

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-I**

CP (IB) 1048/MB/2019

Under section 9 of the Insolvency and Bankruptcy
Code, 2016

KVTEK Power Systems Private Limited

[CIN: U74220DL2005PTC135994]

Reg. Office: Flat No 170 Pocket B-5 sector 8 Rohini
New Delhi 110085

...Operational Creditor/Petitioner

Versus

Nuclear Power Corporation Of India Limited

[CIN: U40104MH1987GOI149458]

Reg. Office- 16th Floor, Centre -1, Worldtrade Centre
Cuffe Parade, Colaba, Mumbai 400005 MH

... Corporate Debtor/Respondent

Order Delivered on 07.10.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical): Mr. Shyam Babu Gautam

Appearances:

For the Operational Creditor : Prachi Rawal i/b SD Israni Law
Chambers

For the Corporate Debtor : Mr. Abhay Itagi a/w Ms. Monica Varma
i/b M.V. KINI Law Firm Associates

ORDER

Per: Shyam Babu Gautam, Member (Technical)

1. This Company Petition is filed under section 9 (“**the Petition**”) of the Insolvency and Bankruptcy Code, 2016 (**IBC**) by **KVTEK Power**

Systems Private Limited ("the Operational Creditor"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **Nuclear Power Corporation of India Limited ("the Corporate Debtor")**.

2. The Corporate Debtor was incorporated 03.09.1987 under the Companies Act, 1956. It has its registered office on 16th Floor, Centre -1, World Trade Centre Cuffe Parade, Colaba, Mumbai 400005. Therefore, this Bench has jurisdiction to deal with this petition.

Brief Facts of the case:

3. The present petition was filed on 13.03.2019 before this Adjudicating Authority (AA) on the ground that the Corporate Debtor failed to make payment of a sum of INR 47,93,013/- (INR Forty-Seven lakhs Ninety-three thousand and thirteen only) being INR 25,29,159/- the Principal Amount and interest of Rs.22,63,853/- calculated @11.125% p.a. upto 06.02.2019 (Petition pg. 15). However, the interest will be calculated upto the date of final payment. The date of default is **11.06.2015**.
4. The Operational Creditor is a manufacturer, installation and supplier of Serveron make Model-TM-8 Transformer Online Dissolve Gas Analyzer with 8 Gas Analyzer and Moisture.

Submissions made by the Counsel for Operational Creditor:

5. The Nuclear Power Corporation of India Ltd., (hereinafter referred to as the "Corporate Debtor") approached KVTEK Power Systems Pvt. Ltd., the (hereinafter referred to as the Petitioner/"Operational Creditor") for supply and installation of Serveron make Model-TM-8 Transformer Online Dissolve Gas Analyzer with 8 Gas Analyzer and Moisture (hereinafter referred to as "the Equipment").

6. The Corporate Debtor placed the Purchase Order No. CMM/MAPS/EM/42580/MANUAL-PO/1269 dated 27.03.2015 for supply and installation of Serveron make Model-TM-8 Transformer Online Dissolve Gas Analyzer with 8 Gas Analyzer and Moisture. As per the Purchase Order the price of supply and installation of Serveron make Model-TM-8 Transformer Online Dissolve Gas Analyzer with 8 Gas Analyzer and Moisture was INR 19,80,000/- (Rupees Nineteen Lakh Eighty Thousand Only) and Excise Duty, CST, Freight Charges, transit insurance charges will be borne by the Corporate Debtor on actual basis. Copy of Purchase Order No. CMM/MAPS/EM/42580/MANUAL-PO/1269 dated 27.03.2015 is annexed to the Petition as Annexure – A (Page 50).
7. The Operational Creditor supplied and delivered the said equipment against the Purchase Order dated 27.03.2015 vide delivery challan dated 11.06.2015, through Safe Express Private Limited. The consignment got delayed in shipment due to the delay in issuance of road permit, hence the equipment was received by the Corporate Debtor on 30.06.2015. The Operational Creditor raised an Invoice No. KVTEK/2015-16/014 dated 11.06.2015 amounting to INR 22,81,350/- inclusive of taxes. Copies of the Delivery Challan and Way Bill dated 11.06.2015 are annexed to the Petition as Annexure A-4 (Colly).
8. The Corporate Debtor sent an email dated 02.11.2015 informing that their site will be ready for installation and commissioning on 16.11.2015. On receipt of the intimation regarding the readiness of the site, again deputed their commissioning engineer on 05.12.2015 and completed the commissioning work. However, two discrepancies were observed in the final MOM (Minutes Of Meeting) of installed equipment. One is

abnormal sound from the oil pump motor assembly and another Discrepancies in Co₂ & CO readings as compared to the test results of ERDA. Copy of the email dated 02.11.2015 received from the Corporate Debtor is annexed to the Petition as Annexure A-8 Colly. (pages 90-91)

9. Operational Creditor took up the matter with their principal supplier of the equipment in USA who took time in understanding the problem and then supplying the required sub-assembly which was finally replaced on-site on 22.07.2016 and the issue of abnormal sound was successfully resolved. It is further submitted that the Operational Creditor through their service engineer onsite verbally conveyed to the Corporate Debtor that ERDA lab results cannot be relied upon and Corporate Debtor should get the transformer oil tested from some other test lab like PGCIL test lab in Bhiwadi which is not only NABL accredited lab but also equipped with the best equipment and most experienced engineers in this field to ensure reliability of the test results.
10. The Operational Creditor further submits that vide email dated 08.09.2016 he informed the Corporate Debtor based on the feedback from their US supplier that it is the ratio of CO₂ & CO that matters in analysing the health of transformer and not the individual readings. It was also informed by the said email that comparison done by Corporate Debtor is not fair as the ERDA test lab results are of the oil sample taken in the month of April 2016 and the same is being compared with online DGA results of July 2016. State of gases dissolved in the transformer oil can dramatically change with such a wide time gap between the two readings (Page 95).
11. Despite these clarifications Corporate Debtor took no steps to cross verify the transformer oil sample results by comparing the same with the test

results of some alternate lab as suggested by us. Seeing the deadlock, Operational Creditor deputed their engineer on the site to collect the transformer oil sample on 08.09.2017 and got the same tested from PGCIL test lab which is the best in the field and is also NABL accredited. It is further submitted that the test results i.e. ratio of CO₂/CO of PGCIL lab on 20.9.2017 clearly showing that PGCIL lab results (4283:101 = 42.4) are in sync with the results of on-line DGA (5557:146 = 38.1) supplied by the Operational Creditor and it is the lab results of ERDA (1825:244=7.5) that are questionable.

12. The Operational Creditor requested the Corporate Debtor to take the oil sample out to get the result from any third party lab and compare the test. Copy of the email dated 12.04.2017 is annexed to the Petition as Annexure A-10 (page 95). Several correspondences through emails were exchanged between the Operational Creditor and the Corporate Debtor with respect to the oil sample required by the Operational Creditor for conducting the test. Copy of the emails exchanged between the parties are annexed to the Petition as Annexure A-11 (pages 96-99). The oil sample was taken and got tested from Power Grid Corporation of India Limited, a Government of India Enterprise, and the report was received on 08.09.2017 and submitted to the Corporate Debtor on 20.09.2017. Copy of the test report of Power Grid Corporation of India Ltd. and email dated 20.09.2017 sent to the Corporate Debtor are annexed to the Petition as Annexure A-12 (Colly) (Pages 100-102). Thereafter, Operational Creditor repeatedly followed up with the Corporate Debtor for the payment and several reminder emails were sent to the Corporate Debtor for release of long pending payment. Copy of the reminder emails annexed to the Petition as Annexure A-13 (Colly) (pages 103-107).

13. Operational Creditor further submits that Assessment of Sale was made for the period 2015-16 under Haryana Value Added Tax Act, 2003 vide Demand No.142 imposing penalty for non-submission of Form C as the Corporate Debtor failed to provide 'C' Form despite the delivery of equipment at its premises. Copy of the said Order of Haryana Value Added Tax Act, 2003 dated 14.08.2018 vide Demand No. 142 is annexed to the Petition as Annexure A-14 (pages 108-109).
14. Operational Creditor further submits that again on 06.09.2018, another reminder email was sent stating neither the payment nor the 'C' Form has been received for the past 3 years. Copy of the said reminder email is annexed to the Petition as Annexure A-15 (page 110).
15. The Operational Creditor wrote another email dated 03.11.2018 to the Corporate Debtor reflecting the comparison between the test of PGCIL lab and ERDA lab. It was mentioned that the tests of PGCIL was comparable with the Online DGA result rather than the tests done by ERDA Lab. Copy of the email dated 03.11.2018 is annexed to the Petition as Annexure A-16 (pages 111-115).
16. On failure to receive any amount due from the Corporate Debtor, the Operational Creditor sent a demand notice dated 22.11.2018. A copy of the demand notice has been annexed as Annexure A-1 to the Petition. The Corporate Debtor on 06.12.2018 replied to the Demand Notice dated 22.11.2018 sent by Operational Creditor, however, failed to raise any dispute with respect to the purchase order. The Operational Creditor has filed the present application seeking their legitimate dues, by disclosing all the relevant facts and documents, from the Corporate Debtor. Copy of the reply to the said Demand Notice sent by Corporate Debtor is annexed to the Petition as Annexure A-17, which is not a dispute raised by them

(pages 116-189). The Corporate Debtor alleged dispute vide their reply dated 06.12.2018 that the Operational Creditor has not carried out the work in accordance with the Purchase Order which is raised merely as an afterthought without any justification whatsoever. It is submitted that the Operational Creditor had carried out the work in accordance with the purchase order and the sequence of events is explained in the Petition.

17. Since the Operational Creditor repeatedly followed up with the Corporate Debtor for the payment without any success, it is pertinent to mention that till date Corporate Debtor has not booked this Purchase Order in their books of account which became evident to Operational Creditor on receipt of the email dated 29.08.2017 seeking submission of revised invoice with GST instead of the original invoice submitted on 11.06.2015 with Excise Duty and sales tax. Operational Creditor refused to make this amendment as the excise duty and sales tax charged on the original invoice dated 11.06.2015 has already been deposited with the concerned departments thus cannot be changed after two years.
18. It is further submitted that the Corporate Debtor has been using the said equipment for the last 4 (four) years. If the equipment was defective as claimed by the Corporate Debtor, they should have rejected it long-back instead of still using the defective equipment. It is submitted that having retained and used the equipment for the last four years, the Corporate Debtor has now turned dishonest and malafidely denying Operational Creditor of its legitimate demand just because they have not booked the purchase in the given year and now they are having problem in doing so as excise and sales tax are no longer applicable and they need invoice with GST which Operational Creditor cannot legally issue. The failure of not booking the invoice in the year of Purchase by Corporate Debtor is the

actual problem that they have not paid till date and the technical problem created by them is just a cover-up.

Submissions made by the Counsel for Corporate Debtor:

19. The Counsel for the Corporate Debtor has filed the Affidavit-in-reply on behalf of the Corporate Debtor on 18.11.2019 and submitted that the Petition is not maintainable either on facts or in law as narrated hereunder hence deserves to be rejected.
20. The Corporate Debtor submits that the Operational Creditor has suppressed the true and material facts in the instant case and has preferred this Petition only with an intent to arm twist the Corporate Debtor unto making payment which the Operational Creditor is not entitled to.
21. The Corporate Debtor submits that on receipt of the Demand Notice dated 22.11.2018, the Corporate Debtor had as and by way of reply disputed the claim vide letter dated 06.12.2018 which the Operational Creditor has conveniently suppressed. Further submitted that Operational Creditor's work under the Purchase Order was unsatisfactory and consistently failed to meet the specifications prescribed thereunder. The Corporate Debtor issued a series of correspondences and reminders for rectification of the same. Such correspondence are listed out in the reply to Demand Notice dated 06.12.2018 and annexed to the Affidavit in reply as Annexure – A (pages 12-21).
22. The Corporate Debtor submits that the Invoice dated 11.06.2015 is barred by law of limitation. Further submits that the Operational Creditor has never raised any dispute and never invoked the dispute resolution mechanism as contemplated in the subject contract but has chosen to

invoke the provisions of the IBC against the Corporate Debtor belatedly after lapse of three years.

23. The Corporate Debtor further submits that as per clause 9 of the Purchase Order, the Operational Creditor ought to obtain a "Satisfactory Installation Certificate from the Engineer-in-charge of the Corporate Debtor and should have submitted along with the invoice to the Corporate Debtor. But the Operational Creditor has failed to adhere to the stipulation of clause 9 of the purchase order and raised the invoice prior to supply and installation of the equipment, which was ultimately installed on 05.12.2015 i.e. after 6 months of raising the invoice. Copy of the Purchase Order dated 27.03.2015 bearing No. CMM/MAPS/E/42580/Manual-PO/1269 placed on the Operational Creditor is annexed as **Annexure -B** (pages 22-98) to the Affidavit-in-Reply.
24. Corporate Debtor further submits that the Purchase Order provides for a Dispute Resolution Mechanism in Clause 17. Any dispute that arises between the parties ought to be referred to Arbitration, wherein the Operational Creditor without resorting to the dispute resolution mechanism, as laid down in the aforesaid Purchase Order, has preferred this petition under Insolvency & Bankruptcy Code, 2016, which is bad in law and hence not maintainable.
25. The Corporate Debtor further submits that the Invoice dated 11.06.2015 bearing Ref. No. KVTEK/2015-16/014, was raised by the Operational Creditor without installing the Equipment and without complying with the requisites of Clause 9 of the terms and conditions of the Purchase Order. Hence the claim of the Operational Creditor in respect of the Purchase Order is barred by period of limitation. In view of the above all

the Corporate Debtor submits that this subject application is not maintainable as the same is devoid of any merit and contrary to the facts of the case.

26. The Corporate Debtor further submits that there was an inordinate delay in supply and installation of the Equipment on the part of Operational Creditor. As per Purchase Order, the Equipment should have been supplied and installed on or before 28.04.2015. However, the Operational Creditor repeatedly requested the Corporate Debtor vide emails dated 25.04.2015 and 04.05.2015 to extend the original delivery date and as support and co-operation, the Corporate Debtor extended the delivery period upto 15.05.2015. Copy of the said emails dated 25.04.2015 and 04.05.2015 are annexed as **Annexure -C (colly)** (pages 99-100). The Operational Creditor miserably failed to deliver and install the Equipment even within the extended delivery period i.e. upto 15.05.2015. Therefore, the Corporate Debtor was constrained to send a reminder letter dated 27.05.2015 to the Operational Creditor and the Operational Creditor vide their email dated 02.06.2015 admittedly acknowledged the delay caused on part of the Operational Creditor. Copy of the correspondence dated 27.05.2015 and 02.06.2015 are annexed as **Annexure – D (colly)** (page 101).
27. Corporate Debtor submits that there was no delay in issuing road permit on their part. The Corporate Debtor further submits that as per the records available with them, the Operational Creditor made a request for Road Permit on 11.06.2015 and the same was provided by the Corporate Debtor on the same day. Copy of the email dated 11.06.2015 is annexed as **Annexure – E** (page 102). Despite repeated follow-ups and reminders, the Operational Creditor could not supply the Equipment till 27.06.2015,

therefore the Corporate Debtor once again issued a reminder to the Operational Creditor vide its email dated 27.06.2015, a copy of which is annexed as **Annexure – F** (page 103). The Corporate Debtor submits that on 30.06.2015, the Operational Creditor delivered the Equipment at the Site, but certain vital materials and accessories required for the installation remained undelivered and the same has been admitted by the Operational Creditor vide its email dated 01.12.2015, copy of which is annexed as **Annexure -G** (page 104). Deputing the Engineer to the Site for installation of Equipment came only after the Corporate Debtor followed up with the Operational Creditor incessantly. Copy of the emails dated 27.07.2015, 12.08.2015 and 01.09.2015 requesting the Operational Creditor for early installation of the equipment, extending training to its departmental officials, are annexed as **Annexure – H (colly)** (pages 105-107). In response thereto, the Operational Creditor vide email dated 01.12.2015 informed the Corporate Debtor about the next visit of their Service Engineer and supply of the short supplied materials and accessories. A copy of the emails dated 27.07.2015, 12.08.2015, 01.09.2015 and 01.12.2015 are annexed as **Annexure – I (Colly)** (pages 108-111). Thereafter, Corporate Debtor again wrote another email on 02.12.2015, the Service Engineer visited the site and installed the Equipment on 05.12.2015. Minutes of the meeting held on 05.12.2015 between the Service Engineer and the officials from both the parties is annexed as **Annexure – J** (pages 112). It is submitted that the Purchase Order will be treated as complete only when the Operational Creditor has satisfactorily installed the equipment and trained the departmental officials of the Corporate Debtor's company. It is further submitted that as per the terms and conditions of the Purchase Order, 100% payment has to be done only on completion of supply of equipment and its satisfactory

installation. As none of these requirements were met, the Operational Creditor is not eligible to claim any amount from the Corporate Debtor in respect of the said Purchase Order.

28. It is further submitted that Equipment has been installed un-satisfactorily and Operational Creditor has time and again assured that the issue in the Equipment will be resolved, but all such commitments were turned to be false and never fulfilled. The issue of online DGA which was un-satisfactorily installed has not been resolved till date. A table showing non-satisfactory performance of online DGA as furnished in the reply to the Demand Notice is annexed as **Annexure – K** (pages 113-184). The Operational Creditor has also accepted the fault in the Equipment and assured to rectify it and the same was recorded in the minutes of the meetings held on various dates 05.12.2015, 17.12.2015, 22.07.2016 and 03.11.2016. These meetings were held with the Service Engineer from Serveron and representatives from both the officials after repeated reminders/requests made by the Corporate Debtor. Email communications sent in this regard on various dates are annexed as **Annexure – L** (pages 185-194) copies of minutes of those meetings annexed as **Annexure – M** (pages 195-197). Repeated samplings carried out by the Corporate Debtor through different NABL accredited independent reputed at different times, do not match with the actual results of the NABL accredited independent labs. The table showing all these discrepancies as furnished while submitting reply to the Demand Notice, is annexed as **Annexure – N**. The Corporate Debtor brought out the deficiency in functioning of online DGA and informed the Operational Creditor on every occasion and also requested to remain present at the site at the time of sampling being done but Operational

Creditor never turned up for the same. Copies of the various emails sent are annexed as **Annexure – O** to the Affidavit in reply.

29. The Corporate Debtor submits that earlier the matter was referred to offline DGA testing Lab M/s. Electrical Research and Development Association for review of email dated 10.06.2016. The copy of the same is annexed as **Annexure – P** to the Affidavit in reply.
30. The Corporate Debtor further submits that on 11.02.2019 multiple samples were collected for DGA and Furan Analysis to be conducted from multiple NABL accredited Labs. Report showing DGA results are annexed as **Annexure – V** and Furan Analysis results are annexed as **Annexure – W** to the Affidavit in reply.

Findings:

31. We have heard the submissions of both the parties and perused the records.
32. The Corporate Debtor has brought to our notice that the present Petition is barred by limitation. The invoice is dated 11.06.2015, which is stated to be the date of default by the Operational Creditor in Part IV of his petition and the present petition is filed on 13.03.2019, which is beyond the period of three years. Hence, the present petition is clearly barred by limitation. Rebutting the same, the Operational Creditor has relied upon the terms mentioned in the contract, however no copy of the contract has been annexed to the petition by the Operational Creditor to establish this very fact. Thus, without going into the merits, we hold that the present Petition is completely misconceived and non-maintainable.
33. The petition bearing **CP (IB) 1048/MB/C-I/2019** filed by **KVTEK Power Systems Private Limited**, the Operational Creditor, under section

9 of the IBC read with rule 6(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating Corporate Insolvency Resolution Process (CIRP) against **Nuclear Power Corporation Of India Limited [CIN: U40104MH1987GOI149458]**, the Corporate Debtor, is **rejected**.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

07.10.2022
Divya/Jenny

Sd/-

JUSTICE P. N. DESHMUKH
Member (Judicial)