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A.No.3120 of 2021
in C.S.No.25 of 2015

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Reserved on :15.11.2021
Pronounced on : 22.12.2021

N.SESHASAYEE, J.,

The third defendant in the suit has filed the present application to set aside the exparte decree passed in the suit.

2.1 The background facts :

- According to the plaintiff, the second defendant lured the plaintiff to invest Rs.2.0 crores in a business run by him. The said business itself is arrayed as the first defendant. According to him, the second defendant agreed to share the profit in the ratio of 70:30 with 70% owing to the plaintiff.
- Based on the understanding thus arrived between them, on 18.08.2011 the plaintiff had transferred Rs.1.50 crores to the second defendant's account. Indeed, the plaintiff has to mobilise the funds otherwise.
- However, the intent of the transaction did not seem to go in the



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right direction, and the plaintiff sensed some foul play. Accordingly, the second defendant agreed to return the money and indeed he has issued a cheque for the sum received. However, the second defendant would inform the plaintiff not to deposit the said cheque, and that he would pay the cash and collect the cheque.

- The plaintiff has ultimately laid the suit seeking repayment of Rs.1.50 crores with interest. The plaintiff would further allege that on 27.09.2011, the second defendant had purchased the property out of the funds transferred by the plaintiff, and that after the issuance of suit notice, the plaintiff came to know that the second defendant had fraudulently transferred the property so purchased by him to the third defendant. The transfer is not genuine and the sale deed is a sham document. He hence seeks a declaration that the sale deed dated 05.06.2013 executed by the second defendant in favour of the third defendant is sham and nominal.

3. The applicant was served with summons on 16.03.2015, but he remained exparte, and an exparte decree came to be passed on 30.01.2017. Therefore,



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the applicant filed the present application to set aside the exparte decree along with A.No.2579 of 2021 for condoning the delay of 1604 days. That application came to be allowed on 30.7.2021.

4. The third defendant / applicant would aver in his affidavit filed in support of his application that upon receiving the suit summons he had approached the second defendant, and that the second defendant had assured him that he would take care of the former's interest. However, contrary to his expectation that second defendant would protect the warranty of his title and to his surprise, he received a notice of Execution Petition during Feb.2019, which the plaintiff has laid. On 20.03.2020, this defendant has filed his vakalath in the Execution Petition, and that due to COVID circumstances, he could not file necessary application in time.

5. In the counter filed by the plaintiff, it is stated that the applicant was careful enough not to disclose when the suit summons was served on him. The applicant states that he was served with notice of the E.P. even in February 2019, but he chose to enter through his counsel only on



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20.03.2020. He hardly has behaved like a prudent and vigilant litigant.

6. The objection of the plaintiff/1st respondent is not without merit. However, it has to be appreciated in the context. Here is the plaintiff, whose core case is that he has transferred funds to the second defendant, and his claim is essentially for recovery of the amount so paid to him. So far as the cause of action vis-a-vis the third defendant/applicant is concerned, it is plaintiff's belief that the sum provided by him might have been used by the second defendant for purchase of some properties, and that this transfer to the third defendant is a fraudulent transfer. In law, given the nature of the transaction between the plaintiff and the second defendant and also the cause which the plaintiff alleges for laying an action against this applicant must be a fact, and not a belief. Secondly, the property of a defendant or a judgment debtor is needed only for realising the decree debt at the time of execution. Plaintiff has no *right in presente* in the said property. Where any sale by the judgement debtor were sought to be ignored as a fraudulent transfer intended to defeat the claims of his creditors, it can be done even in an execution proceedings.



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7.1 Turning to the present case, the position of law being what it is, the lack of caution on the part of the third defendant has posed a great threat to affect his right to property. As already indicated, if the entire plaint is scanned for details, the plaintiff nowhere asserts that he has a subsisting right over the property, nor makes a claim on the property, but wants its availability for him to realise the debt.

7.2 It would have been advisable that the third defendant was vigilant. However, it may have to be stated that the principal obligation to protect the applicant's title is of the second defendant. Therefore, there are reasons enough to believe that this defendant/applicant might have exhibited inadequate vigilance in responding to suit summons. That, however should not strip him of his right to property.

7.3 Still the balance has to be struck and the inconvenience caused to the plaintiff is adequately compensated. This Court, therefore allows this application but subject to condition that the applicant pays the plaintiff/first



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respondent a sum of Rs.1,00,000/- as cost within four weeks from the date of receipt of the copy of this order. He is also further directed not to alienate the property that he had purchased from the second defendant, covered by prayer(c) in the suit without the leave of this Court.

22.12.2021

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Pre-delivery order in
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