

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

C.P. NO. 594/I&BP/2017

Under section 9 of the IBC, 2016

In the matter of
Dolphin Offshore Enterprises
(Mauritius) Pvt. Ltd.
....Operational Creditor/Applicant

v/s.

Unison Engineering &
Construction Pvt. Ltd.
....Corporate Debtor

Order delivered on: 20.06.2017

Coram: Hon'ble Mr. B.S.V. Prakash Kumar, Member (Judicial)
Hon'ble Mr. V. Nallasenapathy, Member (Technical)

For the Petitioner: Apurva Mehta.

For the Respondent: Mr. Yogesh Badoni, Manager (Finance).

Per B. S. V. Prakash Kumar, Member (Judicial)

ORDER

This Company Petition is filed u/s 9 of The Insolvency & Bankruptcy Code, 2016 by the Operational Creditor namely **Dolphin Offshore Enterprises (Mauritius) Pvt. Ltd.** against the Corporate Debtor namely **Unison Engineering & Construction Pvt. Ltd.** for initiation of Insolvency Resolution Process against this Corporate Debtor for the debtor company has failed to repay the debt outstanding to the operational creditor in relation to a vessel (AHT DIVINE DOLPHIN – ship) hired to the corporate debtor company by the petitioner on execution of a Charter Party dated 23.07.2015 , hence this Petition.

2. The facts of the case are that the Creditor entered into a Charter Party dated 23.7.2015 (Exhibit-D) with the Corporate Debtor on BIMCO Time Charter Party for

Offshore Service Vessels – SUPPLYTIME 2005 form, in respect of Dolphin Vessel, namely AHT DIVINE DOLPHIN IMO No.9541899 on terms and conditions appearing in the Charter Party dated 23.7.2015 (Exhibit – D), reflecting the creditor chartering Dolphin Vessel on hire charges of US \$ 5000 per day for a period of 50 days from 25.7.2015 to be paid every 15 days in arrears. Subsequent to the execution of Chartered Party dated 23.7.2015, the creditor and the debtor entered into five Addendums (Exhibits – E, F, G, H &I) extending the period of charter till 5.12.2015. It is further stated that US\$30 was payable per man per day on three meals basis, extra meals US\$25 per man per day, in respect to passengers, US\$10 per man per day is payable for passengers and payment of the above hire charges, if any remained unpaid after due date, shall be at the rate of 1.5% per month. Besides this, it is also agreed upon to pay US\$3,500 if the vessel for any reason remained standby and that should not be more than seven days. In view of these services rendered by the creditor, invoices were raised against the debtor company, to which the debtor kept making payments up to 30th December 2015 totaling to US\$357,668.75. And for still there being US\$556,930.45 due outstanding, when the creditor on 11th May 2016 called upon the debtor to confirm the balance US\$556,930.45 due outstanding with a caveat if the above amount is in agreement with the debtor records, to sign in the space provided beneath the said letter and return this letter to the creditor auditors. Reciprocating to the same, this debtor Manager (Finance), who today present before this Bench, signed on the same letter agreeing that the balance outstanding as on 31st March 2016 was US\$372,577.88. The creditor, to prove that the debtor confirmed that an amount of US\$372,577.88 was due and payable to the creditor, filed email dated 19.7.2016 sent by the Manager (Finance) of the Corporate Debtor reflecting that the confirmation of debt as mentioned above was sent to the creditor on 19.7.2016. When the debtor failed to pay at least the balance outstanding confirmed by the debtor, the creditor on 24.10.2016 sent demand notice under the Companies Act 1956 calling upon the Corporate Debtor to pay the admitted claim of US\$372,577.88 within a period of three weeks along with interest of 1.5% per month from 31.03.2016 till the date of realization, failing which, it should be construed that the debtor is unable to pay the debts and is liable to be wound up and initiate winding up proceedings against the debtor company, to which, the debtor, on 21st November 2016 sent reply notice

summing up its defence that since the Charter Party being covered by an arbitration clause, the petitioner should have initiated Arbitration, for winding up proceedings will not lie in a case when the company is sound and when there are issues in between the parties. In the body of this reply, the debtor elaborately discussed over arrest of vessel subsequent to redelivery of it to the petitioner ignoring the claim of the petitioner in the said notice is limited to the claim admitted by the corporate debtor in the confirmation letter issued on 19.7.2016 confirming indebtedness as on 31.03.2016 is US\$372,577.88. In its entire notice, no denial is there in respect to the above confirmation given after resolving the issue of arrest of vessel owing to the dues outstanding to a service provider, moreover, this petitioner has not made any claim in respect to the arrest of the vessel, whereby no denial is found with regards to the claim admitted in the confirmation letter. The petitioner counsel says that having the debtor Manager (finance) himself confirmed the due outstanding as US\$ 372,577.88, since the creditor limited its claim to the dues confirmed by the debtor side, the claim amount of this Application is not in dispute, and therefore the debtor has to pay the due outstanding. When nothing happened even after giving notice under section 434 (1) of the Companies Act 1956, the Petitioner on 17.3.2017 sent another notice u/s.8 of I&B Code making the same claim confirmed by the debtor company, to which there being no reply within 10 days, this Petitioner filed this Company petition u/s.9 of the Insolvency & Bankruptcy Code on 17.4.2017 making a claim of US\$. 372,577.88 plus contractual interest at the rate of 1.5% per month from the due date of invoices till 10.2.2017 amounting to US\$ 81,202 and further contractual interest @1.5% per month on the sum of US\$ 372,577.88 from 11.2.2017 till date of payment. To prove that the rate of interest mentioned in the Application is in accordance with the Agreement entered into between the parties, the Petitioner Counsel has shown Charter Party Agreement in Clause 25 – the parties agreeing the interest rate at 1.5% per month.

3. Today Mr. Yogesh Badoni working as Manager (Finance) of the Corporate Debtor Company, has appeared before this Bench stating that he is authorized to represent the matter and submits that this Corporate Debtor company has only acted as mediator for the projects involved in this case. Unless the money comes

from the its main contractor namely M/s. HLG, the Corporate Debtor will not be in a position to clear the dues of the Petitioner therefore, this Petition is liable to be dismissed for the services rendered by this financial creditor have been utilized by other company, not by this debtor company.

4. On hearing the submissions of the either side, it is evident that it is the corporate debtor entered into the charter party on 23.7.2015, in pursuance of the same, this financial creditor, basing on the terms entered in between them, hired the vessel and services, for which, this corporate director so far paid US\$ 357,668.75 and further confirmed that the dues remained payable to the creditor as on 31.3.2016 was US\$ 372,577.88, therefore today this corporate debtor cannot turn around and say that this corporate debtor is not the person received services from the financial creditor, therefore we have not found any merit in the argument from the debtor side saying that the debtor is not liable to pay the dues. It could be understood that there is an element of truth in the objection of the corporate debtor no sooner had first invoice raised against the debtor than this debtor would have raised this objection, but he has not done so, indeed this debtor made part payments up to 30.12.2015 to the invoices raised up to 28.9.2015. From 30.12.2015, this Corporate Debtor has not cleared payment to the invoices raised after 28.9.2015. Thereafter though the Applicant sent several notices, the Corporate Debtor did not even reply to the notice given u/s.8 of the Insolvency & Bankruptcy Code within 10 days from the date of receipt of the notice from the Petitioner herein. The Petitioner has filed confirmation letter given by the Corporate Debtor stating that the debt outstanding as on 31.3.2016 is US\$ 372,577.88. Therefore, today the Corporate Debtor cannot take any defense stating that this Debtor Company is under no obligation to make any payment to the creditor unless the payment has come from some other third party, this third party was not spelt out in the agreement, that third party is not privy to anything in between the petitioner and debtor company, the payments made up to 30.12.2015 have been made by the very same petitioner, therefore it appears to us it is a bogey taken out to evade payment to the petitioner.

5. Moreover this debtor has not filed any suit or initiation of arbitration proceeding against the petitioner in respect to this claim, an argument for the sake of argument cannot become a ground for dismissal of this case.

6. For the Petitioner having filed the requisite documents such as Charter Party Agreement, Statement of Accounts, Confirmation letters given by the Corporate Debtor, Bank Certificate as well as showing that no payment has been made by this Corporate Debtor after 30.12.2015, this Bench is of the view that it is a fit case for admission u/s.9 of I&B Code, thereby this Petition is admitted with the reliefs as follows:

7. This Petition clearly reveals that there is a debt as defined in Section 3(11) of I&B Code 2016, also there is default in this case within the meaning of Section 3(12) of I&B Code, 2016, this Bench hereby admits this petition filed under Section 9 of I & B Code, 2016, declaring moratorium with consequential directions as mentioned below:

- (a) That this Bench hereby prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (b) That the supply of essential goods or services to the corporate debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

- (c) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (d) That the order of moratorium shall have effect from 20-06-2017 till the completion of the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, as the case may be.
- (e) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

8. Accordingly, this Petition is admitted.

9. This Bench, having admitted the petition, makes a reference to the Insolvency Bankruptcy Board of India for recommendation of an Insolvency Professional to act as Interim Resolution Professional.

10. The Registry is directed to communicate a copy of this Order to both parties.

Sd/-

V. NALLASENAPATHY
Member (Technical)

Sd/-

B. S.V. PRAKASH KUMAR
Member (Judicial)