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Date: 2024.08.26
12:08:07 +0530*Corrected as per order dated 21/08/2024.***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 22680 OF 2024**

Invest Assets Securitisations &	]	
Reconstruction Private Limited	]	
Having its office at Bakhtawar,	]	
Suite B Ground Floor, Backbay	]	
Reclamation Scheme III, 229, Nariman	]	
Point, Mumbai – 400 021	]	 Petitioner.

V/s

1] Bank of Baroda	]
Having its office at Baroda Bhavan,	]
7 th Floor, R.C. Dutt Road, Vadodara -	]
399 007, Gujarat, India.	]
	]
2] Kemo Steel Industries Private Limited	]
having its office at Unit No.25, 2 nd Floor,	]
Eros Metro Mall, Plot No.8, Sector 14,	]
Dwarka New Delhi- 110 078	]
	]
3] Hans Ispat Limited	]
Having its office at A-1 Skylark	]
Apartment, Opposite Jodhpur Police	]
Station, Near Shivranjani Cross Road,	]
Satellite, Ahmedabad 380 015, Gujarat	]
Also At:	]
72, Palodia (Via Thaltej), Ahmedabad -	]
382115, Gujarat	]
And Also At :	]
Survey No.5/P, 9-13, Village Budharmora]	]
Bhachau-Bhuj Road, Tal Anjar, District:	]
Kutch, Gujarat.	]
	]
4] Shailesh Bhandari	]
An adult, Indian inhabitant, residing	]

at A-1, Skylark Apartment, Opposite]
Jodhpur Police Station, Near Shivranjani]
Cross Road, Satellite, Ahmedabad]
380015, Gujarat]
]]
5] Mukesh Bhandari]
An adult, Indian inhabitant, residing at]
A-1, Skylark Apartment, Opposite]
Jodhpur Police Station, Near Shivranjani]
Cross Road, Satellite, Ahmedabad-]
380015, Gujarat] Respondents.

Mr. Ashish Kamat, Senior Advocate a/w. Mr. Mohit Khanna, Mr. Harsh Behany, Mr. Gaurav Gandhi, Ms. Prachi Sanghvi i/b HN Legal for the petitioner.

Mr. Bhaskar Sharma, a/w. Mr. Shailesh Pai for the respondent No.1.

Dr. Abhinav Chandrachud a/w. Mr. Charles D'souza i/b Ms. Mumtaz Khan for the respondent No.2.

Mr. Shubham Dhamnaskar i/b Phoenix Legal for the respondent Nos. 3 and 4.

CORAM: A.S. CHANDURKAR & RAJESH S. PATIL, JJ.

Date on which the arguments were heard : 23/07/2024

Date on which the judgment is pronounced: 08/08/2024

JUDGMENT: (Per A.S. Chandurkar, J.)

1] In this writ petition filed under Articles 226 and 227 of the Constitution of India, the petitioner – an assignee has raised a challenge to the order dated 24/06/2024 passed by the Debts Recovery

Appellate Tribunal, Mumbai (for short, “DRAT”) dismissing the appeal preferred by the assignee and affirming the order passed by the Debts Recovery Tribunal-I, Ahmedabad (for short, “DRT”) on 31/03/2022 thereby confirming the sale notice dated 24/09/2021.

2] Shri Ashish Kamat, the learned Senior Advocate for the assignee submits that despite a clear direction being issued by this Court to the DRAT to consider effect of violation of Regulation 37(1) of the Debts Recovery Tribunal Regulations, 2015 (“the Regulations”, for short), the DRAT failed to consider the said aspect. According to him, the order of remand passed by this Court in Writ Petition (L) No.30912 of 2023 (*Invest Assets Securitisation & Reconstruction Pvt. Ltd. vs. Bank of Baroda & Ors.*) on 18/12/2023 was clear and it was necessary for the DRAT to consider the effect of non-compliance of the requirements of Regulation 37(1) of the Regulations. According to him, on a perusal of Regulation 37 which deals with sale of immovable property, it was clear that the Recovery Officer ought to first get the immovable property that is proposed to be sold, valued by an approved valuer. The Recovery Officer is also required to issue a proclamation of sale of such property in Form-22. It is only after completing these steps that the Recovery

Officer is required to fix the reserve price of the property after hearing the parties and considering the valuation report which cannot be older than one year alongwith other attending circumstances. Inviting attention to the order dated 19/09/2019 passed by the Recovery Officer, it was submitted that without calling for any valuation report from an approved valuer and without issuing any proclamation of sale in Form-22, the Recovery Officer proceeded to fix the reserve price of the property proposed to be sold. The petitioner as an assignee held pari passu charge alongwith the 1st respondent, – Bank of Baroda (“the Bank” for short) and hence it was interested in ensuring that the subject property was properly valued before it was to be sold in auction. It was urged that the procedure prescribed under Regulation 37(1) was mandatory in nature which was evident from the use of the expression “shall” in clause (1). Only after obtaining such valuation report from an approved valuer could the reserve price be fixed. On the ground that the mandatory requirement of clause (1) of Regulation 37 had not been followed, it was urged that the sale of the subject property in favour of the 2nd respondent (“ the auction purchaser” for short) ought to be set aside. Despite urging these aspects before the DRAT, the learned Presiding Officer failed to consider the effect of non-

compliance of these mandatory provisions before confirming the auction sale. The specific direction issued by this Court to consider the legal effect of such non-compliance was completely ignored. The object behind having the immovable property valued by an approved valuer was to ensure that it fetches a proper market price. The approach of the learned Presiding Officer in ignoring this aspect thus frustrated the object behind directing a *de novo* consideration of the entire matter. As a result, the same conclusion as was recorded earlier by the learned Presiding Officer on 04/08/2023 had been reiterated. Moreover, the observations made in paragraph 21 of the impugned order were uncalled for and without any supporting material. To substantiate his contentions, the learned Senior Advocate placed reliance on the following decisions:-

(i) *Scientific Instruments Co. Ltd. vs. Collector of Customs (Valuation Section) and another*, AIR 1976 Cal 38.

(ii) *ITC Limited vs. Blue Coast Hotels Limited and others*, (2018) 15 SCC 99.

(iii) *State of U.P. and others vs. Babu Ram Upadhya*, AIR 1961 SC 751.

(iv) *Ram Kishnu and others vs. State of Uttar Pradesh and others*, (2012) 11 SCC 511.

(v) *Dhirendra Nath Gorai vs. Sudhir Chandra Ghosh and others*, AIR 1964 SC 1300.

(vi) *Willie (William) Slaney vs. The State of Madhya Pradesh*, AIR 1956 SC 116.

(vii) *Chairman-Cum-Managing Director, Coal India Limited and others vs. Ananta Shah and others*, (2011) 5 SCC 142.

(viii) *State of Punjab and others vs. Dr. R. N. Bhatnagar and another*, (1999) 2 SCC 330.

(ix) *Bhaskar Sarachi Aloys Ltd. & Anr. vs. Union of India & Ors.*, 2012 SCC OnLine Cal 6436.

(x) *Union of India and others vs. Kamlakshi Finance Corporation Ltd.*, 1992 Supp (1) SCC 443

(xi) *Wasting House Saxby Farmer vs. Workmen*, (1973) 2 SCC 150.

(xii) *Shivshankara and another vs. H.P. Vedavyasa Char*, 2023 SCC OnLine SC 358.

It was thus urged that the impugned order dated 24/06/2024 passed by the DRAT was liable to be set aside and consequently the auction sale of the secured asset was also liable to be set aside as it had been effected without complying with the provisions of Regulation 37(1) of the Regulations.

3] Per contra, Dr. Abhinav Chandrachud, the learned counsel

appearing for the auction purchaser opposed the aforesaid submissions. According to him, the assignee failed to raise all these contentions that were being raised now when the reserve price came to be fixed. Despite being a party to the proceedings before the Recovery Officer no objection was raised on the ground that the requirements of Regulation 37 had not been satisfied. After the reserve price was fixed by the Recovery Officer, the same was required to be reduced on three occasions as there was no response to the auction notices. Even in the objection dated 20/09/2021 that was raised by the assignee, this aspect was not raised. Except for stating that the Recovery Officer failed to obtain a valuation report of an approved valuer, the assignee failed to substantiate its contention that the reserve price as fixed was on a lower side. In absence of any contrary material being brought on record by the assignee before the DRAT, there was no reason to hold that the reserve price as fixed did not indicate the true market value of the secured asset. The failure on the part of the assignee in raising any objection before the Recovery Officer coupled with the enormous delay in raising this plea disentitled the assignee to any relief whatsoever. It was pointed out that the auction sale was conducted on 18/11/2021. After bid of the auction purchaser was accepted, the sale came to be

confirmed on 04/04/2022. The auction purchaser was put in possession on 06/04/2022 and a sale certificate was issued to it on 07/04/2022. It is only thereafter that the assignee has sought to question the auction sale on technical grounds. The fact that the reserve price was required to be reduced on three occasions in fact indicated that as no party was willing to bid for reserve price fixed on the earlier occasions, it was required to be reduced. This factor weighed in favour of the auction purchaser rather than the assignee. Since no consequence of the failure to obtain a valuation report from an approved valuer resulting in non-compliance of Regulation 37(1) was indicated in the Regulations, it was clear that the requirements prescribed were directory in nature and not mandatory. It was thus submitted that the grounds raised by the assignee did not warrant acceptance and the writ petition was liable to be dismissed.

4] Mr. Bhaskar Sharma, the learned counsel for the Bank also opposed the writ petition. It was submitted that the challenge as raised by the assignee based on Regulation 37(1) was by way of an afterthought and belated in nature. Referring to the proceedings before the Recovery Officer as well as the DRT, it was submitted that this

contention was never raised by the assignee any time before. The assignee accepted the fact that it had pari passu charge alongwith the Bank and was satisfied with the same. Without sufficient material in support of such contention, the assignee sought to challenge the auction sale. In fact, the assignee did not approach the Court with clean hands. It failed to place on record various orders passed by the Recovery Officer dealing with objections as raised by it. Referring to the grounds raised by the assignee in memorandum of appeal that was filed before the DRAT, it was submitted that the assignee expressed a mere apprehension that the secured asset was sold at a value below the market price. The fair market value of the secured asset was not indicated by the assignee. It was thus submitted that there was no reason to interfere with the impugned order.

5] Having heard the learned counsel for the parties at length and having perused the documentary material on record, we are satisfied that the DRAT by refusing to grant any relief to the assignee did not commit any irregularity and that there is no case made out to exercise discretion in favour of the assignee under Articles 226 and 227 of the Constitution of India. Our reasons for holding so are :

(a) Failure on the part of the assignee in raising any objection to the determination of the reserve price despite participating in the proceedings before the Recovery Officer disentitles it to any equitable relief. The reserve price for selling the secured assets through public auction came to be fixed by the Recovery Officer at Rs 44.50 crores on 19/09/2019. The auction conducted however failed in the absence of any bids. The Recovery Officer thereafter reduced the reserve price on 18/02/2020 to Rs 42.50 crores. This auction too failed for want of bids. Yet again on 22/06/2021, the Recovery Officer brought down the reserve price to Rs 36.40 crores. In absence of requisite number of bids, this auction too did not go forward. It is at this stage that the assignee on 23/09/2021 filed its objection before the Recovery Officer. A perusal of the said objection indicates that the same is silent with regard to non-compliance of Regulation 37(1) or the inadequacy of the reserve price determined. The objection merely states that though the assignee had a

prior pari passu charge, the recovery certificate merely indicated the charge of the certificate holder alone. The Recovery Officer on 24/09/2021 determined the reserve price of the secured assets at Rs. 32.76 crores. The Recovery Officer then appointed a Court Commissioner on 18/11/2021 for taking inventory. It is thereafter that the public auction was held in which the bid of the auction purchaser at Rs 33.03 crores came to be accepted. The order dated 24/09/2021 passed by the Recovery Officer as well as his subsequent orders dated 18/11/2021 and 19/11/2021 were challenged by the assignee before the Gujarat High Court by filing Special Civil Application No.17750 of 2021. By an order dated 15/12/2021, the Gujarat High Court directed the Recovery Officer to decide the objections raised by the assignee. The Recovery Officer on 20/12/2021 decided the objections raised by the assignee. Perusal of the said order indicates that the assignee again failed to raise any objection before the Recovery Officer based on non-

compliance of Regulation 37(1). The prayer made by the assignee for lifting of the attachment and/or recall of the order of auction was rejected by the Recovery Officer.

It is thus clear that till the auction was held and the bid of the auction purchaser was accepted, the assignee failed to raise any objection whatsoever on the aspect of non-compliance of Regulation 37(1) of the Regulations. There is no explanation furnished by the assignee in this regard.

b] Perusal of the order dated 31/03/2022 passed by the learned Presiding Officer, DRT indicates that even therein the assignee did not raise the ground that for failure to follow Regulation 37(1) of the said Regulations, the manner of determination of the reserve price was flawed and the auction held thereafter was vitiated. The only ground urged in the said proceedings as can be seen from the judgment dated 31/03/2022 is based on the pari passu charge of

the assignee over the subject property. This aspect is further fortified on perusal of the memorandum of appeal in Appeal No.20 of 2022 that was filed by the assignee before the DRAT. Paragraph 6.24 thereof indicates that the only ground raised in this regard by the assignee is that it had an apprehension that the subject property had been sold at a value below the market price. Except for expressing such apprehension, there is no reference whatsoever to the failure on the part of the Recovery Officer to take steps under Regulation 37(1). The contention based on the failure to act in accordance with Regulation 37(1) was raised for the first time before the DRAT in appeal. This is evident from the prayers made in Interim Application No.355 of 2022 that came to be filed on 25/07/2022 before the DRAT. The prayer for appointing a valuer from the list of valuers was made on the premise that the valuation reports relied upon by the Recovery Officer did not indicate the fair and actual market value of the secured assets. There is no grievance raised in

the Interim Application that the reserve price was fixed by the Recovery Officer ignoring the mandate of Regulation 37(1) of the Regulations. We therefore find that the challenge raised by the assignee based on non-compliance of Regulation 37(1) was raised quite belatedly and as an afterthought much after confirmation of the sale on 04/04/2022, delivery of possession on 06/04/2022 and issuance of sale certificate to the auction purchaser on 07/04/2022. The DRAT decided the said appeal on 04/08/2023 and while dismissing the same observed in paragraph 8 that there were no pleadings to demonstrate insufficiency of the reserve price fixed for the property. It is true that this order passed by the DRAT was challenged by the assignee in Writ Petition (L) No.30912 of 2023 and on 18/12/2023 the DRAT was directed to decide the appeal preferred by the assignee on merits including the argument raised regarding violation of Regulation 37(1) of the said Regulations. In our view, this aspect cannot be considered in isolation but has to be viewed

in the totality of the facts and circumstances on record. The challenge based on Regulation 37(1) has been raised belatedly by the assignee. In the interregnum, rights have accrued in favour of the auction purchaser which aspect weighs against the assignee.

(c) Assuming that compliance with the procedure prescribed under Regulation 37(1) of the Regulations is mandatory in nature and that the reserve price came to be fixed without obtaining report of an approved valuer, we are of the considered opinion that the aforesaid requirement is for the benefit of a creditor. The beneficiary of such mandatory provision can waive its rights accruing from compliance of the same. Such waiver in a given case can be inferred from the conduct of the beneficiary. The Supreme Court in *GM, Sri Siddeshwara Co-operative Bank Ltd & Anr. vs. Sri Ikbali & Ors.*, 2013 INSC 556 has held that a mandatory provision can be waived by a party or parties for whose benefit such provision has been made. Whether there

has been waiver or not depends on the facts of the case. In the aforesaid case, the question with regard to compliance with the provisions of Rule 9(1) of the Security Interest (Enforcement) Rules, 2002 which indicates procedure for sale of an immovable property and issuance of sale certificate coupled with delivery of possession was under consideration. Under Rule 9(1) sale of an immovable property is not permissible prior to the expiry of thirty days from the date on which a public notice of sale is published in the news-papers as required or the notice of sale is served on the borrower. The public auction therein was conducted prior to expiry of period of thirty days, 25% of the sale price was not deposited within the prescribed period and the balance amount was not paid before expiry of the 15th day from the confirmation of sale. In that context it was held that though the requirement prescribed under Rule 9(1) was mandatory, the said provision was for the benefit of the borrower and it could be waived in a given case. The borrower therein accepted the

consideration pursuant to the auction sale beyond the prescribed period and in that context it was held that the borrower had waived his right under Rule 9(1) as well as under Rule 9(3) and Rule 9(4) of the said Rules.

We have noted hereinabove that the assignee failed to raise any objection to the determination of the reserve price on the premise that the same had been fixed ignoring the mandate of Regulation 37(1). Undisputedly, this provision is for the benefit of creditor/assignee of creditor. The conduct of the assignee which is evident from the record clearly indicates that it failed to raise any objection in this regard till the auction sale of the subject property was confirmed, its possession was delivered to the auction purchaser and a sale certificate was also issued. Absence of knowledge of Regulation 37(1) also cannot be claimed by the assignee. Thus having waived the compliance of a provision which was for its benefit, we find that it is too late in the day to now permit the

assignee to raise this objection at this stage of the proceedings. It may be mentioned that the assignee has not brought on record any material to indicate that the reserve price fixed was on the lower side. There is no valuation report obtained by the assignee to substantiate its contention in this regard. In these facts therefore it is not necessary to specifically refer to the decisions on which reliance was placed by the learned Senior Advocate for the assignee on the effect of the use of the word “shall” in Regulation 37(1).

(d) Much emphasis was placed on the order passed by the co-ordinate Bench on 18/12/2023 in Writ Petition (L) No.30912 of 2023 preferred by the assignee to urge that the DRAT failed to adjudicate upon the contention raised by the assignee as regards violation of Regulation 37(1). Paragraph 3 of the order dated 18/12/2023 on which heavy reliance has been placed reads as under:-

“3. Once this is the case we are of the view

that we can dispose of the above Writ Petition by directing the DRAT to decide the Appeal filed by the Petitioner herein on merits including the argument raised regarding the violation of Regulation 37(1) of the Debts Recovery Tribunal Regulations, 2015.”

The aforesaid direction of this Court indicates that the DRAT was to decide the appeal preferred by the assignee on merits including the argument based on the violation of Regulation 37(1) of the said Regulations. Perusal of the impugned order passed by the DRAT does indicate that such contention based on the violation of Regulation 37(1) was urged on behalf of the assignee. The learned Chairperson noted that the subject property was sought to be sold on three occasions but such steps were not successful for want of bidders. He noted that the assignee failed to raise any objection to the fixation of the reserve price on those occasions. It was further held that the assignee as well as the borrower had at no point of time

objected to the insufficiency of the price at which the subject property was sold. It was of the view that assignee was more anxious than the borrower in challenging the same so as to enable the borrower to continue in possession. On this basis the appeal came to be dismissed.

Though there is substance in the contention raised by the learned Senior Advocate for the assignee that the learned Chairperson failed to deal with the effect of non-compliance of the requirements of Regulation 37(1), we are of the view that the ultimate dismissal of the appeal does not deserve to be interfered with. The learned Chairperson has taken into consideration the failure on the part of the assignee to object to the reserve price as determined. The fact that the property could be sold only at the fourth auction has also weighed with the learned Chairperson. It is on this basis that no merit was found in the grounds raised by the assignee. We find that the ultimate conclusion recorded is correct and that in the facts of the case

dismissal of the appeal was warranted.

The learned counsel for the auction purchaser fairly did not contest the contention raised on behalf of the assignee that the direction issued by this Court of considering the effect of violation of Regulation 37(1) was binding on the Chairperson. There can be no quarrel with the binding effect of such direction issued by a superior Court as held in *Kamalakshi Finance Corporation Ltd* and *Scientific Investments Co. Ltd.* (supra). We however do not find that in the facts of the present case, the impugned order deserves to be set aside only on the ground that the said contention had not been specifically dealt with by the DRAT while dismissing the appeal. As found by us, the assignee by its conduct had waived the requirement of compliance with obtaining the report of an approved valuer before determining the reserve price. It permitted the property to be sold in auction, sale to be confirmed, possession to be delivered to the auction purchaser and sale certificate to be issued to it after which such

contention was raised. Hence, even on this count we do not find that there is any reason to interfere with the impugned order.

6] For all the aforesaid reasons we do not find that the present is a fit case for this Court to exercise discretion under Articles 226 and 227 of the Constitution of India in favour of the petitioner. The challenge therefore fails. The writ petition is dismissed with no order as to costs.

[RAJESH S. PATIL, J.]

[A.S. CHANDURKAR, J.]