

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 1457 & 1458 of 2022**

[Arising out of order dated 29.09.2022 in I.A. No. 2247 of 2021 and order dated 29.09.2022 in I.A. No. 665 of 2022 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench Court III in C.P. No. 4087/MB/2018]

**IN THE MATTER OF:**

**Jal Engineers Private Limited**  
Runwal Chambers, 1<sup>st</sup> Road,  
Chembur, Mumbai MH - 400081

**...Appellant**

**Versus**

**Mr. Dinesh Kumar Aggarwal**  
Resolution Professional of  
Dolphin Offshore Enterprises (India) Limited.  
1507 07, Highland Park, Kolshet Road,  
Behind D-Mart, Thane – 400 607.

**...Respondent**

**Present:**

**For Appellant: Mr. Anuj Tiwari, Rahul Kumar, Tuhina Misra,  
Advocates.**

**For Respondent: Mr. Shubham Kulshreshtha, Advocate for RP.**

**J U D G M E N T**

**ASHOK BHUSHAN, J.**

This Appeal has been filed against two orders passed by the Adjudicating Authority (National company Law Tribunal), Mumbai Bench, Court III i.e. 29.09.2022 in I.A. No.2247/2021 filed by the Appellant as well

*Cont'd.../*

as order dated 29.09.2022 passed in I.A. No.665/2022 filed by the Resolution Professional for approval of the Resolution Plan. The Adjudicating Authority vide order dated 29.09.2022 rejected the I.A. No. 2247/2021 filed by the Appellant for admitting his claim as Financial Creditor and by order of the same date allowed the application of the Resolution Professional approving the Resolution Plan. Brief facts of the case necessary to be noticed for deciding this Appeal are:

- (i) The CIRP commenced against the Corporate Debtor - Dolphin Offshore Enterprises (India) Limited by order dated 16.07.2020.
- (ii) Public announcement was made on 21.07.2020, in pursuance of which Appellant submitted its claim in Form 'C' on 31.07.2020 raising a claim of Rs.50 Lakhs as financial debt against the Corporate Debtor.
- (iii) The Resolution Professional informed the Appellant by email dated 30.07.2021 that debt of Appellant cannot be termed as financial debt and he may file his claim as operational debt.
- (iv) In CIRP, an I.A. No. 2247/2021 was filed by the Appellant seeking a direction to admit the claim of the Appellant as financial creditor and to reconstitute the Committee of Creditors (CoC).
- (v) In the meantime, Resolution Plan of a Resolution Applicant was approved by the CoC on 17.02.2022 and the Resolution

Professional filed an application being I.A. No. 665/2022 before the Adjudicating Authority for approval of the Resolution Plan.

- (vi) Appellant has entered into an agreement with the Corporate Debtor on 24.10.2018 for jointly submitting a bid guarantee. With respect to which agreement the Appellant has given an amount of Rs.50 Lakhs towards, the Bid Bond Bank Guarantee, which was claimed as financial debt.

2. Learned counsel for the Appellant challenging the order contends that the amount which was given was a financial debt given to the Corporate Debtor to enable the Corporate Debtor to submit Bid Bond Bank Guarantee to the ONGC. Resolution Professional as well as the Adjudicating Authority committed error in rejecting the claim as financial debt. It is further submitted that in any view of the matter the amount of Rs.50 Lakhs was given to the Corporate Debtor in trust and the amount was for specific purpose and the amount which was given in trust cannot be treated to be part of the assets of the Corporate Debtor and should be kept apart in view of the provisions of the I&B Code.

3. Learned counsel for the Respondent refuting the submissions of learned counsel for the Appellant contends that the Adjudicating Authority has rightly held that the claim of the Appellant was not a financial debt since the Appellant has given his share of Bid Bond Bank Guarantee which was rightly held to be an operational debt. Insofar as submission of the

Appellant that amount was given in trust to the Corporate Debtor, neither any such pleading was made nor any such submission was made in the proceedings before the Adjudicating Authority and this submission cannot be entertained which has no foundation.

4. We have considered the submissions of learned counsel for the parties and perused the record.

5. The agreement between the Appellant and the Corporate Debtor dated 24.10.2018 which is the genesis of the claim of the Appellant provides as follows:

**“AGREEMENT**

*This Agreement is made on 24<sup>th</sup> day of October month of year 2018 and is to be considered as an Appendix to the MOU signed between both the parties.*

*BY AND BETWEEN*

***Dolphin Offshore Enterprises (India) Limited***  
*a company duly incorporated and validly existing under the laws of India having its office at, having its registered office at 1001, Raheja Centre, 214 Nariman Point, Mumbai – 400 021 (hereinafter referred to as “**Member 1**”), which expression shall unless excluded by or repugnant to the subject or context thereof, be deemed to include its successors, administrators executors and permitted assigns):*

AND

**JAL Engineers Pvt Limited**, a company duly incorporated and validly existing under the laws of India having its office at Runwal Chambers 1<sup>st</sup> Floor, 1<sup>st</sup> Road, Chembur Mumbai - 400 701, (hereinafter individually referred to as the **Member 2**), which expression shall unless excluded by or repugnant to the subject or context thereof, be deemed to include its successors, administrators executors and permitted assigns):

AND

The above Member 1 and Member 2 hereinafter shall be individually referred to as "Consortium member" and collectively be referred to as "Consortium".

WHEREAS

Both the Consortium members have entered into an MOU dtd 24<sup>th</sup> day 2018 for jointly submitting the bid against the tender no.MR/ES/MM/PCWPP-II/01/2018/P85ICI8002 FOR Protective Coating of well head platform project (PCWPP-II) floated by Oil and Natural Gas Corporation Limited.

THE PARTIES HEREBY AGREE AS UNDER

- 1) Member 1 as the leader of the Consortium will arrange the Bid bond bank guarantee for INR 2,16,77,308/- which is to be submitted as part of the Consortium bid.

- 2) *Member 2 will transfer INR 50,00,000/- to Member 1 being their share for bid bond bank guarantee.*
- 3) *The amount of INR 50,00,000/- will be returned back by Member 1 to Member 2 within 7 days of release of the bid bond by ONGC in any of the following events*
  - a) *If the said tender no. **MR/ES/MM/PCWPP-II/01/2018/P85ICI8002 for Protective Coating of Wellhead Platforms Project-II** is awarded to a party other than the Consortium.*
  - b) *If the tender is cancelled **by ONGC.***
  - c) *If the tender is awarded to the Consortium then upon Member 1 submitting the performance bank guarantee to Oil & Natural Gas Corporation Limited and Member 2 submitting counter guarantee to Member 1 for their portion.*

*IN WITNESS WHEREOF the parties here to have hereunto set their respective hands in Mumbai, the day and year first above written*

<b><i>For and on behalf of</i></b> <i>Dolphin Offshore</i> <i>Enterprises (India) Limited</i>	<b><i>For and on behalf of</i></b> <i>JAL Engineers Pvt Ltd</i>
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*(Member 1)*

*(Member 2)*

WITNESSES

WITNESSES

*(1)*

*(1)”*

6. When we look into the agreement between the parties, both the parties formed a consortium and the consortium was to arrange a Bid Bond Bank Guarantee of INR 2,16,77,308/- of which the share of the Appellant was Rs.50,00,000/-. The amount of Rs.50 Lakhs which was given by the Appellant for submitting Bid Bond Bank Guarantee was the share of the Appellant, a member of the consortium. The Adjudicating Authority has rightly in its conclusion observed that the disbursement was not for time value of money and the ingredient of Section 5(8) of the I&B Code has not been made out. We do not find any error in the order of the Adjudicating Authority holding the claim of the Appellant as not a financial debt.

7. Now, coming to the submission of the counsel for the Appellant that the amount was given in trust since it was for specific purpose, hence, it should be kept out of the assets of the Corporate Debtor. It is relevant to notice that before the Adjudicating Authority no such pleading or argument was raised. However, in the appeal ground has been taken that amount of Rs.50 Lakhs was held in trust by the Corporate Debtor for the Appellant.

We, thus, proceed to examine the claim of the Appellant that the amount was given in trust to the Corporate Debtor by the Appellant.

8. Section 18 Sub-section (1) Sub-clause (f) provides as follows:

*“18(1)(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—*

- (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;*
- (ii) assets that may or may not be in possession of the corporate debtor;*
- (iii) tangible assets, whether movable or immovable;*
- (iv) intangible assets including intellectual property;*
- (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;*
- (vi) assets subject to the determination of ownership by a court or authority;*

*x...x...x*

*Explanation.—For the purposes of this 1[section], the term “assets” shall not include the following, namely:—*

- (a) *assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;*
- (b) *assets of any Indian or foreign subsidiary of the corporate debtor; and*
- (c) *such other assets as may be notified by the Central Government in consultation with any financial sector regulator.”*

9. The Explanation to Section 18 (1) clearly provides that assets shall not include assets owned by a third party in possession of the corporate debtor held under trust. Learned counsel for the Appellant has placed reliance on three judgments in support of his submission that amount was given by the Appellant as amount in trust to the Corporate Debtor. First judgment relied by the Appellant is **“1955 SCC OnLine Cal 179, Ganesh Export & Import Co. vs. Mahadeolal Nathmal”**. In Para 6 of the judgment following was laid down by the Hon’ble Calcutta High Court:

*“6. A trustor of monies can claim a refund from an insolvent company in priority over all creditors, not on the ground that an obligation to return trust property must be discharged before an obligation to repay debts, but on the ground that the monies never became the property of the company and are not therefore divisible among its creditors. If the monies have been kept separate, they must be handed back. Even if they have been mixed up with other funds of the company, an equal amount,*

*if deductions, if any, as may be provided for by the trust itself. In order, however, that a Property may be excluded from the assets of a company, divisible among its creditors, it not necessary that it should be held formally in trust for a third party. Where there such a trust, the company has obviously no beneficial interest in it of the nature divisible among creditors upon Insolvency. But there may also be a trust in effect. Property hand by an insolvent in a fiduciary capacity is treated as property held in trust for the purposes of the insolvency laws and property held for a specific purpose in treated as clothed with a species of trust subject to the same principles as trust property. In all these cases, the property concerned is outside the divisible assets of the company. The party who put the Property in the hands of the company can claim it back in a winding up as his property, while the creditors cannot claim that it should be brought into the distribution.”*

10. The next judgment relied by learned counsel for the Appellant is **“1992 SCC Online Bom 110, Reserve Bank of India vs. Bank of Credit and Commerce International (Overseas) Ltd. & Anr.”**, where in Para 20 Bombay High Court has held as follows:

*“20. I shall now refer to the leading judgment of House of Lords in the case of (Barclays Bank Ltd. v. Quistclose Investments Ltd.)<sup>6</sup>. (1968) 3 All. ER. 651. In my opinion, the ratio of this judgment and the formulation of relevant principles by the Court*

*of Appeal in the case of (Quistclose Investments Ltd. v. Rolls Razor Ltd.)<sup>7</sup>, (in voluntary liquidation), (1968) 1 All ER. 613 also clinch the issue in favour of the applicants. In the above referred case, the House of Lords affirmed the decision of Court of Appeal. Lord Wilberforce delivered the main judgment on behalf of House of Lords and Lord Reid, Lord Morris of Borth-Y-Gost, Lord Guest and Lord Pearce concurred with Lord Wilberforce. It is necessary to notice the material facts of the case before deducing the relevant principles laid down in the base. In an annual general meeting of RR. Ltd. on July 2, 1964, payment of dividend was approved. R.R. Ltd. had an overdraft with the Bank which exceeded the limit. The Bank refused to make funds available to RR. Ltd. for the purpose of implementation of resolution declaring dividends.”*

11. The third judgment on which learned counsel for the Appellant placed reliance is judgment of the Hon’ble Supreme Court in **“(2004) 8 SCC 355, Canbank Financial Services Ltd. vs. Custodian & Ors.”**. In Paras 46 and 47, Hon’ble Supreme Court laid down following:

*“46. In Barclays Bank<sup>6</sup> a company which was substantially indebted to the bank needed funds in order to pay a dividend on its shares. Quistclose Investments advanced the necessary funds on the basis that they were only to be used for this purpose and they were paid into a separate*

*account at the bank, which was made aware of the arrangement. The company went into liquidation before the dividend had been paid. If Quistclose Investments were no more than a creditor of the company, then the funds in the bank would belong to the company and the bank would be entitled to set off the credit balance of the account against the substantially greater indebtedness of the company. If, on the other hand, the funds were held on trust for Quistclose Investments, its proprietary interest therein would enjoy priority over the rights of the bank. The House of Lords held that arrangements for the payment of a person's creditors by a third person give rise to "a relationship of a fiduciary character or trust, in favour as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person". Once the primary purpose was fulfilled, the third person would be no more than an unsecured creditor. However, there was "no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies". Since the purpose for which the funds had been advanced had failed, the funds were still held on trust for Quistclose Investments, whose beneficial interest was binding on the bank because it had been aware of the basis on which the funds had been transferred. (See *Equity and Trusts*, 2<sup>nd</sup> Edn., by Alastair Hudson, p. 307.)*

47. *In that case the common intention of both the parties was that the fund in question should be*

*held on trust. The principle in Barclays Bank<sup>6</sup> has been applied both where part of the funds advanced had indeed been used for the specific purpose in question, holding that the creditor was entitled to recover whatever was left (see EVTR, Re<sup>7</sup>) as also where the funds, although advanced for a specific purpose, were paid not by way of loan but rather in satisfaction of a contractual debt. (See Carreras Rothmans Ltd. v. Freeman Mathews Treasure Ltd.<sup>8</sup>)”*

12. There can be no dispute to the proposition that any amount given in trust to a Corporate Debtor cannot be treated as asset of the Corporate Debtor as per Section 18(1)(f), noticed above. There can be no quarrel to the law laid down by the Hon’ble Calcutta High Court, Hon’ble Bombay High Court and Hon’ble Supreme Court as noticed above but question which needs to be answered is as to whether the amount which was given by the Appellant to the Corporate Debtor was an amount given in trust.

13. The agreement entered between the parties on 24.10.2018, as noticed above clearly indicate that the amount was the share of the Appellant for submitting Bid Bond Bank Guarantee by the consortium, Appellant being one of the member of the consortium. The agreement dated 24.10.2018 which was basis of the claim of the Appellant in no manner indicate that the amount was given in trust to the Corporate Debtor. Amount was given by the Appellant as his share to submit Bid Bond Bank Guarantee. Thus, the submission of the learned counsel for the Appellant

that the amount given by the Appellant was the amount given in trust to the Corporate Debtor is wholly unfounded and cannot be accepted.

14. With regard to the order of the Adjudicating Authority approving Resolution Plan, no ground has been urged which may warrant any interference by this Tribunal in the order approving the Resolution Plan. We, thus, do not find any substance in any of the submission of learned counsel for the Appellant. There is no merit in the Appeals. Both the Appeals are dismissed.

**[Justice Ashok Bhushan]  
Chairperson**

**[Barun Mitra]  
Member (Technical)**

**NEW DELHI**

**21<sup>st</sup> February, 2023**

*Archana*