

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

C.P.(IB)-247(MB)/C-III/2023

(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

Indiabulls Commercial Credit Limited

Having Registered Office at: 5th Floor, Building No. 27, KG Marg Connaught Place, New Delhi-110001.

.....Financial Creditor/Petitioner

Vs

Koshika Bioscience Private Limited

Having Registered Office at: A/503, Western Edge II, CCI Compound, Western Express Highway, Borivali East Mumbai- 400066.

.....Corporate Debtor/Respondent

Order Pronounced on: 16.04.2024

CORAM:

**SHRI CHARANJEET SINGH GULATI
HON'BLE MEMBER (T)**

**SMT LAKSHMI GURUNG
HON'BLE MEMBER (J)**

Appearances:

For the Financial Creditor: Adv. Nausher Kohli a/w Adv. Rima Desai

For the Corporate Debtor: Mr. L. Krishnamoorthy, PCS

ORDER

Per: - Smt. Lakshmi Gurung (Judicial Member)

1. The Present **Company Petition (IB)-247(MB)/2023** has been filed under section 7 of Insolvency and Bankruptcy Code, 2016 (“IBC, 2016”) by **Indiabulls Commercial Credit Limited, (“Financial Creditor /Petitioner”)** for initiating Corporate Insolvency Resolution Process (“CIRP”) against **Koshika Bioscience Private Limited**, which issued a corporate guarantee for **Pro Fin Capital Financial Services Limited** and defaulted in payment after the invocation of the guarantee, amounting to Rs. 59,51,46,866/- (Rupees Fifty-Nine Crore Fifty-One Lakh Forty-Six Thousand Eight Hundred and Sixty-Six only). Koshika Bioscience Private Limited is the **Corporate Debtor/Respondent** herein this petition.

Relevant Facts:

2. The Petitioner provided financial assistance of Rs.56,00,00,000/- (Rupees Fifty-Six Crores only) to Principal Borrower which was secured by corporate guarantee issued by the Respondent. The Petitioner has annexed following documents in support of the instant petition:
 - 2.1. Sanction Letter dated 18.01.2021.
 - 2.2. Loan Agreement dated 19.01.2021 executed between the Principal Borrower and the Petitioner.
 - 2.3. Deed of Corporate Guarantee dated 19.01.2021 (“Guarantee Deed”) executed by the Corporate Debtor in favour of the Financial Creditor.
 - 2.4. Hypothecation Deed dated 19.01.2021 executed by Corporate Debtor.
 - 2.5. Mortgage Deed dated 02.09.2021 executed by the Corporate Debtor in favour of the Petitioner creating first charge on the mortgaged properties in favor of the Petitioner.

3. The Corporate Debtor had in the guarantee dated 19.01.2021 under clause 2.1.1, clause 2.1.2 and clause 2.1.4 irrevocably and unconditionally agreed that the Corporate Debtor shall pay the guaranteed amount stipulated in Schedule I of the Guarantee Deed without any delay or demur within three (3) days of demand by the Petitioner, pay the amount as if the Corporate Debtor was a Borrower.
4. Owing to the failure of the Principal Borrower to repay the loan facility on time, an Event of Default occurred under the Loan Agreement. The Petitioner issued a recall notice dated 19.09.2022 to the Principal Borrower and to the Corporate Debtor asking for repayment of the entire loan amount under the Loan Agreement along with interest amounting to Rs. 58,58,58,917/- Rupees Fifty-Eight Crores Fifty-Eight Lakhs Fifty-Eight Thousand Nine Hundred and Seventeen only) within 1(one) day from the date of the receipt of the Notice. This Notice was neither responded to by the Borrower nor by the Corporate Debtor.
5. The Petitioner in Part-IV of the Petition has mentioned the Default Amount to be Rs. 59,51,46,866 and the Date of Default as **21.09.2022**.

Reply of the Corporate Debtor:

6. The only objection raised by the Corporate Debtor in their Affidavit in Reply is that the guarantee issued by the Corporate Debtor is in violation of Section 186 of the Companies Act, 2013 and therefore cannot bind the Corporate Debtor.
7. The Corporate Debtor has stated that the financial position of the Corporate Debtor, as shown in the audited balance sheet as at 31.03.2020, which was prior to the date of issue of the guarantee is as under:

Liabilities	In INR
Authorized Capital	1,00,000

Paid up share capital	1,00,000
Reserves and surplus	(30736)
Long Term Borrowings	8,40,15,000
Short Term provisions	4,15,70,000
Total	12,56,54,264

Assets	In INR
Fixed Assets	12,54,28,000
Cash and cash equivalents	2,26,264
Total	12,56,54,264

8. It is submitted that as per section 186(2) of the Act, the maximum amount upto which the Corporate Debtor could issue guarantee or provide security is Rs. 60,000/- which is 60% of its paid up capital as on 31.03.2020, there being no free reserves and securities premium account as on that date.
9. The Corporate Creditor also created security by way of registered mortgage on its property for the loan of Rs. 56.00 cr. Even in this case also, provisions of section 186(3) of the Act are not complied with.

Additional Affidavits filed by the Petitioner:

10. During the hearing on 24.08.2023, the Petitioner had sought time to place on record, the Certificate issued by IU (NeSL). Though the request was considered and time was granted but Petitioner did not file the same and sought more time on 21.11.2023, this Court was constrained to impose cost of Rs. 50,000/-.
11. Thereafter, the Petitioner has paid cost of Rs. 50,000/- to Bharat Kosh on 12.12.2023 and filed compliance affidavit dated 16.01.2024 with NeSL certificate. In the NeSL Report generated on 03.01.2024, total

outstanding amount is Rs. 68,80,01,477; Default amount is Rs. 17,52,46,498/- and Date of Default is **01.05.2022**.

12. The Petitioner had also filed an additional affidavit dated 08.11.2023 placing on record copy of the Board Resolution passed in the meeting of the Board of Directors of Koshika Bioscience Pvt. Ltd. held on Thursday, 31.12.2020 at its registered office at A/503, Western Edge II, CCI Compound, Western Express High way, Borivali East, Mumbai at 11.30 a.m.
13. The Petitioner submitted that the said board resolution dated 31.12.2020 has been signed by Mr. Abhay Gupta authorizing Mr. Anupam Gupta to execute guarantee on behalf of the Company. It is same Mr. Abhay Gupta, who has signed the Affidavit in Reply also and the guarantee has been signed by Mr. Anupam Gupta hence the guarantee is valid.

Observations & Findings

14. Heard the Ld. Counsel for the Parties and perused the record.
15. It is submitted by the Petitioner that under the Guarantee Deed, the obligation of the Corporate Debtor was joint and several and independent of the obligations of the Principal Borrower. On account of default of the Principal Borrower, and on the invocation of Guarantee notice dated 19.09.2022, the Corporate Debtor failed to discharge its liability. Therefore, there is default on the account of the Corporate Debtor.
16. The Corporate Debtor's sole defense is that the guarantee issued by the Corporate Debtor is in the violation of Section 186 of the Companies Act, 2013 and not binding on the Corporate debtor. Therefore, the Petitioner is not entitled to enforce guarantee which is not valid. According to the Corporate Debtor the maximum guarantee that could be issued by the Corporate Debtor was Rs. 60,000/-. In the event, the Corporate Debtor issued guarantee or provided security in excess of Rs. 60,000, as per

section 186(3), the shareholder’s prior approval by way of special resolution at a general meeting is required.

17. The Petitioner has relied on the Board resolution dated 31.12.2020 and argued that there is no violation of section 186 of the Companies Act, 2013. Even if it is so, it may, at best be the procedural violation by the Company which does not invalidate the guarantee issued by the Corporate Debtor. The said board resolution supplied to it by Corporate Debtor is reproduced below:

“RESOLVED THAT in connection with loan upto Rs. 56,00,00,000/- (Rupees fifty six crores only) (“Loan(s)”) in the aggregate availed/to be availed by the following Borrower(s) (“Borrower(s) from the following Lender(s) (“Lender(s)”):

Loan Agreement(s) Date(s)	Name of the Lender(s)	Name of the Borrower(s)	Loan(s)
19.01.2021	Indiabulls Commercial credit Limited	Pro Fin Capital Services Limited	Upto 56,00,00,000/- (Rupees fifty six crores only)

*and pursuant to the applicable provisions, if any, of the Companies Act, 2013 and other laws and **pursuant to the approval of the members accorded in the general meeting of the members of the Company held on 31.12.2020**, the approval of the Board of Directors of the Company (“Board”) be and is hereby accorded to provide corporate guarantee(s) in favour of the Lender(s) to secure payment of all amounts payable to the Lender(s) under the relevant loan documents relating to the Loan(s) (“Borrower’s Dues”).”*

18. Ld. Counsel for the Petitioner has argued that the Corporate Debtor itself refers to “the approval of the members accorded in the general meeting of the members of the Company held on 31.12.2020.” Therefore, according to the Doctrine of Indoor Management law presumes that the

Company has complied with all the relevant requirements under the law. He relies on the cases of ***MRF Limited v Manohar Parrikar & Ors (2010) 11 SCC 374*** and ***Laxmi Ratan Cotton Mills Co. Ltd Vs. J.K. Jute Mills Co. Ltd.***

19. In addition to the aforesaid, it is also pertinent to note that in the Guarantee Deed, under Clause 3 thereof, the Respondent/Corporate Debtor expressly represented and undertook to the Petitioner/Financial Creditor as under:

“Guarantor hereby represents and warrants to the Lender and undertakes during the subsistence of this Deed (i) the Guarantor has and will have the necessary power to enable the Guarantor to enter into and perform the Guarantor’s obligations under this Deed; (ii) this Deed constitutes the Guarantor’s legal, valid and binding obligations enforceable against the Guarantor in accordance with its terms; (iii) all necessary authorizations to enable the Guarantor to enter into this Deed have been obtained and are and will remain, in full force and effect; (iv) the execution, delivery and performance of this Deed will not conflict with (a) any agreement binding on the Guarantor shall or any of the Guarantor’s assets or (b) any applicable laws, rules or regulations; (v) the Guarantor shall supply to the Lender the financial statements and statements of assets of the Guarantor and as soon as the same become available...”

20. Ld. PCS for the Corporate Debtor has not denied the existence of the Corporate Guarantee dated 19.01.2021 or the Board Resolution dated 31.12.2020 being signed by the Director and having submitted to the Petitioner but points out that in the said board resolution, it is mentioned that the approval of the members was accorded in the general meeting held on 31.12.2020, i.e. the same date of the board resolution. It is to be noted that the letter of sanction of the loan is dated 18.01.2021 and the guarantee is dated 19.01.2021. When the prior approval of shareholders by way of special resolution was purported to be given on 31.12.2020, (as per the board resolution) the letter of sanction was not in existence. Further, there is a reference to loan agreement dated 19.01.2021 in the

board resolution dated 31.12.2020 when even the letter of sanction was not in existence. The Board resolution mentions about the resolution purported to be passed at the general meeting of shareholders about issue of guarantee but there is no mention of shareholders' approval for providing security by the Corporate Debtor to the lender (financial creditor).

21. He further submitted that one of the disbursement conditions in the letter of sanction dated 19.01.2021 provides for the requirement of certified true copy of the resolutions under all applicable laws including the Companies Act 2013 for providing security and guarantee to the lender. No such resolution is ever provided and there is no pleading by the financial creditor in the application to this effect.
22. He further submitted that under section 188 of Indian Contract Act, an Agent, having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act. Section 227 of the Indian Contract Act provides that: When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does, as is within his authority, is binding as between him and his principal.
23. Therefore, the Director/s has/have not acted lawfully and such an unlawful act does not bind the principal, i.e. the Corporate Debtor. Section 399 of the Companies Act 2013 states that any person may, after payment of the prescribed fees, inspect by electronic means any document kept with the Registrar of Companies (ROC) and obtain copies thereof. A special resolution passed by a company's shareholders is required to be filed with ROC under section 117(1) read with section 117(3) of the Companies Act 2013 in form MGT 14. It is available for public inspection under section 399 of the Companies Act 2013 at the portal of the Ministry of Corporate Affairs.

24. The Financial Creditor failed to verify from ROC records whether any such special resolution has been passed by the members of the Corporate Debtor and filed with the ROC under section 117(3) of the Companies Act 2013. The Financial Creditor has constructive notice of the requirement of the Companies Act 2013, namely, section 186(3) of the Companies Act 2013, more so when he knew that the Corporate Debtor with a meagre paid up capital of Rs.1,00,000 cannot issue a guarantee of Rs. 56 Cr. unless it is previously approved by the members of the Corporate Debtor by way of special resolution.
25. We note that Ld. PCS for the Corporate Debtor has not denied that the director of the Corporate Debtor has signed the board resolution and submitted to the Petitioner. He has raised the anomaly in the Board resolution. He has also pointed out that the Petitioner has failed in carrying out due diligence.
26. Considering the rival contentions of the parties and the facts and circumstances we agree with the submission of the Petitioner that after receiving the Board Resolution from the Corporate Debtor, it was well within its rights to presume that all applicable provisions including approval by shareholders in general meeting was obtained by the Corporate Debtor. The **Doctrine of Indoor Management implies** that an outsider whose actions are in good faith and has entered into a transaction with a company can have a presumption that there are no irregularities internally and all the procedural requirements have been complied with by the company.
27. We are supported by the order of NCLT, Mumbai in ***Gajendra Investment Private Limited vs. VR2 Land Development Private Limited CP(IB)/344/MB-IV/2020.***

“Para 5.3 Further, this Bench feels that non-compliance to provisions of section 186 of the Companies Act, 2013 is merely a procedural violation and does not prejudice the claim of applicant financial creditor. Further, the provisions of Maharashtra Money-Lending

(Regulation) Act, 2014 does not come in way of present proceeding, as the said act regulates Money Lending Transactions and any transaction undertaken in contravention of the said act invites penal consequence but does not debar the recovery of such debt.”

28. Further, it is well settled legal principle that no one can take advantage of its own wrong. This is based on latin maxim *commodum ex injuria sua nemo habere debet*, which means that no party can take undue advantage of his own wrong. After signing and issuing of the guarantee on behalf of the Corporate Debtor and after handing over a duly signed board resolution, the same Director cannot wiggle out of it on any ground of anomaly or violation of provisions of Companies Act by the Corporate Debtor.
29. For the purpose of Section 7 Petition, the Adjudicating Authority has to determine whether the “debt” was due and remained unpaid. Applying the doctrine of Indoor Management, we are of the view that Corporate Guarantee issued by the Corporate Debtor is valid and enforceable. Relying on the Record of Default issued by NeSL, we conclude that default has occurred.
30. We refer to the judgement of the Hon’ble Supreme Court in the ***Innoventive Industries Limited vs. ICICI Bank and Another (2018)1 SCC 407***, it was held that-

“The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days receipt of a notice from the adjudicating authority.

*30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, **the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred.** It is of no matter that the debt is disputed so long as the debt is “due” i.e. payable unless*

interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.”

(Emphasis Provided)

31. In view of the above discussions, the Financial Creditor has proved existence of debt and default. Further the debt is in excess of Rs. 1 Crore and thus above the threshold limit mandated in Section 4(1) of the Code. The present Petition was filed on 04.12.2022 and the present Petition is within the limitation period.
32. If the adjudicating authority is of the opinion that a “default” has occurred, it has to admit the application. Therefore, we hereby admit this company petition and also looking at the consent given by the Insolvency Professional, we hereby appoint **Mr. Nitin Om Kothari** as an IRP, with a direction to the Financial Creditors to pay remuneration to the IRP and his expenses until the constitution of CoC.
33. Accordingly, this Company Petition is **admitted** with the following directions:
- a. **The above Company Petition (IB) 247(MB)/2023 is allowed** and initiation of Corporate Insolvency Resolution Process (CIRP) is ordered against **M/s. Koshika Bioscience Private Limited.**
 - b. This Bench appoints **Mr. Nitin Om Kothari**, having Registration No: **IBBI/IPA-001/IP-P)2310/1010-2021/13477**, email: [**cakotharico@gmail.com**](mailto:cakotharico@gmail.com); Address: **5A/301 Alica Nagar, Lokhandwala Township, Kandiwali East, Mumbai-400101** as the Interim Resolution Professional to carry out the functions as mentioned under the Insolvency & Bankruptcy Code, 2016.
 - c. The Financial Creditor shall deposit an amount of Rs. 5 Lakh towards the initial CIRP cost by way of a Demand Draft

drawn in favour of the Interim Resolution Professional appointed herein, immediately upon communication of this Order.

- d. That this Bench hereby directs operation of moratorium under section 14 of Insolvency and Bankruptcy Code, 2016 and prohibits the following:
 - 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 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.
- 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.
34. Before we part with this Judgement, we would like to add the following:
- a. Since there is admission by the Corporate Debtor in reply, that the guarantee is issued in violation of Section 186 of the Companies Act, 2013, let appropriate action u/s 186(13) of the Companies Act, 2013 be initiated in accordance with law against every officer who was in default.
 - b. In the fact and circumstances of the present case, if the Shareholders had not given approval to the issue of the Guarantee then they are entitled to take independent action against the Directors of the Company, in accordance with law.
 - c. We also note that the Principal Borrower is Pro Fin Capital Financial Services Limited which may be covered under NBFC's and there may be violation of RBI guidelines committed by the Principal Borrower. Reserve Bank of India ("RBI") is free to examine the same in accordance with the law.
35. Having stated in point (a) to (c) above, it is also observed that the Financial creditors should be more vigilant in conducting due diligence

and verify the records of the corporate Debtor and its compliances with RoC.

36. Registry shall send a copy of this order to the concerned Registrar of Companies and Reserve Bank of India.
37. The Registry is hereby directed to communicate this order to both the parties and to IRP immediately. The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

Sd/-

CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)

Sd/-

LAKSHMI GURUNG
(MEMBER JUDICIAL)

Arpan, LRA