

**In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)**

Present:

Mr. Justice Md. Riaz Uddin Khan

Civil Revision No. 1153 of 2021

IN THE MATTER OF :

An application under section 115(1) of the Code of
Civil Procedure

-And-

In the Matter of:

Md. Ali Mostafizar and others

... Plaintiff-Petitioners

-Versus-

Md. Ali Asgor @ Babu Mia

... Defendant-Opposite Party

Mr. Md. Zahedul Bari, Advocate

... For the petitioners

Mr. A.S.M. Khalequzzaman, Advocate

... For the Opposite Party

Judgment on: 14.01.2026

Md. Riaz Uddin Khan, J-

Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and decree dated 30.11.2020 passed by the Additional District Judge, 3rd Court, Bogura in Other Class Appeal No. 25 of 2015 allowing the appeal and reversing the judgment and decree dated 30.03.2015 passed by the Assistant Judge, Gabtali, Bogura in Other Class Suit No. 124 of 2012 decreeing the suit should not be set aside and/or such other or further order or orders should not be passed as to this Court may deem fit and appropriate.

At the time of issuance of the Rule this Court was pleased to direct the parties to maintain status-quo in respect of the possession of the suit property

for a period of 06(six) months which was extended time to time.

Brief facts for disposal of this Rule are that the predecessor of the petitioners being the plaintiff filed Title Suit No. 124 of 2012 before the Assistant Judge, Gabtali, Bogura contending *inter alia* that the scheduled property belonged to one Abdul Pramanik who died leaving behind one son Ositullah Pramanik and one daughter Rupjan Bibi Bewa as his heirs. Thereafter, Ositullah Pramanik died leaving behind his two wives Moymon Bewa and Toyronnesa Bewa and two daughters the plaintiff Asia Bewa and Ayesha Khatun. The plaintiff's father, Ositullah Pramanik had no sons for which her father arranged plaintiff's marriage with her husband who used to live with her father's house who was a school teacher. The father of the plaintiff was a rich man and both the father and the husband of the plaintiff used to give/deposit money to the plaintiff. In such situation the plaintiff gave birth to the defendant No.1 along with ten other sons and daughters. The plaintiff from his own pocket and some money from her husband purchased 2.26½ acres of land in her own name along with her 06 months 08 days old son, the defendant No.1 by a registered deed dated 10.01.1946 from Rupjan Bibi Bewa. The original deed is in the custody of the plaintiff. The defendant No.1 is her benamder while she brought the property for her benefits and the name of the defendant was put as curtesy, not for his benefit. SA record was accordingly published in her name in the SA Khatian Nos. 45, 27, and 107. During the last survey, the D.P. khatian was also recorded in her name but the defendant illegally

by filing objection on 24.09.2012 under section 31 of Survey Act got his name recorded in the scheduled property and thus got 1.13¼ acre of land. Thereafter, the defendant on the strength of the said wrong record claimed the property on 10.11.2012 for which the plaintiff was compelled to file the instant suit.

The defendant contested the suit by filing written statement contending *inter alia* that the suit property originally belonged to Abdul Pramanik who died leaving behind one son Ositullah and one daughter Rupjan Bibi. Ositullah died leaving behind two daughters Asia Bewa, the plaintiff and Ayasha Khatun. Ositullah did not have any son for which he gave her daughter Asia Bewa's marriage with one Ishak Ali Akand who used to live Ositullah's house. Thereafter, during the wed-lock of that Ishak Ali and Asia Bewa the defendant was born. The defendant was the first grandson in both sides of his father and mother for which he got many presentations, money and gifts in a function on the occasion of his Akikah. Those gifts and money were preserved to the plaintiff as his mother. Thereafter, Rupjan Bibi declared to sell her share measuring 2.26½ acres of land which the plaintiff and the defendant bought by a registered kabla deed no.331 dated 10.01.1946. The property was bought for his benefit and MRR khatian no.45 was accordingly prepared in his name and lastly in the D.P Khatian No.17 was also recorded in his name and he mutated the property in mutation khatian No. 2846 (ix-i)12-13 and possessing and enjoying the property by paying rents in the government exchequer. The plaintiff filed the suit on

the instigation of some vested quarter for which the suit is liable to be dismissed.

During trial the plaintiff examined 5 and the defendant examined 3 witnesses and both parties produced some documents in their favour which have been marked as exhibits. After conclusion of trial the Assistant Judge decreed the suit vide judgment and decree dated 30.03.2015.

The defendant being aggrieved by the said judgment and decree passed by the trial court dated 30.03.2015 preferred Other class Appeal No.25 of 2015 before the District Judge, Bogura which was ultimately heard by the Additional District Judge, 3rd Court, Bogura. The Additional District Judge after hearing the Appeal was pleased to allow the Appeal by his impugned judgment and decree dated 30.11.2020 and thereby reversed the judgment and decree passed by the trial court.

Being aggrieved by and dissatisfied with the aforesaid judgment and decree dated 30.11.2020 passed by the Appellate Court the plaintiff filed the instant Civil Revision and obtained the Rule and order of status-quo as stated at the very outset.

Mr. Md. Zahedul Bari, the learned advocate appearing for the petitioners submits that the appellate court below failed to appreciate the legal position in relation to law of Benamai Transactions. In that case the court has to see the source of fund for purchase, the custody of the deed after the purchase, the nature and possession of the property after the purchase and the conduct of the parties in dealing with the property after purchase etc. In the present case

the original copy of the sell deed dated 10.01.1946 was in the custody of the plaintiff and the MRR/SA Khatian was also recorded in the name of the plaintiff. The plaintiff has proved that she bought the property by her own money and the defendant admittedly was a boy of only around 6 months having no property or money for purchasing the scheduled property at the time of registration of the deed.

The learned advocate further submits that since the plaintiff-petitioner has proved that the fund of the purchased deed was paid by the plaintiff and she was in continuous possession of the property the original deed was in the custody of the plaintiff and she also proved the motive that not for the benefit of her son but for her own benefit she purchased the property. The learned advocate in support of her contention referred the case of Samul Haque Vs. Luna Fahmida Rahman & others reported in 9 MLR 324 and the case of Birendra Nath Mondal Vs. Raghpada Mondal reported in 10 BLC 170.

On the other hand Mr. ASM Khalequzzaman, the learned advocate appearing for the defendant-opposite party submits that the moot question in a benami transaction is that by whose money the property was purchased and the possession of the same after the purchase. Referring the plaint the learned advocate submits that admittedly as per plaint case the property was purchased by the entrusted/deposited money which was entrusted/deposited to the plaintiff by her father and husband who is the maternal grandfather and father respectively of the defendant. By placing the depositions of the PWs. 2, 3, 4 and 5 the learned

advocate submits that all of them said that the money was of the husband of the plaintiff and/or of the father of the plaintiff. Since admittedly the money by which the property of the deed in the names of both the plaintiff and defendant was purchased was not exclusively of the plaintiff, so the plaintiff cannot be the real owner of the whole disputed property rather the defendant, though was a minor at the time of purchase, is also a co-owner of the property.

The learned advocate next submits that the property is joint property won by both the plaintiff and the defendant and admittedly the original deed was in the custody of the plaintiff but since the plaintiff is the mother of the defendant and is the co-owner of the scheduled property of the deed so any one of two co-owners may be the custodian of the deed. In such situation in the present case the custody of the deed is not so material. The plaintiff admitted in her plaint that she possessed the property through her sons and admittedly the defendant is her one of the sons.

The learned advocate lastly submits that the property was recorded in S.A. Khatin no.45 and in the latest DP khatian in the name of the defendant as such the trial court failed to appreciate the position of law and facts that the property is not a benami property. In support of his contention he submitted two cases reported in AIR 1969 (Madras) 252 and AIR 1975 (Madras) 95.

I have heard the learned advocates for both the parties, perused the application along with the annexures. I have examined the Lower Courts Records including the plaint, written statement, depositions

and exhibited documents. I have also perused both the judgments passed by the courts below.

It appears that the trial court decreed the suit on the findings that the defendant is the *benamdar* of the plaintiff as at the time of registration of the disputed deed he was admittedly of 06(six) months old baby and the defendant failed to prove that in his Akikah he got many gifts and money from which the property was bought in his name. The learned trial judge further found that since the defendant was not in a position to purchase the property at the time of registration of the deed as such he is the *benamdar* of the plaintiff. On the other hand the appellate court below reversed the decision of the trial court on the findings that the names of both the plaintiff and the defendant appear in the disputed registered deed and there is no bar in any law to purchase property in the name of the minor. The deed is an old deed of 1946 and after many years later of becoming major of the defendant, the plaintiff filed the suit in the year 2012 which is neither legal nor logical. The Appellate Court further found that the property was purchased in the names of both the plaintiff and defendant for their benefit and the defendant was not a *benamdar*. The learned judge also found that the M.R.R./S.A. Khatian and latest Khatian is also recorded in the name of the defendant as per his share and he is paying rent to the government and got title and possession over the suit property.

The word '*benami*' is a Persian compound word: *be* and *nam*. *be* means without and *nam* means name. It therefore literally means "without a name", i.e.

nameless or fictitious and used to denote a transaction which is really done by a person without using his own but in the name of another. The *benamidar* has no beneficial interest in the property that stands in his name; he represents in fact, the real owner and so far as their relative legal position is concerned he is a mere trustee for him. *Benami* property, so called, is not a case of both the names, i.e. of the real owner and the resultant trustee appearing together, but of the latter alone being shown while the former stays in the background. The *benami* transaction has been a common practice in our country for centuries and has been prohibited of such *benami* transaction of immovable property by the Land Reforms Ordinance, 1984. Before came into force of the Ordinance, so long, therefore, as a *benami* transaction does not contravene the provisions of any law, the Courts are bound to give it effect. Section 5 of the Ordinance deals with *benami* transaction providing that no person shall purchase any immovable property for his own benefit in the name of another person. This law is intended to prevent future *benami* transaction only. It is never intended to cover any *benami* transaction held before the law came into force. Substantive law should always be read prospective in operation, unless expressly made it retrospective. This Ordinance was not made retrospective by any express provision.

In the case reported in 9 MLR 324 (supra) their lordships observed that it is settled long ago that the question of *benami* is essentially a question of fact. In determining such question of fact, there is no hard and fast rule to be applicable in all situations.

However, the Court may profitably be guided by the following circumstances: i) the source of the fund to pay the price of the property, ii) the nature and possession of the property after purchase, iii) the motive, if any, for such purchase in the name of the ostensible owner instead of real owner, iv) the position of the parties and relationship, if any, between the claimant and the alleged *benamidar*; v) the custody of the deed after the sale and vi) the conduct of the parties in dealing with the property after sale.

There is a presumption in the *benami* transaction that the person who pays the money is the real owner and not the person in whose name the property is purchased. The source whence the purchase money came is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another. The true character of the transaction is governed by the intention of the person who has contributed the purchase money and the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties and their subsequent conduct. In the present case it appears from the plaint that the plaintiff claimed that the property scheduled in the disputed deed was purchased by the money deposited (গচ্ছিত) to her by her father and her husband. PW-2, Mokhlesur Rahman stated in his deposition that plaintiff's husband Isahak Ali was a teacher and the property was purchased by the money from the income of her husband. The name of the defendant was put in the deed as a *curtsey*. PW-3, Idris Ali deposed that plaintiff's husband Isahak

Ali used to live with his father-in-law's house who was a teacher. Money from Isahak and income of father of the plaintiff was used to deposit to the plaintiff and the property was purchased by that money about 70 years ago and at that time the defendant was a 6 months old baby. PW-4, Lal Mia stated that plaintiff's husband Isahak Ali used to live with his father-in-law's house who was a teacher. Money from Isahak and income of father of the plaintiff was used to deposit to the plaintiff and the property was purchased by that money and at that time the defendant was a 6 months old baby whose name was put in the deed as curtesy. PW-5, Abdul Malik deposed that plaintiff Asia purchased the property by the money of her husband and family income when the defendant was a boy of about 6 months only. So, it appears from the depositions of all the PWs that they have stated that the plaintiff purchased the property by the money of her father and husband. On the other hand the defendant claimed that the property was purchased by his money which he got at his Akikah as gifts given by various persons but this fact, the defendant could not prove. Be that as it may, it is well settled that the onus lies on the person who pleads *benami* nature. 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 established circumstances unerringly and reasonably raising an inference of that fact. Moreover, as per section 101 of the Evidence Act whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist and when a

person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. In the present case the plaintiff pleads the *benami* nature of the property, so she has to prove it. From the plaint and the depositions it is abundantly clear that the disputed property was not purchased from the money of the plaintiff but from the fund deposited to her by her father and husband, who are father and maternal grandfather of the defendant.

Regarding the possession in the plaint it is claimed that the plaintiff possessed the property through her sons and since the defendant is one of her sons, it cannot be ruled out that the defendant does not possess the suit property. Moreover, the PWs claim that the plaintiff is in possession while the DWs claim that the defendant is in possession. When oral evidence is opposite to the plaintiff and defendant, in that case documentary evidence will prevail over the oral evidence. In the present case the title deed is in the names of both the plaintiff and defendant in equal share. In the SA Khatian No.45 names of both plaintiff and defendant appear (exhibit-Gha series). Admittedly the latest DP khatian is in the name of the defendant in accordance with his share of the title deed. The defendant mutated his name and by mutation khatian is paying rents (exhibit- Uma series). So, from oral and documentary evidence it is clear that both the plaintiff and the defendant are in possession of the suit land.

In the present case the plaintiff being mother of the defendant claimed that she purchased the property in her name along with the name of her son,

the defendant, not for the benefit of her son but for her benefit. But record shows that the plaintiff failed to prove that the property was purchased by her own money but admittedly that money was deposited by her father and husband. Though in our sub-continent the doctrine of advancement is not applicable especially in case of mother but this is not the final conclusion. The High Courts of this sub-continent decided case of the *benami* property in case to case basis. In our country there is no provision that a minor cannot be owner of any property or cannot purchase any property rather the father or mother can purchase the property on behalf of their minor son and daughter. It is presumable that has been done for the benefit of son or daughter and this money is to be presumed as gift. In the present case since the plaintiff failed to prove that any motive was behind the purchase in the name of the defendant as *benami*, the doctrine of advancement, in my view, will apply. Because, in the present case, the source of money was not of the plaintiff but the husband and father of the plaintiff who are the father and grandfather of the defendant and as such the property was purchased for the benefit of both the plaintiff and the defendant, none of them were the owner of the fund. Most importantly, *Benami* property, so called, is not a case of both the names, i.e. of the real owner and the resultant trustee appearing together, but of the latter alone being shown while the former stays in the background. In the present case the property was purchased in both the names of the plaintiff and the defendant having no character of *benami*.

From the evidence on record it appears that the property is joint property won by both the plaintiff and the defendant and the original deed was in the custody of the plaintiff is admitted. The plaintiff is the mother of the defendant and is the co-owner of the scheduled property of the deed and the original deed is one copy so any one of two co-owners may be the custodian of the deed. In such circumstances in the present case the custody of the deed is not so important to decide whether the property is *benami* or not. It is also settled that the presumption of a registered deed is that whose name appears in the purchase deed is the true owner of the property but this presumption is rebuttable and onus squarely lies upon him who claims that the owner is the *benamidar* and in the present case the plaintiff failed to discharge her onus in this regard.

Considering the facts and circumstances of the case as discussed above and the position of law I am of the view that the learned judge of the appellate court below came to the correct conclusion by his impugned judgment and decree warrants no interference by this Court for which I am constrained to discharge the Rule as the same is devoid of merit destined to fail.

In the result the Rule is **discharged**, however without any order as to cost. The order of status-quo passed earlier by this Court stands vacated.

Send down the Lower Court Records along with a copy of this judgment at once.