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

\+ W.P.(C) 10488/2015

% ***Judgment dated 6th November, 2015***

M/S. BRIGADE ENTERPRISES LIMITED ..... Petitioner

Through : Ms.Manisha Dhir, Mr.Aprove Kapil, Ms.Varsha Banerjee and Mr.Vaibhav Tyagi, Advs.

versus

M/S. KAMANI TUBES LTD. & ANR. ..... Respondents

Through : Mr.Sandeep Sethi, Sr. Adv. with Mr.S. Udaya Kumar Sagar, Ms.Bina Madhavan and Ms.Akanksha Mehra, Advs. for respondent no.1.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (*ORAL*)

CAV 1180/2015

1. Mr.Sethi, learned Senior Advocate, on instructions from the counsel for the respondents, enters appearance on behalf of the respondents.
2. Accordingly, caveat petition stands disposed of.

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3. Exemption allowed subject to all just exceptions.
4. Application stands disposed of.

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5. With the consent of counsel for the parties, this matter is heard at the admission stage itself.

6. Present writ petition has been filed by petitioner under Article 226 read with Article 227of the Constitution of India against the Order dated 28.10.2015 passed by Appellate Authority for Industrial and Financial Reconstruction (hereinafter referred to as the "*AAIFR*"), by which an Order dated 19.7.2010 passed by the Board for Industrial And Financial Reconstruction (hereinafter referred to as the "*BIFR*") by which the application (M.A. No.424/BC/2010) filed by the petitioner herein was dismissed. In M.A. No.424/BC/2010 the petitioner made the following prayers:

> "*Direct ASC to withdraw the cancellation of the proposed sale and not to forfeit the EMD amount as have been conveyed by it vide its letter dated 25.06.2010.*
>
> *Direct ASC to provide the applicant with the four pending documents as enumerated at para 16 of the application.*
>
> *Director ASC to complete the sale transaction after public notice is taken out by the applicant.*
>
> *Direct ASC / M/s.Kamani Tubes Ltd. that the scheduled property be transferred to the applicant free from all encumbrances with a clear marketable title.*
>
> *Direct ASC to maintain status quo till the disposal of the instant application.*"

7. The necessary facts, to be noticed for disposal of the present petition, are that BIFR sanctioned a scheme for revival of respondent no.1 and appointed respondent no.2 as the monitoring agency. Pursuant to an advertisement dated 22.2.2010 published by Assets Sale Committee (hereinafter referred to as the "*ASC*") in the Business Line newspaper, bids were invited for sale of the property having an area of 1,26,540 sq. ft.

bearing Survey No.195/1 and 195/2, situated in Mahadevapura Village, Krishnarajpuram Hobli, Bangalore, South Taluk, Bangalore (hereinafter referred to as the "*subject property*"). The petitioner participated in the said bid and on 8.3.2010 submitted a bid for Rs.20,24,67,000/- for the purchase of the aforesaid property. Rs.30,000,00/- was paid by the petitioner as Earnest Money Deposited (herein after referred to as "EMD"). This amount was subsequently increased to Rs.25,20,00,777/-.

8. According to the petitioner, the EMD was furnished by the petitioner with a specific understanding that the documents required for conducting due diligence with respect to the subject property would be provided within a few days. After the bids were opened, since the petitioner was found to be the highest bidder, petitioner was called for negotiations.

9. It is the case of the petitioner that the desired documents required by the petitioner for conducting due diligence were not be supplied to him. Petitioner claims to have written emails to respondent no.1 to provide the documents, as detailed in the email dated 18.3.2010. It is further the case of the petitioner that as per the condition of NIT, the land was to be converted from agricultural to non-agricultural as per the Karnataka Land Reforms Act, 1961. The petitioner also claims to have visited the office of respondent no.2 at Mumbai on 30.3.2010, claiming requisite documents. Despite promises having been made, the documents were not supplied to the petitioner. The petitioner also claims to have followed up the matter with the ASC. Reminders were issued. Although as per the Minutes of the Meeting dated 10.5.2010 the ASC had promised to supply at least four documents within three or four days, they were not supplied to the petitioner. On the one hand the bid of the petitioner was cancelled on 25.6.2010. The petitioner thereafter filed an application before the BIFR seeking stay of the cancellation and seeking a direction for finalization of

the deed. On 1.7.2010 another advertisement was published by the ASC in the Business Standard Newspaper for sale/development under the joint venture of the subject property, however, on 9.7.2010 the ASC hurriedly proceeded with the auction and purportedly declared M/s Sattva Developers Private Limited as the highest bidder. The bid of M/s Sattva Developers was, however, not accepted. In the meanwhile, the application filed by the petitioner was dismissed by the BIFR. Thereafter a third advertisement was published on 17.8.2010. Meanwhile, in the appeal filed before the AAIFR, a direction was issued that any sale would be subject to the final decision passed in the appeal. Yet another bid was submitted on 1.10.2010 by Kohinoor Infrastructure Limited and an acceptance letter was communicated to the bidder on 25.10.2010.

10. It may be also relevant to note that on 2.6.2011 respondent no.1 was discharged by the BIFR from the purview of the Sick Industrial Companies (Special Provisions) Act, 1985, (for short SICA), as it was no longer a sick industrial company. An appeal was filed by the petitioner and Kamani Employees Union before the AAIFR impugning the Order dated 2.6.2011 and the same is stated to be pending.

11. Ms.Dhir, learned counsel for the petitioner, submits that even as of today, the petitioner is willing to pay the entire amount with interest as envisaged in the bid document to respondent no.1 subject to the respondent no.1 furnishing requisite documents within thirty days. Counsel further submits that petitioner has been diligently pursuing the matter with the ASC seeking copies of relevant documents to enable the petitioner to complete the transaction. It is further submitted by Ms.Dhir that the documents, which were sought from the respondents, were material documents and in the absence of the documents sought petitioner cannot be expected to pay more than Rs.25,00,00,000/-, as it was necessary for the petitioner to

satisfy itself that there were no encumbrances over the property, there were no statutory dues of the Income Tax Department and, thus, in the absence of these material documents, the petitioner could not have paid the amount, as per the bid document the cancellation is thus bad in law. Counsel further submits that the ASC was satisfied with the request of the petitioner seeking such documents, which is evident from the Minutes of the Meeting dated 10.5.2010, which would show that the ASC had promised to supply the documents sought within three or four days. Counsel also submits that in view of the fact that the matter is still pending before the BIFR respondent no.1-company cannot be permitted to sell the property by private negotiations and any sale conducted by respondent no.1 would be illegal. The sum and substance of the arguments of learned counsel for the petitioner are that the petitioner has all along been ready and willing to comply with the terms and conditions of the bid documents; the petitioner has been diligently pursuing the matter with the ASC seeking copies of relevant documents; the ASC has recognized the requirement of the documents and hence has been promising to supply the same; and lastly that the petitioner has all along been ready and willing to complete the transaction and still ready and willing to complete the transaction even now.

12. Mr.Sethi, learned senior counsel appearing on behalf of respondent no.1, submits that the present petition is misconceived and is liable to be rejected for the reason that the petitioner was never a serious bidder. Senior counsel further submits that the petitioner failed to comply with the mandatory requirement of NIT. The petitioner has also failed to point out that the main condition of the bid was that the property was being sold on *"As is where is basis" and "As-it-is-what-it-is basis"* and in view thereof any request for supply of documents was merely be a dilatory

tactics on the part of the petitioner company. Senior counsel further submits that the basic premise of the petitioner of making a conditional bid is unacceptable as the terms of bid documents were to be complied with and the basic terms of the bid document could not have been violated. Reliance is placed by Mr.Sethi on Part A of the Bid wherein details of the property have been given and the following remarks have been made. Part A of the BID reads as under:

"The details of Bid Document – Part A is as follows

Land Area Approx. (In sq. ft)	*Remarks*
1,26,540	*The sale of subject property on "<u>As is where is basis</u>" and "<u>As-it-is-what-it-is basis</u>". However the said land is free from encroachments.*

"Emphasis supplied""

13. Reliance has further been placed by Mr.Sethi on page 265 of the paper book i.e. the bid document, wherein as per the last bullet point – counter conditions and additional conditionals were not accepted by the ASC. The last bullet point reads as under:

- *<u>Bids were counter conditions and also additional conditions will be not accepted by A.S.C.</u>*

"Emphasis supplied"

14. At pages 266 and 267 of the paper book following clauses have also been relied upon by Mr.Sethi, which read as under:

- *Within 15 days of intimation of selection by the Asset Sale Committee (KTL), the Approved bidder would be required to* *provide a **Bank Guarantee** for the full value of the final bid amount and valid for 3 (Three) months and at the sole discretion of the ASC, extendable by another 3 (Three) months.*

- *Approved Bidder must pay the purchase consideration in 2 installments as under:*

    - *50% of the final Bid Value within **30 days** from the date of intimation given by the Company to the Approved Bidder for the acceptance of the Bid.*

    - *Balance 50% of the payment after adjusting EMD amount shall be paid by the Approved Bidder within **30 days** from the date of payment of first instalment.*

- *ASC will have the right to charge the interest @ 15 per annum on unpaid amount after the due date (after 60 days and upto 90 days). However, in case of the delay in payment beyond the 90 days from the date intimation made to Approved Bidder by the Company, ASC shall have the right to forfeit the entire payment made by the Approved Bidder.*

- *EMD from Approved Bidder will be forfeited if the 1st installment of consideration is not paid within stipulated time.*

Procedure for sale under Part-A:

- *Kamani Tubes Limited will provide available documents pertaining to the subject property in their possession for a review by the interested bidder(s) at **204/C, Millers Road, Opp Jain Nursing College, Vasantha Nagar, Bangalore – 560052**. Interested parties/bidder(s) are required to complete their due diligence on the Subject Property before submitting their Bid at its own cost.*

- *The quires raised by bidders will be answered by Sisir and Ravi Associates and also by our Advocates to the extent possible. However the bidders will have to satisfy themselves with regard to all relevant documents relating to subject property, its title, encumbrances, encroachments, extent of area, all liabilities both known and unknown, fees-charges-penalties payable before submission of bid document by them under Bid for Part A.*

15. While relying on the aforesaid terms of the bid document, learned senior counsel for respondent no.1 has urged before this court that, firstly, the subject property was being sold on *"As is where is basis" and "As-it-is-what-it-is basis"*, and secondly, the bidder was to complete his due diligence on the subject property before submitting his bid at its own cost, a stipulation, which has been reproduced hereinabove. It is, thus, contended by Mr.Sethi that since one of the terms of the bid was that due diligence was to be carried out prior to the submission of the bid, the stand of the petitioner that four material documents were not supplied and, thus, petitioner could not comply with the remaining terms of the bid, cannot be accepted. Mr.Sethi has also highlighted that as per the bid document, the bidder was to provide a bank guarantee for the full value of the final bid amount, which was to be valid for three months, to be extended by another three months by ASC. It is further submitted by Mr.Sethi that no bank guarantee was provided by the petitioner and what was sought to be provided by the petitioner was a conditional bank guarantee, which was not acceptable by respondent no.1 herein. It is also submitted that the bidder also did not pay the purchase consideration as per the bid document in two installments and, thus, the bid of the petitioner was rightly rejected and Rs.30,00,000/- forfeited. Another submission of Mr.Sethi, which has been highlighted, is that the queries with regard to the bidders was to be answered by Sisir and Ravi Associates and also by the Advocates to the extent possible, however, all queries were to be answered before the submission of the bid documents. Mr.Sethi has also contended that on account of factual finding rendered by the BIFR and AAIFR, this Court under Articles 226/227 of the Constitution of India would not dislodge the same as the scope of this

Court in these proceedings would be narrow and the view of the two expert tribunals would not be rejected by this Court. Mr.Sethi has also highlighted in the orders passed by the BIFR and AAIFR relevant paragraphs to show that the view taken by the BIFR and AAIFR are cogent and reasonable and, thus, there is no infirmity in the orders so passed.

16. Ms.Dhir, learned counsel for the petitioner, has also contended, while refuting to the submissions made by Mr.Sethi, that the ASC was fully satisfied with the conduct of the petitioner and it is only for this reason that the ASC continued to entertain the petitioner and continued to promise supply of relevant documents, and, thus, the *bonafides* of the petitioner cannot be doubted in any way. Counsel has reiterated that the petitioner is a serious bidder and still ready to complete the transaction within thirty days.

17. We have heard learned counsel for the parties and considered their rival submissions. The basic facts are not in dispute that an advertisement was published by the ASC in Business Standard for sale of subject property on 22.2.2010. The petitioner had participated in the bid and was declared highest bidder after the bid amount was increased Rs. 25,20,00,777/-. It is also not in dispute that the petitioner had paid the earnest money of Rs.30,00,000/-, which was accepted by the respondent.

18. According to the petitioner in the absence of supply of material documents, the petitioner could not complete the transaction and in the absence of documents the cancellation of bid of the petitioner is illegal.

19. In our view, the answer to this submission of learned counsel for the petitioner lies in the bid document, copy of which has been placed on record.

20. We have also extracted the relevant terms of the bid document, which have been relied upon. The most important terms of this bid document is the fact that subject property was to be sold on "*as is where is basis" "and as it is what is basis"*. The terms of the bid document would also show that the bidder was to carry out due diligence prior to making a bid. The relevant clause has been extracted in para 14 aforegoing. Thus, in our view, the stand taken by the petitioner that the transaction could not be completed as the respondent did not provide the necessary documents is without any force and is liable to be rejected.

21. The bid document also makes it clear that any query, which is to be raised by the bidder, cannot be answered by Sisir and Ravi Associates and also the advocates of the respondents to the extent possible that the bidder was to satisfy himself with regard to all the relevant documents relating to subject property, its title, encumbrances, encroachments, extent of area, all liabilities both known and unknown, fees, charges, penalties – all to be checked out prior to the submission of the bid by him under the bid of Part A. The term of the bid, in our view, is clear and explicit. Every kind of liability has been detailed in the term and in case the petitioner was interested, in our view, due diligence should have been carried out by him prior to making a bid and not after the bid was made. The petitioner has also failed to furnish a bank guarantee, which was to be furnished within fifteen days of the selection. The bank guarantee was not furnished and any variation made by the ASC in respect of this cannot be acceptable as the bank guarantee admittedly was not furnished within fifteen days.

22. The BIFR and the AAIFR have dealt with the matter with reasoning and have reached a finding, which cannot be faulted. Even otherwise in the proceedings under Article 226 of the Constitution, we do not find any

illegality or perversity in the impugned order, which would force us to take a view different than the view taken by the BIFR and AAIFR.

23. As far as the submission made by Ms.Dhir is concerned that one of the terms and conditions of the tendered document was that the ASC was given a liberty to modify the terms and conditions and according to the petitioner the Minutes of the Meeting would show that the terms of the bid were modified, we find no force in the same merely because the ASC had promised to provide the documents, this would not make it a case where the terms and conditions of the sale were modified.

24. In view of above, the present writ petition is without any merit and the same is accordingly dismissed.

CM APPL. 26437/2015 (STAY) & CM APPL. 26439/2015 (Lengthy list of documents).

25. Applications stand dismissed in view of the order passed in the writ petition.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

NOVEMBER 06, 2015

msr