NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH

PRESENT: HON'BLE SHRI K ANANTHA PADMANABHA SWAMY– MEMBER JUDICIAL

PRESENT: HON'BLE SHRI BINOD KUMAR SINHA –MEMBER TECHNICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 23.09.2019 AT 10.30 AM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP(IB) NO. 88/7/HDB/2019
NAME OF THE COMPANY	Himagiri Enterprises Pvt Ltd
NAME OF THE PETITIONER(S)	NCC Ltd (formarly Know As Nagarjuna Construction Company Ltd)
NAME OF THE RESPONDENT(S)	Himagiri Enterprises Pvt Ltd
UNDER SECTION	7 OF IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
Avinash Desai	Adv	avinash@desaiclawoffice.com	
Raman Munigala		9813663312	Raman

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature
Sai Phanidhar for Nitish Bandary	Adv	9700942504 7032416379	[signature]

ORDER

Order pronounced in open court. CP admitted vide separate order.

[signature]
MEMBER TECHNICAL

[signature]
MEMBER JUDICIAL

Rk

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

CP(IB)No.88/7/HDB/2019
Under Section 7 of the Insolvency and Bankruptcy Code, 2016, Read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

In the matter of:-

NCC Limited
Having its Registered Office at:-
NCC House, Madhapur,
Hyderabad, Telangana – 500 081, India.

... Financial Creditor

Vs

Himagiri Enterprises Private Limited
Having its Registered Office at:-
Plot no.56, Nagarjuna Hills,
Punjagutta, Hyderabad,
Telangana - 500 082, India.

...Corporate Debtor

Order pronounced on: 23.09.2019

**Coram: Shri. K. ANANTHA PADMANABHA SWAMY, MEMBER JUDICIAL
Dr. BINOD KUMAR SINHA, MEMBER TECHNICAL**

Parties/Counsel Present:

For the Financial Creditor:

Mr.Avinash Desai, Advocate

Mr.TPS Harsha, Advocate

Mr.Pranav Munigela, Advocate

For the Corporate Debtor:

Mr.Nitish Bandary, Advocate

Per: K. ANANTHA PADMANABHA SWAMY, MEMBER JUDICIAL

ORDER

1. The present petition is filed by 'NCC Limited' (hereinafter referred to as 'Financial Creditor') under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against M/s. Himagiri Enterprises Private Limited(hereinafter referred to as 'Corporate Debtor').

2. Brief facts of the present Petition are as under:

3. The learned counsel appearing for Petitioner/Financial Creditor stated that the Corporate Debtor had approached the Financial Creditor with a request to provide Inter Corporate Loan of Rs.24.85 crores (Rupees Twenty Four Crores and Eighty Five Lakhs only) at a normal interest of 12.5% per annum and an additional penal interest of 5% per annum in case of any default. Mr. KS Raju, Promoter Director of the Corporate Debtor undertook to stand as a Guarantor for the said loan transaction.

4. It is submitted that, the Financial Creditor, Corporate Debtor and the Guarantor after due discussion have entered into a Loan Agreement cum Deed of Guarantee dated 15.09.2010 ('Loan Agreement') for recording the understanding reached between them.

5. It is submitted that, the Loan Agreement provided for repayment of the loan in one lump sum as mutually agreed on or before 31.12.2010. It was further agreed that the loan amount shall carry interest at 12.5% per annum and shall be repayable on or before 31.12.2010, and an additional penal interest of 5% per annum in case of default or delay in payment of the principal or of the interest or any part thereof.

6. It is submitted that, a Demand Promissory Note dated 15.09.2010 was executed by the Corporate Debtor and the Guarantor in favour of the Financial Creditor, wherein Corporate Debtor and the Guarantor jointly and severally, unconditionally promised to pay Rs.24.85 crore, together with interest @ 12.5%, being the loan amount availed by HEPL from NCC.

7. It is submitted that, after a lot of follow up, HEPL remitted to NCC, a sum of Rs.7.25 crores on 22.07.2011 towards part payment of the outstanding amount. It is submitted that the Corporate Debtor and the Guarantor had on 15.10.2011 executed a Supplementary Agreement to the Loan Agreement ('Supplementary Agreement –I), undertaking to pay the Financial Creditor quantified outstanding amount of Rs.19,38,55,031-00 (which includes principal amount, interest on loan and penal interest) in two tranches on or before 30.11.2011. Further, in terms of the Supplementary Agreement – I, the Corporate Debtor and the Guarantor had executed a Demand Promissory Note dated 15.10.2011 in favour of the Financial Creditor.

8. Thereafter, on request of Corporate Debtor, the Financial Creditor rescheduled the payment dates for the amounts due and payable as under:-

Particulars	Execution of Supplementary Agreement	Amount due and payable	Outstanding amount to be paid on or before
Supplementary Agreement - II	30.11.2011	Rs.20,84,50,633-00	20.03.2012
Supplementary Agreement –III	31.03.2012	Rs.22,03,17,778.00	31.12.2012
Supplementary Agreement -IV	31.12.2012	Rs.24,27,93,465.00	29.06.2013
Supplementary Agreement – V	29.06.2013	Rs.26,46,84,897.00	31.12.2013

Supplementary Agreement –VI	31.12.2013	Rs.28,81,52,784.00	30.06.2014
Supplementary Agreement -VII	30.06.2014	Rs.31,45,26,270.00	31.12.2014
Supplementary Agreement –VIII	31.12.2014	Rs.32,34,86,244.00	28.02.2015

9. It is submitted that the Corporate Debtor and the Guarantor had approached the Financial Creditor on 28.02.2015 on the issue of settlement of the said inter corporate loan and the Corporate Debtor and the Guarantor had requested final rescheduling of the inter corporate loan upto 30.06.2015, assuring and undertaking to pay the outstanding principal amount as well as the accrued interest therein without fail by that date. It is submitted that Corporate Debtor and the Guarantor executed Supplementary Agreement to Loan Agreement (Supplementary Agreement –IX) together with Demand Promissory Note for repayment of the Loan amount in full.

10. It is submitted that pursuant to the final reschedulement dated 28.02.2015, the Corporate Debtor confirmed the outstanding loan amount of Rs.32,34,86,244/- and had undertaken to pay the said outstanding amount together with interest at 17.25% monthly compound interest (including penal interest on default @5% per annum) updated and quantified at Rs.34,28,27,043/- in one lump sum by 30.06.2015.

11. It is submitted that pursuant to the final reshcedulement dated 28.02.2015, the Corporate Debtor issued two cheques totalling Rs.34,28,27,043/-.

12. It is submitted that the Financial Creditor presented the two aforesaid cheques dated 30.06.2015 for clearance before Syndicate Bank, Banjara Hills Branch. It is submitted that two cheques have been returned by Corporation Bank, with an endorsement of "Insufficient Funds".

13. It is submitted that the Financial Creditor issued a notice dated 24.09.2015 to the Corporate Debtor under Section 138 of the Negotiable Instruments Act, 1881 against the return of the aforementioned cheques. It is submitted that the Corporate Debtor vide reply dated 13.10.2015 categorically admitted to the loan liability of Rs.32,34,86,244/- while denying the reason for the issuing the cheques.

14. It is submitted that the Financial Creditor filed a criminal complaint for offence under Section 138 of Negotiable Instrument Act and the same is pending.

15. It is submitted that the Financial Creditor, the Guarantor and the Corporate Debtor have entered into an agreement on 11.07.2016, wherein the Corporate Debtor along with the Guarantor categorically stated that they would be repaying the amounts to the Financial Creditor within three months. The Corporate Debtor has failed to repay the amount owed to the Financial creditor within three months as promised in the agreement dated 11.07.2016.

16. It is submitted that the Corporate Debtor has also stated in their annual report for the financial year 2016-17 ('Annual Report') that an amount of Rs.23,26,43,209/-. Is due and payable to Financial Creditor, plus interest of Rs.7,81,69,463/- for the financial year 2016-17 and Rs.6,67,30,892/- for the year 2015-2016.

17. It is further submitted that the Financial Creditor on 22.06.2018 issued a notice to the Corporate Debtor invoking Arbitration for recovery of admitted debt under clause 17 of the Loan Agreement and appointed Hon'ble (Retd.) District and Sessions Judge, Mr.R.L.Shankar as the arbitrator. It is submitted that Hon'ble R.L.Shankar issued notices to the Financial Creditor, Corporate Debtor and the Guarantor to appear before

him on 04.08.2018 to commence arbitration proceedings under the Loan Agreement.

18. It is submitted that the Corporate Debtor after receiving the letter from Hon'ble R.L.Shankar belatedly vide letter dated 20.07.2018 proposed the name of Sri M.Chalapathi Rao, Retd. District Judge to act as the Arbitrator instead of Hon'ble R.L.Shankar. It is submitted that the Financial Creditor vide letter dated 28.09.2018 informed the Corporate Debtor that Hon'ble R.L.Shankar withdrew the reference and terminated all further proceedings relating to his notice dated 18.09.2018. The Financial Creditor agreed to the appointment of Hon'ble M.Chalapathi Rao as proposed by the Corporate Debtor.

19. It is submitted that Hon'ble M.Chalapathi Rao vide letter dated 03.10.2018 issued notice to the Financial Creditor, Corporate Debtor and the Guarantor and appointed 20.10.2018 as the date for the purpose of commencing the arbitration proceedings. The arbitration for recovery of admitted debt is pending.

20. In support of his contention, the learned counsel for the Petitioner relied on the following documents:-

- Inter Corporate Loan agreement cum Deed of Guarantee dated 15.09.2010.
- Demand Promissory Note dated 15.09.2010, 15.10.2011, 30.11.2011, 31.03.2012, 31.12.2012, 29.06.2013, 31.12.2013, 30.06.2014, 31.12.2014 & 28.02.2015.
- Supplementary Agreement – I dated 15.10.2011.
- Supplementary Agreement – II dated 30.11.2011.
- Supplementary Agreement – III dated 31.03.2012.

- Supplementary Agreement – IV dated 31.12.2012.
- Supplementary Agreement – V dated 29.06.2013.
- Supplementary Agreement – VI dated 31.12.2013.
- Supplementary Agreement – VII dated 30.06.2014.
- Supplementary Agreement – VIII dated 31.12.2014.
- Supplementary Agreement – IX dated 28.02.2015.
- Letter dated 28.06.2013
- Letter dated 23.12.2013
- Cheques dated 30.06.2015
- Cheque Return Memos dated 27.08.2015
- Criminal Complaint No.79 of 2016
- Agreement dated 11.07.2016 between the Financial Creditor, Corporate Debtor and the Guarantor.
- Annual Report of the Corporate Debtor for the Financial Years 2016-2017
- Notice dated 22.06.2018
- Notice dated 18.07.2018
- Letter dated 20.07.2018
- Letter dated 28.09.2018
- Letter dated 03.10.2018
- Advance Receipt dated 16.09.2010

21. Counsel for the Respondent filed counter. It is submitted that the Company Petition is premature and not maintainable on the following grounds:-

a. That the claim is sub-judice before Ld. Arbitral Tribunal and hence company petition is not-maintainable.

b. That the Financial Creditor has not filed record of default along with company petition from the information utility as contemplated under Section 7(3)(b) of the Insolvency and Bankruptcy Code, 2016.

c. That the Interim Resolution Professional did not file disclosure in terms of regulation 3(2) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate persons) Regulations, 2016.

d. That Financial creditor has not filed Claim statement filed by them in ARB No.12 of 2018, to conceal the material facts.

e. That the present petition is filed against the Corporate Debtor misusing the provisions of the Code.

22. It is further submitted by the Respondents/Corporate Debtor that the Financial Creditor wanted to make an equity investment in a project which was to be executed jointly by the Corporate Debtor and the Financial Creditor, and Financial Creditor wanted to become the Co-Promoter of the said project. Therefore the Financial Creditor in view of certain statutory compulsions, provided an Inter Corporate Loan on 15th September, 2010 and got executed the Inter Corporate Loan Agreement Cum Deed of Guarantee under the premise that after complying with the statutory requirements, the Financial Creditor would become a Co-Promoter of the Project as envisaged. In fact money worth Rs.24.85

Crores was paid by the Financial Creditor towards the investment in the project which was being executed by the Corporate Debtor.

23. It is submitted that as the Financial Creditor was unable to obtain approvals to meet the statutory and accounting compliances to become the Co-Promoter of the project, hence they started pressurizing the Corporate Debtor to issue cheques under the promise that the said cheques will not be presented for payment. It is further submitted that the Financial Creditor without intimating the Corporate Debtor and by mis-representing had presented the cheques which were returned by the Bank. In fact the Financial Creditor was fully aware that the said cheques would be returned as the Project was still under implementation and Financial Creditor themselves had not obtained approvals for making the investment and joining as Co-Promoter and the same were brought to the notice of the Financial Creditor in letter dated 13.10.2015 issued by the Corporate Debtor.

24. It is submitted that all these factors have contributed to the Project getting inordinately delayed and such delay pushing up the Project cost and Finance Cost. Therefore the present Petition is devoid of merits and is contrary to the provisions of the I&B Code, 2016 and hence, not maintainable.

25. It is submitted that Financial Creditor based on the cheques given by Corporate Debtor, filed a criminal complaint CC No.79 of 2016 before the Hon'ble IV ACMM at Nampally, Hyderabad and the same is pending till date. Thereafter an agreement dated 11.07.2016 was entered between the Financial Creditor, Corporate Debtor and the Guarantor for keeping in abeyance the criminal complaint for three months, which was filed before said court by the Financial Creditor. It is further submitted that as specified in the Company Petition in Page No.15 and 16, the Financial Creditor had invoked arbitration as per clause 17 of the Loan Agreement

Cum Deed of Guarantee dated 15.09.2010 for recovery of the same amount as claimed in the present company petition and both the parties after several communications had agreed upon Hon'ble Shri M.Chalapathi Rao as Sole Arbitrator and Hon'ble Shri M.Chalapathi Rao vide letter dated 03.10.2018 had issued notices to Financial Creditor, Corporate Debtor and the Guarantor to appear before him on 20.10.2018 at 10.30 a.m. and subsequently this present Company Petition was filed before this Adjudicating Authority on 20.12.2018 for the same cause which is sub-judice before Arbitral Tribunal. Therefore the subject matter of this Company Petition is already sub-judice before another forum and any act of filing other petition pending Arbitration would amount to Forum shopping and the same is impermissible under law.

26. It is submitted that any outcome or final order by Ld. Arbitral Tribunal would have bearing on the present company petition and if the Ld. Arbitral Tribunal gives award in favour of the Corporate Debtor and CIRP is initiated by this Adjudicating Authority the same would cause irreparable loss to the Corporate Debtor. Therefore the present company petition be dismissed in the interest of Justice. It is also stated that this Adjudicating Authority in "AmritJal Ventures Pvt Ltd vs SREI Infrastructure Finance Limited" (CP(IB)No.21/7/HDB/2018, order dated 24.10.2018 in view of the similar facts of the case has dismissed the Company Petition.

27. It is submitted that the Financial Creditor chose Arbitration forum for adjudication of dispute. The claim filed by Financial Creditor is based on same agreements, based on which the present Company Petition is filed.

28. It is submitted that the Financial Creditor did not file the claim statement filed before Arbitration Tribunal along with Company Petition. Non-filing of the claim statement by Financial Creditor to conceal the material facts to cause loss to Corporate Debtor and wrongful gain and undue advantage

to the Financial Creditor amounts to fraud and as such the Company Petition is liable to be dismissed.

29. Reiterating above, the counsel for the Respondent prayed to dismiss the Application.

30. Counsel for the Financial Creditor filed rejoinder and written submissions reiterating the averments made in the Petition denying the allegations made in the counter and further prayed to allow the Application.

31. Heard both the sides and perused the records.

32. It is the case of the Financial Creditor that the Inter-Corporate Loan was given to the Corporate Debtor in terms of the Loan and Guarantee Agreement dated 15.09.2010, which was to be repaid along with interest of 12.5% and penal interest of 5% in case of delay in payments. The said Loan Agreement was amended by nine Supplementary Agreements, essentially restating the updated debt as on the dates of these Supplementary Agreements. The last such Agreement was signed on 28.02.2015 wherein the Corporate Debtor and the Guarantor undertook to pay the finally rescheduled amount of Rs.34.28 crores in one lump sum by 30.06.2015. Pursuant to the final rescheduling agreement, the Corporate Debtor issued two cheques for payment of the aforesaid amount of Rs.34.28 crores; but both the cheques got dishonoured, leading to filing of criminal complaint by the Financial Creditor U/s.138 of Negotiable Instruments Act 1881, which is still pending adjudication. Later on, the Financial Creditor initiated Arbitral Proceedings in terms of Clause 17 of the Loan Agreement, which is also not finalised as yet. However, meanwhile, the instant Petition U/s.7 of IB Code 2016has been filed.

33. The Corporate Debtor on the other hand has contended that the impugned Loan was in fact an advance for purchase of shares in a

prospective project of the Corporate Debtor, therefore it cannot be treated as 'financial debt' in terms of Sec.5(8) of the Code. Further, the Corporate Debtor has contended that the Financial Creditor has been indulging in Forum shopping which is clear from the fact that they have initiated parallel proceedings under Negotiable Instrument Act, Arbitration Proceedings under the Loan Agreement as well as the instant proceedings under IB Code, 2016.

34. From the pleadings and documents filed, though the Financial Creditor has been able to prove the existence of the debt and default on the part of the Corporate Debtor, the Corporate Debtor has not been able to prove its contention that the impugned amount was given by the Financial Creditor as an advance for investment in shares. In fact, the proceedings under Negotiable Instrument Act only indicate towards the fact that there was a debt, which was due and payable by the Corporate Debtor in terms of the final rescheduling agreement as well as the Demand Promissory Note dated 28.02.2015, but the cheques got dishonoured and default was thus committed. As regards the issue of limitation, the Corporate Debtor has not disputed the fact that the impugned debt has been acknowledged by them in their audited Financial Statements for the Financial Year ending 31.03.2017. Therefore, the instant Petition U/s.7 of the IB Code was filed within limitation period.

35. There is another contention of the Corporate Debtor that since Arbitral Tribunal is seized with the Arbitration matter pertaining to the same debt, the CIRP Process cannot be initiated as a parallel proceeding. This issue was considered and decided by Hon'ble NCLT, Principal Bench, New Delhi in Reliance Commercial Finance **vs** Ved Cellulose in C.P.No.(IB)-156(PB) of 2017 wherein it has been held that CIRP may be initiated even if arbitration is going on in respect the subject debt.

36. The Corporate Debtor have placed reliance on the case of Amrit Jal Ventures Pvt Ltd **vs** SREI Infrastructures Finance Limited in CP(IB)No.21/7/HDB/2018, dated 24.10.2018 to argue that since the impugned amount was intended to be an advance for shares in the prospective project of the Corporate Debtor, the Petitioner cannot be treated as Financial Creditor and the Petition be dismissed. However, the facts of the aforecited case are entirely different. In the aforecited case, the Financial Creditor had invoked pledge of shares by virtue of which they were held to have become Shareholders of the Corporate Debtor. The value of pledged shares was also found to be much higher than the amount of unpaid debt. In such situation, the Adjudicating Authority held that the debt has been extinguished. Therefore, the reliance of Corporate Debtor on Amrit Jal Ventures Pvt Ltd supra is misplaced.

37. Further, the Petitioner has proved its case by placing documentary evidences which establish that the default has occurred for which the present Corporate Debtor was liable to pay. In these circumstances, this Adjudicating Authority is satisfied with the submissions put forth by the Petitioner/Financial Creditor. 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 the written consent in Form-2. In view of the above, we are inclined to admit this petition.

38. 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 timelines stipulated in section 12 of the IB Code, 2016, reckoning from the day this order is passed.

39. This Adjudicating Authority hereby appoint Mr.Ram Murthy Kommera, as IRP as the name proposed by the Financial Creditor and his name is 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 this order, and call for submissions of claim in the manner as prescribed.

40. 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.

41. However, the supply of essential goods or services to the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. Further, the provisions of Sub-section (1) of Section

14 shall not apply to such transactions, as notified by the Central Government.

42. 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 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.

43. The Petitioner/FC 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.

44. The Registry is also directed to communicate this Order to the Financial Creditor and the Corporate Debtor.

45. The address details of the IRP are as follows:-

    Reg. No. IBBI/IPA-002/IP-N00595/2017-2018/11776

    Mr.Ram Murthy Kommera
    #Plot No.143, H.No – 8-19,
    Metro City, Mega Township,
    Bonguloor, Ibrahimpatnam Mandal,
    R.R.District, Hyderabad – 501510,
    E-mail – rammurthyadvocate@yahoo.com

46. The present Petition is hereby admitted.

23.09.19

Dr. BINOD KUMAR SINHA
MEMBER (TECHNICAL)

K.ANANTHA PADMANABAHA SWAMY
MEMBER (JUDICIAL)

Alekhya