

18

**BEFORE THE AJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

C.P. (I.B) No. 33/9/NCLT/AHM/2017

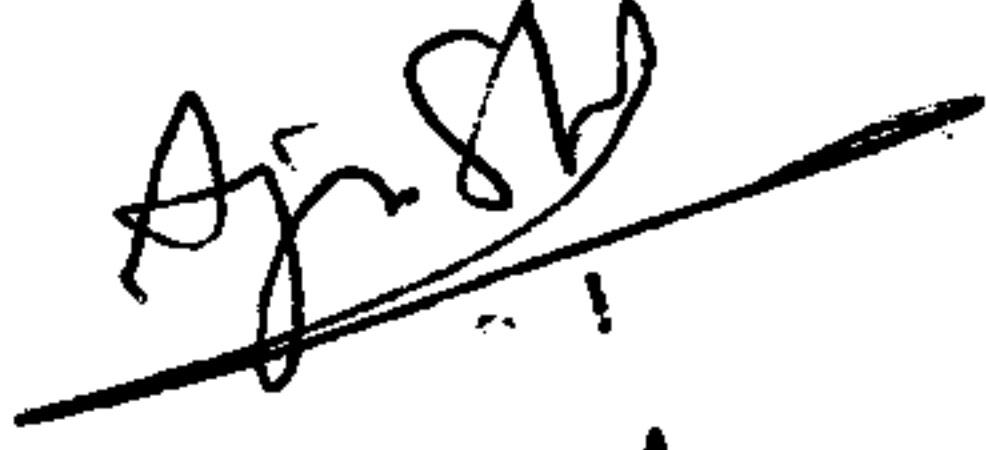

Coram:

**Present: Hon'ble Mr. BIKKI RAVEENDRA BABU
MEMBER JUDICIAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 31.07.2017**

Name of the Company: Renish Petrochem FZE
V/s.
Ardor Global Pvt. Ltd.


Section of the Companies Act: Section 9 of the Insolvency and Bankruptcy
Code

<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.	A. R. Sheth	Adv. & Solicitor	Corporate Debtor	
2.	NAVIN PAHWA	ADV.	OPERATIONAL CREDITOR	
3.				

ORDER

Learned Advocate Mr. Navin Pahwa present for Operational Creditor/ Applicant.
Learned Advocate Mr. Arjun Sheth present for Respondent/ Corporate Debtor.
None present for Caveator/ Central Bank of India.

Order pronounced in open Court. Vide separate sheet.


**BIKKI RAVEENDRA BABU
MEMBER JUDICIAL**

Dated this the 31st day of July, 2017.

**BEFORE ADJUDICATING AUTHORITY (NCLT)
AHMEDABAD BENCH**

C.P. No.(IB) 33/9/NCLT/AHM/2017

In the matter of:

Renish Petrochem FZE
Corporate Office at
37th Floor, HDS Tower,
Cluster-F, JLT,
P.O. Box, Dubai-12537

And

Registered Office at
P.O. Box 42168,
Hamariyah Free Zone,
Sharjah,
United Arab Emirates.

: Applicant.
[Operational Creditor]

Versus

Ardor Global Private Limited,
'ARDOR HOUSE'
Mondeal Business Park,
Beside Gurudwara, S.G. Road,
Thaltej,
Ahmedabad-380059

: Respondent.
[Corporate Debtor]

Order delivered on 31st July, 2017.

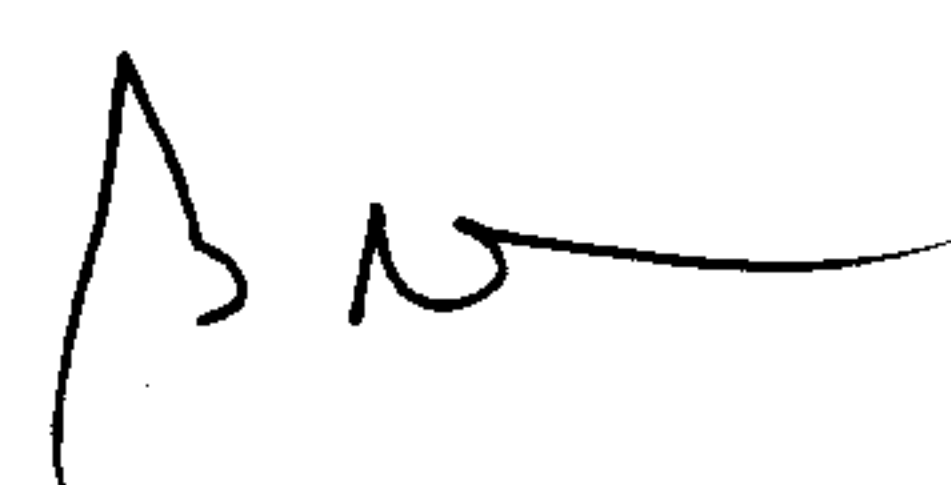
Coram: Hon'ble Sri Bikki Raveendra Babu, Member (J).

Appearance:

Shri Navin Pahwa, learned Advocate for Applicant.
Shri Arjun Sheth, learned Advocate for Respondent.

ORDER

1. Authorised Signatory of Renish Petrochem FZF filed this
Petition under Section 9 of The Insolvency and Bankruptcy Code,

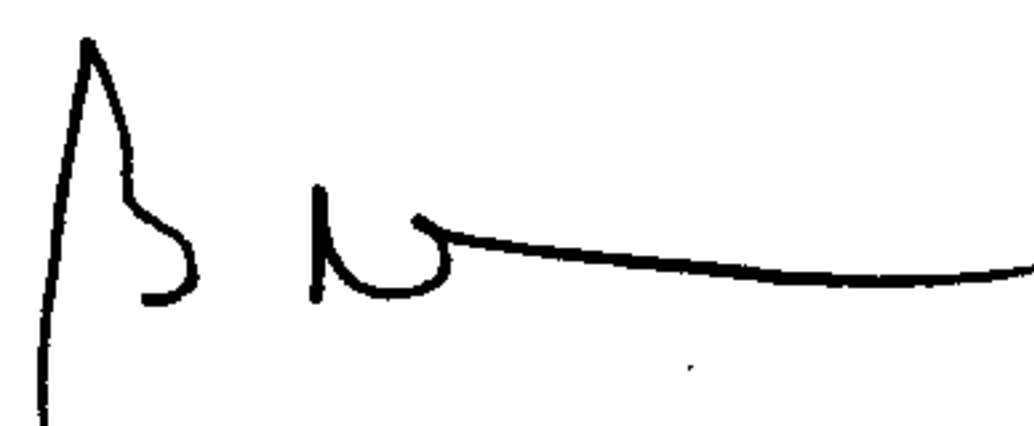


2016 [hereinafter referred to as "the Code"] read with Rule 6 of The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 [hereinafter referred to as "the Adjudicating Rules"], seeking reliefs under Section 9 of the Code.

2. It is the case of the Applicant that it had supplied various materials from time to time to Ardor International Limited and the outstanding amount from Ardor International Limited is Rs. 15,35,40,909.49 ps. It is also the case of the Applicant that Applicant agreed to supply goods to Ardor International Limited on a condition that the payment of all and any sums of monies due and payable by Ardor International Limited shall at all times be guaranteed by Ardor Global Private Limited, its Associate Entity. It is also stated that pursuant to the said understanding a Deed of Guarantee dated 1st September, 2014 between Applicant Company and Respondent Company was entered into whereby Respondent company unconditionally and irrevocably guaranteed as Principal Obligor to make entire payment to the Applicant which is due and payable by Ardor International Limited from time to time. It is stated that Applicant issued notice dated 15th November, 2016 to the Respondent. In response to the said notice, Authorised Signatory of Respondent Company issued a Reply dated 4.12.2016 acknowledging the claim made by the applicant in respect of supply of goods to Ardor International Limited on the basis of Deed of Guarantee dated 1st September, 2014. In the said Reply, Respondent Company requested time to clear the dues.

3. Applicant issued notice as required by Rule 5 of the Adjudicating Rules to the Respondent Company on the same day by hand and endorsement of the same was made by the Respondent on the notice. Thereafter on 31st May, 2017, this Petition is filed by the Applicant.

4. In response to the notice issued by this Adjudicating Authority, Respondent appeared through learned Counsel and filed



Reply. In the Reply, the following are the objections taken by the Respondent;

4.1. The Hon'ble High Court of Gujarat in Company Petition No. 297 of 2016 vide its orders dated 28.11.2016 and 6.12.2016 ordered for liquidation proceedings and appointed Official Liquidator to take over charge and possession of assets of Ardor International Ltd. It is stated by the Respondent that Registered Office of Ardor International Limited and the Registered Office of the Respondent, i.e., Ardor Global Private Limited are situated in one premises and in the process of inventory, Official Liquidator had taken possession of all the books and accounts and registers of the Respondent Company also. Further it is stated that Respondent wrote a letter dated 2.2.2017 to the Official Liquidator to give access of the records and registers of the Respondent company.

4.2. The second objection is, that the dollar conversion rate in calculating the due amount shall be taken into account on the due date but not on the date of demand notice. If the dollar rate is taken on the date of demand notice or one day prior to the date of demand notice it will go to the advantage of the Applicant. It is also contended by the learned Counsel for the Respondent that unless and until Respondent is having access to its records and registers it will not be in a position to effectively defend this Petition.

5. Regarding the first objection, the winding up order is passed not in respect of the Respondent Company and it is in respect of Ardor International Limited. The Respondent did not choose to file any Report of the Official Liquidator to show that the records and registers of the Respondent Company have also been taken into his custody at the time of inventory made by him in the Registered Office of Ardor International Limited. Even assuming that the books and registers of the Respondent Company are in the custody of Official Liquidator, Respondent did not take any effective steps to have access to the records and registers of the Respondent Company by

filing an application before the Hon'ble High Court of Gujarat seeking directions to the Official Liquidator, for the last seven months.

6. It is pertinent to mention here, that in response to the notice dated 15th November, 2016 issued by the Applicant, Respondent in its notice dated 4.12.2016 admitted the liability and sought time for repayment. This admission was made by the Respondent after the winding up order was passed by the Hon'ble High Court in respect of Ardor International Ltd. Therefore, in the light of the said admission, even assuming that Respondent had no access to its records and registers, it is not prejudiced in making defence in its case.

7. Coming to the issue of exchange rate of dollars into rupees, the objection of the Respondent appears to be not a valid objection. If any amount is due in dollars when it is to be repaid in rupees, the exchange rate on the date of repayment has to be taken into consideration irrespective of the fact whether it is advantageous or disadvantageous to the debtor or creditor. To say that the exchange rate as on the due date shall be taken into consideration appears to be not a valid ground for not initiating resolution process under the Code. In view of the above discussion, there are no tenable objections in the Reply of the Respondent.

8. Applicant served copy of the Petition; applicant served the demand notice; applicant named the Insolvency Resolution Professional; applicant filed Deed of Guarantee, copies of Invoices, ledger accounts of Ardor International Ltd, and Bank account of the Applicant Company. There are no defects in the Petition. In the case on hand, admittedly there is an occurrence of default in repayment of amount to the Applicant, who is an Operational Creditor who supplied goods to Ardor International Ltd, for which Respondent Company stood as a guarantor. Therefore, Respondent Company is a Corporate Debtor. The debt due to the Operational Creditor from the Corporate Debtor can be classified as an operational debt since

it primarily arises out of supply of goods and by virtue of Guarantee Deed.

9. The Registry brought to the notice of this Authority on 18.7.2017, on which date the matter was posted for pronouncement of the Order, that a Caveat Application No. 10 of 2017 filed by Central Bank of India, Ahmedabad relating to this matter is pending. Therefore, this Authority directed the Applicant to serve notice on the Central Bank of India and file proof of service. Accordingly, Applicant served notice and filed proof of service. The matter is reopened. This Adjudicating Authority heard the arguments of the learned Counsel for the Applicant, learned Counsel for the Respondent and learned Counsel for the Financial Creditor/Central Bank of India.

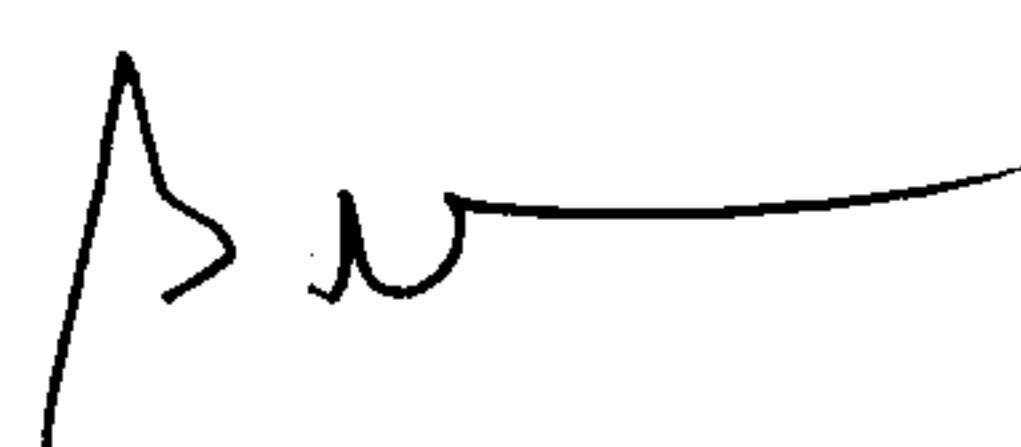
10. The Central Bank of India filed IA No. 208 of 2017 to recall the Order dated 18.7.2017. The said Application was disposed of by this Authority on 25.7.2017 with a finding that it was necessary to reopen C.P. (IB) No. 33 of 2017 to hear on the aspects whether the Operational Creditor can initiate Insolvency Resolution Process against the guarantor of the Corporate Debtor and on the aspect of right of audience to Central Bank of India.

11. First of all, coming to the right of audience to the Central Bank of India, which is said to be a 'Financial Creditor' of the Corporate Debtor, there is no provision in the Code or in the Adjudication Rules that on an application filed by the Operational Creditor under Section 9 of the Code there is a need to give notice to the Financial Creditor. However, in view of the Caveat filed by the Financial Creditor, notice has been ordered. The argument put forward by the learned Counsel for the Central Bank of India is that the Corporate Debtor is a Principal Borrower from the Central Bank of India and therefore the Operational Creditor cannot trigger Insolvency Resolution Process against the Corporate Debtor herein on the ground that it is a guarantor to Ardor International Limited.

Learned Counsel appearing for the Central Bank of India further contended that the amount due under a contract of guarantee from Ardor Global Private Limited is not an 'operational debt'.

12. Learned Counsel appearing for the Operational Creditor contended that 'operational debt' is defined in sub-section (21) of Section 5 which says 'operational debt' means a claim in respect of provision of goods. 'Claim' is defined in Section sub-section (6) of Section 3. A reading of Clause (b) of sub-section (6) of Section 3 of the Code clearly means right to remedy for breach of contract under any law for the time being in force if such breach gives a right for payment of money, it is a claim. In the case on hand, a perusal of the Deed of Guarantee dated 1st September, 2014 executed by Corporate Debtor in favour of the Applicant goes to show that Corporate Debtor undertook to pay the entire amount due by Ardor International Limited towards supply of goods to it not only as a guarantor but also as sole principal obligor. Further, a perusal of the letter dated 14.12.2016 addressed by Ardor Global Private Limited to the Applicant shows that Ardor Global Private Ltd., undertook to pay the claim of the Applicant for supply of goods to Ardor International Limited.

13. Therefore, when the definition of the word 'claim' in Section 3 of the Code is inserted into the definition of 'operational debt' in sub-section (21) of Section 5, it includes the amount payable under the Guarantee Agreement also. No doubt, in case of 'financial debt', Section 8 Clause (i) specifically says about the liability in respect of any of the guarantee for any of the items referred to in sub-clause (a) to (h). There is no such specific clause in case of 'operational debt'. 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'.

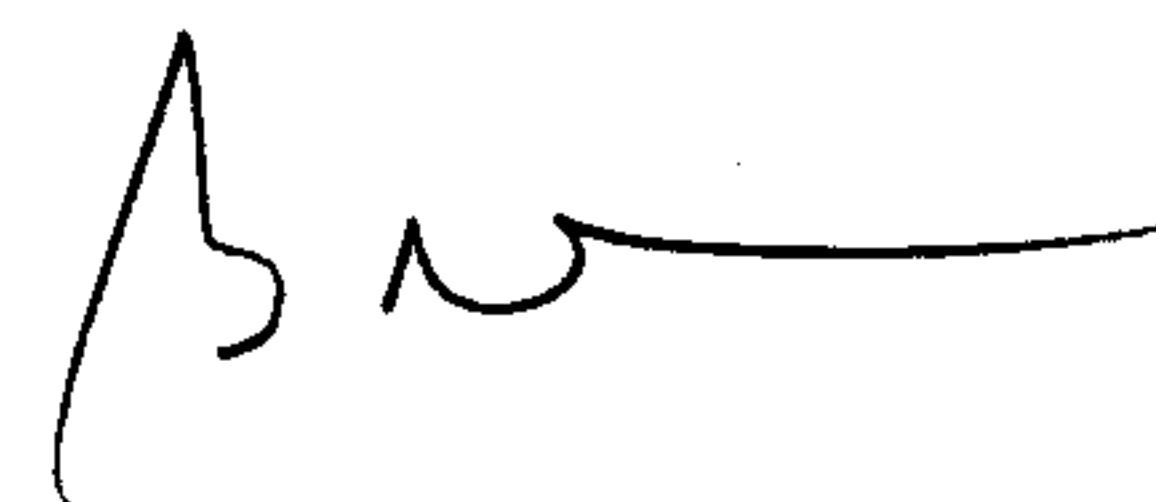


14. The provisions of the Contract Act clearly go to show that the liability of the Principal Borrower and that of the Guarantor is co-extensive to that of the Principal Debtor. On this aspect, learned Counsel for the Applicant also relied upon the decision in **Central Bank of India Vs. C.L. Vimla and Others**, reported in (2015) 7 Supreme Court Cases 337. Therefore, the objection raised by the Central Bank of India, that Operational Creditor cannot proceed against the Respondent from whom the 'financial debt' is due to them, do not merit acceptance.

15. In view of the above discussion, this Petition deserves to be admitted and accordingly it is admitted. This Adjudicating Authority is appointing Shri Ravi Kapoor, who has shown his address at 4th Floor, Shaival Plaza, Near Gujarat College, Ellisbridge, Ahmedabad-380006, and Registration Number as IBBI/IPA-002/IP-00076/2016-17/1203, as 'Interim Insolvency Resolution Professional' under Section 13(1) of the Code. This Adjudicating Authority directs the Applicant to make public announcement of initiation of Corporate Insolvency Process and calls for submission of claims under Section 15 as required by Section 13(1)(b) of the Code.

16. In view of the commencement of the Insolvency Resolution Process with the admission of this Petition and appointment of the Interim Insolvency Resolution Professional, this Adjudicating Authority hereby passed the order declaring moratorium under Section 13(1)(a) prohibiting the following as laid down in Section 14 of the Code;

- (i) 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;



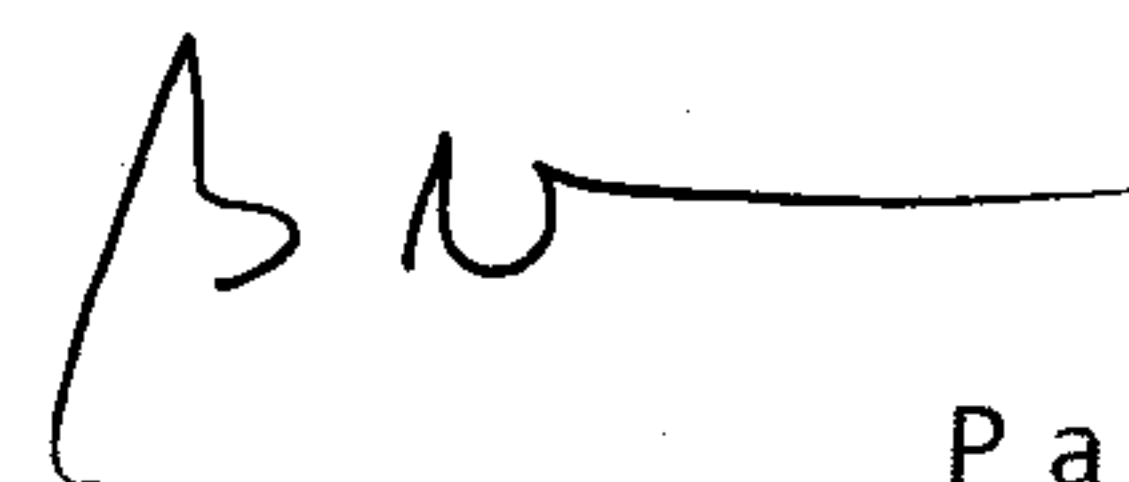
- (ii) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (iii) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (iv) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

16.1. However, the supply of goods and essential services to the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. The moratorium order in respect of (i), (ii), (iii) and (iv) above shall not apply to the transactions notified by the Central Government.

16.2. The order of moratorium shall not apply to such transactions that might be notified by the Central Government in consultation with any financial sector regulator in view of sub-section (3) of Section 14 of the Code.

17. This order of moratorium shall be in force from the date of order till the completion of Corporate Insolvency Resolution Process subject to the Proviso under sub-section (4) of Section 14.

18. This Petition is ordered accordingly.



19. Communicate a copy of this order to Operational Creditor, Corporate Debtor, Financial Creditor/Central Bank of India, and to the Interim Insolvency Resolution Professional.

Signature:  31.7.17

**Sri Bikki Raveendra Babu, Member (J).
Adjudicating Authority.**