

**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH, HYDERABAD**

CP (IB) No.648/07/HDB/2019  
Under section 7 of the IB Code, 2016.  
Read with Rule 4 of the Insolvency and Bankruptcy  
(Application to Adjudicating Authority) Rules, 2016.

**In the matter of:-**  
**M/s. VEERA PRECAST PRIVATE LIMITED**

Between:

M/s. Azad Engineering Private Limited  
Regd. Office at 90/C, Phase 1,  
IDA, Jeedimetla, Hyderabad – 500 055.

...Petitioner/  
Financial Creditor

Vs

M/s. Veera Precicast Private Limited  
Regd. Office at Plot No.86/A/Part,  
Phase-I, IDA, Jeedimetla,  
Hyderabad – 500 055.

... Respondent/  
Corporate Debtor

**Date of Order: 21.09.2020.**

**Coram: Shri. K. Anantha Padmanabha Swamy, Member Judicial.  
Dr. Binod Kumar Sinha, Member Technical.**

**Parties/Counsel Present:**

For the Petitioner/  
Financial Creditor

: Mr. Deepak Bhattacharjee, Senior Counsel  
Mr. Dishit Bhattacharjee, Counsel.

For the Respondent/  
Corporate Debtor

: Mr. B. Vijaysen Reddy  
Mr. Vivek Jain  
Mr.R.Sushanth Reddy  
Counsels.

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**Per: Dr. Binod Kumar Sinha, Member Technical**

**ORDER**

1. The present petition is filed by 'M/s. Azad Engineering Private Limited' (hereinafter referred to as 'Petitioners/Financial Creditor') under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IB Code, 2016) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against M/s. Veera Precicast Private Limited (hereinafter referred to as 'Respondent/Corporate Debtor').
2. Brief facts, as stated by the Applicant, *inter-alia*, are as under:-
  - a. That the Corporate Debtor was in process of reorganization of its business and accordingly the Corporate Debtor and its directors/shareholders approached the Financial Creditor. That the Financial Creditor states that on the offer made by the Corporate Debtor, both the companies agreed to sign a memorandum of understanding, contemplating the terms and conditions of the takeover. Both the parties mutually agreed to reduce the terms in to writing and signed Memorandum of Understanding dated 10.10.2018. Both the parties had to fulfil certain conditions, before the business could be taken over by the Financial Creditor. That the MoU were signed by the Corporate Debtor along with Shri M. Nagi Reddy, Managing Director, Shri Ch Ganga Reddy, Shri Venkata Sudarsan Reddi Nalla and Shri. Suryanaryana Murthy Karry as the Directors.

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- b. That as per clause 4, the Corporate Debtor, who is a party to the Memorandum of Understanding dated 10.10.2018, directed the Financial Creditor to transfer the amount of ₹1,09,45,500 into the account of the Directors/Shareholders.
- c. That there is no dispute with regard to the amounts accepted by the Corporate Debtor and the Corporate Debtor being a signatory to the MoU dated 10.10.2018, was also a surety/co-obligator to the transaction in the event the transaction did not go through or the MoU was cancelled by either of the parties. The Corporate Debtor as per clause 17 of the MoU was liable to pay back the complete amount to the financial creditor with interest at the rate of 15% per annum in the event the deal failed. Thus, the Corporate Debtor herein is also a co-obligator, surety and guarantor as per the provisions of Insolvency and Bankruptcy Code, 2016. Clause 17 of the MoU states as below:

*“All liability of First Party (Statutory & Operational) as on date of transfer of shares of first party to second party should be cleared by first part on or before date of transfer (31.01.2019). In case liability is not cleared in the manner as aforementioned, as on date of transfer (31.01.2019) of shares by First Party, the Second Party will withdraw from this acquisition deal and subsequently first party is duty bound to return all payments received from the date of signing this MoU till date of transfer of shares along with interest rate of 15% per annum. The said date of transfer can be extended by mutual consent signed in writing by both the parties hereto and the need for extension may arise due to procedural and legal formalities as per applicable law”*

- d. That as per the clauses of the MoU, the Corporate Debtor and its directors/shareholders agreed to clear all Corporate Debtor's liabilities

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- and provide no dues certificate from all statutory and regulatory authorities before transfer of shares.
- e. That, the Corporate Debtor has blatantly violated the above stated conditions. The Corporate Debtor admittedly had taken amounts from the financial creditor to clear off its liabilities, which is also evident from the email dated 13.02.2019 filed by Corporate Debtor wherein the Corporate Debtor admits that the amount paid by the Financial Creditor will be utilized to clear the liabilities of Corporate Debtor.
- f. That the Corporate Debtor admittedly was liable to pay back the financial debt to the tune of ₹1,09,45,501 and the Corporate Debtor miserably failed to clear the admitted liability. Therefore the Applicant was left with no other option other than issuing a demand notice dated 14.06.2019, asking for cancellation of the MoU dated 10.10.2018 and demanding repayment of ₹1,20,23,062 (including interest) within fifteen days. The Corporate Debtor vide reply on the letter head of the Company dated 15.06.2019 accepted, confirmed cancellation of the MoU, but did not make any payment to the financial creditor.
- g. That being aggrieved by the action of the Corporate Debtor, the Financial Creditor through its counsel issued a legal notice dated 08.07.2019 demanding a total sum of ₹1,30,08,579 and the notice was received and acknowledged by the Corporate Debtor.
- h. That the Financial Creditor received a reply notice dated 16.07.2019, wherein the first paragraph it is stated that “under the instruction of my client m/s. Veera Precicast Private Limited and Shri M. Negi Reddy, the

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Managing Director of Veera Precicast Private Limited and other Directors and Shareholders, accepting the contention that they have received a sum of ₹1,09,45,501 from the financial creditor and accepting that the transaction as per the MoU could not go through and that the amount is due and payable to the financial creditor. The relevant paragraph of the notice is para 5 wherein, it is stated that "it is true that the notice dated 14.06.2019 issued by your client claiming a sum of ₹1,20,23,062 which was replied by my client vide letter dated 15.06.2019 admitting having received a sum of ₹1,09,45,501". The reply notice issued by the Advocate on behalf of the Corporate Debtor clearly established that the amount was paid to it by the Financial Creditor.

- i. That, in the present case on the instructions of the Corporate Debtor the amounts were paid by the financial creditor into the accounts of the Directors/Shareholders of the Company and as per clause 17 of the MoU dated 10.10.2018, the Corporate Debtor stood as a surety/co-obligant to the whole transaction to repay the financial creditor in the event the MoU terms were not honoured or the MoU was cancelled. That the Corporate Debtor at para 10 and para 11 of the said reply notice has admitted to a liability of ₹41,72,728 in the said notice, which is a clear admission that there is a debt due to the Financial Creditor.
- j. That consideration for a contract need not always necessarily flow from parties to the contract and a party who is a signatory to a valid

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agreement is also equally liable for the amounts to be paid even though it has not received directly any consideration but passed to Third Party on instruction.

- k. That the MoU is not a shareholders agreement. A shareholders agreement would have been signed only if the MoU dated 10.10.2018 would have been honoured and the transaction would have gone forward. The MoU dated 10.10.2018 was signed and the consideration given by the Financial Creditor to the Corporate Debtor was for the purpose that the Corporate Debtor would clear off all its liabilities and honour the MoU and in the event all the statutory and operational dues were cleared only then the Corporate Debtor and the Financial Creditor would have signed the shareholders agreement in future.
- l. That the total amount due and payable by the Corporate debtor is Rs. 1,30,08,579/- and the date of default is 08.07.2019
3. The list of documents filed in order to prove the existence of financial debt are as under:-
  - a. Memorandum of Understanding dated 10.10.2018.
  - b. Days of Default calculated as on 08.07.2019 Computation of Amount in tabular Form.
  - c. Copy of Notice dated 14.06.2019.
  - d. Copy of reply to the notice dated 14.06.2019.
  - e. Copy of demand notice dated 08.07.2019.
  - f. Copy of reply dated 16.07.2019 to the demand notice.
  - g. Copy of reply dated 07.08.2019 to the reply.

4. Ld. Counsel for the Respondent filed its counter and written submissions, *inter-alia* stating as under:-

- i. That the present petition is misconceived and untenable. There is no amount/amounts paid by the Financial Creditor to the Corporate Debtor. That the Memorandum of Understanding (hereinafter 'the MoU') dated 10.10.2018 entered into between the parties for the acquisition of the Respondent Company by the Applicant Company contemplates transfer of shares by the shareholders of the Respondent Company to the Applicant Company. Pursuant to the said transfer of shares arrangement in the MoU, the amount of Rs.1,09,45,501/- as claimed in the present Petition herein was paid by the Applicant to the individual shareholders of the Respondent Company. Admittedly, the Applicants made these payments to the individual shareholders and never to the Respondent Company as is evidenced by the bank receipts and statements/accounts produced by the Applicant Company itself and it is the names of the individual shareholders that appear as debtors in the books of account and not the Respondent company, as such there is no financial debt that the Respondent Company owes to the Applicant and liability, if any, would be upon the individual shareholders and cannot be enforced against the Respondent Company. In the absence of a financial debt owed to the Applicant, the Respondent Company cannot be said to be a corporate debtor for the purpose of corporate insolvency proceedings under Section 7 of the IBC as there exists no relationship of a financial creditor and corporate debtor between the parties in the absence of such a financial

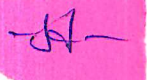
debt. Alternatively, merely because the Respondent Company was a consenting party to the MoU dated 10.10.2018 entered into between the parties does not make it a corporate debtor in the absence of an actual physical transfer of amount to it and non-existence of a financial debt.

- ii. That the allegations in the application, would disclose that there was a share purchase agreement with the shareholders of the respondent/alleged Corporate Debtor. The money which applicant/alleged financial creditor claims to have paid, admittedly undisputed, stood transferred on its own to the accounts of various share-holders and not to the account of the respondent/alleged corporate debtor. Therefore, on this count alone, the applicant/alleged financial creditor does not qualify in any manner whatsoever to maintain the present application under section 7 or much less any other provisions of the IB Code.
- iii. That a dispute as alleged does not fall within the scope and ambit of section 7 or much less any other provision of the IB Code. Assuming without admitting that there is any breach of contract, the scope of dispute and its adjudication lies elsewhere and not under section 7 of any other provision of the IB Code.
- iv. That the Applicant Company cannot be called a Financial Creditor for the purpose of initiating the corporate insolvency process under Section 7 of the Insolvency and Bankruptcy Code, 2016. It is submitted that there exists no financial debt owed by the Respondent Company to the Applicant Company, which is *sine qua non* for

invoking the provisions of Section 7 of the IBC. In the absence of a financial debt, the Respondent Company is not a Corporate Debtor and the Applicant Company not a Financial Creditor within the meaning of Section 7 of the IBC.

- v. That the existence of a 'financial debt' is prerequisite for invoking corporate insolvency proceedings under section 7 of the IBC. Therefore, unless there exists a financial debt and a default in payment of the same, the provisions of section 7 of the IBC cannot be invoked.
  - vi. Since no amount was transferred to the Respondent Company, as such there is no financial debt that the Respondent Company owes to the Applicant and liability, if any, would be upon the individual shareholders and cannot be enforced against the Respondent Company.
  - vii. That the Respondent Company was a consenting party to the MoU dated 10.10.2018 entered into between the parties does not make it a corporate debtor in the absence of an actual physical transfer of amount to it and non-existence of a financial debt. Therefore, the present petition filed under section 7 of the IBC is not maintainable.
  - viii. Reiterating the above, the Ld. Counsel for the Respondent/Corporate Debtor prayed to dismiss the instant application.
5. Ld. Counsel for the Applicant filed its Rejoinder and written submissions, inter-alia, reiterating the averments made in the Application, denying the allegations raised in the counter and further prayed to admit the Corporate Debtor herein for CIRP.





6. An Application bearing IA No.962/2019 was filed inter-alia seeking directions to not to alienate the assets of the Corporate Debtor, on 11.09.2019 and the same was heard along with the main Application.
7. That after scrutiny of the main Company Application, the same was first listed on 17.10.2019 and the counsel for Financial Creditor was directed to issue notice to the Respondent/Corporate Debtor for appearance and the matter was adjourned to 30.10.2019.
8. During the hearing held on 30.10.2019, Mr. Vijaysen Reddy, counsel representing Corporate Debtor filed vakalatnama and prayed time for filing counter. At his request, matter adjourned to 01.11.2019.
9. During the hearing held on 01.11.2019, Counsels representing both sides made submissions in part in the main CP and IA. For continuation, matter was adjourned at request to 05.11.2019. After several adjournments, finally during the hearing held on 04.12.2019, the matter was heard at length and reserved for orders.
10. Heard both the sides and perused the records.
11. It is a fact on record that the Execution of MoU and transfer of monies as between the parties is not disputed by either of the parties to the case at hand. However, the Respondent has taken a stand that the monies advanced by the Applicant herein are not advanced to the Corporate Debtor, but to the individual shareholders of the Corporate Debtor and as such, the petition is not maintainable and further the Applicant does not fall under the ambit of Financial Creditor.

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12.The Clause 12(a) of the MoU between the parties is significant for Adjudicating upon the stand taken by the Corporate Debtor. The relevant portion of MoU, states as under:-

*“50% will be paid at the time of signing MoU. These amount shall be paid proportionately to the shareholders of Veera Precicast Pvt Ltd, in proportion to their shareholding in the Company....”*

13.From a plain reading of the above said clause of MoU entered into between the parties, it is observed that the payments made by the Applicant herein is in consonance with the above said clause of the Agreement and therefore, the objection raised by the Corporate Debtor does not form a valid ground for rejection of the instant Application.

With regard to question of determining whether the amounts advanced in terms of the MoU by the Applicant would qualify as a Financial Debt, it is essential to look at the definition of Financial Debt as stipulated in section 5(8) of the Code and more particularly Section 5(8)(f) of IB Code, 2016.

14. However, before referring to Section 5(8), it is better to refer to definition of 'debt' as stipulated in Section 3(11) of the Code. 'Debt', as defined under Section 3 (11) means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. This liability or obligation to pay must arise out of a claim due from a debtor/ borrower. The nature and source of such obligation is not material. The obligation may be contractual or otherwise.

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15. Further 'financial debt' has been defined in Section 5(8) of I&B Code, which is reproduced herein below:

*"5(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;*
- 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;"*

16. It has been held by Hon'ble NCLAT in the case of *Shailesh Sangani v. Joel Cardoso & Anr.*(Company Appeal (AT) (Insolvency) No. 616 of 2018,) that a financial debt may or may not be interest bearing, but it must be having a time value of money .

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17. Further, in *G. Sreevidhya v. Karismaa Foundations Pvt. Ltd. Company (Appeal (AT)(Insolvency) No. 494 of 2018)*, the Financial Creditor and the Corporate Debtor had entered into an agreement for construction of a residential building on a turnkey basis at a cost of INR 4 Crores and the Financial Creditor released INR 1.5 Crores as advance under the agreement. However, as the agreement could not be performed, the Corporate Debtor retained the money as loan and started paying interest on the same. The Hon'ble NCLAT held that the money was disbursed in pursuance of an agreement in the nature of a financial transaction against consideration of time value of money as the building raised in pursuance of such agreement would fetch fortunes for the Financial Creditor. The Hon'ble NCLAT further held that the payment of interest on the outstanding amount merely supplemented the understanding that the debt of the Financial Creditor was a Financial Debt. The Hon'ble NCLAT thus held that the Applicant was a Financial Creditor and directed the Adjudicating Authority to admit the Application.
18. Keeping the guidance available in the aforecited judgements of Hon'ble NCLAT and advertng to the facts of the instant case, this Adjudicating Authority observes that the Applicants had disbursed the sum of ₹1,09,45,501/- in consideration of time value of money on the following counts:
- (A) Clause 17 of the MoU clearly stipulates that if the deal does not go through the "first party is duty bound to return all payments received from the date of signing this MoU till date of transfer of shares along with interest rate of 15% per annum."
  - (B) The transaction of purchase of business of the Corporate Debtor as a going concern completed in terms of the MoU supra would have handed over an income generating apparatus in the form of 'business of manufacturing of industrial casting' to the applicant which would have fetched substantial income to the applicant thereafter.
19. Further, a reference to Section 5(8)(f) shows that "*any amount raised under any other transaction, including any forward sale or purchase*

*agreement, having the commercial effect of a borrowing" shall also be deemed to be a "Financial Debt". To satisfy whether the impugned transaction will fall within the definition contained u/s 5(8)(f), a reference to the MoU is required.*

20. Clause 1 of MoU *supra*, reads as under:-

*"1. The members of the first party agree to transfer the business of manufacture of Industrial casting to the second party and the second party agrees to acquire the said business on such terms and conditions as hereinafter specified."*

21. A bare reading of the above clause would show that the MoU was entered into between the parties with an intent to purchase the 'Manufacture of Industrial Casting' business of the Corporate Debtor, by the Applicant, subject to fulfilment of agreed terms, which construes as a forward sale and purchase agreement.

22. In view of the reasons as discussed above, this Adjudicating Authority is of the view that the impugned transaction squarely falls within the definition of Financial Debt as defined U/s 5(8) and more specifically under Section 5(8)(f) of IBC, 2016. The debt in the instant case, therefore, qualifies to be a 'financial debt' and the Applicant qualifies as a Financial Creditor.

23. Further, as discussed above, in terms of clause 17 of the MoU *supra*, the Corporate Debtor is liable to return all the payments with interest @ 15% p.a. which admittedly has not been done. Thus there has been a 'default' which has not been disputed by the respondent.

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24. It is pertinent to note here that Hon'ble Supreme Court, while deciding the matter in the case of *INNOVENTIVE INDUSTRIES LTD. Vs. ICICI BANK & ANR.*, in Civil Appeal Nos. 8337-8338 of 2017, held as under:
- ".....The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be."*
25. In the present case, this Adjudicating Authority is satisfied with the submissions put forth by the Financial Creditor regarding existence of 'financial debt' and occurrence of 'default'. Further, the Financial Creditor has fulfilled all the requirements as contemplated under IB Code in the present Company Petition and has also proposed the name of IRP after obtaining his written consent in Form-2. In view of the above, this Adjudicating Authority is inclined to admit the petition.
26. The instant petition is hereby admitted and this Adjudicating Authority Orders the commencement of the Corporate Insolvency Resolution Process which shall ordinarily get completed as per the time line stipulated in section 12 of the IB Code, 2016, reckoning from the day this order is passed.
27. This Adjudicating Authority hereby appoint Mr. Anjaneyulu Sadhu, having Regn. No. *IBBI/IPA-001/IP-P00963/2017-2018/11584* (IRP) as his name is proposed by the Financial Creditor and is also reflected in IBBI website. He has also filed his written consent in Form - 2. The IRP

is directed to take charge of the Respondent/Corporate Debtor's management immediately. He is also directed to cause public announcement as prescribed under Section 15 of the I&B Code, 2016 within three days from the date of receipt of this order and call for submission of claims in the manner as prescribed.

28. This Adjudicating Authority hereby declares the moratorium which shall have effect from the date of this Order till the completion of corporate insolvency resolution process for the purposes referred to in Section 14 of the I&B Code, 2016. We order to prohibit all of the following, 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 (54 of 2002);*
- 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.*

Sd/-

Sd/-

*e) Notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concessions, clearances or a similar grant or right during the moratorium period.*

29. However, the supply of essential goods or services of the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. Further, if the IRP considers supply of any goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period. Furthermore, the provisions of Sub-section (1) of Section 14 shall not apply to such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority.
30. The IRP shall comply with the provisions of Sections 13(2), 15, 17 & 18 of the Code. The directors, Promoters or any other person associated

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with the management of Corporate Debtor are directed to extend all assistance and cooperation to the IRP as stipulated under Section 19 and for discharging his functions under Section 20 of the I&B Code, 2016.

31. The Petitioner/Financial Creditor as well as the Registry is directed to send the copy of this Order to IRP so that he could take charge of the Corporate Debtor's assets etc. and make compliance with this Order as per the provisions of I&B Code, 2016.
32. The Registry is directed to communicate this Order to the Financial Creditor and the Corporate Debtor.
33. The Registry shall also communicate this Order to the ROC, Hyderabad for updating the status of the Corporate Debtor in the MCA website.
34. The address details of the IRP are as follows:-
- Mr. Anjaneyulu Sadhu,  
T402B, Technopolis,  
Chikpti Gardens,  
Begumpet, Hyderabad – 500016,  
Telangana, India.  
Email: anjaneyulu@ezresolve.in
35. The present Company Application bearing CP (IB) No.648/7/HDB/2019 is hereby admitted. Accordingly, IA No.962/2019 stands closed.



**Dr. Binod Kumar Sinha**  
Member Technical



**K. Anantha Padmanabha Swamy**  
Member Judicial