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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.03.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.S.A.No.29 of 2014

N.Kishorekumar

..Appellant/
Petitioner

Vs

1.K.S.Muthusamy,
2.M.Nehru Vivekanandan

..Respondents/
Respondents

Appeal filed under Section 100 of Code of Civil Procedure read with Order 43 Rule 1 CPC against the judgment and decree passed in A.S.No.70 of 2013 on the file of the I Additional Sub Court, Erode dated 28.02.2014 confirming the fair and final order dated 07.10.2013 passed in E.A.No.6 of 2013 in E.P.No.115 of 2011 in O.S.No. 810 of 2002 on the file of I Additional District Munsif Court, Erode.

For Appellant : Mr.J.Prithivi
for Mr.S.Kaithamalai Kumaran

For Respondents: Ms.D.Sathiya
for Ms.Zeenath Begum for R1
Mr.C.S.Saravanan for R2

JUDGMENT

The facts in a nutshell to be considered are that Nehru Vivekanandhan borrowed a sum of Rs.70,000/- and a promissory note was executed on 28.06.2000 in favour of K.S.Muthusamy. The said loan amount was not repaid and the first respondent in the present appeal K.S.Muthusamy instituted a suit in O.S.No. 810 of 2002 for recovery of money against Nehru Vivekanandhan. On 07.10.2000, O.S.No.810 of 2002 was decreed ex-parte. Based on the ex-parte decree, the decree holder K.S.Muthusamy filed E.P.No. 19 of 2004 on 29.10.2004 against the judgment debtor Nehru Vivekanandhan and the said execution petition was dismissed as not pressed. Thereafter, on 14.10.2005, a sale



agreement was executed between the appellant/Kishore Kumar and Nehru Vivekanandhan/judgmebt debtor in respect of R.S.No.732/7 in Kalaingar Karunanithi Nagar Layout ,Erode. Pursuant to the sale agreement, the deed of sale was executed between the appellant and the original owner Nehru Vivekanandhan on 19.05.2008 and after a lapse of three years from the date of execution of sale, another EP was filed by the first respondent/K.S.Muthusamy in E.P.No.113 of 2011 against the original owner of the property Nehru Vivekanandhan for attachment and sale of the said property in respect of R.S.No.732/7 in Kalaingar Karunanithi Nagar Layout ,Erode. Pursuant to the orders passed in E.P. on 29.08.2011, the said property was attached. Knowing the developments, the appellant herein has filed E.A. 6 of 2013 under Order 21 Rule 58 CPC to raise the attachment on 09.04.2013. The E.A.No.6 of 2013 was dismissed on 07.10.2013 against A.S.No. 70 of 2013 was filed and the said first appeal was also dismissed. Thus, the appellant is constrained to move the present civil miscellaneous second appeal.

2. The substantial questions of law raised are that : (a) Whether the Courts below are justified in dismissing the petition filed under Order 21 Rule 58 CPC to raise attachment over the property without considering the fact that there was no attachment before judgment and the sale deed (19.05.2008) alleged by the appellant is much prior to attachment made in E.P.No.115 of 2011 (29.08.2011)? and (b) Whether the Courts below are right in holding that the appellant is a "Caveat Emptor" without considering the fact that the encumbrance certificates Ex.P-5, Ex.R-1 and R-2 does not spell out encumbrance arise due to O.S.No.810 of 2002 on the file of I Additional District Munsif, Erode?

3. Learned counsel appearing on behalf of the appellant mainly contended that the appellant is an innocent third party purchaser and is no way connected with the said execution proceedings between the respondent as well as the original owner of the property Nehru Vivekanandhan. Thus, the attachment made four years after the execution of sale deed would not be binding on the appellant.

4. Learned counsel for the appellant relying on Section 64 of CPC wherein sub-clause (2) enumerated that nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment contends that his rights are to be protected mainly on the ground that as on the date of agreement or purchase of the property, there was no attachment of the Court. Even the earlier execution proceedings was



dismissed as not pressed. Therefore, there was no execution as on the date of purchase and he would not be a bonafide purchaser and, therefore, the findings of the Courts are not in consonance with the provisions of law.

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5. The appellant admits that he was aware of the execution proceedings in respect of the other suit filed in O.S.No. 589 of 2001 and, therefore, the execution proceedings is connected with the execution proceedings filed against the decree in O.S.No. 810 of 2002. Thus, the courts have erroneously understood the facts and circumstances and dismissed E.A.No. 6 of 13 and the First Appellate Court has also failed to consider the facts and circumstances with reference to the documents filed by the appellant.

6. Learned counsel for the respondents objected to the said contentions by stating that the appellant was very much aware of the attachment made in O.S.No 589 of 2001 which was considered by the First Appellate Court in paragraph 11 of the judgment. When the purchaser was aware of the attachment of the property there is no reason whatsoever to plead ignorance of the proceedings. Thus, there is no error in respect of the findings arrived at by the original Court as well as the First Appellate Court and the appeal is liable to be dismissed.

7. Considering the arguments, this Court is of the considered opinion that the suit is for recovery of money. Admittedly, there was no attachment before the judgment. As on the date of institution of the suit, the property purchased by the appellant was not the subject-matter of the suit. There was no execution admittedly as far as O.S.No.810 of 2002 is concerned. Importantly, E.P.No.19 of 2004 filed by the decree-holder K.S.Muthusamy in the present appeal was dismissed as not pressed as on 29.10.2004. O.S.No.810 of 2002 was an ex-parte decree for recovery of money. When in a money suit, the execution proceedings were dismissed as not pressed, the appellant thereafter entered into a sale agreement and executed the sale deed on 19.05.2008, after the lapse of four years from the date of dismissal of E.P.No.19 of 2004 as on the date of the purchase of the property. Admittedly, O.S.No.810 of 2002 is concerned with the money suit. Thus, there was every reason to believe that the issues were settled between the parties. In the absence of any such encumbrance or attachment at the time of sale agreement or execution of sale, the appellant cannot blame nor the subsequent attachment would be binding on the appellant. The facts clearly indicates that the execution proceedings in E.P.No.19 of 2004 was dismissed as not pressed on 29.10.2004 and the sale deed was executed on 19.05.2008 after four years. Even thereafter, there was no action for about three years and the



second execution proceedings in E.P.No.115 of 2011 was filed on 14.02.2011. Thus, there was a time gap of about seven years from the date of the first execution proceedings and the second execution proceedings. In the second execution proceeding filed in E.P.No.115 of 2011, the Court attached the property. However, by the time, the property was sold by the owner in favour of the appellant and under those circumstances, the appellant, who was a purchaser filed E.A.No.6 of 2013 under Order 21 Rule 58 CPC. The First Appellate Court also proceeded its case on the mistaken impression that the appellant had knowledge about the execution proceedings in O.S.No.589 of 2001. Therefore, he purchased the property knowing that there was an attachment. However, the execution proceedings in O.S.No. 589 of 2001 is no way connected with E.P.No. 810 of 2002 which is a suit for recovery of money. If the execution proceedings is pending with reference to other suit, it cannot be a ground to further attach the property with reference to O.S.No. 810 of 2002. As far as the present appeal is concerned, it is related to the judgment and decree passed in O.S.No. 810 of 2002 and thus, the reference made regarding the execution proceedings in O.S.No.589 of 2001 may not have any relevance. However, there is every possibility of some application or otherwise in respect of other suit between the parties and these facts are not taken note of by the Courts. Thus, a mere observation that the execution proceedings in O.S.No. 589 of 2001 would not dis-entitle the appellant from getting the relief of raising the attachment made against the property purchased by virtue of the sale deed executed on 19.05.2008.

8. Perusal of the judgment of the First Appellate Court reveals that the Court considered the execution proceedings in E.P.No.115 of 2011 in O.S.No.810 of 2002, which was filed on 14.11.2011 after the sale deed is filed is to be taken note and the fact that the earlier execution proceedings filed in O.S.No.810 of 2002 in E.P.No. 19 of 2004 was dismissed as not pressed. When the first execution proceedings was not pressed and thereafter the sale took place and the second execution proceedings was filed after a lapse of three years from the date of sale then the trial Court has failed to consider the fact that the sale took place from the date prior to the execution proceedings instituted in E.P.No. 115 of 2011. Thus, the first appellate court has proceeded based on the fact that the appellant had knowledge about the execution proceedings in E.P.No.115 of 2011, which is erroneous in view of the fact that even prior to filing of the said execution proceedings, the sale deed was executed on 19.05.2008.

9. Even assuming that the appellant had knowledge about the attachment of the said property in respect of some other suit, more specifically, O.S.No. 589 of 2001, those attachment is no



way connected with O.S.No. 810 of 2001. As far as the subject-matter of the present appeal in O.S.No.810 of 2001 is concerned, ex-parte decree was passed in the year 2003. The first execution proceedings filed was dismissed as not pressed on 29.10.2004. The sale deed was executed in the year 2008 and after a lapse of three years, the second execution proceedings in E.P.No.115 of 2011 was filed. Considering the facts and circumstances as well as the time gap between the first execution proceeding and the second execution proceeding, this Court is of the opinion that the sale is to be protected with reference to Section 64(2) CPC as the appellant would not have knowledge about any such execution proceedings as the execution proceeding filed in E.P.No. 19 of 2004 was dismissed as not pressed in the year 2004 itself.

10. Considering the facts and circumstances, this Court is of the opinion that the trial Court as well as the First Appellate Court has not considered the facts and circumstances in the right perspective and the first execution proceeding in E.P.No.19 of 2004 was not taken into consideration and further the said execution proceeding was dismissed as not pressed on 29.10.2004. Under these circumstances, the judgment and decree dated 28.02.2014 passed in A.S.No.70 of 2013 confirming the fair and decreetal order passed on 07.10.2013 in E.A.No.6 of 2013 is set aside and consequently, C.M.S.A.No.29 of 2014 stands allowed. The property attached, stands raised. Connected, M.P.No.1 of 2014 is closed.

Sd/-
Assistant Registrar(Audit)

//True Copy//

Sub Assistant Registrar

ssm

To

1. The I Additional Subordinate Judge,
Erode.
2. The I Additional District Munsif,
Erode.



Copy To

The Section Officer,
VR Section, High Court,
Madras-104.

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+1cc to Mr.S.Kaithamalai Kumaran, Advocate, S.R.No.14050

+1cc to Ms.Zeenath Begum, Advocate, S.R.No.13839

C.M.S.A.No.29 of 2014

RR (CO)

CS/06/09/2021