IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH AT NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 1146 of 2023

[ARISING OUT OF ORDER DATED 16.05.2023 PASSED BY THE ADJUDICATING AUTHORITY (NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH-IV) IN CP(IB) No. 05/MB-IV /2020]

IN THE MATTER OF:

Tulip Hotel Private Limited
(The Suspended Board)
Through A.S. Anantharaman, Suspended Director
Basement Chandermukhi
Behind The Oberoi
Mumbai-400021.

.....Appellant

Versus

1. JC Flowers Asset Reconstructions Pvt. Ltd.
Acting in its capacity as Trustee of JCF YES Trust 2022-23/3 and registered as Asset Reconstruction Company
Under Section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [SARFAESI Act,]
Office at 12th Floor, Crompton Greaves House, Dr. Annie Besant Road,
Worli, Mumbai-400030
Represented by its authorized signatory

2. Mr. Hamar Ashok Adukia,
Resolution Professional of the Corporate Debtor 'Tulip Hotel Pvt Ltd'
Sumedha Management Solutions Pvt Ltd
C-703, Marathon Innova,
Lower Parel (West), Mumbai-400013
Also at address registered with IBBI: -
Anand Bhavan, Jamnadas Adukia Road,
Kandivali West,
Mumbai City, Maharahtra-400067

..... Respondents

Present:

Appellant: **Mr. Virender Ganda, Sr. Advocate with Mr. Raghav Anand, Mr. Ayandeb Mitra, Advocates.**

Respondents: **Mr. Abhishek Anand, Mr. Sajal Jain, Advocates.**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (**'IBC'** in short) by the Appellant arises out of the Order dated 16.04.2023 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench – IV) in Company Petition (IB) No. 05/MB-IV/2020. By the impugned order, the Adjudicating Authority has admitted the petition under Section 7 of the IBC and allowed the initiation of Corporate Insolvency Resolution Process ("**CIRP**" in short) of the Corporate Debtor in its capacity as Corporate Guarantor. Aggrieved by this impugned order, the present appeal has been preferred by the suspended Director of the Corporate Debtor.

2. The salient facts of this case which are relevant to be noticed to decide this matter are as below:

- The Respondent No. 1/Financial Creditor - Yes Bank had filed Section 7 application on 13.12.2019 for initiation of CIRP of Appellant/Corporate Debtor - Tulip Hotels in respect of their debt liability as Corporate Guarantor for loan purportedly disbursed by the

Financial Creditor to Cox & Kings Ltd. (hereinafter referred to as '**Borrower No. 1**') and to Ezeego One Travels and Tours Ltd. (hereinafter referred to as '**Borrower No.2**').

- Yes Bank has claimed to have sanctioned a Cash Credit Facility to Borrower No. 1 on 30.05.2017 for Rs.100 cr. To disburse the said loan, a Master Facility Agreement was executed on 06.06.2017. Subsequently, on 26.06.2018, the Cash Credit Facility was enhanced to Rs.350 cr by an Addendum to the Facility Letter and in pursuance thereof a Supplemental Facility Agreement was executed on 26.06.2018. Subsequently, an Addendum to the Facility letter followed by a Supplemental Master Facility Agreement was executed on 12.03.2019 for providing enhanced Cash Credit Facility up to Rs. 450 cr. which mentioned the additional security of Corporate Guarantee to be provided by the Appellant. On 26.04.2019, the Appellant executed the purported Deed of Guarantee in favour of Yes Bank to stand guarantee for the loan facility in respect of Borrower No.1 to the extent of Rs.450 cr. On 20.11.2019, the Yes Bank invoked the Corporate Guarantee demanding the Appellant to pay Rs.450 cr.
- Yes Bank has claimed to have sanctioned Cash Credit Facility to Borrower No. 2 on 02.05.2017 for a term loan of Rs.100 cr and a Facility Letter issued. To execute this Cash Credit Facility, a Term Loan Agreement was entered into on 16.05.2017. A purported deed of mortgage was executed by the Appellant on 12.02.2018 in favour of the Yes Bank for a property at Kerala. Subsequently, a Short-Term Loan

Agreement was signed and a Facility letter was issued on 27.08.2018 sanctioning Rs. 350 cr. An Addendum to the Facility letter dated 10.07.2019 was issued by Yes Bank which mentioned the additional security to be provided by the Appellant. On 10.07.2019, the Appellant executed the purported Deed of Guarantee in favour of Yes Bank to stand guarantee for the loan facility in respect of Borrower No.1 to the extent of Rs.450 cr. On 26.08.2019, the Yes Bank invoked the Corporate Guarantee demanding the Appellant to pay Rs.450 cr.

- During the pendency of Section 7 application, Yes Bank had assigned the debt to J.C. Flowers Asset Reconstruction Pvt. Ltd. (hereinafter referred to as '**JCF**').
- JCF, being the assignee, filed an IA No.798 of 2023 for substitution of their name in place of Yes Bank in the Section 7 proceedings which was allowed by the Adjudicating Authority on 06.03.2023.
- The Appellant filed IA No. 362 of 2023 challenging the assignment of debt in favour of JCF which was dismissed by the Adjudicating Authority on 23.03.2023.
- The Corporate Debtor having failed to repay the amount as mentioned in the letters of invocation of guarantee dated 26.08.2019 and 20.11.2019 aggregating Rs.900 cr, the Respondent No. 1 filed the Section 7 application which has been admitted by the Adjudicating Authority vide the Impugned Order.
- Aggrieved by the Impugned Order, the present appeal has been preferred by the Appellant.

3. We have heard Shri Virender Ganda, Learned Senior Counsel appearing for the Appellant and Shri Abhishek Anand appearing for the Respondent No.1.

4. Making his submissions, the Learned Senior Counsel for the Appellant stated that that the Section 7 application filed by one Mr. Rahul Dodeja for the Respondent No. 1 on the basis of Power of Attorney without any supporting Board Resolution of the Financial Creditor is not maintainable. It has also been contended that the Corporate Debtor was not related to Borrowers No.1 and 2 and have no cross holdings in them and never been funded by them. Hence, the question of acting as their Corporate Guarantor did not arise. In any case it was pointed out that the Corporate Debtor had never agreed to issue any Deed of Guarantee. It was further submitted that the alleged Deeds of Guarantee dated 26.04.2019 and 10.07.2019 which has been claimed by the Respondent No.1 to have been executed by the Yes Bank in respect of Borrowers No. 1 and 2 are forged and fabricated documents. It was vehemently contended that there is no Board resolution of the Corporate Debtor company or any authorisation issued by them to sign and execute the Deeds of Guarantee. Submission was also pressed that the signatories of the alleged Guarantee Deeds have denied to have signed the Deeds and have claimed that their signatures on the Deed of Guarantee were forged. Further, the Appellant had also filed a police complaint flagging the issue of fabrication of Deed of Guarantee. In such circumstances, reliance could not have been placed by the Adjudicating Authority without ascertaining the veracity of these documents.

5. It is also submitted that in terms of Banking Regulation Act, it is required for banks and financial institutions to obtain Deeds of Guarantee prior to disbursement of loan. There was no whisper of any Deeds of Guarantee which was required to be signed before disbursement of the loan. Moreover, in the present case there is nothing to show that the Borrowers had either agreed to provide any Deed of Guarantee in favour of Yes Bank any time before or at the time of the disbursement of loan to the Borrowers. The loan disbursement took place in 2017 while the alleged Deed of Guarantee got executed in 2019. Furthermore, the Deed of Guarantee in respect of Borrower 1 nowhere specifies as to for which loan facility the Deed of Guarantee was executed. Pointing out at other infirmities, it was stated that from the stamp paper affixed on the Deed of Guarantee, it can be seen that the same was purchased in New Delhi and that it was executed in New Delhi. The registered Office of the Corporate Debtor being in Mumbai, it was contended that there was no occasion for any Director of the Appellant to have come to Delhi to sign the said Deed and this puts question marks on the authenticity of the Deeds. In the absence of valid Guarantee Deeds, the Appellant was not entitled to invoke the alleged liability on the Deed of Mortgage. The Adjudicating Authority also committed an error in not noticing that the Deed of Guarantee was not signed by any authorised signatory on behalf of Yes Bank. Given the suspicious circumstances surrounding the signing and execution of the Deeds of Guarantee, it was an error on the part of the Adjudicating Authority to apply the Doctrine of Indoor Management in holding the Deeds of Guarantee to be valid.

6. On the Deeds of Mortgage, it was argued that both the Deeds of Mortgage of 12.02.2018 and the Supplemental Deed of Mortgage dated 13.05.2019 were forged and fabricated documents. The purported mortgage deed was signed by one Hardik Walia who was not authorised to execute such deeds and neither was he related to the Corporate Debtor and hence a police complaint had been registered in the matter. Furthermore, the underlying property with respect to the purported mortgage deeds located in Kollam District in Kerala could not have been mortgaged since an exclusive charge had already been created in favour of IFCI Ltd. in respect of this immoveable property.

7. Refuting the submissions made by the Appellant, the Learned Counsel for Respondent No. 1 submitted that Section 7 application has been filed on behalf of the Respondent No. 1 by Mr. Rahul Dodeja with proper authorisation. It was submitted that Mr. Dodeja was duly authorised by means of power of attorney to act as the authorised representative of the Financial Creditor while filing the Section 7 application. It was also stated that the said power of attorney was issued pursuant to a duly passed Board Resolution of the Financial Creditor.

8. As regards the tenability and validity of the Deeds of Guarantee, it was vehemently contended that the Appellant has raised a frivolous ground as an afterthought that the Deeds of Guarantee were forged and fabricated. In fact, these Deeds of Guarantee were executed by the Corporate Debtor in pursuance of Board Resolution passed by them on 26.03.2019. It has been pointed out that the Appellant never challenged the Deeds of Guarantee on

grounds of forgery in any court of law prior to filing of Section 7 application though these were executed in 2019. In the absence of any findings by any court of competent jurisdiction holding the Deeds of Guarantee to be invalid, such contentions cannot be raised by the Corporate Debtor when IBC proceedings have been initiated against the Corporate Debtor. Even the police complaint which had been lodged by the Appellant with regard to the forgery of documents, the investigations thereon have not been taken cognisance of by any court of law. It was pointed out that the Appellant had raised baseless issues about the validity of the Deed of Guarantee with the ulterior motive of delaying the CIRP process. It has also been submitted that the contention raised by the Appellant that since the disbursement of the loan had taken place prior to the execution of Deeds of Guarantee this rendered the said Deeds invalid lacks merit. It was pointed out that it is settled law that even past consideration made is sufficient for a contract of guarantee to be valid. It was also pointed out that it is settled law of contractual jurisprudence that a party to a contract need not be present in person for its execution at the place written on the agreement.

9. It was also contended that the Doctrine of Indoor Management is squarely applicable in the present case since the Respondent No. 1 was entitled to believe that the Appellant had been authorised by its Board of Directors to provide Corporate Guarantee and that the Deeds of Guarantee had been signed by their authorised representatives. These being matters of internal management of the Corporate Debtor, the Respondent No. 1 was

entitled to believe that what was being done by the Appellant was right and valid.

10. It was further submitted that in the Addendum to Facility Letter in respect of Cox and Kings of 13.03.2019, the revised facility description clearly shows the new term under the head of security as "Corporate Guarantee of Tulip Star Hotels Ltd and Tulip Hotels Pvt Ltd." Similarly in the Addendum to Facility Letter in respect of Ezeego One Travel & Tours Ltd of 02.05.2017, the revised facility description shows the new term under the head of security as "Corporate Guarantee of Tulip Star Hotels Ltd and Tulip Hotels Pvt Ltd." It was further submitted that the Corporate Debtor had executed a Deed of Mortgage dated 12.02.2018 in favour of Yes Bank with Vistra ITCL acting as the security trustee in respect of facility letter of 02.05.2017. This charge was duly registered with MCA. There was also a Supplementary Deed of Mortgage dated 13.05.2019 with the same security trustee for a sum of Rs.850 cr and a certificate of Modification of Charge was filed with the MCA. Since, neither the charge nor the modification thereof was disputed by the Appellant either with the MCA or before any appropriate legal forum at an earlier stage, the existence of mortgage deeds stands clearly established. It was also strenuously asserted that the notice for invocation of the Corporate Guarantee was properly issued. It is also submitted by the Learned Counsel of the Respondent No.1 that the contention raised by the Appellant that parallel proceedings cannot be taken up against the Principal Borrower and the Corporate Guarantor is incorrect as there is no bar on the Financial Creditor to proceed simultaneously against both. Since, both the Borrowers No.1 and

2 had defaulted in respect of the facilities extended by the Yes Bank and the Adjudicating Authority had admitted the Section 7 petition vide No. CP(IB)03/MB/2020 on finding them to be in default of debt, which was due and payable, there is sufficient ground for allowing admission of Section 7 Petition against the Corporate Debtor/Appellant having extended corporate guarantees and failed to discharge their liability post invocation of guarantees.

11. We have heard the Learned Counsel of both parties and perused the records carefully.

12. The first issue for our consideration is whether the instant Section 7 application filed by Shri Rahul Dodeja on behalf of Respondent No.1 suffered from any infirmity as it is the case of the Appellant that this instant petition has been filed by a person on the basis of Power of Attorney without any supporting Board Resolution of the Financial Creditor and hence not maintainable. It is the contention of Respondent No. 1 that Mr. Rahul Dodeja who filed the Section 7 proceedings under IBC was duly authorised by a Power of Attorney dated 03.07.2019 to file the application and that there was a proper Board Resolution dated 12.03.2019 to that effect. Hence, the filing of the Section 7 application by Mr. Rahul Dodeja cannot be put to question. In support of their contention, reliance has been placed on the judgment of this Tribunal in the matter of ***Sameer Bansal vs Canara Bank & Ors*** in ***CA(AT)(Ins)No.1188 of 2020*** (‘***Sameer Bansal judgement***’ in short).

13. To begin with our analysis, we may take a look at Rule 4(1) of the "Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 which prescribes the modalities of how a Financial Creditor is to make an application against the Corporate Debtor under Section 7 of the IBC. Rule 4(1) reads as follows :-

> "**4. *Application by financial creditor*** – (1) *A financial creditor, either by itself or jointly, shall make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 7 of the Code in Form 1, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016."*

If we notice Rule 4(1) supra, an application against the Corporate Debtor under Section 7 of the IBC requires to be made in Form 1 accompanied with relevant documents and records. In the present case, when we look at the Form 1 of Section 7 in Part - I filled in by the Financial Creditor, it has been clearly stated at Sl. No.5 that '*A copy of the Power of Attorney dated July 8, 2019 authorising Mr. Rahul Dodeja to act on the behalf of the petitioner is annexed herewith and marked as Exhibit 2*' as is placed at page 90 of the Appeal Paper Book ('**APB**' in short). When we look at the Power of Attorney, we notice that the same has been issued pursuant to Board Resolution of 12.03.2019 empowering Mr. Rahul Dodeja to file the Section 7 application as is seen at page 103 of the APB. For reasons of removing all ambiguities in this regard, we would like to extract the relevant portions of the Power of Attorney as below:

"*TO ALL TO WHOM THESE PRESENTS SHALL COME I, Ravneet Gill, Managing Director and Chief Executive Officer (hereinafter referred to as the "MD&CEO") of YES Bank Limited, a banking company within the meaning of section 5(c) of the Banking Regulation Act, 1949 incorporated under the provisions of the Companies Act, 1956 and having its registered office at Yes Bank Towers, IFC-2, 15th Floor, Senapati Bapat Marg, Elphinstone (W), Mumbai-400013 (hereinafter referred to as the "Bank" which term shall include its successors).*

WHEREAS ***pursuant to the Resolution passed by the Board of Directors of the Bank on March 12, 2019****, the MD & CEO of the Bank has been duly authorized to manage the affairs of the Bank.*

AND WHEREAS for the purpose of efficiently carrying on the management of the office the various departments and branches of the Bank in India, I ***deem it necessary and expedient to appoint officer(s)/heads of department(s) of the Bank and to delegate to him/them such of the powers conferred on me*** *in the manner and to the extent hereinafter specified.*

NOW KNOW YE AND THESE PRESENTS WITNESSETH that I, the MD&CEO, in exercise and in pursuance of the powers in that behalf vested in me do hereby nominate, constitute and appoint Hitesh Darji (Emp No. HDE3845019), President – Asset Reconstruction & Management, Sanjeev Baria (Emp No. SBE0012417) GEVP – Emerging Corporates Banking, ***Rahul Dodeja (Emp No. RDE4626027) SVP – Emerging Corporates Banking****, Pavan Wadhwani (Emp No. PWE4576014), SVP – Emerging Corporates Banking, Loveleen (Emp No. LNE4699030), AVP – Asset Reconstruction & Management, severally to be the true and lawful attorney of the Bank (hereinafter referred to as "the Attorney)* ***and confer upon the Attorney the following powers and authorities to act on behalf of the Bank and in the name of the Bank****, to execute and perform all or any of the following acts, deeds, matters and things jointly or severally* ***in relation to Loan Account/credit facilities*** *sanctioned to Ezeego One Travels & Tours Limited and* ***also in relation to its hypothecators/Mortgagors/ Guarantors****:-*

1. …….

2. …….

3. …….

4. ***To file suits for recovery of loans advanced or deposits made, defend suits filed against the Bank*** *pertaining to the Bank's properties and other assets and to compromise such suits;*

5. ***To file/defend application(s) petition(s) under Insolvency and Bankruptcy Code 2016 and rules made there under*** *(as amended from time to time) and initiate corporate insolvency resolution process against Ezeego One Travels & Tours Limited or any of the security providers as may be applicable;*

(Emphasis supplied)

14. Given this backdrop of the Power of Attorney pursuant to Board Resolution, it may be constructive to now go through the relevant portions of the ***Sameer Bansal judgement*** supra of this Tribunal which is to the effect:

"14. We may also notice the judgement of the Hon'ble Supreme Court in ***"Rajendra Narottamdas Sheth & Anr. vs. Chandra Prakash Jain and Anr.-(2022) 5 SCC 600"****. The Hon'ble Supreme Court has examined the question as to whether an Application under Section 7 of the Code through Power of Attorney Holder for initiating CIRP is permissible. An Application under Section 7 was filed where objection was raised by the Corporate Debtor that Application on the basis of Power of Attorney was not maintainable. Submission of the Counsel for the Appellant was noted in paragraph 9 of the judgment, which is to the following effect:-*

"Maintainability of the application under Section 7 when filed by a power of attorney holder

9. Mr. Rana Mukherjee, learned Senior Counsel appearing for the Appellants, submitted that the application filed on behalf of the Financial Creditor

under Section 7 of the Code was on the basis of a power of attorney. He relied upon a judgment of the NCLAT in Palogix Infrastructure Private Limited v. ICICI Bank Limited in which it was held that an 'authorised person', distinct from a 'power of attorney holder', can file an application under Section 7 and that a 'power of attorney holder' is not competent to file an application on behalf of a financial creditor. According to Mr. Mukherjee, the defect in filing of the application by an unauthorised person is not curable. Assuming it is curable, the Financial Creditor failed to rectify the defect within the time stipulated under Section 7 (5) of the Code, in spite of an order passed by the Adjudicating Authority on 22.01.2020 granting time to the Financial Creditor. He submitted that the person who filed the application under Section 7 of the Code is not the authorised representative of the Financial Creditor and therefore, the application was liable to be dismissed."

15. The Hon'ble Supreme Court rejected the objection of the Appellant and while noticing the judgement of this Tribunal in ***'Palogix Infrastructure Pvt. Ltd."*** *(supra) has approved the observations made in paragraph 41. Paragraphs 13, 14 & 15 of the judgment are as follows:-*

"13. The NCLAT in its judgment in Palogix Infrastructure (supra) held that a 'power of attorney holder' is not competent to file an application under Section 7 on behalf of the financial creditor. However, the NCLAT made certain further observations, as reproduced below:

"41. In so far as the present case is concerned, the 'Financial Creditor'-Bank has pleaded that by Board's Resolutions dated 30th May, 2002 and 30th October, 2009 , the Bank authorised its officers to do needful in the legal proceedings by and against the Bank. If general authorisation is made by any 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant' in favour of its officers to do needful in legal proceedings by and against the 'Financial Creditor'/'Operational

Creditor'/'Corporate Applicant' in favour of its officer, mere use of word 'Power of Attorney' while delegating such power will not take away the authority of such officer and for all purposes it is to be treated as an 'authorization' by the 'Financial Creditor'/'Operational Creditor'/'Corporate Applicant' in favour of its officer, which can be delegated even by designation. In such case, officer delegated with power can claim to be the 'Authorized Representative' for the purpose of filing any application under section 7 or Section 9 or Section 10 of 'I&B Code'."

14. The NCLAT was of the opinion that general authorisation given to an officer of the financial creditor by means of a power of attorney, would not disentitle such officer to act as the authorised representative of the financial creditor while filing an application under Section 7 of the Code, merely because the authorisation was granted through a power of attorney. Moreover, the NCLAT in Palogix Infrastructure (supra) has held that if the officer was authorised to sanction loans and had done so, the application filed under Section 7 of the Code cannot be rejected on the ground that no separate specific authorisation letter has been issued by the financial creditor in favour of such officer. In such cases, the corporate debtor cannot take the plea that while the officer has power to sanction the loan, such officer has no power to recover the loan amount or to initiate corporate insolvency resolution process, in spite of default in repayment. We approve the view taken by the NCLAT in Palogix Infrastructure (supra).

15. In the present case, Mr. Praveen Kumar Gupta has been given general authorisation by the Bank with respect to all the business and affairs of the Bank, including commencement of legal proceedings before any court or tribunal with respect to any demand and filing of all necessary applications in this regard. Such authorisation, having been granted

by way of a power of attorney pursuant to a resolution passed by the Bank's board of directors on 06-12-2008, does not impair Mr. Gupta's authority to file an application under Section 7 of the Code. It is therefore clear that the application has been filed by an authorised person on behalf of the Financial Creditor and the objection of the Appellants on the maintainability of the application on this ground is untenable."

16. The above judgment of the Hon'ble Supreme Court clearly holds that an Application under Section 7 even if it is on the basis of Power of Attorney which is referable to the Resolution of the Board is fully maintainable.

17. In the present case, we have looked into the Power of Attorney which has been brought on record and in paragraph 20 of the Power of Attorney, there is a clear mention that Power of Attorney was executed by Director of Bank on the basis of Resolution dated 24-01-2005 passed by the Board of Directors in the meeting held at Bangalore. The above part which is in paragraph 20 of the Power of Attorney dispels all doubt regarding maintainability of the Application."

(Emphasis supplied)

15. When we apply the ratio of the ***Sameer Bansal judgement*** supra to the facts of the present case, we find that Mr. Rahul Dodeja had been provided general authorisation by the Yes Bank by way of Power of Attorney pursuant to a Board Resolution to file necessary applications for commencement of legal proceedings not only against the Borrower but also against their Hypothecators/Mortgagors/Guarantors. Given this position, we are clear in our minds that Section 7 application was filed in the present case by a duly authorised person on behalf of the Financial Creditor and thus objection raised by the Appellant in this regard are misconceived and hence not sustainable.

16. The second issue which has come up for our consideration is the tenability of the Deeds of Guarantee in question in the context of the allegation levelled by the Appellant that they were products of fraud and fabrication.

17. It is the contention of the Appellant that the Deeds of Guarantee were forged and fabricated documents and the signatory, Shri Ravindra G. Mohite on behalf of the Corporate Debtor in the Deed of Guarantee dated 26.04.2019 and Shri A.S. Anantharaman in the Deed of Guarantee dated 10.07.2019 have denied their signatures on these documents. It has been further contended that there is nothing on record to show that there was any Board Resolution passed by the Corporate Debtor on 26.03.2019 as has been claimed by the Respondent No.1 which authorised the signing and execution of the alleged Deeds of Guarantee. The alleged claim of the Respondent No. 1 that a Board Resolution had been passed on 26.03.2019 is false since no Board meetings were held between 13.02.2019 to 29.05.2019. Thus, when the company records reveal that there was no Board meeting held on that date at all authorising them to sign and execute the alleged Deeds of Guarantee, the same should not have been relied upon by the Adjudicating Authority in fastening any liability on the Appellant. The Appellant having not agreed to provide the Deeds of Guarantee in favour of the Financial Creditor, the Deeds of Guarantee were not in existence. It has also been contended that there was no mention of any Corporate Guarantee in respect of Borrower No. 2 to be executed by the Appellant in the Facility Agreement prior to the Board Resolution. The first time that there is any mention of Corporate Guarantee in respect of Borrower No.2 is in the Addendum of 10.07.2019. It has also

been questioned that if the Corporate Guarantee issue was a later contemplation and was reflected in the Addendum on 10.07.2019 for the first time then how could this subject figure in the Board Resolution of 26.03.2019. Moreover, as a police complaint had also been lodged on 28.02.2020 in respect of Deed of Guarantee dated 10.07.2019 signed by Mr. A.S. Anantharaman, the Adjudicating Authority ought to have taken due note of such police complaints. Much emphasis has been laid on the fact that handwriting expert in its opinion dated 01.10.2020 had also indicated forgery of signature in respect of Mr. A.S. Anantharaman. Assailing the impugned order, it has been contended that all these aspects have been completely overlooked by the Adjudicating Authority.

18. The Learned Counsel for the Respondent No.1 has rebutted the above objections by submitting that in terms of the Board Resolution of the Appellant/Corporate Debtor passed on 26.03.2019, Mr. Ravindra G. Mohite and Mr. Sagar Deshpande were the authorised signatories of the Corporate Debtor. Further in accordance with the Articles of Association of the Corporate Debtor Company, they were authorised to both sign and execute the Deed of Guarantee and also affix the Common Seal of the Company thereto. It is the contention of the Respondent No.1 that since the power of management of the affairs of the company is vested in the Board of Directors and in the present facts when the Board of Directors of the Corporate Debtor has passed a Resolution authorising certain persons to sign and execute Deeds of Guarantee and affix the common seal of the Company, the Respondent No.1 was well within its rights to assume that such a Resolution was passed in

good faith and the Deeds of Guarantee were signed by authorised persons. When the Appellant themselves did not endeavour to challenge the said Board Resolution, the Respondent No. 1 cannot be blamed for relying on the Board Resolutions which vested upon the signatories the lawful authority to sign the Deeds of Guarantee.

19. At this juncture we may take notice of the contested Board Resolution of 26.03.2019 which is on record at page 281 of the APB as reproduced below:

> "CERTIFIED TRUE COPY OF THE **RESOLUTION PASSED BY THE BOARD OF DIRECTORS OF TULIP HOTELS** PRIVATE LIMITED AT ITS MEETING HELD AT REGISTERED OFFICE ON **26TH MARCH 2019**
>
> TO **ISSUE CORPORATE GUARANTEE IN FAVOUR OF YES BANK LIMITED** FOR EXTENDING CREDIT FACILITIES TO COX & KINGS LIMITED:
>
> *The Board was informed that Cox & Kings Limited, had availed financial assistance from Yes Bank Limited for Rs. 450 Crs. Pursuant to the said Sanction issued by Yes Bank Limited to Cox & Kings Limited, the Company was required to provide Corporate Guarantee in favour of Yes Bank Limited for securing the said facilities. Post discussion, it was:*
>
> *"RESOLVED THAT consent of the Board be and is hereby accorded for providing Corporate Guarantee in favour of Yes Bank Limited for extending Financial Assistance to M/s Cox & Kings Limited, for an amount aggregating to Rs.450 Crs (Rupees Four Hundred Fifty Crores only).*
>
> *RESOLVED FURTHER THAT Mr. Ravindra G. Mohite, Director of the Company, be and is hereby authorized severally to execute the Corporate Guarantee on behalf of the Company and all other documents, deeds, undertakings etc. for the purpose of securing the*

said credit limits and to take all such step as would be necessary in this regard.

RESOLVED FURTHER THAT the Common Seal of the Company, if require, be affixed in presence of Mr. Ravindra G Mohite, Director and Mr. Sagar Deshpande, authorized signatory who shall countersign the same in token thereof in accordance with the Articles of Association of the Company.

RESOLVED FURTHER THAT copy of the foregoing resolution certified to be true by any two Director be delivered to Bank."

(Emphasis supplied)

20. This brings us to the impugned order which has dwelled upon this issue and concluded that the Doctrine of Indoor Management comes to the rescue of the Respondent. The relevant extracts of the Impugned Order are as extracted below:

"7.3 As regards the board meeting this bench feels that the irregularity in this respect pointed out by the Corporate Debtor is saved by Doctrine of Indoor Management and cannot prejudice the right of the applicant Financial Creditor…."

21. The Learned Counsel for the Respondent No. 1 has contended that the impugned order is justified as the Doctrine of Indoor Management is squarely applicable in this case. In support of their contention, they have relied on the decision in ***Royal British Bank vs Turquand (1856) 6 E.&B.327*** wherein the Doctrine of Indoor Management was propounded and also on the judgment of the Hon'ble Bombay High Court in the matter of ***Raja Bahadur***

and others vs The Tricumdas Mills Company Ltd. (1912) ILR 36 BOM 564 wherein the Turquand rule was followed.

22. Per contra, it is the case of the Appellant that when there was ample evidence that there existed suspicious circumstances surrounding the Corporate Guarantees which warranted further enquiries for reasons of forgery and fabrication, the Adjudicating Authority should have considered this aspect before passing the Impugned Order. It was further mentioned that certain preconditions were mentioned in the Addendum to the Facility Letter dated 13.03.2019 and in the Addendum to the Facility letter dated 10.07.2019 as placed at pages 261 and 482 of APB. When these preconditions were drawn out by Yes Bank itself and these were to be ensured by them before disbursement of loan, the Yes Bank should have exercised due diligence. Having not done so, Yes Bank cannot absolve itself of having failed to exercise due oversight by taking refuge of the Doctrine of Indoor Management.

23. Coming to our analysis and findings, we would like to begin by first appreciating the essence and nuances of this doctrine of indoor management. This doctrine proceeds on the premise that third parties who enter into a contract with any company is protected against any irregularities in the internal procedure of the company. Persons transacting with companies are entitled to assume that internal company rules have been complied with even if they are not. In other words, the company's indoor affairs are to be treated as the company's outlook. What happens internally in a company is not a matter of public knowledge and hence an outsider can only presume the intentions of a company and cannot be expected to know the information

he/she is not privy to. Only if the compliance or non-compliance with an internal requirement becomes ascertainable from the company's public documents, the protective shield of the doctrine of indoor management disclosure gets ruptured as the countervailing doctrine of constructive notice comes into play.

24. In extending this doctrine to the facts of the present case, we find that the Adjudicating Authority held that there was clearly no requirement for Yes Bank to look into the company's internal workings. The Yes Bank enjoyed the right to infer that the Board Resolution authorizing the signing of the Deeds of Guarantee was legitimately passed and that the Corporate Debtor was consequently bound by the Deed of Guarantee even if the internal requirements and procedures had not been complied with by the Corporate Debtor.

25. The Learned Counsel for the Appellant has relied on the judgement of the Hon'ble Supreme Court in the matter of ***MRF Ltd vs Manohar Parrikar and Ors (2010)11 SCC 374*** to contend that the protection of the Doctrine of Indoor Management is not available where the circumstances surrounding the contract are suspicious and requires inquiry. We are fully in agreement with the above proposition of the law as laid down by the Hon'ble Apex Court. However, the facts of the case therein were clearly distinct in that the notification under challenge had been issued by the Government of Goa in violation of the Rules of Business of the Government of Goa. It has also been asserted by the Appellant that the Adjudicating Authority should have used its jurisdiction to enquire into the forgery and fabrication of the Deeds of

Guarantee before admitting the Section 7 application and in their support, the Appellant has also relied upon the judgement of this Tribunal in ***Ocean Deity Investment Holdings Limited, PCC vs Suraksha Asset Reconstruction Limited in CA(AT) (Ins) No.927 of 2021***. We however feel that this judgment also cannot come to the aid of the Appellant since in the present facts of the case no conclusive findings of any statutory/quasi-judicial body have come to surface which established the element of forgery and fabrication. Given the fact that the Appellant has not challenged the Deeds of Guarantee before any Court or appropriate forum and also given the fact that the Board Resolution authorising the signing and execution of the Deed of Guarantee has not been questioned in any proceedings before a competent court by the Appellant, raising such a bogey now that the Adjudicating Authority should have looked into the veracity of these documents lacks merit. The Appellant always had the liberty to move any appropriate forum for enquiring into the genuineness of the Deeds of Guarantee which it has not done and now cannot invoke the summary jurisdiction of the Adjudicating Authority for determination of the genuineness of these documents.

26. Thus, to answer the second issue, we hold that in the given circumstances, when there is no cognisance which has been taken by any court of law, civil or criminal, of the Deeds of Guarantee being forged and fabricated, in all fairness, the Respondent No. 1 is fully protected in proceeding on the assumption that the signing and execution of the Guarantee Deeds has taken place in good faith and is therefore a valid and legal document. We are also of the considered opinion that such disputes

which involve fraud and forgery in respect of contractual documents cannot be investigated and decided by the Adjudicating Authority which has only been conferred the benefit of summary jurisdiction. Such issues can be raised only in a civil suit and hence any attempt to convert the proceedings under the IBC into civil proceedings akin to a trial cannot meet our approval since it clearly transgresses the legislative intent behind the IBC framework. As regards the alleged handwriting expert's opinion which has been adverted attention to by the Appellant to establish forgery, the Adjudicating Authority in exercise of summary jurisdiction is not expected to scrutinise such opinions and rely upon the assessment contained therein and more so when the opinion has been disputed as not being an independent third-party opinion. We find no error on the part of the Adjudicating Authority to have desisted from entering into the realm of contractual disputes as it would tantamount to judicial overreach.

27. This brings us to the third issue raised by the Learned Senior Counsel of the Appellant that the Deed of Guarantee was required to be obtained before the disbursement of loan in terms of Section 127 of The Indian Contract Act,1872. Before we dwell into this issue, we may notice the said statutory provision along with the illustrations provided which is to the effect:

> ***127. Consideration for guarantee***.—
>
> *Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.*
>
> *Illustrations*

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

28. From a plain reading of the above construct, the word 'done' has a clear and unambiguous meaning denoting an act that has ended. Hence, when the legislature has actually used the word 'done', which in its ordinary sense denotes any act that has been completed, it must be assumed that the intention of the legislature is to include 'anything' done by the lender for the benefit of the borrower in the past to be valid consideration. Hence, the only plain and natural meaning that could be deciphered would be that any act that has been completed for the benefit of the borrower would constitute consideration. In case of a conflict between the section and its illustration, the latter must give way to the former. It can thus be positively concluded that an act done for the benefit of the principal debtor in the past would constitute a valid consideration for an agreement of guarantee with the surety.

29. The contention of the Appellant that Section 127 of the Contract Act necessitated the disbursement of loan to precede the Deed of Guarantee also

does not hold good in view of a catena of judgements passed by the various Hon'ble High Courts wherein it has been held that the language of Section 127 was clear and unambiguous to also cover past transactions and past promises prior to giving a guarantee or surety. Without enlisting the entire catena of judgements, we feel that it would suffice to note the findings of the Hon'ble Delhi High Court in the matter of ***Poysha Oxygen Pvt. Ltd. Vs Ashwini Suri & Others 2009 (112) DRJ 169*** which has been relied upon by the Respondent No.1. The relevant extract from the above judgement is as reproduced below:

> *"20. I am however not only unable to accept the reasoning of the single judge of the Rajasthan High Court but may mention that this court also in Madan Lal Sobti aforesaid though referring to the Ram Narain case, nevertheless held that consideration even though subsequent, once shown was sufficient and the deed of guarantee could not be avoided on such ground.*
>
> *21. In view of the judgments of several High Courts mentioned hereinabove and with which I respectfully concur, the interpretation placed in the award on illustration (c) to Section 127 of the Contract Act cannot be accepted. I hold that a past consideration is a sufficient consideration for the contract of guarantee."*

30. Thus, to answer the third issue, we are of the considered opinion that it is not necessary that grant of loan to the principal debtor by the creditor must be necessarily contemporaneous with the execution of Guarantee Deeds and hence the legality and subsistence of the present Deeds of Guarantee cannot be questioned on this ground.

31. This brings us to the fourth principal issue raised by the Appellant that the Deeds of Mortgage dated 12.02.2018 and Supplementary Deed of Mortgage dated 13.05.2019 were forged. It was pointed out that the Mortgage Deed had been signed by Mr. Hardik Walia who was not related to the Appellant Company nor authorised on behalf of the Appellant to execute any such Mortgage Deed and that a police case was filed in this regard. These Mortgage Deeds purportedly created a charge against the property located in Kerala and since an exclusive charge had already been created in respect of the charged property in favour of IFCI Ltd, it could not have been charged to Yes Bank without permission of IFCI. It is also the case of the Appellant that they had disputed and objected to the creation of charge in respect of the mortgage property and had sent an email in this regard to MCA on 21.09.2019. It is therefore the case of the Appellant that reliance by the Adjudicating Authority on the mortgage deeds is erroneous.

32. Before we give our findings on this issue, we would first like to see how the Adjudicating Authority has treated this matter in the impugned order. The relevant findings are as below:

> *"7.3……. As regards forging of signature on the mortgage deed, this bench feels that the credit facilities enjoyed by the Principal Borrowers are secured by Corporate Guarantee also, in addition to the mortgage on the property of the Corporate Debtor. It is pertinent to note provision of section 80 of the Companies Act, 2013 providing that where any charge on the property or assets of a company or any of its undertakings is registered u/s 77, any persons acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be deemed to have notice of the charge from the date of such registration. It is not in dispute that a charge in favour of applicant is registered with MCA*

in the present case. Accordingly, the liability of Corporate Debtor cannot be done away even if their irregularity in the execution of the mortgage deed or creation of mortgage without NOC from existing mortgagee i.e. IFCI pointed out by the Corporate Debtor is believed."

33. If we look at the facts of the present case, it is an undisputed fact that the Appellant has executed a Deed of Mortgage on 12.0.2018 in favour of Yes Bank with Vistra ITCL in respect of facility letter dated 02.05.2017 which charge was registered with MCA. This charge has not been disputed by the Corporate Debtor either with MCA or before any appropriate legal forum. Further, even the Supplementary Deed of Mortgage dated 13.05.2019 was executed, the charge registered with MCA was duly modified and this Modification of Charge has also not been disputed by the Corporate Debtor. It is significant to note that these Deeds of Mortgage were executed in furtherance of the Deed of Guarantee. Moreover, the Deeds of Mortgage contained the signature and the common seal of the Appellant besides bearing the stamp of registering authority thereby authenticating its execution. Since, neither the charge nor the modification thereof was disputed by the Appellant either with the MCA or before any appropriate legal forum at an earlier stage and the mortgage deeds were executed in furtherance of the Deed of Guarantee and the notice for invocation of the Corporate Guarantee was issued we have no reasons to disagree with the findings of the AA that "*the liability of Corporate Debtor cannot be done away even if their irregularity in the execution of the mortgage deed or creation of mortgage without NOC from existing mortgagee i.e. IFCI pointed out by the Corporate Debtor is believed"*.

34. This brings us to the last issue as to whether in the facts of the present case, Section 7 petition could have been admitted against the Appellant in their capacity as Corporate Guarantor. This question has been dealt at length by the Adjudicating Authority after noticing the guarantee clauses and the service of notice which is extracted below:

> *7.1 The Financial Creditor/Petitioner has granted/sanctioned the credit facility in favour of Principal Borrower)(s) and said facilities were secured by Guarantee of the Corporate Debtor vide deed of guarantee(s) dated 26.04.2019 and 10.07.2019. The clause(s) contained in both the guarantee are identical. The clauses relevant to the liability of the guarantor are as follows:*
>
> > *(5) in the event of any default on the part of the borrower in payment/repayment of any of the monies in respect of the Obligations, or in the event of any default on the part of the Borrower to comply with or perform any of the terms, conditions and covenants contained in the agreement, the Guarantor(s) shall, upon demand, forthwith pay to the beneficiary/lender(s) without any demur or protest or reference to the borrower or anyone else and without the right of any set off and/or deductions and/or adjustments of any kind whatsoever, all the amounts payable by the borrower to the lender(s) under the Transaction documents. Any such demand made by the beneficiary/lender(s) on the guarantor(s) shall be final, conclusive and binding notwithstanding any difference or any dispute between the lender(s) and/or beneficiary and/or the Borrower whether referred to arbitration or presented before any court, tribunal or any other authority. Any part enforcement of the guarantee shall not amount to discharge of the guarantor(s) from their liability to make the entire payment, if asked upon to do so.*
> >
> > *(6) In the event of failure by the Guarantor(s) in making any such payment, the Guarantor(s) shall be liable to pay interest at the rate stipulated by the lender(s) on the defaulted amounts till receipt of the said amounts by the lender(s) to its satisfaction, without prejudice to and in addition to any other remedy that the beneficiary/lender(s) may have against the guarantor(s).*

(7) The Guarantor(s) shall not be entitled to look into or consider any question or dispute which may arise between the beneficiary/ lender(s) and the Borrower as to the repayment by the borrower to the lender(s) any sum due and owing by the Borrower to the Lender(s).

(8) The Guarantor's liability hereunder shall be irrevocable, continuing and joint and several with that of the Borrower.

7.2. The above clauses make it abundantly clear that the Corporate Debtor is liable to the credit facilities availed by principal borrowers. The demand notice invoking the guarantee is stated to be served upon the registered office of the Corporate Debtor vide Registered Post/ Speed Post and has placed copy of receipt issued by Indian Post in that relation. Hence, the contention of the Corporate Debtor that no such notice was received is without merits, in view of clause 29 of the deed providing for service of notice can be affected through registered post at address specified in schedule 1, which is saying as is stated in the notice invoking guarantee."

35. It has been contended by the Respondent that there is no bar on the Financial Creditor to proceed against the principal borrowers and the Corporate Guarantor simultaneously. It is their case that the liability of a Corporate Guarantor is coextensive with the principal borrower and therefore the Financial Creditor is at liberty to require the performance by the Guarantor to discharge its liability and obligations.

36. This issue has been squarely covered by the judgement of the Hon'ble Supreme Court in ***Laxmi Pat Surana vs UOI (2021) 8 SCC 481***. The relevant paragraphs are set out hereunder :

"21. Section 7 is an enabling provision, which permits the financial creditor to initiate CIRP against a corporate debtor. The corporate debtor can be the principal borrower. It can also be a corporate

person assuming the status of corporate debtor having offered guarantee, if and when the principal borrower/debtor (be it a corporate person or otherwise) commits default in payment of its debt.

23. Indubitably, a right or cause of action would ensure to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. It would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of amount of debt. For, the obligation of the guarantor is coextensive and coterminous with that of the principal borrower to defray the debt, as predicated in Section 128 of the Contract Act. As a consequence of such default, the status of the guarantor metamorphoses into a debtor or a corporate debtor if it happens to be a corporate person, within the meaning of Section 3(8) IBC. For, as aforesaid, the expression "default" has also been defined in Section 3(12) IBC to mean non-payment of debt when whole or any part of instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor, as the case may be."

37. In terms of the ***Laxmi Pat Surana judgment*** supra of the Hon'ble Supreme Court, when the Corporate Debtor gives a guarantee in respect of a loan transaction, the right of the Financial Creditor to initiate action against the Corporate Guarantor gets triggered the moment the principal borrower commits a default. In other words, when default is committed by the principal borrower, the amount becomes due against both the principal borrower and the Corporate Guarantor and hence both become liable to pay the amount when the default is committed. Thus, the default by the principal borrower and the guarantor arises on the same date, unless, the terms of contract of guarantee provides that the liability of the guarantor would arise

in terms of the Deed of Guarantee. In the present facts of the case, the Yes Bank had invoked the guarantee vide notice dated 26.08.2019 and 20.11.2019, therefore, the defaults had arisen on the issue of the demand notice as contemplated in the Deeds of Guarantee. The company petition under Section 7 which was filed against the principal borrowers has already been admitted by the Adjudicating Authority and presently undergoing CIRP. In the present case, notice has been duly served upon the Corporate Guarantor demanding payment and there being a clear default on the part of the Corporate Guarantor to clear the outstanding due, the Adjudicating Authority has rightly admitted the Corporate Debtor in its capacity as Corporate Guarantor into CIRP.

38. Having considered the entirety of facts as on record, we are of the view that the Adjudicating Authority has rightly admitted the Section 7 application for initiation of the CIRP process after coming to the correct conclusion that Respondent No.1 has successfully proved the financial debt and default on part of the Corporate Debtor as Corporate Guarantor. We see no reason to interfere in the impugned order passed by the Adjudicating Authority. The appeal is accordingly dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi
Date: 09.04.2024
Ashok Kr.