IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)

First Miscellaneous Appeal No. 264 of 2023
With
(Civil Rule No. 760 (FM) of 2023)

In the matter of:

United Energy Limited, Gulshan Centre Point (14th Floor), Plot No. 23-26, Road 90, 91, Gulshan-2, Dhaka 1212 represented by Mr. Kutubuddin Akhter Rashid, Chief Executive Officer of United Energy Ltd., Unity House, House No. 10, Road No. 55, Gulshan-2, Dhaka-1212.

… Appellant

-Versus-

Faridur Rahman Khan, son of Yunus Ali Khan, United House, Madani Avenue, United City, Dhaka-1212 and others.

…Respondents.

Mr. Mustafizur Rahman Khan, Senior Advocate with
Ms. Mehreen Hassan, Advocate

…For the appellant-petitioner

Mr. Mehedi Hassan Chowdhury, Senior Advocate with
Mr. Khandaker Reza-E-Raquib,
Mr. Reja-E-Rabbi Khandoker and
Ms. Meherunessa, Advocates

....For the respondent-opposite-party no. 1

Heard on 17.12.2023, 14.01.2024, 23.01.2024, 06.02.2024, 15.02.2024 and 20.02.2024.
Judgment on 07.03.2024.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Mohi Uddin Shamim

Md. Mozibur Rahman Miah, J.

Since the point of law and fact so figured in the appeal and that of the rule are intertwined, they have heard together and are being disposed of by this common judgment.

At the instance of the plaintiff in Title Suit No. 486 of 2023, this appeal is directed against the judgment and order dated 20.07.2023 passed by the learned Joint District Judge, 1st Court, Dhaka in the said suit rejecting an application filed for temporary injunction under order XXXIX, rule 1 and 2 read with section 151 of the Code of Civil Procedure.

The appellant as plaintiff originally filed the aforesaid suit against the respondent-opposite-party nos. 1-8 as defendants seeking following reliefs:

> *"A. Pass a decree declaring that the plaintiff is the beneficial owner of 48.10% of all the shares held in the BO account of the defendant no. 1 being BO Account No. 1204780028979044 as laid out in Schedule B o the plaint; that 48.10% of all dividends, capital gains and sale proceeds arising therefrom belong to the plaintiff and that the defendant no. 1 has been holding the same as trustee for the benefit of and subject to the direction of the plaintiff;*
>
> *B. Pass a money decree of Tk. 36,79,00,000/- (Taka Thirty Six Crore Seventy Nine Lacs only) as laid out in Schedule C to the plaint, for dividends and capital gains*

already accrued against the said shares in favour of the plaintiff, and against the defendant no. 1;

C. Pass a decree of mandatory injunction directing the defendant no. 1 to transfer to the plaintiff 48.10% all the shares held in his BO Account being Bo Account No. 1204780028979044;

D. Award costs; and

E. Grant such other or further reliefs as may be deemed fit and proper."

On the same date of filing the suit, the plaintiff also filed an application under order XXXIX, rule 1 and 2 read with section 151 of the Code of Civil Procedure making following prayers:

"WHEREFORE it is humbly prayed that the learned Court ma graciously be pleased to issue a show cause notice calling upon the defendant-opposite-parties to show cause as to why (a) the defendant no. 2 (brokerage house) and the defendant no. 7(CDBL) shall not be restrained by an order of temporary injunction from allowing the defendant-opposite-party no. 1 from transacting in the shares held in his BO Account as scheduled in Schedule B; and (b) why the defendants-opposite-party nos. 3-6 shall not be restrained by an order of temporary injunction from paying out any dividend to the defendant-opposite-party no. 1 against

the shares scheduled in schedule B, and instead restrain the said dividends in suspense, until disposal of the suit.

-AND-

Pending disposal of the show cause notice, pass an order of ad interim injunction restraining the defendants-opposite-party nos. 2 and 7 from allowing the defendant-opposite-party no. 1 from transacting in the shares held in BO Account No. 1204780028979044 as scheduled in Schedule- B and restraining defendant-opposite-party nos. 3-6 from paying out any dividend to the defendant-opposite-party no. 1 against the shares scheduled in Schedule- B, and instead restrain the said dividends in suspense."

The precise facts so stemmed from the application for temporary injunction filed before this court by the appellant-petitioner are:

The plaintiff-company in course of business, entrusted the defendant no. 1, the duty to invest the plaintiff's money in the secondary share market and to hold such shares and the capital gains, profits and dividends accruing therefrom on trust for the benefit of the plaintiff. However, such trust was not reduced in writing to any document. In January, 2018, the defendant received Tk. 36,79,00,000/- (Taka Thirty Six Crore Seventy Nine Lakhs only) in total from the plaintiff and invested the same to purchase shares in various companies by opening and maintaining beneficiary owner's Account (precisely, "BO Account") with the pro-forma-defendant no. 2 aimed at expanding the business portfolio of the

plaintiff, company. In course of investment, the dividends and capital gains have continued to accrue on the share held by the defendant no. 1 on trust for the plaintiff and the outstanding amount stands at Taka 36,79,00,000/- which has not been paid by the defendant no. 1 to plaintiff's-company. The plaintiff invested in the share market through the defendant no. 1from time to time by opening and maintaining BO Account with proforma defendant no. 2 under the name of defendant no. 1. That the defendant no. 1 has received the dividends in relation to the shares of "AB Bank Limited", "Shahjalal Islami Bank Ltd.", 'Square Pharmaceuticals Ltd." and "Titas Gas Transmission & Distribution Co. Ltd.", Pro-forma defendant nos. 3-6 all mentioned in schedule-'B' to the plaint as well as application. That the defendant no. 1 has not paid for the said shares rather all the payment for the shares were paid by the plaintiff on the basis of his (defendant no. 1) assurance and undertaking to hold the shares as a trustee for the benefit of the plaintiff. It has further been stated that, the defendant no. 1 has been acting as trustee of the plaintiff and was under a strict obligation not to claim ownership of the trust property and even if, he so did, it is his duty to hold the same on constructive trust for the benefit of the plaintiff but fact remains, the defendant has been acting in total breach of trust by not re-paying the dividends to the plaintiff received for the shares which he is holding on trust. In such a situation, the plaintiff on 29.11.2022 sent a letter demanding the dividends accrued and the sale proceeds of the shares in pro-forma defendant no. 2 BO account but such request has not been heeded. It has also been stated that, the plaintiff company has established a strong *prima facie* case and the balance of convenience and inconvenience

is in its favour and against the defendants and unless an injunction is granted as preyed, the plaintiff-company will suffer irreparable loss and injury.

The said application was resisted by the defendant-opposite-party no. 1 stating *inter alia* that, the BO account as maintained by the defendant-opposite-party no. 1 with various brokerage houses were opened in his individual name and he is legally authorized to conduct any transaction in respect of these BO accounts and as such, any interference related to the transactions of these BO Accounts of the defendant-opposite-party no. 1 by the court would amount to interfere with his legal rights. It has further been asserted that, as per section 5 of the Trust Act, 1882, no trust in relation to a moveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee, or unless the ownership of the property is transferred to the trustee. Since in the instant case, the 'shares' are considered as movable property under section 30 of the Companies Act, 1994 so to hold shares on trust for the benefit of the plaintiff-petitioner-company as started by it is contrary to the provision of section 5 of the Trust Act, 1882 and hence the alleged assertion of the plaintiff has no legal substance and not at all maintainable. It has further been averred that, there is no existence of so called trust in any Audit Report of the plaintiff-company or the Income Tax Return of the defendant-opposite-party no. 1 or any other related documents of the plaintiff-company and in absence of any such valid trust, mere contention of the plaintiff-company in this respect is absolutely bogus, misleading and

not sustainable in the eye of law. It has been further asserted that, the defendant-opposite-party no. 1 has never received any amount whatsoever from the plaintiff-petitioner-company for the purpose of investing and/or acquiring any share rather he invested his own money and personal funds to purchase shares in various companies upon opening BO accounts in his own name and he has been enjoying dividends of the BO accounts. It has also been stated that, if the defendant-opposite-party no. 1, being the legal owner of the BO accounts is not able to make any transaction of his BO account and receive any dividend in his respective BO accounts, he will suffer irreparable loss and injury for which the balance of inconvenience stands in his favour and against the plaintiff-petitioner-company. On the other hand, if the temporary injunction is not granted, the plaintiff-petitioner-company will not suffer any loss and injury since literally it does not have any sort of ownership over the BO accounts and even if on adjudicating the suit, the verdict is given to the plaintiff-petitioner-company, the claim/loss of the plaintiff-company can be compensated with money and finally prayed for rejecting the application.

The learned Judge of the trial court after hearing the parties to the suit then vide impugned order rejected the application for injunction holding that, the claim of the plaintiff as the beneficial owner of scheduled share or the defendant being holding the shares as trustee for the plaintiff is grievously questionable and principle of balance of convenience and inconvenience and irreparable loss is not in favour of the plaintiff.

It is at that stage, the plaintiff as appellant preferred the instant appeal. After preferring this appeal, the appellant as petitioner filed an

application for temporary injunction on which this court vide order dated 14.08.2023 apart from issued rule passed an order of *status quo* in the following term:

> *"Subject to the disposal of the Rule, the respondents-opposite-parties are directed to maintain* ***status quo*** *in respect of possession and position of the schedule-'B' as mentioned in the application for a period of* ***3(three) months*** *from date."*

That said order of status quo was lastly extended on 12.11.2023 for another 6(six) months. However, the said order dated 14.08.2023 then gave rise to Civil Rule No. 760 (FM) of 2023.

It is worthwhile to mention here that, the opposite-party no. 1 filed two applications, one for discharging the rule and another for vacating the order of status quo. However, this court vide order dated 16.10.2023 and 05.12.2023 respectively kept those applications with the record for considering at the time of hearing of the rule.

Mr. Mustafizur Rahman Khan, the learned senior counsel appearing with Ms. Mehereen Hassan, the learned counsel for the appellant-petitioner by taking us to the impugned order and all the relevant documents annexed therewith the application for injunction at the very outset submits that, the learned Judge of the trial court failed to appreciate that, the plaintiff-appellant-petitioner was able to establish a *prima facie* case asserting that the defendant no. 1 held the money on trust for the plaintiff-appellant-petitioner and the shares bought with the trust monies and the proceeds of the shares were trust property which was required to be preserved pending disposal of the suit by an order of injunction in the interests of justice

where the balance of convenience and inconvenience is in favour of the plaintiff-appellant-petitioner and it is the appellant-petitioner who would suffer irreparable loss and injury if the order of injunction prayed is not granted.

The learned counsel further contends that, the learned Judge of the trial court failed to appreciate the fact that, the respondent-opposite-party no. 1 paid dividends, capital gains to the appellant-petitioner accrued from shares purchased with its money until 2022 when the dispute between the parties arose which has not been denied by the respondent-opposite-party no. 1 that reinforces the prima facie case and in that view of the matter, the trust property was required to be preserved pending disposal of the suit by an order of injunction.

The learned counsel next contends that, the learned Judge of the trial court erred in law in rejecting the application for temporary injunction in taking into account of the contention of the defendant-respondent no. 1 that the monies advanced to him was loan shown in his income tax returns, though such income tax returns are self-serving unilateral documents prepared by the defendant-respondent no. 1 himself and hence such income tax returns have no probative value in determining the issues at stake in the suit.

The learned counsel also contends that, the learned Judge of the trial court erred in law and facts in failing to appreciate that, the contension of the defendant in regard to application of section 5 of the Trusts Act, 1882 was misconceived inasmuch as that the monies advanced to the respondent-opposite-party no. 1 was not for any immoveable property rather moveable

property and the requirement for declaration of trust by a non-testamentary instrument signed in writing by the author of the trust is applicable only when the property is either immoveable or yet to be transferred to the trustee but when the ownership of moveable property is found to have transferred to the trustee as was done in the instant case, there is no requirement for such written instrument.

The learned counsel further contends that, the learned Judge of the trial court erred in law in appreciating the contention of the defendant-opposite-party no. 1 that the trust was barred by the prohibition of benami transaction so provided in section 5 of the Land Reforms Ordinance, 1984 which is misconceived inasmuch as that prohibition is applicable only in regard to immovable property but in this instance, the monies advanced and the shares purchased by the defendant-opposite-party no. 1 are not immovable property rather movable property.

The learned counsel also contends that, the learned Judge of the trial court erred in law in failing to appreciate the fact that, if the respondent-opposite-party no. 1 is not restrained by an order of injunction from transacting the shares in opposite-party-respondent nos. 3-6 he would be free to dispose of the shares which justifies an order of injunction to secure the claim of the appellant-petitioner otherwise the suit would become infructuous.

By controverting the assertion of the defendant-opposite-party no. 1 in relation to the application of section 5 of the Trust Act, 1882, the learned counsel then adds that, under section 81 of the Trust Act, there is no necessity to declare trust by any instrument as “attendant circumstances”

dictates that the defendant no. 1 holds the shares for the benefit of the plaintiff-appellant.

The learned counsel wrapped up his submission contending that, the learned Judge of the trial court failed to appreciate that, the appellant-petitioner had a *prima facie* case and the balance of convenience and inconvenience were in favour of the appellant-petitioner and it would suffer irreparable loss and injury if an order of injunction is not granted and finally prays for allowing the appeal and making the rule absolute.

In contrast, Mr. Mehedi Hassan Chowdhury, the learned senior counsel along with Mr. Khandaker Reza-E-Raquib, the learned counsel appearing for the respondent-opposite-party no. 1 by filing counter-affidavit and two sets of supplementary-affidavit vehemently opposes the contention taken by the learned counsel for the appellant-petitioner. The learned counsel at the very outset submits that, the BO account as maintained by the defendant-respondent-opposite-party no. 1 with various brokerage houses were opened in his individual name who is legally authorized to conduct any transaction in respect of these BO accounts and as such, any interference related to the transactions of these BO accounts of the defendant-respondent-opposite-party no. 1 by this Hon'ble court would amount to interference of the legal rights of the defendant-respondent-opposite-party no. 1.

The learned counsel further contends that, as per section 5 of the Trust Act, 1882, no trust in relation to a moveable property is valid unless declared by a non-testamentary instrument in writing and signed by the author of the trust or the trustee and registered and in the instant case, since

the ‘shares’ are considered as movable property under section 30 of the Companies Act, 1994 so to hold these shares on trust for the benefit of the plaintiff-appellant-petitioner as stated by it, there must be an existence of a ‘valid trust’ between the respondent-opposite-party no. 1 and the appellant-petitioner and in absence of any valid trust as per section 5 of the Trust Act, 1882, the claim of the plaintiff-petitioner does not have any legal substance.

The learned counsel next contends that, there is no existence of so called hypothetical trust in any Audit Report of the plaintiff-company or the income tax return of the respondent-opposite-party no. 1 or any other related documents of the appellant-petitioner and then in absence of any such valid trust, the contention of the appellant-petitioner in this respect is absolutely bogus, misleading and untenable in the eye of law.

The learned counsel also contends that, the contention of the appellant-petitioner that an amount of taka 36,79,00,000/- was received by the respondent-opposite-party no. 1 from the appellant-petitioner during the period of January, 2018 and invested the same to purchase shares in various companies that is, pro-forma respondents by opening and maintaining various BO accounts for the appellant-petitioner is totally false, fabricated and misconceived and is devoid of any proof as the respondent-opposite-party no. 1 has never received any amount whatsoever from the appellant-petitioner for the purpose of investing and/or acquiring any share in any company as alleged.

The learned counsel next contends that, as per section 5(1) of the Land Reforms Ordinance, 1984, any benami transaction in respect of an

immovable property is absolutely prohibited and illegal in Bangladesh and the said principle is equally applicable in the instant case.

The learned counsel also contends that, the appellant-petitioner filed the title suit (Title Suit No. 486 of 2023) before the court of 1st Joint District Judge, Dhaka only to frustrate the Company Matter being No. 502 of 2022 which is now pending before the Hon'ble High Court Division and thus the rule issued is liable to be discharged.

The learned counsel further contends that, since the respondent-opposite-party no. 1 is the legal owner of the BO accounts so he will not be able to make any transaction of his BO accounts and of receiving any dividends and capital gain in his respective BO accounts if the rule is discharged and order of stay vacted as the balance of inconvenience clearly stands in favour of the respondent-opposite-party no. 1 and against the appellant-petitioner.

The learned counsel also contends that, basing on application dated 15.06.2023, the learned Judge of the trial court initially issued show cause notice upon the respondent-opposite-party nos. 1-7 against which the appellant-petitioner had filed Civil Revision being No. 2654 of 2023 before this division which this Hon'ble court apart from issuing rule passed an ad-interim order of *status quo* on 20.06.2023. However, against that, ad-interim order, the respondent-opposite-party no. 1 filed civil petition for leave to appeal no. 1928 of 2023 before the Hon'ble Appellate Division and upon hearing, the Hon'ble Appellant Division stayed the operation of the aforesaid order of *status quo* passed on 20.06.2023 with a direction to the trial court to dispose of the application for injunction which was

ultimately heard and rejected vide impugned order dated 20.07.2023 and then submits that, since the Hon'ble Appellate Division earlier stayed the order of *status quo* so there has been no scope to sustain the same order and hence, the appeal is liable to be dismissed and rule be discharged.

The learned counsel further contends that, the learned Judge of the trial court has rightly rejected the application for temporary injunction being satisfied that the appellant-petitioner has miserably failed to satisfy the principles as laid down in order XXXIX, rule 1 and 2 of the Code of Civil Procedure and as such, the appeal is liable to be dismissed and that of the rule discharged.

Mentionable, the respondent-opposite-party no. 1 also submitted two supplementary-affidavits dated 09.01.2024 and 15.02.2024 respectively annexing a host of documents in support of his claim asserting that, he has not received money from plaintiff-company allegedly to purchase share. The appellant-petitioner then filed counter-affidavits against these two supplementary-affidavits denying the assertion of the respondent-opposite-party no. 1 made therein the affidavits. Since we have been informed by the learned counsel for the respondent-opposite-party no. 1 that none of the defendants has yet filed written statement to assert their defence case controverting the material averment of the plaintiff's case so we are of the considered view that, if we take cognizance of those documents contained in the supplementary-affidavits and counter-affidavits filed thereagainst it might affect the merit of the case of the parties to the suit and for such obvious reason, we are refrained from making any discussion on those documents vis-à-vis make any observation thereof.

We have considered the submission put forth by the learned senior counsels for the appellant-petitioner and that of the respondent-opposite-party no. 1. Together, we have gone through the impugned judgment and order and those of the documents appended with the application for temporary injunction vis-à-vis the counter-affidavit so filed by the opposite-party no. 1 against the rule application meticulously.

At the same time, we have perused the prayer of the plaintiff-appellant-petitioner sought in both the suit and the application for injunction. In the prayer of the plaint, the plaintiff claimed to be the beneficial owner of 48% of all the shares and then claimed dividends, capital gains and sale proceeds of the shares held in defendant no. 1. Expressing apprehension the plaintiff then sought a restrained order upon the defendant no. 2 and 7 from allowing the defendant no. 1 in transaction the shares held in BO account (Schedule- 'B' to the plaint as well as application) and those of respondent-opposite-party nos. 3-6 from paying any dividend, sale proceed and capital gain to the defendant no. 1.

So on the face of aforementioned prayer made in the plaint, it is clear that, the plaintiff sought declaration to be beneficial owner to the extent of 48.10% of all the shares. It is admitted position that, claim is yet to be adjudicated upon which the trial court would determine on the basis of evidence supposed to be adduced and produced by the contending parties to the suit. So until and unless, the ownership of certain number of shares the plaintiff claimed is declared, there is no earthly reason to restrain any of the defendants mentioned above either to transact all the shares or to receive dividend, capital again or sale proceeds accrued therefrom, when

plaintiff itself asserted the defendant no. 1 holds majority of the shares mentioned in the schedule and admittedly he transacted the BO account in his personal name with defendant no. 2.

Further, section 5 of the Trust Act, 1882 (Second Part) put legal binding for having a written instrument if any trust is made to anybody else in regard to movable property. It is admitted by the plaintiff-petitioner that, shares are movable property and if it is so, then there should have a 'written instrument' of trust of the plaintiff who asserted that the defendant no. 1 is holding the shares as trustee for the benefit of and subject to the direction of the plaintiff. So, invariably from the above, the plaintiff has failed to prove its *prima facie* case.

Conversely, since the BO account with the defendant no. 2 is being maintained and transacted solely in the individual name of the defendant no. 1 so at this point of time, we clearly find his *prima facie* case for claiming shares in the BO account maintain with defendant no. 2 and invariably the court will not interfere with the transaction of share by him which is based on material documents.

Furthermore, it is highly likely, the defendant no. 1 would suffer irreparable loss and injury if he is restrained from transacting share and receiving dividend, sale proceeds and capital gain from respondent nos. 3-6. So invariably the balance of inconvenience palpably sustains in favour of the defendant no. 1. So all the three basic principles in granting or refusing injunction stand not in favour of the plaintiff rather for the defendant no. 1.

The alternative submission of the learned counsel for the appellant with regard to section 81 of the Trust Act refuting the assertion of the

defendant no. 1 in section 5 of the Trust Act for having legal instrument while creating trust simply not sustainable to validate a trust be it immovable property or movable property in other words, a non-testamentary instrument is must.

All in all, whether the defendant no. 1 is acting as trustee for the benefit of the plaintiff-company and monies in purchasing shares by the defendant no. 1has been provided by the plaintiff are all matters to be adjudicated in the suit but under no circumstances, can the defendants be restrained from transacting shares and receiving sale proceeds, dividends and capital gain in his favour when the transaction is being made in the individual name of the said defendant.

Against the backdrop, we don't find any merit in the appeal vis-à-vis rule.

Accordingly, the appeal is dismissed however without any order as to costs.

Since the appeal is dismissed, the connected rule being Civil Rule No. 760 (FM) of 2023 is hereby discharged.

Since the appeal is dismissed and so does the rule discharged having no reason to pass any separate order on the application for discharging rule and that of vacating the order of *status quo* which we had earlier kept in the record.

However, the learned Judge of the trial court is directed to dispose of the Title Suit No. 486 of 2023 as expeditiously as possible preferably within 6(six) months from the date of receipt of the copy of this judgment.

Let a copy of this judgment be communicated to the learned Joint District Judge, 1st Court, Dhaka forthwith.

Mohi Uddin Shamim, J.

I agree.

Abdul Kuddus/**B.O**.