

1935

*Present : Koch J. and Soertsz A.J.*  
**SAMARASINGHE v. WICKREMESINGHE.**  
154—D. C. Matara, 1,444.

*Partition—Sale of property—Valuation by Commissioner—Upset price—Sale to public after offer to co-owners—Irregularity—Ordinance No. 10 of 1863, s. 8.*

When land appraised by a Commissioner for sale under the Partition Ordinance is offered for sale to the co-owners, the bidding should commence at the appraised value. When it is put up for sale to the public the law does not require the bidding to start from an upset price.

By upset price is meant the appraised value.

A sale under section 8 of the Partition Ordinance may be set aside for substantial irregularity and unfairness.

<sup>1</sup> (1924) 26 N. L. R. 181.

<sup>2</sup> (1892) 1 S. C. R. 147.

<sup>3</sup> (1906) 1 Matara Cases 103.

**A** PPEAL from an order of the District Judge of Matara.

*Cur. adv. vult.*

*Navaratnam*, for appellant.

*Garvin*, for respondent.

July 20, 1935. SOERTSZ A.J.—

This is an appeal from an order of the District Judge of Matara, cancelling a sale held under section 8 of the Partition Ordinance, No. 10 of 1863, on December 9, 1933. The land put up for sale on this occasion was lot B of Beligahakumbura shown on plan No. 973 dated April 30, 1925, made by S. E. Ferdinand, Licensed Surveyor. By decree entered on March 23, 1926, a sale of the entire land 'in three lots as surveyed' was ordered and a commission was issued to the Surveyor for that purpose. He valued lot A at Rs. 840, lot B at Rs. 375, and lot C at Rs. 300. A sale was held on December 19, 1932, at which lot A fetched Rs. 625, lot B Rs. 1,075, and lot C Rs. 510. The Court, however, set aside this sale on the ground that it took place long after the advertised time and ordered a resale, "upset values to be those fetched at first sale". The Commissioner, however, held the second sale with the appraised values taken as the upset prices, and on a complaint by the parties this sale too was set aside so far as lot B was concerned, and order was made that lot B be put up for sale again at the upset price of Rs. 1,075 which was the amount it was sold for at the first sale. The conditions of sale drawn up for this occasion provide that "the said land shall be put up for sale among the shareholders at the *appraised value* of Rs. 1,075 and if not purchased by them at the *appraised value*, it will then be put up for sale to the public and sold to the highest bidder". There were no bids when the sale was confined to the shareholders. The lot was then offered for sale without reserve to the public and a shareholder, the seventeenth defendant-appellant, purchased it for Rs. 385. The plaintiff-respondent moved that this sale be cancelled (a) on the ground that the Court order of March 23, 1933, had not been communicated to the auctioneer, (b) on the ground that there was collusion between the purchaser and the first respondent. The District Judge made order holding "the sale bad in that the price accepted was below the upset price fixed by Court". It is from this order that the appeal has been taken. All the delay and the confusion in this case are the result of the learned District Judge not having taken the elementary precaution of reading the section of the Partition Ordinance under which he was acting. That section is quite explicit with regard to the procedure to be followed. On a commission for sale being issued the Commissioner "shall proceed to make a just valuation of the property" and give notice that the "property will be put up for sale, first among the owners thereof, *at the price for which the same shall have been valued*, and if not purchased by some of them that it shall be put up and sold to the highest bidder, and on the day named the Commissioner shall proceed to sell the whole of such property by first putting up the property for sale, . . . amongst the said owners. *at the upset price for which the property has been valued*; and if none of the owners shall become the purchaser thereof : : . the Commissioner

shall forthwith put the same up for sale . . . . by public auction to the highest bidder". Now, in this case on the occasion of the third sale, the one under consideration, the land was put up for sale at what is described as the "*appraised value of Rs. 1,075*", among the shareholders. But the appraised value was Rs. 375 and not Rs. 1,075. The figure Rs. 1,075 was the upset figure at which the Court ordered on March 23, 1933, the sale to be held "of consent of the parties affected" says the District Judge. A reference to the Journal entry of March 23, 1933, does not show which of the parties were present when that order was made, and I see no justification for the District Judge's observation that this course was taken with the consent of the parties affected. There were several parties in this case who were not represented by proctors. Moreover, I am doubtful whether a clear requirement of the Ordinance that the sale among the co-owners be held at the upset price at which the Commissioner has valued it, can be disregarded with the consent of parties.

It has been repeatedly held that the provisions of this Partition Ordinance should be punctiliously observed. I find the following notes on the words "just valuation" in *Jayewardene on Partition*, p 183. "The first duty of the Commissioner is to make a valuation of the property to be sold. The valuation or appraisal must be just; if it is low the co-owners will suffer, if it is high the co-owners anxious to buy their property might be prevented from doing so". In this instance it is impossible to say how many co-owners refrained from taking part at the sale owing to the high upset price fixed for the sale among them. Some of them might have thought—perhaps without justification—that it would be at a price higher than that figure, that it would be sold to a member of the public. That appears to be what the District Judge intended too, for he says in his order that the sale was bad as the price accepted was below the upset price. In my opinion, it is not at all clear that there is an upset price fixed for the sale to the public. *Jayewardene* in his commentary raises this question at page 187 "Must not the sale by public auction too commence at the upset price?", but leaves it unanswered. I am not aware of any decisions on this point, but I think that if that had been the intention of the Legislature it should have and would have been clearly expressed. Here when the question is considered carefully one feels compelled to take notice of the fact that it says "first among the owners thereof, *at the price for which the same shall have been valued*, and if not purchased by some of them it shall be *put up and sold to the highest bidder*". Nothing is said as to an upset price in that case. This is so far as the notice of sale is concerned. Later when the sale itself is being provided for, there is a similar distinction drawn: "The Commissioner shall proceed to sell . . . . by first putting up the same for sale . . . . *amongst the said co-owners, at the upset price for which the property has been valued*; and if none of the owners shall then because the purchaser thereof . . . . the Commissioner shall forthwith put the same up for sale . . . . by public auction to the highest bidder".

In my opinion, therefore, the District Judge was wrong when he held the sale bad because when the lot was offered for sale to the public, the

bidding was not started with the upset price. The grounds upon which the petitioner attacked the sale were also unsubstantial. But yet, I think the sale should be set aside on the ground that section 8 of the Partition Ordinance was not complied with. The upset price should have been Rs. 375, which was the figure found by the Commissioner to be a 'just valuation'. There had been no other valuation by the Commissioner to supersede his first valuation. There is no provision in the Ordinance for a revaluation. But then there is no provision in it for setting aside a sale once it has taken place, and yet there are a number of cases in which it has been held that a sale under section 8 is liable to be set aside for substantial irregularity and unfairness. Likewise, I take it, it will be open to a Court to order a fresh valuation in appropriate cases. No such revaluation by the Commissioner at the direction of the Court took place in this case. What happened was that the Court and some of the parties agreed to substitute for the 'just valuation' of the Commissioner the price fetched at the first sale. Now this price cannot be said to be necessarily a just valuation. It is possible that that was the price realized on that occasion as a result of some keen bidding between two competitors for reasons of their own—and to adopt such a price for the 'upset' at the sale among co-owners would be to deprive them of the opportunity of becoming purchasers. I, therefore, am of opinion that the sale of this lot should be set aside and a fresh sale held after proper notice has been given and after the Commissioner has made a just valuation anew. I think this is desirable in view of the length of time that has elapsed since the first valuation. I am also of opinion that the order for costs made by the District Judge is wrong. I do not see why the second respondent and the Commissioner should be made to pay costs. If the Commissioner is to blame in this matter, I think the Court is equally to blame for not scrutinizing the conditions of sale and making its directions clear to the Commissioner.

I think the most equitable order regarding costs is that the petitioner should pay the first respondent, *i.e.*, the seventeenth defendant, his costs of the inquiry, for although the sale is set aside, it is not for any of the reasons urged by the petitioner. I would dismiss the appeal, but make no order as to the costs of appeal.

Koch J.—I agree.

*Appeal dismissed.*

