

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

CP 341 (IB)/MB/2018

Under Section 9 of the I&B Code, 2016

In the matter of

Aquafil Wintech (JV)

...Applicant

v/s

Krupay Tradepipes Private Limited

...Corporate Debtor

Order Dated 03.09.2019

Coram: Hon'ble Member (Judicial) Mr V.P. Singh

Hon'ble Member (Technical) Mr Rajesh Sharma

For the Petitioner: Adv.Sriraj Menon.

For the Respondent: Adv. Atul Singh.

Per V.P. Singh, Member (Judicial)

ORDER

1. This is an application being CP 341/2018 filed by **Aquafil Wintech (JV)**, Applicant, under section 9 of Insolvency & Bankruptcy Code, 2016 (**I&B Code**) against **Krupay Tradepipes Private Limited**, Corporate Debtor, for initiating Corporate Insolvency Resolution Process (**CIRP**).
2. This application is filed by Mr. Hitesh Shah, Partner of the Applicant firm.
3. The Applicant placed some order for the purchase of goods and had given an advance of ₹30,00,000/- to the Corporate Debtor against Purchase Order dated 02.03.2016 for a total purchase consideration of ₹89,66,819/-. The Advance payment is said to have been acknowledged by the Corporate Debtor by letter dated 03.03.2016. As per the Purchase Order a third party inspection was to be carried out before supply of goods however, the said inspection could not be carried out which along with other issues led the Corporate Debtor

to propose to return the advance amount to the Applicant vide its e-mail dated 13.08.2016. After certain deliberations, a repayment plan was agreed and the Corporate Debtor is said to have paid vide several instalments an amount of ₹15,00,000/- to the Applicant. It is stated that the Corporate Debtor has failed to make the remaining payment of ₹15,00,000/-.

4. The Applicant has annexed dishonoured cheques given by the Corporate Debtor. The Applicant had also sent Demand Notice dated 12.09.2017 to the Corporate Debtor in Form-3. As per the Form-5 filed by the Applicant, the amount in default is ₹18,82,500/- and the date of default is 01.03.2016.
5. Before proceeding further it is pertinent to note that as per the payment terms contained in the said Purchase Order dated 02.03.2016, the Applicant was to pay an advance of ₹30,00,000/- and the remaining balance through LC of 60 days from the date of Bill of Exchange.
6. The Email of the Corporate Debtor dated 31.03.2016 mentions the request of the Corporate Debtor for the remaining ₹23,00,000/- from the Applicant. Further, in the e-mail dated 04.05.2016, the Corporate Debtor had again made a certain request for the payment of the balance of ₹23,00 000/- which was said, will be returned at the time of dispatch or against discounting of LC.
7. The Corporate Debtor has filed its reply on 26.10.2018 wherein it has annexed its reply dated 18.06.2017 to the notice of the Applicant under section 138 of the Negotiable Instrument Act 1881 raising a dispute upon the payment as per the terms of Purchase Order dated 02.03.2016. It is stated in the said reply that the Applicant failed to submit LC as per the terms of the Purchase Order and for other reasons mentioned therein, the Corporate Debtor is not liable to pay anything to the Applicant.
8. We have perused the records submitted by Ld. Counsel for both the sides and heard the arguments.
9. It is pertinent to note that the demand notice under section 8 of the I&B Code was sent on Dt. 12th Sept.2017. However, the correspondence of email of the Corporate Debtor dated

31.03.2016,07.04.2016, 04.05.2016 and 13.08.2016 as well as the reply of the Corporate Debtor to the notice of the Applicant under section 138 of Negotiable Instrument Act, 1881 dated 18.06.2017 clearly establish the existence of a pre existing dispute between the Applicant and the Corporate Debtor.

10. It is pertinent to note the judgment of Hon'ble Supreme Court in *Mobilox Innovations Private Limited vs Kirusa Software Private Limited (AIR2017SC 4532)* regarding the pre-existence of dispute in section 9 application. The relevant portion of the said judgment is reproduced below:

*"The scheme Under Sections 8 and 9 of the Code, appears to be that an operational creditor, as defined, may, on the occurrence of a default (i.e., on non-payment of a debt, any part whereof has become due and payable and has not been repaid), deliver a demand notice of such unpaid operational debt or deliver the copy of an invoice demanding payment of such amount to the corporate debtor in the form set out in Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Form 3 or 4, as the case may be (Section 8(1)). Within a period of 10 days of the receipt of such demand notice or copy of invoice, the corporate debtor must bring to the notice of the operational creditor the existence of a dispute and/or the record of the pendency of a suit or arbitration proceeding filed before the receipt of such notice or invoice in relation to such dispute (Section 8(2)(a)). **What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be pre-existing - i.e. it must exist before the receipt of the demand notice or invoice, as the case may be.**" (emphasis supplied)*

11. Further, it is undisputed that the claim amount is advance paid by the Applicant to the Corporate Debtor for goods which were never supplied. In this regard it would be appropriate to note the decision of the Hon'ble NCLAT in *Roma Infrastructures India Pvt. Ltd. vs. A.S. Iron & Steel (I) Pvt. Ltd. in Company Appeal (AT) (Ins) No. 223 of 2019 dated 22.04.2019* wherein it was held that since money was

paid as advance for supply of goods but the goods were not supplied hence the application under section 9 was not maintainable. The relevant portion of the said Judgment is reproduced below:

"Admittedly, Appellant – Roma Infrastructures India Pvt. Ltd. has not supplied the goods nor provided any services to Respondent- A.S. Iron & Steel (I) Pvt. Ltd. It advanced payment of Rs. 74,32,326/- to Respondent for the supply of goods. In view of the aforesaid fact, the payment cannot be treated to be an 'Operational Debt' and the application under Section 9 filed by the Appellant was not maintainable. Accordingly, no relief can be granted."

12. In view of the pre-existing dispute and the facts and circumstances of the present case, and in light of the Judgment of Hon'ble Supreme Court in Mobilox(supra.) and the Judgment of Hon'ble NCLAT in Roma Infrastructure (supra.) the present Application filed under section 9 of the I&B Code is not maintainable and liable to be rejected.

ORDER

This petition filed under Section 9 of I&B Code, 2016, by **Aquafil Wintech (JV)** against **Krupay Tradepipes Private Limited**, Corporate Debtor, for initiating Corporate Insolvency Resolution Process is at this moment **rejected**.

We further make it clear that we have not decided upon the merit of the claim of the Applicant and the Applicant is at liberty to proceed before appropriate authority as per law.

Sd/-
RAJESH SHARMA
Member (Technical)

Sd/-
V.P. SINGH
Member (Judicial)

3rd September 2019