

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.5998 OF 2016

ORDER:

This petition is filed under Article 227 of the Constitution of India, challenging the order in E.A.No.264 of 2016 in E.P.No.38 of 2016 in O.S.No.169 of 2015 dated 17.11.2016 passed by the Senior Civil Judge, Repalle, dismissing the petition filed under Section 151 C.P.

The petitioner allegedly filed O.S.No.68 of 2015 on the foot of promissory note for recovery of amount due from the respondents. The petitioner also filed I.A.No.222 of 2015 in O.S.No.68 of 2015 for attachment before judgment. But, the Trial Court ordered conditional attachment calling upon the defendants therein to furnish security within the time fixed therein. Accordingly, security was furnished for the suit amount and costs. However, it is alleged in the affidavit that attachment was ordered therein. While the matter stood thus, the D.Hr & J.Dr in O.S.No.169 of 2015 colluded together and brought the schedule property for auction to cause loss to the petitioner to obtain a decree. In pursuance of the decree, E.P.No.38 of 2016 is filed for realization of the amount by sale of the property under Order XXI Rule 11(1),54 & 66 C.P.C. The order obtained by the first respondent against the second respondent is collusive and sought to dismiss E.P.No.38 of 2016.

The first respondent filed counter denying material allegations, contending that the petitioner is bringing the property

for sale and the petitioner before this Court is entitled to claim rateable distribution and E.P. cannot be dismissed on the grounds urged before this Court.

During hearing, learned counsel for the petitioner contended that, filing of E.P. after obtaining collusive decree, the respondents cannot be proceeded to sell the property, since it is collusive, while subsistence of attachment before judgment in I.A.No.222 of 2015 in O.S.No.68 of 2015 and prayed to set-aside the order, ordering the application in E.A.No.264 of 2016 in E.P.No.38 of 2016 in O.S.No.168 of 2015 and dismiss the E.P.

Learned counsel for the respondents contended that the suit itself is dismissed and the question of subsisting attachment does not arise, consequently, the petitioner is disentitled to claim any relief in the present petition and prayed for dismissal of the civil revision petition, while placing certified copy of the judgment in O.S.No.68 of 2015.

Admittedly, the petitioner filed O.S.No.68 of 2015 on the file of Principal Senior Civil Judge, Gudivada, for recovery of an amount of Rs.4,00,000/-, based on the promissory note and also filed an application under Order XXXVIII Rule 5 C.P.C. But, it is not clear whether attachment was actually effected or not. Even assuming for a moment that property was attached before attachment under Order XXXVIII Rule 5 C.P.C, still the first respondent/D.Hr in O.S.No.169 of 2015 is entitled to attach the property.

Section 63 C.P.C deals with attachment of property in execution of decrees of several Courts. According to it,(1) where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached. (2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees. For the purposes of sub-section (2), "proceeding taken by a Court" does not include an order allowing, to a decree-holder who has purchased property at a sale held in execution of a decree, set-off to the extent of the purchase price payable by him.

Thus, Section 63 C.P.C permits more than one attachment or property in more than one decree of different Courts. The claim can be filed only under subsection (1) of Section 63 C.P.C and shall be decided by a Court of highest grade court. Instead of filing such objection, the petitioner approached this Court under Section 151 C.P.C to dismiss E.P, which is omnibus provision. Moreover, O.S.No.68 of 2015 was dismissed by the Court below on 10.04.2017. When the suit itself is dismissed, the attachment before judgment, if affected is deemed to have raised.

Order XXXVIII Rule (11-A)(2) C.P.C, provides an attachment made before judgment in a suit which is dismissed for default shall not become revived merely by reason of the fact that the order for

the dismissal of the suit for default has been set aside and the suit has been restored.

Thus, it means, even if the suit is dismissed for default if attachment before judgment was affected, such order will not revive even after restoration of the suit which is dismissed for default. Here, the suit was dismissed for non-prosecution. Therefore, XXXVIII Rule (11-A)(2) C.P.C is applicable and thereby, the attachment is deemed to have been raised by necessary implications and as such, there was no subsisting attachment of the property brought for sale.

Hence, I find no ground to revise the order in E.A.No.264 of 2016 in E.P.No.38 of 2016 in O.S.No.169 of 2015 dated 17.11.2016 passed by the Senior Civil Judge, Repalle, Guntur District, by exercising power under Section 227 of the Constitution of India. Consequently, the civil revision petition is devoid of merits and the same is liable to be dismissed.

In the result, civil revision petition is dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:05.02.2018

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