NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.952 of 2019

[Arising out of Order dated 04.09.2019 passed by National Company Law Tribunal, Division Bench, Chennai in IBA/130/2019]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
M.S. Jain R.S. No.37, Nagore Road, T.R. Pattinam, Karaikal, Puducherry – 611002	---	Appellant
Versus		
1. TVG Limited New Fetter Place, 8-10, New Fetter Lane, London – EC4A 1AZ	Operational Creditor	Respondent No.1
2. Kiran Global Chem Limited, Through the Interim Resolution Professional, Mr. Nagalingam Muthiah No.42, New Avadi Raod, Kilpauk, Chennai – 600 101 Also at: Room No.708, 7th Floor, Shivalaya Buildings, "A" Block, Ethiraj Road, Egmore, Chennai – 600 008	Corporate Debtor	Respondent No.2

For Appellant: **Shri Krishnendu Datta, Shri Ravi Raghunath, Ms. Mehak Khurana and Shri R. Swarnavel, Advocates**

For Respondents: **Shri Mohit Singh, Shri Amit Kr. Mishra, Ms. Samridhi Hota, Shri Shivam Pandey and Shri Turab Ali Kazmi, Advocates**

J U D G E M E N T

(11th December, 2019)

A.I.S. Cheema, J. :

1. Respondent No.1 - TVG Limited (hereafter referred as 'Operational Creditor') filed Application under Section 9 of Insolvency and Bankruptcy Code, 2016 (IBC – in short) against Respondent No.2 - Kiran Global Chem Limited (hereafter referred as 'Corporate Debtor') which has been admitted by the Adjudicating Authority (National Company Law Tribunal, Division Bench, Chennai) on 4th September, 2019 in Application numbered as IBA/130/2019. Thus, the present Appeal has been filed by Appellant - M.S. Jain - shareholder and Director of Respondent No.2 (Corporate Debtor), taking up the cause of the Corporate Debtor.

2. The Operational Creditor – TVG Ltd. claimed before the Adjudicating Authority that it was Financial Advisor for "PTAL International FZC" ('PTAL' – in short), a subsidiary of the Corporate Debtor having office in London. Corporate Debtor engaged in manufacturing of Sodium Silicate and traded in Soda Ash and related products. The Operational Creditor was engaged by PTAL in connection with any potential transaction, whereby ownership or control of significant interest of Corporate Debtor or assets or activities is transferred directly or indirectly by the Corporate Debtor or group

company belonging to Corporate Debtor to one or more third parties. Engagement letter dated 10th April, 2017 (Page -70) was executed in this regard. Corporate Debtor had obligation to pay the signing fee and in the event of out of pocket expenses incurred in connection with the engagement letter, the same were also payable. As per the Clause 12 of engagement letter, if PTAL failed to pay any amount owed to Operational Creditor, the Corporate Debtor had given unconditional guarantee for PTAL to make the payments. The Operational Creditor suggested a list of potential strategic partners including name of Tata Chemicals Limited who ultimately, acquired Allied Silica Limited – a subsidiary of the Corporate Debtor. The signing fee and expenses towards out of pocket expenses were outstanding. In spite of invoices, payments were not made. Invoice dated 05.05.2017 for £19,458.30 was raised and for transaction of Tata Chemicals Ltd. which acquired M/s. Allied Silica Ltd. plant of Corporate Debtor, signing fee was due and invoice was raised on 10.04.2018 for £419,458.30. Operational Creditor claimed that in spite of admitted dues in e-mail, the same were not paid and Notice under Section 8 of IBC dated 27.07.2018 was sent. The Corporate Debtor by Reply dated 04.08.2018, denied liability on grounds which was stated for the first time. The Operational Creditor filed Section 9 Application and claimed Rs.3,73,31,788/- equivalent to the 419,458.30 pounds claimed to be outstanding, claiming liability of guarantor was co-extensive of Principal Debtor under Section 128 of India Contract Act.

3. The Corporate Debtor before the Adjudicating Authority pointed out that there was no privity of contract between the Operational Creditor and the Corporate Debtor and no invoice had been raised to the Corporate Debtor. The Operational Creditor rendered no service to the Corporate Debtor. The engagement letter was between the Operational Creditor and PTAL – a subsidiary of Corporate Debtor for rendering services as Financial Advisor as and when requested by PTAL. Corporate Debtor claimed that no material was brought by Operational Creditor to attract Clause - 11 of the engagement letter in which the Corporate Debtor is guarantor. Corporate Debtor claimed that on 7th April, 2018, M/s. Tata Chemicals Ltd. signed Business Transfer Agreement and took over subsidiary of Corporate Debtor namely, M/s. Allied Silica Ltd. and made Public Announcement on 09.04.2018. In this transaction, the Operational Creditor was nowhere part of the proceedings and the transaction was done without any assistance or service taken from the Operational Creditor. In fact, on 22nd March, 2018, an e-mail was also sent to the Operational Creditor making this clear. The Operational Creditor seeing news in the newspaper started claiming payment of out of pocket expenses along with signing fee for a transaction which was directly between the subsidiary of Corporate Debtor and Tata Chemicals Ltd.

4. The Adjudicating Authority on hearing the parties, looked into the Letter of Engagement/Agreement (Page – 70) and observed that the Corporate Debtor – Kiran Global was signatory and liable under Clause 12. The stand taken by the Corporate Debtor that matter related to

"operational debt" which did not apply to guarantor to invoke IBC was referred by Adjudicating Authority but without discussing the same, the Adjudicating Authority only mentioned that there was Indemnization Agreement and dispute could not be raised after Demand Notice. Adjudicating Authority referred to the out of pocket expenses and correspondence of e-mail on that count and observed that Corporate Debtor – Kiran Global did not deny liability. The Adjudicating Authority referred to the defence that Operational Creditor had not given any assistance in the transaction between Allied Silica and Tata Chemicals and observed that the dispute was raised after Section 8 Notice and thus, concluded that the Section 9 Application deserved to be admitted.

5. Learned Counsel for the Appellant has referred to the contents of the Appeal filed and referring to the record, it is stated that before Agreement as recorded in the letter dated 10th April, 2017 (Annexure A-3), there was correspondence between the Corporate Debtor and Operational Creditor (Page 217 – 251) and referred specifically to Page – 236 of the paper book to underline that when draft was made, in the proposal/draft - Clause, there was use of word 'exclusive' which was deleted in the final document. By the letter, the Agreement proposed was that PTAL – the Company was engaging the Operational Creditor as its "Financial Advisor" but the word 'exclusive' was deleted and what was agreed into in Annexure A-3, was that PTAL was engaging the Operational Creditor (referred as Valence) as Financial Advisor. The argument is that it is apparent intention between the parties that it was to be a non-exclusive arrangement between the

parties which means that only if in a given transaction, Operational Creditor gives assistance, liability to pay would be there. The argument is that it was apparent that PTAL could, independent of Operational Creditor also enter into transactions relating to ownership or control of significant interest in Kiran Global or assets or activities thereof transferred, directly or indirectly by Kiran Global or Kiran Global group of one or more third parties.

6. The learned Counsel for the Appellant argued for Corporate Debtor that M/s. Tata Chemicals Ltd. had approved investment and entered into Highly Dispersible Silica (HDS) business and this was informed to Stock Exchange on 9th February, 2017 by public announcement (Page – 95). Appellant claims that the Corporate Debtor started negotiation in March – April, 2017 with Tata Chemicals to sell one of their Indian subsidiary "M/s. Allied Silica Limited" plant in Tamil Nadu. It is argued that then on 10th April, 2017, the non-exclusive engagement letter was signed between PTAL and the Corporate Debtor where the Operational Creditor was to render assistance as incorporated on request from PTAL. There was provision made for signing fee "if" Kiran Global enters into an Agreement which provides for the subsequent completion of transaction in which case the signing fee as provided in Clause – 5 of the engagement letter which would be equal to £400,000 would be attracted. The learned Counsel referred to Clause – 7 to state that out of pocket expenses could be incurred by the Operational Creditor but it required the prior approval of PTAL.

7. Learned Counsel for the Corporate Debtor argued that the e-mail communications available on record do not show that for out of pocket expenses, Operational Creditor took any prior approval from PTAL. It is argued that the Operational Creditor reached out to some potential investors in Kiran Global which is seen from correspondence of e-mail dated 23rd August, 2018 at Pages – 257 and 259. However, the Operational Creditor has not shown any such e-mail with regard to transaction relating to Tata Chemicals and Allied Silica Limited. It is argued by the learned Counsel for Appellant that the Operational Creditor suspended its work due to outstanding out of pocket expenses for which invoices dated 05.05.2017 had been raised and this can be seen from Annexure A-6.

8. Learned Counsel for the Appellant for Corporate Debtor pointed out (Annexure – A) that if the e-mail at Annexure A-7 are seen and read, it will make clear as to how the Operational Creditor was not at all concerned with the transaction between Tata Chemicals and Allied Silica. The e-mail dated 13th March, 2018 sent by Corporate Debtor to the Operational Creditor read as under:-

> "From: Atul Jain [mailto:atul@kiranglobal.com]
> Sent: Tuesday, March 13, 2018 1:30 PM
> To: Peter Hall
> Subject: Last year financials of Egypt
>
> Dear peter,
>
> This is last year financials of our egyptian plant. It did an approximate net margins of 3 million USD. I am computing gross margins as well. We are looking to find a buyer for this unit to solve the current debt in India.

Revenue was approximately 18 million USD. Ebdita looks like 23 percent.

I have some people in mind who may be interested:

1. IQE (spain)

2. PQ

3. Solvay

4. Eti soda (turkey)

Regarding our Silica business, we are in touch with a strategic Buyer at the moment. Due diligence is completed. It's negotiations time, but not yet signed.

Let me know if you need more data.

Regards,

Atul jain"

In response, the Operational Creditor on 22nd March, 2018 sent e-mail to the Corporate Debtor (part of Annexure A-7) which reads as under:-

"From: Peter Hall <PHall@valencegroup.com>
Date: Thu, Mar 22, 2018 at 9.06 AM
Subject: RE: Last year financials of egypt
To: Atul Jain <atul@kiranglobal.com>

Hi Atul,

I suspect that whatever value that you might realise for the Egyptian business will not make much of a dent in the existing debt load on the business. Are your negotiations on the silicas plant likely to realise much value? And are you still considering a sale of the entire business?

Best regards

Peter"

It is argued by the learned Counsel for Appellant for Corporate Debtor that this e-mail itself makes clear that even on 22.03.2018, the Operational Creditor was completely clueless about the transaction between Tata Chemicals and Allied Silica and was enquiring if the negotiations of the Corporate Debtor would help realise much value. The argument is that soon thereafter, in 15 – 16 days, Tata Chemicals Ltd. acquired M/s. Allied Silica Ltd. on 7th April, 2018 and on 8th April, 2018 informed National Stock Exchange and disclosure as per SEBI Regulations was made. This is apparent from Annexure A-8. The learned Counsel has then referred to Annexure A-9 (Page – 97) and the e-mails therein. Reference is made to e-mail dated 9th April, 2018 which was sent from Corporate Debtor to Operational Creditor which reads as follows:-

> "From: Atul Jain [mailto:atul@kiranglobal.com]
> Sent: Monday, April 09, 2018 11:51 AM
> To: Peter Hall
> Cc: Alex Khutorsky; Dominic Risso-Gill
> Subject: Re: Allied Silica Transaction
>
> Dear peter and team,
>
> Thank you. Due to confidentiality I could not disclose more details.
>
> Now we need to start working on kiran global as well. Peter, please look into Egypt for sale. The reason why I'm saying this is to save time in due diligence. Even if valence works on 10 percent on success fee for egypt which I feel if we get 8 times ebidta (very conservative) we are looking at 30 million USD valuation. I don't mind shelling a higher success fee (5 to 7 percent) for the same amount of Kgcl (2 to 3

> percent) as this will be easier, faster and a reasonable incentive for valence to work on.
>
> Think about it. We had an internal discussion with brenntag and their Mumbai office has shown interest also.
>
> Let me know if we can take this forward.
>
> Regards
>
> Atul"

It is argued that in this e-mail, the Corporate Debtor had rather informed the Operational Creditor that with regard to Allied Silica, Transaction due to confidentiality details could not be disclosed and the Operational Creditor was then called upon to start work with regard to Kiran Global. It is apparent that Operational Creditor was not concerned and hence politely told that confidentiality clause prohibited giving details. In response, on the same day, there was e-mail sent from the side of Operational Creditor to the Corporate Debtor congratulating the Corporate Debtor on the transaction. The e-mail reads as under:-

> "On Mon, 9th Apr 2018, 21:56 Peter Hall, <PHall@valencegroup.com> wrote:
> Atul
>
> Congratulations on getting the transaction signed and announced.
>
> Do you have an idea as to when the transaction will close and complete?
>
> Best regards
>
> Peter"

The Appellant has further pointed out the e-mail dated 10th April, 2018 to claim that although the Operational Creditor was totally clueless with regard to the details of the transaction with Tata Chemicals, (which it would have known had it been involved in the transaction), it tried to take a chance by sending e-mail dated 10th April, 2018 which reads as under:-

> "On Tue, 10 Apr 2018, 06:37 Peter Hall, <PHall@valencegroup.com> wrote:
> Atul
>
> For clarity, you're suggesting a success fee for Egypt of 10% of the EV, correct? I couldn't quite follow what you meant by "shelling a higher success fee……..for the same amount of kgcl…"?
>
> The fee that is due to us in respect of the Allied Silica/Tata transaction is £ 2.55 million (consisting of the Signing Fee and the Success Fee and after allowing for the 25% creditability of the Signing Fee) i.e. approx. $3.6m (depending on exact fx rate). So the additional success fee you're proposing in respect of an Egypt sale would be approximately the same amount again, correct?
>
> Thanks and best regards
>
> Peter"

9. The learned Counsel for the Corporate Debtor has then referred to Reply of the Corporate Debtor of the same date informing Operational Creditor as follows:-

> "From: **Atul Jain** <atul@kiranglobal.com>
> Date: Tue, 10 Apr 2018, 10:15
> Subject: Re: Allied Silica Transaction
> To: Peter Hall <PHall@valencegroup.com>
> Cc: Alex Khutorsky <AKhutorsky@valencegroup.com>,
> Dominic Risso-Gill <drgill@valencegroup.com>

Dear peter,

No you got me totally wrong :). Maybe we could have a call for me to explain my proposal for egypt.

Regards,
Atul"

10. The argument is that the Operational Creditor only because there was an agreement like 10th April, 2017, tried to take advantage by dishonestly making a claim which was immediately rebutted by the Corporate Debtor informing the Operational Creditor that the Operational Creditor had got the Corporate Debtor totally wrong. It is stated the dispute was already raised by above e-mail dated 10.04.2018.

11. The learned Counsel further referred Page – 100 to show that unlike invoice dated 5th May, 2017 raised for out of pocket expenses (which is at Annexure A-4) which had Invoice No.423, the Operational Creditor half-heartedly made a "Request for Payment" vide Annexure A-10 on 10th April, 2018 which was addressed to PTAL and claimed signing fee £400,000 and £19,458.30 for out of pocket expenses. The Operational Creditor later claimed this request to be an invoice.

12. It has been argued by the learned Counsel for the Appellant for Corporate Debtor that as Operational Creditor had made some efforts with potential investors for Kiran Global (as is seen from e-mails referred at Page – 257 and 259 [supra]) liability with regard to which out of pocket expenses was payable but even with regard to that, there was no prior

consent of PTAL. It is argued that the Operational Creditor has not shown any such e-mail or documents to show that the Operational Creditor was party to efforts made for the transaction between Tata Chemicals and Allied Silica. Referring to document issued by Tata Chemicals (Page – 137) rather it is argued that there was no third party involvement in the transaction.

13. It is thus stated that the Adjudicating Authority erred in not considering the above aspects while admitting the Section 9 Application which should have been rejected as the Appellant had shown no service rendered as regards transaction between Tata Chemicals and Allied Silica and no invoice had been raised with PTAL on that count and only a Letter of Request was sent. With regard to out of pocket expenses, there was no prior permission taken for the out of pocket expenses as per the letter of engagement and thus, dues were not shown and two different transactions were mixed and so there could not be default.

14. Apart from the above, it is argued by the Appellant that the Section 9 Application has been filed against Kiran Global. It was only a Guarantor in the letter of engagement. The engagement related to operational debt and Guarantor of an operational debt transaction, is not covered under Section 5(21) of IBC. It is argued that the definition of "operational debt" as per Section 5(21) is not similar to the definition of "financial debt" under Section 5(8)(i) where amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in Sub-Clauses (a)

to (h) of the Clauses explaining financial debt is specified. It is not a debt disbursed against consideration for time value of money to attract the definition of financial debt under Section 5(8). The matter relates to debt which has arisen in respect of the provision of services and there was no disbursement of any monies and thus, the argument is that dues allegedly liable to be paid by PTAL cannot be claimed under IBC from the Corporate Debtor – Kiran Global who is shown as guarantor for PTAL.

15. Thus, the Appellant taking up the case of Respondent No.2 – Corporate Debtor claims that the Section 9 Application was not maintainable and the same should have been rejected.

16. The learned Counsel for the Respondent – TVG Limited (Operational Creditor) has supported the Impugned Judgement. According to the contesting Respondent – Operational Creditor, Application under Section 9 is maintainable against the Corporate Debtor who has given guarantee in favour of a principal creditor's liability to honour an operational debt. It is argued that as per Section 5(20), Operational Creditor is person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. In the present matter (while accepting is not the case of assigning or transferring), the Counsel claimed that operational debt means "a claim" in respect of provision of goods or services and the Counsel tried to rely on Section 3(6) of the Code to say that claim means a right to payment and right to remedy for breaching a contract. Reliance has been placed on Clause - 12 of the engagement letter

dated 10th April, 2017 to claim that if PTAL defaulted, Kiran Global had guaranteed unconditional payments. The Counsel claimed that the debt in the present case had arisen in respect of provisions of services and it is not case of disbursement of any monies.

17. The learned Counsel for the Respondent relied on the documents relating to Letter of Engagement (Annexure A-3) and the reasons recorded by the Adjudicating Authority to claim that there was an operational debt which was in default and that Corporate Debtor was liable to pay.

18. The Impugned Order shows (in para – 8) that the Corporate Debtor had raised the question of connection between the operational debt and guarantee claiming that when it is only an operational debt, Guarantor of operational debt cannot be proceeded against under IBC if existing provisions are seen. guarantee is not applicable in the present case. The Adjudicating Authority did not go into particulars and simply stated that when Corporate Debtor is signatory to the Indemnization Agreement, it could not raise dispute after Section 8 Notice. It appears to us that it is a legal question which is involved, and can be raised.

19. Section 5 is in Part II of IBC which deals with insolvency resolution and liquidation for Corporate Persons. Section 5 deals with definitions and Financial Creditor and financial debt have been defined in Section 5(7) and (8), respectively as under:-

> “(7) "financial creditor" means any person to whom a financial debt is owed and includes a person

to whom such debt has been legally assigned or transferred to;

(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[Explanation.—For the purpose of this sub-clause,—

(i) any amount raised from the allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

> (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
>
> (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
>
> (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;"

Sub-Clause (i) of Section 5(8) with reference to financial debt includes the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in Sub-Clauses as 'a' to 'h' of the Clauses. This is unlike the definitions of "Operational Creditor" and "operational debt" which in Section 5(20) and (21), respectively reads as under:-

> "(20) "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;
>
> (21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

Intention of legislature is apparent as, while defining "financial debt" counter indemnity obligation in respect of a guarantee is covered but no such case is there when "operational debt" is defined. The learned Counsel

for the Respondent has not been able to satisfy us as to how in a matter relating to operational debt, Guarantor can be roped in for the purpose of invoking IBC. If it was financial debt, Section 5(8)(h) and (i) could have been relevant but that it not the case with operational debt as can be seen from the definition. Thus, we find that for the dues of operational debt which is claimed to be against PTAL, proceeding under Section 9 against the Guarantor – Kiran Global could not have been maintained.

20. In view of the above, the Section 9 Application against the Corporate Debtor should have been rejected.

21. With such finding, the present Appeal can be straight away allowed. However, with regard to the merits of the matter, we record our views, in case at any point of time our views on merits of the matter become relevant or necessary.

22. We have referred to the arguments of the Counsel for Appellant – Corporate Debtor in details and we find that the arguments have substance when the same are read along with record. Although the Operational Creditor was pointing out to the Corporate Debtor, potential investors for "Kiran Global" as can be seen from e-mails dated 09.06.2017 and 08.06.2017 (at Pages 257 and 260), there is no such record shown by the Operational Creditor with regard to the transaction between Tata Chemicals and Allied Silica Limited. The learned Counsel for the Appellant has rightly pointed out that the engagement letter which was executed is required to be treated as non-exclusive engagement letter and PTAL could

enter into transactions or arrangements with regard to ownership or control of interest in Kiran Global or the assets or activities thereof even without involving the Operational Creditor. There is substance in the arguments of the learned Counsel for the Appellant as is evident from the e-mails referred that the Operational Creditor even on 22nd March, 2018 was completely clueless relating to the transaction between Tata Chemicals and Allied Silica when e-mail (as at Annexure A-7) was sent asking the Corporate Debtor "Are your Negotiations on the silica plant likely to realize much value?" and "are you still considering a sale of the entire business?" The counsel rightly submits that if this was the scene as regards Operational Creditor on 22nd March, 2018, it is unlikely that the transaction between Tata Chemicals and Allied Silica which was completed on 7th April, 2018 (as seen in Annexure – A8) would have had any involvement of the Operational Creditor. The Counsel rightly submitted that the e-mail dated 9th April, 2018 (at Annexure – A9) shows the Operational Creditor congratulating the Corporate Debtor with regard to the transaction relating to Tata and enquiring "Do you have an idea as to when the transaction will close and complete?" If the Corporate Debtor was part of the transaction, Corporate Debtor would not have been asking such questions. We find substance in the submissions of the learned Counsel that the Corporate Debtor on change of heart laid claim for signing fee and success fee in the e-mail dated 10th April, 2018 (part of Annexure A-9) to take advantage of the existing engagement letter. There is substance in the argument that unlike the claim for out of pocket expenses for which a

specific invoice (Annexure A-4) was raised, with regard to transaction with Tata Chemicals, half-hearted "Request for Payment" (Annexure A-10) was made referring to signing fee referred in engagement letter and adding out of pocket expenses to claim £419.458.30. The Operational Creditor has not shown reasonable material to claim that it was entitled to alleged signing fee in the matter of transaction relating to Tata Chemicals and Allied Silica Ltd.

23. Relying on Annexure A-10, the Operational Creditor filed the Section 9 Application with the Adjudicating Authority mixing the issue with out of pocket expenses. As regards out of pocket expenses, the learned Counsel for the Appellant submitted that as e-mails show that there were certain efforts made by the Operational Creditor with regard to sale of Kiran Global and out of pocket expenses were considered for payment as is appearing from the exchange of e-mails. It was, however, submitted that the same would require prior approval of PTAL which is not shown. Against this, the learned Counsel for the contesting Respondent – Operational Creditor referred to the engagement letter (Annexure A-3) and contents in Clause – 7 to show that PTAL had agreed to reimburse the Operational Creditor out of pocket expenses reasonably incurred "including prior to the date hereof, in connection with this agreement …….". The learned Counsel could not show prior approval of PTAL with regard to expenses post execution of engagement letter (Annexure A-3) but the Counsel referred to e-mails dated 5th May, 2017 with which the Invoice No.423 (Annexure A-4) was sent in respect of out of pocket expenses for project - Knight. Reference is made to

Page – 269 of the paper book to show that particulars had also been given for which Invoice No.423 had been raised and these included amounts for out of pocket expenses incurred prior to the date of engagement letter. According to the Counsel even if those expenses were to be considered, the dues would be of more than Rs.1 Lakh and when admittedly the same was claimed and not paid, default is there. We find that although the learned Counsel for the Operational Creditor has pointed out the above, the Section 9 Application based on Invoice No.423 (Annexure A-4) read with Request for Payment (Annexure A-10) mixed issues relating to transaction between Tata Chemicals and Allied Silica to make a claim for outstanding dues of £419,458.30 as if the out of pocket expenses were with regard to services for the transaction between Tata Chemicals and Allied Silica. This is apart from the fact that the learned Counsel for the Appellant at the time of arguments orally submitted that the Appellant is ready to clear dues with regard to out of pocket expenses.

24. In view of our finding that for operational dues, the Guarantor could not have been proceeded against in IBC, we allow the Appeal. The Impugned Order dated 4th September, 2019 passed by the Adjudicating Authority is quashed and set aside. The CIRP proceeding and steps taken under the proceeding are quashed and set aside. The IRP/RP will hand over the management of the Corporate Debtor back to the Board of Directors/Promoters of the Corporate Debtor along with records.

25. The Adjudicating Authority will close the proceedings after ascertaining from IRP/RP the expenses of CIRP process and the fees payable. These amounts shall be paid by the Operational Creditor to the IRP/RP.

The Appeal is disposed accordingly. No costs of Appeal.

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

[V.P. Singh]
Member (Technical)

/rs/md