

(2023) 02 BOM CK 0117
In the Bombay High Court
Case No : Writ Petition No. 184 Of 2023

Si2 Microsystems Pvt. Ltd And Others	APPELLANT
Vs	
Bank Of Baroda And Others	RESPONDENT

Date of Decision : 27-02-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Income Tax (Certificate Proceedings) Rules, 1962 — Rule 53(cc), 60, 61, 63
Recovery Of Debts And Bankruptcy Act, 1993 — Section 3, 17, 19, 19(25), 25, 26, 27, 28, 29, 30, 30A

Citation : (2023) 02 BOM CK 0117

Hon'ble Judges : Nitin Jamdar, J;Abhay Ahuja, J

Bench : Division Bench

Advocate : Mustafa Doctor, Karl Tamboly, Rishir Daulat, Srijan Sinha, Shivani Prasad, Anant Bamne, A.R. Bamne, Umesh Shetty, Sharila D'souza, Gopalkrishna Nayak

Final Decision : Dismissed

Judgement

Nitin Jamdar, J

1. Respondent No.1- Bank of Baroda sanctioned a loan facility in favour of the Petitioners. The Petitioners did not repay the loan. On the application of the Respondent –Bank, the Debt Recovery Tribunal issued a recovery certificate against the Petitioners. Pursuant to the recovery certificate, the mortgaged asset was put to a sale in an auction. It was purchased by Respondent No.3-Auction Purchaser, and the sale certificate in his favour was issued. Thereafter, the Petitioners filed an application stating that the Petitioners have a prospective buyer willing to give a higher offer than the Auction Purchaser and, therefore, the sale certificate in favour of the Auction Purchaser should be cancelled. The Recovery Officer rejected this application. The Petitioners did not file statutory appeal to challenge this order and are before us by this writ petition under Article 226 of the Constitution of India with their challenge.

2. The basic facts are not in dispute. Petitioner No.1 is a Company of which Petitioner No.2 is a Director, referred to as the Petitioners. The Petitioners availed of a cash credit facility of Rs. 10 crores and a term loan facility of Rs. 3 crores, totaling to Rs.13 crores, from Respondent No.1- Bank. The Petitioners mortgaged an industrial Plot numbered 52-A, Part of Survey Nos. 81, 91 and 58 of Chokkahalli Village, Kasaba Hobli, Hosakote, Bengaluru District. As the Petitioners did not repay the loan, on 28 September 2012, the Petitioners' account was declared as Non-Performing Asset (NPA) by Respondent No.1 – Bank (the Bank). The restructuring proposal of the Petitioners Company was approved, and Rs. 1.4 crores was transferred to the Bank. Thereafter, again in 2016, the Petitioner's account was declared an NPA account. On 2 January 2017, the Bank filed an Original Application No. 11 of 2017 in Debt Recovery Tribunal-II, Mumbai (DRT). The Bank sought a recovery of Rs.18.5 crores along with interest at 15.85% per annum. The DRT rendered the judgment on 18 January 2018 and a recovery certificate was issued against the Petitioners, directing the Petitioners to pay an amount of Rs. 18.52 crores to the Bank.

3. By order dated 2 April 2019, the DRT transferred the matter to the Recovery Officer to recover the amount as per the certificate. On 24 February 2022, a Valuer- H.H.Longani, was appointed to value the mortgaged property, and he valued it for fair market value at Rs. 3.83 crores. The recovery officer took the valuation report on record for the purpose of sale. On 8 March 2022, the Recovery Officer issued a notice for sale proclamation regarding the mortgaged property. On 5 April 2022, the Bank filed an application seeking fresh valuation of the mortgaged property. The Bank had submitted a valuation report given by the Valuer stating that the fair market value of the mortgaged property is Rs. 7.42 crores. The Recovery Officer by order dated 7 April 2022 observed that the Bank should bring a bidder for the said amount; otherwise, the auction would proceed based on the valuation report submitted by Valuer H. H. Longani, the Valuer of the DRT. The Recovery Officer adjourned the proceedings to 19 May 2022, giving time more than a month. Neither the Bank nor the Petitioners brought any prospective bidder, nor was this order challenged. After more than five months, on 19 September 2022, the Recovery Officer issued a notice for the sale proclamation fixing the reserve price at Rs. 3.84 crores on the basis of the valuation report. The auction sale was conducted on 10 November 2022. The Recovery Officer declared one M. Arun as the highest bidder as per his offer for Rs. 3,84,00,000/- and confirmed the sale. In the evening of that day, the Petitioners filed an application challenging the sale on the ground that it was undervalued. The Recovery Officer took the objection application of the Petitioners on record. By order dated 24 November 2022, the Recovery Officer rejected the application of the Petitioners. This order was not challenged in appeal by the Petitioners. It is informed during the arguments in this petition by the Petitioners that they filed a Writ Petition (L) No. 38469 of 2022 challenging the orders dated 10 November 2022 and 24 November 2022. The petition is pending and no interim order was sought or granted. On 12 December 2022, the

Recovery Officer confirmed the sale in favour of M. Arun. A week thereafter, on 20 December 2022, the Petitioners filed another application for setting aside the sale confirmation stating that there is an offer of Rs. 5.64 crores from one Vijay Gupta and a Demand Draft of Rs. 1.41 crores was also sought to be tendered. On 22 December 2022, Respondent No.2 rejected the application filed by the Petitioners and appointed a Receiver. Sale certificate was issued in favour of Respondent No.3 on 30 December 2022. Thereafter, the present petition is filed on 5 January 2023. The petition was taken on board at the Petitioners' request on 16 January 2023. The Petitioners first had not joined M. Arun, Auction Purchaser, as a party Respondent; later, he was added as Respondent no.3. The Respondent no.3 has filed a reply affidavit and has opposed the petition.

4. We have heard Mr. Mustafa Doctor, the learned Senior Advocate for the Petitioners, Mr. Anant Bamne, the learned Counsel for Respondent No.1 and Mr. Umesh Shetty, the learned Senior Advocate for Respondent No.3.

5. Before we refer to and deal with the rival contentions, the statutory framework governing the sale of the mortgaged asset, confirmation of sale, the challenge to the sale and appeal will have to be referred to.

6. Section 3 of the Recovery of Debts and Bankruptcy Act, 1993, contemplates the establishment of the Debs Recovery Tribunal. The Tribunals' jurisdiction, powers and authority are specified under section 17 of the Act of 1993. Section 19 of the Act of 1993 contemplates application to the Tribunal by a Bank or a financial Institution to recover the debts. Chapter V of the Act of 1993 lays down the procedure for recovery of debts to be determined by the Tribunal. Various modes for recovery of debts are provided under section 25 of the Act of 1993. These include attachment and sale of the movable or immovable property of the defaulter. Section 28 of the Act of 1993 deals with the other modes of recovery. Section 29 of the Act of 1993 specifies that the Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962, would be applicable regarding recovery of dues under the Act of 1993. Since the procedure for recovery is governed by the Second Schedule of the Act of 1961, it would be necessary to refer to the relevant clauses of the Schedule. Part III deals with the attachment and sale of immovable property.

Sale to be by auction.

56. The sale shall be by public auction to the highest bidder and shall be subject to confirmation by the Tax Recovery Officer:

[Provided that no sale under this rule shall be made if the amount bid by the highest bidder is less than the reserve price, if any, specified under clause (cc) of rule 53.]

Application to set aside sale of immovable property on deposit.

60 (1) Where immovable property has been sold in execution of a certificate, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing—

(a) [***] the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of [one and one-fourth per cent for every month or part of a month], calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) for payment to the purchaser, as penalty, a sum equal to five per cent of the purchase money, but not less than one rupee.

(2) Where a person makes an application under rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws that application, be entitled to make or prosecute an application under this rule.

Application to set aside sale of immovable property on ground of non-service of notice or irregularity.

61. Where immovable property has been sold in execution of a certificate, [such Income-tax Officer as may be authorised by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or Commissioner in this behalf], the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale of the immovable property on the ground that notice was not served on the defaulter to pay the arrears as required by this Schedule or on the ground of a material irregularity in publishing or conducting the sale:

Provided that—

a) no sale shall be set aside on any such ground unless the Tax Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the non-service or irregularity; and

(b) an application made by a defaulter under this rule shall be disallowed unless the applicant deposits the amount recoverable from him in the execution of the certificate.

Confirmation of sale.

63. 1) Where no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed by the Tax Recovery Officer, the Tax Recovery Officer shall (if the full amount of the purchase money has been paid) make an order confirming the sale, and, thereupon, the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application made to set aside the sale on deposit of the amount and penalty and charges, the deposit is made within thirty days from the date of the sale, the Tax Recovery Officer shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to the persons affected thereby.

7. Section 30 and 30A provide and regulate the remedy of appeal from the order passed by the Recovery Officer. These provisions are reproduced below for reference :

"30. Appeal against the order of Recovery Officer.-- (1) Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

(2) On receipt of an appeal under sub-section

(1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under sections 25 to 28 (both inclusive)".

"30A. Deposit of amount of debt due for filing appeal against orders of the Recovery Officer. -- Where an appeal is preferred against any order of the Recovery Officer, under section 30, by any person from whom the amount of debt is due to a bank or financial institution or consortium of banks or financial institutions, such appeal shall not be entertained by the Tribunal unless such person has deposited with the Tribunal fifty per cent. of the amount of debt due as determined by the Tribunal".

Thus, section 30 provides for an appeal against the order of the Recovery Officer to the Tribunal to be filed within thirty days. As per section 30A of the Act of 1993, where an appeal is preferred against any order of the Recovery Officer under section 30 by any person from whom the amount of debt is due to a Bank or financial institution, the appeal is not to be entertained by the Tribunal unless such person has deposited with the Tribunal 50% of the amount of debt due as determined by the Tribunal.

8. With this statutory backdrop, we now turn to the rival contentions.

9. The Petitioners contend, briefly, as follows. The Recovery Officer was under a bounden duty to ensure that the sale of the mortgaged asset should fetch the maximum value, and the Recovery Officer has failed to exercise the said duty. Whenever a sale takes place under the supervision of the Recovery Officer, the

Officer must make an endeavour to ensure that the sale is conducted in a fair and proper manner to fetch the correct value. The Recovery Officer has inherent power under section 19 (25) of the Act of 1993 which permits making such order or giving such direction to prevent abuse of the process of law and secure the ends of justice. The sale of the Petitioner's mortgaged property was undervalued and it was an abuse of the process of law, and therefore, the Recovery Officer was under a duty to secure the ends of justice, which he has failed. The Bank itself had made a grievance regarding the valuation report of Mr. H. H. Longani dated 18 February 2022, which stated that the fair market value is Rs. 3,83,60,000/- and in fact, the Valuer of the Bank had valued the mortgaged property at Rs.7,42,00,000/-. This valuation could not have been discarded by merely calling upon the Bank to fetch a buyer. The Petitioners had produced a buyer who was ready to pay Rs. 5.65 crores, which was more than Rs. 2 crores, the price at which the property was sold in an auction, and was ready with a Demand Draft of Rs. 1.41 crores dated 20 December 2022, yet the same was ignored. The Petitioners were not stalling the loan recovery through the sale but were aiding it by bringing a purchaser ready to give a higher value. In these circumstances, the Petitioners have no other alternative but to approach this Court by way of a writ petition invoking the equity jurisdiction of this Court so that a suitable direction can be issued as regards the sale of the property to the prospective purchaser. The Petitioners rely upon the decisions of the Hon'ble Supreme Court in the case of Divya Manufacturing Company (P) Ltd. Tirupati Woollen Mills Shramik Sangharsha Samity and Another Versus Union Bank of India and Others (2000) 6 SCC 69 and this Court, in the case of Everest Fincap Pvt. Ltd. v. Krishna Realtors and others (2017) 6 AIR Bom R 332 in support of the contention that the Recovery Officer was under a duty to ensure that the maximum price should have been obtained and that the sale in favour of Respondent No.3-Auction Purchaser should have been set aside in view of the higher offer on the ground of alternate remedy. The Petitioners could not file an appeal because the Petitioners had no means to pay the debt and, consequently, the amount of pre-deposit mandated under section 30 A of the Act of 1993. Also, in view of the decision of the Hon'ble Supreme Court in the case of Godrej Sara Lee Ltd. Versus Excise and Taxation Officer – cum-Assessing Authority & Ors 2023 SCC OnLine SC 95., the existence of the alternate remedy will not be a bar to entertaining this writ petition.

10. Respondent No.3- Auction Purchaser opposed the petition, submitting in short as follows. Rights have been created in favour of the Auction Purchaser, who is a bona fide purchaser, and they cannot be taken away. There is no allegation, nor is there any fraud in the auction sale confirmed in favour of the Auction Purchaser. The valuation was proposed by the Bank in its application to the Recovery Officer, and thereafter the Bank took no steps. None of the orders have been challenged by the Petitioners in appeal provided under section 30 of the Act of 1993. The application for setting aside the sale under Rule 60 has to be with a deposit, and no such application with a deposit was made; therefore,

the Petitioners have not adopted any remedy under the statute. The appeal against the impugned order is barred by limitation, and therefore writ petition should not be entertained. The sale is confirmed in favour of Respondent No.3-Auction Purchaser, and the appeal has not been filed during the limited period. There is a finality to the transaction in favour of Respondent No.3 -Auction Purchaser. No material irregularity in the sale has been pointed out; merely because there is a proposal of a better offer, the rights accrued to the Auction Purchaser under Rule 63 cannot be taken away. The decisions relied upon and cited by the Petitioners are entirely distinguishable on facts. The decision of the Hon'ble Supreme Court in the case of Divya Manufacturing Company has been explained in subsequent decisions of the Hon'ble Supreme Court in the cases of Valji Khimji and Company Versus Official Liquidator of Hindustan Nitro Product (Gujarat) Limited and others (2008) 9 SCC 299 and Vedica Procon Private Limited Versus Balleshwar Greens Private Limited and others (2015) 10 SCC 94. Therefore, the only attempt of the Petitioners is somehow to delay the proceedings and stall the rights accrued in favour of Respondent No.3. Therefore, this petition has no merit and should be dismissed.

11. The learned Counsel for the Respondent- Bank submitted that the Bank had opposed the Petitioners' application before the Recovery Officer. The learned Counsel for the Bank admitted that the Bank had not challenged the order of rejecting the valuation of the Bank, nor has it challenged the impugned order. The learned Counsel for the Bank has it left to this Court to pass appropriate orders.

12. It cannot be disputed that when a mortgaged property is to be sold, an attempt should be made to fetch the maximum value so that both, the defaulters and the creditors benefit. However, this endeavour has to be balanced with the right accrued to the purchaser because there is one more principle involved. That is the desirability of attaching finality to the sale transaction. If there is no finality to the sale of mortgaged assets and concluded sales are reopened on the ground of a better offer later, it would make the conclusion of sales by the DRT wholly uncertain. This uncertainty would discourage bidders who often themselves raise finances for bidding. If potential buyers are discouraged, it will affect the process of recovery of loans through the sale of mortgaged properties. Therefore, the doctrine of finality involved in the circumstances has to be seen from a wider perspective. Statutory provisions have been enacted to structure the sale of the mortgaged assets, to provide for an opportunity to challenge or question the sale on conditions upto a particular point and, thereafter, to close further proceedings and conclude the sale transactions. The doctrine has been recognized and emphasized by the Division Bench of this Court in the case of Hotel Paras Garden, Balapur and another vs. Central Bank of India, Balapur and others 2015 (6) Mh. L.J. 152 . Therefore, after the stage of Rule 60 is crossed, primacy will have to be given to the interest of Respondent No.3. In this context, the plea made before us by the Petitioners to set aside the sale in favour of Respondent No.3 must be viewed. The stage at which the Petitioners have raising

the challenge, the conduct of the Petitioners and the failure of the Petitioners to adopt remedies available under the statute would also be germane considerations.

13. First, we note the conduct of the Petitioners. This writ petition was filed and circulated for urgent orders without joining the Auction Purchaser as a party Respondent even though the impugned order was passed after hearing the Petitioners and Respondent No.3. After a brief hearing, on the court noticing and pointing out that it would amount to non-joinder of the necessary party, that the amendment was sought, and leave was granted to the Petitioners to join the Auction Purchaser. Such a basic position does not need to be pointed out. Therefore initially, interim relief was sought without joining the Auction Purchaser, who, on the face of it, would be the only affected party by the prayer sought in the petition. Be that as it may, even regarding the so-called offer of another purchaser, we have no particulars before us. One Vijay Gupta is stated to be willing to purchase the property for Rs. 5.64 crores, but he has not stated anything on oath by filing an affidavit. All that was stated was that a Demand Draft of Rs. 1.41 crores was ready. Nothing is informed to us about how this person would raise finances, within how much time the amount would be paid and whether he is ready with an amount as of today. These particulars should have been placed on record by the 'purchaser' himself in an affidavit. Except for stating that one person is present in the Court with a Demand Draft of 25 % of the purchase price, nothing further is stated. No reason is given as to why an affidavit was not filed. At least when the order of the Recovery Officer was against the Petitioners, the so-called purchaser should have been ready with the entire amount or at least filed an affidavit placing the details of the finances from where the prospective purchaser would generate the said amount. Furthermore, even assuming that the subsequent offer is bonafide, still, the Petitioners are not entitled to succeed as further discussion would demonstrate.

14. Petitioners availed of the credit facility in September 2012. The DRT passed an order against the Petitioners in January 2018, and the recovery certificate was issued on 18 January 2018. On 24 February 2022, the Recovery Officer appointed a Valuer who valued the property at fair market value at Rs. 3.83 crores. When the Bank sought fresh valuation by an application, the Recovery Officer disposed of the same on 7 April 2022 by calling upon the Bank to bring a buyer for this valuation. There was no error in the view taken by the Recovery Officer. The valuation was already on record and the Recovery Officer had to ensure that the suggested valuation was realistic and therefore called upon the Bank to demonstrate. The order dated 7 April 2022 was not challenged by the Bank nor by the Petitioners when it was open for them to do so. The Bank therefore went by the valuation on record.

15. Thereafter, the matter proceeded further on the basis of the valuation of Rs. 3.84 crores and the reserve price was fixed on 19 September 2022. In the meanwhile, neither the Bank nor the Petitioners had brought any buyer for

higher offer, nor was the valuation challenged. On 10 November 2022, when the proceedings resumed, the Petitioners were present through their Advocates. At 12.05 p.m., it was directed that the matter be kept for sale at 2.00 p.m. At 2.00 p.m., Respondent No.3 was declared a successful bidder and was directed to deposit 25% (minus EMD) amount of sale consideration along with 75% of the balance sale consideration as per terms and conditions. Later at 4.40 p.m., the Petitioners, through their Advocates, applied to set aside the sale and for the appointment of a fresh Valuer. Under Rule 60, the defaulter whose immovable property is sold can apply to the Recovery Officer to set aside the sale on his depositing the amount specified in the proclamation of sale with interest as stipulated. Therefore, the application made at 4.40 p.m. on 10 November 2022 was traceable to Rule 60, which mandated deposit. No such deposit was made.

16. Thereafter, by order dated 24 November 2022, the application filed by the Petitioners under Exhibit 52 for setting aside the sale was dismissed. The Petitioners' contention was noted in the order dated 24 November 2022 that the property is valued at Rs. 4,72,28,868/-. The Recovery Officer noted that the matter was listed on 14 October 2022 and 9 November 2022, the Petitioners were present through their Advocate, they did not raise any objection to the valuation, and only after the sale was completed was that objection sought to be raised. It is sought to be informed by the learned Senior Advocate for the Petitioners that Writ Petition (L) No. 38469 of 2022 was filed on 9 December 2022 for challenging the orders dated 10 November 2022 and 24 November 2022. This writ petition is filed and kept pending. It is not circulated with the present petition. A copy of this petition is not served on Respondent No.3. The order dated 24 November 2022 was also not challenged by the Petitioners under section 30 with a deposit as mandated under section 30 A of the Act of 1993. Thereafter, the sale was confirmed in favour of the Respondent no.3 on 12 December 2022.

17. After that, on 20 December 2022, the Petitioners moved another application at Exhibit 70/72 to set aside the sale confirmation in view of an offer stated to be received from one Vijay Gupta of Rs. 5.64 crores. The Recovery Officer heard the parties on this application. The Recovery Officer noted the stage at which these applications were moved and took into consideration Rule 60 and that nothing stopped the so-called purchaser from making a bid during the auction and rejected the application by the order dated 22 December 2022. The Petitioners did not make the deposit as required under Rule 60 neither the order dated 20 December 2022 was challenged in appeal under section 30 with mandatory pre-deposit as per section 30 A of the Act of 1993.

18. The learned Counsel for Respondent no.3 submitted that the Petitioners had not filed an appeal under section 30 within limitation when it was open for them to do so and cannot seek to challenge the order dated 22 December 2022, invoking writ jurisdiction. He relied upon the decision of the Hon'ble Supreme Court in the case of Assistant Commissioner (CT) LTU, Kakinada and Others

Versus Glaxo Smith Kline Consumer Health Care Limited (2020) 19 SCC 681 . The learned Counsel submitted that the Act of 1993 provides a scheme for challenge to the sale under Rule 60 with deposit of the stipulated amount and a challenge to the order of the Recovery Officer by way of appeal with pre-deposit. It was contended that the Petitioners could not invoke writ jurisdiction without recourse to these remedies and without following the legislative scheme. The learned Counsel for the Petitioner relied on the decision of the Hon'ble Supreme Court in the case of Godrej Sara Lee Ltd. to contend existence of the alternate remedy will not be a bar to entertaining this writ petition. The Petitioners, however, have not been able to distinguish the decision of the Supreme Court in Glaxo Smith Kline Consumer Health Care Limited (supra). Even assuming the merits of this case can be looked at in this writ petition, we do not find that any interference in a writ jurisdiction is required.

19. Respondent no.3 is a bona fide purchaser who has submitted a bid as per the accepted valuation. The Petitioners have participated in the proceedings throughout. There is not even a hint of an allegation of fraud. The Petitioners' main contention is that the Recovery Officer has inherent power and duty to ensure that the maximum price is fetched in the auction sale of the mortgaged properties, and in the facts this case, the Officer has failed in his duty. The thrust of the Petitioners' argument is on the decision of the Hon'ble Supreme Court in the case of Divya Manufacturing Company and on the decision of the Division Bench of this Court in the case of Everest Fincap Pvt. Ltd. According to the Petitioners, these judgments lay down the proposition that when a higher offer is received for the sale of a mortgaged property, the Court/ Tribunal/ Officer must consider the same and, if necessary, set aside the sale, even if it is confirmed. The learned Counsel for Respondent No.3 relied on the decisions of the Hon'ble Supreme Court in the cases of Valji Khimji and Company (supra) and Vedica Procon Private Limited (supra).

20. The facts in the case of Divya Manufacturing were that the High Court of Calcutta had ordered the winding up of the company under company jurisdiction and the official liquidator was appointed. The official liquidator submitted a valuation report, and an advertisement was issued inviting offers. Sale in favour of one party was confirmed, and the Division Bench set aside the sale and directed the resale of the property. This order was challenged in the Hon'ble Supreme Court. The Hon'ble Supreme Court dismissed the appeals observing that it is the duty of the court to see that the price fetched at the auction was adequate even though there is no suggestion of irregularity or fraud. One crucial fact from the said decision however needs to be noted that there was a specific clause in the terms and conditions of sale which empowered the High Court to set aside a sale even after confirmation for the interest and benefit of the creditors.

21. The decision in the case of Divya Manufacturing was considered in the case of Valji Khimji and Company (supra) and the Hon'ble Supreme Court observed

that the ratio in Divya Manufacturing was that if there is fraud then even after the confirmation of the sale it can be set aside because fraud vitiates everything. It was opined that the decision in Divya Manufacturing could not be treated as laying down any absolute rule that a confirmed sale can be set aside in all circumstances. The Hon'ble Supreme Court then observed that if every confirmed sale can be set aside, no auction sale will ever be complete because somebody can always come after the auction or its confirmation offering a higher amount. It was held that when an auction sale is widely advertised, all eligible persons can come and bid for the same, and they are themselves to be blamed if they do not come forward to bid at the time of the auction. They cannot ordinarily be allowed to offer a higher price after the bidding or confirmation. Again in the case of Vedica Procon Private Limited (supra), the Hon'ble Supreme Court made the following observations-

47. A survey of the abovementioned judgments relied upon by the first respondent does not indicate that this Court has ever laid down a principle that whenever a higher offer is received in respect of the sale of the property of a company in liquidation, the Court would be justified in reopening the concluded proceedings. The earliest judgment relied upon by the first respondent in Navalkha & Sons [Navalkha & Sons v. Ramanya Das, (1969) 3 SCC 537] laid down the legal position very clearly that a subsequent higher offer is no valid ground for refusing confirmation of a sale or offer already made. Unfortunately, in Divya Mfg. Co. [Divya Mfg. Co. (P) Ltd. v. Union Bank of India(2000) 6 SCC 69] this Court departed from the principle laid down in Navalkha & Sons [Navalkha & Sons v. Ramanya Das, (1969) 3 SCC 537] . We have already explained what exactly is the departure and how such a departure was not justified."

(emphasis supplied)

This dicta is clear.

22. As regards the reliance of the Petitioners on the decision of the Division Bench of this Court in the case of Everest Fincap Pvt. Ltd. (supra) and section 19 (25) of the Act of 1993, it is entirely misplaced. The facts in this case were that the subject immovable property was part of a security document in respect of a loan advanced by the banks. One of the creditor bank filed a suit for recovery of loan on the original side of this Court, which was transferred to the DRT. A valuer was appointed, and the receiver of the DRT took over possession. Offers were received pursuant to the valuation. The bank filed an application before the DRT to place on record a settlement of sale by a private treaty. A miscellaneous application was filed by one of the parties contending that the official liquidator could not have given consent for the sale of the said property by private treaty without obtaining permission from the Court and that there was fraud perpetuated on the Tribunal. The DRT set aside the sale on the condition of a deposit of Rs. 45 crores by the respondents. The respondents challenged this order in the Debt Recovery Appellate Tribunal, and the Appellate Tribunal set

aside the condition of the deposit. Thereafter, the petitioner approached this court. In this context, the Division Bench examined the facts of the case and the controversy. The Division Bench noted the decision of the Hon'ble Supreme Court in the case of Divya Manufacturing and section 19 (25) of the Act of 1993. After considering the decision and the statutory provision, the Division Bench observed that the statute itself gives powers to the Tribunal which are analogous to the powers of a civil court under section 151 of the Civil Procedure Code and, therefore, the order passed by the Presiding Officer of DRT recalling his earlier order was to prevent abuse of its process and to secure the ends of justice. Having reached this conclusion, the Division Bench dismissed the writ petition. Therefore facts in this case were different than the present one. In the present case, in what manner the Respondent no.3 abused the process before the Recovery Officer/ Tribunal to invoke inherent power under section 19 (25) of the Act of 1993 is not explained by the Petitioners. The Division Bench in Everest Fincap Pvt. Ltd. (supra) did not lay down any absolute proposition as sought to be canvassed by the Petitioners that the Recovery Officer must refuse to confirm the concluded sales even if there no fraud when a proposal of higher offer is submitted by the defaulter after the sale.

23. Therefore, mere subsequent higher offer brought forth by the Petitioners (assuming to be genuine) was not a valid ground for refusing confirmation of the auction sale validly conducted by the Recovery Officer in favour of Respondent no.3. Both the decisions, that is in the cases of Divya Manufacturing Company and Everest Fincap Pvt. Ltd. are therefore not of any assistance to the Petitioners. Neither the argument based on section 19 (25) of the Act of 1993 has any merit.

24. The Petitioners' property was duly put to sale pursuant to the recovery certificate. The valuation report of the Valuer of the Tribunal was on record. Bank attempted to revise the valuation but did not pursue the same. No attempt was made by the Bank or the Petitioners in respect of the valuation for almost seven months. Sale was conducted validly by way public auction. There was no fraud in the auction. Respondent no.3 has been duly declared highest bidder as per the valuation. He has deposited the requisite amount. After the sale was confirmed, a buyer is sought to be brought forth. The Petitioners' first application to set aside the sale was rejected. No appeal was filed against the rejection of the first application. The rejection of the second application by the impugned order was also not challenged by way of appeal. Both challenges to the orders have become time-barred under the statute. The Petitioners did not avail of the remedy of an appeal under section 30 of the Act of 1993. The Petitioners argument that they had no money and, therefore, could not file an appeal under section 30 of the Act of 1993 is without any substance. Section 30 A of the Act of 1993 mandates deposit and that is the legal position. Respondent No.3 pointed out that in the One Time Settlement scheme submitted by the Petitioners to the Bank, the Petitioners have referred to the deposit made by Respondent no.3 and have sought set off in respect of the same.

25. In these circumstances, we do not find any error of jurisdiction committed by the Recovery Officer. There is no perversity in the discretion exercised by the Recovery Officer in not setting aside the sale in favour of Respondent no.3. No case is made out for interference under the writ jurisdiction.

26. The Writ Petition is dismissed.

ABHAY AHUJA, J.

NITIN

JAMDAR, J.

The learned Senior Advocate for the Petitioners at this stage makes a request for continuation of the ad-interim arrangement by extending the date of handing over possession to Respondent No.3 further. In view of our discussion in this judgment whereby we have found no merit in the petition, the request is rejected.