National Company Law Appellate Tribunal, New Delhi

Principal Bench

COMPANY APPEAL (AT) (Insolvency) No. 820 of 2020

(Arising out of Order dated 08th September, 2020 passed by National Company Law Tribunal, Division Bench – I, Chennai in IA/637/2020 in TCP/111/IB/2017)

IN THE MATTER OF:

Mr. Dhan Prakash Gupta
S/o Late Mr. Kishan Das,
R/o H. No. 1721, Gali No. 125,
Shanti Nagar, Tri Nagar,
Delhi - 110035 **...Appellant**

Versus

M/S Daehsan Trading India Private Ltd.,
(A Company in Liquidation Under IBC Hence Through Its Liquidator Mr. S. Rajendran)

Office At:-
2nd Floor, HaiKrupa,
71/1, Mc Nicholas Road
(Off Poonamallee High Road),
Chetpet, Chennai – 600031. **...Respondent**

Appellant: **Ms. Ekta Choudhary, Advocate.**
Respondent: **Mr. Anant A. Pavgi (Caveator).**
Ms. Yajura RV (Caveator).

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. The present Appeal is preferred by the successful Auction Purchaser under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the **'Code'**), being aggrieved by the Impugned Order dated 08.09.2020 in IA/637/2020 in TCP/111/IB/2017 passed by the Adjudicating Authority, (National Company Law Tribunal, Division Bench - I, Chennai), wherein the Appellant herein was directed to pay an

amount of Rs. 6 Lakhs towards Maintenance Security Deposit in respect of the property which was e-Auctioned by the Liquidator.

2. While dismissing the Application, preferred by the Appellant herein, the Learned Adjudicating Authority has observed as follows:-

> *10. Thus, even in the Process Memorandum itself, the Liquidator has mentioned that the successful bidder will have to pay a sum of Rs. 6 Lakhs towards interest bearing maintenance security Deposit with DLF and it is understood that the said amount has to be paid over and above bid price. Hence, the attempt of the Applicant to say that the bid amount is inclusive of the Maintenance Security Deposit proves to be futile and not sustainable.*
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> *11. Further, when the terms and conditions of the bid have clearly postulated that the successful bidder has to pay the Maintenance Security Deposit, the stance of the Applicant that it will be paid only after getting clarification from this Tribunal is strange on the part of the Applicant. Hence, the Applicant is directed to pay the said sum of Rs. 6 Lakhs as Maintenance Security Deposit with the Liquidator over and above the successful bid price amount of Rs. 1.30 Lakhs.*
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> *12. During the course of arguments, it was submitted by the Learned Counsel for the Liquidator that certain dues are payable to the Corporation (MCD) and the Liquidator has undertaken to pay the same as of date; let the same be duly paid by the Liquidator.*
>
> *13. As regards the payment made by the Applicant, it is seen that the Applicant has paid a sum of Rs. 10 Lakhs as EMD and the remaining sum of Rs. 120 Lakhs is yet to be paid and the Counsel for the Applicant has submitted that they are ready with the amount to be paid to the Liquidator. Taking into consideration, the said representation, we direct the Applicant to pay the remaining amount of Rs. 120 Lakhs to the Liquidator within seven days from the date of receipt of the Order. Further, the Applicant is also directed to pay a sum of Rs. 6 Lakhs to the Liquidator towards Maintenance Security Deposit within the said period of 7 days from the date of receipt of this order and the same to be remitted to DLF. Upon receiving the total bid amount and the*

Maintenance Security Deposit, the Liquidator is directed to execute the sale deed and hand over the possession of the property along with title documents within a period of 7 days thereafter and further it is clarified that the Liquidator will pay the pending tax arrears to MCD as undertaken.

Submissions on behalf of Learned Counsel for the Appellant:

3. Learned Counsel appearing for the Appellant vehemently contended that the Learned Adjudicating Authority did not consider that the Respondent/Liquidator has retracted from his statement made in e-mail dated 10.04.2020, wherein it was clarified, that *'further, with regard to your request on the Maintenance Security Deposit we do not wish to negotiate and you are free to quote your final amount while participating in the said Auction,'* on the basis of which the Appellant had acted and the same was hit by the Doctrine of estoppel. It is further submitted that Maintenance Security Deposit ('MSD') is part of statutory dues, incurred during the period of liquidation and hence, the liability of the Liquidator; that the dues occurred primarily due to the negligence of the Liquidator; that the amount towards 'MSD' is an integral part of the property and that the Liquidator is not entitled to revise the Process Memorandum and state new terms and conditions after the Appellant insisted on e-Auction on the apprehension that the property would be sold through a Private Sale to the favored purchaser.

4. Learned Counsel for the Appellant strenuously argued that the Liquidator issued a Process Memorandum on 24.03.2020, for which, the Appellant had sought clarification on the terms and conditions of the said e-Auction over 'MSD' charges vide an email dated 10.04.2020 as it was the 5th

Auction and all the previous Auctions had failed. The Learned Counsel drew our attention to the email dated 10.04.2020 (Annexure P-25) which is reproduced as hereunder:-

Annexure P25 187

Pinki

PINKI TOURS & Travels <amar@pinkitravels.com>

Re: DAEHSAN TRADING (INDIA) PVT LTD - AUCTION OF DELHI PROPERTYDAEHSAN TRADING (INDIA) PVT LTD - AUCTION OF DELHI PROPERTY

1 message

S.Rajendran & Associates Company Secretaries <cs.srajendran.associates@gmail.com> Fri, Apr 10, 2020 at 5:58 PM
To: AMAR GUPTA <adv.amar987@gmail.com>
Cc: SUBRAHMANIYA SIVAM R <subs3425@gmail.com>, Nageswaran Swamy <swamynageswaran@gmail.com>, chairman@pinkitravels.com

Dear Mr. Amar Gupta,

We acknowledge receipt of the Bid Form of Mr. Dhan Prakash Gupta along with supporting documents as forwarded by you in connection with the Auction of Delhi Property of Daehsan Trading (India) Pvt Ltd (In Liquidation).

In this regard, we find the following discrepancies in the Bid Form:

(1) The Particulars of EMD remittance / Reference No. & Date in the Bid Form has been left blank.
(2) EMD Deposit: The screen short submitted by you for having remitted the EMD Deposit does not provide any details with regard to:
  (i) Depositor Name / Depositing Bank Details
  (ii) Beneficiary Name / Beneficiary Bank Account Details
  (iii) Amount Deposited as EMD.
(3) Undertaking by the Bidder that the conditions with regard to submission of all original documents (bid form along with other documents) within 10 days upon relaxation of the present lock-down is not provided.

Further, with regard to your request on the maintenance security deposit, we do not wish to negotiate and you are free to quote your final amount while participating in the said Auction.

We request you to rectify the above discrepancies and re-submit the Bid Form immediately, but not later than 13th April 2020, enabling Liquidator to consider your Bid Form and declare you as eligible bidder.

Regards
Raghu
Mobile: 9840906523
From the office of the Liquidator
In the matter of Daehsan Trading (India) Pvt Ltd

S. Rajendran
B.Com., FCS, FCMA, CAIIB, DCG(ICSI)
IBBI Regn. No. IBBI/IPA-002/IP-N00098/2017-18/10241
S. Rajendran & Associates
Company Secretaries
2nd Floor, Hari Krupa, 71/1, Mc Nicholas Road,
(off Poonamallee High Road) Chetpet, Chennai - 600 031
Phone:+ 91 44 2836 1636 | Mobile: 94446 48589
Email: cs.srajendran.associates@gmail.com

(Emphasis Supplied)

5. Learned Counsel further drew our attention to the e-mails dated 01.10.2019, 03.03.2020 annexed as Annexure B and C to the Rejoinder, wherein the Liquidator had sought for details of the prospective buyer and details of the price quoted to them to improve their negotiation accordingly and thereafter addressed an e-mail stating that the Liquidator shall sell the property by way of a Private Sale to maximize the value of property in the interest of all stakeholders.

6. Learned Counsel vehemently contended that the Appellant participated in the e-Auction and found that the online Auction process provided only for entering the bid amount and no separate field/provision was available to enter the 'MSD' amount and hence was forced to quote the consolidated bid amount of Rs. 130 Lakhs (inclusive of the 'MSD'), sincerely believing that the bid amount being accepted was inclusive of 'MSD'. Thereafter the draft Letter of intent dated 21.04.2020 separately demanded an amount of Rs. 6 Lakhs over and above Rs. 130 Lakhs to consummate the sale. It is submitted that the mala fide intention of the Liquidator is evident from the fact that only after repeated requests, after filing of Application before the Adjudicating Authority, the Liquidator provided the Appellant with the Builder Buyer Agreement and also did not share the tax and maintenance charges details.

Submissions on behalf of Learned Counsel for the Respondent:

7. Learned Counsel for the Respondent submitted that the Auction was completed on 17.04.2020; LoI was issued on 21.04.2020 in line with the Process Memorandum dated 24.03.2020, according to which, the Appellant ought to pay the balance sale consideration of Rs. 120 Lakhs after adjusting

EMD of Rs. 10 Lakhs on or before 19.07.2020, additionally, Rs. 6 Lakhs was to be deposited with DLF towards 'MSD' as per the terms stipulated in the Letter of intent and the Process Memorandum issued; as per the said terms and in line with Schedule I of the IBBI (Liquidation Regulations, 2016) interest at the rate of 12% p.a. was to be paid by the successful bidder in case of any payment made beyond 30 days; on account of lockdown situation caused by the pandemic the Liquidator had extended the last date of payment; when the Liquidator was about to forfeit the EMD of Rs. 10 Lakhs due to non-payment of the balance sale consideration within the specified time period, the Appellant had moved his Application before the Learned Adjudicating Authority; that Clause 14(III) pertaining to the payment of Rs. 6 Lakhs towards 'MSD', was not maintained in the Process Memorandum pertaining to the previous four Auctions conducted during 2019, cannot be accepted as the Appellant did not even submit any interest to participate in the previous Auctions; the Appellant participated only in the 5th Auction held on 17.04.2020 and therefore is bound by the terms and conditions stipulated in the Process Memorandum dated 24.03.2020; knowing fully well the terms and conditions of the Auction held on 17.04.2020, the stance of the Appellant that the terms of Auction was not clear with regard to 'MSD' of Rs. 6 Lakhs cannot be justified; that the Appellant mailed to the Liquidator on 13.08.2020 a copy of two DDs for Rs. 50 Lakhs and Rs. 70 Lakhs respectively but as the DDs were not handed over to the Liquidator, the remittance of the said amount is still pending and hence attracts interest at 12% p.a. from 19.07.2020, which is the 90th day form the date of the issuance of LoI.

8. The Learned Counsel for the Respondent drew our attention to the e-mail correspondence exchanged between the Appellant and the Liquidator annexed to the Reply filed before us pertaining to the period between 18.07.2020 and 10.09.2020, the sum and substance of which pertains to the reminders issued by the Liquidator to the Appellant with respect to payment of balance sale consideration of Rs. 120 Lakhs to be paid within the time period specified, failing which the amount shall attract interest at 12% p.a. and if the amount is not paid by 12.08.2020, the EMD amount of Rs. 10 Lakhs would stand forfeited. The correspondence also evidences that there is some dispute between the Appellant and the Respondent and the conduct of the Liquidator has been raised several times in these e-mails.

Assessment:

9. It is not in dispute that the Appellant participated in the 5th Auction dated 17.04.2020 and was declared a successful bidder for a sum of Rs. 130 Lakhs as a bid price as per the terms of the Process Memorandum dated 24.03.2020. It is an admitted fact that the Letter of intent was issued on 21.04.2020, the relevant terms and conditions of which are reproduced as hereunder:-

> *1. In accordance with the Process Memorandum issued to you, your deposit towards the Earnest Money Deposit of Rs. 10,00,000/-(Rupees Ten Lakhs Only) vide your transaction dated 10th April, 2020, paid via* ***RTGS (Ref. No. BDBLH20101004010)*** *shall be retained towards part sale consideration.*
>
> *2. You shall remit the balance sale consideration of Rs. 1,20,00,000/- (Rupees One Crore Twenty Lakhs Only) which is after adjusting the Earnest Money Deposit, within a period of 90 days (i.e., on or before 19th July 2020) from the date of this Letter of intent.*

Provided that payment made after 30 days shall attract interest at the rate of 12% per annum in terms of Regulation 33 read with Schedule I of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

[Please note that due to the present lockdown imposed by the Central Government on account of Covid-19, the payments made beyond 30 days from the date of the lifting of lockdown in Delhi shall attract interest @ 12% per annum as communicated to you vide our email dated 16th April, 2020.]

3. In case you withdraw the auction bid or fail to remit the balance sale consideration of Rs. 1,20,00,000/- (Rupees One Crore Twenty Lakhs Only) within 90 days as specified above, the Liquidator shall forfeit the Earnest Money Deposit of Rs. 10,00,000/- (Rupees Ten Lakhs Only).

4. All applicable taxes (including stamp duty and registration charges etc.,) on Sale of Commercial Office Space as stated above, should be borne by you.

5. You will have to pay a sum of Rs. 6,00,000/- (approximately) towards interest Bearing Maintenance Security Deposit with DLF (towards maintenance deposit), which will be your asset.

6. You shall be responsible for obtaining requisite regulatory or statutory or third-party approvals, no objections, permission or consents, if any, that are or may be required under Applicable Law for transfer of the said Property.

7. On payment of the full amount, the sale shall stand completed and the Liquidator shall issue a Certificate of Sale or Sale Deed to transfer the said Property.

8. The assets of the Company are sold on ***"As is where is basis", "As is what is basis", "Whatever there is basis"*** *and* ***"No recourse"*** *basis and the sale does not entail transfer of any title except the title which the Company had on its assets as on date of transfer. The Liquidator does not take or assume any responsibility for any shortfall or defect or*

shortcoming in the movable/immovable assets of the Company.

9. Notwithstanding any as above, Liquidator shall revoke the Letter of intent, without being liable in any manner whatsoever to the recipient of this LOI (you), if the Liquidator, at his discretion, determines that the recipient of this LOI has (you have), directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the auction Process or has, undertaken any action in respect of such process which results in the breach of any Applicable Law including the Prevention of Corruption Act, 1988.

10. Any dispute arising out of or in relation to this Letter of intent shall be subject to the exclusive jurisdiction of Hon'ble Chennai Bench of the National Company Law Tribunal.

11. The terms of this Letter of intent shall be binding on the recipient of this LOI.

(Emphasis Supplied)

10. It is pertinent to mention that the email relied upon by the Learned Counsel for the Appellant in (Para 4) is dated 10.04.2020 whereas the draft Letter of intent is dated 21.04.2020 wherein it has been stated that the accepted copy of the Letter of intent should be submitted by 28.04.2020. In the aforenoted e-mail, Annexure P-25, it is categorically stated that *'further, with regard to your request on the Maintenance Security Deposit, we do not wish to negotiate and you are free to quote your final amount while participating in the said Auction'*. This clearly substantiates the case of the Respondent that the Appellant was in the knowledge of the additional Rs. 6 Lakhs to be paid towards 'MSD', *prior* to the acceptance of the Letter of intent. It is the case of the Appellant that the Letter of intent was signed on 04.05.2020 and a legal notice was issued vide an e-mail dated 19.05.2020 to

the Liquidator with respect to this additional amount of Rs. 6 Lakhs payable towards 'MSD'. It is significant to mention that in this legal notice, the Appellant had called upon the Liquidator to redraft the Letter of intent modifying Clause 5 to reflect that the total bid amount of Rs. 130 Lakhs is inclusive of the 'MSD'. We observe from the material on record that the Appellant had participated only in the 5th Auction and therefore the question of whether the 'MSD' charges were raised in the previous Auctions or not, is irrelevant. The draft Letter of intent and the Process Memorandum dated 21.04.2020 clearly stipulates that an amount of Rs. 6 Lakhs (approximately) towards interest bearing Maintenance Security Deposit with DLF (towards Maintenance Deposit) is to be paid and would be a part of the asset of the successful bidder. The Process Memorandum issued by the Liquidator evidences the same in Clause 14(III) and therefore the stand of the Appellant that Clause 5 of the Letter of intent should be redrafted making the 'MSD' a part of the total bid amount of Rs. 130 Lakhs cannot be justified. At the cost of repetition, the fact that the additional amount of Rs. 6 Lakhs payable towards 'MSD' is not negotiable was admittedly brought to the notice of the Appellant herein way back on 10.04.2020 whereas the draft LoI is dated 21.04.2020 and the same was subsequently signed, thereby giving an opportunity to the Appellant herein to exercise their choice of bidding for the subject Auction property or not. Having bid, paid the EMD and gone through the Process Memorandum and terms of LoI, the Appellant herein has exercised their choice of being a successful bidder and now cannot turn around and state that Rs. 6 Lakh amount to be paid towards statutory dues cannot be fastened upon them. Additionally, the record also establishes that

the period of time for payment of the balance sale consideration was also extended by the Liquidator on account of the pandemic situation in the country. Taking into consideration the current Covid situation and the facts and circumstances of the case, the Liquidator shall accept the balance sale consideration of Rs. 120 Lakhs + Rs. 6 Lakhs ('MSD') without charging any interest provided the amount is deposited in the account of the 'Corporate Debtor' within 10 days from the date of receipt of a copy of this Order. The other directions with respect to Title deeds and documents, issued by the Learned Adjudicating Authority in the Impugned Order stand confined.

11. For all the aforenoted reasons we see no illegality or infirmity in the Impugned Order passed by the Learned Adjudicating Authority and hence this Appeal fails and is accordingly dismissed. No order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
01st June, 2021

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