

PETITIONER:

M. L. MUBARAK BASHA & ORS.

Vs.

RESPONDENT:

MUNI NAIDU

DATE OF JUDGMENT: 06/01/1997

BENCH:

K. RAMASWAMY, G.T. NANAVATI

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

Leave granted.

Heard the learned counsel for the parties.

This appeal by special leave arises from the Division Bench judgment of the Madras High Court, made in LPA No. 205/1995 on August 28, 1995. The appellant had filed a suit, viz., O.S. No. 69/1976 in the Court of Subordinate Judge, Thiruvananthapuram for partition and separate possession of his 16/64 share in the plaint schedule property. A preliminary decree passed for partition was confirmed. Before the final decree was passed, the property at Item No.18 of the plaint schedule, namely, Saw Mill, was initially brought to sale between the parties, as per the directions of the Court; subsequently, there was a public auction thereof. In the public auction, the second respondent came to purchase the property for a sum of Rs.1,03,600/-. An application had been filed by the appellant under Section 47 of C.P.C. for setting aside sale. though several grounds had been raised, none of them was pressed. But one ground canvassed before the High Court and pressed for consideration before us is that the Commissioner had no power to fix the upset price in conducting the sale. Since this point was raised for the first time before the High Court, the Division Bench has rejected the same and confirmed the sale though it was upset by the learned Single Judge. Thus, this appeal by special leave.

It has been strenuously contended by the learned counsel for the appellants that in terms of the mandatory language used in Order XXI, Rule 66, sub-rule (2)(d) & (e), CPC, the Commissioner has no power to fix the upset price which is the judicial function of the Court. Therefore, it goes to the root of the matter. We have given opportunity to the learned counsel to place the necessary material before us in that behalf. Both parties have filed their record and also their affidavits. The only question is; whether the Commissioner or the executing Court can fix the upset price? Order XXI Rule 66 postulates thus:

"66. Proclamation of Sales by
public auction - (1) Where any
property is ordered to be sold by

public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible -

(a) the property to be sold (or where a part of the property would be sufficient to satisfy the decree, such part);

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

(c) any encumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court considers materials for a purchaser to know in order to judge of the nature and value of the property;

Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under Rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs: Provided further that nothing in this rule shall be construed as required the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon a person whom it thinks necessary to summon and may examine him in respect to any such matters and

require him to produce any document in his possession or power relating thereto.

Madras and Pondicherry amendment reads - (i) In Sub-rule (1) for "made" substitute "drawn up".

(ii) substitute sub-rule (2) as follows:

2. The term of such proclamation shall be settled in Court after notice to the D.H. and J.D. except in cases where notices have already been served under Order XXI, Rule 64 and such proclamation shall state the time and place of sale and specify as accurately possible - (a) the property to be sold, (b) the revenue assessed upon the estate or part of the state where the property to be sold is an interest in an estate or part of an estate paying revenue to the Government, (c) any encumbrance to which the property is liable, (d) the amount for the recovery of which the sale is ordered, (e) the value of the property as stated (i) by the D.H. (ii) by the J.D., (f) every other thing which the Court considers material for a purchaser to know in order to judge the nature and value of the property."

A reading of the above provision would in unequivocal terms indicate that it is the function of the Court, while proclamation is drawn up, to fix the amount of the recovery for which the sale is ordered and also to specify such other particulars as are necessary in that behalf to be material for the purpose of conducting the sale. The value of the property given by the decree-holder - judgment-debtor and the upset price is to be fixed under the residue clause relating to writ rules made by the High Court. The learned Single Judge himself observed in his order that the Commissioner who has been examined as RW-3 had stated that he had fixed the sale of the property and the upset price at Rs.70,000/- as was ordered by the Court and the sixth respondent was the highest bidder in the said bid, viz., for Rs. 95,200/-. He had deposited the entire amount on the said date. It is seen that the executing Court appears to have given direction to the Commissioner not only to conduct the sale but also to fix the upset price at Rs. 70,000/-. In that view, there is no infraction of the mandatory language contained in Order XXI, Rule 66, CPC as the Commissioner had fixed the upset price not on his own but on the direction of the Court itself.

The appeal is accordingly dismissed. No costs.