(2019) 07 NCLT CK 0015

In the National Company Law Tribunal

Case No : Miscellaneous Application No. 42 Of 2019, TCP. 431/IB Of 2017

Nag Yang Shoes Private Limited And Another APPELLANT

Vs

Mahalingam Suresh Kumar (Liquidator) And Another RESPONDENT

Date of Decision : 22-07-2019

Acts Referred:

Citation : (2019) 07 NCLT CK 0015

Hon'ble Judges : Ch. Mohd. Sharief Tariq, J

Bench : Single Bench

Advocate : Aashish Jain Lunia, M. Suresh Kumar

Final Decision : Dismissed

Judgement

Ch. Mohd. Sharief Tariq, J

1. Under consideration is Miscellaneous Application No. 42/2019 filed in TCP/431/(IB)/2017 on 19.12.2018 by the Applicant viz., Mr. S.S. Chockalingam against Mr. Mahalingam Suresh Kumar (Liquidator) of M/s. Nag Yang Shoes Private Limited.

2. The prayer made by the Applicant in the Application is as follows:

a)Pass an order directing the 1st Respondent to refund the entire monies deposited by the Applicant amounting to Rs. 1,30,25,000/- (Rupees One Crore Thirty Lakhs and Twenty Five Thousand only) with interest @ 15% per annum;

Or in the alternative

b) Pass an order directing the 1st Respondent to restrict the forfeiture only to the EMD amount of Rs. 15,00,000/- (Rupees Fifteen Lakhs only) and refund the balance amount of Rs. 1,15,25,000/-(Rupees One Crore Fifteen Lakhs and Twenty Five Thousand only) to the Applicant.

3. The Applicant has participated in the auction proceedings of 2nd Respondent viz., M/s. Nag Yang Shoes Private Limited by filing the Tender Form based on the advertisement issued in newspapers on 29.09.2018. The detailed chronology of

all the events pertaining to the e-auction is given as under:

S. No.

Date

Events/Particulars

1

24-Oct-2018

Last Date for submission of e-auction tender form. Only one party M/s. Farida Shoes has submitted its Tender within the specified time limit.

2.

25-Oct-2018

Mr. S.S. Chockalingam transferred EMD of Rs. 15 Lakhs and submitted tender form with condonation of delay, citing medical reasons. In the interest of realizing better value for the stake holders, Liquidator condoned the delay and accepted the tender form of Mr. Chockalingam and allowed him for participation in 26th October, 2018 e-auction process.

3.

26-Oct-2018

e-auction held on 25.10.2018. The final price was as under:

M/s. Farida Shoes: 2.27 Crores

SS Chockalingam: 2.32 Crores (highest bidder)

Mr. SS Chockalingam had been declared as successful bidder and sale letter had been issued to him seeking payment as per the tender terms, i.e. 25% within 24 hours and balance (75%) within 15 days. Accordingly, the due date for full payment was scheduled on 10th November 2018.

4.

29-Oct-2018

The 25% payment (less EMD) has been received (Rs. 43.25 lakhs)

5.

10-Nov-2018

Due date for full payment. However, no payment received till this date.

The Applicant has requested for 15 days extension.

(FIRST EXTENSION)

6.

26-Nov-2018

Subsequently Rs. 42 Lakhs had been received in the next 15 days. (balance receivable - Rs. 1.74 crores (including GST). Again extension was requested by the Applicant for an additional 10 days (SECOND EXTENSION)

7.

27-Nov-2018

Rs. 30 Lakhs received. Extension granted for 10 days (i.e. upto 6th Dec.2018). Balance receivable -1.44 crores (including GST)

8.

06-Dec-2018

Last date for payment of full sale consideration. No payment received on the due date.

9.

07-Dec-2018

Liquidator had issued a letter of cancellation of proposed sale and forfeited the paid amount as per clause 12 of the Tender terms & conditions.

10.

10-Dec-2018

Subsequent to cancellation of the sale and the forfeiture of the amount deposited, the Liquidator had evaluated the option of selling the asset to the next highest bidder. The second bidder had bid an amount of Rs. 2,27,92,000/- during the e-auction. Hence, communication had been sent seeking their interest in purchasing this asset and their best offer for the said asset

11.

12-Dec-2018

The Second bidder had submitted his revised offer to purchase the asset at Rs. 2,32,92,000/- which was the price offered by the defaulted First bidder. On the same day, the second bidder paid the EMD amount and submitted his acceptance to purchase the asset. On receipt of the 10% EMD, a formal sale confirmation has been issued for payment of the balance amount within the specified time limit.

12.

13-Dec-2018

The second bidder M/s. Farida Shoes Private Limited had paid the full purchase consideration along with applicable GST into the Liquidation account and accordingly the liquidator had proceeded with sale completion confirmation.

13.

18-Dec-2018

Applicant herein had moved an Application under Rule 11 of NCLT rules, 2016 seeking to extend the last date of payment from 06.12.2018 to 29.12.2018. This Tribunal had held that the extension sought was not in line with the terms and conditions of the bidding process, nor are there any provisions in IBC, 2016 to grant such an extension. This Tribunal had further gone on to record that the Liquidator had already negotiated unth the 2nd highest bidder who had already made payment that was equivalent to the amount offered by the Applicant and had become the successful bidder by making the payments in time.

4. On failure of the Applicant to honour the commitment and keeping in view the objective of the Insolvency & Bankruptcy Code, 2016, i.e., the maximization of the value of assets, the Liquidator has decided to sell the assets to the 2nd bidder, who has made the payment well in time. The amount of Rs. 1,30,25,000/- (Rupees One Crore Thirty Lakhs and Twenty Five Thousand only) deposited by the 1st bidder viz., Applicant was forfeited under Clause-12 of the Sale Notice, which is reproduced as under:-

"Type of offer and manner of payment:

? The successful bidder shall deposit 25% of sale consideration (including EMD), by way of a DD/NEFT/RTGS to the Liquidator within 24 hours. ? The balance amount of the sale consideration payable shall be paid by the purchaser within 15 days from the date of confirmation of sale.

? Extension of Time for delay in payment due to unavoidable circumstances may be allowed at the sole discretion of LIQUIDATOR. However, interest @ 15% p.a. shall be charged for the extended period on the Balance amount due.

? In default of the payment within the period mentioned above, the amounts deposited shall be forfeited and the property put on sale afresh. The defaulting Bidder shall have no right to claim any amount deposited by him/her and shall have no claim over the property."

(Emphasis Supplied).

5. It has been submitted by the Counsel for the Applicant that the Liquidator has wrongly forfeited the entire bid amount paid by the Applicant. The Counsel has further submitted that the Liquidator could have forfeited only the EMD amount of Rs. 15,00,000/- (Rupees Fifteen Lakhs only) and should have refunded the balance amount of Rs. 1,15,25,000/- (Rupees One Crore Fifteen Lakhs Twenty Five Thousand only).

6. It is contended by the Counsel for the Applicant that the Liquidator has forfeited the entire amount deposited by the Applicant by misinterpreting the terms and conditions of the Tender document. The Counsel for the Applicant has tried to support his contention with the case law, which is not relevant and cannot be made applicable to the facts and circumstances of the case on hand. Therefore, the detail of the case law cited need not to be discussed as facts involved in those cases are different from the facts of the case on hand. Therefore, it is necessary to refer to the relevant part of the Tender document, acceptance thereof by the Applicant and intimation given to the Applicant by the Liquidator of his success in e-auction.

7. The Clause-12 of the Tender document has already been extracted under Para No. 4 hereinabove, which clearly provides that "the defaulting bidder shall have no right to claim any amount deposited by him/her and shall have no claim over the property."

8. The terms and conditions of the Tender document have been accepted by the Applicant by filing Tender Form on 25.10.2018. The relevant contents of the acceptance of the Tender document by the Applicant are extracted below:

".........I/We have read the Tender Document and the terms and conditions of tender and the above advertisement and understood them fully. I/We, hereby unconditionally agree to conform with and to be bound by the said conditions..........'"

9. Further, the following has been agreed by the Applicant while accepting the terms and conditions of the Tender document.

"......

4) I/We also agree that after my/our offer given in my/our tender for purchase of a property is accepted by the LIQUIDATOR if I/We fail to accept the terms and conditions of the offer letter or am/are not able to complete the transaction within the time limit specified in the offer letter for any reason whatsoever and/or fail to fulfill any/all the terms and conditions of the tender and offer letter, the Earnest Money Deposit paid by me/us along with the tender is liable to be forfeited by the LIQUIDATOR and that the LIQUIDATOR has also a right to proceed against me/us for specific performance of the contract........."

(Emphasis Supplied).

10. After declaration in favour of the Applicant as the highest successful bidder, the Liquidator vide his letter dated 26th of October, 2018 has intimated the Applicant wherein under the heading "Important Note", the following conditions have clearly been mentioned:

"Important note: As per e-auction terms, this intimation of your success in e-auction is conditional, and is subject to your payment of the balance dues as per the terms and conditions of the e-auction. In case of any failure in payment of the auction amount in the Liquidation account on or before the scheduled date, this intimation stands withdrawn automatically and the Liquidator reserves right to award the bid to the second highest bidder, subject to his payment.

Any non-compliance of terms of this e-auction by your company will attract complete forfeiture of the EMD amounts and further payments received.

Once again, we congratulate you for emerging successful in this e-auction process. If any clarification required, kindly let us know."

(Emphasis Supplied).

11. From the above, it has become clear that the Applicant has accepted all the terms and conditions of the Tender document consciously after reading and understanding the same, and he has not sought any clarification from the Liquidator as was requested by the Liquidator vide intimation letter dated 26th October, 2018 under the head "Important Note" mentioned above. Therefore, the Liquidator has rightly forfeited the entire amount deposited by the Applicant which is completely in accordance with the terms and conditions of the Tender document, acceptance thereof and the conditions contained in the intimation letter dated October 26, 2018 sent by the Liquidator to the Applicant.

12. For the foregoing reasons, the Application is devoid of merits and stands dismissed. No order as to costs.

13. The Order is pronounced in the open court.