NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III

1. I.A. 1195/2022
I.A. 665/2022
I.A. 2247/2021
IN
C.P.(IB)-4087(MB)/2018

CORAM: SHRI H. V. SUBBA RAO, MEMBER (J)
SMT ANURADHA SANJAY BHATIA, MEMBER (T)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON **29.09.2022**

NAME OF THE PARTIES: Supreme Hydro Engineering Pvt Ltd.

V/s.

Dolphin Offshore Enterprises (India) Ltd.

SECTION 7 OF INSOLVENCY AND BANKRUPTCY CODE, 2016

ORDER

Mr. Amey Hadwale a/w Adv Geeta Lundwani, counsel appearing for the Resolution Applicant, Ms. Prachi Wazalwar, counsel appearing for the Applicant in I.A. No. 2247/2021 and I.A. 1195/2022 are present through virtual hearing.

Order pronounced in the open court vide separate order. In the result, the above Interlocutory Application No. **665/2022 is allowed**. Resolution Plan is approved and **I.A. Nos. 1195/2022, I.A. 2247/2021 are dismissed.**

Sd/-
ANURADHA SANJAY BHATIA
Member (Technical)

Sd/-
H. V. SUBBA RAO
Member (Judicial)

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IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-III

I.A. No. 665 of 2022
IN
C.P. No. 4087 of 2018

In the matter of an Application under Section 31(1) of the Insolvency and Bankruptcy Code, 2016.

In the matter of
Supreme Hydra Engineering Pvt. Ltd.
... Operational Creditor
V/s.

Dolphin Offshore Enterprises (India) Ltd.
... Corporate Debtor

I.A. No. 665/2022
Mr. Dinesh Kumar Agarwal
...Applicant/
Resolution Professional
V/s.
M/s. Deep Industries Ltd.
... Respondent

Date of conclusion of arguments : **06.09.2022**
Order pronounced on : **29.09.2022**

Coram:
Hon'ble Shri H. V. Subba Rao, Member (Judicial)
Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearance (through video conferencing):
For the Applicant: Mr. Pradeep Sancheti, Advocate

Mr. Amir Arsiwala, Advocate for Resolution Applicant

Mr. Dinesh Kumar Agarwal, Resolution Professional-in-person

Per Shri H. V. Subba Rao, Member (Judicial)

ORDER

1. This is an Application under Section 31(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the Code) filed by the Resolution Professional seeking approval of the Resolution Plan submitted by the Resolution Applicant M/s. Deep Industries Ltd., which is approved by 88.75% of the voting share of the members of the Committee of Creditors (hereinafter referred to as 'COC').

2. The facts leading to the Application are as under:
   i. Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor was initiated by this Bench by an order dated 16.07.2020 under section 9 of the Insolvency and Bankruptcy Code 2016 (hereinafter referred to as 'the Code') (Admission Order) and Mr. Vinit Gangwal, was appointed as Interim Resolution Professional. The COC in its 3rd meeting held on 19.10.2020 appointed (the present Applicant) as the Resolution Professional (RP) and the same was approved by this Bench vide an order dated 04.12.2020.
   ii. The Applicant published a public announcement in Form A on 22.07.2020 in "The Economic Times" (English) and "Maharashtra Times" (Marathi) newspapers, inviting claims with proof from the creditors of the Corporate Debtor.
   iii. The Applicant submits that on 10th August 2020 the Committee of Creditors was constituted and thereafter the first meeting of the COC was convened on 17th August 2020.
   iv. The Applicant submits that he had received claims from various Creditor, after verification of the claims from the creditors, the Committee of Creditors was constituted comprising of Five financial creditors as on 10th August, 2020 and the first meeting of the COC was convened on 17th August 2020. Thereafter, the

COC was reconstituted on 12th October, 2021 comprising of Six Financial Creditors. Summary of claim received from Creditors and the debt admitted thereto is hereunder:

Particulars	**Amount claimed**	**Amount of claim admitted**
Financial Creditors	95,44,76,657	94,93,78,218
Financial Creditors (Related party)	56,76,75,457	47,67,38,592
Operational Creditors (Suppliers)	181,84,56,471	113,87,29,806
Operational Creditors (Divers)	15,03,13,657	15,03,13,657
Operational Creditors (Statutory Dues)	767,76,71,759	767,72,98,879
Operational Creditors (Workmen)	7,29,98,555	7,13,06,823
Operational Creditors (Employee)	21,82,03,490	21,48,73,891
Other Creditors (Form-F)	10,83,53,585	10,83,53,585
Total	**1156,81,49,631**	**1078,69,93,452**

v. The Applicant in compliance of the provisions of the Code and Rules framed there under conducted the CIRP of the Corporate Debtor.

3. That the Applicant pursuant to Regulation 27 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016, appointed the registered valuers on 1st September, 2020 (M/s. Adroit Appraisers Research Private Ltd.) and 28th September, 2020 (M/s. Den Valuation) in order to determine the fair value and liquidation value of the Corporate Debtor is as under:

In Rs. Cores

Particulars of Assets	**Valuation – Valuer- I**		**Valuation – Valuer- II**		**Average Valuation**	
	Fair Value	Liquidation Value	Fair Value	Liquidation Value	Fair Value	Liquidation Value
Land and Building	21.98	17.58	20.05	16.9	21.02	17.24

Plant and Machinery	2.15	1.63	2.17	1.63	2.16	1.63
Financial Assets	0.35	0.27	0.16	0.16	0.26	0.22
Total	**24.48**	**19.48**	**22.38**	**18.69**	**23.43**	**19.09**

4. During the period of CIRP, the RP issued Form-G on 02.01.2021, for inviting Expressions of Interest (EOI) in Free Press Journal (English) and in Nav Shakti (Marathi) newspapers, from prospective resolution applicants (PRA) to submit their resolution plan(s) in respect of the Corporate Debtor. The last date for receiving the expression of interest, was 17.01.2021 and 03.03.2021 was the last date for submitting Resolution plan.

5. The Applicant states that the COC in its COC Meeting decided that a revised advertisement for inviting EOI be issued. Form G inviting EOI was published on 03.03.2021 in Free Press Journal (English) and in Nav Shakti (Marathi) newspapers. The last date for receipt of EOI was 18.03.2021 and last date of receipt of Resolution Plan was 30.04.2021.

6. The Applicant further states that in furtherance of the revised Form-G issued by applicant, he received EOIs from 12 Prospective Resolution Applicants (PRAs) within the stipulated time period. However, only 3 prospective Applicants qualified to the final list of eligible prospective resolution applicant issued on 5th April, 2021 and request for Resolution Plan (RFRP) was issued with the approval of CoC on 31st Mach 2021.

7. The Applicant submits that the Resolution Plan was discussed by Committee of Creditors (CoC) in several meetings held between 17th August 2021 to 7th January, 2022. During the said meetings there

were two addendums dated 03.12.2021 and 04.01.2022 that were submitted by the Resolution Applicant to the Applicant.

8. The Resolution plan dated 15th November 2021 along with the addendums dated 3rd December 2021 and 4th January 2022 was placed before the CoC and the proposed Resolution Plans was evaluated on the basis of the evaluation matrix and same was approved by the CoC by majority of 88.75% votes, through the E-voting on 7th February, 2022. The CoC having 11.25% of the voting share have abstained from voting.

9. The Applicant submits that, during the Meeting of COC, the resolution passed and e-voting conducted on 07.02.2022, it was declared that the plan submitted by the M/s. Deep Industries Ltd. approved.

10. The COC in its 16th meeting considered the final Resolution Plan of M/s. Deep Industries Limited and approved the Plan along with the addendums with a voting share of 88.75% according to the section 30(2) and Regulation framed under the IB Code, and compliance certificate was in Form "H" required under Regulation 39(4) of the CIRP Regulation was issued by the Resolution Professional. Following is the Resolution passed by the COC:-

> *"RESOLVED THAT, the member of the COC hereby approve the Revised Resolution Plan dated 15th November, 2021 submitted by Deep Industries Limited, addendum dated 3rd December, 2021 and addendum dated 4th January, 2022 to the Resolution Plan dated 15th November, 2021."*

11. **The salient features of the Resolution Plan are as under:**

a. **M/s. Deep Industries Limited)** ("Successful Resolution Applicant") (CIN: L1492GJ2006PLC049371; PAN: AACCD5657K), The Group is engaged into Oil and Gas Field services business since 1991. Since inception, Deep Industries Limited has been serving the industry in various segments like Air & Natural Gas Compressor Services on chartered hire basis, wherein company commands a healthy market position. By acquiring the Corporate Debtor, Deep industries Limited intends to foray in the area of providing services in offshore areas in E&P and marine Sector etc. Management of Deep Industries Limited believes that acquisition and revival of the corporate debtor will be a promising alternative to development of new business.

b. M/s. Dolphin Offshore Enterprises (India) Limited **(Corporate Debtor)** has been providing integrated services to the Oil and Gas industry for over 40 years and hence can be considered a pioneer in this industry. Incorporated in 1979, Dolphin Offshore Enterprises (India) Limited has been offering comprehensive underwater services, including Air, Mixed Gas and Saturation diving services also including cable laying to the Indian Offshore Oil & Gas Industries since inception. The Company has worked in projects in Iran, Thailand, Malaysia, Indonesia and Africa to name a few. The vision of the Company is to become a global provider of integrated services to the oil and gas industry, with a diversified portfolio for undertaking turnkey projects involving Underwater, Marine and Offshore Construction.

c. **Cancellation of Share Capital:-**

At the time of submission of this Resolution Plan, Rule 19A (5) of the Securities Contracts (Regulation) Rules, 1957, allows for a

resolution plan to reduce the public shareholding of a listed company to below 25% as long as the public shareholding is raised back to 10% within a period of eighteen months, and 25% within a period of three years.

However, it is the understanding of the Resolution Applicant that SEBI has recommended an amendment to these rules requiring that a minimum of 5% public shareholding be maintained even after the approval of Resolution Plan. Accordingly, the shares held by public shareholders shall be partially extinguished to ensure that the public shareholding is reduced to 5% of the total shareholding.

All other shares including the shares owned by the promoters of the Corporate Debtor shall, on and from the Effective Date, be extinguished. This is in line with section 30 of the IBC as, to the best of the knowledge of the Resolution Applicant, the liquidation value due and payable to the shareholders of the Corporate Debtor is nil.

d. **Formation of new Board: -**

It is proposed that upon Resolution Applicant acquiring control over the Company, the existing Board will be replaced by new Board of Directors constituted with adequate representation from the member of Resolution Applicant Group and independent directors in compliance with Applicable Laws.

It is further proposed that the Resolution Applicant shall appoint requisite directors and file the prescribed form with concerned Registrar of companies manually for the purpose of filling required documents online with their own digital signatures. The Registrar of companies shall be directed to accept the same on approval of the resolution plan by this Adjudicating Authority.

i. **Appointment of CEO, CFO, COO and CS:**

The appointment of Chief Executive Officer, Chief Operating Officer and Chief Financial Officer and Other Key personnel shall be decided by Resolution Applicant at the appropriate time in compliance with Companies Act, 2013 and amendments there to and SEBI Regulations as applicable.

e. **Implementation & Supervision of Resolution Plan after Effective Date:-**

After the Effective Date, the implementation of the Resolution Plan will be supervised by Management Agency (MA) as formed under clause 7. Resolution Applicant will report the progress of implementation & Supervision of Resolution Plan on quarterly basis as per the formats prescribed/decided by MA. The meeting of MA shall be chaired by appointed Insolvency Professional.

During the period between the Effective Date and the completion of payment to the Financial Creditors, the affairs of the Company shall be managed by the nominees of the RA subject to the overall supervision of the MA. However, it is clarified that the MA shall not interfere in the day-to-day business of the Company, nor shall it be empowered to restrict the business operations of the Company in any way.

f. **Working Capital:-**

The Resolution Applicant as part of its Resolution Plan shall be infusing an amount **Rs. 10 Crore** towards CAPEX and Working Capital requirement. In case requirement arises, RA will infuse more fund for Working Capital.

g. **Effective Date:-**

The date of receipt of the certified copy of the Order approving the Resolution Plan from the Adjudicating Authority under Section 31 (1) of the Code, or the order of the National Company Law Appellate Tribunal or the Supreme Court, if an appeal is made to such tribunal or court against the order of the Adjudicating Authority**.**

h. The Resolution Plan proposes a total Consideration of Rs. 27.02 Crores for the settlement of claim by the Resolution Applicant.

12. The details of the proposed payments are as follows:

A) <u>CORPORATE INSOLVENCY RESOLUTION PROCESS COSTS:-</u>

a. The CIRP Costs shall, amongst other things, include the costs, fees and charges incurred by the Resolution Professional, in running the operations of the Corporate Debtor as a going concern.

b. Resolution Applicant proposes to pay an amount of Rs. 1,87,49,585/- as CIRP cost. In case if the CIRP cost already paid from the existing fund available of the Corporate Debtor, Resolution Applicant will pay such reduced amount to meet the CIRP cost. In case the CIRP Cost exceeds the estimate set out herein, Resolution Applicant will induct additional funds. The entire CIRP cost shall be paid by the Resolution Applicant within a period of 75 days from the effective date and in priority to any other payment under this Resolution Plan.

c. **Sources of Fund:** CIRP Cost shall be funded out by the Resolution Applicant out of its own sources and the Resolution Applicant may utilize the cash flows of the Corporate Debtor being run as a going concern to fund this Resolution Plan.

B) <u>PAYMENTS TO FINANCIAL CREDITORS</u>

i. **<u>Financial Creditors – Secured</u>**

Resolution Applicant, against the claim of non-related Secured Financial Creditors of Rs. 84,26,05,100 shall pay Rs. 16,22,28,042/- (to SBI INR 13,96,45,550/- and to Canara Bank INR 2,25,82,491). The Financial Sponsor shall pay Rs.3,00,00,000/-(SBI INR 2,90,45,462 and Canara Bank INR 9,54,538)/- to the secured Financial Creditors for assignment of right to invoke/ all rights under Corporate Guarantee of DOSL and assignment of charge on ships of DOSL and Rs.4,00,00,000/- (SBI INR 3,23,63,695/- and Canara Bank INR 76,36,305/-) for assignment of right to invoke/ all rights under Personal Guarantee of Personal Guarantors towards assignment of debt of INR 68,03,77,058 (Debt of SBI INR 53,82,79,643 and Debt of Canara Bank INR 14,20,97,412) State Bank of India, Canara Bank and the Financial sponsor shall enter into a deed of assignment (along with all other necessary agreements required) to give effect of above assignment. For the sake of clarity post assignment, the financial sponsor shall have the right to invoke the personal guarantee of personal guarantors, Corporate Guarantee of DOSL and charge on the ships of DOSL and/ or have all rights under these guarantees and on the charged assets.

ii. Further on payment of Rs. 16,22,28,042/- by Resolution Applicant and Rs.7,00,00,000/- by Financial Sponsor to State Bank of India and Canara Bank the liability of Corporate Debtor towards them will be extinguisged in full and the charge over assets of the Corporate Debtor shall be released at the earliest.

iii. **Unsecured Financial Creditors (Non related):-**

Resolution Applicant, against the claim of non-related Unsecured FCs of Rs.10,67,73,118/- shall pay Rs.10,67,731/- in manner provided in 4.7.5 and 4.7.6 of the Resolution Plan.

iv. **Secured/Unsecured Financial Creditors (Related):-**

Resolution Applicant through proposes to pay NIL amount to the Related parties whether secured or unsecured Creditors.

C) PAYMENT TO OPERATIONAL CREDITORS:-

a. Workmen, Employees and Divers:-

Resolution Applicant proposes the following amount to be received by each class of creditors being workmen, employees and divers as mentioned hereunder within 90 days of effective date:-

Particulars	**Amount Claim in Rs.**	**Claim Admitted in Rs.**	**Amount proposed Rs.**
Operational Creditors-	15,03,13,657	15,03,13,657	15,03,137
Operational Creditors- Workmen	7,29,98,555	7,13,06,823	1,34,10,336
Operational Creditors-	21,82,03,490	21,48,73,891	21,48,739

b. No additional amount will be received by any workmen/ employees/ divers of the Corporate Debtor except mentioned above. All the operational creditors (workmen/ employees/ divers) will receive proceeds in accordance with the mode of acquisition and funding of resolution plan as envisage under Annexure – 2 of the Resolution Plan.

c. Liquidation value to the Operational Creditor (workmen/ employees/ divers) is presumed to be NIL. The Plan proposes to pay Divers, Workmen and Employees more than the liquidation value and is compliant with section

30(2)(b).

d. An additional Affidavit dated 22.07.2022, explaining the payments proposal, based on cut-off date as per section 53 of I&B Code.

b. Operational Creditors (Suppliers, Statutory dues) :-

Resolution Applicant proposes the following amount to be received by each class of creditors being suppliers and statutory dues as mentioned hereunder within 90 days of effective date.

Particulars	**Amount proposed under the plan**
Operational Creditors (Suppliers)	1,13,865/-
Operational Creditors (Statutory Dues)	7,67,730/-

Liquidation value to the Operational Creditors (Suppliers and Statutory dues) is presumed to be NIL. The Plan proposes to pay suppliers and statutory dues more than the liquidation value.

D) Other Creditors (Form F) :-

Resolution Applicant proposes to pay an amount of Rs. 10,835/- to the other creditors who have submitted their claim in Form F within 90 days of Effective date.

13. **INFUSION OF FUNDS**

The Successful Resolution Applicant shall fund the Corporate Debtor, through Deep Onshore Services Pvt. Ltd. (SPV), for the amount to be paid to the Financial Creditors under this Resolution Plan. The SPV is

a wholly owned subsidiary of the Resolution Applicant. The Funds shall be infused funds in following manner:-

- Own Contributions from RA
  a. Equity/ Preference shares :- Rs.10 crore
  b. Debentures / debt :- Rs.10 crore
- Contributions from Financial Sponsor :- Rs.7 crore.

The Resolution Applicant through its financial sponsor namely Raje Radhe Finance Limited shall infuse an amount of Rs. 7,00,00,000/- which shall be allocated in terms clause 4.60.3 of the Resolution Plan.

In addition to the above the Resolution Applicant intends to infuse an amount of Rs. 10,00,00,000/- for working capital requirements/ Capex requirements.

14. **SUMMARY OF PAYMENTS (along with indicative timeline) :-** The amount of Rs. 27 crores the total amount provided for the payments of all the creditors/ stake holders under resolution plan and shall be sourced from its own funds and partly by the financial sponsor which will be secured by way of debt assignment. The distribution of this amount among the creditors is as follows:-

Sr. No	**Particulars**	**Amount Claimed**	**Amount credited**	**Amount provided under the Plan**	**Amount provided to the Amount Claimed %**	**Timeline for payment**
1	CIRP Cost	-	-	1,87,49,585	100	Within 75 days
2	Secured Financial Creditor	84,26,05,100	84,26,05,100	23,22,28,042	27.56	Within 90 days
3	Unsecured Financial Creditor (Non-Related)	11,18,71,557	10,67,73,118	10,67,731	1.00	Within 90 days

4	Unsecured Financial Creditor (Related)	56,76,75,457	47,67,38,592	NIL	-	-
5	Operational Creditor - Workmen	8,28,41,666	7,25,96,878	1,36,52,995	18.81	Within 90 days
6	Operational Creditor – Employees	21,82,03,490	21,48,73,891	21,48,739	1.00	Within 90 days
7	Operational Creditor - Divers	15,03,13,675	15,03,13,675	15,03,137	1.00	Within 90 days
8	Operational Creditor – Suppliers	181,84,56,471	113,87,29,806	1,13,865	0.01	Within 90 days
9	Operational Creditor – Government dues	767,76,71,759	767,72,98,879	7,67,730	0.01	Within 90 days
10	Other debts and dues (Form F)	10,83,53,585	10,83,53,585	10,835	0.01	Within 90 days
11	Capex / Working Capital Infusion			10,00,00,000		
Grand Total		**1157,79,92,742**	**1078,82,83,506**	**37,02,42,659**		

15. **DISBURSEMENT OF AMOUNT:**

The Resolution Professional has submitted the following chart showing the details of the total claims received and admitted by him and amount provided for the stakeholders under Resolution plan as under:

(amount in Rs.)

Sr. No.	**Category of Stakeholder**	**Sub-Category of Stakeholder**	**Amount Claimed**	**Amount Admitted**	**Amount Provided under the Plan**	**Amount Provided to the Amount Claimed** (%)
1		a. Creditors not having a right to vote under sub-	NIL	NIL	NIL	NIL

	Secured Financial Creditors	section (2) of section 21				
		b. Other than (a) above: (i) who did not vote in favour of the Resolution Plan (ii) who voted in favour of the resolution plan	NIL 84,26,05,100	NIL 84,26,05,100	NIL 23,22,28,042	NIL 27.56
		Total [(a) + (b)]	**84,26,05,100**	**84,26,05,100**	**23,22,28,042**	**27.56**
2	**Unsecured Financial Creditors**	(a) Creditors not having a right to vote under sub-section (2) of section 21	56,76,75,457	47,67,38,592	NIL	0.00
		(b) Other than (a) above: (i) who did not vote in favour of the resolution Plan (ii) who voted in favour of the resolution plan	NIL NIL	NIL NIL	NIL NIL	NIL NIL
		Total[(a) + (b)]	**67,95,47,014**	**58,35,11,710**	**10,67,731**	**-**
3	**Operational Creditors**	(a) Related Party of Corporate Debtor	-	-	-	-
		(b) Other than (a): (i) Suppliers (ii) Government Dues (iii) Workmen (iv) Employees	 181,84,56,471 767,76,71,759 8,28,41,666 21,82,03,490	 113,87,29,806 767,72,98,879 7,25,96,878 21,48,73,891	 1,13,865 7,67,730 1,36,52,995 21,48,739	 0.01 0.01 18.81 1.00
		Total [(a) + (b)]	**9,94,74,87,043**	**9,25,38,13,111**	**1,81,86,466**	**-**
4	**Other Debts and Dues**	FORM F	10,83,53,585	10,83,53,585	10,835	0.01
5	**CIRP Cost**				1,87,49,585	100.00

6	**Capex Working Capital Infusion**				10,00,00,000	
Grand Total			**1157,79,92,742**	**1078,82,83,506**	**37,02,42,659**	

16. The indicative Repayment Tenure towards various creditors in the events for implementation of Resolution plan from approval date is as follows:-

Activity	**Days**
Receipt of Letter of Intent from the CoC	Y
Issuance of Performance security in form negotiable instruments	Y+ 5
Receipt of certified copy of order of Approval from Adjudicating Authority	X
Appointment of Monitoring Agency	X+7
Entering into assignment agreement and other documents for the purpose of giving effect of the assignment mentioned in clause – 2.3	X+45
Payment for CIRP Process Cost	X+75
Payment to Operational Creditors including statutory and other creditors	X+ 90 days
Payment to Financial Creditors for the debt of CD for extinguishment of entire debt of Corporate Debtor, release of charges over assets of Corporate Debtor	X+ 90 days
Payment to Financial Creditor by Financial Sponsor towards assignment of right to invoke/all rights under Corporate Guarantee of DOSL and assignment of charge on ships of DOSL , and assignment of right to invoke /all rights under Personal Guarantee of Personal Guarantors	X+ 90 days
Necessary statutory approvals	Within 1 year from X (In accordance with Sec 31(4) of the Code

17. The Resolution Applicant is eligible to submit resolution plan. The successful Resolution Applicant has given an Affidavit satisfying the eligibility criteria as per the provisions under section 29A of the Insolvency & Bankruptcy Code, 2016.

18. **OBSERVATIONS AND FINDINGS :-**

i. As per IBC Code 30(2)(a) – A Resolution Plan provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor.

ii. The Resolution Applicant proposes to appoint suitably qualified and experienced persons, key personnel and other officer for operations of the Corporate Debtor in terms of Section 30(2)(c).

iii. The Plan also provides for implementation of provision of the Resolution Plan as stated above as per Section 30(2)(d).

iv. The Resolution Plan does not contravene any of the provisions of the law for the time being in force - please include a statement to this effect in the Resolution Plan as per Section 30(2) (e)

v. The Resolution Applicant has given a declaration that the Resolution Plan does not contravene any provisions of the law for the time being in force as per Section 30(2)(f).

vi. As per Article 38(1) of CIRP Regulation the amount payable under a Revised Resolution Plan - to the operational creditors shall be paid in priority over financial creditors; Thus, Operational creditors – statutory claims shall be paid in priority to Financial Creditors in the following manner.

vii. The Resolution Plan is in compliance of the Regulation 38 of the Regulations as under:-

a. As per IBBI Guidelines 38(1)(b) - The amount payable under a Resolution Plan -to the financial creditors, who have a right to vote under sub-section (2) of section 21 and did not vote in favour of the Resolution Plan, shall be paid in priority over financial creditors who voted in favour of the plan.

b. Provides for the payment of CIRP Costs in priority to the repayment of any other debts of the Company (Regulation 38(1)(a)).

c. Provides for the mechanism regarding management and control of the Company post the NCLT Approval Date.

d. Provides for the manner of implementation and supervision of the Resolution Plan and adequate means for implementation and supervision of the Resolution Plan.

e. The amount payable under a resolution plan to the Financial Creditors, who have right to vote under sub-section (2) of section 21 and did not vote in favor of the resolution plan, shall be paid in priority over financial creditors who voted in favor of the plan.

f. The Resolution Applicant confirms that to the best of the knowledge of the Resolution Applicant, the Resolution Plan is not in contravention of the provisions of Applicable Law and is in compliance with the Code and the CIRP Regulations.

g. The Resolution Applicant confirms that the Resolution Applicant and its connected persons are not disqualified from submitting a resolution plan under Section 29A of

the Code and other provisions of the Code and any other Applicable Law.

h. Provides that the amount due to the Operational Creditors under a resolution plan shall be given priority in payment over Financial Creditors.

i. Provides for the management and control of the business of the Corporate Debtor during its term.

j. All the above factors demonstrate that the plan address the cause of default and the Resolution Applicant has the capacity to implement the Resolution Plan.

k. That the Resolution Applicant or any of its related parties has never failed to implement or contributed to the failure of implementation of any other Resolution Plan approved by the Adjudicating Authority at any time in the past. This is in compliance of Regulation 38(1)(b) of the Regulations.

l. The interests of all stakeholders (including Financial Creditors, Operational Creditors and other creditors, guarantors, members, employees and other stakeholders of the Company, keeping in view the objectives of the Code (Regulation 38(1A)).

19. The Resolution Plan has been approved in the COC meeting held between 17.08.2021 to 07.01.2022 with 88.75% votes approved the plan in the COC at e-voting held from 07.02.2022 to 14.02.2022 in accordance with the provisions of the Code.

20. In ***K. Sashidhar v. Indian Overseas Bank & Others: 2019 SCC Online SC 257 (2019) 12 SCC 150)*** the Hon'ble Apex Court held that if the CoC had approved the Resolution Plan by requisite percent of voting share, then as per section

30(6) of the Code, it is imperative for the Resolution Professional to submit the same to the Adjudicating Authority (NCLT). On receipt of such a proposal, the Adjudicating Authority is required to satisfy itself that the Resolution Plan as approved by CoC meets the requirements specified in Section 30(2). The Hon'ble Court observed that the role of the NCLT is 'no more and no less'. The Hon'ble Court further held that the discretion of the Adjudicating Authority is circumscribed by Section 31 and is limited to scrutiny of the Resolution Plan "as approved" by the requisite percent of voting share of financial creditors. Even in that enquiry, the grounds on which the Adjudicating Authority can reject the Resolution Plan is in reference to matters specified in Section 30(2) when the Resolution Plan does not conform to the stated requirements.

21. In **CoC of Essar Steel** (*supra*) the Hon'ble Apex Court clearly laid down that the Adjudicating Authority would not have power to modify the Resolution Plan which the CoC in their commercial wisdom have approved. In para 42 Hon'ble Court observed as under:

"Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and section 32 read with section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in ***K. Sashidhar*** *(supra)."*

22. In view of the above ruling of the Apex Court, the legislature has given paramount importance to the commercial wisdom of committee of creditors (CoC) and the scope of judicial

review by the Adjudicating Authority (AA) is limited to the extent provided under section 31 of Code and of the Appellate Authority is limited to the extent provided under sub-section (3) of section 61 of the Code, is no more an untouched-matter.

23. In view of the discussions and the law thus settled, the instant Resolution Plan meets the requirements of Section 30(2) of the Code and Regulations 37, 38, 38(1A) and 39(4) of the Regulations. The Resolution Plan is not in contravention of any of the provisions of Section 29A of the Code and is in accordance with law. The Resolution Plan is feasible and viable. There are no workers claims. Resolution Applicant agreed to pay the full CIRP costs and also future costs if any as certified by the Resolution Professional and CoC. The Resolution Plan balances the interest of all the stakeholders and thus it deserves to be approved.

ORDER

i. The Interlocutory Application No. **665 of 2022** is allowed. The Resolution Plan submitted by **M/s. Deep Industries Ltd.**, is hereby approved. It shall become effective from this date and shall form part of this order. It shall be binding on the Corporate Debtor, its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of payment of dues arising under any law for the time being in force is due.

ii. The approval of the Resolution Plan shall not be construed as waiver of any statutory obligations of the Corporate Debtor and shall be dealt by the appropriate Authorities in accordance with law. It is seen that the Resolution Applicant sought several dispensations, concessions and waivers. Any waiver sought in the

Resolution plan shall be subject to approval by the Authority concerned in the light of the Judgment of Supreme Court in ***Ghanshyam Mishra and Sons Private Limited v/s. Edelweiss Asset Reconstruction Company Limited,*** the relevant para's of which are extracted herein below:

"on the date of approval of the Resolution Plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in, respect to a claim, which is not part of the resolution plan."

"95. (i) Once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of the resolution plan shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

(ii) 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the Code has come into effect;

(iii) consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued."

iii. The Memorandum of Association (MoA) and Articles of Association (AoA) shall accordingly be amended and filed with the Registrar of Companies (RoC), concerned for information and record. The Resolution Applicant, for effective implementation of the Plan, shall obtain all necessary approvals, under any law for the time being in force, within such period as may be prescribed.

iv. The moratorium under Section 14 of the Code shall cease to have effect from this date.

v. The Applicant and the Monitoring Committee shall supervise the implementation of the Resolution Plan and the Applicant shall file status of its implementation before this Authority from time to time, preferably every quarter.

vi. The Applicant shall forward all records relating to the conduct of the CIRP and the Resolution Plan to the IBBI along with copy of this Order for information.

vii. The Applicant shall forthwith send a copy of this Order to the CoC and the Resolution Applicant for necessary compliance.

viii. The Interlocutory Application No.665 of 2022 is accordingly allowed and disposed of.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-
H. V. SUBBA RAO
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH COURT III

I.A. 1195/2022

In

C.P. No. (IB) 4087/MB/2018

Under Section 60(5) r/w other relevant provisions of IBC, 2016 r/w Regulations 7 and other relevant regulations of the IBBI (Insolvency Resolution Process for Corporate Persons, Regulations, 2016 r/w Rule 11, 154 and 155

Filed by

Jal Engineers Private Limited,

Runwal Chambers, 1st Road Chembur, Mumbai- 400071

...Applicant

Vs.

Mr. Dinesh Kumar Aggarwal.

1507 07, highland Park, Kolshet Road, Behind D-Mart, Thane-400607

Resolution Professional of Dolphin Offshore Enterprises (India) Limited.

...Respondent No.1

Deep Industries Limited

12A & 14, Abhishree Corporate Park, Ambli Bopal Road, Ambli, Ahmedabad Ahmedabad GJ- 380058

...Respondent No.2

IN THE MATTER OF

Supreme Hydro Engineering Private Limited

...Petitioner/Operational Creditor

Vs

Dolphin Offshore Enterprises (India) Limited

...Respondent/Corporate Debtor

Reserved for Orders on: 10.08.2022

Order delivered on: 29.09.2022

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Smt Anuradha Sanjay Bhatia, Member (Technical)

Appearance:

For the Applicant: Ms. Prachi Wazalwar Adv.

For the Respondent/RP: Amey Hadwale a/w Mr. Nirav Shah

Per: Shri H.V. Subba Rao, Member (J)

ORDER

1. The above I.A. is filed by the Applicant for the following reliefs:

   I. *Be pleased to list the present Application along with LA 2247 of 2021 for urgent reliefs,*

   II. *Be pleased to direct the Resolution Professional to provide copy of Resolution Plan and the copy of relevant minutes of COC approving the said plan;*

   III. *Be pleased to direct the Resolution Professional to allow us to make our submission regarding the plan before the COC;*

IV. *Be pleased to direct the Resolution Professional to rectify its records of claims and admit our Claim in the category of Financial Debt;*

V. *Be pleased to direct the RP to report Bombay Stock Exchange about the surge in the stock price of the Successful Resolution Applicant due to publication of false news;*

VI. *Be pleased to declare the Applicant as a dissenting financial creditor in case the Applicant does not support the plan;*

VII. *Be pleased to direct the Resolution Professional (Respondent) to reconstitute the COC;*

VIII. *Be pleased to direct the Resolution Professional to show that the Applicant is a Financial Creditor on the website of the Corporate Debtor;*

IX. *Be pleased to provide all financial information and copy of Resolution Plan, if any to the Applicant to enable Applicant to exercise his rights as a claimant;*

X. *Please pleased to reconstitute the COC in CIRP of the Corporate Debtor pending disposal of this Application;*

XI. *Be pleased to direct the Resolution Professional to upload the list of creditors on IBBI website as per the CIRP Regulations.*

XII. *Any other reliefs as this Hon'ble Tribunal may deem fit.*

FINDINGS/OBSERVATIONS

The first Respondent/Resolution Professional filed reply opposing the above Application. The second Respondent is a Successful Resolution Applicant whose plan was pending before the

Adjudicating Authority for approval and therefore he did not file any separate reply.

Before going into the merits of the above Application, it is important to mention here that the present petitioner herein filed another I.A. bearing no. 2247/2021 challenging the rejection of their claim as "Financial Debt" by Resolution Professional and also for reconstitution of COC and providing them seat in the COC etc. reliefs which was also listed for orders along with this I.A.

In view of dismissing I.A. 2247/2021 on merits through separate speaking order, the present application bearing no. 1195/2022 become infructuous and accordingly stands disposed of.

Sd/-

ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)

---Rajeev---

IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH COURT III

I.A. 2247/2021

In

C.P. No. (IB) 4087/MB/2018

Under Section 60(5) of Insolvency and Bankruptcy, 2016

Filed by

Jal Engineers Private Limited,

Runwal Chambers, 1st Road Chembur, Mumbai- 400071

...Applicant

Vs.

Mr. Dinesh Kumar Aggarwal.
1507 07, Highland Park, Kolshet Road, Behind D-Mart, Thane-400607
Resolution Professional of Dolphin Offshore Enterprises (India) Limited.

...Respondent

IN THE MATTER OF

Supreme Hydro Engineering Private Limited

...Petitioner/Operational Creditor

V/s

Dolphin Offshore Enterprises (India) Limited

...Respondent/Corporate Debtor

Reserved for Orders on: 10.08.2022

Order delivered on: 29.09.2022

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Smt Anuradha Sanjay Bhatia, Member (Technical)

Appearance:

For the Applicant: Ms. Prachi Wazalwar Adv.

For the Respondent/RP: Amey Hadwale a/w Mr. Nirav Shah

Per: Shri H.V. Subba Rao, Member (J)

ORDER

1. The above I.A. is filed by the Applicant for the following reliefs:

I. *Be pleased to direct the Resolution Professional to admit the claim as Financial Creditor.*

II. *Be pleased to direct the Resolution professional to rectify its records of claims and admit our Claim in the category of Financial Debt;*

III. *Be pleased to direct the Resolution Professional (Respondent) to reconstitute the COC;*

IV. *Be pleased to direct the Resolution Professional to introduce the Applicant as a COC member;*

V. *Be pleased to direct the Resolution Professional to form a new COC making Applicant a part of the COC;*

VI. *Be pleased to direct the Resolution Professional to show that the Applicant is a Financial Creditor on the website of the Corporate Debtor;*

VII. *Be pleased to provide all financial information and copy of Resolution Plan, if any to the Applicant to enable Applicant to exercise his rights as a claimant;*

VIII. *Please pleased to reconstitute the COC in CIRP of the Corporate Debtor pending disposal of this Application;*

IX. *Be pleased to direct the Resolution Professional to accept the claims along with the interest accrued upon from the date of filing of claims by the Applicant till date*

X. *Be pleased to direct the Resolution Professional to upload the list of creditors on IBBI website as per the CIRP Regulations.*

THE BRIEF SUBMISSIONS OF THE APPLICANT ARE AS FOLLOWS:

PRELIMINARY SUBMISSION

1. JAL Engineers Private Limited the 'Applicant' herein is a Financial Creditor of the Corporate Debtor. The Respondent is the present Resolution Professional (RP') of the Corporate Debtor. The RP has erroneously admitted our claims filed in Form-C as an operational debt. We say that the RP has erred in admitting our claims in wrong head. It is remotely not possible to admit our claims as operational debt as we have submitted Form-C and not Form-B. The RP had only two options either to admit our claims as under Form-C or to reject the same stating/instructing us to submit our claims again in Form-B.

2. We say that our claim of Rs. 50,00,000/- (Rupees Fifty Lakhs) arose on account of the money that was lent by the Applicant to the Corporate Debtor for providing bid bond bank guarantee, which was the requirement for the bidding process of Oil and Natural Gas Corporation Limited hereinafter referred as ONGC tender. The Claim of the Applicant is not against any goods or services provided. The Applicant was

eligible to receive the said amount back as per the terms and conditions more specifically discussed herein under.

3. The Applicant submits that, the Corporate Debtor was under the obligation to return the money back within 7 days of the release of the guarantee by ONGC.

4. The Applicant submits that, the bid bond bank guarantee was released by ONGC on 13th May, 2019 which was also later confirmed by ONGC via email dated 18th January, 2021. Thus the default had occurred on 20th May, 2019.

II. BRIEF FACTS OF THE MATTER

5. The Original Application being CP 4087/2018 was filed by Supreme Hydro Engineering Private Limited, Operational Creditor, under section 9 of Insolvency & Bankruptcy Code, 2016 (1&B Code) against Dolphin Offshore Enterprises (India) Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP). The said application was admitted by this Hon'ble Bench on 16th July, 2020 and Mr. Vinit Gangwal was appointed as Resolution Professional as proposed by the Operational Creditor.

6. The COC then preferred to change the Resolution professional and accordingly made an application with Adjudicating authority under I.A 2051 OF 2020, wherein the Respondent i.e. Mr. Dinesh Kumar Agarwal was appointed as a Resolution Professional on 4th December 2020.

7. The Public Announcement for attention of the Creditors of the Corporate Debtor for submission of their claims was made by the Resolution Professional on 21st July, 2020.

8. On 31.07.2020, the Applicant had submitted its claim in Form C i.e., Proof of Claim by Financial Creditor.

9. The claim of the Applicant is been arrived on account of the revised MOU dated 10th December, 2018. The said MOU was entered between the Applicant and the Corporate Debtor for jointly submitting the bid as a consortium for the tender of ONGC having the tender no as MR/ES/MM/PCWPP II/01/2018/P851C18002.

10. The Applicant and the Corporate Debtor, individually were not able to fulfil the technical eligibility criteria of the said tender and thus came together for submitting their bid against the tender of ONGC.

11. As per the terms of the 'invitation of Bids' by ONGC, the bidding members were to submit the Bid Bond Bank Guarantee. Hence the Applicant and the Corporate Debtor entered into the Agreement dated 24th October, 2018, for specifying the terms for the Bid Bond Bank Guarantee. The Corporate Debtor was the main bidder and hence, the money was transferred by the Applicant to the Corporate Debtor.

The relevant terms of said agreement are mentioned below for convenience: -

The parties hereby agree as under: -

1) *Member 1 i.e. Corporate Debtor herein, 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 i.e., the Applicant herein, 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 11/01/2018/P851C18002 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 I submitting the performance bank guarantee to ONGC and member 2 submitting counter guarantee to member 1 for their portion.*

12. That the consortium of the Corporate Debtor and the Applicant was not a Successful Bidder, hence the Bid-bond bank guarantee stands to be returned back by virtue of Event

mentioned in '**Clause a**' of the above mentioned clauses and the amount of Rs. 50,00,000/- was to be returned back within 7 days of release of bid-bond bank guarantee as per the above mentioned '**Clause 3**'.

13. The Applicant submits that the bid-security was released by the ONGC on 13.05.2019, which was collected by the representative of Corporate Debtor. Letter dated 13.05.2019 for release of the Bid-security, with acknowledged by the representative of Corporate Debtor.

14. That the ONGC had also confirmed the release of Bid-security and that the same was received by the Corporate Debtor via Email dated 18th January, 2021.

15. The Applicant has thus given Rs. 50,00,000/- to a Corporate Debtor for providing the security in the bidding process and which shall be paid back within 7 days by the Corporate Debtor in accordance with the terms of the Agreement. Thus, the Applicant is a Financial Creditor and not an Operational Creditor, as the money given is not for supply of goods or services and does not qualify as operational debt.

16. The Applicant had thus rightly submitted the claim as a Financial Creditor in Form C. However, the Resolution Professional had erroneously admitted the claim of the Applicant as Operational Creditor. The name of the Applicant was also visible on the website of the Corporate Debtor under

the head Operational Creditor under the category IBC matters. However the website of the Corporate Debtor is not responding now.

17. That the Applicant had however saved the copy of list of creditors available on the website of the Corporate Debtor, when the website was functioning. The copy of the list of creditors showing the claim of the Applicant accepted as Operational Creditor.

18. The Applicant had objected to the said acceptance of the claims under the head of Operational Debt by Resolution Professional on various occasions via mail communications and also had forwarded to him all the relevant documents such as claim Form-C along with the copy of MOU dated 10.12.2018, Agreement dated 24.10.2018, Ledger account statements which are accepted by the Corporate Debtor, which prove that the Applicant is Financial Creditor of the Corporate Debtor.

19. In the meanwhile, Mr. Dinesh Kumar Aggarwal took charge as the Resolution professional on 4th December 2020. The Applicant communicated to Mr. Aggarwal on various occasions to rectify the defect of acceptance of claims under wrong head. In response to our various requests Mr. Aggarwal, on 17th April, 2021 informed us that the Applicants needs to file Form-B.

20. On 29th July, 2021 the Applicant had received a mail from the Resolution professional, confirming that the claim of

the Applicant was already accepted by the erstwhile RP under the Operational Creditor category and asking the copy of MOA and AOA with highlighting the relevant clause for the claim to enable him to take a view on the matter. The Applicant had replied to the said mail on the same day giving complete information/ documents required by the Resolution Professional.

21. Furthermore vide an email dated 30th July, 2021 Mr. Aggarwal informed us that as *'Amount of Rs. 50 Lakh given by you to the Corporate Debtor has not been supported by consideration of time value of money...'* and accordingly the said claim cannot be considered as a financial debt.

22. That the Resolution Professional after perusal of the documents submitted by the applicant, replied to the Applicant that the claim does not qualify as the financial debt under section 5 (8) of IB Code.

23. That as per Section 5(8)(i), the amount of any Liability in respect of any of the guarantee or indemnity is a Financial Debt. The Bid- Bond Guarantee was nothing but for the purpose of providing guarantee to ONGC for the purpose of bidding and hence it is a Financial Debt.

24. That the applicant had made all his efforts to explain the fact to the Resolution Professional that he is a Financial Creditor to the corporate Debtor but all his efforts went in vain and thus the Applicant has preferred to make this application before the Adjudication authority for the relief.

25. The amount of INR 50,00,000/- is held in trust by the Corporate Debtor for the Applicant as the money was given for providing bid bond bank guarantee and it is returnable back as per the terms of Agreement. The Applicant cannot be termed as Operational Creditor, as the money given is not for supply of goods or services and does not qualify as operational debt.

26. The amount of INR 50,00,000/- held in trust by the Corporate Debtor is a financial debt which the Corporate Debtor had to repay to the Applicant within 7 days from the release of bid bond.

27. That the serious prejudice and irreparable loss shall be caused to the Applicant if the present application is not allowed in interest of justice. That an amount of Rs. 50 lacks has been held by the Corporate Debtor, which is causing loss to the business of the Applicant. The Applicant is in the urgent need for the Working capital, and that amount of Rs. 50 lakhs is blocked which has caused financial difficulties for Applicant who is a MSME.

GROUNDS

1. That once the Applicant has submitted their claims under Form-C the same ought to be accepted by the RP as the RP is required only to verify and collate the claims and the same ought to have been considered as Financial Debt.

2. That the amount of INR 50,00,000/- is outstanding against the security (Bid-bond bank guarantee) provided and is now held in trust by the Corporate Debtor for the Applicant.
3. The debt stands outstanding form 20th May, 2019 i.e. 7 days after the release of the bid- bond bank guarantee.
4. The debt of the Creditor is a Financial debt as per section 5(8)(i) of Insolvency and Bankruptcy Code, 2016.
5. That the said amount does not qualify as the Operational debt as the amount given by the Applicant is not against any goods and services.

The brief submissions of the Respondent are as follows:

1. Affidavit in Reply filed by Mr. Dinesh Kumar Aggarwal, Resolution Professional of the Corporate Debtor Company and submit that the application preferred by the Applicant is frivolous, bad in law and not maintainable. That upon pursuing the facts of the case, the Applicant does not fall under the definition of the Financial Creditor as defined under the IB Code which is evident from the Memorandum of Understanding and Agreement executed being Exhibit-E and F respectively to the Application is not a loan agreement or any kind of an agreement which can be construed as a loan agreement. The Applicant to mislead this Hon'ble Court has used the word "lent" to fall under the definition of the Financial Creditor.

2. That the entire application prefaces purely on the basis that the money was lent to the Corporate Debtor whereas upon pursuing the Exhibit-E and F annexed to the Application executed between the Applicant and the Debtor being

Memorandum of Understanding for Consortium clearly defines both the Applicant and the Debtor were acting as Consortium members jointly for submitting the bid against the tender floated by ONGC.

3. That to consider the Applicant as a Financial Creditor it should fall under the definition of the Financial Creditor as defined under Section 5(7) of the Insolvency and Bankruptcy Code, 2016, hereinafter referred to as "code"). The relevant extract of the definition of the Financial Creditor is re produced herein.

> *5(7) "a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred".*

Further, in order to ascertain whether a person is a financial creditor, the debt owed to such a person must fall within the ambit a 'Financial Debt as under Section 5(8) of the IBC.

4. A financial debt is defined under Section 5(8) of the IBC to mean:

"a debt alongwith interest, if any, which is disbursed against the consideration for time value of money and includes -

a. Money borrowed against payment of interest;
b. Any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;

c. Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
d. The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
e. Receivable sold or discounted other than any receivable sold on non-recourse basis;
f. Any amount raised under any other transaction, including, any forward sale or purchase agreement, having the commercial effect of borrowing;
g. Any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

The amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause

5. That in view of the definition as defined under the Code, the Applicant does not fall under the definition of Financial Debt. It is further submitted that the Applicant to get the preferential treatment has made the present Application.

6. That from the perusal of the terms of the Memorandum of Understanding dated 10th December 2018 executed between the Applicant and the Debtor it appears that to submit the bid for the tender with ONGC for Protective Coating of well head platform project, which was floated by ONGC, the Applicant and the Debtor had incorporated a consortium to fulfil the

technical eligibility criteria of the said tender. Upon perusal of the Agreement executed by and between the Debtor and Applicant dated 24th October 2018 the consortium was to arrange for the bid bond bank guarantee. Accordingly, the Debtor being the lead member was to submit the bid bond bank guarantee for INR 2,16,77,308/- as a part of the consortium bid and the Applicant was required to transfer ***its share*** of INR 50,00,000/- towards the bid bond bank guarantee to the Debtor. Therefore, the said amount which is being transferred cannot be referred to as a loan but is a part of the contractual obligation as Executed under the terms of the Memorandum of Understanding. The relevant extract of the Agreement dated 24th October 2018 executed by and between the Debtor and the Applicant is reproduced hereinbelow:

THE PARTIES HEREBY AGREE AS UNDER

1) *Member I 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) *....*

Thus, the Respondent/Resolution Professional prayed for dismissed of the above Application.

FINDINGS/OBSERVATIONS

Heard the arguments on both sides and perused the material available on record. The above Application is filed by the Petitioner challenging the action of the Resolution Professional in accepting their claim as an "Operational Debt" instead of "Financial Debt".

It is the contention of the Petitioner that the Petitioner has lent an amount of Rs. 50 lacs to the Corporate Debtor for the purpose of submitting Bid Bond Bank Guarantee in case the work was not awarded to them from the ONGC jointly with the Corporate Debtor which shall be refunded by the Corporate Debtor.

The Ld. Counsel appearing for the RP appeared and vehemently opposed the contention of the Petitioner contending that the above amount of Rs. 50 lacs was arranged by the Petitioner to the Corporate Debtor towards their share of contribution for Bid Bond Bank Guarantee for securing the contract from ONGC which is nothing but an "Operational Debt" and does not fall within the definition of "Financial Debt" nor the Petitioner fall under definition of Financial Creditor of IBC and therefore his action in accepting it as an "Operational Debt" is in accordance with the Code.

In order to decide the above controversy, it is important to read the terms and conditions of the agreement dated 24th October 2018 entered into between the parties that reads as under;

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ON RS. 100/- STAMP DUTY PAID ONLINE THROUGH SBIEPAY PAYMENT GATEWAY TO GOVERNMENT OF MAHARASHTRA UNDER GRN NO. MH009098316201819P ON 06TH DECEMBER, 2018.

AGREEMENT

This Agreement is made on 24th day of October month of year 2018 and is to be considered as an Appendix to the MOU signed between both 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 1st Floor, 1st 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 24th 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:-

For JAL ENGINEERS PVT. LTD.
Director / Authorised Signatory

NOTARY K. V. DAME Reg. No. 7337 GOVT. OF INDIA

45

a) If the said tender no **MR/ES/MM/PCWPP-II/01/2018/P851C18002** 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.

For and on behalf of
Dolphin Offshore Enterprises (India) Limited

(Member 1)

WITNESSES
(1) .....

For and on behalf of
JAL Engineers Pvt Ltd.

(Member 2)

WITNESSES
(1) .....

NOTARY K. V. DAVE Reg. No. 7337 GOVT. OF INDIA

For JAL ENGINEERS PVT. LTD.
Director / Authorised Signatory

It is very clear from the plain reading of the above terms that the above amount of Rs. 50 lacs was contributed by the Petitioner being their share for submitting Bid Bond Bank Guarantee to ONGC which has to be refunded by the Corporate Debtor within seven days of release of Bid Bond by ONGC in any of the conditions mentioned in the agreement dated 24th October 2018.

If the said tender no. MR/ES/MM/PCWPP-II/01/2018/P851C18002 for Protective Coating of Wellhead Platforms Project-II is awarded to a party other than the Consortium.

a) *If the tender is cancelled by ONGC.*
b) *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.*

It is also very clear from the above terms that the Petitioner is also bound to submit counter guarantee to the Corporate Debtor in case the tender is awarded to them after submitting performance Bank Guarantee by Corporate Debtor. Thus, it is very clear from the above terms that the above amount was lent by the Petitioner towards their contribution which does not fall within the definition of "Financial Debt" as argued by the Resolution Professional. In this regard, it is also appropriate to observe here that the unsecured financial creditors are getting an amount of Rs. 10,67,731/- against the admitted claims of Rs. 10,67,73,118/- with 1% recovery. Similarly, the Operational Creditors including workmen and employees are getting 1% or less than 1% recovery under the approved Resolution Plan and deciding the nature of claim of the Petitioner in this application merely remains as an academic issue and the petitioner is not going to get any higher advantage under any of the two categories.

For the aforesaid reasons, this Bench did not find any apparent irregularity or illegality committed by the Resolution

Professional in rejecting the claim of the Petitioner as a "Financial Debt" and there are no merits in the above application and accordingly, the above I.A. is **dismissed** confirming the action of Resolution Professional in accepting the claim of the Petitioner as an "Operational Debt".

Sd/-

ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-

H.V. SUBBA RAO
MEMBER (JUDICIAL)

--Rajeev--