

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. IV)

CP No. IB- 1141/ND/2020

[Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016]

IN THE MATTER OF:

Eurotainer S.A.
Having its Registered Office at
Espace Seine, 26 Quai Charles
92300 Levallois, Perret- France

... APPLICANT/OPERATIONAL CREDITOR

VERSUS

M/s Panoli Products Private Limited
CIN No. U62200DL2013PTC251028
Having Registered Office at:
1st Floor, M-3, Hauz Khas Enclave,
South Delhi, New Delhi-110016

...RESPONDENT/ CORPORATE DEBTOR

ORDER PRONOUNCED ON: 11.04.2022.

CORAM:

SH. SHRI DHARMINDER SINGH, HON'BLE MEMBER (JUDICIAL)

SMT. SUMITA PURKAYASTHA, HON'BLE MEMBER (TECHNICAL)


11/4/22

ORDER

PER: SHRI DHARMINDER SINGH, MEMBER- JUDICIAL

1. This is an application filed by Eurotainer S.A., the applicant/operational creditor seeking (for brevity Operational Creditor) to initiate CIRP against the Respondent company/Corporate Debtor (for brevity Corporate Debtor) M/s s Panoli Products Private Limited, under Section 9 of IBC 2016 for the alleged default on the part of the Corporate Debtor having an outstanding balance of USD 349,677.04. The details of transactions leading to the filing of this petition as averred by the applicant are as follows:-

- a. In 2014 the operational creditor had lease its tanker containers under four lease agreements to the corporate debtor. In terms of the lease agreement, the operational creditor lease out tanker containers to the Corporate Debtor and issued delivery notes dated 22.04.2014, 03.03.2014, 12.05.2014, 12.07.2014 and 26.08.2014.
- b. Accordingly, the operational creditor raised total 66 invoices from the period starting from 31.03.2014 to 11.09.2018. Out of the 66 invoices 41 invoices are still outstanding. As the corporate debtor failed to clear outstanding dues the operational creditor recalled the leased tanker containers in 2015. The case of the applicant is that the corporate debtor not only admitted its liability but also cleared some of its liability


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from 24.07.2014 to 27.08.2020. The last payment was made by the Corporate Debtor on 30.07.2020, received by operational creditor 27.08.2020.

- c. As per part-IV of the application an amount of USD 349,677.04 is still due and outstanding to be paid by the corporate debtor. The debt becomes due on 31.08.2020, i.e. the last payment made by corporate debtor.
- d. The applicant issued Demand Notice u/s 8 of the Code on 09.07.2020 duly served at the registered office of the corporate debtor. The applicant has filed an affidavit under Section 9 (3) (b) stating that no payment or notice of dispute has been received by applicant after service of demand Notice. It is pertinent to mention here that the applicant had received payment of USD 3441 on 30.07.2020, after issuance of Demand Notice dated 09.07.2020.

2. The respondent corporate debtor has filed its reply raising following objections:

- a) The Demand Notice was issued by the operational creditor for recovery of USD 5,24,616.48 (Principle amount of USD 3,53,118 and interest of USD 1,67,300) whereas in the application the applicant has claimed USD 3,49,677 as principal amount and USD 1,74,939.



- b) It is stated that the penalty component claimed by applicant is not maintainable under Section 9 of the Code, if there is no such clause in the agreement.
- c) It is submitted that an addendum dated 10.07.2014 to the original contract was signed between the operational creditor, corporate debtor and Shri Vaibhavi Logistics and it was agreed between the parties that the payment to the operational creditor shall be made by Shri Vaibhavi Logistics on behalf of the Corporate Debtor in respect of all invoices that are due and payable to the operational creditor. Therefore, the corporate debtor has no obligations to make payment to the operational creditor and thus there is no default committed by corporate debtor. The corporate debtor has duly paid Rs. 3,24,53,181/- i.e. USD 4,63,617 to Shri Vaibhavi Logistics in terms of the Contract.
- d) It is also stated that quantum of outstanding dues cannot be ascertain without proper reconciliation of accounts and in absence of any reconciliation of the balance amount and since the corporate debtor has already paid USD 4,63,617 to Shri Vaibhavi Logistics, there can be no outstanding balance payable by the corporate debtor.
- e) Objection has also raised by corporate debtor that the claim of the operational creditor is barred by limitation as 53 invoices



were raised between march 2014-June 2017 and became due and payable after 30 days from the date of the respective invoices. Since, the subject account is a running account and no part payments were ever made by the corporate debtor all the 53 invoices are now barred by limitation.

f) Further, it has been stated that remaining 13 invoices which are within limitation are of value less that the threshold limit to file present application.

3. The operational creditor has filed its rejoinder and submitted as follows:

- a. It is submitted that vide addendum dated 10.07.2014 it was agreed between the parties that the payment will be made through Shri Vaibhavi Logistics but only one payment on 22.07.2019 was made through Shri Vaibhavi Logistics and all other payments were made through corporate debtor only.
- b. It is submitted the present application satisfies all the requirement for initiation of CIRP against the Corporate Debtor, and the corporate debtor by acknowledging its liability has also made two payments on 30.07.2020 and 29.12.2020 of USD 3441 and USD 3330 respectively.
- c. It is submitted that amount of interest claimed is well agreed by the parties which is evident from the invoices and the invoices were never disputed by the corporate debtor.



4. Heard, record perused. The Corporate Debtor placed reliance on addendum dated 10.07.2014 and argued that the entire liability was that of Shri Vaibhavi Logistics, therefore, the Corporate Debtor cannot be made liable for the payment stated above. No doubt there is addendum dated 10.07.2014 executed between Eurotainer S.A., Panoli Products Private Limited and Shri Vaibhavi Logistics, wherein it is written that *“Shri Vaibhavi Logistics will make remittance to Eurotainer S.A. on behalf of Panoli Products Private Limited on all the invoices, which are due to them.”*
5. From the bare perusal of the above said addendum, it is apparent that the remittance of the amount was to be made by Shri Vaibhavi Logistics only on behalf of Panoli Products Private Limited. Although, a copy of ledger containing account of Shri Vaibhavi Logistics has been placed on record, but that is qua running account from July 2014 to March 2015, where some freight charges etc. also shown to be paid. From the said ledger record, it is not established whether the said amount was paid on behalf of Panoli Product Private Limited for the purpose of making the payment to the Operational Creditor. Although, one payment appears to have been made by Shri Vaibhavi Logistics to Operational Creditor, but subsequent two payments of amounting U.S.D 3441.00 and U.S.D 3330.00, were made by the Corporate Debtor to Operational Creditor, which proves that the payments were to be made by the Corporate Debtor to the Operational



Creditor. Even otherwise, in such like circumstances, the 'principle of estoppel' comes into play as above said two payments made by the Corporate Debtor to the Operational Creditor directly. Therefore, the Corporate Debtor is hereby estopped to allege that the payment were to be made by Shri Vaibhavi Logistics.

6. Moreover, as per addendum, the payment were even otherwise to be made "on behalf of" Corporate Debtor itself. The word 'on behalf of' clearly indicates that the ultimate responsibility to pay the same was that of the Corporate Debtor as there is nothing on the record to prove that the Corporate Debtor was absolutely discharged from its liability. The Corporate Debtor failed to prove on record that all such payments as shown in the ledger were actually made by it only for the purpose of making the payment to the Operational Creditor. In fact, those payments appeared to be made with respect of some freight charges apart from other credits & debits. Therefore, in the absence of any convincing evidence on record that the said payment was exclusively to be made by Shri Vaibhavi Logistics to the Operational Creditor, it could not be presumed that the responsibility to make the payment was only of that of Shri Vaibhavi Logistics. Hence, the dispute is of vague nature and raised just to escape from consequence. In this regard, the reliance can be placed on citation of "**Mobilox Innovative Private Limited vs. Kirusa Software Private Limited**", (2018) 1 SCC 353, the Hon'ble Supreme Court observed:



“It is clear, therefore that once the Operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility . It is clear that such notice must bring to the notice of operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which required 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.”

7. In sequel of the above said discussion, this Tribunal of affirm view that the Corporate Debtor failed to make the payment to the Operational Creditor with respect to the invoices raised. Accordingly, the present petition stands admitted.
8. The applicant has not proposed the name of an IRP, therefore, this bench appoints Mr. Vikram Sharma as the Insolvency Resolution Professional of the corporate debtor. The registration number of the IBBI/IPA-001/IP-P02533/2021-2022/13876 and email id ipvikramsharma@gmail.com. IRP above named is appointed subject to the condition that no disciplinary proceedings are pending against him. The specific consent is required to be filed in Form 2 of Insolvency and Bankruptcy Board of India (Application to



Adjudicating Authority) Rule, 2016 and made disclosures as required under IBBI (insolvency Resolution Process for Corporate Persons) Regulations, 2016.

9. We direct the applicant to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional, namely Mr. Vikram Sharma to meet out the expense to perform the functions assigned to him in accordance with regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Operational Creditor. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by Interim Resolution Professional, and shall be paid back to the Operational Creditor.
10. As a consequence of the application being admitted in terms of Section 9(5) of IBC, 2016, moratorium as envisaged under the provisions of Section 14(1), shall follow in relation to the corporate debtor, prohibiting as per proviso (a) to (d) of the Code. However, during the pendency of the moratorium period, terms of Section 14(2) to 14(4) of the Code shall come in force.
11. A copy of the order shall be communicated to the applicant, Corporate Debtor and IRP above named, by the Registry. In addition, a copy of the order shall also be forwarded to IBBI for its records. Applicant is also directed to provide a copy of the complete paper book



to the IRP. A copy of this order is also sent to the ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.

-Sd-

[SUMITA PURKAYASTHA]
MEMBER (T)

-Sd-

[DHARMINDER SINGH]
MEMBER (J)