

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, CHENNAI**

IA/480/2020 in TCP/130/IB/CB/2017
file under section 60 (5) (c) of the
Insolvency and Bankruptcy Code,
2016.

In the matter of **M/s. Auro Mira Biopower India Private
Limited**

M/s. Sri Gomathi Energy Private Limited

Rep. by its Managing Director Mr. P. Srinivas Rao
1-7-289/C, 126, Block-B, 2nd Floor,
Jaya Mansion, Opp. Centro, S. D Road,
Secunderabad, Telangana-500003

---Applicant

Vs.

Mr. L.K Sivaramakrishnan, Liquidator

of M/s. Auro Mira Biopower India Private Limited
"Rajparies Trimeni Towers", 1st Floor,
147, G N Chetty Road, Chennai-600017.

---Respondent

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R. SUCHARITHA, MEMBER (JUDICIAL)

S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

For the Petitioner: *Shri. Arvind Rajagopal, Advocate*

For the Respondent: *Shri. V.V Siva Kumar, Advocate*

ORDER

Per: S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

Order Pronounced on: 05.08.2020

This application has been filed under section 60(5) (c) of the
Insolvency Bankruptcy Code, 2016 (in short "**the IBC Code, 2016**")

by the Applicant namely M/s. Sri Gomathi Energy Private Limited (hereinafter referred as "Applicant") with a prayer as follows:-

- a) To direct the Respondent/Liquidator to extend the term for payment of balance consideration amount without penal interest upto 4 months subsequent to lifting of the lock down imposed by the Central/ State Government; and
- b) To direct the respondent to no impose any penal interest and demand payment for maintenance expenditure as conditions for such extension and during the extended period
- c) To restrain the Respondent from enforcing the forfeiture clause in their Letter of Intent and selling the property under the private sale transaction to any other party during the extended period.

2. Learned counsel for the Applicant submitted that the Respondent herein who was appointed as Liquidator for M/s.Auro Mira Biopower India Private Limited (Corporate Debtor) by this Tribunal on 16.07.2018 has filed MA/711/2019 seeking permission to sell the assets of the Corporate Debtor based on the interests evinced by interested parties. The Adjudicating Authority vide its order dated 27.09.2019 permitted the Respondent/Liquidator to

conduct 'private sale' to dispose the assets so as to distribute the sale proceeds in accordance IBC provisions.

3. It is further submitted that the Applicant herein made an offer to the Respondent for the purchase of 18 Mega Watt Power Plant, Civil Work, Shed and Land of the Corporate Debtor for Rs.10.536 crores (Rupees Ten Crores Fifty Three Lakhs and Six Thousand only) including all the applicable taxes and duties and excluding registration charges/stamp duty on the cost of the land. The Respondent/Liquidator accepting the above offer through e-mail, requested the Applicant to pay 10% of the offered amount. The total offer amount was to be paid in three tranches viz. Tranch-I 10%, Tranch-II 15% and Tranch-III 75% on or before 20.03.2020. As on 18.03.2020, the Applicant has remitted Rs.2,62,60,000/- (Rupees Two Crores Sixty Two Lakhs, Sixty Thousand only). Due to Covid-19 pandemic, on the request of Applicant, the Liquidator extended time upto 30.06.2020. Since the Applicant was unable to optimally use the extended period, the Liquidator ultimately proposed in his letter dated 03.06.2020 to extend last date of payment upto

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30.09.2020 subject to the following conditions to be fulfilled by the Applicant:

- i) payment of Rs.25 lakhs on or before 15.06.2020 (based on factors, namely Maintenance and Insurance cost of the Plant and time value of money); or*
- ii) Alternatively, payment of maintenance and insurance costs at actual every month and a nominal interest of 6% p.a. on the outstanding amount to be paid from 20.03.2020 till the date of final payment of the balance consideration.*

4. It is stated that in the present economic conditions, the Applicant was unable to honour their obligations and imposition of unreasonable conditions as above by the Respondent /Liquidator and hence approached this Adjudicating Authority seeking appropriate relief.

5. In the reply filed on behalf of the Respondent, it was contended that as per the Letter of Intent (LoI) dated 21.01.2020, it was specifically agreed between the parties that the First Tranch of 10% payment Rs.1,05,36,000/- be paid on or before 01.01.2020, the Second Tranch of 15% payment of Rs.1,58,04,000/- be paid on or

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before 25.01.2020 and Third Tranch of 75% payment Rs.7,90,20,000/- be paid on or before 20.03.2020 and in case of default in any of the aforesaid payment, the Respondent is at liberty to forfeit 25% of the above payment. Terms and Conditions of Letter of Intent (LoI) dated 21.01.2020 are as follows:

Transaction:

The Purchasing party shall remit a sum of Rs.10,53,60,000 (Rupees Ten Crores Fifty Three Lakhs and Sixty Thousand only) (“Offer amount/Purchase Price”) including taxes at the applicable rates and excluding Registration charges/stamp duty towards purchase of Power Plant, Civil Work, Shed and Land of Auro Mira Biopower India Private Limited.

Conditions precedent for purchase:

“The Purchasing Party shall be required to execute the terms of this Letter of Intent (LoI) and shall submit other documents provided by the Liquidator within a period of 15 (fifteen) days from announcement of successful bidder.

The Purchasing Party shall assess, analyze, evaluate and take necessary steps for restarting the operations and repairing the plant and machinery by intimating a prior communication to the Liquidator with all the details till full consideration is remitted.

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The Purchasing Party shall take adequate insurance against the plant and machinery as well as against the personnel to be deputed at the site, if any. The copy of the insurance policy is required to be submitted to the Liquidator within 7 days of receipt of LoI.

In case the remaining payment is not remitted within the timeline or other required conditions/documents are not executed, the Liquidator shall forfeit amounts remitted, subject to a maximum of 25% of the offer amount.

Tranches – Total Consideration:

Payment Terms:

*Tranche 1 – 10% of the offer amount on or before 07.01.2020**

15% of the offer amount on or before 25.01.2020

75% of the offer amount on or before 20.03.2020

** Tranche 1 – Rs.1,05,36,000/- (10% of Rs.10,53,60,000/-). Due to unavoidable circumstances (Bank Strike), Tranche-1 was mutually decided to be remitted on or before 13.01.2020. An amount of Rs.1,01,00,000/- (part of Tranche-1) was paid on 10.01.2020 and an amount of Rs.4,50,000/- was paid on 16.01.2020.*

Transfer of Property:

Within a period of 10 days of receipt of deposit of the entire consideration by the Proposed Purchaser in the prescribed account, the property will be transferred, subject to execution of documents and other statutory formalities.

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The Purchasing Party shall place his security person at the site on receipt of LoI, jointly along with the security personnel deputed by the Liquidator.

On deposit of the entire consideration it is responsibility of the bidder to immediately take charge of the assets and will be his complete responsibility.

Costs, Expenses and Tax Implication:

All taxes applicable (including stamp duty implications and registration charges) on sale of assets would be borne by the purchasing party.

6. It is further contended that the First and Second Tranches of payment were belatedly paid by the Applicant. It is submitted that the compliance of the LoI ought to have been completed by 20.03.2020 and since that date, the maintenance of the property was the duty of the Applicant. The Respondent had suggested to the Applicant to bear the maintenance expenses from 20.03.2020. The Corporate Debtor has no funds to bear such additional expenses and the stakeholders have also been reluctant to bear the said maintenance expenses, due to the default committed by the Applicant. In the light of the above, for the default committed by

the Applicant, the aforesaid liabilities cannot be saddled upon the Corporate Debtor under liquidation.

7. It is also submitted that the LoI was entered between the parties on 21.01.2020 i.e. prior to the Covid-19 pandemic. The last date of payment was as late as 20.03.2020, thereby the lock down imposed by the Government does not render the compliance of the LoI an impossible act under Section 56 of the Indian Contract Act, 1872. It is settled law that where a party to a contract has already committed breach of contract, he cannot subsequently rely on a subsequent event to his benefit and detriment to the Corporate Debtor. Furthermore, this Tribunal cannot enforce specific performance of contract since it is a contract which is in its nature determinable and is so dependent on the personal qualifications of the parties. In the light of the above, it has been submitted by the Respondent/Liquidator that the prayer seeking for extension of the period of LoI is not maintainable under law and liable to be rejected.

8. It has been submitted by the Respondent/Liquidator that with regard to the relief seeking to restrain the Liquidator from enforcing

the 'Forfeiture Clause' and selling the property under private sale, the LoI does not create any right, title or interest in the property in favour of the Applicant. Therefore, the above relief sought by the Applicant cannot be granted under the provisions of Specific Relief Act, 1963.

9. It has been submitted by the Respondent/Liquidator that the Applicant has not produced any document which entitles it to claim any relief whatsoever against the Respondent or with regard to the Corporate Debtor. The applicant wilfully and intentionally had chosen to prolong the payment under the guise of national lock down even though sufficient time was given upto 30.09.2020 for payment. Therefore, it is prayed that this Applicant be restrained from creating hindrances in the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor and the present Application ought to be dismissed with costs in the interest of justice and equity.

ORDER

1. Upon perusing the material placed before this Tribunal, it is seen that the Applicant ought to have made the payment towards

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the last tranche by 20.03.2020. It is also seen that even in the case of earlier tranches, the payments were made belatedly. The lockdown announced by the Central/State Governments was from 25th March 2020 by which date all the payments required to have been made were not paid by the Applicant. In view of this, the Applicant cannot seek to prolong the liquidation process indefinitely upto 4 months subsequent to the lifting of the lock down and also force the Corporate Debtor to bear the maintenance expenditure without imposing any penal interest on the Applicant. The Applicant has also sought for restraining the Respondent/Liquidator from enforcing the 'forfeiture clause' under the Letter of Intent (LoI) and selling of the property under "private sale".

2. From the facts mentioned above, it is seen that the lockdown did not in any way affect the ability of the Applicant to make the payment and the Applicant has agreed to the conditions mentioned in the Letter of Intent (LoI) and at this point of time cannot seek to renege on his undertakings. After hearing the issues raised by the Applicant as well as Respondents and in order to ensure speedy

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realization of the amount due to the financial and other creditors, this Tribunal is of the opinion that there is no merit in the application made by M/s. Sri Gomathy Energy Private Limited and the application is liable to be dismissed as untenable under the provisions of law.

3. Accordingly the application in IA/480/2020 is hereby dismissed.

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[S. VIJAYARAGHAVAN]
Member (Technical)


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[R. SUCHARITHA]
Member (Judicial)

TJS/KNP