

**THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO**

**C.M.A. No.342 of 2009 and C.R.P.No.1628 of 2012**

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**COMMON ORDER:**

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This Appeal and Revision arise out of the same suit between the same parties. Therefore, they are being disposed of by this common order.

2. Heard Sri N.Subba Reddy, learned Counsel appearing for Sri P.Vamsheedhar Reddy, learned counsel for petitioner in C.R.P.No.1628 of 2012 and for the appellant in C.M.A.No.342 of 2009 and Sri P.Ganga Rami Reddy, learned counsel for 3<sup>rd</sup> respondent in the Revision and Appeal.
3. These cases had a chequered history. I will briefly advert to the events in the suit. The J.Dr. in O.S.No.143 of 1997 on the file of the  
II Additional District Judge, Nellore is the petitioner in the C.R.P. and the appellant in the C.M.A. He will be hereinafter referred to as the 'petitioner'.
4. Respondent Nos.1 and 2 had filed O.S.No.143 of 1997 on the file of the II Additional District Judge, Nellore for recovery of a sum of Rs.3,57,690/- on the basis of a mortgage against the petitioner. Preliminary decree was passed on 25-11-1997 and final decree was passed on 18-08-2000.
5. On 15-11-2001 E.P.No.7 of 2002 was filed for sale of the mortgage property. The petitioner sought time to file a counter in the E.P.

6. On 31-07-2006, the executing Court ordered sale of the E.P. schedule property and sale proclamation was issued on 23-09-2006 and it was published in Janatha newspaper. According to petitioner, this newspaper was a local newspaper only having circulation in Vijayawada of Krishna District and has no circulation in Nellore Town where the E.P. schedule property is located.
7. On 10-10-2006, the sale was conducted and 3<sup>rd</sup> petitioner in the Revision/auction purchaser became the highest bidder.
8. An application C.F.R.No.14059 of 2006 was filed in December, 2006 to set aside the sale invoking Order XXI Rule 90 and Section 47 and 151 C.P.C. by petitioner.
9. It was returned with an objection as to how it is maintainable since one of the points raised therein was the ground of less price having been realized in the sale and such a ground was not taken when the market value was fixed by the Court. It was represented on 17-01-2007 by the learned counsel for petitioner requesting that the matter be called on the Bench. Thereafter on 12-02-2007, the learned counsel for petitioner represented in writing "as the petitioner is not responding, the petition is not pressed".
10. Thereupon the said E.A. was disposed of by the Court below with the following docket order on 14-02-2007 "rejected as not pressed this petition by the learned counsel for petitioner".
11. Alleging that the learned counsel for petitioner had no business to make such a representation contrary to the petitioner's interest and facts of the case and this warrants strict condemnation from

the Bench, and stating that petitioner had issued a notice to the said counsel, and also reiterating the grounds on which the sale conducted on 10-10-2006 required to be set aside, the petitioner filed E.A. (C.F.R.No.2393 of 2007) with the following prayers:

*“ (a) that the Hon’ble Court may be pleased to set aside the sale of the E.P. schedule house property in E.P.No.7 of 2002 held on 10<sup>th</sup> October, 2006, under Order 21, Rule 90, and Section 151 Civil Procedure Code;*

*(b) that the Hon’ble Court may be pleased to pass an order, cancelling the Confirmation of Sale of E.P.No.7 of 2002 dated 27<sup>th</sup> February, 2007 passed on the previous E.A., and the same may be restore to file and dispose off the same on merits:*

*(c) such other and further reliefs be granted as are as the Hon’ble Court might deem fit and proper in the circumstances of the case”*

12. Again this application was returned with an endorsement of the Court dt.21-03-2007 as to how the petition was maintainable as the auction held on 10-10-2006 and the objections mentioned earlier were not complied.
13. It was represented on behalf of the petitioner that the application is within time. But the Court below returned it again on 24-04-2007 with a docket order.
14. The petitioner then questioned it in C.R.P.No.2408 of 2007. By order dt.03-08-2007, this Court directed the Court below to entertain the E.A., number it and then decide the matter on merits in accordance with law.
15. Thereafter the said E.A. was numbered as E.A.No.60 of 2007.
16. Counter affidavit was filed by respondents contending that there were no irregularities or illegalities in conducting the sale and since the petitioner had not raised any objections about the

irregularities at the earlier point of time, this application should be dismissed. It was further contended that E.A. (C.F.R.No.14059 of 2006) filed by petitioner earlier had not been not pressed and therefore the present application is not maintainable.

17. By order dt.12-12-2007, the Principal District Judge, Nellore dismissed E.A.No.60 of 2007. He observed that the petitioner had filed E.A. (C.F.R.No.14059 of 2006) earlier for setting aside the sale and had not pressed the same; the dispute between the petitioner and his counsel are of no avail to petitioner to file another application under Order XXI Rule 90 C.P.C.; and having not pressed the earlier application through earlier counsel, the petitioner cannot resort to a fresh application. He also quoted Article 127 of the Limitation Act, 1963 to hold that the application to set aside the sale should be filed within 60 days from the date of sale and since E.A.No.60 of 2007 was filed on 16-03-2007 (beyond 60 days from the date of sale i.e. 10-10-2006), it is beyond time. In the said order, the Court below also referred to contentions of the petitioner regarding the irregularities in the sale and held that there was no fraud or irregularity in the sale. The contention regarding the low price fetched in sale was rejected on the ground that in Court sales, less price would be received. The contention of the petitioner that the publication in Janatha newspaper which had no circulation in Nellore Town where the property is situated, was not adverted to.
18. Challenging the same, C.M.A.No.342 of 2009 is filed.
19. The petitioner also filed E.A.No.27 of 2009 to set aside the sale held on 10-10-2006 and also its confirmation on 27-02-2007 stating that he is ready to deposit the balance decretal amount

and he had already filed C.M.A.No.342 of 2009 before this Court. He pointed out that he already deposited a sum of Rs.4,15,000/- towards E.P. pursuant to the interim order passed by the High Court in A.S.No.29 of 2008, which is more than the E.P. warrant amount of Rs.4,08,107/-, and therefore the sale should be set aside.

20. By order dt.04-02-2012, this application was dismissed. The Court below held that this Court in A.S.M.P.No.572 of 2008 on 24-07-2008 had held that the Execution Petition can be proceeded with without any impediment and therefore there is no question of setting aside the sale on that ground.

21. Challenging the same, C.R.P.No.1628 of 2012 was filed.

22. Learned counsel for petitioner contended that E.A.No.60 of 2007 has to be construed as implying a prayer to restore E.A. C.F.R.No.14059 of 2006 filed on 11-12-2006 to set aside the sale held on 10-10-2006 in view of the prayer in clause (b) therein to restore the said E.A. to file; that this portion of the prayer in E.A.No.60 of 2007 was not even noticed or adverted to by the trial Court while dismissing E.A.No.60 of 2007; in para-3 in the affidavit filed in support of E.A.No.60 of 2007, a specific contention was raised that the counsel who made the representation before the Court below on 14-02-2007 not pressing E.A. (C.F.R.No.14059 of 2006) had no business to make such a representation contrary to the petitioner's interest; the Court below was not right in dismissing the said application stating that disputes between the petitioner and his counsel are of no avail; therefore the finding of the Court below that E.A.No.60 of 2007 is a second application to set aside the sale

and it was time barred since it was filed beyond the period of 60 days from the date of sale as prescribed in Article 127 of the Limitation Act, 1963, cannot be accepted. He contended that publication of proclamation of sale of property ought to have been made in Nellore town where the property is located and not in a newspaper 'Janatha', which has circulation only in Vijayawada, which is 280 K.Ms. from Nellore; such a proclamation has to be treated as void in the eye of law; and any such irregularity would totally vitiate the sale and make the sale itself a nullity. He relied upon the judgments in **Srikakula Chinna Venkatanarayana and others Vs. Pannapati Elias, China Dandsi Vs. P.Tataiah** and **Chirravuri Veerabhadra Rao Vs. State Bank of India, E.G.District and others** in this regard. He also contended that when a party engaged a counsel and the counsel withdraw from the case and the parties were not before the Court, interest of justice required that a fresh notice of the actual date of hearing should be sent by the Court to the parties as held in **Malkiat Singh and another Vs. Joginder Singh and others** and **Tahil Ram Issardas Sadarangani Vs. Ramchand Issardas Sadarangani**. He pointed out that in the present case, on

14-02-2007 the counsel for petitioner having represented before the Court below that petitioner is not responding, ought not to have not pressed the C.F.R.No.14059 of 2006 (E.A. filed under Order XXI Rule 90 C.P.C. by petitioner) and the Court below, on that basis, could not have rejected the said E.A. as not pressed.

He also contended that whatever reasons the Court below had given to reject the E.A. on merits cannot be taken into account once the Court forms a view that E.A.No.60 of 2007 itself was time barred.

23. The learned counsel for 3<sup>rd</sup> respondent/auction purchaser, on the other hand, contended that the order dt.14-02-2007 in E.A. (C.F.R.No.14059 of 2006) has not been questioned by petitioner at all and it had attained finality; therefore E.A.No.60 of 2007 has to be construed as second application filed to set aside the sale invoking Order XXI Rule 90 C.P.C. and since this application filed only on 16-03-2007, it was rightly held to be beyond time. He contended that even in E.A.No.60 of 2007, there is no specific prayer to set aside the order dt.14-02-2007 and prayer (b) therein has to be construed as only a prayer to restore E.P.No.7 of 2002 particularly because E.A.No.60 of 2007 is filed under Order XXI Rule 90 C.P.C. and Section 151 C.P.C. only. He pointed out that even in E.A.No.60 of 2007, the counsel engaged by petitioner had abstained from arguing the matter and matter had underwent several adjournments on account of non-cooperation of the petitioner and his counsel and taking into account this conduct of petitioner also, the C.M.A. and C.R.P. deserves to be dismissed.

24. I have noted the submissions of both sides.

25. The following points arise for consideration:

- a. When a counsel reports “no instructions” and withdraws from the case, what is the course of action which a Court has to follow? And whether in the facts and circumstances of the present case, the Court below has followed such procedure?
- b. Whether E.A.No.60 of 2007 can be said to be a

fresh application under Order XXI Rule 90 C.P.C. or only an application to set aside the order dt.14-02-2007 rejecting E.A. (C.F.R.No.14059 of 2006)?

c. To what relief?

**Point (a)**

26. From the facts narrated above, there is no dispute that E.A. (C.F.R.No.14059 of 2006) filed under Order XXI Rule 90C.P.C. by petitioner on 11-12-2006 to set aside the sale was filed within time. It is pointed out that 10-10-2006 was the date when the sale was conducted and although the 60 days period ends by 10-12-2006, since the said day happened to be Second Saturday and the following day was Sunday, the application filed is within time. This is not disputed by the learned counsel for 3<sup>rd</sup> respondent. The docket order in the said E.P. reveals that the counsel for petitioner reported on 12-02-2007 before the Court below that petitioner was “not responding” and so the petition was not pressed and consequently on 14-02-2007 for that reason only, the Court below rejected C.F.R.No.14059 of 2006.

27. In **Tahil Ram Issardas Sadarangani** (5 supra), the Supreme Court held that if an Advocate for a party withdraws from the case and parties were not present in Court, since the parties had no notice of the hearing of the case on that day, the interests of justice required that a fresh notice be issued by the Court to the parties to attend the actual date of hearing. It held that if this procedure was not followed, the party cannot be said to be at fault and he should not be made to suffer.

28. This principle was reiterated in **Malkiat Singh and another**

(4 supra).

29. In view of these authoritative pronouncements, I am of the opinion that E.A. (C.F.R. No.14059 of 2006) could not have been dismissed as not pressed on 14-02-2007 by the Court below on the basis of the representation by the counsel for petitioner that petitioner is not responding. It should have issued a notice to petitioner to attend the Court at the next date of hearing and only then could it have dismissed C.F.R.No.14059 of 2006. In this view of the matter, it has to be held that the learned counsel for petitioner could not have not pressed C.F.R. No.14059 of 2006 and that on the ground that the counsel had not pressed it, the Court below ought not to have rejected it. This point is held in favour of petitioner and against the 3<sup>rd</sup> respondent.

**Point (b)**

30. Coming to this point, the prayer in E.A.No.60 of 2007, no doubt seeks in clause (a) to set aside the sale held on 10-10-2006, but in clause (b), the petitioner had also prayed “for cancellation of the confirmation of sale on 27-02-2007 passed on the previous E.A. and the same may be restored to file” and sought for the disposal of the same on merits. No doubt Order XXI Rule 90 and Section 151 of C.P.C. alone were mentioned. In para-3 of the affidavit filed in support of the said application E.A.No.60 of 2007, the petitioner had specifically raised a contention that his counsel had no business to report to the Court that the matter was not pressed contrary to his interests and that such conduct of the counsel calls for strict condemnation from the Bench. Having adverted to these facts, the petitioner had sought the relief mentioned above.

31. Although the learned counsel for 3<sup>rd</sup> respondent sought to contend that there is no specific prayer to set aside the order dt.14-02-2007 in C.F.R. No.14059 of 2006, I am of the considered opinion that such prayer has to be implied in E.A.No.60 of 2007 since the prayer (b) therein indicates that petitioner wanted the previous E.A. to be restored to file and dispose of the same on merits.
32. In this view of the matter, I am of the opinion that E.A.No.60 of 2007 is primarily an application to restore E.A. (C.F.R. No.14059 of 2006) although incidentally the grounds to set aside the sale under Order XXI Rule 90C.P.C. were also mentioned therein in detail.
33. Since the reason given by petitioner for seeking restoration of the previous E.A. (C.F.R. No.14059 of 2006) is a valid reason because his counsel could not have not pressed the said E.A. when petitioner did not give any instructions to not press it, and since the Court below could not have dismissed it as not pressed on the basis of the representation of the counsel not pressing it, the petitioner is entitled to have the order dt.14-02-2007 set aside and to have restored it to the file of the Court.
34. Tragically, the Court below has not adverted to prayer (b) in E.A.No.60 to 2007 to restore E.A. (C.F.R. No.14059 of 2006) to the file of the Court and has not considered E.A.No.60 of 2007 in that perspective at all and thus committed a grave error in dismissing E.A.No.60 of 2007.
35. In this view of the matter, it cannot be said that E.A.No.60 of

2007 is a second application to set aside the sale under Order XXI Rule 90 C.P.C. and that since it is filed beyond time, it is barred by limitation. Point (b) is answered accordingly in favour of petitioner.

**Point (c)**

36. I also disagree with the Court below that the allegation made by petitioner against his counsel in the affidavit filed in E.A.No.60 of 2007 is not a cause for petitioner to allow him to file E.A.No.60 of 2007.

37. Having regard to the above findings, C.M.A.No.342 of 2009 is allowed; order dt.12-12-2007 in E.A.No.60 of 2007 in E.P.No.7 of 2002 in O.S.No.143 of 2007 is set aside; the said E.A. is allowed; Court below is directed to restore E.A. (C.F.R. No.14059 of 2006) to its file, number it and decide the same in accordance with law after considering all the objections raised by petitioner therein. This is however subject to the petitioner paying costs of Rs.20,000/- (Rupees Twenty Thousand only) to 3<sup>rd</sup> respondent within a period of three (03) weeks from the date of receipt of a copy of this order since in the Court below the petitioner or his Counsel did not address any arguments in E.A.No.60 of 2001. In default of the petitioner complying with the above conditions, the C.M.A. as well as C.R.P. shall stand dismissed.

38. In this view of the matter, the C.R.P.No.1628 of 2012 is also allowed; order dt.04-02-2012 in E.A.No.27 of 2009 in E.P.No.7 of 2002 in O.S.No.143 of 1997 is also set aside; the said E.A.No.27 of 2009 is also remanded back to the Court below to decide along with E.A. (C.F.R.No.14059 of 2006) in accordance with law.

39. Subject to the above, C.M.A.No.342 of 2009 and C.R.P.No.1628 of 2012 are both allowed. The Court below is directed to decide E.A. (C.F.R. No.14059 of 2006) filed under Order XXI Rule 90 C.P.C. and E.A.No.27 of 2009 filed by petitioner within a period of six (06) weeks from the date of receipt of a copy of this order positively.
40. It is made clear that this Court has not expressed any opinion on the merits of the contentions of either side or the grounds on which the sale is challenged.
41. As a sequel, miscellaneous petitions pending if any, in the appeal and Revision, shall stand disposed of.

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**JUSTICE M.S. RAMACHANDRA RAO**

Date: 28-09-2015

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