

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 10.02.2010

+ W.P.(C) 12420/2009

PADMAVATI BUILDTECH & FARMS PVT. LTD.

..... Petitioners

Through: Mr. Mukul Rohatgi, Sr. Advocate,
Mr. Rajiv Nayyar, Sr. Advocate with Mr.
Mahesh Agarwal, Mr. Rishi Agrawala,
Mr. Rahul Dwarkadas and Ms. Neha
Nagpal, Advocates for the petitioners

-versus-

NATIONAL TEXTILE CORPORATION LTD. & ORS.

..... Respondents

Through: Mr. A.S. Chandhiok, ASG with
Mr. Sanjoy Ghose and Mr. Bhagat
Singh, Advocates for the respondent
no. 1
Mr. Mohan Parasanan, ASG with Mr.
Zoheb Hossain, Mr. Alok Prasanna
Kumar and Ms. Aarthi Rajan, Advocates
for respondent no. 2
Mr. Sandeep Sethi, Sr. Advocate with
Mr. R. Chandrachud, Advocate for
Applicant/Intervenor in CM No.
1843/2010

CORAM:-

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MS. JUSTICE VEENA BIRBAL

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

SANJAY KISHAN KAUL, J (ORAL)

CM No. 1844/2010 (for exemption)

Allowed, subject to just exceptions.

CM No. 1843/2010 (for intervention)

Notice is accepted by learned counsel for the parties.

It is agreed that the applicant be permitted to intervene and make the submissions during the course of hearing. Learned counsel for the applicant does not seek to place on record any documents.

Application is accordingly allowed.

W.P.(C) No. 12420/2009

Rule D.B.

At the request of learned counsel for the parties, petition is taken up for final disposal.

M/s Finlay Mills Limited, a private limited company had a textile undertaking known as Finlay Mills located in Mumbai. The management of Finlay Mills was taken over by the Government of India on 18.10.1983 in pursuance to the Textile Undertakings (Taking Over of Management) Act, 1983 and was nationalized under the Textile Undertakings (Nationalization) Act, 1995. The ownership of Finlay Mills was, thereafter, transferred to National Textile Corporation (South Maharashtra) Limited. The said company subsequently went into difficult financial times and proceedings were initiated before the Board of Industrial and Financial Reconstruction (BIFR). The manufacturing activity has stopped since 2006. We may note at this stage that the workmen of NTC have also intervened in the present matter and have pointed out to us that since the year 2002, they have been paid only the basic wages drawn by them at that stage in terms of an understanding

reached and are thus, directly affected by the subject matter of the present proceedings relating to the sale of the mill/land.

A scheme was formulated before the BIFR and in pursuance to the scheme, the sale of this textile unit was envisaged consisting of this surplus freehold land and a closed mill alongwith structures and plant and machinery on outright basis. An Asset Sale Committee (ASC) was also set up consisting of senior officials of the Ministry and as per a letter dated 12.03.2007 of the Ministry of Textiles which has been placed on record, it has been categorically stated that the Ministry has found it appropriate that all the decisions of sale of assets are finally and fully rested with the ASC and no reference to Ministry of Textiles is required in this behalf, the ASC being fully empowered to take all decisions of sale of assets of the company in the best interest of NTC.

The first tender was initiated in December, 2008 with a reserve price of Rs. 1,065 crores but the highest bid was a meager bid of Rs. 405 crores. The auction bid effort thus failed. The second tender was held in March, 2009 with a lower reserve price of Rs. 710 crores. Unfortunately, this process also failed because of a bogus bid. The third tender was floated in July, 2009 and it is an undisputed position that no reserve price was specified in the advertisement. Two bids were received. The petitioner submitted the higher bid of Rs. 657.90 crores which was declared as the highest bid and the petitioner was thus H-1.

The controversy has arisen on account of the fact that as per the respondents, there was an undisclosed reserve price of Rs. 710

crores (which is in fact the reserve price at the stage of the second tender) and the bid of the petitioner did not match this undisclosed reserve price. This resulted in some discussions in the ASC as to whether the petitioner should be called for a negotiation of the bid. There was apparently no unanimity on the same with the result that the ASC suggested that the negotiations, if any, be conducted by the management. After the meeting of the ASC, the Chairman and Managing Director along with other officers of NTC held a discussion with the petitioner in which the management of the petitioner agreed to enhance the bid amount from Rs. 657.90 crores to Rs. 710 crores as per their letter dated 23.07.2009. These facts are clearly recorded in a communication dated 27.07.2009 of the Chairman and Managing Director of NTC/respondent no. 1 addressed to respondent no. 3/ the Secretary, Ministry of Textiles, Government of India. The said communication also shows that the ASC and the management have proceeded under Clause 2.7 of the Conditions of Tender which reads as under:-

"2.7 PROCEDURE FOR SELECTING SUCCESSFUL TENDERER

(i) The sealed offers will be opened in the presence of Member Secretary of the Assets Sale Committee and at least one other member of the ASC. Chairman, ASC is empowered to constitute a Tender Opening Committee specifically for each tender opening, if the presence of Member Secretary, ASC and / or other member for that particular meeting is not possible. All original documents will be signed by members of the Tender Opening Committee in whose presence the tenders are opened.

(ii) Soon after opening the bids, Member Secretary of the ASC shall prepare a 'Comparative Chart' of the offers received and along with all relevant details place the same before the Chairman, ASC.

In case the offer received is less than Reserve Price fixed by the Company, the Chairman, ASC reserves the right to go for fresh tender if so desired and inform the decision in the next meeting of the ASC to avoid delay in re-tendering.

(iii) In case of sale of land, buildings, plant and machinery through a Tender Process by NTC, post tenders negotiations shall be held by the management with H 1 (Highest bidder), if required. After negotiation, the final bid amount shall be placed before ASC for its decision.

(iv) If the highest bid is less than the Reserve Price fixed by the Company, the Chairman, ASC reserves the right to reject the offer and return the EMD."

It was perceived that since the highest offer was below the reserve price, the petitioner should be called for a negotiation in terms of Clause 2.7 (iii) of the tender documents.

The ASC and the management of NTC sought the opinion of the Ministry of Textiles which, in turn, advised that the bidding process should be scrapped and fresh bids should be called through a new tender.

The petitioner, aggrieved by this decision, has filed the present writ petition under Article 226 of the Constitution of India. We have heard learned counsel for the parties and perused the records of the case.

In our considered view, there is a basic fallacy in the decision making process. Whether it be the ASC, the NTC or the Ministry – all three have proceeded on the premise of existence of a reserve price and the highest bid being below the reserved price. If that would have been the situation, then certainly the petitioner was out of court as a bid made below the reserved price could be rejected without assigning any further reasons as per Clause 2.7(iv). These are, however, not the facts of the present case. It is not disputed on

behalf of the respondents that there can be bids with a reserve price or without the reserve price. The ASC in its wisdom in the case of the first two bids did fix a reserve price albeit a lower reserve price in the second bid. Possibly, seeing the fate of these two bid efforts, the third time no reserve price was specified in the auction notice. The result is that it is a case of an auction without reserve price where the petitioner is the highest bidder.

The aforesaid does not imply that the ASC is bound to accept the highest bid but the rejection of the highest bid keeping in mind the past factors of two failed bids would have to be considered in a reasoned order recorded in the file. However, this has not happened in the present case as the premise on which respondents have acted is as if it is a case of failure of the petitioner as the highest bidder to match the reserve price specified in the auction notice.

The petitioner has procured certain documents under the Right to Information Act, 2001. The minutes of the meeting of the ASC dated 23.07.2009 show that the aspect of failure of the earlier two bids have been examined. The relevant issues adversely affecting the property were taken note of. The comparative rates at NTC got from sale of five properties during the months of January to June, 2005 were taken note of whereby the quote received from the petitioner was higher than four of the properties and only less than one property in the premium area of Dadar. The post-tender negotiations were required in view thereof only for purposes of matching the reserve price of Rs.710 crores (undisclosed in the

auction notice). Not only that once again the letter dated 12.03.2007 issued by the Ministry of Textiles intimating that all decisions of sale of assets are final and fully rested with the ASC was noted and, thus, the factum of there being no requirement to refer the matter to the Ministry. The Chairman of NTC also apprehended that the entire revival scheme of BIFR being based on sale of assets, the scheme would be rendered unworkable if the sale does not take place.

The intimation, which was sent to the Ministry of Textiles vide letter dated 27.07.2009 referred to the factum of the highest offer price of Rs.657.90 crores being below the reserve price of Rs.710 crores and the negotiation with H-1 under clause 2.7(iii). The Ministry advised vide letter dated 08.08.2009 to go in for a rebid of the sale of assets on the premise that the bid received was below the reserve price. Thus, this material also shows that even the Ministry has proceeded on a wrong premise of there being a reserve price whereas there was no reserve price indicated in the auction notice.

In our considered view, the ASC ought to have examined the case in terms of the aforesaid parameters and, ultimately, the decision was liable to be placed before the BIFR which would examine and take a decision on whether to confirm the bid or not, the same being done under the scheme of the BIFR.

The decision taken by the respondents predicated on a wrong premise and, thus, erroneous process having been followed, the rejection of the bid of the petitioner on the ground of it not

matching the so-called reserve price cannot be sustained and is quashed.

We direct the ASC to re-examine the bid of the petitioner on a premise that there is no reserve price but the petitioner is the highest bidder. There is an evaluation available in the records of the respondents at Rs. 710 crores which has been matched by the petitioner, in negotiations held as per Clause 2.7(iii). The bid of the petitioner would, thus, be re-examined by the ASC and the due process followed as envisaged under the scheme of the BIFR.

The petition is allowed in the aforesaid terms leaving the parties to bear their own costs.

At this stage, it is pointed out to us that while rejecting the bid, the earnest money deposited by the petitioner has been returned whereafter the petitioner challenged the rejection in the proceedings. Since the matter has to be re-examined, the earnest money should be re-deposited by the petitioner on or before 15.02.2010.

CM No. 12854/2009 (stay)

No further directions are called for on this application.

Application stands disposed of.

SANJAY KISHAN KAUL, J.

VEENA BIRBAL, J.

FEBRUARY 10, 2010
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