



**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
COURT-III, MUMBAI BENCH**

**C.P.(IB) 560 OF 2022**

Under **Section 7** of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

*In the matter of*

**Clearwater Capital Partners Singapore Fund IV Private Limited** a private company limited by shares incorporate in Singapore having its registered office at 6 Temasek Boulevard #38-03 Suntec Tower Four, Singapore 03898

**..... Financial Creditor 1**

**Clearwater Capital Partners Singapore Fund V Private Limited** a private company limited by shares incorporate in Singapore having its registered office at 6 Temasek Boulevard #38-03 Suntec Tower Four, Singapore 03898

**...Financial Creditor 2**

(together or collectively hereinafter referred as **“Financial Creditors”**)



IN THE NATIONAL COMPANY LAW TRIBUNAL,  
COURT-III, MUMBAI BENCH

C.P.(IB) 560 OF 2022

v/s

**Rajesh Estates and Nirman Private**

**Limited** a company registered under

the Companies Act, 1956 having its

registered office at 139, Seksaria

Chambers, 2nd floor, N.M. Road

Kalbadevi Road: 400002.

**...Corporate Debtor**

**Order reserved on: 09.01.2023**

**Order pronounced on: 24.03.2023**

**Coram:**

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Smt. Madhu Sinha, Member (Technical)

Appearances (via video conferencing)

**For the Petitioner:** Adv. Pulkit Sharma a/w Ranjit Shetty, Priyanka Shetty,  
Arjun Amin i/b Argus Partners.

**For the Corporate Debtor:** Adv. Viraj Parikh i/b DSK Legal

**PER: Smt. Madhu Sinha, Member (Technical)**

**ORDER**

The above Company Petition is filed by Clearwater Capital Partners  
Singapore Fund IV Private Limited (**Financial Creditor 1**) and  
Clearwater Capital Partners Singapore Fund IV Private Limited



**(Financial Creditor 2)** (hereinafter referred collectively as “**Financial Creditors**”) seeking to initiate Corporate Insolvency Resolution Process (“**CIRP**”) against **Rajesh Estates and Nirman Private Limited**, (hereinafter referred as “**Corporate Debtor**”) by invoking the provisions of Section 7 Insolvency and Bankruptcy Code (hereinafter referred “**Code**” read with Rule 4 of Insolvency & Bankruptcy (Application to Adjudication Authority) Rules, 2016 for a resolution of an unresolved Financial Debt of **Rs. 208,50,15,081/-** (Rupees Two Hundred and Eight Crores Fifty Lakhs Fifteen Thousand and Eighty-One) (Rs. 30,90,63,124/- for Financial Creditor 1 and Rs. 1,77,59,51,957/- for Financial Creditor No. 2).

**I. Submissions On Behalf Of The Financial Creditors :**

1. The Financial Creditors states that the Corporate Debtor is engaged in the business of real estate construction and development. Further, the Corporate Debtor through a Private Placement Offer Letter, issued 432 unrated, unlisted, secured, redeemable, non-convertible debentures (hereinafter referred as “**NCDs**”) having a face value of Rs. 1,00,00,000/- each to various other individual investors including the Financial Creditors. These NCDs were issued pursuant to Debenture Trust Deed dated 19.03.2018 (hereinafter referred as “**DTD**”) entered between the Corporate Debtor, Rajesh Cityspaces Private Limited, Rajguru Developers Private Limited and Vistra ITCL (India) Private Limited in its capacity of a Debenture Trustee (hereinafter referred as



“**Debenture Trustee**”). The Financial Creditors states that along with aforementioned documents a Supplemental Deed dated 19.03.2018 (hereinafter referred as “**Supplemental Deed**”) was also executed between the Corporate Debtor and the Debenture Trustee to record certain representation, covenants and undertakings in relation to the NCDs. Furthermore, the investors to whom the private placement offer was issued with respect to the 432 NCD’s is set out in the PAS-5 form of the Corporate Debtor which is uploaded on the official website of the Ministry of Corporate Affairs(MCA).

2. The Financial Creditors states that out of 432 NCDs, 129 NCDs were subscribed by both the Financial Creditors amounting to Rs. 129,00,00,000/- (19 NCDs to Financial Creditor 1 amounting to Rs. 19,00,00,000/- and 110 NCDs to Financial Creditor 2, amounting to Rs. 110,00,00,000/-)
3. Further, the Financial Creditors states that sometime around May 2021, the Corporate Debtor defaulted in fulfilling the payment obligation with respect of the NCDs. The computation of default as on March 31, 2021 with regards to Financial Creditor 1 is Rs. 10,68,37,203/- and Financial Creditor 2 is Rs. 58,45,30,759/-. Therefore, on the account of default, the Financial Creditors issued two separate Notices dated 31.05.2021 (Acceleration Notices) demanded payment of the total outstanding amount and called upon the Corporate Debtor to redeem the NCDs and also



declared that as on 31.05.2021, the entire amount aggregating to Rs. 29,28,59,070/- with respect to Financial Creditor 1 and Rs. 165,49,09,612/- with respect to Financial Creditor 2 is due and payable forth with, and in any event within 1(one) day from the Acceleration Notice. However, the notices were returned unclaimed.

- 4.** As there was no acknowledgement by the Corporate Debtor, the Financial Creditors in accordance to the Deed of Guarantee, invoked the Personal and Corporate Guarantees. Further, by the way of Guarantee Notices along with the Demand Certificates dated 02.06.2021, The Financial Creditors called upon the Corporate Guarantor i.e. Rajesh Constructions and Personal Guarantors i.e., Mr. Harish R Patel, Mr. Rajesh R Patel , Mr. Pratik R Patel , Mr. Priyal K Patel, to pay the Financial Creditors within 1 (one) day from the receipt of the notice, the entire accelerated amount of Rs. 29,28,59,070 with respect to the Financial Creditor 1 and Rs. 165,49,09,612 with respect to the Financial Creditor 2 as on 31.05.2021 along with the applicable interest. However, even these notices were returned unclaimed. The Financial Creditors further states that they had also e-mailed the said notices to the Corporate debtor on 01.06.2021.
- 5.** The Financial Creditors further states that the Corporate Debtor, Corporate Guarantor as well as Personal Guarantors had duly received the Acceleration Notices and Guarantee Notices, however



still no amounts were paid by the Corporate Debtor and the notices were returned unclaimed. Therefore, the Financial Creditors on the basis of above circumstances state that the Corporate Debtors and Guarantors despite of giving reminders have failed to fulfil the payment obligation. Hence, this Petition.

**II. Reply on Behalf of the Corporate Debtor:**

1. The Corporate Debtor has filed its reply dated 29.08.2022, opposing all the averments made in the present Company Petition. The Corporate Debtor states that it is engaged in the business of development of real estate since 2006 and forms a part of the well-known Rajesh Group. The Corporate Debtor further states that Altico Capital (India) Limited ("Altico") approached to show their willingness to partner with the Rajesh Group. After thorough due diligence, Altico partnered with Rajesh Group by providing financial assistance to RSSPL, forming a part of the Rajesh Group, for acquisition of a project in South Bombay. The reputation and strength of Altico prompted Rajesh Group to consider the proposal of debt financing.
2. As per the terms of the Transaction Documents, the Corporate Debtor states that Altico was to comply with its financial obligation by paying the Subscription Amount by subscribing to non-convertible debentures ("NCDS") to be issued by the Corporate Debtor and other companies in the Rajesh Group



including Rajesh Cityspaces Private Limited, Rajguru Developers Private Limited, Rajesh Buildpaces Private Limited and Rajesh Landmarks Private Limited respectively (all forming a part of the Rajesh Group). The NCDs were to be subscribed in series and the Subscription Amounts paid by the Altico was designated to be utilized as follows:

SERIES	PROPOSED USAGE
Series 1	Takeover of Existing Debt/New IDA Payments/Land Acquisition General Corporate Purposes
Series 2	Construction/Project Funding Pre-Fund Interest
Series 3	Interest Service Reserve Account (“ISRA”) Altico Fees & Deal Expenses

3. In consonance with the Transaction Documents, on March 21, 2018, March 28, 2018 and March 31, 2018, Altico subscribed to all the Series of debentures issued by Rajesh Group by paying an aggregate sum of INR 560 Crores which was utilized by Rajesh Group in the following Projects, as follows:

- a) Project Raj Embassy — Piramal was repaid INR. 243 crores and an exit was provided to them;
- b) Project Raj Altezza Motilal Oswal was paid INR. 165 crores and JM was paid INR 62 crores and an exit was provided to them;
- c) INR. 50 crores was utilized for General Corporate



Purpose; and

- d) Balance towards processing fees, deal expenses  
(INR.15 crores) & Project expenses (INR25 crores).

4. Thereafter, in consonance with the Transaction Documents, on 11.06.2018, 13.06.2018, 30.06.2018 and 25.07.2018, Altico further subscribed to Series 2 and Series 3 debentures which were issued and allotted by Rajesh Group. As on date, Rajesh Group has issued NCDs worth INR. 1135 Crores in various tranches ("Total Issued Amount"). Out of the Total Issued Amount, Rs. 965 crores were subscribed by Altico, Rs. 129 crores were subscribed by the Financial Creditors of the present Petitioner, Rs. 18 Crores were subscribed by IREP Credit Capital (IREP) and Rs. 23 crores by AL Mehwar and Varde Holdings. Therefore, The Corporate Debtor states that with the aforementioned calculations, the Financial Creditors are minority NCDs holder.
5. The Corporate Debtor further states that Altico, despite been allotted entire Series 1, Series 2 and Series 3 Debentures, only partly paid monies due under the Series 2 and Series 3 Debentures.
6. The Corporate Debtor states that as per the Debenture Trust





Deeds, Altico was obligated to pay the Subscription Amount to Rajesh Group within 5 days of Rajesh Group making a Draw Down request. From the date of First Disbursement till the month of September 2018, Altico Capital partly rendered financial assistance which was to be utilized towards construction finance. It is to be placed on record that, post September 2018 and until June 2019, Altico only lent monies to service their interest payment and marginal amount was disbursed towards the cost of the Projects, as per the terms of the Business Plan. Despite requests made for drawdown through emails, Altico failed and neglected to honor their financial obligation under the Transaction Documents.

7. In the interregnum, on account of breaches committed by Altico, a meeting was held by the Rajesh Group in or about August 2018 to discuss the matter. The Corporate Debtor states that at the meeting, Rajesh Group representatives were shocked when they were informed, for the first time by Altico that they were legally prohibited from honoring their obligations under the Transaction Documents on account of prohibition under the Non-Banking Financial (Non-Deposit Accepting or Holding) Companies Prudential forms (Reserve Bank) Directions 2015 ("RBI Circular"). By an email dated August 16, 2018, Altico represented to the Rajesh Group that they would solicit borrowings from their peers



and other lenders. By this, Altico expressed its inability to perform their obligations under the Transaction Documents.

8. Thereafter, at various meetings, Rajesh Group representatives requested Altico to release the available pre-funded interest in order to assist them to fulfill its interest obligations, however, in breach of their obligations; Altico not disburse the pre-funded interest for the quarter ending September 2019. Rajesh Group also requested that in case of any shortage towards the availability of pre-funded interest amount, Altico should disburse ISRA. Altico, however purposely did not disburse he pre-funded interest or IRSA.
9. The Corporate Debtor states that the default committed by Altico had far reaching consequences on the Rajesh Group, including the Corporate Debtor. While the Rajesh Group was working with Altico to remedy the default committed and the consequence on the Rajesh Group, from November 2019, COVID — 19 virus was on setting in India. Due to the lockdown, the real estate development market was one of the primary victims. In this regard, the Corporate Debtor states that Rajesh Group and particularly the Corporate Debtor were impacted. The Corporate Debtor states that the Petition is not maintainable and should be dismissed on the following grounds ;



A. The Present Petition Is Barred By Section 10-A Of The Code:

- i. The Corporate Debtor states that Section 10-A explicitly envisages that no application for initiation of CIRP can be filed for any default by a Corporate Debtor which default has occurred from 25.03.2020 to 24.09.2020. Further, the Legislature strategically imposed a blanket suspension of initiation of CIRP (which is a very strict measure as the Management loses control, IRP/RP is given control and is essentially an irreversible process etc.) for all defaults occurring from 25.03.2020 till 24.03.2021. In fact, the Legislature has gone ahead and imposed a total prohibition on ever initiating CIRP against corporate persons, for the defaults which have occurred between 25.03.2020 to 24.03.2021. It is not the case that CIRP cannot be initiated only between 25.03.2020 to 24.03.2021. The Legislature has provided an express bar from initiating CIRP, ever in time, for defaults committed between the aforesaid period. This means that when a default has been committed by a borrower during this suspension period, the creditor will never be able to initiate CIRP against the borrower. This position of law is undisputed, and the Financial Creditors cannot have any different view on the same.



- ii. Further the Corporate Debtor states that as per the documents filed by the Financial Creditors in support of their claim in the Company Petition, the alleged default by the Corporate Debtor in payment of the principal amount under the DTD was on December 31, 2020. Such date of December 31, 2020 admittedly falls within the suspension period for initiation of CIRP under the Code.
  
- iii. The Corporate Debtor states that the Financial Creditors were aware that they will be unable to initiate CIRP against the Corporate Debtor since the default is on December 31, 2020, therefore, the Financial Creditors have intentionally sought to hide the date of default as per their own case in the Application and with mala-fide sought to portray the date of default as the date on which the Financial Creditors issued the Notice dated May 31 2021, which is labelled as the 'Facility Acceleration Notice' which was not only unreasonable but a clear indication of the ill-intended tactics of the Financial Creditors.
  
- iv. Furthermore, the Corporate Debtor submits that under the 'Facility Acceleration Notice' the Financial Creditors provide no details and granted one day's time to the Corporate



Debtor to repay a total sum of INR. 29,28,59,070 and INR. 165,49,09,612, respectively.

- v. Further, the Facility Acceleration proceeds on the assumption that an 'Event of Default' as occurred as per the terms of the DTD however, the said Notice makes no mention of the date on which such "Event of Default" came to have occurred. The schedule annexed to the Facility Acceleration Notice crystallises an amount allegedly due and payable by the Corporate Debtor as of May 31, 2021 without referring to the date on which such amount/s was or were due and payable. The interest amount has been crystallised without any specifics of the amount allegedly in default, the date from which the interest is calculated as well as the rate of interest which has been applied by the Financial Creditors.
- vi. Without prejudice to the rights and contentions of the Corporate Debtor, it is submitted that as per the statements produced by the Financial Creditors, a default, if any, has occurred in December 2020. However, the Financial Creditors has deliberately sought to suppress this fact from this Hon'ble Tribunal and mala fidely to portray the date of default as 31.05.2021 (i.e., the date of "Facility Acceleration Notice"). This deliberate and false representation in the Application renders the Application infructuous and



demonstrates that it in fact, filed for a malafide intention.

- vii. Accordingly, it is submitted that on this ground itself, this Application deserves to be rejected and dismissed by this Hon'ble Tribunal.

B. As per the financial creditors' own case there is no default as the Facility Acceleration Notice is non est.

- i. The Corporate Debtor states that it is a matter of record that the Financial Creditors are not the only NCD holders but are minority NCD holders also 'Facility Acceleration Notice' issued by the Financial Creditor is contrary to the provisions of the DTD and therefore, is null and void ab initio. The Corporate Debtor states that the Facility Acceleration Notice as per Clause 9 of the DTD can only be issued only by the Debenture Trustee and not by NCD holders. Further, the Debenture Trustee can only act on instructions issued by a majority of the NCD Holders and this requirement is not fulfilled in the present case. The DTD recognizes that there are multiple Debenture Holders and provides a mechanism for democratic functioning and decision between the Debenture Holders. Furthermore, Clause 24 (n) of the DTD provides that the Debenture Trustee shall only act on the basis of "Approved Instructions" of the Debenture Holders. The term "Approved Instructions" is defined in the DTD as



“the prior written instructions of the Debenture Holders to the Debenture Trustee approved pursuant to the provisions set out in Schedule III. The Schedule III lays down the manner in which Approved Instructions can be issued by Debenture Holders. Effectively, it provides for two ways in which Approved Instructions can be issued: In a meeting, with vote of more than 50% of the Debenture Holders: (i) By written consent, given by more than 50% of the Debenture Holders.

- ii. The object and purpose of providing for a strict procedure for the purpose of controlling any actions under the DTD is to ensure that minority Debenture Holders do not act against the interests of the majority and attempt to jump the line without the consent of the majority by exerting pressure on the Respondent and the majority debenture holders.
- iii. The Corporate Debtor states that the Financial Creditors being minority of the NCDs being fully aware of the restriction on its powers and its duty to follow the democratic procedure under the DTD. Therefore, the Financial Creditors were bound by the procedure prescribed under the DTD.
- iv. The Corporate Debtor states that the Financial Creditors by solely issuing the Facility Acceleration Notice without



following the procedure has acted in violation of the contractual terms set out in DTD. The Corporate Debtor also states that the default is not defined by the Code and it is exclusively left to the domain of the contract between the parties. The Corporate Debtor states that the Financial Creditors being the minority DTD holders cannot declare an event of default without following the provisions and no other Majority NCD holders have issued any Facility Acceleration Notices.

C. Other factors exist that require exercise of this Hon'ble Tribunal's discretion not to admit the present petition

- i. The Corporate Debtor states that without prejudice to the above, it is settled law that this Hon'ble Tribunal has the discretion/power to not admit a corporate debtor into CIRP, despite all ingredients for admission being present. Thus, along with the existence of debt and default, this Hon'ble Tribunal is also required to examine the aspect of whether it is financially expedient to initiate CIRP of the Corporate Debtor considering all relevant facts and circumstances. This is due to the intent of the legislature which states that this Hon'ble Tribunal 'may' admit an application for initiation of CIRP as per Section 7(5)(a) of the Code. The Corporate Debtor states that it is presently having 1





project in hand known as Raj Torres at Thane apart from Raj Embassy, a commercial project at Bhandup, which will affect more than 400 home buyers. Therefore, it is very likely that the Corporate Debtor may be able to service its debt, provided additional time is granted. Needless to state that the present situation of the Corporate Debtor is only due to the impact of COVID — 19 pandemic in India. The situation of the Corporate Debtor may have been glaringly different had COVID — 19 pandemic not been there. Further, intent of the Legislature in inserting Section 10A to the Code was to provide benefits to corporate persons like the Corporate Debtor, whose businesses were impacted due to COVID — 19 pandemic and consequent defaults were made. It must also be noted that it is the default of financial creditors like Altico that has contributed to the difficulties faced by the Corporate Debtor.

In view of the above, the Corporate Debtor prays before this Hon'ble Tribunal to reject the reliefs sought by the Financial Creditors and dismiss the captioned Petition.

**III. FINDINGS:**

- i. Heard Mr. Adv. Pulkit Sharma Counsel appearing for the Financial Creditors and the Mr. Viraj Parikh Counsel appearing for the Corporate Debtor at great length and perused the pleadings and the documents annexed to this Application. Upon hearing both parties and after



perusing the record, this tribunal framed the following issues for consideration:

- a. *Whether the Financial Creditors being Minority Debenture Holders have a right to invoke necessary action/remedy against the Corporate Debtor in case of any event of default without any action initiated by the Majority Debenture Holder and the Debenture Trustee;*
- b. *Whether the Present Company Petition is barred by the scope of Section 10A of the Code;*

ii. The Corporate Debtor has raised the contention that the Financial Creditors is in clear violation of clause 9 of the DTD as the Facility Acceleration Notices and Guarantee Notices were to be issued only by the Debenture Trustee through “Approved Instructions” as detailed out in the Debenture Trust Deed. In addition to this contention, the Corporate Debtor states that the Financial Creditors being minority NCDs holders have invoked the remedy without approaching the Debenture Trustee which is in clear contravention of the contractual terms of the DTD. Countering the above argument, the Financial Creditors in their Additional Affidavit filed on 18.11.2022, stated that such invocation is taken under the shelter of clause 9.8 which is extracted for the ready reference as follows:

**9.8. Other Remedies under Applicable Law:**



*Notwithstanding anything to the contrary contained in this Deed, **the Issuer acknowledges the Debenture Trustee's and Debenture Holders' unqualified right, to take all such actions as may be available to them** under various policies and schemes promulgated by the RBI from time to time (including but not limited to such actions in accordance with the RBI's Stressed Assets Framework to convert the Secured Obligations into paid-up equity share capital of the Issuer and other measures available therein) **and other remedies available to lenders in general in accordance with the provisions of the Applicable Laws, at any time until the Final Settlement Date.***

(emphasis supplied)

- iii. We have carefully examined the contents of the Debenture Trust Deed executed between the Financial Creditors and the Corporate Debtor, this Bench after the interpretation of clause 9.8 of the DTD have formed an opinion that the above clause has given unqualified rights to the Debenture Trustee and the Debenture Holder independently and separately wherein they may take the necessary actions when required under various policies, schemes, etc., under the applicable laws. In order to look into the aspect whether a Debenture Holder is restricted to invoke any remedy without the Debenture Trustee, it is pertinent to observe that Debentures are governed by **Section 71 of the Companies Act, 2013 along with Rule 18 of the Companies (Share capital and Debentures) Rules 2014** wherein Section 71(6) construes Debenture Trustee as one who shall take steps to protect the interests of the Debenture Holders and redress their grievances in accordance with such rules as may be prescribed. Therefore, it is noted that the intention of the Legislation for a Debenture Trustee was to provide a smoother process by acting as an agent between the Issuer



and the Debenture Holder. By entering in such DTD's, it is the Debenture Holder who is exposed to risks and therefore, should be allowed to invoke remedies in case of any event of default. Further, the contention of the Financial Creditors stating that the Debenture Holders can independently take actions is governed by the case law of **'Reliance AIF Management Company Limited & Ors. v. Bharucha & Motivala Infrastructure Private Limited'** CP(IB) – 4108 /2019, wherein the Hon'ble Tribunal at paragraph 25.1 of the judgment held that:

*“the Corporate Debtor had contended that the Petitioners are only holders of the NCDs and are not parties to the debenture trust deed and therefore the debenture holders do not have any locus to file the present Petition as only debenture trustee can file the present Petition. The Bench finds this argument taken by the Corporate Debtor to be untenable as it is a fact that the Debenture Trustee is for the convenience of the Debenture Holders and their benefit. It is for this reason that the Debenture Trustee is only an agent of the Debenture Holders. The presence of a Trustee in no way limits or erases any right of the debenture holders under any circumstances”.*

Further, upon the bare perusal of the DTD, there is no express bar provided which prevents the Debenture Holders, i.e. the Financial Creditors from independently initiating any proceedings in accordance with law. In this context it is appropriate to mention **Mr. T Prabhakar**



***v. Mr. S Krishnan' (Company Appeal (AT) (CH)(INS) No. 217 of 2021***

**which states as follows:**

*“There is no fetter in law for the ‘Debenture Holder’ to file an application seeking to initiate CIRP against the concerned, without adding the ‘Debenture Trustee’. Even the ‘Trust Deed’ is not restricting the rights of 2nd and 3rd Respondents from acting, in the absence of ‘Debenture Trustee’. To put it precisely, the ‘Debenture Trust Deed’ gives right to the 2nd and 3rd Respondents to act.”*

Therefore, the contention of the Corporate Debtor that only the Debenture Trustee is empowered to initiate any action and the Financial Creditors being Minority Debenture Holders has no locus to declare a default or to take any action unilaterally, cannot be availed by the Corporate Debtor. Furthermore, it is observed that the Financial Creditors being the Debenture Holders and parties to the DTD have rightfully invoked their remedy under clause 9.1 and 9.8 of the DTD.

It is noteworthy to mention that as per the information provided by the Financial Creditors in the Additional Affidavit, the Majority Debenture Holder of the Corporate Debtor i.e., Altico Capital India Limited had itself filed a Company Petition bearing no. 79 of 2020 under Section 7 of the Code against the Corporate Debtor which suggests that even the Majority Debenture Holders were aggrieved by the Corporate Debtor. Thereafter, the aforesaid Company Petition i.e. 79 of 2020 was disposed off as the CIRP was initiated against the Corporate Debtor vide Order



dated 16.07.2021 of the Tribunal in the Company Petition bearing no. 520 of 2020 which was filed by Steel Investments Private Limited against the Corporate Debtor under Section 7 of the Code. The Corporate Debtor went in appeal before the Hon'ble NCLAT which was dismissed on the ground of settlement between the parties and the consent terms entered between the parties was taken on record. The record reveals that various cases have been filed against the Corporate Debtor under Section 7 and Section 9 of the Code which shows the precarious financial condition of the Corporate Debtor.

- iv. The next contention raised by the Corporate Debtor is with regards to the maintainability of the Petition as it is barred by the Section 10A of the Code. The Section 10A which we are presently concerned, has been inserted after Section 10 of the Principal Act which reads as follows: Section 10 A Suspension of initiation of corporate insolvency resolution process-

*“Notwithstanding anything contained in Sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020, for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf.*



*Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.*

*Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020”*

(emphasis supplied)

- v. In the light of the insertion of Section 10 A to I&B Code, 2016 as extracted above, the date of default in the present Petition as per Part IV is considered as June 1, 2021 i.e. the due date for payment of outstanding amounts demanded vide the Acceleration Notices dated May 31, 2021, whereunder the entire outstanding amount was repayable within 1(one) day from the date of the notice. Pursuant to which, the Corporate Debtor has raised the contention that the Financial Creditors have misled the bench by providing a different date of default, as the actual date of default in payment of the principal amount under the DTD was on December 31, 2020 and therefore it comes under the purview of the Section 10A of the Code. As the Date of Default is disputed let us examine the DTD which provides for the payment obligation and event of defaults. As per the payment obligation prescribed



under DTD, it is observed that the obligations of the Corporate Debtor to repay the Financial Creditors are set forth in Clause 4.2 (principal amount) and 4.3 (interest) of the DTD – As per Clause 4.3, interest was to be paid quarterly. The obligation to pay principal amount at redemption is in Schedule III of the Supplemental Deed. (For redemption of the principal amount, the scheduled redemption date started from December 31, 2020 and thereafter continued on each quarter). As per the facts borne on record, the Corporate Debtor defaulted in making the payment of interest in May 2021. Even if December 31, 2020 is taken as date of default, the Financial Creditor contended that ample time was given to the Corporate Debtor to make the payments due even after the pandemic. Apart from the first date in the redemption schedule i.e. December 31, 2020 (which is for payment of only 10% of the total outstanding), all other dates in the redemption schedule are beyond the 10A period (which is 90% of the outstanding amount). As there has been a default even after the 10A period, the Corporate Debtor is merely seeking to take shelter under the suspension period and alleges that the entire claim of Rs. 208 crores should be barred however no specific explanation/justification is given by the Corporate Debtor on failure to make payment towards the due even after the pandemic. Further the Corporate Debtor in his entire has reply stated multiple times the inability of M/s Altico Capital (India)





Limited (“Altico”) to perform its payment obligations provided under the DTD. However, the Corporate Debtor to substantiate its claim has not produced any documents to show the default committed by the M/s Altico Capital (India) Limited (“Altico”).

- vi. The Financial Creditors have further stated that the first notice was issued to the Corporate Debtor only on May 31, 2021 which was more than a year and two months after the lockdown situation in March 2020 and yet there is no repayment till date. To support this contention, the Financial Creditors has relied on a similar case ‘**Classic Exports v. Ram Charan Company Private Limited**’ (CP/IB/157/CHE/2021), the Tribunal held that,

*“the Corporate Debtor post the Section 10A period till date has admittedly not paid interest on the principal amount. The debt clearly establishes that there is a continuous default during the period of Section 10A and post period of Section 10A to till date. Hence the 'debt' and 'default' is proved.”*

- vii. Upon a combined consideration of the respective oral as well as written submissions of the parties and from the averments made by the Financial Creditors and Corporate Debtor in the present Petition, it is evident that no repayment of the NCDs, Principal



and Interest amount has been made by the Corporate Debtor till date. It is pertinent to note that Section 10A was inserted taking into consideration the extraordinary situation prevalent all over the world, including India impacting the business, financial markets and economy which had created uncertainty and stress for business for reasons beyond the control of corporate persons and it provided relief only for the default occurring during the pandemic period. It is noteworthy to mention that in this case no payment has been made till date which suggests that there has been a default on the part of the Corporate Debtor. Further, the protection of the newly inserted Section 10A will not come into play only as 10 percent of the amount fell due under the suspension period and 90 percent is not covered as the default being of a continuous nature. Therefore, the Corporate Debtor cannot seek shelter of Section 10 A for the entire claim of Rs. 208 crores and thus the present Petition is not barred by Section 10 A.

- viii. Further, the Corporate Debtor themselves have admitted the liability and entirely arraigned on M/s, Altico without providing any documents. The fact that the Financial Creditors have disbursed money to the Corporate Debtor in the form of NCDs is an admitted position. Debentures are a form of Financial Debt as per Section 5(8)(c) On the account of default in payment 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. Thus, 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.

- ix. As a consequence, keeping the aforesaid facts in mind, it is found that the Financial Creditors have not received the outstanding debt from the Corporate Debtor and that the formalities as prescribed under the Code have been completed by the Financial Creditors. The Financial Creditors have also suggested the name of proposed Interim Resolution Professional in Part-3 of the Petition along with his consent letter in Form-2. Therefore, we are of the conscientious view that this Petition deserves ‘**Admission**’ by passing the following:

**ORDER**

- a. The above Company Petition No. C.P.(IB) 560 of 2022 is hereby allowed and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **Rajesh Estates and Nirman Private Limited.**
- b. The Financial Creditors have proposed the name of Interim Resolution Professional . The IRP proposed by the Financial Creditors is **Mr. Divyesh Desai**, having E-mail Id: [divyeshdesai@singhico.com](mailto:divyeshdesai@singhico.com), having Registration No. IBBI/IPA-001/IP-P00169/2017-18/10338,



is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process as mentioned under the Insolvency and Bankruptcy Code, 2016.

- c. The Financial Creditors shall deposit an amount of Rs. 5 Lakhs towards the initial CIRP costs by way of a Demand Draft drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order. The IRP shall spend the above amount towards expenses and not towards fee till his fee is decided by COC.
- d. That this 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 the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.
- e. 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.



- f. 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.
- g. That the order of moratorium shall have effect from the date of pronouncement 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, as the case may be.
- h. That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.
- i. During the CIRP period, the management of the corporate debtor will vest in the IRP/RP. The suspended directors and employees of the corporate debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP/RP.
- j. Registry shall send a copy of this order to the Registrar of Companies, Mumbai, for updating the Master Data of the Corporate Debtor.
- k. Accordingly C.P. 560 of 2022 is **admitted**.
- l. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately.

**SD/-**  
**MADHU SINHA**  
**MEMBER (TECHNICAL)**

//Renuka//LRA//

**SD/-**  
**H.V. SUBBA RAO**  
**MEMBER (JUDICIAL)**