced here under:

> "Intention is the essence of a benami transaction. When the plaintiff alleges such an intention, he is required to prove it by cogent evidence. A purchase made by a father in the name of his minor son will be presumed to be one for the benefit of the son, if not proved otherwise."

From these decisions it has been decided that one of the essential ingredients to prove or disprove a deed as being a benami transaction whatsoever is the source from which the purchase money to the title deed transferees was derived. Bearing this in mind, I have particularly perused the finding of the trial court wherein the trial court elaborately discussed the source of purchase money.

> "১নং বিবাদীর মাতা বদরের নেছা পৈত্রিক বাড়ী নালিশী মৌজার হওয়ায় তিনি তাহার পৈত্রিক সম্পত্তির অর্জিত অর্থ দ্বারা ব্যবসা পরিচালনা করিতে থাকাবস্থায় এবং পরবর্তীতে বদরের নেছা সন্তানদের আকিকা ও খতনার সময় প্রাপ্ত উপহার সামগ্রী ও নগদ টাকা দ্বারা বিবাদীগনের নামে ও নিজ নামে

নালিশী জমাজমি খরিদ করেন। উক্ত সম্পত্তি খরিদ করায় ৫নং বিবাদী তাহার নিজ তহবিলের কোন অর্থ প্রদান করেন নাই। ৫ নং বিবাদী ১-৪ নং বিবাদীগনের খরিদকৃত সম্পত্তিতে ৫নং বিবাদীর কোন স্বত্ব ও স্বার্থ ছিল না বা ৫নং বিবাদী উক্ত সম্পত্তি কখনো দখল করে নাই। পরবর্তীতে বদরের নেছা মারা গেলে বিবাদীগন তাহার ওয়ারিশ বর্তমান আছেন।"

Upon scrutiny into the oral evidences it is revealed that the plaintiff could not disprove by any cogent evidences that the source of purchase money as shown by the defendants is not true. It is a principle of law inter alia under Section 101 of the Evidence Act, 1872 that the plaintiff must prove his case. Therefore it was the plaintiff's duty to prove that the transaction was a benami transaction and that it was a transaction by Abdul Wahid defendant No. 5 in his own interest and out of his own money. In the instant case the plaintiff could not prove his claim of the benami transaction since he could not prove that the source of purchase money was not derived actually out of the transferee's own funds.

Moreover it is also clear that the appropriate party to raise any question about the deed being challenged to be benami transfer whatever was the defendant No. 5 Abdul Wahid himself. It is also clear that Abdul Wahid defendant No. 5 however in his life time never ever raised any challenged nor any other question

about the deed being a benami transaction. Therefore I am of the considered view that the deeds are not benami transaction. Rather the deeds were executed in favour and the interest of the defendant No. 1-4 and their mother Badrunnessa and not in the interests or purchase money of the defendant No. 5 father. I have also perused the judgment of the appellate court. I am inclined to hold that the appellate court without discussing the reason of its finding elaborately only gave an unfounded remark without any cogent evidences and wrongly found that defendant No. 1-4 are not the actual purchasers but rather it was a benami transaction.

For purpose of arriving at a proper finding, I am inclined to touch upon some of the other ingredients of a Benami transaction an enunciated in the 21 BLD (AD) 2001 decision.

Besides the issue of source of purchase money this decision also laid out a few other criterias to determine a transaction as Benami or vice versa.

Number 2 of the ingredients is the nature and possession of the property. It is revealed from the materials that the plaintiff in the suit could not disprove the possession of the defendants in the suit land. Moreover given that they and their mother are the admitted legal heirs of defendant No. 5 Abdul Wahid.

Number 3 in the ‘motive’ for giving the transaction a Benami color. Herein although the plaintiff claims that one of the

reasons to give the transaction a Benami color may have been to ‘evade’ taxation, but then again such claim of the plaintiff is nowhere supported by any evidence.

Number 4 include the relationship between the claimant and the alleged Benamder. It is evident that in this case the claimant is virtually a stranger to the contesting defendants. Apparently, the instant plaintiff filed the case only after the present defendant filed a fresh case against the present plaintiff. I am of the opinion that this issue does not need further discussion.

Number 5 is custody of the title deeds. The custody of the deeds are with the defendant evidently. Moreover the contrary has not been asserted anywhere in the proceedings by way of evidence whatsoever.

Number 6 is the conduct of the parties concerned. I am of the considered view that the last issue is not so relevant here since admittedly the defendants and their mother are the legal heirs of the defendant No. 5.

However, the courts below, particularly the appellate court while arriving on its erroneous finding on the transaction as a Benami transaction did not discuss and discern these issues which the courts ought to have done.

Attention of this bench is also drawn to a preemption case which was filed by the defendant No. 1 in the instant case against the instant plaintiff who are defendants in that case and wherein the defendant No. 5 Wahid father was the vendor.

Be that as it may, under the foregoing discussions and under the facts and circumstances I am of the considered fact that the appellate court upon misapplication of mind and without sifting through and without properly examining the evidences and material facts and without evaluating the settled principles of a Benami transaction came upon a wrong finding. I find merits in the Rule.

In the result, the Rule is made absolute and the judgment and decree dated 08.03.2016 passed by the appellate court is hereby set aside and the judgment and decree dated 04.07.2011 passed by the trial court is hereby upheld.

Send down the lower court record at once.

Communicate the order at once.

Shokat (B.O)