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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.09.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.738 of 2018

Senthil Kumar

...Appellant / Defendant

Vs.

Sabesh

...Respondent / Plaintiff

Prayer : Appeal Suit filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree passed in O.S.No.140 of 2015 dated 04.08.2018 on the file of the II Additional District Judge, Chidambaram.

For Appellant : Mr.J.Antony Jesus

For Respondent : Mr.P.Valliappan

JUDGMENT

The above First Appeal is filed challenging the Judgement and Decree in O.S.No.140 of 2015 of the II Additional District Judge, Chidambaram. The suit was one for Specific performance filed by the respondent herein. The brief facts necessary for disposing of the above Appeal are herein below narrated.

2. The respondent herein had filed the suit in question stating that he had entered into an agreement with the appellant to purchase the suit property belonging to the appellant under an agreement of sale dated 13.04.2009. The sale consideration was fixed at a sum of Rs.11,00,000/-. The appellant had undertaken to handover possession of the property at the time of registration of the sale deed. However, the registration of the sale deed could not be proceeded with since the appellant had expressed that he was unable to handover the possession



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immediately and thereafter suggested that the sale agreement be canceled and a fresh agreement of sale entered into later. Accordingly, the earlier agreement was canceled by a registered cancellation deed dated 29.09.2014.

3. In the beginning of the year 2015, the appellant once again approached the respondent with an offer to sell the property and the respondent agreed to the same and thereafter a registered agreement of sale dated 29.01.2015 was entered into between the appellant and the respondent. The price agreed was a sum of Rs.15,00,000/- and on the date of the agreement a sum of Rs.10,00,000/- was received by the appellant herein. The parties have agreed that the sale deed would be executed within a period of one year from the date of the agreement. According to the respondent herein, he has been ready to proceed with the purchase and in pursuance to this, he had been requesting the appellant to come to execute the deed. However, the appellant had not responded favorably.

4. This prompted the respondent to issue a legal notice dated 17.07.2015 calling upon the appellant to execute and register the sale deed. Although the appellant had received the said notice he did not come forward to either send a reply or execute the sale deed. This compelled the respondent to file the present suit.

5. Although the appellant had received the summons in the above matter he failed to appear before the Court and thereafter an ex parte decree came to be passed on 15.02.2016. The appellant had filed I.A.No.9 of 2017 to set aside the ex parte decree. This petition was ordered on 23.03.2017 and on 20.06.2017 the appellant had filed his written statement. Even prior to the order in I.A.No.9 of 2017 and immediately after the ex parte Judgement and Decree the respondent herein had deposited the entire balance sale consideration on 16.04.2016 to the credit of the suit.

6. After filing the written statement when the matter came up for trial the respondent herein did not appear and thereafter the second ex parte Judgement and Decree came to be passed on 07.02.2018. Once again the appellant had filed I.A.No.72 of 2018 for setting aside the ex parte decree. The said application was allowed and the ex parte decree was set



aside on 16.07.2018 and the matter was posted for evidence of P.W.1.

7. On 24.07.2018, the notes sheet would show that the plaintiff's witness was present and the appellant was also present. However, since the appellant's counsel did not appear till 4 p.m the matter was adjourned to 31.07.2018. On 31.07.2018, there was no representation on behalf of the appellant and neither did the appellant appear before the Court. Therefore, he was called absent and set ex parte and the matter posted for the evidence of the plaintiff. Since the chief examination of the respondent was submitted in the form of proof affidavit and the respondent had stated that they had no further evidence the matter was posted for arguments on 01.08.2018. On 01.08.2018, it was only the respondent who had submitted their arguments and even then it appears that the appellant herein had not taken steps to set aside the ex parte.

8. Ultimately, the Judgement and Decree came to be delivered on 04.08.2018 decreeing the suit.

9. The appellant had filed a written statement in which he had raised two defenses:

(i) That the agreement of sale was not intended to be an agreement of sale but was only executed as security for a loan borrowed by the appellant from the respondent. It is his case that he had borrowed a sum of Rs.15,00,000/- and since the respondent had insisted upon a security the agreement of sale had been executed.

(ii) The second defense taken by the appellant was that the property of value of Rs.1,00,00,000/- was sought to be purchased at paltry sum of Rs.15,00,000/-.

Apart from the above two defenses there was no other major defenses that has been raised on the side of the appellant.

10. The Trial Court taking note of the pleadings on both sides had framed the following issues:

1. கிரய ஒப்பந்தம் உண்மையானதா, செல்லக்கூடியதா?
2. கிரய ஒப்பந்தமானது கடன் தொகைக்காக ஏற்படுத்தப்பட்டதா?
3. பிரதிவாதி தாவா சொத்தை விற்க தயாராக இருந்தார் என்பதும் தாவா சொத்தின் மதிப்பு ரூ.ஒரு கோடி என்பது உண்மையா?



4. வாதி கோரியபடி தொகை பெற அருகதையுடையவரா?
5. வேறு என்ன பரிகாரம்?

11. Since the appellant had been set ex parte, the respondent had examined himself as P.W.1 and one Guruvayurappan as P.W.2 and had marked Ex.A.1 to Ex.A.3.

12. The learned Judge taking into consideration the agreement of sale and the fact that the appellant had not denied the execution and also considering the fact that entire balance sale consideration had been deposited, proceeded to decree the suit. It is challenging this decree that the appellant is before this Court.

13. Mr.J.Antony Jesus, learned counsel appearing on behalf of the appellant would put forward the argument that even if the appellant had not participated in the proceedings since his written statement is already on file the Trial Court ought to have corroborated the evidence of the respondent to the defense raised by the appellant. He would further submit that the fact that two agreements have been executed with reference to the same property and first of which had been canceled would only go to show that the agreement was not intended to be an agreement but was only as a security for the loan. He would submit that a reading of the Judgement and Decree would indicate that the learned Judge has proceeded to consider that the appellant had not participated in the proceedings whereas the defendant had filed their written statement and it was only thereafter that they have not participated in the proceedings.

14. Per contra, Mr.P.Valliappan, learned counsel appearing on behalf of the respondent would submit that the Judgement and Decree which is now appealed against is the third Judgement and Decree that has been passed in the above suit. He would submit that the first Judgement was passed on 15.02.2016, which was an ex parte decree and thereafter the application to set aside the ex parte decree was ordered on 23.03.2017, once again the appellant allowed the matter to go ex parte though he had filed a written statement on 20.06.2017. This ex parte decree dated 07.02.2018 was once again sought to be set aside by the appellant by filing I.A.No.72 of 2018. This application was allowed and thereafter the matter posted for the evidence. Since the appellant had once again failed to appear in the matter he was set ex parte and ex parte decree has been passed.



15. The learned counsel would submit that the conduct of the appellant throughout was only to protract the proceedings and not to defend the same. He would submit that the Trial Court has considered the evidence on record and passed a detailed order which has not been rebutted on merits by the appellant herein.

16. After hearing the arguments, the following points for consideration arises in the instant appeal.

(a) Whether the Judgement and Decree of the Court below requires to be set aside since the learned Judge has not addressed the defense of the appellant?

(b) Whether Ex.A.1 was intended to be only a security for the loan transaction or whether it was intended to be an agreement of sale?

17. The records would indicate that the respondent and the appellant had entered into an agreement of sale dated 29.01.2015, whereunder, the appellant had agreed to sell the suit property to the respondent for a total sale consideration of Rs.15,00,000/-. Time frame of one year was provided for paying the balance sale consideration of Rs.5,00,000/-. The appellant has admitted the execution of this agreement but his contention is that the agreement was intended as a security alone. It is the case of the respondent that there was an earlier agreement on 13.04.2009 which had to be canceled ultimately by cancellation deed dated 29.02.2014 and the reasons for the same has been set out in the plaint at paragraph no.2 as follows:

"Under this document the defendant agreed to hand over possession to the plaintiff at the time of Registration of sale deed. But the sale deed could not be executed within the period as the defendant expressed that he wanted some more time for handing over possession and suggested that the sale agreement can be cancelled and suggested execution of a fresh agreement of sale later. Accordingly the above said agreement of sale was cancelled and a registered cancellation deed was executed on 29.09.2014."

This statement has not been refuted by the appellant in the written statement filed by him.

18. Further, on 17.07.2015, the respondent has issued a notice to the appellant calling upon him to execute the



agreement of sale. The notice has been received by the appellant however he has not come forward to issue reply notice rebutting the claim and stating that the parties had not entered into agreement to sell the property but that the agreement of sale was only intended as a security for the loan. In his written statement the appellant has simply denied the notice dated 17.07.2015. The records would also show that the balance sale consideration of Rs.5,00,000/- has been deposited into the Court by the respondent as soon as the first ex parte Judgement and Decree came to be passed on 15.02.2016.

19. The appellant who claims that the agreement of sale has been executed only as a security did not choose to enter the box and adduce evidence to substantiate the said statement. On the contrary he has remained away from the witness box. He has not even cross examined the respondent who had adduced evidence. The original evidence of P.W.1 would show that after the Chief examination of P.W.1 the matter was posted for the cross examination. On 24.07.2018, the learned II Additional District Judge, held that the appellant was not interested in cross examining the witness and therefore exercising the rights under Order XVII Rule 2 (e) of the Code of Civil Procedure the cross examination was dispensed with.

20. The records would clearly show that the appellant has been given several opportunities to prove his case but he has not chosen to enter the box to adduce evidence in this regard. Therefore, the contention of the learned counsel appearing for the appellant that the Trial Court has failed to address the argument of the appellant is without any basis. In fact a reading of the issues would clearly show that the Trial Court has considered the pleadings on either side and framed the issues. This is striking when the issue nos.2 and 3 are taken into account.

21. Therefore, it is clear that the Trial Court has considered the pleadings while framing the issues but since the appellant has not got into box to prove his case by filing necessary documentary evidence the learned Judge could not have addressed the defense of the appellant which remained uncorroborated. Therefore, the first point for consideration is held against the appellant.



22. As regards the second point for consideration the respondent / plaintiff has very clearly set out the transactions that had been entered into between the appellant and the respondent has narrated the earlier agreement of sale and the reasons for its cancellation followed by the agreement of sale which is now the subject matter of this First Appeal.

23. The respondent has clearly set out that the agreement between the parties was for the sale of the suit schedule property and nothing else. This statement has not been denied by the appellant in his written statement on the contrary the appellant admits the execution of the agreement of sale but tries to over come the same by contending that it was only executed as security for a loan, which statement has not been proved by the appellant. The appellant has not responded to the legal notice dated 17.07.2015. If really the transaction between the appellant and the respondent was only for a loan transaction it would be logical for the appellant to immediately respond to the legal notice dated 17.07.2015 and contend that the parties had not entered into an agreement of sale but that the document was only intended to be security. Considering the fact that such a stand has not been taken at the very first instance, I hold that the agreement of sale was only intended to be so and never intended to be a security. The second point for consideration is also answered against the appellant.

24. Therefore, I do not find any reason for interfering with the Judgement and Decree of the II Additional District Judge, Chidambaram. The First Appeal is dismissed with costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

1.The II Additional District Judge,
Chidambaram.



2.The Section Officer,
V.R.Section,
High Court, Madras.

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+1cc to M/s.P.Valliappan, Advocate SR.No.45330

A.S.No.738 of 2018

RR(CO)
RVM(13/10/2021)