

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

CP (IB) No. 356/MB-IV/2020

Under Section 9 of the I&B Code, 2016

In the matter of:

Prime Maritime DWC-LLC

...Operational Creditor/Applicant

V/s

Pentagon Waterlines Private Limited

[CIN: U63032MH2005PTC154568]

...Corporate Debtor/Respondent

Order Dated: 17.03.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Petitioner(s) : Mr. Shubham Agrahari i/b Anoma
Law Group LLP, Advocate.

For the Respondent(s) : Ms. Riddhi Nyati a/w Ms. Ujwala
Deshmukh, Advocate.

Per: Kishore Vemulapalli (Member Judicial)

1. This is an Application being C.P. (IB) No. 356/MB/C-IV/2020 filed on 29/01/2020 by Mr. Gautam Kumar Roy, Director of Prime Maritime DWC LLC, the Operational Creditor/Applicant, under section 9 of

Insolvency & Bankruptcy Code, 2016 (I&B Code) against Pentagon Waterlines Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (CIRP).

1.1. The Operational Creditor has filed Board Resolution dated 10.10.2019 in support of authorization in favour of signatory of this Application authorising him to file the present company application on behalf of the Operational Creditor.

2. The Applicant Operational Creditor provided its professional services of allotting space/slots on the various vessels to the Corporate Debtor, for the Respondent's cargo to be imported/exported. The Applicant (through its agents) raised invoices on the respondents against the said professional services rendered by the Applicant.

2.1. The Applicant submits that it had provided freight services to the Corporate Debtor and Applicant's agent in India i.e. Samudera Shipping Line (India) Private Limited, raised 6 invoices raised from 10.04.2018 to 26.04.2018 due for payment on the date of invoice itself. These invoices were not paid and are in default for an aggregate sum of Rs. 19,29,285.05/- alongwith 18% interest per annum (till 27.05.2019) i.e. Rs. 3,87,226.47/-. The Applicant has placed on record various email communications in this regard. The invoices were raised upon the Corporate Debtor stating the Corporate Debtor's GST Number.

2.2. The Applicant issued a Demand Notice dated 27.05.2019 u/s. 8 of the Insolvency and Bankruptcy Code, 2016 upon the Corporate Debtor vide Email and Registered Post A/D asking the amount due. Vide email dated 01.06.2019, the Corporate Debtor advised the Applicant that they were appointed as agents for Infinity Shipping and Logistics

LLC, Dubai only to handle their NVOCC movement from India to various destinations and such Principal is liable to make the same payment to the Operational Creditor. The Operational Creditor, vide letter dated 07.06.2019, stated that the Corporate Debtor has never told the Operational Creditor or its Agent that they are acting as Agents for any Principal. Besides this there is no communication informing about this fact while booking the slots.

3. The Corporate Debtor has filed a Reply dated 06.03.2020 stating that they are agent of M/s Infinity Shipping and Logistics LLC, Dubai and acting on their behalf was known to both, Samudera as well as the Operational Creditor. The Corporate Debtor was assured by Samudera that the Operational Creditor shall be duly informed that the transaction was at the behest of Infinity, the Principal of the Corporate Debtor. The Corporate Debtor has stated vide email dated 19.06.2018 it was again clarified and informed that the invoiced should be raised on infinity. Pursuant to this clarification of the Corporate Debtor, the Operational Creditor did the needful and issued the invoices on Infinity. Thereafter, there were numerous correspondence/emails exchanged by Samudera and the Operational Creditor with Infinity requesting Infinity to clear the dues of the Operational Creditor and settle all invoices. Initially, Samudera and the Operational Creditor kept the Corporate Debtor in loop of the email correspondence and thereafter emails were exchanged by Samudera and the Operational Creditor directly with Infinity. In this regard, the Corporate Debtor has submitted emails dated 27.09.2018, 15.11.2018, 20.11.2018, 15.02.2019, 18.02.2019 and 06.03.2019. These emails relate to communication between Infinity, Samudera, Operational Creditor and the Corporate Debtor in connection with outstanding payment claimed in this Application.

4. The Operational Creditor has filed Rejoinder dated 25.11.2021 stating that the Corporate Debtor never disclosed the fact that it is acting as an agent on behalf of the infinity either at the time of booking of the slots or confirmation of the booking. Further, it has not submitted any evidence of communication of this fact. Also, in its email dated 01.06.2019, the Corporate Debtor has admitted its dues and merely requested Infinity to make the payment in its behalf.
5. We have carefully gone through the documents and pleadings available on record and considered the arguments of both the sides.

5.1. The Applicant has enclosed one email dated 12.07.2018 from Accounts Department of the Corporate Debtor informing “*We will check-in with our Dubai office and revert back to you*” in response to payment follow-up mails from the Operational Creditor. Few other mail communications annexed to the Application suggests that the payment was to come from Dubai Company. It is not in dispute that the Applicant’s agent Samudera had raised invoice(s) upon the Operational Creditor quoting its GST Number therein.

5.2. There is no evidence on record in relation to communication of fact that the Corporate Debtor was acting as agent of Infinity prior to confirmation of booking of slots by the Agent of the Operational Creditor. However, the email communications placed on record by both the parties suggest that there has been follow-up for payment by the Operational Creditor with the Principal of the Corporate Debtor and such Principal has promised to clear the dues to the Operational Creditor. The Corporate Debtor has also placed an email dated 01.06.2019 expressing surprise on receipt of legal notice even after confirming that Infinity will be making the payment and Infinity has

already settled these amounts with the Corporate Debtor in their SOA with them.

5.3. The Operational Creditor's agent vide email dated 12.07.2018 has requested to make payment in India as it has made GST payments here and agreed that future payments can take place in Dubai. Vide email dated 17.08.2018, the Operational Creditor sought the details of Principal of the Corporate Debtor in Dubai, which were provided on the same day by return mail. However, vide email dated 21.08.2018 the Corporate Debtor has asked the Operational Creditor to send the account details for transfer of dues in India.

5.4. The above email communications give rise to an issue for determination of who is primarily liable to make payment to the Applicant Operational Creditor. In an application under Insolvency and Bankruptcy Code, 2016, the Adjudicating Authority has limited scope of enquiry in so far as existence of prior dispute in relation to debt claimed as due and in default is concerned.

In the case of "***Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd. (2018) 1 SCC 353***" the Hon'ble Apex Court held that,

"Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a

dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application”.

5.5. In view of the above it is held that the petition is not maintainable on account of existence of prior dispute and hence, deserves to be dismissed.

ORDER

6. This Application being C.P. (IB) No. 356/NCLT/MB/C-IV/2020 filed under Section 9 of I&B Code, 2016, filed by Prime Maritime DWC LLC, the Operational Creditor/Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (I&B Code) against Pentagon Waterlines Private Limited, Corporate Debtor, for initiating Corporate Insolvency Resolution Process is **Dismissed**.
7. We make it clear that any observations made in this order should not be construed as expressing opinion on merits. The right of the petitioner before any other judicial forum shall not be prejudiced on the grounds of dismissal of the present petition.

Sd/-

Prabhat Kumar
Member (Technical)
/LRA Akshata/

Sd/-

Kishore Vemulapalli
Member (Judicial)