

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 12520 OF 2022

Mahesh Rambhau Patil and Others	... Petitioners
<i>Versus</i>	
Shreeram City Union Finance Ltd. GPA Holder Rakesh K. Yewale and Others	... Respondents.

Mr. V.D. Salunke, Advocate for the Petitioners.
Mr. V.Y. Bhide, Advocate for the Respondent No.1.

CORAM : SHARMILA U. DESHMUKH, J.
DATED : JANUARY 04, 2023.

JUDGMENT :-

1. Rule. With the consent of the parties, rule made returnable forthwith and heard finally.
2. By this petition, the Petitioners impugn the order below Exh.38 dated 13th September, 2022 passed in ARD No.284 of 2019. A perusal of prayer clause shows that the substantial prayer pertains to the quashing of the order below Exh.38 dated 13th September, 2022, however, the prayer clause “C” seeking interim relief seeks stay of the order below Exh.42 dated 25th November, 2022, in addition to the order passed below Exh.38 dated 13th September, 2022.

3. By the impugned order dated 13th September, 2022, the application filed by the decree-holder for preparing schedule of the place, date and time of proclamation of sale to be published in the daily Lokmat for sale of the property by public auction was allowed. Whereas, by the order passed below Exh.42 dated 25th November, 2022, the draft of the proclamation of sale of the attached/mortgaged property was approved and the auction sale was fixed at the location of the mortgaged/attached property on 15th December, 2022 at 11:00 a.m. Although, the substantial prayer does not impugn the order passed below Exh.42 dated 25th November, 2022, this Court has considered the validity of both the orders.

4. Shorn of unnecessary details the facts are as under:

. The Petitioner No.1 had obtained the loan of Rs.40 lakhs from the Respondent No.1-Company in the year 2016 and as a security for the said loan two mortgage deeds were executed in respect of plot No.1 admeasuring 354.75 sqr.mtrs. bearing land Survey No.31/1+2/1/4/1/5 Mauje Takli Parcha, Tq. Chalisgaon, District Jalgaon, partly owned and possessed by Petitioner No.2 to the extent of 168.87 sq.mtr., and Petitioner No.3 to the extent of 185.87 sq.mtrs.

. The Petitioners could repay a sum of Rs.8,72,000/- and

as there was a default in the repayment of the balance amount of the loan, the Respondent No.1 initiated arbitration proceedings wherein an arbitration award for sum of Rs15,93,000/- was passed in favour of the company by award dated 14th April, 2018. Respondent-decree-holder filed an execution application bearing ARD No.284 of 2019 before the learned Civil Judge, Senior Division, Chalisgaon for execution of the award. On 13th September, 2022, an application below Exh.38 came to be filed by the Respondent No.1-decree-holder stating that the court had passed an order permitting the sale and that for publishing the same in the local newspapers it is necessary to settle the details of the sale and other particulars. By order dated 13th September, 2022 passed below Exh.38, the Executing Court issued a notice directing to the petitioners to attend the Court on the next date at 11:00 a.m. and take notice to the date fixed for setting terms fixed of the sale in accordance with the Order XXI Rule 54(1) of the Code of Civil Procedure, 1908 (for short, “**the Code**”). By the said order, the Executing Court directed the issuance of notice to the judgment-debtor and decree holder under Order XXI Rule 66(2) of the Code. Subsequent thereto, an application was filed on 17th November, 2022, below Exh.42 by the Respondent No.1-decree holder submitting draft of the proclamation of the sale. The application was resisted by the petitioner-judgment- debtor on various grounds that the copy of the application was not served upon the judgment-

debtor, the application is not supported by an affidavit and is not legal. An objection was also raised that due to pendency of Petition preferred by the Petitioner No.2 against the order of the Executing Court before this Court in which the notices have been issued to the Respondents, the application of the decree holder cannot be considered.

5. After hearing the counsel for both the parties at length, the Executing Court allowed the application and approved the draft of proclamation of sale and fixed the schedule of the place and the time on 15th December, 2022 at 11:00 a.m. also directed the publication in two local Marathi newspapers. It was also directed that the final sale would be held in the Court premises after three weeks i.e. on 5th January, 2023, which shall be conducted by the head bailiff of the concerned Court. As the draft of the proclamation of sale was approved and the sale was directed to be held on 15th December, 2022, the present petition came to be filed on 6th December, 2022. By order of this Court on 9th December, 2022, considering the submissions made by the counsel for the petitioner, the following order came to be passed.

“1. Heard.

2. Petitioners challenge the order dated 25.11.2022 passed by the Civil Judge, Senior Division, Chalisgaon on application below Exhibit-42 thereby approving draft of proclamation of sale of attached/mortgaged

property bearing plot no.1 area admeasuring 354.75 sq. mtrs. for recovery of amount of Rs.78,64,475/-. The auction is scheduled to be held on 15.12.2022.

3. Mr. Salunke, learned counsel appearing for petitioners has two objections to the proposed auction. Firstly, he submits that plot no.1 admeasuring total area of 354.75 sq. mtrs. is actually divided into two parts of Eastern Side area of 168.88 sq. mtrs. and Western Side area of 185.87 sq. mtrs. He would submit that as per valuation report of a private valuer nominated by petitioners, the valuation of part of the plot admeasuring 185.87 sq. mtrs. (Western Side) alone is Rs.60,00,000/-. Second objection of Mr. Salunke is that the Executing Court has failed to fix the upset price before approving the draft of proclamation of sale. Inviting my attention to the copy of notice affixed at the site, he would submit that column no.7 with heading 'Upset price fixed by the Court' is kept blank. Whereas column no.6 of valuation of the plot indicated by the decree holder is shown as only Rs.4,95,600/-. Mr. Salunke would, therefore, submit that contrary to valuation of only part of the land admeasuring 185.87 sq. mtrs. is Rs.60,00,000/-, the decree holder has shown the valuation of the entire plot admeasuring 354.75 sq. mtrs. at only Rs.4,95,600/-. He, therefore, expresses an apprehension that the entire plot admeasuring 354.75 sq. mtrs. is likely to be sold by taking into consideration the valuation of Rs.4,95,600/- indicated by the decree holder.

4. The auction is fixed on 15.12.2022. Let the auction take place so as to give an indication about likely price the entire plot would fetch.

5. List the petition on 19.12.2022 in urgent

category.

6. Issue notice to respondent no.1 only, returnable on 19.12.2022. Humdast granted.

7. In addition to the Court notice, petitioners are permitted to serve respondent no.1 by private notice and file affidavit of service.

8. Till the next date of hearing, the auction sale shall not be finalized and respondent no.1 shall place before this Court the offers received in the auction for sale of the plot.”

6. By reason of directions contained in the order of 9th December, 2022, an affidavit in reply came to be filed on 19th December, 2022 by Respondent No 1, opposing the petition and placing on record the offer which was received for the plot. In the affidavit in reply, it is stated that the highest offer for sale of the entire plot was Rs.90 lakhs. After considering the affidavit in reply, on 21st December, 2022, the following order came to be passed.

“ On 09.12.2022 this Court stayed the finalization of auction sale and directed respondent no.1 to place before this Court the offers received in the auction for sale of the plot. 2. Accordingly, respondent no.1 has filed affidavit-in-reply placing on record that the highest offer for sale of the entire plot admeasuring 354.75 sq. mtrs., is Rs.90,00,000/-. Thus, the apprehension expressed by petitioners that the entire plot admeasuring 354.75 sq. meters was likely to be sold for Rs.4,95,600/- has turned out to be misplaced. Petitioners have placed reliance on Valuation Report of a private valuer, according to

which the value of Western Side plot admeasuring 185.87 sq. mtrs is Rs.60,00,000/-.

3. Mr. Bhide, the learned counsel for respondent no.1 submits that two separate plots do not exist and that the entire plot is only one admeasuring 354.75 sq. mtrs and that the husband and wife have undivided shares in that plot.

4. Considering the offer of Rs.90,00,000/- received for auction of the entire plot admeasuring 354.75 sq. metrs., the apprehension of the petitioners that the plot might be sold for throw away price has been proved to be misplaced. The petition could have been disposed of today. However, adjournment is sought on account of leave note filed by Mr. V.D. Salunke, learned advocate for petitioners. It is submitted that the date for finalization of the auction sale is fixed on 05.01.2023.

5. Stand over to 04.01.2023, first on board.”

7. Heard learned counsel appearing for the parties.

8. Mr. Salunke, learned counsel for the Petitioners submits that the order dated 13th September, 2022 and 25th November, 2022 is not in accordance with the provision of Order XXI, which deals with the procedure to be followed for execution of decrees for the reason that the public notice issued on 30th November, 2022 did not mention the upset price and the proclamation of sale annexed to the affidavit in reply dated 19th December, 2022 filed by the Respondent No.1 mentions the upset price of Rs.4,95,600/- based

on communication issued by the Sub-Registrar. He would submit that the said price of Rs.4,95,600/- is not the valuation but is the stamp duty amount, payable on the purchase price of the property. He would further submit that there was no notice issued to the Petitioner-judgment-debtor and hence the proclamation of the sale is vitiated. In support of his submission, he has invited attention of this Court to the provision of Order XXI Rule 54(1-A) and Order XXI Rule 66 (e) of the Code. He would urge that in order for the property to fetch the proper price it was necessary to mention the upset price in public notice which has not been done in the present case and hence the procedure contemplated under Order XXI of the Code is violated. In support of his contention he has relied upon the decisions of the Apex Court in the cases of ***Mahakal Automobiles & Anr. vs. Kishan Swaroop Sharma***, reported in ***2008 (13) SCC 113*** and in the case of ***Gajadhar Prasad vs. Babu Bhak I A Ratan***, reported in ***1973 (2) SCC 629***.

9. *Per contra*, the learned counsel for the Respondents submits that there is no material irregularity or illegality in the procedure adopted by the Executing Court in executing the Award. He further submits that the submissions made by the petitioners had not been raised before the Executing Court and the only submissions which have been raised are produced at page No.35, which are vague and have been raised only to delay the execution

proceedings. He would further submit that perusal of the order dated 25th November, 2022 would show that the parties were heard at length. He has invited the attention of this Court to the second proviso of Order XXI Rule 66 and would submit that it was not necessary for the Court to enter in the proclamation of sale its own estimate of the value of the property. As regards the valuation of the property, he would submit that the valuation of Rs.4,95,600/- has been given by the Sub-Registrar by its communication dated 25th November, 2021 which was placed for consideration of the Court, while settling the draft of proclamation of sale and there was no rival estimate which was submitted by the petitioners-judgment-debtors. He would submit that this communication by the Sub-Registrar giving the valuation of the property, is as per ready reckon rates and is not an amount of stamp duty, as it is sought to be contended by the learned counsel for the Petitioners. As regards the decisions which have been cited by the learned counsel for the Petitioners, he would urge that the judgment in the case of *Gajadhar Prasad (supra)*, is distinguishable as in that case the rival estimates were given and it is in the facts of that case that the Apex Court has observed that adjudication by the Executing Court in the face of the rival estimates is required. As far as the second decision relied upon by the learned counsel for the *Mahakal Automobiles (supra)* is concerned, he would submit that the said decision is not applicable to the facts of this case, as the observations were made in

the context of the non-issuance of the notice to the judgment-debtors.

10. Learned counsel for the respondents would further urge that on 9th September, 2022 when the matter was listed for hearing an incorrect statement was made by the learned counsel for the Petitioners that there are two plots of land and the valuation of one plot of land is Rs. 60 lakhs. The documents on record would show that there is one plot of land i.e. Plot No.1 and mortgage deed has been created by the petitioner Nos.1 to 3 jointly by executing mortgage deed. He has invited the attention of this Court to Index-II issued in respect of the said plot No.1 which is at page Nos.50 to 52 which show that by two registered sale deeds undivided portion of land admeasuring 354.75 sqr. mtrs. was purchased by the petitioner Nos.2 and 3. He would therefore, urge that the petition be dismissed with exemplary costs. In support of his submission, he has relied on the decision of the Apex Court in the case of ***Hirabai vs. Hanumanth Krishnaji Bhide and Others***, reported in 1996 AIR SCW 4113 .

11. I have considered the rival submissions of the parties.

12. The provisions pertaining to the execution of the decrees and orders is contained in Order XXI of the Code. The relevant Rules under Order XXI dealing with the attachment and sale of the immovable property are as under:

“54. Attachment of immovable property.- (1) *Where the property is immovable, the attachment shall be made by an Order prohibiting the judgment debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.*

(1-A) The order shall also require the judgment debtor to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.

(2) The Order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the Order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the District in which the land is situate and, where the property is land situate in village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.”

“64. Power to order property attached to be sold and proceeds to be paid to person entitled.- Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.”

“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 incumbrance 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 material 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 requiring 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 any 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.”

13. The Rules contemplate issuance of notice to the judgment debtor to attend the Court on specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale and the proclamation of sale to be drawn up after notice to the decree-holder and judgment-debtor, the purpose being to ensure that the judgment debtor has notice of the terms of settlement of the proclamation of sale and to enable the judgment-debtor to submit the estimate of the value of the property, which will be considered while settling the terms of proclamation of sale.

14. The challenge to the conduct of the sale is raised by the Petitioners, at the time of arguments, on the ground of non fixing of the upset price. The said submission of the petitioners is contrary to the pleadings in the petition, wherein at paragraph 4, the

petitioners have averred that the Court has settled the proclamation to be issued for auction of the plot and whereas the upset price is shown as Rs.4,95,600/-, though the market value of the said plot is Rs.60 lakhs + Rs.54,51,000/- as per approved valuation. In the grounds taken in the petition, the said contention is reiterated that valuable immovable property is sought to be auctioned for a meager and insufficient price by fixing meager upset price of Rs.4,95,600/-.

15. As far as the first submission of the petitioners that the proclamation was issued without any notice to the petitioners-judgment-debtors is concerned, the same cannot be countenanced in view of the order passed below Exh.42 dated 25th November, 2021 which clearly records that the counsel for both the parties were heard at length and perusal of order shows that the objections of the Petitioners have been dealt with by the executing Court. For the purpose of settling the terms of proclamation of the sale, the provision of Order XXI Rule 66, sub-Rule (2) requires the proclamation to be drawn up after the notice to the decree-holder and the judgment-debtors, which has been done as evidenced by the order of 13th September, 2022.

16. By order of 13th September, 2022, upon an application being made by the Respondents for settling the terms of proclamation of sale the Executing Court has directed the

judgment-debtors to attend the Court on the next date at 11:00 a.m. and take notice on date settling the terms of proclamation of sale, in compliance of the provisions of Order XXI Rule 54 (1) and accordingly, notice was issued to the Petitioners and the Respondents under Rule 66 (2) in the form 28 of Appendix E of Schedule-I, pursuant to which the parties were heard extensively as reflected in the order of 25th November, 2022.

17. The second submission which has been raised by the learned counsel for the Petitioner is that no upset price has been fixed. The said submission is contrary to the pleadings in the petition that meager and insufficient upset price of Rs.4,95,600/- has been fixed. The Petitioners are taking contradictory stands in as much as in the pleadings and even during the submissions arguments are made regarding the insufficiency of the upset price of Rs.4,95,600/ and at the same time the challenge to the sale is mounted on the ground of non fixing of upset price. Upon query by this Court regarding the reconciliation of the stand to be adopted by the Petitioner, nothing was forth coming. Considering the proclamation of sale, which mentions the upset price of Rs.4,95,600/, the submission of the Petitioner about non-fixing of upset price is liable to be rejected.

18. As regards the submission regarding insufficiency of upset price, considering the fact that the estimate of the valuation

of the property is given by the Sub-Registrar, Chalisgaon as per the ready reckoned rates, the proclamation of sale specifying the amount of Rs.4,95,600/- which is the valuation given by the Sub-Registrar, Chalisgaon cannot be faulted with. It is necessary to consider the second proviso to Order XXI Rule 66 of the Code, which provides that nothing in this rule shall be construed to require 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 parties. The order settling the terms of the proclamation of the sale dated 25th November, 2022, does not record that any estimate was given by the Petitioners. Learned counsel for the Petitioners submits that valuation report dated 12th November, 2022 was submitted to the Executing Court which has not been considered. I am unable to accept this submission for the reason that the petitioners have not been able point out any document evidencing the submission of valuation report to the Executing Court and pertinently there are no such pleadings in the petition. On the other hand, a perusal of the affidavit in reply of the Respondents specifically denies that estimate was placed before the Executing Court. There is no denial by way of the rejoinder to this assertion by the Respondents. I am therefore, not inclined to accept the submission of the learned counsel for the Petitioners that estimate was given to the Executing Court which has not been considered.

19. The decision of the Apex Court in the case of *Gajaprasad (supra)*, which has been relied by the learned counsel for the petitioners requires the executing court to apply its mind and to consider the objections while deciding the task of valuation. The observations of the Apex Court is in the particular facts of that case wherein different offers were placed for consideration of the Executing Court by the decree-holders and judgment-debtors and without assigning any reason, the Executing Court had accepted estimate of the decree-holders and had failed to deal with the valuation put by the judgment-debtors on the properties put up for sale. In my opinion, the said decision does not assist the case of the petitioners, for the reason that the petitioner has not been able to substantiate his contention that any estimate was given by the petitioner. The decision in case of ***Mahakal Automobiles (supra)*** is not applicable to the present case.

20. A perusal of the provision of Order XXI Rule 66 of the Code, shows that the proclamation of sale is required to state the time and place of the sale and specify as fairly and accurately as possible the details which the Court considers material for the purchase of property and nature of value of the property. It is left to the discretion to the Court to specify the necessary details, the only caveat being that in event of estimate given by the parties, the proclamation to include the estimate. What is to be noted is that the second proviso to Rule 66 specify that it is not necessary for the

Court to enter into the proclamation of sale as its owned estimate valuation of the property.

21. One of the submissions raised by learned counsel for the Petitioners is that since the valuation has been shown to be of a lower amount, the bidding of the property would start at the lower value and would not fetch the desired price. This submission cannot be accepted in face of the factual position that although the valuation is shown as Rs.4,95,600/-, the highest bidder has submitted a bid of Rs.90 lakhs.

22. Learned counsel for the petitioners has not been able to demonstrate any substantial prejudice or injury which is being caused to the Petitioners, in event the bid of Rs.90 lakhs is accepted. The admitted position being that the Petitioners have defaulted on the payment of loan amount and the highest bid of Rs.90 lakhs has been received. The matter is fixed for final sale on 5th January, 2023. Learned counsel for the Petitioners has not been able to demonstrate violation of any provision of the Code, set out for execution of the decree. On the contrary every effort is being made by the Petitioners to stall the sale. The material on record demonstrates that property has been attached and the proclamation has been settled in accordance with the provision of Order XXI and in particular Order XXI Rule 66 of the Code.

23. Considering the aforesaid, the petition is devoid of merits and is accordingly dismissed.

24. Rule discharged.

(SHARMILA U. DESHMUKH, J.)