

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

C.P. (I & B) No. 1560/MB/2017

Under Section 9 of the Insolvency and Bankruptcy Code,
2016 read with Rule 6 of the Insolvency and Bankruptcy
(Application to Adjudication Authority Rules, 2016)

In the matter of

Mr. Amit Mittal

Sole Proprietor of M/s Shyam Udhyog,
310, Gokul Building, 80-A, Baroda Street, Iron Market,
Mumbai – 400009.

Correspondence address: Flat No. 202, 2nd Floor, Irene
Apartment, Hanuman Road, Opp. Cosmos Bank, Parle
Tilak School Compound, Vile Parle (E), Mumbai 400057

...Operational Creditor

Vs

M/s Krupay Tradepipes Pvt. Ltd.

4-A, Akbar Street, Devi Galli, Off. Bhaurao Bobade
Marg, Carnac Bunder, Mumbai - 400009

.....Corporate Debtor

Reserved for order on: 30.09.2022

Order Pronounced on: 16.12.2022

Coram:

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

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

For the Petitioner: Adv. Girish Kedia a/w Mr. Krushang Kedia and
Ms. Shivangi Kedia Ruia

For the Respondent: Mr. Atul Singh, Advocate

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

1. This Company petition is filed by *Mr. Amit Mittal* (hereinafter called “Operational Creditor”) seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *M/s Krupay Tradepipes Pvt. Ltd.* (hereinafter called “Corporate Debtor”) by invoking the provisions of Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter called “Code”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for resolution of a sum of Rs. 27,45,593/- (Rupees Twenty Seven Lakhs Forty Five Thousand Five Hundred Ninety Three Only) being an Operational Debt due and payable by the Corporate Debtor towards the unpaid invoices for the steel material items supplied by the Operational Creditor to the Corporate Debtor.

2. **The brief facts of the case are as follows:**
 - i. The Operational Creditor is a Sole Proprietary of M/s. M/s Shyam Udhyog and the said Operational Creditor is involved in supplying steel materials.
 - ii. The Corporate Debtor had placed various purchase orders to the Operational Creditor requesting supply of steel material. Wherein the Operational Creditor supplied the material and thereafter raised the various invoices.
 - iii. The Operational Creditor states that between 29.02.2016 to 06.03.2016, the Corporate Debtor placed order to the Operational Creditor for supply of steel material under 4 invoices aggregating to Rs. 32,68,948/- (Rupees thirty Two Lakhs Sixty Eight Thousand Nine Hundred and Forty Eight only).
 - iv. On 30.03.2016 the Corporate Debtor paid a sum of Rs. 5,23,355/- (Five Lakhs Twenty Three Thousand Three Hundred and Fifty Five only) towards the payment of one invoice.

- v. On 29.04.2016, the Corporate Debtor issued a cheque for a sum of Rs. 8,00,000/- (Rupees Eight Lakhs only). When the Operational Creditor deposited the cheque the same was dishonoured on presentation to the Bank.
 - vi. On 17.12.2016, the Corporate Debtor issued two cheques both of 17.12.2016 of Rs. 8,00,000/- (Rupees Eight Lakhs only) each aggregating to a sum of Rs. 16,00,000/- (Rupees Sixteen Lakhs only) which cheques were also dishonoured on presentation with the remark "FUNDS INSUFFICIENT" and intimation of the said dishonour was received on 22.12.2016.
 - vii. On 03.01.2017, the Corporate Debtor replied to the above mentioned notice.
 - viii. On 12.06.2017 the Operational Creditor issued demand notice dated 12.06.2017, to the Corporate Debtor, calling upon the Corporate Debtor to make the balance unpaid principle amount of unpaid invoices for a sum of Rs. 27,45,593/- (Rupees Twenty Seven Lakhs Forty Five Thousand Five Hundred Ninety Three Only). The Corporate Debtor replied to the said Demand Notice vide reply dated 27.06.2017.
 - ix. Therefore, the Operational Creditor has filed the present application under Section 9 of the I.B. Code, 2016 to recover the total debt amount of Rs. 27,45,593/- (Rupees Twenty Seven Lakhs Forty Five Thousand Five Hundred Ninety Three Only).
3. The Corporate Debtor filed affidavit in reply of Mr. Pradip R Shah, the authorized representative of the Corporate Debtor opposing the above Company Petition. The main contentions raised by the Corporate Debtor is with regard to the pre-existing dispute. The reply submitted is summarized as under:

- i. The Operational Creditor had issued a notice dated 12.06.2017 to which the Respondent replied vide letter dated 27.06.2017.
- ii. The Corporate Debtor states that Application has been filed by the Operational Creditor in respect of an alleged claim of Rs. 27,45,593/- (Rupees Twenty Seven Lakhs Forty Five Thousand Five Hundred Ninety Three Only) being the alleged principal operational debt along with alleged interest @ 18% p.a. amounting to Rs. 2,06,011/- (Rupees Two Lakhs Forty Five Thousand Five Hundred Ninety Three Only) in total aggregating to Rs. 29,51,604/- (Rupees Twenty Nine Lakhs Forty Five Thousand Five Hundred Ninety Three Only) as more particularly described in the table of Computation of the Claim Amount contained in the Application.
- iii. The Corporate Debtor further states that the alleged claim amount sought by the Operational Creditor is simply a malafide opportunistic attempt to exert pressure on the alleged Corporate Debtor abovenamed, to concede to the illegal and malafide claims of the Applicant; inter alia, by preferring such false and frivolous Application. This application has been instituted by the Operational Creditor in respect of the supply of steel pipes to the Corporate Debtor abovenamed, under the below mentioned Invoice Nos:- ST/1792/15-16 and ST/1733/15-16 dated 5th March 2016 and ST/1737/15-16 dated 6th March 2016. The Corporate Debtor deny the contents thereof and state that no such transaction ever took place between the Operational Creditor and the Corporate Debtor. No delivery of steel pipes etc., ever took place from the Operational Creditor to the Corporate Debtor. It is further submitted that the claim was raised

by the Operational Creditor even earlier, inter alia, by threatening the Corporate Debtor to initiate Winding Up proceedings and also to prosecute u/s 138 of the Negotiable Instruments Act 1881. However, the Operational Creditor has failed to even attempt to initiate any such proceedings against the Corporate Debtor. The Corporate Debtor had denied and disputed the claims of the Operational Creditor and had further called upon the Operational Creditor to bring forth the acknowledgements in respect of the delivery of the steel pipes / goods for which till date no acknowledgements have been presented and/or produced including in this Application.

- iv. The Corporate Debtor submits that the Operational Creditor has deliberately and with malafidely intention also concealed, from this Tribunal, the fact that the Operational Creditor has, prior to the filing of this Application, filed Summary Suit No. 1199 of 2017 on 21st June 2017 before the Hon'ble Bombay City Civil Court against the Corporate Debtor for the recovery of the same claim amount and on the basis of the same purported cause of action which is the subject matter of this Application.
- v. The Corporate Debtor further submits that the claim of the Operational Creditor in respect of the bounced cheques, etc. is also disputed by the Corporate Debtor. The Operational Creditor and the Corporate Debtor are part of the same industry / trade dealing in steel pipes, etc. In this regard, the Operational Creditor and the Corporate Debtor had attempted to commence a trade relationship however, the same was short lived. In an attempt to establish a trust relationship the parties and

keeping in view of the industry norms, the Corporate Debtor had handed over blank security cheques to the Operational Creditor to being trading on a line of credit. However, the trade relationship between the parties never really fructified and the transaction never ensued between the parties. The Operational Creditor, having security cheques in possession, malafidely filled and attempted to encash the security cheques. The security cheque bearing no. 113371, was deposited by the Operational Creditor on 29th April 2016, which was stopped from clearance in time by the Corporate Debtor; contrary to the allegation of dishonour by the Operational Creditor. The other cheques were accordingly then not deposited by the Operational Creditor and were only deposited later in time which was also not cleared as the said account was not in use.

- vi. In view of what is stated hereinabove, it is proved beyond a reasonable doubt that the alleged claim amount has always been disputed by the Corporate Debtor. It is further proved that there is an existing Suit pending between the parties on the same cause of action. Accordingly, without prejudice to the contents herein above, the captioned Application is not Maintainable under the provisions of the Insolvency and Bankruptcy Code 2016 and is liable to be dismissed.
- vii. In view of what is stated hereinabove, it is evident and proved beyond reasonable doubt that there is no case to the Operational Creditor for filing the above Application.
- viii. In the circumstances stated hereinabove, the captioned Application should be dismissed without granting any relief as prayed therein and with costs and consequential relief to the alleged Corporate Debtor abovenamed.

Rejoinder of the Operational Creditor

4. In response to the above Affidavit in reply filed by the Corporate Debtor, the Operational Creditor filed a rejoinder contradicting the pleas raised by the Corporate Debtor in their reply. The relevant Para's contradicting the reply of the Operational Creditor are as follows:

- Para. 3 of the rejoinder

The Operational Creditor states that on going through the entire contents of the Affidavit-in Reply, the only defence which is sought to be raised by the Corporate Debtor that (i) the invoices under which the goods were sold and delivered aggregating to a sum of Rs.32,68,948/- were not received by the Corporate Debtor, (ii) that the cheques amounting to Rs.16,00,000/- which were issued annexed to the Corporate Application issued by the Corporate Debtor towards the collateral security / blank security cheques admittedly issued by the Corporate Debtor. The Operational Creditor states that save and except the aforesaid two defences, there is no other defence raised in reply.

- Para. 4

The Operational Creditor states that the contention of the Corporate Debtor that it has not received the goods, is false and frivolous and concocted one. The Operational Creditor states that the goods were supplied by the Operational Creditor under the four invoices as follows:

Sr. No.	Invoice No.	Date	Amount (Rs.)
1.	ST/1706/15-16	29.02.2016	5,23,355.00
2.	ST/1732/15-16	05.03.2016	9,58,508.00
3.	ST/1733/15-16	05.03.2016	8,69,505.00

4.	ST/1737/15-16	06.03.2016	9,17,280.00
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The Operational Creditor states that the delivery of the said goods was collected by the Corporate Debtor by arranging their own transport. The Kata-Chitthi/Weigh Bridge Slip are annexed in the rejoinder by the Operational Creditor. After the materials were collected by the Corporate Debtor from the Operational Creditor's Godown and the same was duly weighed at the Weigh-Bridge proving the quantity of the material collected by the Respondent as set out in the Invoices.

Para. 5

The Operational Creditor states that the said tax invoices along with the Operational Creditor's are already annexed to the application. The Operational Creditor further submit that as far as the dispute regarding non-receipt of the material by the Corporate Debtor, the same is false and frivolous defence. The Operational Creditor states that the goods are sold to the Corporate Debtor were chargeable for necessary excise duty and on each of the invoice, the Operational Creditor have mentioned TIN No. of Supplier issued by the Sales Tax Authority. The Operational Creditor's TIN No. is 278550337671-V. The Operational Creditor states that the said TIN No. is mentioned on all the invoices annexed to the application. The Operational Creditor states that after receipt of the said material, the Corporate Debtor has availed the necessary benefit from the Excise Department, thereby confirming the receipt of the goods from the Operational Creditor. The Operational Creditor states that the material supplied to the Operational Creditor under four invoices, aggregated to a sum of Rs.32,68,944/- against which the Corporate Debtor have made part payment for one invoice of Rs.5,23,355/- and failed to pay the balance payment of three

invoices. The Operational Creditor submitted an extract from the Sales Tax Department order with respect of the goods purchased by the Corporate Debtor between the period commencing from 1.4.2015 to 31.3.2016.

Para.6

The Operational Creditor states that at Sr.No.24, reflects TIN No. of the Operational Creditor herein, and the aggregate amount of four invoices is Rs.32,68,944/- with regard to benefit availed by the Corporate Debtor is of Rs. 1,55,664/-. The defence raised by the Corporate Debtor that the he has not received the invoices, is falsely contended and call upon the Operational Creditor to produce before this Hon'ble Court their Excise Register i.e. RG-34 maintained by them to substantiate the contention that the Corporate Debtor has not received the goods.

Para.7

The Operational Creditor states that the goods were supplied to the tune of Rs. 32,68,948/- and the Corporate Debtor have made part payment of Rs. 5,23,355/-. Had there been no delivery of the goods, as contended in the reply to the notice and in the Affidavit-in-Reply, there was no question of the Corporate Debtor's making any part payment. The Operational Creditor states that the aforesaid submissions makes it crystal clear that the goods are duly received and consumed by the Corporate and they have availed the necessary benefit of Excise as well as VAT. Therefore, the defence of not receiving the goods apart from false and frivolous but made a false statement on oath for which the necessary perjury action be initiated against the Deponent.

Para. 8

The Operational Creditor states that the second defence of the Corporate Debtor as raised in Affidavit-in-Reply that the

Corporate Debtor have handed over blank Cheques security to the Operational Creditor. The operational creditor states that said defence is also false and frivolous. The Operational Creditor states that in response to the legal notice dated 20.12.2016, the Corporate Debtors' vide his Advocate's Reply dated 3rd January, 2017 had contended that the Corporate Debtors had issued blank cheques without signature which does not contain any details or signature. However, in the present Affidavit-in-reply, it was contended that the same was merely blank security cheques. Both the defence are contradictory to each other. The Operational Creditor states that the Cheques were issued by the Corporate Debtor in discharge of their legal debt and liability and when the said cheques were presented, the same were dishonoured with the remark "funds insufficient" and not with the remark "signature differ" and/or interpolation. The Operational Creditor further states that the defence that the cheques are forged and fabricated is also false, frivolous, contrary to each other. The Operational Creditor submits that the Corporate Debtors has no defence and have admittedly failed and neglected to discharge its admitted liability towards the Operational Creditor.

FINDINGS / OBSERVATIONS

5. Heard the submissions of Mr. Girish Kedia learned counsel appearing for the Operational Creditor and Mr. Atul Singh, learned counsel appearing for the Corporate Debtor and perused the record. Mr. Girish Kedia invited the attention of this Bench to the subject matter of the following invoices details of which are extracted hereunder:

Sr. No.	Invoice No.	Date	Amount (Rs.)
1.	ST/1706/15-16 (Exhibit – 7 at Page No. 103)	29.02.2016	5,23,355.00
2.	ST/1732/15-16 (Exhibit – 8 at Page No. 105)	05.03.2016	9,58,508.00
3.	ST/1733/15-16 (Exhibit – 9 at Page No. 107)	05.03.2016	8,69,505.00
4.	ST/1737/15-16 (Exhibit – 9 at Page No. 109)	06.03.2016	9,17,280.00

He has also invited the attention of this Bench to the Demand Notice dated 12.06.2017 and the reply dated 27.06.2017 got issued by the Corporate Debtor. He further submits that the Operational Creditor has filed a summary suit bearing No. 1199 of 2017 on the file of Citi Civil Court, Mumbai in which summons of judgment bearing No. 33 of 2018 was served on the Corporate Debtor and the Citi Civil Court after hearing both sides directed the Corporate Debtor herein to deposit an amount of Rs. 16,00,000/- as a condition precedent for grant of conditional leave to defend the said suit against which the Corporate Debtor herein filed a writ petition bearing no. 8143 of 2019 on the file of Hon'ble Bombay High Court and the Hon'ble High Court vide its order dated 17.08.2021 extended 4 weeks' time to deposit the above amount of Rs. 16,00,000/- ordered by the trial court against which the Corporate Debtor herein filed SLP before the Hon'ble Supreme Court which was dismissed by extending another two weeks' time to deposit the amount as directed by both courts. Since the Corporate Debtor failed to deposit the above amount of Rs. 16,00,000/-, Mr. Kedia prayed for admission of the above Company Petition.

6. Opposing the above argument, Mr. Atul Singh, counsel appearing for the Corporate Debtor submits that mere non-deposit of Rs. 16,00,000/- by the Corporate Debtor in the summary suit is not a ground to draw the inference of non-existence of any pre-existing disputes between the parties nor rejection of the defences raised by the Corporate Debtor. It is his further submission that the summary suit was filed by the Operational Creditor in respect of the same invoices for the same amount in which the Corporate Debtor has already raised the issues of quality and non-delivery of the material etc. He further submits that the said summary suit is filed prior to filing of the present company petition and therefore the present Company Petition cannot be admitted till a decree is passed by Civil Court by rejecting the defences raised therein.
7. This Bench is in complete agreement with the above submissions of Mr. Atul Singh. As rightly contended by Mr. Singh, the civil suit is filed on 14.06.2017 i.e. 5 months prior to filing the present Company Petition filed on 03.11.2017 and after issuing reply by the Corporate Debtor. Therefore, the Corporate Debtor is not expected to bring to the notice of Operational Creditor regarding pendency of the Civil Suit in the reply issued in response to the Demand Notice. Admittedly the Civil Suit is filed for the same amount arising out of the same invoices in which the corporate Debtor has raised all the defences that were raised by them in the reply notice and in the present Company petition. As rightly argued by Mr. Singh, this Bench cannot brush aside the defences of Corporate Debtor in the absence of a decree by rejecting the defences of the corporate debtor. Mere non-deposit of conditional amount to defend suit would not amount to presumption of a decree till the decree is passed. Admittedly the Operational Creditor has not produced the copy of any decree passed by the Civil Court. This tribunal shall not

get into the issue as to whether the Corporate Debtor would succeed on the defences while dealing with an application under Section 9 of the Code as per law laid down by the Hon'ble Apex Court in *Mobilox Innovations Private Ltd vs Kirusa Software Private Ltd.*. It would have been altogether a different situation, had the Civil Suit been not filed by the Operational Creditor in which case this Tribunal is empowered to decide whether the defence raised by the Corporate Debtor is spurious or not and whether the defence requires further investigation in this Company Petition. Though, the defence of the Corporate Debtor appears to be very trivial and technical in nature, this Bench is bound by law and cannot decide a case on sympathy. Therefore, under these circumstances, this Bench has no option except to hold that the present Company Petition is premature and liable to be rejected on the ground of pre-existing disputes.

8. For the aforesaid reasons, this Bench is of the considered opinion that the above Company Petition is liable to be rejected. Accordingly, the above Company Petition is rejected.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

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