IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IBA/797/2019 filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of ***M/s. Swiss Garnier Biotech Private Limited***

M/s. Kevin Process Technologies Private Limited,
201, 202 Shapath – I
Opp. Rajpath Club, Bodakdev,
Ahmedabad GJ 380 015 IN

... Operational Creditor

-Vs-

M/s. Swiss Garnier Biotech Private Limited,
No.25, Level 2, Kambar Street,
Alandur, Chennai, Tamil Nadu 600 016

... Corporate Debtor

Order Pronounced on 19th February, 2020

CORAM:

R. VARADHARAJAN, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Operational Creditor : P.R. Renganath, Advocate
For Corporate Debtor : P.S. Suman, Advocate

ORDER

***Per:* R. VARADHARAJAN, MEMBER (JUDICIAL)**

1. This is a Petition filed by the Petitioner in the capacity of an Operational Creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code, 2016") as against the

Respondent being described as its Corporate Debtor. Part-I in the prescribed Petition filed under the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 hereinafter to be referred as ('AAA Rules, 2016') contains the details of the Petitioner.

2. Part-II of the Petition gives the details of the Corporate Debtor from which it is seen that the Corporate Debtor was incorporated on 02.07.2018 and that the Authorized capital and paid-up capital of the Corporate Debtor stands at Rs.40,00,000/-. The Registered Office address of the Corporate Debtor as per the Petition is at No.25, Level 2, Kambar Street, Alandur, Chennai, Tamil Nadu 600 016, which is correlated with the Master-data of the Corporate Debtor as maintained in the MCA website enclosed as Annexure-II (8) in the typed set filed with the Petition. No Interim Resolution Professional's (IRP) name has been proposed by the Operational Creditor as seen from Part-III of the Petition and it is left to the discretion of this Tribunal in case this Petition is admitted, for the appointment of the IRP.

3. Part-IV of the Petition deals with the Operational Debt and it is seen that the amount claimed is in a sum of Rs.10,97,979/- arising out of the transactions as between the

Operational Creditor and the Corporate Debtor in relation to supply of machinery and equipments viz., Vibro Shifter, High Shear Mixer Granulator, Starch Paste Kettle, Fluid Bed System, Multi Mill, Double Cone Blender.

4. It is also stated in the Petition that based on the Purchase Order issued by the Corporate Debtor to the Operational Creditor for supply of goods the Operational Creditor raised the invoices and after crediting the payment which had been received from the Corporate Debtor, the balance sum is due in a sum of Rs.10,97,979/- being the amount claimed in this Petition by the Operational Creditor.

5. It is further seen from Part-IV of the Petition that prior to incorporation of the Company, the Corporate Debtor was a Partnership firm by the name of M/s. Swiss Garnier Bio Tech and subsequently converted into a 'private limited company', which is the present status of the Corporate Debtor. It is also stated that despite repeated reminders to the Corporate Debtor to make the payment of the outstanding dues as made by the Operational Creditor and even though the Corporate Debtor vide e-mails sent to the Operational Creditor dated 06.03.2017 and 07.06.2017 wherein the debt were admitted, however, the same was not paid and in the circumstance the

Operational Creditor was constrained to issue Demand Notice dated 20.02.2019 through registered post in accordance with the provisions of the I&B Code, 2016 r/w AAA Rules, 2016 and that the Demand Notice was also sent through e-mail dated 25.02.2019 to the WTD/Key Managerial Personnel of the Corporate Debtor in accordance with Rule 5(2)(b) I&B Code, 2016 r/w AAA Rules, 2016.

6. Further in relation to the said notice of demand issued by the Operational Creditor, the Corporate Debtor has chosen to issue a notice of dispute dated 07.03.2019, wherein a reference has been made to the minutes of the meeting held on 15.02.2017 in which it was recorded that there were defects in the machine supplied and the Operational Creditor has also committed to make arrangement to rectify the defects by supplying the missing parts and replacement of damaged parts. However the Operational Creditor has not made any efforts to rectify the defects as promised and in view of the same, the Corporate Debtor have withheld the payment of a sum of Rs.10,97,979/-. It has also been stated in the reply notice that the Operational Creditor is very much aware of the fact that the said sum was retained by the Corporate Debtor for the reason of the Operational Creditor's inability to rectify the defects in the machines supplied by

them. However, according to the Operational Creditor, the reply to the demand notice sent by the Corporate Debtor is without any merit as the Corporate Debtor is only trying to wriggle out of its liabilities owed under the invoices towards supply of the machineries, particularly taking into consideration the e-mails which had been exchanged as between the parties and as brought-forth as above.

7. In any case, a Rejoinder letter dated 07.05.2019 sent by the Operational Creditor to the notice of dispute as sent by the Corporate Debtor stating that there is no prior existing dispute and the Operational Creditor is hence seeking for initiation of the Corporate Insolvency Resolution Process (CIRP) in relation to the Corporate Debtor. The under mentioned documents have been filed by the Operational Creditor in support of the claim:-

Sl.No	Particulars	Annexures	Page No'
1	Copy of invoice/demand notice dated 20.02.2019 as in Form-3 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the Corporate Debtor vide RPAD Copy of e-mail dated 25.02.2019 issued by the Operational Creditor to WTD/KMP of the Corporate Debtor, emailing copy of the said demand notice under the IB Code	I	11-15

2	Copies of Table of Computation	II(1)	16-17
3	Copies of Purchase Orders issued by the Corporate Debtor to the Operational Creditor	II(2)	18-20
4	Copy of invoices raised by the Operational Creditor on the Corporate Debtor	II(3)	21-34
5	Copy of Ledger account of Corporate Debtor	II(4)	35-38
6	Copy of notice of dispute dated 07.03.2019 issued by the Corporate Debtor to Operational Creditor	II(5)	39-44
7	Copy of Rejoinder letter dated 07.05.2019 issued by the Operational Creditor to the Corporate Debtor replying to their letter dated 07.03.2019	II(6)	45-47
8	Copy of Board Resolution passed by the Board of Directors of the Operational Creditor	II(7)	48-49
9	Copy of the Master-data of the Corporate Debtor from the website of the MCA	II(8)	50
10	Copy of correspondences exchanged between the Operational Creditor and Corporate Debtor, where the Operational Creditor has issued repeated reminder and Corporate Debtor has admitted to the debts and sought time for payment of the outstanding without any dispute	II(9)	51-56
11	Affidavit under Section 9(3)(b) of the I&B Code and general Affidavit verifying petition in accordance with the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016	IV	57-61

8. Further it is seen from the Petition and as evidenced from the tabulation of annexure provided as above that an

Affidavit under Section 9(3)(b) of the I&B Code, 2016 as well as an Affidavit verifying the Petition has also been filed. In relation to this Petition, the dispatch proof has also been filed under the provisions of the AAA Rules, 2016 along with this Petition.

9. A perusal of the Counter as filed by the Respondent/Corporate Debtor discloses a preliminary objections has been taken that the debt which is sought to be claimed before this Tribunal cannot be considered as an Operational Debt, consequently the Petitioner is not an Operational Creditor to the Respondent and the contents of Part-IV and V of the Petition was sought to be denied in toto.

10. It is further contended in the Counter that the Petitioner has not fulfilled the conditions to the Purchaser Order as placed with it and in the circumstance is not entitled for the payment. In this connection it is stated in the Counter that the Purchase Order envisages not only the installation and commissioning by the Petitioner and the Petitioner was required to also provide the operating and service manuals to the Respondent and that the Petitioner has failed to provide the same to the Corporate Debtor.

11. Further it is also stated in the Counter that the supplies based on the Purchase Order placed by the Corporate Debtor upon the Petitioner it was required to be done on or before 15.03.2016, but however the Petitioner chose to supply with delay only by 03.12.2016 and 14.02.2017. It is also brought to the notice of this Tribunal in the Counter that the Petitioner had failed to provide the Corporate Guarantee for 1 year and in the circumstance the Respondent is not required to make 10% payment which is linked to the Operational Creditor for the supply of the machineries.

12. In addition to non-compliance of the terms of the Purchase Order by the Operational Creditor, the Corporate Debtor also contends that there has been defects in the equipments supplied, installed and commissioned by the Operational Creditor, which also taken on consideration in the joint meetings held as between the parties held on 15.02.2017 annexed by way of Minutes in Annexure-II to the Counter filed before this Tribunal. Even though pursuant to the said joint meeting held on 15.02.2017 the Petitioner promised to replace the defective materials Free of Charge, however, chose to not to do so. Even in the Final Status Report dated 07.06.2017 the defects also brought to the notice of the Petitioner by the Corporate Debtor and the Corporate Debtor has requested the

Petitioner to raise a debit note towards the replacement cost, however, the same was not provided by the Operational Creditor and that the same shall be adjusted with the balance due payable by the Corporate Debtor to the Petitioner and in the circumstance the amount as claimed by the Operational creditor as against the Corporate Debtor is in dispute.

13. It is further stated in the Counter that the Respondent has lost business worth over Rs.1.00 Crore due to the Petitioner's inaction and non-cooperation on the part of the Petitioner/Operational Creditor. It is also highlighted that as against the total value of Rs.1,97,74,868/-, only a sum of Rs.10,96,180/- is due and approximately 5% of the total value in view of the corporate guarantee of one year not given as covered in the Purchase Order the same is not required to be remitted.

14. The Respondent has concluded in the Counter that in view of non-fulfilment of the terms and conditions of the Purchase Order and serious defects noticed to the equipments supplied, installation and commissioning by the Operational Creditor and also in view of several disputes as raised in the claim is not sustainable and the Petition is liable to be dismissed as not maintainable.

15. Heard both sides and perused the records. From the record of proceedings, it is evident that upon receipt of Petition, the Corporate Debtor had entered appearance before this Tribunal and also filed a Counter as dealt above in relation to the Application/Petition as filed by the Petitioner which was taken on record by this Tribunal subject to cost of Rs.5000/-. In the said circumstance upon compliance of the Order dated 24.09.2019, the matter was finally heard on 27.11.2019 wherein the oral submissions of the respective Counsels of the parties were heard in detail.

16. A perusal of the Purchase Order as annexed with both the typed set as filed by the Petitioner as well as the Corporate Debtor, the terms and conditions have been described in the Purchase Order given by the Corporate Debtor in Page 18, Annexure-II(2) of the Petition which are as follows:-

> *"Payment Terms: 30% Advance along with PO, 60% Against FAT & PI before dispatch, 10% against installation & commissioning and Corporate Guarantee for 1 year from the date of commissioning.*
>
> *Delivery: 14 to 16 weeks after all techno-commercial formalities. Transportation & insurance is at actual in Swiss*

Garnier Scope. Installation/commissioning of all machines handed over to us at site with all documents before 15th of March 2016."

17. It is not in dispute as between the parties in relation to supply of materials. It is also to be noted that in relation to supply, installation and commissioning of the equipments which have been supplied by the Petitioner to the Corporate Debtor is also not in dispute. However, as seen from the Counter as well as the submissions of the Ld. Counsel for the Corporate Debtor that in the absence of the corporate guarantee for one year being given from the date of commissioning, the Corporate Debtor is entitled to retain 10% of the value of the Purchase Order and since the amount claimed herein being only 5% of the total value of the Purchase Order/supplies made the amount is for the time being not payable and hence there is no default.

18. From the e-mail exchanged as between the Operational Creditor and the Corporate Debtor as annexed by the Operational Creditor in Annexure-II (9) of the typed set filed with the Petition it is seen that immediately after the supply, the installation and commissioning of the equipments, the Corporate Debtor has promised to make the payment in instalments in view of the Corporate Debtor undergoing

expansion even in the said e-mail exchanged between the Operational Creditor and the Corporate Debtor no mention has been made to the defective supply as sought to be projected between Operational Creditor and the Corporate Debtor. The Counsel for the Operational Creditor relied upon the email dated 07.06.2017, wherein the Corporate Debtor has promised to make the pending payment by the then coming Saturday.

19. However, a perusal of the list of e-mails filed by the Corporate Debtor and more particularly email dated 16.10.2017, the Operational Creditor has written to the Corporate Debtor as follows;

> *Dear Sir,*
>
> *This refers to below email and telephonic conversation had yesterday, today we are shipping the materials to your works on replacement basis. We will keep you informed for the shipment details.*
>
> *Please arrange to send the old materials to work once you get the material at your works.*
>
> *Thank you,*
>
> *With Best Regards,*

20. Further, in the email dated 21.07.2018, the Corporate Debtor has raised a quality issue in relation to the materials

supplied by the Operational Creditor, which is extracted hereunder;

Dear Sir,

In reference to our telephonic discussion, please send your final statement of accounts to us (Mr Alex) to proceed further

Kindly also note we are facing HMI issue in the auto coater supplied to us (UNA PLANT). Kindly ask your people to rectify the same by deputing engineer immediately. If it is possible your person can talk to Mr. Saini over the phone to sort out this issue. We have spoken a lot of time to Mr Paresh in the past as we got issues in PLC / HMI continuously. But still time no concrete steps have been taken.

Kindly do the needful..

21. From the aforesaid email addressed by the Corporate Debtor to the Operational Creditor, it is evident that the Corporate Debtor raised a dispute with regard to quality of service which is prior to issuance of Demand Notice.

22. Section 5(6) of the IBC 2016 defines dispute as:

"dispute" includes a suit or arbitration proceedings relating to:-
(a) the existence of the amount of debt;
(b) the quality of goods or service; or
(c) the breach of a representation or warranty

23. The Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited;** *2017 1 SCC Online SC 353* held that the 'existence of 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 and observed as follows;

> "33. 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)]. <u>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</u>.."

At paragraph 51 it is held:

> "51. ......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."

24. Thus, it is evident that there is a pre-existing dispute between the parties in relation to the quality of service provided by the Operational Creditor.

25. Under the circumstances, in view of the discussions made supra, the petition as filed by the Operational Creditor stands **dismissed**, however without costs.

-SD-	-SD-
(ANIL KUMAR B)	**(R.VARADHARAJAN)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

MS / Raymond