

IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, CHENNAI

IBA/130/2019

*Under Section 9 r/w Rule 6 of the IBC, 2016*

**In the matter of M/s. Kiran Global Chem Limited**

**M/s. TVG Limited**

**---Operational Creditor**

V/s

**M/s. Kiran Global Chem Limited**

**---Corporate Debtor**

**Order delivered on: 04.09.2019**

**Coram:**

**B. S.V. PRAKASH KUMAR, MEMBER (JUDICIAL)**

**S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)**

For the Operational Creditor: *Shri. T.K. Bhaskar, Advocate*

*Shri. Vikram P. Jain, Advocate*

*Ms. Shwetha Vasudevan, Advocate*

For the Corporate Debtor : *Shri. E. Om Prakash, Sr. Advocate*

*Shri. R.Swarnavel, Advocate*

*Shri. R. Ramkumar, Advocate*

*Shri.T. Sankaran, Advocate*

**ORDER**

**Per: S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)**

**Order pronounced on: 04.09.2019**

It is an Insolvency and Bankruptcy Application filed by  
M/s. TVG Limited (in short, "Operational Creditor") against M/s.

Kiran Global Chem Limited (in short, “Corporate Debtor”) under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short, **IB Code, 2016**) r/w Rule 6 of the Insolvency and Bankruptcy (Application of Adjudicating Authority) Rules, 2016 (for brevity, **IB Rules 2016**) to initiate Corporate Insolvency Resolution Process against the Corporate Debtor.

2. The Operational Creditor was engaged as Financial Advisor for PTAL International FZC (**PTAL**), a subsidiary of the Corporate Debtor herein having its office at New Fetter Place, 8-10, New Fetter Lane, London EC4A 1AZ. The Corporate Debtor Company engaged in manufacture of Sodium Silicate and trader of Soda Ash and related products was incorporated on 29.11.1973 under the Companies Act, 1956 with its registered office at No.42, New Avadi Road, Kilpauk, Chennai-600010, Tamilnadu.

3. The learned counsel for Operational Creditor stated that the Operational Creditor was engaged as Financial Advisor for PTAL International FZC (in short “**PTAL**”), a UAE-based subsidiary of the Corporate Debtor herein in connection with any potential

transaction, whereby the ownership or control of a significant interest in the Corporate Debtor or the assets or activities thereof is transferred directly or indirectly by the Corporate Debtor or a group company belonging to the Corporate Debtor to one or more third parties. It is submitted that the **Engagement Letter** dated 10<sup>th</sup> April 2017 (Page-1 of the typed set) clearly provides the existence of any agreement with respect to and the subsequent consummation of any transaction would trigger Corporate Debtor's obligations to pay the **Signing Fee** (Page-2) and in any event, the out-of-pocket expenses incurred in connection with the engagement also becomes payable. As per Clause 12 of the Engagement Letter, in the event of PTAL failed to pay any amount owed to Operational Creditor, the Corporate Debtor (M/s.Kiran Global Chem Ltd), as the unconditional Guarantor of PTAL's obligations under the Engagement Letter was liable to make such payments. It is further submitted that the Operational Creditor, having commenced the services in March 2017, inter alia vide email dated 05.05.2017 (Page-80) suggested a list of potential strategic partners, including the name of Tata Chemicals Limited (Page-83) who was the ultimate 'acquirer' triggering the

transaction as defined under the Engagement Letter. In pursuance thereof, out-of-pocket expenses were incurred and an invoice dated 05.05.2017 for £19,458.30 (Page-12) was raised and upon knowing the Transaction i.e. acquisition of Allied Sicilia Limited, a subsidiary of the Corporate Debtor by Tata Chemicals Limited, one of the potential acquirers suggested by the Operational Creditor, the Signing Fee became payable and invoice in respect of the same was raised on 10.04.2018 for £419,458.30 (Page-14). As payments were not forthcoming, several reminders were issued vide emails dated 02.06.2017 and 05.07.2017 and 22.09.2017 (Pages-93, 100 and 101) in relation to the out of pocket expenses, calling upon the Corporate Debtor to make the payments. Vide e-mails dated 10.07.2017 (Page-90) and 11.08.2017 (Page-93), the Corporate Debtor acknowledged the liability and assured to clear their outstanding dues. Upon the issuance of invoice through e-mail dated 27.04.2018 for Signing Fee (Page-103), a reminder was issued for which neither any payment was received nor was there any demurer to the same. Subsequently, a Demand Notice dated 27.07.2018 was issued under Section 8 of the Insolvency and Bankruptcy Code (Page-15). The Corporate Debtor

has denied the liability vide reply dated 04.08.2018 (Page-47) on grounds which were stated for the first time. Even in the reply to the demand notice, the Corporate Debtor has failed to provide any record of the pendency of any suit or arbitration proceedings or any dispute. The total outstanding debt payable to Operational Creditor is £419,458.30 (approximately equal to INR 3,73,31,788/- based on exchange rate as on 18<sup>th</sup> December 2018) inclusive of Signing Fee of £400,000 (GBP) as on 10<sup>th</sup> April 2018 and out of pocket expenses of £19,458.30 (GBP) as on 20<sup>th</sup> May 2017. As a guarantor, the liability of the Corporate Debtor under Section 128 of the Indian Contracts Act, 1872 is co-extensive with that of the Principal Debtor. Further, in the case of *Dr. Vishnu Kumar Agarwal vs. Piramal Enterprises Limited* (Company Appeal (AT) Insolvency No.346/2018), the Hon'ble NCLAT vide para 25 held that

*“we hold that it is not necessary to initiate ‘Corporate Insolvency Resolution Process’ against the Principal Borrower before initiating Corporate Insolvency Resolution Process against the Corporate Guarantors”*

4. In the case of *Renish Petrochem FZE vs. Ardor Global (P) Limited* (CP/(IB) No.33/9/NCLT/AHM/2017) vide para 13 and 14 that,

*But, reading the definition of claim into the definition of operational debt, it could only mean that the amount due from the buyer of the goods, and which is due to the seller of the goods and is guaranteed by the Guarantee Agreement, is also an Operational Debt.*

*..... The provisions of the Contract Act clearly go to show that the liability of the Principal Borrower and that of the Guarantor is co-extensive to that of the Principal Debtor”.*

5. The learned counsel for Respondent/Corporate Debtor contended that the Applicant is not an Operational Creditor to the Respondent as there is no privity of contract between the Applicant/Operational Creditor and the Respondent/Corporate Debtor and no invoice was raised on the Respondent. It was submitted that the Applicant has not rendered any service to the Respondent to enable them to claim any amounts from the Respondent. The instant Application does not satisfy the requirements of the Code, more particularly Section 8 & 9 and only

based on an Engagement Letter between the Applicant and PTAL International FZC, a subsidiary of the Corporate Debtor for rendering services as Financial Advisor as and when requested by PTAL. The Applicant has not placed any material for requesting such services and hence cannot invoke clause 12 of the Engagement Letter to enforce the liability on the Respondent/Corporate Debtor as a Guarantor. Further no supporting documents were submitted by the Applicant to substantiate the claim on PTAL for £19,458.30 on 5<sup>th</sup> May 2017. After the dispute on the said invoice, there is no correspondence till April 2018. In fact, the Applicant has suspended all its services to PTAL on 10.07.2017 itself.

6. It is further submitted that on 9<sup>th</sup> April 2018, M/s. Tata Chemicals Limited had decided to take over the Respondent's subsidiary M/s. Allied Silica Limited and executed a Business Transfer Agreement (BTA). The Applicant were never been a part to any of the proceedings and the entire process of acquisition was completed without any kind of assistance or service sought from the Applicant as per clause 2 of the Engagement Agreement and in

respect of this acquisition, a mail was also sent to the Applicant on 22.03.2018. On seeing the acquisition news in a daily, the Applicant sent a mail request to the Respondent's Dubai subsidiary on 10.04.2018 demanding payment of out of pocket expenses along with a Signing Fee of £400,000 for the concluded BTA between one of the Respondent's Indian subsidiary and M/s. Tata Chemicals Limited. There is no invoice raised, rather a request for payment referring to earlier invoice for out of pocket expenses. This is also raised on PTAL and not on the Corporate Debtor. The above transaction is not a financial transaction to claim guarantee as co-extensive liability, but only an operational debt on a company in Dubai. In the absence of an invoice, no claim can be made in terms of Section 8 of the Code. The Applicant is misleading this Adjudicating Authority by referring to the request for payment for Success Fee as an Invoice.

7. It is further submitted that the e-mail communications dated 12.07.2017 and 11.08.2017 which is alleged as acknowledgement of debt, is connected only to the Out of Pocket expenses invoice No.423 dated 05.05.2017 amounting to £19,548 and not the Signing Fee

payment request made on 10.04.2018 amounting to £400,000. The Engagement Agreement is not an exclusive arrangement so that the Applicant could claim such demand of £400,000 without rendering an iota of service to the alleged transaction between M/s. Allied Silica Ltd and M/s. Tata Chemicals Ltd. The Signing Fee demand for the said BTA without rendering any service for the said deal is unjust and unlawful.

8. On perusal of material placed before this Bench, it is seen that the Respondent has claimed that there is no privity of contract between the Applicant and the Respondent. However, it is seen that the Corporate Debtor has executed an Indemnification Agreement with the Applicant regarding any amount which may be due on account of the Agreement between the PTAL International FZC, and TVG Limited (the Valence Group) wherein Kiran Global Chem Limited is also a signatory and it has been specifically stated in Clause-12 vide Agreement with PTAL and TVG Limited along with Kiran Global Chem Limited wherein vide Clause-5 & 6, the Corporate Debtor (Kiran Global Chem Limited) is expected to pay £400,000 as Signing Fee and also

Success Fee £2,250,000, less the creditable portion of the signing fee, to the extent actually paid, clause-7 of the Agreement also provides for the re-imbusement of out-of-pocket expenses including those pertaining prior to the date of the agreement. Further, the Corporate Debtor has also claimed that it is only an operational debt and hence no guarantee is applicable in this case. However, it is seen that the Corporate Debtor being a signatory to the indemnification agreement with the Applicant, cannot, at this juncture, claim any dispute on this count after receipt of Demand Notice under Section 8 of IBC, 2016.

9. In this connection, it is seen that the TVG Limited has presented invoice for travel and other expenses and various e-mail correspondences between the TVG Limited and Kiran Global Chem Limited have been furnished from Page 88 to Page 97. Nowhere in the said e-mails, we could find that the Corporate Debtor (Kiran Global Chem Limited) denying the liability for the services rendered by TVG Limited. It is also seen that e-mail correspondence dated 10.07.2017 from Corporate Debtor (Kiran Global Chem Limited) to the Applicant, Corporate Debtor has requested the Applicant to

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continue their work and when the cash flows come in again, the Corporate Debtor will start making interim payments. Even in this letter, there has been no denial of the liability to pay the Applicant Company in pursuance of the Agreements between them. After several correspondences, the Applicant has issued Demand Notice under Section 8 of the Insolvency and Bankruptcy Code, 2016 on 27<sup>th</sup> July, 2018. The Corporate Debtor denied the claim made in the demand notice contending that there is no privity of contract, non-availability of any documents and also due to the fact that no iota of assistance has been rendered by the Applicant for transaction between M/s. Allied Silica Ltd. And M/s. Tata Chemicals Ltd.

10. It is seen that the Corporate Debtor has raised the dispute only after the issuance of the Demand Notice under Section 8 and in all previous correspondences, there has been no denial on the part of the Corporate Debtor regarding the outstanding amount or the liability of the Corporate Debtor to pay the same.

11. In view of this, the Tribunal is of the opinion that the amount claimed by the Applicant is due and that there has been a default on

the part of the Corporate Debtor in the payment of the amount claimed. We hereby admits the instant **IBA/130/2019** filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 and order commencement of Corporate Insolvency Resolution Process (CIRP). Accordingly, this **IBA/130/2019** is hereby **admitted** with the following directions:

- (I) That Moratorium is hereby declared prohibiting all of the following actions, namely,
- (a) 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;
  - (b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
  - (c) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act);

81

- (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- (II) 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.
- (III) 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.
- (IV) That the order of moratorium shall have effect from **04.09.2019** 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.
- (V) That the public announcement of the Corporate Insolvency Resolution Process shall be made immediately as specified under Section 13 of the Code.

(VI) That this Bench hereby appoints **Mr. Nagalingam Muthiah** as **Interim Resolution Professional (Reg. No. IBBI/IPA-001/IP-P00774/2017-2018/11347)**, Room No. 708, 7<sup>th</sup> Floor, Shivalaya Buildings, "A" Block, Ethiraj Road, Egmore, Chennai-600008, E-mail: [mnaga2050@gmail.com](mailto:mnaga2050@gmail.com), Mobile No: 9789055123 with his consent to carry the functions as mentioned under The Insolvency & Bankruptcy Code.

22. The Registry is hereby directed to immediately communicate this order to the Operational Creditor, the Corporate Debtor and the Interim Resolution Professional by way of e-mail.

**-Sd-**  
**(S. VIJAYARAGHAVAN)**  
**Member (Technical)**

**-Sd-**  
**(B. S.V. PRAKASH KUMAR)**  
**Member (Judicial)**