

IN THE NATIONAL COMPANY LAW TRIBUNAL
COURT NO. 5, MUMBAI BENCH

CP No. 1236/IBC/NCLT/MB/MAH/2020

Under Section 7 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

In the matter of

Shapoorji Pallonji Finance Private Limited

SP centre, Courtyard 10B, 41/44 Minoo Desai Road, Colaba, Mumbai – 400 005.

... Petitioner

v/s

Rajesh Construction Company Private Limited

139, Seksaria Chambers, 2nd Floor, Nagindas Master Road, Fort, Mumbai – 400 023.

... Corporate Debtor

Order Pronounced on: 13.05.2021

Coram:

Hon'ble Smt. Suchitra Kanuparthi, Member (J)

Hon'ble Shri. Chandra Bhan Singh, Member (T)

For the Petitioner: Adv. Jehaan Mehta, Adv. Kunal Kanungo, Adv. Tanushree Sogani, Adv. Atishay Jain

For the Respondent: Adv. Viraj Gami

Per: Suchitra Kanuparthi, Member (J)

ORDER

1. The Petitioners/Financial Creditor viz. 'Shapoorji Pallonji Finance Private Limited' (hereinafter as Petitioner) has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter as Rules) in the capacity of "Financial Creditor" by invoking the provisions of Section 7 of the Insolvency and Bankruptcy

Code (hereinafter as Code) against 'Rajesh Construction Company Private Limited' (hereinafter as 'Corporate Debtor').

Brief facts:

2. The Financial Creditor and the Corporate Debtor executed a Facility Agreement for an amount of Rs. 15 crores on 16.04.2019 wherein it was held that facility of short-term loan for general corporate purposes and real estate projects would be granted to the Corporate Debtor.
3. As per the facility agreement various securities were provided to the Corporate Debtor which includes-
 - i. Personal guarantees of two of the promoters of Corporate Debtor.
 - ii. A pledge on shares held by 5 promoters of Corporate Debtor aggregating to 76% of paid-up equity share capital of the Corporate Debtor free from all encumbrances.
 - iii. A Demand Promissory Note in respect of the entire principal amount of Rs. 15 crores issued by the Corporate Debtor in favour of Petitioner.
 - iv. An undertaking executed by the Corporate Debtor and its promoters for creation of a negative lien.
 - v. Post-dated Cheques from the Guarantors as well as from the Corporate Debtor.
4. The Corporate Debtor was also supposed to execute a mortgage in favour of the Petitioner in respect of all the rights, title and interest (including TDR rights), both present and future over the Corporate Debtor's properties in Dahisar, Mumbai, however, the same was not provided.
5. The Corporate Debtor requested a drawdown of the facility on 18.04.2019 and amount was accordingly disbursed by the Petitioner on the same day.
6. The Corporate Debtor along with its two guarantors confirmed by three separate letters all dated 23.04.2019 that they have availed a short-term loan facility from the Petitioner for the principal amount of Rs. 15 crores

and agreed to repay the same along with agreed rate of interest. The Corporate Debtor and the Guarantors provided 7 Post-dated Cheques each corresponding to the dates of monthly interest payments and cheque for repayment of entire principal amount.

7. From the very outset, the Corporate Debtor delayed monthly payment of interest due, the Petitioner was repeatedly following up with the Corporate Debtor for outstanding payments on account of interest, penal interest and fee amount.
8. M/s. Vasant J. Mehta and Company, Chartered accountants, issued a certificate dated 14.06.2019 to the Petitioner, certifying the fact that the short-term facility of Rs. 15 crores were availed on 18.04.2019 and the disbursed amount had been applied and utilised towards general corporate purpose by the Corporate Debtor in accordance with purpose stated in the facility agreement.
9. The Corporate Debtor continues to delay payments and actually they were obligated to provide quarterly valuation report for the pledged shares, create a mortgage in Dahisar Property. However, the same was not provided/ created despite several reminders from the Petitioner.
10. On 12.07.2019, the Petitioner issued notice to the Corporate Debtor calling upon to pay an amount of Rs. 17,01,38,819/- and to mandatory repay the entire outstanding on or before 17.07.2019. The Petitioner has received no reply from the Corporate Debtor. The failure to comply with the same constituted as an event of default under facility agreement. The maturity debt as mentioned in the Facility Agreement was 18.10.2019 which is 6 months from the date of disbursement, however, the Corporate Debtor failed to repay its financial debt both in terms of principal and interest.
11. The Corporate Debtor failed to pay the monies but raised various frivolous queries in respect of calculation of interest and for tax invoices in respect

of amounts vide email dated 01.11.2020, 06.11.2020, 07.11.2020, 08.11.2020, 11.11.2020, 12.11.2020, 13.11.2020, 14.11.2020 and vide emails exchanged between the Corporate Debtor and the Petitioner, however, there was no denial of financial debt which is due and payable.

12. The Petitioner was thus constrained to issue notice dated 22.01.2020 under the Facility Agreement to the Corporate Debtor, Guarantors and Pledgors in view of the event of default which has occurred due to non-payment of money and interest by the Corporate Debtor.

13. It is pertinent to note that all the cheques issued by the Corporate Debtor and Guarantors were returned by the banks for insufficient funds.

14. The Petitioner further issued notices dated 18.03.2020 to the Corporate Debtor, Guarantors and Pledgors/ Promoters to pay the amount of Rs. 18,35,45,616/-. The Corporate Debtor addressed an Email on 31.03.2020 and stated that they are unable to meet the obligations with respect to the facility on account of post majeure event (COVID-19) and proposed a one-time restructuring of obligation. The Petitioner vide email on 03.04.2020 replied to the Corporate Debtor stating *inter alia* that the principal amount of the facility was to be repaid on 18.10.2019, and therefore, there was a default of 5 and half months which could not be said as a result of economic fallout of COVID-19.

15. On 18.06.2020, the Corporate Debtor transferred an amount of Rs. 50 lakhs to the Petitioner by way of RTGS. However, the remaining amount outstanding were still remained to be payable by the Corporate Debtor.

16. The total amount in default as on 22.10.2020 is Rs. 26,30,11,626/-. The breakup of outstanding amount is as follows:

PARTICULARS OF FINANCIAL DEBT

<p>Total amount of Debt Granted</p> <p>Date(s) of Disbursement</p>	<p>The total amount of debt granted pursuant to the Facility Agreement dated 16th April, 2019 executed between the Applicant and the Corporate Debtor ("Facility Agreement") was a principal sum of Rs. 15,00,00,000/- (Rupees Fifteen Crore) along with the applicable interest rates as contained therein aggregating to Rs. <u>26,30,11,646/-</u> (Rupees Twenty Six Crores Thirty lakhs Eleven Thousand Six Hundred Forty Six Only) as on October, 22 2020.</p> <p>The principal amount was disbursed on <u>18th April 2019.</u></p>
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17. The Corporate Debtor executed following securities in favour of the Petitioner to secure debts:

- 1) A first and exclusive charge by Harish Raghavji Patel, Rajesh Raghavji Patel, Shilpa Rajesh Patel, Praveena Kantilal Patel, Anita Harish Patel and Pratik Harish Patel ("Pledgors") of 76% of the paid-up equity share capital of the Corporate Debtor (free from all restrictive covenants, lien, or other encumbrance) together with all accretions thereon. This is by way of a Deed of Pledge executed by the Petitioner, the Corporate Debtor, and the Pledgors on 16th April 2019 ("Pledge"). In this regard, the Pledgors also confirmed the Pledge and addressed individual Dividend Mandates dated 16th April 2019 to the Corporate Debtor (with a copy to the Petitioner) in favour of the Petitioner, and executed Power of Attorney on 16th April 2019 in favour of the Petitioner. The Pledgors also provided the originals of the pledged shares along with executed transfer deeds to the Petitioner under cover of their letter dated 18th April 2019.
- 2) A Demand Promissory Notice dated 18th April 2019 issued by the Corporate Debtor in favor of the Petitioner, where under the Corporate

Debtor irrevocably and unconditionally promised to pay Rs. 15 crores together with interest thereon ("DPN"). The DPN expressly stated inter alia that it was given as security for the repayment of the facility and was along with a Letter of Continuity of the same date which A copy of the Letter of Continuity dated 18th April 2019.

- 3) An Undertaking for creation of a Negative Lien executed by Harish Raghavji Patel, Rajesh Raghavji Patel, Praveena Kantilal Patel, Anita Harish Patel and Prateek Harish Patel and the Corporate Debtor in favor of the Financial Creditor ("Undertaking"). The Undertaking was executed on 18th April 2020 and under the same the obligors thereunder undertook not to create any charge on (i) the pledged shares and (ii) the right, title, and interest (including present and future TDR rights) in relation to the Corporate Debtor's Dahisar property viz. immovable property at Dahisar viz. Rehab Building No. R-1 on Slum Rehabilitation Scheme under Clause 3.11 read with Clause 3.5 and 3.19(ii) of Appendix IV of the DCR, 33(10) on land bearing CTS No. 358 corresponding Survey No. 4 and CTS No. 359 corresponding Survey No. 3, Hissa No. 1 of village Dahisar at Dahisar (West), Mumbai ("Dahisar Property").
- 4) Two individual Deeds of Guarantee dated 16th April 2019, being personal guarantees extended by Haresh Raghavji Patel and Rajesh Raghavji Patel, i.e., Guarantors to the Applicant where under all the obligations of the Corporate Debtor were secured.
- 5) A copy of the Certificate of Registration of Charge by the Registrar of Companies in Form No. CHG-1 recording that there is first and exclusive ranking pledge of the pledged shares under the Deed of Pledge dated 16th April 2019, and a Negative Lien over the properties and shares (being the Dahisar Property and the pledged shares) under the Undertaking for creating negative lien dated 16th April 2019. The certificate also records that Haresh Patel and Rajesh Patel, the Guarantors and promoters of the Corporate Debtor, had executed personal guarantees. A copy of the Certificate of Registration of Charge by the Registrar of Companies in Form No. CHG-1 obtained

from the website of the Ministry of Corporate Affairs is annexed as Exhibit AA.

18. List of documents annexed to the Petition to prove the existence of financial debt and amounts in default:

- 1) The Facility Agreement dated 16th April 2019 along with sanction letter dated 15.04.2019.
- 2) Deeds of Guarantee executed by Rajesh Raghavji Patel and Haresh Raghavji Patel dated 16th April 2019.
- 3) Deed of Pledge dated 16th April 2019.
- 4) Dividend Mandates issued by the Pledgors on 16th April 2019.
- 5) Powers of Attorney executed by the Pledgors in favour of the Applicant on 16th April 2019.
- 6) Letter dated 18th April 2019 addressed by the Corporate Debtor to the Applicant providing originals of the pledged shares along with executed transfer deeds.
- 7) Demand Promissory Notice dated 18th April 2019 issued by the corporate Debtor in favour of the Applicant, along with the Letter of Continuity.
- 8) Undertaking for creation of a Negative Lien dated 18th April 2020.
- 9) The Corporate Debtor's letter dated 18th April 2019 requested drawdown of the facility.
- 10) The bank statement of the Applicant showing the disbursement on 18th April 2019.
- 11) Letters dated 23rd April 2019 addressed by the Corporate Debtor, Rajesh Raghavji Patel and Harish Raghavji Patel.
- 12) Emails dated 20th May 2019, 23rd May 2019, 17th June 2019, 18th June 2019, 19th June 2019, 24th June 2019, 26th June 2019, 27th June 2019, 3rd July 2019, 8th July 2019, 10th July 2019, 15th July 2019, 18th July 2019, 23rd July 2019, 26th July 2019, 2nd August 2019, 5th August 2019, 9th August 2019, 19th August 2019, 23rd August 2019, 29th August 2019, 5th September 2019, 10th September 2019, 16th September 2019, 11th October 2019, 1st

- November 2019, 5th November 2019, 6th November 2019, 7th November 2019, 11th November 2019, 11th November 2019, 12th November 2019, 13th November 2019, 15th November 2019, 11th December 2019, 31st March 2020, 3rd April 2020 and 1st June 2020.
- 13) Certificate issued by M/s. Vasant J. Mehta and Co., Chartered Accountant, dated 14th June 2019.
 - 14) Emails dated 5th July 2019 and 12th July 2019 in respect of the Option, along with the Notice dated 12th July 2019 where under the Applicant exercised the Option under the Facility Agreement.
 - 15) Notice dated 22nd January 2020 issued by the Applicant along with its covering email dated 22nd January 2020.
 - 16) Cheque Return Memos in respect of the cheques issued by the Corporate Debtor and its Guarantors.
 - 17) Two notices addressed by the applicant to the Corporate Debtor on 18th March 2020 along with their covering emails.
 - 18) Certificate of Registration of Charge by registrar of Companies in Form No. CHG-1.
 - 19) A detailed tabular computation showing the calculations for the financial debt, the payments thereunder, the defaults thereunder, interest calculations thereon, along with the days of default.
 - 20) Information Utility Report.

Written submissions of Petitioner:

19. The Petitioner had sanctioned a financial debt of a short-term loan to the Corporate Debtor for general corporate purposes and for real estate project by way of Sanction Letter dated 15.04.2019 and thereafter executed a Facility Agreement dated 16.04.2019 wherein the total amount of debt granted is total amount of Rs. 15 crores was lent to the Corporate Debtor. The agreement specifically contained the maturity as six months from the broad on date and the agreement also entailed that monthly interest payments (on every 30 days) from the date of drawdown were to be made and the interest was payable @18% p.a., the default interest rate @2% over and above also applicable, an additional interest rate for failure of two perfect security @2% was also applicable.

20. The Corporate Debtor on 23.04.2019 confirmed that they have availed the facility for the principal amount of Rs. 15 crores and that they have agreed to repay the same along with interest.

21. The Corporate Debtor failed to pay the amounts of interest as per the schedule and hence, the Petitioner was constrained to issue a notice dated 22.01.2020 calling upon them to pay the outstanding dues as per the Facility Agreement. The Corporate Debtor addressed an email dated 31.03.2020 and mentioned as follows:

"You will understand that we are unable to meet with our obligations with respect to the facilities referred to the aforesaid sanction letter and other commercial understandings till the time as may be required to bring the situation under control or reasons of Force Majeure are cured".

22. The Petitioner replied to Corporate Debtor's mail on 03.04.2020 and pointed out that the facility was to be repaid on 19.10.2019 much prior to outbreak of COVID-19.

23. A copy of informational utility and Bankers Book was annexed to the Petition.

Written submissions of the Corporate Debtor:

24. The Corporate Debtor pointed out by a letter dated 10.02.2021 that the Corporate Debtor forwarded a without prejudice proposal to the dues, however, after lapse of 10 days, the Petitioner responded to the proposal on 24.02.2021.

25. The Corporate Debtor further addressed a revised proposal to the Petitioner which reads as under:

"There are approx. 51.72 Acres of Non-Agricultural Land at Karjat in the name of Harish Patel and Rajesh Patel at Survey No. 97, Hissa No. 1 to 6 as per 7/12 extract. The Ready Recknor Rate is

approx. Rs. 1.75 Cr. Per Acre. Thus, the approx. the market value of the said Land is about Rs. 90.51 crores. These Lands are free from any encumbrance and with clear marketable title. The said Land is contributed as a capital in a Partnership firm known as "synergy Developers" where the total Land is about 261.55 Acres and the combined share of Harish Patel and Rajesh Patel is 19.78%. the Undivided share of Harish Patel and Rajesh Patel in Partnership firm known as "synergy Developers" can be given as a security".

26. In terms of the aforesaid proposal, Corporate Debtor submitted that they are willing and ready to offer security to tune of Rs. 90 crores, whereas the purported debt claimed by the Petitioner is a meagre sum of Rs. 26,30,11,646/-. Evidently therefore, the security being offered by the Corporate Debtor is far in excess of the Petitioner's alleged claim and hence, claimed that it is wholly inequitable for the Petitioner for not accepting the proposal and insisting for CIRP proceedings. The other grounds as set out in the written submissions are as follows:

- (a) The Corporate Debtor is a going concern with assets in excess of Rs. 280 Cr.;
- (b) The Corporate Debtor is the Parent Company of Rajesh Estates and Nirman Private Limited, Kothari Auto parts Manufacturers Private Limited and Arihant Techno Economic Park Private Limited ("Subsidiaries");
- (c) The Corporate Debtor's Subsidiaries are engaged in the business of Real Estate development and have over 5 Projects under their care;
- (d) Over 600 employees/workers and their family are dependant of the Respondent and its subsidiary companies;
- (e) In the event this Company Petition is admitted, the future of over 450 homebuyers of Corporate Debtor and its subsidiary companies will be in peril.

27. The Corporate Debtor is engaged in development and construction of real estate within Mumbai and other places in India. The value of current

assets of the Corporate Debtor is more than Rs. 240 crores and has been carrying out business for over 55 years and have completed various project till date, delivering numerous homes to its customers. As on date, there are 600 workers of Corporate Debtor and its group companies.

Findings:

28. It is undisputed fact that the Petitioner had granted a short term loan to the Corporate Debtor for general corporate purposes for real estate projects by way of a Sanction Letter dated 15.04.2019 and thereafter, executed a facility agreement dated 16.04.2019 wherein the total amount of Rs. 15 crores were lent by the Petitioner to the Corporate Debtor. In terms of the facility agreement, the Petitioner paid the amounts as per the drawdown at clause 2.3 of facility agreement.

29. The Facility Agreement contained specific clauses in relation to payment of interest, default interest, additional interest and additional interest too. The repayment term was captured at Clause 3.1 of Facility Agreement. The repayment terms are as follows:

i. Subject to Clause 3.2 (Prepayment); Clause 3.7 (Put / Call Option and Put / Call Option Fees) or acceleration of the Facility on the occurrence of an Event of Default, the Borrower shall duly and punctually pay / repay / reimburse the Outstanding on the relevant due date including the Facility on the date(s) for repayment as stated in the Repayment Schedule.

ii. At the request of the Borrower, the Lender may in suitable circumstances, in its sole and absolute discretion, revise, vary or postpone the repayment of the Facility or the balance amount outstanding for the time being, upon such terms including but not limited to the payment of Interest at a rate higher than the interest Rate.

iii. If, for any reason, the amount finally disbursed by the Lender out of the Facility is less than the sanctioned amount of Facility, the amount of instalment(s) of repayment of the Facility

shall stand reduced proportionately but shall be payable on the date(s) for repayment as set out in Schedule III hereto.

iv. The Lender shall have the right but not the obligation to pay any Taxes as may be applicable to the transaction contemplated in this Agreement, as and when the same become due and recover the same from the Borrower in the manner hereinafter specified or as part of the Facility (at the option of the Lender). Within 7 (Seven) days of the Lender making a claim along with documentary evidence for payment for reimbursement of any Taxes incurred by the Lender, the Borrower shall refund to the Lender the entire amount paid as Taxes. However, the Borrower shall not be liable to refund any tax imposed on the income of the Lender, including any tax deducted at source under the provisions of the Income Tax Act, 1961.

30. The Facility Agreement was executed for a fixed term of 6 months and therefore, it can be construed that upon maturity, the money would be repaid by the Corporate Debtor to the Petitioner. The Facility Agreement also provides for events of default wherein the Petitioner could seek the payment of entire amounts on account of breaches of performance of obligations by the Corporate Debtor. The events of default as reflected in Facility Agreement are as follows:

"Each of the Clauses, as more particularly set out in Clauses 9.1 (i) to 9.1 (xxxiii) below, describes the circumstances / events / conditions which constitute an Event of Default for the purpose of this Agreement and other Financing Documents:

- i) Any Obligor fails to pay in terms of the Financing Documents i.e. when it fails to pay to the Lender any sum due to be paid under any financing Document at the time, in the currency and in the manner specifies therein;*
- ii) any of the Obligors is / are in breach or default of the performance of any covenant, undertaking, term, condition or agreement under any Financing document or any representation or statement made*

by any of the Obligors in this Agreement or in any of the Financing Documents or in any notice or other document, certificate of statement delivered by it / them / him / her pursuant hereto or in connection herewith or orally is or proves to have been false, incorrect or misleading;”

31. The Corporate Debtor provided securities to the Petitioner to secure repayment of loan amount lent by the Corporate Debtor which includes personal guarantees of two promoter, a pledge of shares, a demand promissory note, undertaking of the Corporate Debtor and its promoter, negative lien of 24% of shares pledged, post-date cheques from guarantors.
32. The Corporate Debtor has evidently failed to repay the said amount and as such, the Petitioner has issued Recall Notice dated 22.01.2020 calling upon the Corporate Debtor to make the payment of outstanding dues.
33. The Corporate Debtor vide email dated 31.03.2020 pointed out that they are unable to meet the obligation in view of COVID-19 outbreak. However, the Corporate Debtor deposited an amount of Rs. 50 lakhs towards by RTGS to the Petitioner.
34. The Corporate Debtor filed written submissions, wherein they proposed settlement as on 10.02.2021. However, have also offered to give a revised proposal to the Petitioner and claimed that Corporate Debtor and their group of subsidiaries are going concern and in excess of Rs. 250 crores, engaged in development/real estate, having 600 employees and 450 home buyer. As such sought the Company Petition to be dismissed.
35. Upon perusal of Facility Agreement and security created in pursuance of monies lent to the Corporate Debtor, it is established beyond doubt that the Facility Agreement executed between the parties entails the details of debt of Rs. 15 Crores, as was sanctioned and disbursed to the Corporate Debtor. The events of default expressly define the rights accrued to the

Financial Creditor to recall the entire loan on non-payment of dues by the Corporate Debtor. The Corporate Debtor has also not disputed that he had availed the said monies and hence, has offered to settle the said outstanding amount by way of proposal on 24.02.2021. Hence, all the ingredient of Section 7 are satisfied and Petition is admitted.

36. Considering the above facts, we come to conclusion that the nature of Debt is a "Financial Debt" as defined under section 5 (8) of the Code. It has also been established that there is a "Default" as defined under section 3 (12) of the Code on the part of the Debtor. The two essential qualifications, i.e., existence of 'debt' and 'default', for admission of a Petition under section 7 of the I&B Code, have been met in this case. Besides, the Company Petition is well within the period of limitation. This Petition is admitted.

37. Further that, we have also pursued the Form – 2, i.e., written consent of the proposed Interim Resolution Professional submitted along with this application/ Petition by the Financial Creditor and there is nothing on record which proves that any disciplinary action is pending against the said proposed Interim Resolution Professional.

38. The Financial Creditor has proposed the name of Insolvency Professional. The IRP proposed by the Financial Creditor, Mr. Abhijit Gokhle, having Registration No. IBBI/IPA-002/IP-N00964/2020-2021/13092 is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.

39. Having admitted the Petition/Application, the provisions of Moratorium as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of order, and shall be applicable by prohibiting institution of any Suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc. However, the supply of essential goods or services to the "Corporate Debtor" shall not be terminated during Moratorium period. It shall be effective till completion of the

Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code.

40. That as prescribed under Section 13 of the Code on declaration of Moratorium, the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.
41. That the Interim Resolution Professional shall perform the duties as assigned under Section 18 and Section 15 of the Code and inform the progress of the Resolution Process and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.
42. The Petition is hereby "**Admitted**". The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of this Order.
43. Ordered Accordingly.

Sd/-
Chandra Bhan Singh
Member (Technical)

Sd/-
Suchitra Kanuparthi
Member (Judicial)