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**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO:II**

SPECIAL BENCH(Video Conference)

**CORAM: HON'BLE MADAN BHALCHANDRA GOSAVI – MEMBER JUDICIAL
HON'BLE DR.BINOD KUMAR SINHA-MEMBER TECHNICAL**

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HELD ON 27.08.2021 AT 12:30 PM THROUGH VIDEO CONFERENCE

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	CP(IB) No.524/9/HDB/2019
NAME OF THE COMPANY	Nagarjuna Fertilizers & Chemicals Ltd
NAME OF THE PETITIONER(S)	Keytrade AG
NAME OF THE RESPONDENT(S)	Nagarjuna Fertilizers & Chemicals Ltd
UNDER SECTION	9 of IBC

Counsel for Petitioner(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

Counsel for Respondent(s):

Name of the Counsel(s)	Designation	E-mail & Telephone No.	Signature

ORDER

Orders passed in CP(IB)No.524/9/HDB/2019 vide separate orders.

CP is admitted.


MEMBER (T)


MEMBER(J)

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IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD

CP (IB) No.524/9/ HDB/ 2019

Under section 9 of IBC, 2016
R/w Rule 6 of I&B (AAA) Rules, 2016

In the matter of

Keytrade AG

Regd. Office Zucherstrasse, 68
CH- 8800 Thalwill
Switzerland

Represented by its signatory
Mr. Venkiteswaran Sivaraman

.. **Petitioner/
Operational Creditor**

Versus

Nagarjuna Fertilizers & Chemicals Limited

Having Regd Office at
D. No.8-2-248, Nagarjuna Hills
Punjagutta, Hyderabad – 500082.
Telangana, India.

Represented by Chairman & Managing Director

.. **Respondent
Corporate Debtor**

Date of order: 27th August 2021

Coram:

**Hon'ble Shri Madan Bhalchandra Gosavi,
Member (Judicial)**

and

**Hon'ble Dr. Binod Kumar Sinha,
Member (Technical)**

Parties / counsels present:

For the Petitioner: Shri Vivek Reddy, Senior Counsel assisted by
Shri K. Manoj Reddy.

For the Respondent: Shri Nitish Bandary, counsel

Per Bench

Heard on: 15.04.2021, 14.07.2021, 04.08.2021 and 05.08.2021.

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ORDER

This petition is filed by M/s Keytrade AG/ Operational Creditor claiming that an amount of USD 2,463,435.11 (INR 17,07,16,053.123) along with interest is due and payable by the Corporate Debtor to the Operational Creditor. Hence this petition is filed under section 9 of Insolvency and Bankruptcy Code, 2016, read with Rule 6 of Insolvency & Bankruptcy (Application to the Adjudicating Authority) Rules, 2016 seeking admission of the petition, initiation of Corporate Insolvency Resolution Process, granting moratorium and appointment of Interim Resolution Professional as prescribed under the Code and Rules thereon.

2. The facts leading to the present petition are as under:

30.04.2013 Contract bearing No.KTS 201310338 (Annexure-3/ page 23) between seller/ Keytrade AG, Switzerland/ petitioner and buyer/ Nagarjuna Fertilizers and Chemicals Ltd., was entered into. Said contract was later split into two contracts, viz. No.KTS 201310338.1 and No. 201310338.2, whereby Keytrade agreed to sell and Nagarjuna agreed to purchase 50,000 MT of di-ammonium phosphate ('DAP' for brevity) with a shipping tolerance of plus/ minus 10% in Keytrade's option.

Disputes arose between the parties and each party has nominated one arbitrator. In turn, both the arbitrators have nominated a third arbitrator and Chairman of the Arbitral Tribunal. London Court of International Arbitration (LCIA) had subsequently constituted Arbitral Tribunal.

05.04.2016 Final Arbitration Award is passed by the London Court of International Arbitration (LCIA) in LCIA Arbitration No.142698. (ANNEXURE-4).

18.01.2017 Final Arbitration Award as to Costs in LCIA Arbitration No.142698 is passed by the LCIA.

- 2017 Operational Creditor has filed Execution Petition No.3 of 2017 under section 47 read with section 49 of the Arbitration & Conciliation Act, 1996 for enforcement and execution of the award dated 05.04.2016 passed by the Arbitral Tribunal, London before the Hon'ble High Court of Judicature at Hyderabad.
- 27.11.2018 The Hon'ble High Court at Hyderabad vide order dated 27.11.2018 (ANNEXURE-5) directed enforcement and execution of the award dated 05.04.2016 passed by the Arbitral Tribunal, London and further directed attachment of building D. No.8-2-248, Nagarjuna Hills Punjagutta, Hyderabad and shares of Jai Prakash Engineering and Steel Limited (JESCO) owned by the Corporate Debtor.
- 2018 Corporate Debtor carried the matter before the Hon'ble Supreme Court.
- 03.01.2019 Hon'ble Supreme Court dismissed the SLP filed by the Corporate Debtor against the judgment of the Hon'ble High Court, vide order at ANNEXURE-6.
- 27.06.2019 Since the Corporate Debtor has failed to make payment of the amounts under the award dated 05.04.2016 passed by the Arbitral Tribunal, London despite the same being upheld by the Hon'ble High Court and the Hon'ble Supreme Court, the Operational Creditor issued Demand Notice in Form-3 (ANNEXURE-7).
- 05.07.2019 Respondent/ Corporate Debtor has filed reply (ANNEXURE-8) and contended that as the Hon'ble High Court has passed orders 29.11.2018, 03.03.2019, 15.04.2019 and 23.04.2019 for attachment of properties, shares and Bank accounts of the company, and Execution Petition No.3 of 2017 was pending, issuance of Demand Notice under section 8 of the I&B Code is impermissible and untenable.

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3. The respondent/ Corporate Debtor has filed counter dated 22.10.2019, and the petitioner/ Operational Creditor has filed rejoinder dated 14.11.2019. Primarily, it is contended by the Operational Creditor, in para 4 of the rejoinder, that though the award dated 05.04.2016 passed by the Arbitral Tribunal, London was required to be challenged by the Corporate Debtor within 28 days from the date of the award, the Corporate Debtor chose not to do so. Thus, the award attained finality. The contentions of the parties are discussed briefly as under.

Contentions raised by the Corporate Debtor in Counter dated 22.10.2019.	Answer given by the Operational Creditor in Rejoinder dated 14.11.2019.
The Operational Creditor did not file record of default from the Information Utility as required under section 9(3)(d) of the I&B Code. [para 4(a)].	The application fully meets necessary condition precedent required by law and therefore, the submissions made by the Corporate Debtor ought to be rejected. The Operational Creditor relied on two judgment of the Hon'ble Supreme Court, namely (i) Mobilox Innovations (P) Ltd Vs. Kirusa Software (P) Ltd., (2018) 1 SCC 353 (para 34); and (ii) Macquarie Bank Ltd Vs. Shilpi Cable Technologies Ltd. (2018) 2 SCC 674 (paras 13, 14, 15 and 16).
Execution Petition EX EP 3/ 2017 is pending before the Hon'ble High Court of Telangana. [para 4(b)].	Order passed by the Hon'ble High Court has been upheld by the Hon'ble Supreme Court.
The Operational Creditor did not file Financial Statements and Balance Sheets along with the petition. [para 4(c)].	Filing Financial Statement and Balance Sheet is not mandatory. The Operational Creditor relied on judgment of the Hon'ble Supreme Court in the matter of Macquarie Bank Ltd (supra). Quoting para 17 of the said judgment it is submitted that "such accounts are

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	not a precondition to trigger the Code”.
The Operational Creditor had availed remedies under Arbitration Act and CPC and obtained orders securing the debt amount. Initiating CIR process amounts to forum shopping. (para 8)	Award dated 05.04.2016 passed by the Arbitral Tribunal, London has been upheld by the Hon’ble High Court and the Hon’ble Supreme Court. Since the Corporate Debtor is not able to make payment of the amount under the award, the Operational Creditor was required to initiate CIRP against the Corporate Debtor. This does not amount to forum shopping.
There was pre-existing dispute between the parties. The Operational Creditor did not file orders passed by the Hon’ble High Court dated 27.11.2018, 27.03.2019, 15.04.2019 and 23.04.2019. (para 9)	The Operational Creditor denies existence of dispute prior to issuance of Demand Notice dated 26.06.2019 or even thereafter.

4. We have heard the arguments advanced by the learned counsel for both the sides, perused the documents on record and the authorities cited before us.

5. It is observed that award dated 30.04.2013 passed by the Arbitral Tribunal constituted under the London Court of International Arbitration (LCIA) Rules is on sound footing and is in consonance with section 34 of the Arbitration and Conciliation Act, 1996. Besides, award dated 05.04.2016 passed by the Arbitral Tribunal, London was required to be challenged by the Corporate Debtor within 28 days from the date of the award. The Corporate Debtor, having not done so, has allowed the award to attain finality.

6. The award could not be interfered with either by the Hon’ble High Court of Judicature at Hyderabad in Execution Petition or by the Hon’ble Supreme Court. The respondent/ Corporate Debtor in para 6 of its

Counter dated 22.04.2019 (page 23 of rejoinder dated 14.11.2019) filed before the Hon'ble High Court of Judicature at Hyderabad in Interlocutory Application in IA No.2 of 2019 in Execution Petition No.3 of 2017, has admitted its liability saying that,

" Suffice it to say that this respondent company is short of funds for compliance of decretal amount. I state that this respondent has already clarified to the consortium of banks where a debt restructuring plan is under consideration that there is a liability on this respondent which relates to the present decretal amount."

Said admission of the respondent/ Corporate Debtor amounts to admission of debt and default. The Corporate Debtor has never controverted the existence of 'debt' and 'default' as claimed by the petitioner/ Operational Creditor.

7. The Corporate Debtor has raised in their Counter/ Affidavit-in-Reply the following grounds for rejection of the instant application:

- (a) That the Operational Creditor has not complied with the provisions of section 9(3)(d) of the Insolvency and Bankruptcy Code, 2016 and that it has not filed Financial Statement and Balance Sheet along with the petition;
- (b) That the Operational Creditor has already secured its debt by virtue of the Arbitration Award and therefore, the instant application is nothing but an example of forum shopping; and
- (c) That there was a pre-existing dispute between the Operational Creditor and the Corporate Debtor in the form of execution proceedings before the Hon'ble High Court of Judicature at Hyderabad, which was not disclosed in the petition by the Operational Creditor on the date of filing of the instant application.

8. We have considered these grounds and our observations are as under:

- (i) As regards (a) above it is to be noted that it has been held by the Hon'ble Supreme Court vide Civil Appeal No.15135 OF 2017 in the case of Macquarie Bank Ltd Vs. Shilpi Cable Technologies Ltd, that it is not mandatory to comply with the provisions of section 9(3)(d) of the I&B Code, if there are other proofs attached

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with the petition to indicate that there is operational debt owed by the Corporate Debtor which has remained unpaid. In the same judgment the Hon'ble Supreme Court have also held that submission of Financial Statement and Balance Sheets along with the application under section 9 of the I&B Code is not a mandatory pre-condition to trigger the provisions of the I&B Code. Therefore, these are not good grounds for rejecting the instant application.

- (ii) As regards the allegation of forum shopping, the Operational Creditor has explained that the Arbitration Award had already attained finality pursuant to the judgment dated 27.11.2018 of the Hon'ble High Court of Judicature at Hyderabad, which was upheld by the Hon'ble Supreme Court by its order dated 03.01.2019, thereby rejecting all the objections raised by the Corporate Debtor to the Final Arbitration Award. However, the Corporate Debtor has still expressed its inability to make payment with respect to the award through an affidavit filed in the execution proceedings before the Hon'ble High Court of Judicature at Hyderabad. Therefore, the Operational Creditor had no option but to exercise its rights as an Operational Creditor under the I&B Code. The explanation seems reasonable and acceptable to us.
- (iii) As regards challenge to the instant application based on 'pre-existing dispute' as raised by the Corporate Debtor, it is observed that the dispute leading to institution of Arbitration proceedings had come to an end on 05.04.2016 with passing of Final Award by the LCIA. Further, the objections raised by the Corporate Debtor during the execution proceedings were considered and dismissed by the Hon'ble High Court of Judicature at Hyderabad by order dated 27.11.2018 and the said order of the Hon'ble High Court of Judicature at Hyderabad was affirmed by the Hon'ble Supreme Court in the SLP proceedings by its order dated 03.01.2019. Therefore, all the disputes regarding 'debt' in the form of Arbitration Award got determined by order dated 03.01.2019, with passing of order by the Hon'ble Supreme Court. In our view, the execution proceedings are nothing but a testimony to the continuing default committed by the Corporate Debtor in repayment of the

amount determined by the Final Award. Even during these proceedings, they have expressed their inability to repay the debt as determined by the Final Award and affirmed by the Hon'ble High Court of Judicature at Hyderabad and by the Hon'ble Supreme Court. The execution proceedings filed by the Operational Creditor for recovery cannot be deemed as a pre-existing dispute raised by the Corporate Debtor.

9. We are, therefore, of the opinion that the Operational Creditor has fulfilled the criteria laid down by the Hon'ble Supreme Court in the case of Macquarie Bank Limited (supra), wherein three elements are envisaged to trigger the Code, namely:

- “(i) occurrence of a default;
- (ii) delivery of a demand notice of an unpaid operational debt or invoice demanding payment of the amount involved; and
- (iii) the fact that the operational creditor has not received payment from the corporate debtor within a period of 10 days of receipt of the demand notice or copy of invoice demanding payment, or received a reply from the corporate debtor which does not indicate the existence of a pre-existing dispute or repayment of the unpaid operational debt.”

10. It is to be noted in the present case there are concurrent findings of fact by the LCIA, Hon'ble High Court of Judicature at Hyderabad and the Hon'ble Supreme Court. In view of the above the present petition is required to be entertained.

11. Hence, the Adjudicating Authority admits this Petition under Section 9 of IBC, 2016, declaring moratorium for the purposes referred to in Section 14 of the Code, with following directions: -

- (a) Corporate Debtor, M/s Nagarjuna Fertilizers and Chemicals Limited is admitted in Corporate Insolvency Resolution Process under the provisions of the Insolvency & Bankruptcy Code, 2016,
- (b) The Bench hereby prohibits 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; transferring , encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein; any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002); the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate Debtor;
- (c) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.
- (d) 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.
- (e) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (f) That the order of moratorium shall have effect from the date of this order till the completion of the Corporate Insolvency Resolution Process or until this Bench approves the Resolution Plan under Sub-Section (1) of Section 31 or passes an order for liquidation of Corporate Debtor under Section 33, whichever is earlier.
- (g) That the public announcement of the initiation of Corporate Insolvency Resolution Process shall be made immediately as





prescribed under section 13 of Insolvency and Bankruptcy Code, 2016.

- (h) The Operational Creditor failed to name any one as IRP and has requested the Tribunal to appoint one for the CIRP. The IBBI has recommended a panel of IRPs for appointment as IRP for the period July 1, 2021 to December 31, 2021 in compliance with section 16(4) of the Code in order to avoid delay. Accordingly, this Tribunal appoints Mr. Cherukuri Venkata Ratnababu, bearing Reg. No. IBBI/IPA-002/IP-N00529/2017-2018/11633, #8-3-224/1/B, 5th Floor, 502, Vishnu Classic, Madhura Nagar, Yousufguda, Hyderabad, West Marredpally, Telangana, 500038, email cv.ratnababu@gmail.com as IRP. He is directed to file his written consent along with Authorization for Assignment within three days from date of Order.

The petitioner is directed to pay a sum of Rs.1,00,000/- (Rupees one lakh only) to the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. This shall, however, be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the petitioner.

12. Accordingly, this Petition is admitted.

13. Registry to send a copy of this order to the Registrar of Companies Hyderabad for appropriately changing the status of Corporate Debtor herein on the MCA-21 site of Ministry of Corporate Affairs.

BINOD KUMAR SINHA
MEMBER (TECHNICAL)

MADAN BHALCHANDRA GOSAVI
MEMBER (JUDICIAL)

Karim