

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

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**CO.PET. 5 of 2012**

ERNST AND YOUNG PVT. LTD.

..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate with  
Mr. Sandeep Kapur, Mr. Shivek Trehan and Mr.  
Laksh Khanna, Advocates.

versus

JAGSON INTERNATIONAL LTD.

..... Respondent

Through: Mr. Sakal Bhushan and Mr. Robin  
George, Advocates.

**CORAM: JUSTICE S. MURALIDHAR**

**ORDER**

**07.05.2013**

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1. This is a petition under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956 ('Act') filed by Ernst and Young Private Limited ('E&Y') seeking winding up of Respondent Jagson International Limited ('JIL') on the ground of its inability to pay its debts.

2. The background facts are that JIL contacted E&Y seeking assistance in arranging adequate finance through debt/equity financing to help JIL in expanding their offshore oil drilling services. JIL needed financial assistance of USD 330 million to acquire two additional rigs. After mutual negotiations a letter of engagement ('LOE') dated 1<sup>st</sup> April 2008 was executed by E&Y and JIL. The terms and conditions of the engagement were spelt out in the LOE. The breakup of the total funding requirement for the rigs was also set out.

3. Clause 3.3 of the LOE set out the fees and expenses payable. The fees payable by JIL to E&Y was structured as 'Engagement fees' and 'Success fees'. Clause 3.3.1 and 3.3.2 of the LOE which set out the details read as under:

**“3.3.1 Engagement Fees**

Engagement fee is designed to compensate E&Y for a portion of the time and efforts expended from the Start Date to Transaction Closing Date for raising both debt and equity funds required for the proposed acquisition on the rigs.

The amount of engagement fees for the debt/mezzanine debt/equity raise would be as follows:

Rs.5,00,000 payable upon signing of this letter.

Rs.10,00,000 payable upon finalisation of the appropriate structure for undertaking the funding exercise.

Rs.10,00,000 payable upon acceptance of a non-binding term sheet from a potential debt/mezzanine debt/equity investor (for clarification this would be payable for each term sheet that is finally accepted by the Company, subject to a cap of INR30,00,000/- in aggregate towards the aforesaid fees payable upon acceptance)

This Engagement Fees would be fully creditable against the respective success fee (as defined below) for equity and debt funds raised, paid under this Engagement Letter, but shall not be refundable.

**3.3.2 Success Fees**

The success fee that shall be payable for this engagement is as follows:

0.9% of debt funding raised both at the level of JIL and in the subsidiaries for the acquisition of the rigs payable on the Transaction Closing Date, co-terminus with the transactions at Closing between the Company, its subsidiaries and the lenders/investors, as applicable.

2% of equity funds raised, subject to a minimum fee of

Rs.2,00,00,000 (Rupees Two Crores) payable on the Transaction Closing Date co terminusly with the transactions at Closing between the Company, its subsidiaries and the lenders/investors, as applicable.

For the purposes of calculating our success fee for funds raised from investors, the fee shall be based on the value of the Transaction Size, which shall be deemed to be the total value of equity (including convertible) and debt funds received from all investors as per the above terms.

Whilst the structure and nature of the transaction may change as discussions progress, you acknowledge that this is the basis on which the transaction has been undertaken. For the avoidance of doubt, the above success fee will not be prejudiced in the event that a transaction, once completed, has evolved away from that originally envisaged in this letter and we will still be entitled to our success fee based on any consideration paid by you in relation to any transaction on which we advise pursuant to this engagement or any variation of this engagement.

Furthermore, if the structure or nature of the transaction begins to alter from the mandate originally envisaged by us as outlined in this letter, we reserve the right to withdraw from this engagement or renegotiate the Engagement Letter.”

4. Clause 3.3.3 provided for termination fees. In the event that JIL sought to withdraw from the project with no material changes to the terms offered, JIL had to pay E&Y termination fees of Rs.30 lakhs in addition to the engagement fees for the debts and equities raised separately.

5. Clause 3.3.6 of the LOE sets out the payment schedule. The entire fees was payable as per different milestones defined in clause 3.3.1. Success fees was to be paid on the day of transaction closure co-terminus with the

transactions at closing between JIL, its subsidiaries and the lenders/investors, as applicable. An extension letter was issued on 2<sup>nd</sup> November 2009.

6. On 11<sup>th</sup> June 2008 E&Y raised an invoice regarding fees for professional services rendered in the sum of Rs.5 lakhs together with service tax and educational cess totalling Rs.5,61,800. Another invoice was raised for professional services rendered in Phase-II in the sum of Rs.11,23,600. On 22<sup>nd</sup> June 2009 an invoice for a sum of Rs.17,81,681.48 for milestone fee, out of pocket expenses etc. was raised. An invoice for Rs.3,23,667.91 for out of pocket expenses was raised on 18<sup>th</sup> March 2010. On 18<sup>th</sup> March 2010 itself another invoice for Success fee including service tax and education cess totalling Rs.2,30,52,700 was raised.

7. On 22<sup>nd</sup> April 2010 E&Y addressed a letter to JIL setting out the key milestones achieved by it since the LOE was executed. In the letter, addressed to the Chairman of JIL with a copy marked to Mr. Pradeep Gupta, its Director, E&Y stated that it had assisted JIL in successful acquisition financing of two jack-up rigs. It was added:

“In the context of the above and our long standing relationship, we wanted to request for an additional 0.25% success fee over and above agreed success fees in our engagement letter i.e. a total success fee of 1.15% of the debt funds raised for financing the Ensco rigs. We trust that you have seen and realised value in our association and would consider our request in a positive light.”

8. Following the above letter, on 4<sup>th</sup> June 2010 an invoice for Success fee in the sum of Rs.2,76,85,300 was raised by E&Y indicating a rate of 1.15% of total loan raised of Rs.400 crores with adjustment of invoice dated 18<sup>th</sup>

March 2010. In a letter dated 4<sup>th</sup> October 2010 to addressed to the Chairman, and a copy marked to Mr. Pradeep Gupta, Director of JIL, E&Y reminded that its invoices dated 18<sup>th</sup> March 2010 and 4<sup>th</sup> June 2010 remained unpaid. It also referred to the letter dated 22<sup>nd</sup> April 2010 whereby enhancement of the rate of Success fee by 0.25% had been requested. It also referred to the previous meeting dated 21<sup>st</sup> September 2010 during which JIL reassured that the outstanding amount would be cleared by 30<sup>th</sup> September 2010. E&Y ended the letter dated 4<sup>th</sup> October 2010 by stating as under:

“We hope that you will appreciate that we have supported you and Jagson in achieving its strategic objectives in obtaining financing for these two assets and in refinancing the ICICI debt facilities with Axis Bank. We hope that in the spirit of maintaining our relationship with Jagson, we will get an early payment/clearance of our outstanding.”

9. JIL wrote a letter to E&Y on 27<sup>th</sup> January 2011 stating as under:

“Dear Sir

We refer to your fund raising engagement with Jagson International Ltd. dated April 1, 2008 and the extension letter dated November 2, 2009 and further correspondence with reference to the letter dated April 22, 2010 and October 4, 2010 with respect to clearance of our outstanding invoices. We appreciate your patience and would like to inform you that the company is currently facing some cash-flow mismatch, which is expected to be clear by February 2011, We acknowledge the receipt of invoice of INR4,90,04,429 from E&Y Pvt. Limited and the same would be cleared subject to approval with Mr. J.P. Gupta, Chairman, Jagson Group.”

10. With no payment coming forth, a legal notice was issued on 31<sup>st</sup> August 2011 by E&Y to JIL under Sections 433(e), 434 and 439 of the Act. JIL was called upon to make payment of the admitted debt of Rs.7,94,65,462

together with the interest @ 12% per annum from the due date till payment.

11. A reply was sent to the aforementioned notice by JIL through its counsel on 24<sup>th</sup> November 2011 where, *inter alia*, it was stated as under:

“2. That my client has instructed me to say that it is not in a position to comprehend the said notice in the absence of the availability of the correspondence mentioned therein. According to it, its officers spent a lot of time in making arduous efforts to trace the said correspondence but in vain and that is the reason this reply is being submitted thereafter.

3. That I have the instructions from my client to call upon you to make available to it the full correspondence mentioned in the said notice so that the contents thereof may be comprehended in order to submit an effective reply thereto.”

12. The present petition was thereafter filed on 23<sup>rd</sup> December 2011. Pursuant to the notice issued in the petition on 6<sup>th</sup> January 2012 the Respondent entered appearance through counsel. On 3<sup>rd</sup> October 2012 the parties were referred to mediation but no settlement could be arrived at.

13. In the reply filed to the petition on 16<sup>th</sup> March 2013, a preliminary objection was taken that the Petitioner had conjured up a non-existing debt and that “there was no ascertained debt or liability at all” which JIL was obliged to pay E&Y. It was stated that there were varying claims in paras 4(k), (o) and (p) which led to an irresistible conclusion that the claim was unascertained and incomprehensive. It was contended that the sum of USD 330 million was sought to be raised for acquiring two rigs, an old one from a US company and the other a new one to be constructed at a Chinese/Singaporean shipyard. However, the transactions did not materialise

and the said rigs were never acquired. It is, therefore, asserted by JIL that under the LOE, E&Y is entitled to only an Engagement fee of Rs.5,61,800 including service tax. In March-April 2010, JIL acquired two old rigs Ensco 51 and Ensco 57 at a price of USD 47 million each. JIL availed the services of E&Y for arranging the debt of USD 42.30 million and RS.341.5 million equivalent to USD 7.58 million thus totalling USD 49.88 million from the ICICI Bank for financing the acquisition of Ensco 51 rig. It is stated that during the course of transactions with the ICICI Bank, JIL felt that the said financial arrangement made at the behest of E&Y was unreasonable. The loan was transferred from ICICI Bank to Axis Bank and in the meanwhile JIL faced a lot of harassment. It is stated that considering that the JIL's poor experience with E&Y, it decided not to avail the services of E&Y for financing the acquisition of another rig i.e. Ensco 57. JIL stated that on its own it arranged the debt of USD 37.6 million from the State Bank of India ('SBI'). It is stated that even the transaction relating to the financing of Ensco 51 was outside the scope of the LOE. Further since the debt of USD 49.88 million to be arranged by E&Y was less than 1/6<sup>th</sup> of the originally proposed debt of USD 330 million an understanding had been arrived at between the parties to the effect that the respondent company would, on successful arrangement of the debt for the Ensco 51 rig, pay 0.32% of the debt as Success fees apart from service tax. Accordingly, JIL paid E&Y Rs.76,55,902 plus Rs.7,88,558 for of service tax totalling Rs.84,44,460 by 11<sup>th</sup> October 2010. JIL contends that with the said payment nothing further remains to be paid to E&Y. JIL has claimed that there was an "oral" understanding between the parties that JIL would on successful arrangement of the reduced debt pay E&Y 0.32% of the debt as Success fee. JIL asserts that it is a financially sound company having an annual turnover of Rs.220

crores during the financial year 2011-12 and has 250 employees.

14. E&Y has in its rejoinder denied that there was any “oral” understanding between the parties as claimed by JIL. Reference is made to JIL’s letter dated 27<sup>th</sup> January 2011 which constituted an admission of liability. It is pointed out that till it filed a reply to the present petition, JIL never denied its liability. It cited financial problems and asked for time till February 2013 to make payment. Reference is made to the letter dated 22<sup>nd</sup> April 2010 whereby E&Y had sought enhancement of the success fee rated from 0.9% to 1.15%. Reference is made to para 3.3.2 of the LOE in terms of which if JIL was not successful in the transactions for the acquisition of the two rigs for which it sought financial assistance in the sum of USD 330 million, it would nevertheless have to pay E&Y the Success fee. It is asserted that E&Y arranged for loans from ICICI as well as Axis Bank but JIL was unable to close the originally envisaged acquisitions leading to additional time and efforts being made by E&Y. It is pointed out that JIL’s revenue declined from Rs. 55.8 crores in the financial year ending 31<sup>st</sup> March 2008 to Rs. 45.9 crores in the financial year ending 31<sup>st</sup> March 2009. Likewise, the profit after tax declined from Rs 16.84 crores in the financial year ending 31<sup>st</sup> March 2008 to Rs 6.19 crores in financial year ending 31<sup>st</sup> March 2009. Further, JIL had only one operational rig. The other two rigs were defunct and would have marginal salvage value. It is pointed out that during the entire period from November 2009 till October 2010 JIL never communicated to E&Y that the Success fee was not payable. It is asserted that E&Y was effectively involved in financing and refinancing of the rigs. It is submitted that sum of Rs.84.44 lakhs paid by JIL was only the milestone fees.



15. Mr. Sandeep Sethi, learned Senior counsel appearing for the Petitioner, referred to the relevant clauses of the LOE and the correspondence exchanged between the parties. He submitted that there was a clear admission of liability by JIL as was evident from its letter dated 27<sup>th</sup> January 2011. He also referred to the e-mails dated 16<sup>th</sup> January 2010, 26<sup>th</sup> May 2011 and the reply thereto by Mr. Pradeep Gupta.

16. Appearing on behalf of Respondent Mr. Sakal Bhushan submitted that under Clause 13 of the LOE, the Engagement fee was to be set off against the Success fee. He reiterated the submissions that the original purpose for which the assistance in finance was sought could not be achieved and the actual assistance provided by E&Y to enable JIL to obtain loans was not even 1/6<sup>th</sup> of the original sum of USD 330 million. The fees, therefore, correspondingly was required to be reduced. He submitted that apart from the sum of Rs.84.44 lakhs nothing was payable either towards Engagement fee or Success fee by JIL to the E&Y. He pointed out that JIL never agreed to the enhanced Success fee rate of 1.15%. He also sought to draw a distinction between E&Y arranging for finances and merely assisting JIL in obtaining finances. According to Mr. Sakal Bhushan no Success fee could be claimed by E&Y for merely 'assisting' JIL in obtaining finance as compared to 'arranging' for such finance. He pointed out the variance in figures of the amount due as claimed by E&Y in different paras of the petition and that this itself was a good reason for not entertaining the petition. In support of his plea that a winding up petition for a vague and unascertained sum ought not to be entertained Mr. Bhushan relied on the decision in *Madison Communications Pvt. Ltd. v. Som Distilleries and Breweries Ltd. [2005] 126 Company Cases 786 (Delhi)*. He further submitted that so-called

admission of liability made by Mr. Pradeep Gupta was without any authorisation of JIL or its Chairperson and, was, therefore, not binding on JIL. Reliance was placed on the decision in *Patel Investments v. Credential Finance Ltd. [2001] 105 Company Cases 13 (Bombay)*. Thirdly, it was submitted that the admission, if any, by JIL was at best ambiguous and it was for E&Y to show that there was an unequivocal admission of liability by JIL. Reliance is placed on the decision in *Tata Iron and Steel Co. Ltd. v. Omega Cables Ltd. [2008] 142 Company Cases 468 (Madras)*.

17. By way of rejoinder, Mr. Sandeep Sethi, learned Senior counsel appearing for the Petitioner pointed out that discrepancy, if any, in the figures of the debt owing to E&Y would be on account of fluctuating foreign exchange currency rates. He stated that JIL could even go by the Indian rupee equivalent of the admitted liability. Referring to the letter of the SBI addressed to JIL dated 15<sup>th</sup> April 2010 he pointed out that the loan amount sanctioned in terms of the said letter could form the basis for calculating the fees owing to E&Y. He submitted further on instructions that E&Y was without prejudice to its rights to claim the differential sum prepared, for the purposes of this petition, to accept a Success fee @ 0.9% as originally stated in the LOE, if JIL was prepared to make payment of the fees calculated on that basis. He pointed out that the emails from Mr. Pradeep Gupta showed that he had written those letters as Director of JIL with the authorisation of the Chairperson of the JIL. Therefore, the said admission could not now be resiled from by JIL.

18. The above submissions have been considered. It is seen that at no point in time did JIL terminate the LOE. It also did not write to E&Y in response

to the invoices received by it after 10<sup>th</sup> April 2010 protesting that the Success fee claimed was either not payable or that the rate was not 1.15%. Also JIL never wrote to E&Y stating that it does not require their services any longer. Even in reply to the legal notice issued by E&Y, JIL did not take the defences it now seeks to raise for the first time in these proceedings.

19. Clause 3.3.2 of the LOE makes it clear that Success fee “will not be prejudiced in the event that a transaction, once completed, has evolved away from that originally envisaged in this letter”. It clearly states that E&Y will still be entitled to the Success fee relation to any transaction on which E&Y advises. The words “structure and nature of the transaction” might refer to the debt/equity financing but the explanation offered by JIL that this was only for finances ‘arranged’ for by E&Y on not those for which it provided ‘assistance’ is not borne out from the LOE. Among the services offered by E&Y providing ‘assistance’ in obtaining finance for the transactions of acquisitions of rigs is definitely included.

20. Further, it is seen that there is an unequivocal admission of liability by JIL in its letter dated 27<sup>th</sup> January 2011 while acknowledging receipt of the invoice in the sum of Rs.4,90,04,429 from E&Y. In his e-mail of 9<sup>th</sup> October 2011 sent to the Petitioner, Mr. Pradeep Gupta makes a reference to the meeting held with the Chairman of JIL even when he requests for “patience for little more time”. The e-mail dated 26<sup>th</sup> May 2011 from JIL also seeks some more time to make payment. Therefore, the decisions in *Patel Investments* and *Tata Iron and Steel Co. Ltd.* are distinguishable on facts and do not assist JIL. In the circumstances, the defence of JIL to the petition does not appear to the Court to be *bonafide*. The Court finds that there is an

admitted liability of JIL towards E&Y which it has been unable to pay.

21. As regards the issue of ‘unascertained’ debt, the discrepancy in the figures is possibly due to the fluctuating foreign exchange currency rates. As far as the present petition is concerned, the legal notice dated 31<sup>st</sup> August 2011 sent by E&Y to JIL mentions an admitted debt of Rs.7,94,65,462 together with the interest @ 12% per annum from the due date till payment.

22. The plea that JIL is commercially solvent and ought not to be wound up is answered by the following observations of the Supreme Court in *IBA Health (India) Private Limited v. Info-Drive Systems SDN. BHD (2010) 10 SCC 553*:

“23. The principles laid down in the abovementioned cases indicate that if the debt is bona fide disputed, there cannot be “neglect to pay” within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debt cannot be termed as “neglect to pay” so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

24. The appellant company raised a contention that it is commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company’s insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. **If there is no dispute as to the company’s liability, the solvency of the company might not constitute a standalone ground for setting**

**aside a notice under Section 434(1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand.** The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay its debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.” (emphasis supplied)

23. Accordingly, the Court is satisfied that the Petitioner has made out a case for admission of the petition and for appointment of the Official Liquidator (‘OL’) attached to this Court as Provisional Liquidator (‘PL’) of JIL on the ground of its inability to pay its admitted debts.

24. The petition is, therefore, admitted. A copy of this petition be served on the Official Liquidator (‘OL’) attached to this Court. The OL is appointed as the Provisional Liquidator (‘PL’) of the JIL. The OL is directed to take over all the assets, books of accounts and records of the JIL immediately upon this order becoming effective as indicated hereafter. The OL shall in that event also prepare a complete inventory of all the assets of the JIL before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value the assets. He is permitted to take the assistance of the local police authorities, if required.

25. Publication of the citation of the petition be effected in the Official Gazette, ‘The Statesman’ (English) and ‘Veer Arjun’ (Hindi) in terms of Rule 24 of the Companies (Court) Rules, 1959 (‘Rules’). The cost of publication shall be borne by E&Y.

26. The Directors of the JIL are directed to strictly comply with the requirements of Section 454 of the Act and Rule 130 of the Rules and furnish to the OL a statement of affairs in the prescribed form verified by an affidavit within a period of 21 days from the date that this order become operative as indicated in para 34 below. They will also file affidavits in this Court, with advance copies to the OL, within four weeks thereafter setting out the details of all the assets, both movable and immovable, of the JIL company and enclose therewith the balance sheets, profit and loss accounts and copies of the statements of all the bank accounts for the last three years.

27. This order is kept in abeyance for a period of eight weeks from today to give JIL one last opportunity to make payment to E&Y of the admitted liability to the satisfaction of E&Y. If the payment as directed above is made by JIL to E&Y within eight weeks, then the present petition will be disposed of leaving it open to E&Y to institute other appropriate proceedings in accordance with law to recover the balance amount claimed by it. If such payment is not made by JIL to E&Y within eight weeks then this order, and in particular para 24 to 26 above, will become immediately operational. E&Y will immediately inform the OL and the OL will proceed to take steps in terms of paras 24 to 26 of this order. In that event, a compliance report shall be filed by the OL before the next date of hearing.

28. List on 25<sup>th</sup> September 2013.

**S. MURALIDHAR, J**

**MAY 07, 2013**

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