NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)
Company Appeal (AT)(CH)(Ins) No.416/2022 & IA Nos.1018, 1019 & 1020/2022
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)
(Arising out of the Impugned Order dated 12.10.2022 in IA (IBC)/972/2022 in CP (IB) No.678/7/HDB/2018 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench, Court No.II)

In the matter of:

MCM Pacific PTE Ltd.,
Having its Office at 911 Lorong 1 Toa Payoh,
#25-01-Oleander Towers, Singapore … Appellant
V
Mr. Pankaj Dhanuka
Liquidator of Lanco Kondapalli Power Limited
Having its registered Office at FE 328, Sector 3,
Salt Lake City, Kolkata 700 106,
West Bengal … Respondent

Present :

For Appellant	:	Mr. Elayarajkumar, Advocate M/s. Ramalingam Associates
For Respondent	:	Mr. Abhishek Swaroop, Advocate & Mr. Naman Kamdar, Advocate

ORDER

(Virtual Mode)

28.11.2022: Heard both sides, at the 'Admission stage', of the instant Comp. App. (AT) (CH) (Ins) No.416/2022.

2, The Learned Counsel for the 'Appellant' submits that the instant Comp. App. (AT) (CH) (Ins) No.416/2022 is preferred by the 'Appellant', as an 'Affected Person', in regard to the 'Impugned Order' dated 12.10.2022, passed by the 'Adjudicating Authority'. (National Company Law Tribunal, Hyderabad Bench, Court No.II) in IA (IBC)/972/2022 in CP (IB) No.678/7/HDB/2018.

3, The 'Adjudicating Authority', (National Company Law Tribunal, Hyderabad Bench, Court No.II), while passing the 'Impugned Order' dated 12.10.2022 in IA (IBC)/972/2022 in CP (IB) No.678/7/HDB/2018, at 'Paragraph Nos.11 to 16', had observed as under:-

> 11. *"Shri Prakash, Learned Counsel appearing for the Liquidator states that the request of the applicant for extension of time was placed before the Stakeholders' Consultation Committee (SCC) on 21.09.2022. The Stakeholders' Consultation Committee has, by its decision dated 21.09.2022, rejected the request of the applicant and declined to grant extension of time to make the balance payment. Minutes of Meeting of 14th Stakeholders' Consultation Committee (SCC) is at Annexure R/3 (Page 33-39) of the Affidavit-in-Reply filed by Shri Pankaj Dhanuka, Liquidator.*

The relevant discussion is at Pages 36 and 37 of the Affidavit-in-Reply.

12. While it is the stand of the applicant that he was not called to the Meeting of 14th Stakeholders' Consultation Committee (SCC) held on 21.09.2022, despite specific direction of this Tribunal to the applicant to approach the Stakeholders' Consultation Committee, the Learned Counsel for the Liquidator, on the contrary, pleads that one e-mail communication was sent to the successful bidder followed by telephonic intimation. He, however, did not participate in the Meeting for reasons best known to him. Hence plea of no opportunity is denied.

13. On the basis of Bid Process Agreement, it is clear that in respect of Category – B, Parcel – 4, Asset there is timeline prescribed in the Updated Process Document, viz., date of registration, date of auction, date of submission, etc. Such timelines can be extended at the discretion of the Liquidator. However, the timeline which cannot be extended is payment of the sale consideration by the successful bidder. Payment of the final amount by the bidder should be within 90 (ninety) days with interest and 30 days without interest from T. The only benefit that the successful *bidder gets is 30 days without interest. The prescribed period for payment of the full consideration is 90 days with interest from the date of LoI(s). No further extension is contemplated in the Bid Process Document. Therefore, the plea for extension cannot be countenanced by the nature of Bid Document and the terms contained therein.*

14. Paragraph 59, sub-clause (iii) of the United Process Document dated 08.04.2022 also makes it clear that if there is failure to pay the entire final consideration within the timeline, it will result in cancellation of the LoI and further consequences. Therefore, the plea of the applicant seeking extension of time does not merit consideration.

15. We further observe that a formal letter is required from the bidders, which is already extracted above. In that a condition is put upon all the bidders that once bid is confirmed the bidder cannot withdraw and that the bid is valid for a period. This does not give a right to the applicant to seek extension of time. In any event the application is bound by the time line as per the relevant clause.

16. The applicant relied upon decision of the Hon'ble NCLAT in ***Standard Surfa Chem India Pvt. Ltd.*** *Vs.* ***Kishore Gopal Somani*** *rendered in Company Appeal (AT) (Insolvency) No.684 of 2021, a copy of which is produced at Annexure – 3 of the compilation of documents filed by the applicant. The said decision does not apply to the facts of the present case. The facts of para 31 of the said decision clearly provides for extension on timelines which is not the case in the present case. Hence it is not applicable to the present case. We also hasten to add that in matters like the present case, NCLT has to affirm to the timelines within the scope and ambit of the Insolvency & Bankruptcy Code, 2016 to resolve the cases in liquidation of value of assets of the Corporate Debtor. If such time lines are not maintained the value of the assets gets deteriorated and the object of Insolvency & Bankruptcy Code, 2016 will be lost".*

and ultimately 'dismissed' the 'Interlocutory Application', without Costs.

4. The 'Appellant' / 'Petitioner' in IA (IBC)/972/2022 in CP (IB) No.678/7/HDB/2018 (Filed under Section 60(5) of the Insolvency & Bankruptcy Code, 2016 and the IBBI (Regulation Process) Regulations, 2016, read with Rule 11 of the NCLT Rules, 2016), before the 'Adjudicating Authority'. (National Company Law Tribunal, Hyderabad Bench, Court No.II) had averred that the CP (IB) No.678/7/HDB/2018 was filed by the 'Financial Creditor', to initiate 'CIRP', in regard to the 'Corporate Debtor'.

The said ‘Petition’ was ‘Admitted’, by the ‘Adjudicating Authority’, (National Company Law Tribunal, Hyderabad Bench, Court No.II) on 23.04.2019. By an ‘Order dated 16.04.2021, ‘Adjudicating Authority’, (National Company Law Tribunal, Hyderabad Bench, Court No.II) had placed the ‘Corporate Debtor’ under the ‘Liquidation Process’ and appointed the ‘Respondent’ as the ‘Liquidator’.

5. It comes to be known that the ‘Respondent’ / ‘Liquidator’ had issued a ‘Process Document’ dated 08.04.2022, in respect of an ‘E-Auction Process’ (Amended and Supplemented from time to time). In regard to the ‘Public Announcement’ and ‘Process Document’, the ‘Appellant’ / ‘Petitioner’ had furnished a ‘Bid’, in the ‘E-Auction’ process, for the following Parcel as per Annexure II of the ‘Process Document’ with ‘Financial Proposal’ of INR 136,11,30,698/- and the same runs as under: -

> *‘Category B (Parcel 4) – Assets of Phase III of the Corporate Debtor in parcel as mentioned in Schedule C of the Process Document.*
>
> *Parcel – 4 – Assets of Phase III of the Corporate Debtor in parcel as mentioned in Schedule C of the Process Document amended as on April 08,2022.*

6. In the ‘E-Auction Process’, the Petitioner was declared as the ‘Successful Bidder’ in respect of the Parcel, in question : -

Category B (Parcel 4) – Assets of Phase III of the Corporate Debtor in parcel as mentioned in Schedule C of the Process Document.

Parcel – 4 – Assets of Phase III of the Corporate Debtor in parcel as mentioned in Schedule C of the Process Document amended as on April 08,2022.

7. The ‘Respondent’ / ‘Liquidator’ had issued a ‘Letter of Intent’ dated 21.06.2022 to and in favour of the ‘Appellant’ / ‘Petitioner’, in regard to the purchase of aforesaid Assets. The ‘Petitioner’ / ‘Appellant’, in terms of the ‘Letter of Intent’ dated 21.06.2022, and the ‘Process Document’ dated 08.04.2022, was required to effect the ‘Payment’ of the ‘entire sale’ / ‘purchase consideration’, within ‘30 Days’ and in case, the ‘payment’ was not made within ‘30 Days’ from the date of ‘Receipt’ of ‘Letter of Intent’, the ‘unpaid sum’, shall carry an ‘interest’ of 12% per annum. Indeed, the ‘Petitioner’ / ‘Appellant’ was required to make ‘payment’ of the ‘whole purchase consideration’ within ‘90 Days’ from the date of receipt of the ‘Letter of Intent’.

8. The 'Petitioner' / 'Appellant' had already made payment of Rs.14,94,23,947/- to the 'Respondent' / 'Liquidator', in tune with the 'Letter of Intent' dated 21.06.2022 and the 'Process Document' dated 08.04.2022. Because of the unforeseen circumstances (including backing out of the 'International Investors of the 'Petitioner' / 'Appellant' and sharp depreciation in Mayanmar currency, within a short time), the 'Petitioner' / 'Appellant' was unable to 'disburse' the remaining 'Purchase Consideration'. These aspects were brought to the 'Notice' of the 'Respondent' / 'Liquidator' and the 'Petitioner' / 'Appellant' had prayed for an 'extension of time' before the 'Respondent' / 'Liquidator' to extend the time for effecting the 'Payment'.

9. The forceful stand of the 'Appellant', is that the 'United Amera Bank' had duly agreed to extend fund facility to the 'Appellant'. However, because of the 'current policy' in Mayanmar, wherein for every loan that was approved by the Bank, a prior permission from the Government is required and that the 'Bank' had informed the 'Appellant', that it was not in a position to disburse the required fund within 'Three to Four Months'.

10. Through a 'Letter dated 15.09.2022, the 'Appellant' / 'Petitioner' had informed the 'Respondent' / 'Liquidator', that due to the unforeseen event (including backing out of the International Investors of the 'Appellant' / 'Petitioner') and sharp depreciation in 'Mayanmar Currency', within a 'short

time', the 'Appellant' was not able to disburse the 'whole purchase consideration' and, accordingly, it made a request to the 'Respondent' / 'Liquidator' to grant the 'Appellant', some additional time of '4 to 5 months', approximately, to 'disburse' the 'purchase consideration'.

11. Since the '90 Days' period from the 'Receipt' of 'Letter of Intent' dated 21.06.2022, was coming to an end on 18.09.2022, the 'Appellant' / 'Petitioner' had prayed for an 'extension of time' to the 'Adjudicating Authority'. (National Company Law Tribunal, Hyderabad Bench, Court No.II), being the 'Successful Bidder' for payment of 'balance consideration'.

12. Before the the 'Adjudicating Authority'. (National Company Law Tribunal, Hyderabad Bench, Court No.II), the 'Respondent' / 'Liquidator' had filed a 'Reply' / 'Response', inter alia, stating that the 'Sale of Parcel 4 of Assets of the 'Corporate Debtor' was informed by the 'Terms and Conditions', mentioned in the 'Process Document' dated 08.04.2022 and the 'Letter of Intent' dated 21.06.2022. Further, the 'economic hardship' in performance of a 'Contract', does not by itself render, a 'Contract' impossible to perform. That apart, the parties to the 'Contract' cannot wriggle out of the 'obligations' by mentioning charges, in the 'economic scenario' because of the 'unforeseen circumstances'.

13. On perusal of the 'Reply' of the 'Respondent' / 'Liquidator' to IA (IBC)/972/2022 in CP (IB) No.678/7/HDB/2018 shows that the 'Appellant' / 'Petitioner', before the 'conduct' of 'E-Auction' on 16.06.2022, had submitted a 'Payment Schedule' along with the 'Requisite Proof' of 'Funds', and in fact, the 'Appellant' was invited to the 'meeting' of the 'Stakeholders Consultation Committee', that took place on 14.06.2022, to present its proposal, because of the assurances given by the 'Appellant' / 'Petitioner' and the 'Payment Schedule' of the 'Appellant' / 'Petitioner' having been considered by the 'Members' of the 'Stakeholders Consultation Committee', the 'Committee' that had fit to permit the 'Appellant' to participate in the 'E-Auction'.

14. Because of the lapse of '90 Days period', the 'Respondent' / 'Liquidator' had proceeded to 'forfeit the amount' paid by the 'Appellant' / 'Petitioner' towards the 'acquisition' of 'Parcel 4 of the Assets' and cancelled the 'Letter of Intent' dated 21.06.2022 and in fact the forfeiture was made by the 'Respondent' / 'Liquidator' through an 'E-Mail dated 20.09.2022. Also, that in the 14^{th} meeting of the 'Stakeholders Consultation Committee', the 'Appellant' was invited to participate in the said 'Meeting', but, none was present for and on behalf of the 'Appellant' / 'Petitioner'. The 'Members' of the Stakeholders Consultation Committee', after deliberating the issues, at

length, had 'Rejected', the request made by the 'Appellant' because it had 'defaulted' in 'honouring' the 'Terms of 'Letter of Intent' for the 2nd time. Moreover, in the 1st of 'E-Auction' that took place on 11.01.2022, the 'Appellant' was declared as a 'Successful Bidder' for 'Phase III Assets' and fails to furnish 'Performance Security' and also proposed payment time line of 6-9 months as against timeline of 1-3 months as per IBBI Regulations. Therefore, the 'Letter of Intent' issued to the 'Appellant' was cancelled in 1st 'E-Auction' round.

15. According to the 'Respondent' / 'Liquidator', the 'Appellant' / 'Petitioner' has paid only 10% of the 'Total Consideration' till date and there was no 'sufficient source' of fund demonstrated by the 'Appellant' for arranging the 'balance payment', and this aspect was observed by the 'Stakeholders Consultation Committee', in their 14th Meeting held on 21.09.2022. Added further, the 'Appellant' / 'Petitioner' till date had not remitted any amount to the 'Respondent' / 'Liquidator' in relation to the incurring of all 'expenses', pertaining to the 'maintenance' and 'preservation' of Phase III Assets from the date of 'Declaration' of the 'Successful Bidder' in the 'Process Document', as per the 'Terms'.

16. The 'crucial aspect' is that the period of 15 Months, available under 'I&B Code, 2016' and 'Regulations' were already exhausted and the process

was undergoing because of the 'Order' dated 07.09.2022 passed by the 'Adjudicating Authority', (National Company Law Tribunal, Hyderabad Bench, Court No.II) extending the 'Liquidation Process', for a further period of 'six months'. Therefore, the Respondent / Liquidator prays for 'dismissal' of the IA (IBC)/972/2022 in CP (IB) No.678/7/HDB/2018.

17. Assailing the correctness, validity and propriety of the 'Impugned Order' dated 12.10.2022, passed by the 'Adjudicating Authority', (National Company Law Tribunal, Hyderabad Bench, Court No.II), the Learned Counsel for the 'Appellant' submits that in terms of the 'Letter of Intent' dated 21.06.2022 and the 'Updated Process Document' dated 08.04.2022, the 'Appellant' had already effected the payment of Rs.14,94,23,947/- to the Liquidator.

18. Furthermore, it is the version of the 'Appellant' / 'Petitioner' that due to the unforeseen circumstances, including backing out of the 'International Investors' of the 'Appellant' and 'sharp depreciation' in 'Mayanmar currency', in a 'short time', the 'Appellant' was not in a position to disburse the 'balance purchase consideration'. Furthermore, the Liquidator had issued 'E-mails', calling upon the 'Appellant' to make payment.

19. It is the stand of the 'Appellant' that it had replied to the 'Notice' of the 'Liquidator', explaining the circumstances in which the 'Appellant' could not

pay the ‘Balance Purchase Consideration’ and had prayed for an ‘extension of time’, before the ‘Liquidator’, to make payment.

20. The ‘grievance’ of the ‘Appellant’ is that it had approached a local bank (i.e. United Amara Bank) to fund them and that the Bank had agreed to extend such facility to it, due to ‘Current policy’ in ‘Mayanmar’, wherein for every ‘Loan’ i.e., approved by the ‘Bank’, prior permission from the ‘Government’ is required and the ‘Bank’ had informed the same to the ‘Appellant’ and the Bank would be in a position, to provide the required fund, within ‘Three to Four Months’.

21. Not resting with the above, it is represented on behalf of the ‘Appellant’ that the ‘Appellant’ through the letter dated 15.09.2022 had informed the ‘Liquidator’ that due to ‘Investor Fund’ backing out of the ‘International Investors’ and sharp depreciation in ‘Myanmar currency’, within a short time the ‘Appellant’ was not able to disburse the ‘entire purchase consideration’ and hence, made a request before the ‘Liquidator’, to grant some ‘Additional Time’, approximately ‘Four to Five Months’ to pay the ‘Purchase Consideration’.

22. It transpires that the ‘Appellant’ had ‘pleaded’ with the ‘Liquidator’ to the fact that the period of ‘90 days’ from the receipt of ‘Letter of Intent’ dated 21.06.2022 is coming to an end on 18.09.2022. But due to the unforeseen

circumstances, as mentioned aforesaid, the 'Appellant' was not in a position to make payment of the 'entire purchase consideration' of the Liquidator.

23. The contention advanced on behalf of the 'Appellant', before this 'Tribunal', is that the 'Adjudicating Authority', (National Company Law Tribunal, Hyderabad Bench, Court No.II) should have considered that the 'Appellant' has filed the 'Subject Application', praying for an extension of time before the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench, Court No.II) for '90 days' time', with a 'Bonafide' request, to extend the time, to pay the 'balance purchase consideration', to complete the sale by 'exhausting all avenues', including approaching the Bank for 'Funding'.

24. Per contra, it is a submission of the Learned Counsel for the 'Respondent' / 'Caveator' that the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench, Court No.II) had rightly passed an 'impugned order' in dismissing the IA (IBC)/972/2022 in CP (IB) No.678/7/HDB/2018 by assailing cogent, coherent and just reasons for dismissing the Application and this 'Tribunal', as an 'Appellant Authority' may not interfere with the 'impugned order' of 'dismissing' the Application, passed by the 'Adjudicating Authority', (National Company Law Tribunal, Hyderabad Bench, Court No.II).

25. It is an evident from the terms of Paragraph 3.2 of the ‘Updated Process Document’ dated 08.04.2022, that, if there is failure to the ‘Bid’, within the time of the ‘Letter of Intent’, further consequences will flow for the ‘Default’. It is relevantly pointed out, that if a condition is to be followed by the ‘Bidders’ and that when a ‘confirmation of the Bid’ had taken place, then, at a later point of time, it is not open to the concerned ‘Bidder’ to resile from the same and it cannot be brushed aside that the ‘Bid’ is ‘valid’ for a particular certain period.

26. The ‘Appellant’ / ‘Applicant’ either as a matter of routine or as a matter of right, cannot ‘lay a claim’ to seek for an ‘extension of time’. In this connection, this ‘Tribunal’ points out that I&B Code, 2016 is an ‘inbuilt and self-contained code’. Speed is the Essence / Gist of the Code. Moreover, the Provisions of I&B Code, 2016 are summary in nature, and they are not adversarial in character. Also, that the ‘Appellant’ / ‘Applicant’ is bound, as per the relevant clause of the ‘Letter of Intent’ concerning the ‘Bid’.

27. No wonder, the I&B Code, 2016 stipulates the ‘time limit’ that the period, in which the entire ‘CIRP process’ is to be completed, with a view to ensure maximisation of value of ‘Assets’ of the Corporate Debtor and to avoid ‘depreciation value’, of the property concerned.

28. More importantly, a 'Successful Bidder' gets '30 Days' time 'without interest'. The payment of 'Loan sum', by the 'Successful Bidder' / 'Bidder' ought to be made, within '90 days with interest' and '30 days without interest'. The only benefit that the 'Successful Bidder' derives is that no interest for '30 Days' from the date of 'Letter of Intent'. The balance 'full sale consideration' (money consideration) is to be paid within 90 days, of course, with 'interest', on some pretext or the other.

29. In the light of foregoing, this 'Tribunal' keeping in mind that the 'Appellant' had defaulted in 'fulfilling the tenor and spirit' of 'Letter of Intent' for the 'second time', and also, the observations, made by the 'Members of the Stakeholders Consultation Committee', in their 14^{th} Meeting held on 21.09.2022 and on a 'cumulative consideration' of the facts and circumstances of the present Case, in a 'Holistic Manner', the plea of the 'Appellant', in seeking 'an extension of time', in IA (IBC)/972/2022 in CP (IB) No.678/7/HDB/2018 towards the payment of 'balance purchase consideration', the said request cannot be acceded to by this 'Appellate Tribunal', to secure the 'ends of justice'.

29. Be that as it may, this 'Tribunal' on going through the contents of the 'impugned order' dated 12.10.2022 in IA (IBC)/972/2022 in CP (IB) No.678/7/HDB/2018 comes to an 'inevitable and unescapable conclusion'

that the ‘impugned order’ of dismissing the IA (IBC)/972/2022 in CP (IB) No.678/7/HDB/2018 is free from any ‘Legal Flaws’. Consequently, the instant Comp. App. (AT) (CH) (Ins) No.416/2022 fails.

In fine, the Comp. App. (AT) (CH) (Ins) No.416/2022 is dismissed. No Costs. The connected IA No.1018/2022 (For ‘Stay’), IA No.1019/2022 (For ‘Others’) and IA/1020/2022 (For ‘Direction’) are Closed.

[Justice M. Venugopal]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

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