IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique,C.J.

Mr. Justice Md. Nuruzzaman

Mr. Justice Obaidul Hassan

Mr. Justice M. Enayetur Rahim

CIVIL APPEAL NO.362 OF 2017

(Arising out of C. P. No.1796 of 2015)

With

CIVIL APPEAL NO.363 OF 2017

(Arising out of C. P. No.1850 of 2015)

(From the judgment and order dated 23rd day of July, 2014 passed by the High Court Division in Civil Revision No. 2326 of 2012)

Jotilal Chowdhury and others	:	. . . Appellants (In C.A. No.362 of 2017)
Meena Rani Chowdhury and others	:	. . . Appellants (In C.A. No.363 of 2017)

-Versus-

Suruchi Bala Singha alias Ambika Devi and others	:	. . . Respondents (In C.A. No.362 of 2017
Manju Rani Roy and others	:	. . . Respondents (In C.A. No.363 of 2017

For the Appellants (In C.A. No.362 of 2017)	:	Mr. Zainul Abedin, Advocate-on-Record
For the Appellants (In C.A. No.363 of 2017)	:	Mr. Probir Neogi, Senior Advocate with Mr. Shishir Kanti Majumder, Advocate with Ms. Anita Gazi Rahman, Advocate instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record
For the Respondent Nos.6-9 (In C.A. No.362 of 2017)	:	Mr. Nozrul Islam Chowdhury, Senior Advocate instructed by Mr. Md. Helal Amin, Advocate-on-Record
For the Respondent Nos.2-3 & 5 (In C.A. No.362 of 2017)	:	Mr. Selim Reza Chowdhury, Advocate instructed by Mrs. Nahid Sultana, Advocate-on-Record

For the Respondent Nos.1,4 & 10-17 (In C.A. No.362 of 2017)	:	Not represented
For the Respondent Nos.1-4 (In C.A. No.363 of 2017)	:	Mr. Nozrul Islam Chowdhury, Senior Advocate instructed by Mr. Md. Helal Amin, Advocate-on-Record
For the Respondent Nos.5-6 & 8 (In C.A. No.363 of 2017)	:	Mr. Selim Reza Chowdhury, Advocate instructed by Mr. Md. Khabir Udding Bhuiyan, Advocate-on-Record
For the Respondent Nos.7 & 9-14 (In C.A. No.363 of 2017)	:	Not represented
Date of Hearing	:	**The 15th, 22nd day of November, 2022 and**
Date of Judgment		**The 23rd day of November,2022**

JUDGMENT

M. Enayetur Rahim, J: These 02(two) appeals, by leave, are directed against the same judgment and order dated 23rd July,2014 passed by the High Court Division in Civil Revision No.2326 of 2012 heard along with Civil Revision No.2051 of 2012 discharging the Rules.

Both the appeals have been heard together and disposed of by this judgment.

The relevant facts for disposal of these appeals are as follows:

The predecessors of the Appellants of C.A. No.363 of 2017 instituted other class suit No.116 of 1975 in the 1st Court of Sub-Ordinate Judge, Chattogram for declaration of title over the suit property, confirmation of possession, perpetual injunction and also for recovery of khas possession, if the plaintiffs are dispossessed during

pendency of suit. By amendment of plaint, the plaintiffs also made a prayer for declaration that B.S. Khatian No.89 which stands in the name of the plaintiffs in respect of the suit land as Shebait of the deities is partially wrong and such wrong record has not affected the right, title, interest and possession of the plaintiffs.

In the plaint it is averred that the suit property belonged to the predecessors of the plaintiffs Dwip Chand Chowdhury, son of Rashik Chand Chowdhury, and Keshab Chand Chowdhury, son of Sevak Channd Chowdhury. The said owners had been enjoying and possessing the suit property, and installed deities namely, **Sree Sree Shalgram Chakara**, **Sree Sree Ram Sita**, **Sree Sree Modan Mohan**, **Sree Sree Radha Madhob**, **and Sree Sree Barodeshwar** (hereinafter referred to as deities). They had vast properties and one Haralal Roy, father of Makhon Lal Roy was the manager of their estate.

To lessen the burden of taxes, and to avoid other liabilities, the said predecessors of the plaintiffs created a transfer deed without consideration in the name of the deities, and made Haralal Roy the next friend of the deities.

To give effect to the transfer deed in favour of deities, several deeds were created through Haralal Roy. Ultimately, the suit property stood in the name of Dwijendra Lal Roy, the grandson of Haralal Roy, and son of Makhon Lal Roy. In the same manner, some cases were filed. In one of such cases, the decree stood in the name of Rashik Lal Singh, son-in-law of said Makhon Lal Roy, and predecessor of defendants No.1-5.

The aforementioned transferees or decree-holders never claimed any right, title or interest in any part of the suit property, nor did they ever possess the same; none of them ever paid any rent or tax. Though to show genuineness of the said transfer and decree, municipal holdings were created in the name of defendants. They are nothing but benamders of the plaintiffs' predecessors.

Due to old age and ailments, Makhon Lal became unable to look after the suit property. So, he executed a registered `Mukti Patra Nama' i.e. a deed of release dated 12.11.1974 in favour of the plaintiffs.

Keshob Chand Chowdhury died leaving behind his brother Dwip Chand Chowdhury as his sole heir and successor, and said Dwip Chand Chowdhury died leaving behind the plaintiffs and some others as his heirs and successors. By executing a 'Muktinama' dated 12.11.1974, defendants No.8 to 11 namely Subhasini Chowdhurani, wife of Manik Chand Chowdhury, Motilal Chowdhury, Jotilal Chowdhury, Babulal Chowdhury, sons of Manik Chand Chowdhury returned the suit land to the plaintiffs and they (plaintiffs) have been enjoying and possessing the same by paying taxes to the Government. After death of Rashik Lal Singh (son-in-law of Makhon Lal), his wife, defendant No.1 Suruchi Bala Singh (Daughter of Makhon Lal) claiming under her other name Ambika Devi, instituted Case No.119 of 1975, under Guardianship and Wards Act, 1890 (Act VIII of 1890) praying for guardianship of her minor children, defendants No.2-5, and by practicing fraud upon the Court obtained a guardianship certificate.

In the said case, Rashik Lal Singh was shown as owner of the suit land, and subsequently defendants No.1-5 were shown as owners. After finding out about such certificate, Makhon Lal Roy filed an application to cancel the same. After obtaining that certificate, defendant No.1 Suruchi Bala Singh alias Ambika Devi prayed for permission to sell 7 gondas of land. Defendant No.2 had been earning good money by running a tea stall and sweetmeats shop. Under the impression that after obtaining the guardianship certificate his daughter Suruchi Bala may cause injury to his grandsons (sons of Rashik Lal Singh and Suruchi Bala) Makhon Lal Roy filed application being Miscellaneous Case No.170 of 1975 for cancellation of the said guardianship certificate. On 05.09.1975, Makhon Lal Roy informed the plaintiffs about such activities of defendants No.1-5. In fact, defendants No.1-5 or their predecessor Rashik Lal Singh have/had got no right, title, interest and possession over the suit land. Subsequently, the plaintiffs came to know about transfer of the suit land by defendants No.1-5 to defendant No.6 Osman Gani, who has been trying to take possession of the suit land, and hence, they were constrained to institute the suit.

By making amendment in the plaint, they plaintiffs further claimed that the deed of settlement dated 03.03.1951 by their predecessor through Makhon Lal Roy is a “Deed of Benami Transaction”. The said deed was executed by Makhon Lal Roy as first party. Their predecessors became owner of the suit land and other lands by a deed dated 11th Srabon 1282 Maghi Year, and the B.S. record in

respect of the suit land was prepared in their names as Shebait of the deities. Such record as Shebait is wrong, but their title over the suit land has not been affected by such record and hence, they instituted the suit.

Defendants No.1-5, i.e., the successors of Rashik Lal Singh (son-in-law of Makhon Lal Roy) contested the suit by filing written statement denying the material statements made in the plaint.

In their written statements it is contended that the suit land belonged to Dwip Chand Chowdhury and Keshob Chand Chowdhury having equal shares. For his own interest, Haralal Roy purchased the suit land and other lands from them by a kabala executed in 1282 Maghi year. While Haralal Roy had been enjoying and possessing the suit land, he died leaving behind his only son Makhon Lal Roy.

Makhon Lal Roy, while he had been enjoying and possessing the land by taking Tk.600/- on 05.01.1939, granted settlement of the same with one Basonti Bala Sen and handed over possession to her. Basonti Bala Sen died leaving behind her husband, Aparna Charan as her successor in the suit land. Aparna Charan while he had been enjoying and possessing the suit land, died leaving behind his nephew Purna Chandra as his heir and successor. While said Purna Chandra had been enjoying and possessing the land, by executing a kabala dated 27.10.1943, he sold the suit land to Dijendra Lal Roy (Son of Makhon Lal Roy) and handed over possession. Said Dijendra Lal Roy while he had been enjoying and possessing the same, on receipt of Tk. 2,970/- as consideration, transferred the suit land to

Rashik Lal Singh by executing a patta dated 09.01.1955 and handed over possession. Rashik Lal Singh obtained said pattan in benami of Mozaffar Ahmed Sawdagar. Rashik Lal instituted other case No.108 of 1958 in the 1st Court of Munsif, Chittagong, impleading the said Mozaffar Ahmed Sawdagar and Dijendra Lal Roy as defendants for declaration that said Muzaffar Ahmed Sawdagar was his benamder. The said suit was decreed in his favour on 10.11.1958.

After getting settlement of the suit land by said patta, Rashik Lal Singh constructed huts thereon and let those out to some tenants and had been enjoying and possessing the same through tenants. After the death of Rashik Lal, defendants No.1-5 as his successors now have been enjoying and possessing the suit land through tenants. Like their predecessor, they have been paying taxes to the Government as well as to the Municipality. The Municipality holding in respect of the suit land was also opened in their names. Haralal Roy purchased the suit land for his own interest and he was never Shebait of any deities. The said deities did never purchase or possess the suit land. While Haralal Roy had been enjoying and possessing, the R.S. record in respect of the suit land was prepared in his name. Makhon Lal was not a benamder in the suit land and the "Muktinama" allegedly executed by him is illegal, collusive and fraudulent by which the plaintiffs never acquired any right, title and possession over the suit land. At the time of execution of said "Muktinama", Makhon Lal had no possession over the suit

land as well as right and title since before its execution, the suit land was transferred to Basonti Bala Sen. Suruchi Bala Singh alias Ambika Devi for legal necessity sought permission of the court to transfer a part of the suit land. Such prayer was seriously opposed by her father Makhon Lal with an ill motive. Ambika Devi and Suruchi Bala Singh is one and the same person and she is the daughter of Makhon Lal and wife of Rashik Lal Singh. The plaintiffs have no right, title and possession over the suit land and they never owned or possessed any part of the same. By filing an additional written statement, defendants No.1-5 further stated that their predecessor Rashik Lal Singh constructed three tin sheds over the suit land and holding numbers of all those huts were in his name and the P.S. record in respect of the suit land was prepared in his name. The B.S. record was also prepared in the names of defendants No.1-5. The claims of the plaintiffs are false and fraudulent, and hence the suit is liable to be dismissed.

Defendants No.12-15 namely, Monju Rani Roy wife of Dijendra Lal Roy and Pulik Roy, Alak Roy, Tilak Roy, sons of said Dijendra Lal Roy, i.e., daughter-in-law (son's wife) and grandsons respectively of Makhon Lal Roy submitted separate written statement to contest the same. In their written statement, they stated that Makhon Lal Roy was Shebait of the said deities installed in the suit property, and while he had been enjoying and possessing the suit property as Shebait, settled the same by executing a patta dated 05.01.1939 with Basonti Bala Sen.

The said patta was witnessed by the original owners, Dwip Chand Chowdhury, Keshob Chand Chowdhury, and Shebok Chand Chowdhury. While Basonti Bala Sen had been enjoying and possessing the same, by executing a kabala dated 27.10.1943, she sold the same to Dijendra Lal Roy, son of Makhon Lal Roy. The Municipal holding in respect of the suit land was opened in their names and they have been enjoying and possessing the same through tenants. They are successors of Dijendra Lal Roy. For realization of arrear rent Dijendra Lal Roy instituted a suit and obtained a decree.

The plaintiffs have no right and possession over the suit land. By the so called 'Muktinama' allegedly executed by Makhon Lal Roy their title over the suit land has not been affected and they are also not affected by the Guardianship Certificate obtained in Case No.119 of 1975 by Suruchi Bala Singh. The said defendants also filed an additional written statement stating that the suit of the plaintiffs in respect of correction of the B.S. record is not maintainable. The kabala executed in 1283 Maghi year was not a benami kabala, rather Haralal Roy for his own interest and by his own money purchased the suit land. The B.S. record is wrong and by the same the plaintiffs acquired no right, title and possession over the suit land. Defendant No.12 is a lady and defendants No.13 and 14 are minors and by taking advantage of their such condition the plaintiffs in collusion with the settlement employees created false B.S. record in their names.

At the trial, the respective parties adduced both oral and documentary evidence.

Trial court by its judgment and decree dated 30.08.1993 decreed the suit (decree signed on 04.04.1993) against defendants No.1-5 and 12-15 declaring the plaintiffs title and confirmed the possession in the suit property.

Against the judgment and decree of the trial court, defendants No.12-15 preferred other Appeal No.477 of 1993 and defendant Nos.1-5 also filed other Appeal No.459 of 1993 before the District Judge, Chattogram.

Eventually, the other appeal No.477 of 1993 was heard and disposed of by the Joint District Judge, 3rd Court, Chattogram, who allowed the appeal and dismissed the suit by the judgment and decree dated 20.05.2012 (decree signed on 27.05.2012).

Against the judgment and decree of the Appellate Court, the heirs of the plaintiffs preferred Civil Revision No.2051 of 2012 and the defendants No.10 & 11 also filed civil Revision No.2326 of 2012 before the High Court Division.

Both the civil revisions were heard together, and disposed of by a single judgment of the High Court division.

The High court Division discharged both the Rules with the finding that the suit land belonged to defendant Nos.1-5. The ordering portion of the High Court Division judgment is as follows:

> "In the result, both the Rules being civil Revisions Nos.2051 and 2326 of 2012 are hereby discharged with the finding that suit land belonged to defendant Nos.1-5. Though it is not clear before this court how the appeal preferred by the defendant Nos.1-5 was dismissed, but on perusal of the record this court is satisfied about the title of the contesting defendant Nos.1-5 in the suit land. Apparently, the said Makhon Lal and the plaintiffs Chowdhury family collusively instituted the instant suit to deprive the children and window of Rashik Lal Singh".

Against the judgment of the High court Division, the plaintiffs filed civil petition for leave to appeal No.1850 of 2015, and defendants No.10 & 11 filed Civil Petition for Leave to Appeal No.1796 of 2015. Both the leave petitions were heard together and leave was granted in both the civil petitions.

Hence the Appeals.

Mr. Probir Neogi, learned Senior Advocate, appearing for the appellants in civil appeal No.363 of 2017 having assailed the impugned judgment passed by the High Court Division has made the following submissions amongst others:

i) the findings of the trial court that the registered sale deed dated 03.08.1920 (Exhibt-4) executed by the plaintiffs' predecessors, Dwip Chand Chowdhury and Keshab Chand Chowdhury in respect of the suit property standing in the name of deities as vendees, and Haralal Roy as its Shebait is a benami transaction, the

High Court Division and the Court of Appeal below were wrong in law and on facts in passing their respective judgments dismissing the suit, and one (appellate court) holding that defendants No.12-15, and other (High Court Division) holding that defendants No.1-5 are owner of the land, and consequently, both the judgments are liable to be set aside;

ii) the sale deed dated 03.08.1920 (Exhibit-4) in respect of the suit land was executed showing the deities as vendees, and Haralal Roy was Shebait thereof, consequently, he was not a transferee owner of the suit land, and as such the High Court Division was palpably wrong in finding that suit land belongs to defendants No.1-5 without at all considering the nature of the instrument dated 03.08.1920, and status of Haralal Roy, predecessor of defendants Nos.1-5.

If it is assumed, not admitted, that by virtue of the instrument dated 03.08.1920 (Exhibit-4), title of the suit property passed in favour of deities, in that case, the judgment of the appellate court and the High Court Division finding title and

possession of defendants nos.12-15, and defendants Nos.1-5, respectively are without any legal basis, and liable to set aside;

iii) even if it is assumed, not admitted, that by virtue of the instrument dated 03.08.1920 (Exhibit-4), title of the suit property passed in favour of deities, in that case, after execution of 'Muktinama' dated 12.11.1974 by Makhon Lal Roy, son of Haralal Roy, and registration of the said instrument, it would be legally sound to be held that the plaintiffs as heirs of Dwip Chand Chowdhury and Keshab Chand Chowdhury, and members of the dedication family are possessing the suit property on behalf of deities, and among all the three contending parties, namely, the plaintiffs, defendants No.1-5, and defendants No.12-15, the plaintiffs are legally entitled to safeguard the suit property on behalf of the deities;

iv) the High Court Division committed error of law in abruptly finding that the suit land belonged to the defendant Nos.1-5 without considering and discussing the fact that the disputed kabala dated 03.08.1920 in respect of the suit land was registered in the name of the deities as vendees and Haralal Roy as

its Shebait, consequently Haralal Roy the Shebait and the predecessor in interest of the defendant Nos.1-5 could not be the transferee owner of the disputed land under the said kabala dated 03.08.1920 according to the principles of law;

v) the court of appeal below committed gross error of law in finding that defendant Nos. 12-15 succeeded in proving the title and possession over the disputed land through chain of ownership vide kabala dated 03.08.1920 which is a saf-kabala in the name of Haralal completely overlooking and not at all considering the fact that the disputed kabala dated 03.08.1920 in respect of the suit land was registered in the name of the deities as vendees and Haralal as its Shebait consequently Haralal the Shebait and the predecessor in interest of defendant Nos.12-15 could not be the transferee owner of the disputed land under the said kabala dated 03.08.1920 according to the principle of law.

Mr. Zainul Abedin, learned Advocate-on-record, appearing on behalf of appellants in civil appeal No.362 of 2017 having adopted the submissions of Mr. Neogi submits, additionally as follows:

i) the High Court Division as well as the court of appeal below were wrong in law in passing the impugned judgment and decree setting aside the judgment and decree of the trial court without specifically reversing the findings and decision of the trial Court to the effect that the Kabala dated 03.08.1920 in respect of the suit land standing in the name of the deities as vendees and Haralal as its Shebait is a benami nature Kabala of the plaintiffs' predecessors;

Mr. Nozrul Islam Chowdhury, learned Senior Advocate appearing for the respondent Nos.6-9 (in C.A. No.362 of 1917) and respondent Nos.1-4 (in C.A. No.363 of 2017) makes his submissions in support of the judgment passed by the Court of appeal below.

However, during pendency of the present appeals, on behalf of the said respondents (defendant Nos.12-15) an application was filed for correction of the judgment and decree passed by the High Court Division to the following effect:

> "The right, title, interest and possession in the suit land is hereby declared in favour of defendant Nos.12-15" should be inserted upon deleting "defendant Nos.1-5" from the ordering portion of the impugned judgment dated 22.06.2015 passed in Civil Revision No.2326 of 2012".

We have considered the submissions of the learned Advocates for the respective parties, perused the judgment of the High Court Division as well as the courts below and

the evidence, both the oral and documentary, adduced by the respective parties and the application filed on behalf of the defendant Nos.12-15.

It is the claim of the plaintiffs that their predecessor Dwip Chand Chowdhury and Keshab Chand Chowdhury were the original owner of the suit property. The transfer of land by the registered sale deed dated 03.08.1920 (exhibit-4) in favour of the deities did not confer any right, title and interest in favour of the deities and Haralal Roy the father of Makhon Lal Roy as its Shebait was a benami transaction. Eventually, Makhon Lal by executing a 'Mukti Nama' dated 12.11.1974 (exhibit-2) returned back the suit property to the predecessor of the plaintiffs and the defendants never acquired any right, title and interest in the suit land and the record stands in the name of deities is wrong.

On the other hand it is the claim of defendant Nos.1-5 that Haralal Roy was the original owner of the suit property and he purchased the same from its original owner Dwip Chand Chowdhury and Kesab Chand Chowdhury by a kabala executed in 1282 Maghi year. Makhon Lal Roy became the owner of the suit property after the death of his father, Haralal Roy, and Makhon Lal while had been enjoying and possessing the suit property by taking taka 600/- on 05.01.1939 settled the land in favour of one Basonti Bala Sen and handed over the possession to her. The successor of said Basonti Bala Sen by executing a Kabala dated 27.10.1943, sold the suit land to Dwijendra Lal Roy son of Makhonlal Roy and handed over possession of it and

eventually said Dwijendra Lal Roy transferred the suit land on 09.01.1955 executing a patta in favour of Rashik Lal Sing; however, Rashik Lal Sing obtained said patta in benami of Muzaffar Ahmed Sawdagar and eventually he got a decree in his favour on 10.11.1958 that said Muzaffar Ahmed Sawdagar was his benamder. Haralal Roy purchased the suit property for his own interest and he was never the Shebait of any deities. No right, title and interest in respect of the suit property had been conferred upon the deities. Makhon Lal or his father Haralal Roy were not the benamder, of the suit property and the 'Muktinama' allegedly executed by Makhon Lal is illegal, collusive and fraudulent, by which plaintiffs never acquired any right, title, interest and possession in the suit property.

It is the case of the defendant Nos.12-15 that Makhon Lal Roy being the Shebait of the deities for legal necessity of the deities, he executed a patta on 05.01.1939 in favour of Basonti Bala Sen where the original owner Dwip Chand Chowdhury, Keshab Chand Chowdhury and Sebak Chand Chowdhury were the witnesses. Dwijendra Lal Roy son of Makhon Lal Roy purchased the suit property on 27.10.1943 from Basonti Bala Sen and as the heirs of said Dwijendra Lal Roy, the said defendants have become the owners of the suit property and have been possessing and enjoying the same.

In the instant case one of the moot issues is whether the suit property standing in the name of deities as vendees, as one Haralal Roy as its Shebait is a benami transaction or not.

We have carefully examined exhibit-4, the deed of transfer dated 03.08.1920 in favour of the deities executed by Dwip Chand Chowdhury and Keshab Chand Chowdhury.

In the said deed it has been stipulated to the effect;

> ‘‘কস্য জমিনজমা নির্দ্দায় বিক্রি কবলা পত্র মিদং কার্যাংচাগে আমি ১ নম্বর দাতার জেষ্ঠ ভাতা ও আমি ২ নম্বর দাতার পীতা সেবক চাঁন্দ চৌধুরী সাল ১২৮১ ৯ পৌষ তারিখে লোকান্তর হওয়ায় তাহার শ্রাদ্ধ এবং সৎকার কাজের জন্য ও নৈমিত্তিক খরচ টাকা হাওলাত করিয়া উক্ত কার্যাদি নির্বাহ করা হইয়াছিল। সেই হাওলার টাকা এবং অন্যান্য লোকের হাওলা টাকা পরিশোধার্থে আমরা টাকা পাওয়ার অন্য কোন উপায় না থাকায় নিম্ন লিখিত তপশীলের জমিন জমা বিক্রি করার আবশ্যক হওয়ায় আপনি বিগ্রহনের খরিদ করিতে ইচ্ছুক হওয়ায় তাহার প্রকৃত মূল্য মং ৫০০/- পাঁচ শত টাকা স্থির করিয়া উক্ত বিগ্রহাদির পক্ষে আপনি শ্রী হরলাল রায় মারফত উক্ত জমিন জমান মূল্যের টাকা বুঝি পাইয়া নিম্ন লিখিত তপশীলের জমিন জমা উক্ত বিগ্রহাদির মালিকি দখলে ছাড়িয়া দিলাম। কশ্মিনকালে আমরা কি আমরার পূর্ববর্তী গনের কোন দাবী এলাকা রহিল না। দাবী করিলে তাহা অগ্রাহ্য হইবেন। অদ্য হইতে হুজুরের রাজস্ব আদায় দিয়া নাম এন্তেকালী করাইয়া ভোগ দখল করিতে থাকেন। খাস দখলি জমিন খাস ও প্রজাবিলী জমিন প্রজা হইতে কর শাসন পূর্ববর্তী জমি দখল করিতে আমার কি আমরার ওয়ারিশগনের কোন প্রকারের দাবী থাকিবেক না।’’ [Underlines supplied]

In view of the above recital made in exhibit-4, the claim of the plaintiffs that the above transaction was in fact a benami transaction and deities are the benamders of original owner Dwip Chowdhury and another do not have leg to stand. The above deed shows that said property was transferred in favour of the deities and on behalf of the deities consideration money was paid to the vendors by its Shebait, Haralal Roy and thus, the deities have become the absolute owner of the same. As such, there is no scope to

claim that deities are the benamder of it's vendors and it is a benami transaction. A deity, established for 'puja' or other religious purpose being a jurist person, and being a perpetual minor cannot be a 'Benamder' and any transaction detrimental to the interest of a deity is void, illegal and non-est in the eye of law. In the instant case by virtue of the deed, exhibit-4 right, title and interest has been conferred/vested upon the deities. Once property vests or confers upon the deity by dedication, gift or otherwise, the deity acquires its right, title and interest.

In the case of **Sitaram Agarwal vs. Subrata Chandra, (2008) 7 SSC 716 =MANU/SC/7626/2008,** the Supreme Court of India has held that –

> "Where dedication was not normal, and the property was purchased by the Shebait for the deity, it could not be said that it was not property of the idol or debuttar property."

It is the case of the plaintiffs that by executing a 'Muktinama' on 19.11.1974, Exhibit-2 Makhon Lal Roy had returned the suit property to the plaintiffs, successor of the vendors stating the fact of benami transaction. Makhon Lal Roy had/has no authority to execute such a deed as the suit property being the deities' property never vested upon Hiralal Roy, his father or him. The Shebait had/has no authority to alienate the property of a deity. Moreover, the title which has been conferred upon the deities cannot be affected by such acts on the part of Shebait.

Moreover, it is well settled that a 'Nadabi-Patra' or 'Muktinama' being merely a deed of disclaimer disclaiming any interest in the property transferred by an earlier sale deed is not a deed of transfer.

Exhibit-4, the deed was executed on 03.08.1920, but the alleged 'Muktinama' was executed on 19.11.1974 i.e. after more than 54 years, which clearly manifests the malafide motive of the plaintiffs as well Makhon Lal Roy. Moreover, R.S and B.S Khatians, Exhibit 5 and 15 respectively have been prepared in the name of the deities and the plaintiffs and their predecessors have/had the knowledge about the same.

The defendant Nos.1-5 and the defendant Nos.12-15 in their respective written statements categorically stated that Makhon Lal as the Shebait of the deities executed a patta on 05.01.1939 **(exhibit-ka = *Ka Ka***) settled the suit property in favour of Basonti Bala Sen and the said defendants adduced evidence to that effect.

Upon perusal of the said patta, exhibit-**ka**= **Ka ka** it transpires that the Makhonlal Roy son of Haralal Roy as the Shebait of the deities had allegedly settled the suit property in favour of the Basonti Bala Sen.

It emerges from the recitals of deed of transfer (patta) dated 10.01.1955, exhibit-1 executed by Dijendra Lal Roy, son of Makhon Lal Roy in favour of Mojaffar Ahmed, lease deed dated 03.01.1951 (exhibit-12) executed by Makhon Lal, Shebait of the deities, in favour of Moulavi Obaidul Hoque, patta dated 09.01.1955, exhibit-Ka-1 executed by Dejendra Lal Roy in favour of Mojaffar

Ahmed, that the suit property originally belonged to the deities and Makhon Lal as Shebait transferred the same to Basanti Bala Sen vide a deed of Patta exhibit-**Ka**=**ka ka**, dated 05.01.1939.

Exhibit-5, R.S. Khatian in respect of the suit property speaks to the effect:

> ‘‘অত্র স্বত্ত্বের বিবরণ ও দখলকার
>
> শ্রী শ্রী সাল গ্রাম চক্র ও রাম সীতা রাধামাধব ঠাকুর ও ব্রজেশ্বর নামক মহাদেব বিগ্রহগণের
>
> পক্ষে সেবায়েত
>
> ক দং মাখন লাল পিং হরলাল রায়। ’’

Exhibit-15, B.S. Khatian in respect of the suit property also speaks to the effect;

> ‘‘মালিক অকৃষি প্রজা বা ইজারাদারের নাম ও ঠিকানা
>
> অকৃষি প্রজা
>
> ইং শ্রী শ্রী শালগ্রাম চক্র ও রামসীতা
>
> রাধামাধব ঠাকুর ও ব্রজেশ্বর নামক মহাদেব পক্ষে সেবাইত
>
> নির্মল চান্দ চৌধুরী পরিমল চান্দ চৌধুরী
>
> পিং দীপক চান্দ চৌধুরী
>
> সাং-নিজ। ’’

If we consider the above documents i.e. exhibits-1, 12, Kha-1, 4, 5, 15 and ka = ka ka together, then we have no hesitation to come to a definite conclusion that the suit property belongs to the deities, and neither the Haralal Roy nor the Makhonlal Roy had any right, title and interest in the suit property. They had looked after the suit property as Shebait i.e. next Friend of the deities.

Mr. Selim Reja Chowdhury, learned Advocate, appearing for the respondent Nos.6-9 in C.A. No.362 of 2017 and

respondents No.5-6 and 8 in C.A. No.363 of 2017 on our query has failed to satisfy us by referring to any evidence that the alleged settlement of the suit property by the alleged patta dated 05.01.1939 by Makhon Lal Roy as Shebait in favour of the Basonti Bala Sen was a valid and legal piece of documents and said transfer was made for legal necessity and interest of the deities i.e. in accordance with law.

We have also perused the evidence of the respective defendants, but we do not find any evidence that Shebait Makhonlal transferred the suit property to Basonti Bala Sen for legal necessity of the deities. As such the transfer in favour of Basonti Bala Sen and the subsequent transfer by Purna Chandra, successor of Basonti Bala Sen, (nephew of her husband Aparna Charan), to the defendants Nos.1-5 is void and illegal and non-est in the eye of law.

It is pertinent to mention here that the power of a Shebait or a Mahant to alienate debutter property is analogous to that of a manager for an infant heir as defined by the judicial committed in **Hunooman Persaud Vs. Babooee (Mst).** It held in that case, Shebait or Mahant has no power to alienate debutter property except in a case of need or for the benefit of the estate.

The Supreme Court of India in case of **The Controller of Estate Duty, West Bangal, Calcutta V. Usha Kumar and ors. 1974 SC 663** and in **Shriomani Gurudwara Prabandhak Committee, Amritsar V. Shri Som Nath Dass and Ors. (AIR 2000(3) SC 1421)** makes it clear that deity is a juristic person and a gift to the juristic person is perfectly

valid in accordance with law, but deity cannot be treated as a living person like Shebaits and, therefore, section 5 of the Transfer of Property Act will not apply. It has been further held that affairs of the deity could be managed through Shebaits/Sarvakars/Managers appointed in accordance with the Deed of Dedication, who are simply managers to manage the properties vested in the Deity (Almighty). Shebait is a person, who is appointed according to Deed of Dedication, to give effect: to the terms and conditions contained therein and to perform Rag, Bhog and worship and other connected affairs and to protect the properties vested in Deity (Almighty) not to alienate the same. Gift once made to the Deity is irrevocable on any ground.

In the Case of **Shriomani Gurudwara Prabandhak Committee, Amritsar V. Shri Som Nath Dass and ors.** the Supreme Court of India has also held that the deity is a minor and if the property is dedicated for the religious purposes, welfare of the deity could be looked into by the Shebait/Sarvakar/Manager appointed in accordance with the deed of dedication or by the Management as Guardian, because a deity is a perpetual minor and never attains majority and always remains minor. Any transfer made against the interest of the deity will be void as other minors may attain majority, but deity cannot. (Under lines supplied)

This Division in the case of **Nurjahan Begum vs. Mahmudur Rahman 34 DLR (AD) 61** had traced the history of benami transaction and also the law propounded by the Privy Council in the following conclusions:

"In a benami transaction source of purchase money is an important criteria 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 criterion 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 **Musammat Bilas Kunwar vs. Desraj Ranjit Singh (1915) LR 42 1A 202** the privy council while adopting the principle as 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. Kumleshwari 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."

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."

[Underlines supplied]

This Division in the case of **Rupe Jahan Begum and others vs. Lutfe Ali Chowdhury and others** reported in **49 DLR (AD), 73** also approved the view of the Supreme Court of India expressed in the case of **Jaydayal Poddar vs. Bibi Hazra AIR (SC), page-171, 1974,** wherein it had summed up the principles governing determination of benami transaction 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." [Underlines supplied]

If we consider the present case, in the light of above tests and propositions coupled with the evidence; both oral and documentary adduced by the parties, then we have no hesitation to hold that the plaintiffs have failed to prove that the transaction vide exhibit-4, the deed of transfer dated 03.08.1920 is a benami transaction as claimed by them.

The High Court Division though discharged both the Rules dismissing the suit and turned down the claim of defendant Nos.12-15 but has held that the defendant Nos.1-5 have the title in the suit property and suit properly belongs to them.

The High Court Division totally misread and misconstrued the materials on record and also failed to

appreciate the legal position that the suit property belongs to deities, and that the predecessors of defendant Nos.1-5 had no interest to transfer the same to anyone. Moreover, other appeal No.495 preferred by the said defendants was dismissed by the court of Appeal below, against which no legal steps had been taken before the Higher Court.

Further the application filed by the defendant Nos.12-15 for correction of the judgment of the High court Division before this Division is absolutely misconceived one and also not tenable in law. Hence rejected.

It is pertinent to mention here that the appellants of C.A. No.362 of 2017 who were the defendant Nos.10 and 11 in the suit, did not file any written statement in order to contest the suit, even they did not file any appeal or revision before the appropriate forum to ventilate their grievances. As such their claim, for the first time, before this Division is nothing but a luxurious endeavor.

Having considered and discussed as above, we have no hesitation to come to a definite conclusion to the effect:

i) neither the plaintiffs nor any of the defendants had/have right, title, interest in the suit property;

ii) the suit property belongs to deities namely, **Sree Sree Shalgram Chakara, Sree Sree Ram Sita, Sree Sree Modan Mohan, Sree Sree Radha Madhob, and Sree Sree Barodeshwar** (hereinafter referred to as deities) and the

said deities were not the benamder of any one, in particular the predecessors of the plaintiffs, and further, transaction vide exhibit-4, deed of transfer dated 03.08.1920 is not a benami transaction;

iii) patta dated 05.01.1939, **exhibit-Ka= ka ka** executed by Makhonlal as Shebait of the deities in favour of Basonti Bala Sen is illegal, void and by virtue the said patta no right, title and interest had been developed upon Basonti Bala Sen, predecessor of the defendant Nos.1-5 as well as defendant Nos.12-15;

iv) on the strength of the alleged patta dated 05.01.1939 the subsequent transfer vide exhibit-ka(1), kha, kaka(1) made by successor of Basanti Bala Sen to the predecessor(s) of the defendants in respect of the suit property is void and illegal;

v) the High Court Division as well as the courts below, both the trial court and the appellate court committed serious error in deciding the merit of the suit;

vi) the High Court Division Committed serious error in holding that defendants nos.1-5 have the, title in the suit property without considering the fact that deities are the owner of the suit property and Dijendra Lal Roy son of Makhan Lal Roy had never acquired

any right, title and interest over the suit property ;

vii) the R.S. and B.S. Khatians, exhibits-5 and 15 have been rightly preferred in the name of deities.

viii) the plaintiffs' suit is not maintainable on the following reasons-

(a) the plaintiffs instituted the suit making so many prayers, like declaration of title, confirmation of possession, perpetual injunction and also for recovery of khas possession, if necessary.

Upon perusal of the plaint it is abundantly clear that the suit property has not been demarcated and identified specifically as required under the law for granting perpetual injunction or confirmation of possession and further, plaintiffs have failed to prove their exclusive possession in the suit property;

(b) the deities were not made parties, though relief(s) has/have been sought in respect of the deities' property.

Mr. Probir Neogi, learned Senior Advocate, appearing for the appellants in civil appeal No.363 of 2017 has tried to convince us that the plaintiffs as heirs of Dwip Chand Chowdhury and Keshab Chand Chowdhury, and members of the dedicating family be allowed to manage and look after

the suit property as they are legally entitled to safeguard the suit property on behalf of the deities.

It emerges from the materials on record that the plaintiffs have instituted the present suit in order to grab the deities' properties claiming that the transaction infavour of deities vide exhibit-4 is a benami transaction and their predecessors were the real owners of the same and further the R.S. and B.S record prepared in the name of deities is wrong. In view of the above facts, there is no scope to accept the above submission of Mr. Probir Neogi. And further, Makhon Lal Roy, Shebait had miserable failed to protect the interest of the deities, and the said Makhon Lal illegally transferred/settled the property of the deities to predecessors of the defendants.

Thus, it is our considered opinion that since at present there is no legal Shebait of the deities to run, manage and protect the interest of the deities and it's properly, it is necessary to pass necessary orders for proper and effective management and supervision of the deities' property.

This Division in **C.A. No.163 of 2009 Bangladesh represented by the Secretary, Ministry of Land, Bangladesh Secretariat & others Vs. Abdul Hye and others, reported in 13 ADC, page-460** and **in civil review petition Nos.147, 259 and 355 of 2018,** arising out of the judgment of the above appeal, reported in **7 ADC, page 508,** elaborately discussed and made observations as to the status of a deity, Shebait's obligation, responsibility, role and power, and

management of deity's property etc. in absence of a legal Shebait.

In the above case this Division having relied on the case of **Pijush Kanti Chowdhury Vs. Sitakunda Shirne Committee and others, reported in 36 BLD, (AD), page 73** having invoked extra-ordinary power under article 104 of the constitution had constituted a committee to run the three temples giving some specific directions and guide lines.

In **Civil Review Petition Nos.147, 259 and 355 of 2018** this Division has observed to the effect:

> "Form the above discussion of the facts and circumstances it is clear that the trust was created for public purpose and same was of charitable and religious nature. In the case of a public endowment the public have a right of worship and a right of management and they are entitled to have their rights properly protected under section 92 of the Code of Civil Procedure read with the Charitable Endowment Act, 1890 and since there was breach of trust by the Shebait Pankaj Kumar Gupta, a direction of court is necessary in the administration of "Sree Sree Radha Krishna. Jieu Deity" and the instant debutter property. One thing must be taken into consideration, that is neither the trustee nor the Shebait nor the beneficiaries took any step against the illegal transfer of the debutter property. Rather in other words, all of them helped in destroying the debuttor property although as it was their obligation to preserve and protect the property of the minor idol. Surprisingly, no one stated anything about the

present position of the trustees. In the case of Romesh Chandra V. Gulab Rai and other reported in AIR 1980 All 283 it was observed that Section 92 of the Code of Civil Procedure applies when there, is breach of any terms of trust deed created for the public, charitable and religious purpose. It also applies where direction of the court is necessary for the administration of any such public trust. In view of the facts and circumstances, the assistance of the Court is necessary to remove mismanagement and maladministration on the part of the Shebait and trustees and to have a proper scheme for management framed for administration of the affairs of the instant debutter property" .

In the light of observations and guidelines made in the case of **Secretary Ministry of Land Vs. Abdul Hye and another** we are giving following directions and observations for proper and effective management of the present suit property i.e., deties' property.

(1) The administration of the deities and its property are to be administered by a democratically elected management committee. The first management committee is to be formed following the guide lines mentioned as bellow;

(i) 1(one) representative of highly respectable hindu residents of Chattogram town to be nominated by the Deputy Commissioner, Chattogram;

(ii) 1(one) elected Hindu Commissioner/ Councilor from the Chattogram City Corporation,

if any, to be nominated by the Mayor of Chattogram City Corporation. If such person is not available, the Mayor of Chattogram City Corporation shall nominate any hindu resident of Chattogram city who is of high social standing and good reputation;

(iii) 1(one) elected Hindu member of Zila Parishad, Chattogram District, if any, to be nominated by the Chairman of Zila Parishad, Chattogram. If no such person is available, the Chairman of Zila Parishad, Chattogram shall nominate any highly respectable hindu resident of Chattogram;

(iv) 1(one) Hindu representative from the District Bar Association, Chattogram to be nominated by the Executive Committee of said District Bar Association;

(v) 1(one) Judicial Officer preferably from Hindu Community, of District and Sessions Judge Court, Chattogram "Judgeship" including Magistracy to be nominated by the District Judge, Chattogram;

(vi) Shebait of the deities shall be ex officio member of the management Committee;

(vii) The Deputy Commissioner, Chattogram in consultation with the 05(five) leading Shebaits or priests of the different temples/deities of Chattogram town/district shall appoint Shebait of the Deities;

(viii) 1(one) Hindu Officer from District Police Administration, Chattogram to be nominated by the Metropolitan Police Commissioner, Chattogram, if such person is not available, any Hindu responsible officer from Chattogram District;

(ix) The members of the Management Committee shall hold the office for a period of 03(three) years. The management committee shall be reconstituted at the end of every 03(three) years;

(x) There will be no bar to re-elect a member from the respective category. In case of death, resignation or removal of any member the vacancy shall be filled up by election and tenure of such new member shall be up to the tenure of the existing committee. Charge of office shall have to be handed over by the outgoing committee to the newly formed committee within seven days of its formation.

(2) The Committee shall elect a President, a Vice President, a Secretary, a Treasurer and an Assistant Secretary from amongst the aforesaid members of Management Committee. The members of the management Committee shall discharge their powers and functions as trustees of the deities' property in consonance with religious customs and traditions.

(3) The President shall be the Executive Head of the Management Committee and he shall preside over all the meetings. He shall have the power to direct the Secretary to convince any meeting of the Management Committee in the normal course of business with two days notice and an Emergency Meeting may be called with twenty four hours notice. If the Secretary for any reason fails to convey such meeting directed by the President, the later shall himself convene such a meeting. In the absence of the President, the Vice President shall preside over the meeting and if the President and vice-president are not available, then any senior member of the Committee shall preside over the meeting.

(4) The Secretary shall be responsible for the overall management of the affairs of the trust. The functions of the Assistant Secretary shall be assigned by the Management Committee and he shall be responsible for his activities to the Committee.

(5) Meetings of the Management Committee shall be held preferably once in every two months and must be held at least thrice in a calendar year. Quorum of the meetings will be formed with the presence of one third members of the committee. The president shall have casting vote in case of any tie. Minutes of the proceedings of such

meetings shall be maintained in a bound volume as permanent record.

(6) The Management Committee shall have the right to appoint necessary employees for management of the suit property which may be found necessary by the Management Committee. The terms and conditions of their service, including salary and other benefits, shall be determined by the management Committee in consultation with the District Judge, Chattogram.

(7) The minimum educational qualification of the Shebait shall be Higher Secondary Certificate (HSC) from a recognized Board of the country or equivalent thereto.

(8) The Management Committee shall have the right to take disciplinary actions against the Shebait, and any of the employees, including suspension, termination and dismissal from service on the grounds of inefficiency, negligence, insubordination, action in any manner prejudicial to the interest of the suit property, indulging in any activity subversive to the state or of discipline, any undignified conduct not commensurate with the high ideals and sacredness of the Deity, malafide and malfeasance.

(9) The Secretary shall take proper steps to prepare and preserve:

(i) a complete record of the properties (suit property) of the deities;

(ii) he shall also maintain a separate Register of all dues payable by the Deities property, cases or rent, and other public dues, giving the exact dates by which those are required to be paid and the dates of actual payments made.

(iii) the Secretary shall arrange for safe custody and proper preservation of all important papers and correspondence relating to the property. An authenticated complete list of property, must be promptly supplied to the District Judge, Chattogram for his record;

(iv) the Secretary shall not sell or otherwise dispose of or alienate the property nor shall be leased out and mortgage the property under any circumstances and also not borrow any money from any person or authority except under a resolution of the Management Committee, duly approved by the District Judge, Chattogram;

(v) the Secretary shall keep regular accounts and preserve all vouchers. The vouchers may be destroyed after three years, if permitted by the Management Committee;

(vi) at least a month and a half before the beginning of the Fiscal Year, the Secretary

shall prepare a budget of income and expenditure and obtain approval from the Management Committee. The budget shall then be placed before the District Judge, Chattogram for his approval;

(vii) the Secretary will not generally spend any amount of money beyond the budget. In case of emergency, he may spend up to taka 50,000.00 (fifty thousand) only in excess of the budget subject to approval of the Management Committee in the next meeting;

(viii) within two months after the end of the fiscal year the Secretary shall submit accounts of the property for the preceding year, audited by a certified Auditor to be nominated by the District Judge, Chattogram. The report of the Auditor shall be submitted to the Management Committee and which shall send the report with its remarks for perusal of the District Judge, Chattogram.

(10) The Deputy Commissioner and Metropolitan Police Commissioner of Chattogram shall accord all co-operations to the Management Committee in the administration, preservation and protection of the suit properties and shall provide necessary safety and security measures.

(11) If any doubt, dispute or difficulty arises amongst the member of the committee, the Management Committee may apply to the District

Judge, Chattogram for necessary clarification, advice and guidelines.

With the observations and directions made above, these appeals are disposed of.

The District Judge and Deputy Commissioner, Chattogram are directed to take necessary steps to form the management committee following the above directions and observations within a period of 2(two) months from the date of receipt of this order.

There is no order as to cost.

C.J.

J.

J.

J.

B/O.Imam Sarwar/
Total Wars:8,941