IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5094 OF 2008

[Arising out of SLP(C) No. 5815/2007]

THANGAMMA AND ORS. ... APPELLANT(S)

:VERSUS:

SETHUMADHAVAN ... RESPONDENT(S)

O R D E R

Leave granted.

The defendants in the original suit are the appellants before us.

The respondent filed a suit for partition in respect of the suit schedule property, inter alia on the premise that although the property stood in the name of defendant - appellant No.1, but the transaction was benami in nature. The defendants denied and disputed the aforementioned contention of the respondent.

One of the issues which was framed by the Trial Court was:

"Whether the defendants prove that the suit property is the joint family property of the plaintiff and the defendants?"

The said issue was determined in favour of the appellants by the learned Trial Judge holding:

"In fact, DW 1 also has stated that the plaintiff was residing with his

parents till his marriage. Therefore, this document would lose much of its importance to establish that the suit schedule property was the joint family property. Ex. P.3 is the notice issued by the 1st defendant to the plaintiff. In the said notice issued on 23.6.1988, defendant No.1 had stated that suit schedule property were purchased by investing the sale proceeds of the property situated at Kozikode given by the father of the 1st defendant. This document as stated earlier, dates back to 23.6.1988, i.e. much prior to the institution of the suit. Even prior to the institution of the suit the defendant No.1 had categorically stated that the property was purchased by utilizing the sale proceeds of the property of Kozikode. This would not throw much light regarding the dispute in question."

It was furthermore held:

"The Property as stated earlier, would, at best be the property acquired in the joint venture, but for which, sufficient evidence is not there. According to the plaintiff, he joined service in the Police Department in 1972. Earlier to 1972 he was not having any earnings, as could be seen from the evidence. If really the plaintiff had earnings earlier 1972, he would have produced some document or would have spoken about it. On the other hand, in the course of cross-examination, as referred to earlier, the plaintiff has stated that he is not having any document to show that he had source of income prior to 1972. Of course, in the course of cross-examination of DW1, the learned counsel for the plaintiff had posed a suggestion to DW1 that earlier to 1972 the plaintiff was working at Galaxy Theatre. Writ reference to the said suggestion, DW1 has denied the same in unequivocal terms. The plaintiff, if really had an employment with the Galaxy Theatre earlier to 1972, he would not have lost sight of to

mention that such an important event in his life before Court. But, in the course of his examination-in-chief PW1 has not even whispered a word about it. Therefore, the contention of the plaintiff's Advocate that his client was working at Galaxy Theatre prior to 1972, to augment the funds fall to the ground."

Inter alia on the aforementioned finding, the suit for partition filed by the respondent was dismissed. A first appeal was preferred thereagainst before the High Court. By reason of the impugned judgment, the High Court without considering any of the aforementioned findings of the learned Trial Judge, allowed the same holding:

"In Ex.P3 – reply notice, DW1 admits that on the suit site, a house is constructed from out of the terminal benefits of her husband. In evidence, she states that about 26 years ago, a property at Kachikodi was sold and a site was purchased at Suddaguntanapalya which was again sold and from the said funds the suit site was purchased later on. DW1 clearly admits that she does not have any documents to show the sale of site in Suddaguntanapalya and use the said funds for purchase of the suit site. Therefore, in the absence of necessary evidence, it emerges that the property was purchased by Kumaran Nair and the house is constructed from out of the funds of Kumaran Nair. The first defendant appears to be only benamidar. The provisions of Benami Transaction Act does not prohibit benami investment in the name of wife. The facts stated by defendant No.1 show that the suit property is the self acquired property of the propositus. In that view, upon his demise, the wife and children would be entitled to equal share under Section 8 of the Hindu Succession Act. Obviously, the plaintiff is entitled to 1/5th share in the suit property. The judgment and decree of the trial court is set aside. The appeal is partly allowed as indicated above."

Having heard the learned counsel for the parties, we are of the opinion that keeping in view the nature of the dispute, namely, as to whether the transaction in question was a benami one, was required to be gone into by the High Court keeping in view the findings of the learned Trial Judge. The High Court did not follow the provisions of order 41 Rule 31 of the CPC; the reasonings of the learned Trial Judge were not met and the oral evidence adduced by the parties have not been discussed.

In this view of the matter, the impugned judgment cannot be sustained and it is set aside accordingly. The appeal is allowed and the matter is remitted to the High Court for consideration thereof afresh on merit.

We make it clear that all contentions of the parties shall remain open.

.....J
(S.B. SINHA)

.....J
(AFTAB ALAM)

NEW DELHI,
AUGUST 13, 2008.