(2023) 01 NCLT CK 0062

In the National Company Law Tribunal

Case No : IA No. 1811 Of 2022 in CP (IB) No.298/Chd/Hry/2018

Kuldeep Singh And Another Vs Manjul Mittal ?

Date of Decision : 23-01-2023

Acts Referred:
Insolvency and Bankruptcy Code, 2016 — Section 60(5)
National Company Law Tribunal Rules, 2016 — Rule 11
Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation 2016 — Regulation 47
Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation 2016 — Regulation 33(2)(c)

Citation : (2023) 01 NCLT CK 0062

Hon'ble Judges : Harnam Singh Thakur, Member (J);Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : Rohit Kapoor, Karan Kaushal, Ashutosh Mishra, Pulkit Goyal

Final Decision : Disposed Of

Judgement

Subrata Kumar Dash, Member (Technical)

IA No. 1811/2022

1. The present application is filed by the auction bidder under Section 60(5) of Insolvency and Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules, 2016 seeking ad-interim stay on termination and forfeiture of Rs. 4,51,00,000/- notice dated 29.11.2022 issued by the respondent-liquidator and further directions that no coercive actions may be taken during the pendency of this application. Further, grant the applicants an extension of 60 days despite the complete bid amount i.e., remaining (45%) to the tune of Rs. 3,68,00,000/- along with admissible interest. Alternatively, the applicant is seeking direction to the respondent/liquidator along with the stakeholder’s consultation committee to abstain from forfeiting the already deposited bid amount of Rs.4,51,00,000/- and return the same in case the extension is denied.

2. It is submitted by the applicant that the liquidator issued the e-auction notice

dated 12.03.2022, 22.04.2022, 26.05.2022 issued a call for the sale of Block-I at a reserved price of Rs.8,20,00,000/-. The date of the auction was fixed to be 28.03.2022, 07.05.2022, and 15.06.2022 respectively. However, there was no sustainable bid received pursuant to the above-mentioned auction. Lastly, vide corrigendum dated 14.06.2022 the date of e-auction was extended from 15.06.2022 to 25.06.2022 by the respondent/liquidator, and again there was no sustainable bid received.

3. It is further submitted by the applicant that on 07.07.2022, the applicants/ auction bidder with the help of one Mr. Praveen Gupta, submitted a proposal to purchase the land. The same was accepted and crystallised in the shape of a letter of intent (in terms of Regulation 33(2)(C) of IBBI Liquidation Process, 2016) for the private sale of land and building dated 20.08.2022.

4. In compliance of letter of intent, on 22.07.2022 the EMD (10%) i.e. Rs.83,00,000/- was deposited by the applicant followed by (15%) i.e. Rs.1,23,00,000/- which was deposited on 28.09.2022. Further, on 18.11.2022, the applicant deposited (30%) i.e., Rs.2,45,00,000/- qua the remaining amount. Further, the applicant sought an extension of time to deposit the remaining with admissible interest by 31.12.2022.

5. It is averred that on 29.11.2022, the respondent/liquidator served the applicant a notice wherein it was informed that he is constrained to terminate the letter of intent dated 20.08.2022 and forfeit the already deposited amount i.e., Rs,4,51,00,000/- on account of failure to meet the timelines prescribed.

6. The applicant submitted that Regulation 47 of IBBI Liquidation Process, Regulations, 2017 (Model Timeline for Liquidation Process) is the only directory in nature and in the present circumstances the time limit can be extended. Further, the failure to meet with the timeline is attributed to the ongoing elections in Himachal Pradesh and shutdown of tehsil (office of sub-registrar) due to which applicant was unable to dispose of another assets of theirs, in order to meet with the sale consideration.

7. Notice of this application issued to the respondent vide order dated 16.12.2022. Pursuant to the said notice respondent filed its reply vide diary No.03159/01 dated 20.12.2022, wherein it is stated that the application of the applicant is misconceived. The letter of intent dated 20.08.2022 was offered by way of private sale in accordance with Regulation 33(2)(C) IBBI Liquidation Process, Regulations, 2016 read with Clause 1(12) of Schedule I for a total sale consideration of Rs.8,19,00,000/- subject to the terms and conditions therein i.e., within a period of 90 days from 20.08.2022 i.e., up to 18.11.2022. However, the applicants failed to deposit the entire sale consideration within the prescribed. In view of the above, part payment of Rs.4,51,00,000/- received stood forfeited for breach of the terms and conditions of the offer for sale. It is further submitted by the respondent that the interference of this Adjudicating Authority cannot be sought by the applicant seeking an extension of time to

make the payment of sale consideration when there is a clear contract/Letter of Intent (LOI), and such LOI does not provide any clause/provision with regard to the extension of time. Therefore, the request of applicants is beyond the purview of the contract/LOI.

8. We have heard the learned counsels for the applicant and respondent. For proper adjudication of the instant application, the relevant terms are extracted hereinbelow:

5. The payment consideration of

a. 15% of the Bid Amount i.e. Rs 1,22.85.0001- (One Crore Twenty Two Thousand Eighty-Five Thousand Only) shall be made within 7 days of the issuance of LOI to the Successful Bidder by the Liquidator failing which EMD already paid shall stand forfeited b. Balance Payment of Rs 6,14,15,000/- (Six Crore Fourteen Lakhs Fifteen Thousand Only) and other levies if any, shall be made as follows:

For Land & Building-Within 30 Days from the issuance of the LOI to the successful bidder by the Liquidator. The payment can be made in 90 Days from the issuance of the LOl to the successful bidder by the Liquidator, subject to payment of interest of 12% per annum. If the Full Payment is not made within 90 days-the amounts paid shall stand forfeited, and the liquidator shall proceed to e-auction the assets afresh

6. Sale Certificate will be issued on the following basis:

a. Sale Certificate with respect to Building after receipt of R$ 4,40,00,000 (Four Crore Forty Lakhs) and applicable taxes and duties, if any. You will be required to furnish the necessary proof in respect of the payment of all the taxes/charges applicable if any

b. Sale Certificate with respect to Land after receipt of the entire purchase price/ bid and applicable taxes and duties, if any. You will be required to furnishing the necessary proof in respect of the payment of all the taxes/charges applicable if any.

(Emphasis Supplied).

9. In this context, we are conscious of the decision of the Hon’ble Delhi High Court in the matter of Union of India & Anr. vs M/s. Jindal Rail Infrastructure dated 23.05.2022, wherein it is held that:

“In cases where it is found that the terms of the contract do not clearly express the intentions of the parties, it is open to seeking recourse to various tools of interpretation. This would include interpreting a contract in a manner that would make commercial sense as it is assumed that men of commerce would have intended it so. However, it is not open to re-work a bargain that was struck between the parties on the ground that it is commercially difficult for one party to perform the same.

The decision of the Arbitral Tribunal to award the difference between the price quoted by the tenderers and the price quoted by JRIL is unsustainable. It amounts to re-writing the contract between the parties. The impugned award is in conflict with the fundamental policy of Indian law and is vitiated by patent illegality".

10. Further, the Hon'ble Supreme Court in the matter of Shree Ambica Medical Stores & Ors vs. The Surat People's Co-operative Bank Limited & Ors; Civil Appeal No. 562 of 2020 dated 28.01.2020 held that:

This Court, while interpreting the contract of insurance must interpret the words of the contract by giving effect to the meaning and intent which emerges from the terms of the agreement. In a Constitution Bench decision of this Court in General Assurance Society Ltd V Chandumull Jain, it was observed thus:

"11. ...In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties because it is not for the court to make a new contract, however reasonable if the parties have not made it themselves..."

The court through its interpretative process cannot rewrite or create a new contract between the parties. The court has to simply apply the terms and conditions of the agreement as agreed between the parties.

(Emphasis Supplied)

11. We also refer to the decision of the Hon'ble NCLAT in the case of Saboo Tor Private Limited Vs. Mr Sanjay Gupta; Company Appeal (AT) (Insolvency) No. 1098 of 2020 dated 18.01.2021, wherein reliance is placed on the following two decisions of the Hon'ble Supreme court while upholding the confirmation of forfeiture of EMD by the Liquidator.

"We find it a fit case to place reliance on the Judgement of the Hon'ble Supreme Court in National Highways Authority of India v. Ganga Enterprises, (2003) 7 SCC 410 in which the Hon'ble Apex Court has observed as follows:

"The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But the withdrawal of an offer before it is accepted is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into a contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security in no way affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given an advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity of a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.”

(Emphasis Supplied)

12. Further, the Hon’ble Supreme Court in State of Haryana V/s. Malik Traders, (2011) 13 SCC 200, has held as under:

“The right to withdraw an offer before its acceptance cannot nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of the agreement. A person may have a right to withdraw his offer, but if he has made his offer on a condition that the bid security amount can be forfeited in case he withdraws the offer during the period of bid validity, he has no right to claim that the bid security should not be forfeited and it should be returned to him. Forfeiture of such bid security amount does not, in any way, affect any statutory right under Section 5 of the [Contract] Act. The bid security was given by the respondent and taken by the appellants to ensure that the offer is not withdrawn during the bid validity period of 90 days and a contract comes into existence. Such conditions are included to ensure that only genuine parties make the bids. In the absence of such conditions, persons who do not have the capacity or have no intention of entering into the contract will make bids. The very purpose of such a condition in the offer/bid will be defeated if forfeiture is not permitted when the offer is withdrawn in violation of the agreement.”

13. In the present case, as per the terms and conditions of Letter of Intent dated 20.08.2022 there is a specific mention of forfeiture of the amounts paid in the event of default in full payment within the stipulated 90 days. In view of the above discussion, we hold that this Adjudicating Authority can not rewrite the terms of the contract or create a new contract between the parties.

14. Consequently, the instant application fails, and dismissed accordingly.

