THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION Nos.2399 AND 2412 OF 2011

COMMON ORDER:

The Civil Revision Petition No.2399 of 2011 , under Section 115 of the Code of Civil Procedure, 1908 ('the Code', for short), is filed by the Decree Holder/plaintiff assailing the order dated 30.05.2011 of the learned Senior Civil Judge, Nandikotkur of Kurnool District passed in E.A.No.51 of 2011 in E.P.No.24 of 2009 in O.S.No.24 of 2007 filed by the DHr under Section 151 of the Code for the issuance of a cheque in favour of the DHr for a sum of Rs.2,28,637/- to be credited to his Savings Bank Account, as per procedure.

1.1 The other Civil Revision Petition No.2412 of 2011 is also filed by the Decree Holder against the docket order dated 31.03.2011 in E.A.No.21 of 2011 in E.P.No.24 of 2009 in O.S.No.24 of 2007, whereby the Executing Court had ordered not to issue (deliver) the cheque in view of several attachments as per the office note dated 31.03.2011.

2. I have heard the submissions of the learned counsel for the Decree Holder/plaintiff ('the DHr', for brevity). Despite service of notices by substituted service on the respondents/Judgment Debtors/defendants, none appeared. I have perused the material record.

3. The introductory facts, which are necessary for consideration, in brief, are as follows:

The DHr had obtained a preliminary decree dated 11.03.2008 in a mortgage suit. Having obtained a final decree dated 02.07.2009 in terms of the preliminary decree, the DHr had filed the E.P.No.24 of 2009 ('EP', for short) for realization of the decree debt by sale of the schedule property (mortgaged property). Ultimately, the mortgaged property was sold in a Court auction held on 14.09.2010 and one K.V.N.Prabhakar Rao became a successful bidder. He had deposited the sale proceeds in a sum of Rs.5,00,000/- to the credit of the EP before the Executing Court ('the Court below', for brevity). The sale was confirmed on 15.11.2010 and the property was delivered to the successful purchaser. Thereafter, the DHr had filed an application for issuance of a cheque for a sum of Rs.2,28,637/- towards the full satisfaction of the mortgage decree debt. The DHr had also filed necessary payment schedule, advance receipt and his bank passbook as required and as per practice and procedure. The Judgment Debtors 1 to 3 had remained *ex parte* in the EP. Considering the chronology of the events and the entitlement of the DHr to receive the amount as claimed in the application for issuance of a cheque, the Executing Court had passed an order dated 24.03.2011 allowing the application filed by the DHr and had directed for issuance of a cheque for Rs.2,28,637/- in his favour; and the Executing Court had further directed that the proceeds of the cheque shall be credited to his Savings Bank account. However, when the cheque is about to be issued (delivered), the Executing Court had passed the aforementioned docket order dated 31.03.2011, which is impugned in C.R.P.No.2412 of 2011, and ordered not to issue the cheque in view of the several attachments as per the office note dated 31.03.2011. Having been aggrieved of the said orders, the DHr had filed E.A.No.51 of 2011 under Section 151 of the Code to issue (deliver) the cheque, in view of the orders passed in E.A.No.21 of 2011 allowing the cheque petition. Though that application was not resisted by the Judgment Debtors, the Court below had dismissed the said petition holding that in view of the office note and several attachments against the money lying to the credit of the EP, the DHr has to approach the highest grade Court as the attached amount cannot be distributed by the Executing Court. Aggrieved of the said orders, the DHr had filed these two revisions.

4. The learned counsel for the DHr while narrating the chronology of events referred to supra, would submit as follows: The decree obtained by the DHr is a final decree in a mortgage suit. The debt is secured debt. The DHr being secured creditor is having a priority and his secured debt is having priority over the debts of the other decree holders, if any, whose debts are not secured debts. After the amount that is realized on the sale of the mortgaged property is paid to the DHr towards the mortgage decree debt, the balance, if any, is payable to the other decree holders or creditors, of the JDrs, who are not, secured creditors. In fact, the DHr had brought the decree schedule property, which is the mortgaged property, to sale and the property was sold in a Court auction. The successful purchaser had deposited the sale proceeds to the credit of the EP before the Executing Court. On that the DHr had filed the E.A.No.21 of 2011 in the above EP for issuance of a cheque towards full satisfaction of the decree debt as the sale proceeds are lying to the credit of the EP. The Executing Court by its order dated 24.03.2011 had allowed the application filed for issuance of a cheque and had directed to issue the cheque as prayed for by the DHr; but, later the executing Court had ordered not to (deliver) issue the cheque after having noted from the office note of the Court that there are several attachments against the amount. The said order stopping the issuance of a cheque is erroneous as the DHr is a secured creditor and his debt has got priority over the debts, if any, of the other Decree Holders. As per the settled legal position, the other Decree Holders are not entitled to claim rateable distribution. In the case on hand, even assuming for a moment that any other Decree Holder is entitled to claim any amount by way of rateable distribution, no such claim of any other decree holder can be entertained unless such other Decree Holder, who had obtained the decree in another suit makes an application well in advance, that is, before the property of Judgment Debtor is brought to sale. In the case on hand, none of the other Decree Holders in the other suits had made applications for rateable distributions before the property of the Judgment Debtor was brought to sale in the instant EP. The sale was already held and confirmed; and, the auction purchaser had deposited the amount. Therefore, the other

Decree Holders cannot object to the issuance of a cheque to the DHr herein, more particularly when E.A.No.21 of 2011 is allowed directing issuance of the cheque to the DHr herein. Hence, the order dated 31.03.2011 stopping the issuance of the cheque and the further order dismissing the petition filed by the DHr under Section 151 of the Code to direct issuance of cheque are both erroneous and are unsustainable in facts and in law.

4.1. The learned counsel for the DHr had relied upon the following decisions, in support of his said contentions:

i) Sannidhi Krishna Murthy v. Ponipireddy Venkata Rao (2009(6) ALT 498)
(ii) Kotak and Co., v. State of U.P.(AIR 1987 SC 738)
(iii) V.T.Ranga Bashyam Chetty v. Sambandam Chetty (AIR 1952 Madras 540)

5. I have bestowed my attention to the facts and given earnest consideration to the submissions.

6. The short but important question is as to whether the Court below is not correct in refusing to consider the request of the DHr to issue/deliver the cheque as per its earlier orders granting the cheque and in not determining the question of title or priority arising between the DHr and other persons claiming to be interested in the money by virtue of attachments by prohibitory orders.

7. There is no dispute with the fact that the DHr had obtained initially a preliminary decree in a mortgage suit and eventually a final decree in the said suit in terms of the preliminary decree.

He had filed the EP for sale of the decree schedule property, i.e., the mortgaged property. The mortgaged property i.e., the EP schedule property was brought to sale and the successful bidder had deposited the sale proceeds in a sum of Rs.5,00,000/- to the credit of the EP before the Court of Execution. The DHr had filed E.A.No.21 of 2011 for grant of a cheque for the amount due under the mortgage final decree towards full satisfaction. The said cheque petition was ordered. However, the delivery of the cheque was stopped as the executing Court had noted from the office note that there are several attachments. As the delivery of the cheque was stopped, the DHr had filed a petition to direct issuance of cheque as ordered earlier, but, that petition was also dismissed.

8. In fact, the Executing Court in its orders had observed that it received attachment by Prohibitory Orders (Prohibition order of attachment) in several suits where under and whereby the amount lying to the credit of the present execution petition is attached and that there are prohibitory orders from releasing the amount to the DHr. The details of such prohibitory orders in five matters as received by the executing Court are mentioned in the orders impugned. In three cases, the prohibitory orders were received from Courts of Higher Cadre viz., District Courts. As the prohibitory orders were issued by various Courts including three Superior Courts, the Court of Execution though granted orders for issuance of cheque had stopped the issuance/delivery of the cheque to the DHr. It is pertinent to note that the Court below in its orders, which are impugned in one of these two revisions, recorded a finding in paragraph (3) as follows:

> "This Court received pro orders for (1) Rs.65,000/- on 10-02-2011 in E.P.103/2010 in O.S.217/2005 on the file of Hon'ble Junior Civil Judge, Nandikotkur; 2) Rs.6,60,000/- in I.A.271/2011 in O.S.7/2011 on the file of Hon'ble I Addl. District Judge, Kurnool; 3) Rs.80,000/- in E.P.12/2011 in O.S.147/2008 on the file of Hon'ble Junior Civil Judge, Nandikotkur; 4) Rs.24,030/- in E.P.47/2010 in MVOP.202/2003 on the file of Hon'ble Prl. District Judge, Kurnool; 5) Rs.1,08,433/- in E.P.46/2010 in MVOP 189/2003 on the file of Hon'ble Prl. District Judge, Kurnool. The above said pro-orders are issued under Order 21, Rule 52 CPC."

The Court below had also held as follows:

> "In the present case, decree-holders of other E.Ps., filed in other Courts have not filed petition U/sec.73 CPC in this Court for Proceeds of execution sale to be rateably distributed among decree holders. Until determination of priority attachment arising between the decree holder and other person not being the judgment debtor by the highest grade Court, the attached amount cannot be distributed by this Court."

The executing Court, having thus noted that some of the pro-orders are received from superior Courts, did not consider the requests of the DHr as it was of the view that the DHr has to approach the highest grade Court as the attached amount cannot be distributed by it.

9. In view of the above findings of the Executing Court, it is necessary to refer to Order XXI Rule 52 of the Code, which reads as under:

> ***52. Attachment of property in Custody of Court or public officer.***
> *Where the property to be attached is in the custody of any court or public officer, the attachment shall be*

made by a notice to such Court or officer, requesting that such property, and any interests or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued :

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

Andhra Pradesh Amendment

Add the following as proviso (ii) and renumber the existing proviso as (i) :

"(ii) Provided further that, where the Court whose attachment is determined to be prior receives or realizes such property, the receipt or realization shall be deemed to be on behalf of all the Courts in which there have been attachments of such property in execution of money decrees prior to the receipt of such assets. Explanation.--Priority of attachment in the case of attachment of property in the custody of Court shall be determined on the same principles as in the case of attachment of property not in the custody of Court." [P.Dis.No.445 of 1935].

A plain reading of the provision of law would show that where the property is in the custody of a Court, any question of title or priority arising between the DHr or any other person, not being the Judgment Debtor, claiming to be interested in such property shall be determined by such Court. 'Such Court' is obviously the Court having custody of the property. In the case on hand the property is in the custody of the Executing Court (i.e., the Court below). Therefore, if the above extracted findings of the Court below to the effect that the said prohibitory orders of attachment are issued under Order XXI Rule 52 of the Code are to be taken as correct, then it is for it, i.e., the Executing Court to decide any question of title or priority arising between the DHr in the present EP and any other person/s claiming to be interested in such property by virtue of attachments or otherwise. Going by the findings of the Court below and the legal position obtaining, this Court wanted to make sure as to whether the attachment warrants or prohibitory orders received by the Executing Court from the other Courts were issued under Order XXI Rule 52 or not. Accordingly, the records of the Executing Court including the warrants of attachments or the prohibitory orders, which were received from the other Courts and which are referred to in paragraph (3) of the order impugned were called for by this Court for perusal. However, in the records sent by the court below, such warrants or orders are not available. In the circumstances, going by the findings recorded in the orders of the Court below the revision petitions are being disposed of. Going accordingly by the findings of the Court below and the provision of law and the fact that the property (money) is in the custody of the Executing Court (i.e., the Court below), it is to held that it is for the Executing Court i.e., the Court below to decide any question of title or priority arising between the Decree Holder in the present EP and any other person claiming to be interested in such property by virtue of attachment or otherwise. Viewed thus, this Court finds that the Executing Court ought not to have refused to determine the said question and instead it ought to have determined the said question and also the question of priority of the mortgage decree debt of the DHr over the other debts, if any, of the other persons. As the Executing Court is obligated under facts and in law to decide the question involved in the present EP, it must be held that the orders impugned in these revisions call for interference and are liable to be set aside.

10. Accordingly, the orders impugned in both the revisions are set aside and the matter involved in the *lis* along with the EA is remitted to the Executing Court and the Executing Court is directed to determine the title or priority arising between the DHr in the instant EP and any other person, not being the judgment debtor, claiming to be interested in the money lying to the credit of the EP by attachment or otherwise. It is needless to state that the Court below shall determine the same in strict accordance with the procedure established by law and then pass further consequential orders, if any, necessary. Till such time the money realized from the sale of the mortgaged property and lying to the credit of the EP shall be invested by the Court below in a fixed deposit, if not already invested, in a Nationalized Bank.

No costs.

Miscellaneous petitions pending, if any, in these Civil Revision Petitions shall stand closed.

M.SEETHARAMA MURTI, J

29th June, 2016
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