

**THE HON'BLE SRI JUSTICE G.SHYAM PRASAD**  
**CIVIL MISCELLANEOUS APPEAL NO.1042 OF 2017**  
**&**  
**CIVIL REVISION PETITION No.4763 of 2017**

**COMMON JUDGMENT :**

Civil Miscellaneous Appeal arises out of the order dated 14.3.2017 passed in I.A.No.52 of 2014 in O.S.No.49 of 2014 on the file of the Court of the V Additional District Judge, Nellore.

Civil Revision Petition arises out of the order dated 14.3.2017 passed in I.A.No.563 of 2014 in O.S.No.49 of 2014 on the file of the Court of the V Additional District Judge, Nellore.

For the purpose of brevity, this Court deems it appropriate to take up Civil Miscellaneous Appeal No.1042 of 2017 and refer to the parties as referred in the above Civil Miscellaneous Appeal.

2. Heard the learned counsel for appellant and the learned counsel for respondents.

3. The appellant /Garnishee is the Manager of Andhra Bank, who is the third party to the suit in O.S.49 of 2014 filed by the plaintiff against the defendants 1 and 2 for recovery of money, basing on the promissory notes executed by the husband of Defendant No.1 and father of Defendant No.2. The petitioner /plaintiff filed I.A.No.52 of 2014 against the defendants 1 and 2 and the 3<sup>rd</sup> respondent /garnishee under Order XXXVIII Rule 5 CPC for attachment of the petition mentioned movable properties (gold ornaments) before judgment as the respondents failed to return the petition schedule moveable properties. The trial Court on consideration, allowed the said petition by ordering the

attachment warrant before judgment on payment of process. Aggrieved by the same, this appeal has been preferred by the appellant contending that the garnishee has a right over the schedule properties as per the provision of Section 176 of the Indian Contract Act, 1982. The learned counsel for the appellant has relied upon the judgment of the Apex Court in ***Bank of Bihar Vs. The State of Bihar***<sup>1</sup>, wherein, it is held that

“The approach of the trial Court was unexceptionable. The plaintiff's right as a pawnee could not be extinguished by the seizure of the goods in its possession in as much as the pledge of the goods was not meant to replace the liability under the cash credit agreement. It was intended to give the plaintiff a primary right to sell the goods in satisfaction of the liability of the pawnor. The Cane Commissioner who was an unsecured creditor could not have any higher rights than the pawnor and was entitled only to the surplus money after satisfaction of the plaintiff's dues”.

4. Section 176 of the Indian Contract Act, 1982, reads as follows :

*“if the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.*

*If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.”*

Therefore, the learned counsel for the appellant submits that in view of the provision under Section 176 of the

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<sup>1</sup> AIR 1971 SC 1210

Indian Contract Act, 1982, the pawnee has got a right when pawnor makes default in payment of the debt. Hence, the order of the trial Court is liable to be set aside.

5. Learned counsel for the appellant further submits that as per Order XXXVIII Rule 10 of CPC reads that *“any petition filed for attachment before judgment shall not affect the existing rights of the parties, who are not parties to the suit, prior to the attachment and the Attachment before Judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.”*

In the instant case, the trial Court has passed an order of attachment before judgment in I.A.52 of 2014 in O.S.49 of 2014. The petitioner being the pawnee of the schedule property having rights existing prior to the attachment and therefore, the petitioner is entitled for raising attachment over the schedule properties against the defendants.

6. The learned counsel for the respondents submits that the respondents in I.A.52 of 2014 have taken additional plea at para No.7 that “in the light of the above circumstances that there is an apprehension that the Bank Manager would not deliver the gold to this respondent and encourage disputes in respect of the gold which absolutely belongs to the 1<sup>st</sup> respondent. That these respondents are ready and willing to deposit the entire bank loan before this Hon’ble Court and the Hon’ble Court may direct the Garnishee to produce the gold before this Hon’ble Court.”

7. Learned counsel further submits that they are ready and willing to deposit the bank loan amount and requested to issue notice to the Legal heirs of the original borrower.

8. Having regard to the submissions of both the counsel and in view of the facts and circumstances of the case, this Court of is of considered view that the order of the trial Court dated 14.3.2017 passed in I.A.No.52 of 2014 in O.S.No.49 of 2014 on the file of the Court of the V Additional District Judge, Nellore, is hereby set aside by directing the appellant / garnishee to issue notice to the legal heirs of the original borrower for depositing entire amount within a period of three (03) weeks from the date of receipt of a copy of this order. If the legal heirs are failed to deposit entire amount, the appellant / garnishee is directed to follow the procedure for sale of the gold ornaments.

9. In the light of the observation in Civil Miscellaneous Appeal No.1042 of 2017 and also the ratio laid down in between ***Bank of Bihar Vs. The State of Bihar and others***, the Civil Revision Petition is also allowed and the order dated 14.3.2017 passed in I.A.No.563 of 2014 in O.S.No.49 of 2014 on the file of the Court of the V Additional District Judge, Nellore, for stay of public auction of the gold to be conducted by the Garnishee / Manager, Andhra Bank, Kavali Branch, Sree Potti Sreeramulu Nellore District, is hereby set aside.

10. With the above observations, Civil Miscellaneous Appeal and Civil Revision Petition are disposed of. There shall be no order as to costs.

As a sequel, miscellaneous petitions pending, if any, in the Civil Miscellaneous Appeal and Civil Revision Petition shall stand closed.

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**G.SHYAM PRASAD, J**

Dated : 26.02.2020  
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