

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V

(IB) No. 1874/(ND)/2019 (IA-3642 & 3790 of 2020)

In the matter of:

M/s Anurutan Textiles
1092, Shri Mahavir Market
Kucha Natan, Chandni Chowk,
Delhi 110006

.... Operational Creditor

Versus

Sarveshwar Creations Private Limited
Registered Office At: -
CR-274, Lalit Park
Laxmi Nagar,
Delhi 110092
Office also at: -
B-152, Sector -63
Noida-Uttar Pradesh

.... Corporate Debtor

In the matter of: (IA-3642/2020)

Union Bank of India
(Erstwhile Corporation Bank)
Vs.

.....Applicant

Manohar Lal Vij

...Resolution Professional

And

In the matter of: (IA-3970/2020)

Manohar Lal Vij

...Resolution Professional

Vs.

Union Bank of India
(Erstwhile Corporation Bank)

....Respondent

Order delivered on: 27.10.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

For the Applicant: Ms. Ekta Chaudhary on behalf of Bank (IA-3642/2020) Mr. Aditya Dewan (IA-3970/2020).

For the Respondent: Ms. Ekta Chaudhary on behalf of Bank (IA-3970/2020) Mr. Aditya Dewan (IA-3642/2020).



ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

1. IA-3642/2020 has been filed on behalf of Union Bank of India praying therein to hold the applicant bank is a secured Financial Creditor and direct the respondent to accept the claim of the applicant bank or pass such other order may deem fit, whereas IA-3790/2020 has been filed on behalf of RP praying therein to direct the respondent bank i.e. Union Bank of India to release charge and hand over the original lease deed of the subject property and also direct the respondent to return Rs. 1.40 crore deposited by the Corporate Debtor with the respondent bank received earlier as an advance on execution of agreement to sell for subject property.
2. Since the prayer made in both the IAs are in respect of the property, which is under the possession of the Union Bank of India and on the basis of that, Union Bank of India in IA-3642/2020 claimed themselves to be a Financial Creditor and submitted its claim before the RP, which is rejected by the RP and RP by filing an application i.e. IA-3790/2020 made a prayer to direct the Union Bank of India to release the charge and handover the original lease deed of the subject property on the basis of which, Bank is claiming to be Financial Creditor, therefore, we would like to dispose of these two IAs with this common order.

IA-3642/2020

3. The facts mentioned in the application in short is that the applicant had filed the claim before the RP/respondent on the basis of guarantee deed executed by the Corporate Debtor and on the basis of which, the applicant Bank had sanctioned a loan to the principal borrower and the claim of the applicant was rejected



and communicated by the RP vide email dated 24.08.2020 and the ground for the rejection of the claim was the guarantee agreement, which is under reference is not in perpetuity and in the absence of compliance to Section 185 and 186 of the Companies Act, 2016 the corporate guarantee is not enforceable.

4. Further, as per provisions of section 18 and section 25 of the I&B Code, it is the duty of Resolution Professional to receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under Sections 13 and 15, that evidently there exist no adjudicatory powers to admit or reject claim. That the apex court in the matter of Swiss Ribbons Pvt. Ltd. Anr. Vs. Union of India & Ors.-Writ Petition (Civil) No. 99 of 2018 has upheld that the Resolution Professional has no adjudicatory powers.
5. Further, the Respondent rejected the claim on the ground of non-compliance of section 185 & 186 of companies act and thus holding that the corporate guarantee duly executed by the Corporate Debtor is not enforceable. That the instant contention is directly hit by Doctrine of indoor management, because the liability of the corporate debtor arises from the contractual agreement between the applicant and Corporate Debtor and noncompliance, if any on the account of internal management is the responsibility of the company. Further, Articles of Association reflects that in accordance with the provisions of section 58A and 292, the Directors had the power to borrow, raise or secure the payment of any sum of money along with the power to create mortgage over the properties of the company. Further, Memorandum of Association further confirms the powers of the company to mortgage any movable or immovable property on behalf of and for the benefit of the company. Further, the objective of the company as reflected in the Memorandum of Association is also to finance, hire purchase, leasing and investment. Further, it



is settled law' as upheld in a catena of judgement that in case of non-compliance of relevant provisions, the company shall be liable since the person dealing with the company is entitled to assume that there has been necessary compliance with regards to the internal Management. Since, compliance under section 185 & 186 is a part of Internal Management for which penal provisions are as laid down under section 185 (2) (2) of 'Companies Act, 2016. The perusal of the penal provisions reveals that it is the company which is liable for non-compliance if any of section 185 & 186 of companies Act. Hence, it does not affect the contractual obligation of the company. Further, the guarantee agreement specifically states that this Guarantee shall be in addition to and shall not in any way be prejudiced affected by any collateral or other security or guarantee now or hereafter to be held by the bank. Thus. the guarantee agreement duly executed is enforceable in the eyes of law.

6. Further, non-compliance of Section 185 and 186 is not maintainable either on facts, perusal of the list of the shareholders reflect that the Board Resolution in pursuance to which guarantee was duly executed and equitable mortgage created in respect of the immovable property has been passed/authorized by a special majority.
7. Further, the original application has also been filed against the Principal Borrower and the Corporate Debtor/guarantor being original application no. 278/2020 dated 07.03.2020 and interim relief has been granted vide order dated 07.03.2020.
8. Further, in respect of facility i.e. PCL (Enhancement), FDBN/FDBP/FDBD (Enhancement), Term Loan (TLS), Corporate Mortgage, 3 vehicle loan, in order to secure the aforesaid facility guarantee was duly executed by the Corporate Debtor in pursuance to the Board Resolution dated 02.02.2013 and guarantee agreement dated 04.02.2013.



9. Further, at the request of Principal Borrower were enhanced/renewed vide sanctioned letter reference No. CO:DLI:CSI:CLCC:M150513:A04:75:2013.

10. Further, the facilities were renewed vide sanction letter reference no. CDS:CSI:GLN:HLCC:185:2016-2017 dated 31.03.2017 on the below stated terms and conditions:-

- a) Enhancement of CMTSC limit from Rs. 3 Crores to 4 Crores.
- b) Approval of deviation in respect in respect of reduction in margin under CMTSC Scheme from 50% to 38%
- c) Sanction of cash credit limit of 5 crores, (in lieu of the existing WCDL of Rs. 5 Crores)
- d) The action of Branch in extending the time period. for% realization of 2 export bills aggregating Rs, 1.01 crores upto 07.03.2017 and 25.03.2017/ respectively be and is hereby confirmed.

That by virtue of the said sanction the facilities were reduced/reviewed to Rs. 3007.85 Lakhs (Rupees Thirty Crores seven lakhs Eighty Five Thousand Only)

11. Further, in order secure the liability besides execution of guarantee agreement charge was created in respect of properties being-

- a) EMG of industrial land and building at B-107, Sector-63, owned by M/s Sheen India Pvt. Ltd, Noida.
- b) EMG of industrial land and building at 11C, Mahila Udhyami Park, Greater Noida owned by M/s Sheen India Pvt. Ltd.
- c) EMG of industrial land and building at B-152, Sector-63, Noida, owned by M/s Sarveshwar Creations Pvt. Ltd Corporate Debtor, having registered office at CR- 274, Lalita Park, Laxmi Nagar, Delhi-110092.
- d) EMG of industrial land and building at B-58, Sector-63, owned by M/s Sarveshwar Creations Pvt. Ltd Corporate

Debtor, having registered office at CR-274, Lalita Park, Laxmi Nagar, Delhi-110092.

- e) EMG of residential land and building at plot no. J03, 1" e. Floor, Tower T-10. Roval Retreat Omaxe NRI city. Greater Noida owned by Mr. Adhesh Bhati and Mrs. Raj bhati both residents of J-267, block-J, Sector-Beta Greater Noida, UP.
12. Further, the Principal Debtor failed to pay the amount then the account was classified as NPA on 30.08.2017 and accordingly, the notice was also issued under Section 13(2) read with Section 13(3) of the SRFAESIA Act, 2002 and in pursuance of the property being Industrial Land and building at B-152, Sector-63 Noida has been sold for fair market value of Rs. 3,37,00,000 /- only.
13. Further, the CIRP in the present matter commenced on 13.02.2020 upon the admission of the petition filed under Section 9 of the IBC, 2016 and respondent no. 1 was appointed as IRP.
14. Further, vide email dated 27.02.2020 IRP requested the applicant to file its claim electronically in Form C and accordingly the claim in Form C was filed as per Regulation 8 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 against the Corporate Debtor, who was guarantor to the facilities for the claim amount being Rs. 26,53,15,260.61/- and the said claim was submitted vide letter dated 24.02.2020.

The Principal outstanding on the date of NPA i.e. 30.008.2017 was as under:-

Sno.	Nature of Limit	Amount (in Lakhs)
1	PCL	1796.10
2	FDBN/D/P/RACB	146.52
3	CMTSC	400.00
4	Cash Credit	500.00
5	Term Loan	32.15

15. Further, the clarification was sought by the Resolution Professional and the same was duly replied.

Reply filed by the RP in IA-3642/2020: -

16. The respondent/RP has appeared and filed the reply and facts mentioned in the reply in short is that the respondent denied all the averments/allegations/imputations contained in the application.
17. Further, as per Section 126, Indian 1971, a contract of guarantee is a Contract Act, independent contract, making the liability of the guarantor co-extensive with that of the principal debtor, unless otherwise agreed upon. The said Guarantee however could be considered as perpetual only if there is no timeline and there is no material alteration in terms and condition of the Guarantee. Further, if any material alteration in the Guarantee is to be effectuated, a new Guarantee is to be executed in terms of law applicable on that date. In the present case, the Guarantee executed between Corporate Debtor and Respondent Bank in 2017 was a new Corporate Guarantee. The amount under consideration was different from the previous Guarantee executed on 28.06.2013, in the previous guarantee the amount was of Rs 3347.44 lacs, while the Guarantee executed on 06.05.2017 was a fresh guarantee for Rs. 3007.85 Lacs, therefore, same could not construed to be in continuation of earlier Guarantee dated 28.06.2013. Further, the terms and conditions too changed as is evident from the sanction letter dated 31.03.2017 preceding the Guarantee executed on 06.05.2017 as well as Board resolution passed by the Corporate debtor. Further, the Applicant Bank in fact asked the Corporate Debtor to furnish the fresh Corporate Guarantee, which further establishes that the new Corporate Guarantee was executed by the Applicant Bank. Thus, the Corporate Guarantee executed on 06.05.2017 was/is to be



considered independent of the Corporate Guarantee executed in 2013.

18. Further, the Guarantee dated 06.05.2017, in order to be valid, had to be in consonance with the law applicable on the said date i.e. 06.05.2017 i.e. Section 185 and 186 of the Companies Act, 2013, in force on that date. In other words, the position before Companies (Amendment) Act, 2017 therefore shall be applicable in the present case as the amended Section 185 and 186 of the Companies Act 2013 came into effect only on 07.05.2018. Section 185 of the Companies Act, 2013, as it existed on the date when the Corporate Guarantee dated 06.05.2017 was executed, contained a blanket prohibition on companies from advancing any loan (including loan represented by a book debt) or giving any guarantee or any security in connection with a loan taken by the directors of such company or any other person in whom the directors are interested. Section 185 (1) provided certain exceptions to the applicability of this section on certain persons, however the restrictions continued to be stringent for group companies with common directors. Additionally, as per proviso of Section 185, of the Companies Act, 2013, the entities/person covered in the ambit of any other person whom the director is interested is exhaustive, and inter alia includes, any director of lending company, or of a company which is in its holding company, and in the present case the director(s) of both the subsidiary and holding company were the same, as is evident from the ROC Master Data, which shows that the director(s) of the Corporate Debtor were having interest in the holding company. Further, Section 186 of the Companies Act, 2013 restricted a company from giving loan or guarantee or provide security in connection with a loan to any 'person' or body corporate where such loan, guarantee or security in connection with any loan exceeded the thresholds specified therein, subject to the

shareholders passing a special resolution permitting such loan, guarantee or security in excess of such threshold. Further, in the present case, the requirement of passing a Special Resolution was higher than limit prescribed. Therefore, no such special resolution was passed by the Corporate Debtor under Section 186 of the Companies Act 2013. Hence, the Corporate Guarantee executed between Corporate Debtor and Respondent Bank 06.05.2017, was thus null/illegal/invalid/ and void ab initio, and hence unenforceable in law.

19. Further, non-compliance of Section 185 and 186 of the Companies Act, 2013 is directly hit by the Doctrine of Indoor Management, however, this submission of the applicant is not applicable in the present case because being a public sector bank the onus for the applicant bank to ascertain the compliance of Section 185 and 186 of the Companies Act, 2013.
20. Further, the purported charge created by the applicant bank on property being B-58, Sector 63, Noida, UP belonging to the Corporate Debtor is void and invalid as the Board Resolution dated 06.05.2017 passed by the Corporate Debtor resolved only to keep the property being B-152, Sector-62, Noida, UP mortgaged against the credit limit facilities sanctioned by the Applicant bank to M/s Sheen India Pvt. Ltd. which is later sold by the applicant bank under the provisions of SARFAESI Act and not for the subject property.
21. Further, the RP has right to verify the claims in terms of Regulation 13 of the Insolvency (CIRP) Regulations, 2013, since the applicant bank fails to produce the relevant documents, so, the RP has rightly rejected the claim of the applicant bank.
22. Further, the provision of Section 185 and 186 of the Companies Act, 2013 came into effect only on 07.05.2018, therefore, this provision is applicable.

Rejoinder to the Reply: -

23. The rejoinder has been filed on behalf of the petitioner and the facts of the rejoinder in short is that corporate guarantee was executed in 28.06.2013 is not in perpetuity and it is denied that the Corporate Guarantee executed on 06.05.2017 is not in continuation of Corporate Guarantee executed on 28.06.2013.
24. Further, Section 129 of The Indian Contract Act, 1872 (hereinafter referred to as "the Act") defines a continuing guarantee as "A guarantee which extends to a series of transactions is called a "continuing guarantee"." Section 130 of the Act says that " A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor." That the relevant clause of the guarantee agreement is reproduced herein:

This is evident from perusal of the relevant clause of the guarantee agreement, which is reproduced herein that the guarantee was a continuing guarantee:-(Page 94 of the application filed by bank)

"The guarantee shall be a continuing guarantee notwithstanding the death of any one or more of the guarantors and shall be binding on the representatives and Estates of the Deceased Guarantor. (Page 94 of the application filed by bank last paragraph)

"The guarantor hereby consents to the bank making any variation that bank may think fit in the terms of banks contract with the borrower, to the bank determining, enlarging or varying any credit to the borrower, to the bank making any composition with the borrower or promising to give the borrower time and not to sue him and bank parting with any security the bank may hold for the guaranteed debt. That the guarantor also agrees that guarantor shall not be discharged from his liability by the bank releasing the borrower or by any act or omission of the bank the legal consequences of which may be to discharge the borrower or by any



act which would, but for his present provision, be inconsistent with the guarantors right as surety or by the Banks omission to do any act, which but for the present provision the banks duty to the guarantor, would have required the bank to do. Though as between the borrower and the guarantor, the guarantor is the surety only the guarantor agrees that as between the bank and the guarantor, the guarantor is the principal debtor jointly with the borrower and accordingly, the guarantor shall not be entitled to any of the rights conferred as surety by section 133, 134, 135, 139 and 141 of the Indian Contract Act 1872 or any other provision of law for the time being in force”.

(Page 97 of the application filed by bank)

"that the guarantee shall be in addition to and shall not in any way be prejudiced or affected by any collateral or other security or guarantee now or hereafter to be held by the bank."

Thus, evidently a reading of the agreement clearly shows that the guarantee was to continue to all future transactions. The deed also clearly mentions that while between the guarantor and borrower, the guarantor is only a surety; yet between the bank and the guarantor, the surety is the principal debtor and his liability would be co-extensive to that of the borrower. Accordingly, the guarantor himself waived off his rights under Chapter VIII of the Act which is conferred on a surety. It is in line with long established precedents that anyone has a right to waive the advantages offered by law provided they have been made for the sole benefit of an individual in his private capacity and does not infringe upon the public rights or public policies.

It is denied that on execution of the Guarantee Agreement dated 06.05.2017 the previous guarantee is annulled. The Hon'ble Apex court in the matter of Lata Construction Ltd. Vs. Dr. Rameshchandra and Anr. MANU/SC/0741/1999 : (2000) 1 SCC 586 whereby the Hon'ble Apex Court has held that if the rights



under the old contract were kept alive even after the second agreement and rights under the first agreement had not been rescinded, then there was no substitution of contracts and, hence, no novation. Evidently the contract was a continuing one and hence enforceable. It is denied that the corporate guarantee executed on 06.05.2017 is not in consonance with the Law applicable on the said date.

25. That the corporate guarantee executed on 06.05.2017 was in pursuance to sanction letter reference no CDS:CSI:GLN:HLCC:185:2016-2017 dated 31/03/2017. The said sanction was for execution of fresh cash credit cum WCDL of Rs. 5 crores and CMTSC Limit was enhanced from 3 crores to 4 crores (Sanction letter page 115 of the application). Further, the corporate debtor has three directors as per MCA records being Geetika Kweera, Apoorva Joshi (1% each of shareholding) & Harish chandra shingh Kawera (active, non compliant). 98% of the share holding is with the Principal borrower/ M/S Sheen India (P) Ltd. (List of shareholders Annexure A 3 page 55 of the application) The guarantee agreement has been executed by Geetika Kweera, Approva Joshi as well as M/S Sheen India (P) I.td (Guarantee Agreement : Page no 123 of the application). Board Resolution of the Corporate Debtor has been executed by both the directors. (Annexure- A17 page 126 of the application). Board Resolution has been separately executed by principal borrower (page I3 of the affidavit) and has been signed by all the shareholders. Both the resolution reads categorically that the modification has been adopted. Further, the intent of the legislature behind the amendment was to ensure that directors who hold a fiduciary position with respect to shareholders do not utilize the funds of the company for their own benefit. Evidently the guarantee agreement was executed by all the shareholders as well as directors which



has been supported by the duly enforceable Board Resolution. Hence, the guarantee of 2017 was legally valid.

IA-3790/2020: -

26. The facts mentioned in this application in short is that the applicant was appointed as IRP vide order dated 13.02.2019, when the application against the Corporate Debtor under Section 9 was admitted and the CIRP was initiated.
27. Further, after issuance of public announcement initially two claims were received from Syndicate Bank (now Canara Bank) and the Corporation Bank (now Union Bank of India). The claim of the Syndicate Bank (now Canara Bank) was provisionally admitted and the CoC of the Corporate Debtor was duly constituted by the applicant and the said CoC in its first meeting held on 14.03.2020 confirmed the appointment of the applicant herein as the RP of the Corporate Debtor with 100% voting and thereafter, the Corporation Bank (now Union Bank of India) claim was also provisionally admitted and the present application is filed to release the charge and handover the original lease deed in respect of property, situated at B-58, Sector-63, Noida, Uttar Pradesh belonging to the Corporate Debtor and amount of Rs 1.40 crores (belonging to the corporate debtor to illegally being retained by it), to the RP for successful completion of the Corporate Insolvency Resolution Process ("CIRP") proceedings of the Corporate Debtor. The said Rs. 1.40 Crore, received as an advance by the Corporate Debtor, against the Agreement to Sell dated 09.02.2018 executed by Corporate Debtor for the Subject Property, had been deposited with the Respondent Bank as the Subject Property was purportedly mortgaged with the Respondent Bank and over which a charge was existing.
28. Further, on account of the Union Bank's failure to hand over the original lease deed pertaining to the subject property,



vacate/release charge in respect of the Subject property and to refund the amount of Rs. 1.40 crore belonging to the Corporate Debtor the applicant herein is unable to discharge his statutory duties stipulated under the Code and the Rules/Regulations framed thereunder. The CIRP on the whole is thus suffering, necessitating the filing of the present application by the applicant for directions to the Union Bank. Pertinently, the Corporate Debtor has no other worthwhile asset apart from the Subject Property, and without gaining control/access of the Subject Property and the documents pertaining to the same, the resolution of the Corporate Debtor would neither be feasible nor equitable.

29. Further, the respondent bank by filing the claim in Form-C claimed an amount of Rs. 265315260.61/-.
30. Further, the applicant while in the course of verification of claim found that the Corporate Debtor holding company M/s Sheen India Pvt. Ltd. (Principal Debtor) back in the year 2013, had approached the respondent bank for a financial assistance, which was later sanctioned by the Respondent Bank vide Sanction Letter dated 01.02.2013. Further, in order to secure the said financial facility, a Guarantee Agreement was executed between the Corporate Debtor and Corporation Bank on 28.06.2013. The said Guarantee Agreement was executed in pursuance to a Board Resolution dated 28.06.2013 passed by the Corporate Debtor. A true copy of the Guarantee Agreement dated 28.06.2013 along with Board Resolution passed by the Corporate Debtor is annexed herewith and marked as Annexure 4.
31. Subsequently in year 2017, the financial facilities sanctioned to M/s Sheen India Pvt Ltd were reviewed, and vide sanction letter no. CDS:CSIGLN:HLCC:185:2016-17 dated 31.03.2017, the financial facilities were enhanced on new terms and conditions. Thereafter, in order to secure the aforesaid enhanced financial facilities having new terms & conditions a fresh Guarantee



Agreement was executed between Corporate Debtor and Respondent Bank on 06.06.2017. A true copy of the Guarantee Agreement dated 06.06.2017 along with Board Resolution is annexed herewith and marked as Annexure 5.

32. That in order to secure the afore-mentioned facilities extended by the Respondent Bank, Corporate Debtor, in the capacity of a corporate guarantor, got created a charge on the Corporate Debtor's two properties i.e. the properties situated at i) B-152, Sector- 63, Noida, and ii) B58, Sector- 63, Noida. However due to the failure of the Principal Debtor to adhere to the repayment schedule as agreed upon, the account was classified as NPA by the Respondent Bank on 30.08.2017 and the property situated at B-152, Sector- 63, Noida was sold by the Respondent Bank under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002, "SARFAESI". The Respondent Bank received Rs.6,46,00,000/- (Rupees Six Crore Forty-Six Lakh Only) in the auction sale for the said property.
33. That in so far as the Subject Property, situated at B-58, Sector 63, Noida, U.P belonging to the Corporate Debtor was/is concerned, the actual possession of the same was/is with a proposed buyer pursuant to an agreement to sell executed by the Corporate Debtor against which an advance of Rs. 1.40 crore was taken by the Corporate Debtor and deposited with the Respondent Bank.
34. Further, since the Form-C submitted by the respondent bank was not substantiated and supported with material evidence, therefore, the applicant sought evidence and clarification vide email dated 03.06.2020 and demanded the documents and respondent bank vide its reply email dated 04.06.2020 stated that, "the Corporate Debtor continued to stand as guarantor for the credit limits sanctioned to M/s. Sheen India Put Ltd. and executed



the necessary documents for the enhanced limits in the due course." Further in reply to Applicant's query pertaining to: "How Respondent Bank's financial debts fall under the category of secured creditors?", the Respondent Bank stated that since one property of the corporate debtor is still mortgaged with the Respondent Bank, therefore, the guarantee of Corporate Debtor continues for the credit limits by virtue of property ownership. Noteworthy, the existence Guarantee executed in 2017 was not disclosed Respondent Bank.

35. Further, again on vide reminder dated 11.08.2020, the applicant again direct the respondent bank to furnish the list of documents including the copy of the application filed by it before the DRT and on 11.08.2020, the respondent bank in response to the email dated 11.08.2020 sent by applicant, sent only few documents, despite stating that it is sending all documents as asked by the Applicant. The Respondent Bank omitted to share certain important documents deliberately with the Applicant, for reasons best known to the Respondent Bank. A true copy of email communication dated 11.08.2020 between Applicant and Respondent Bank is attached herewith as Annexure 8.

36. Despite several reminders, the Respondent Bank failed to provide the requisite documents asked by the Applicant. On 14.08.2020, the Applicant issued a letter in response to the Respondent Bank's letter dated 11.08.2020, stating that on the basis of material on record, the contentions of the Respondent Bank with respect to perpetuity of guarantee executed between Corporate Debtor and Respondent Bank were untenable. The Applicant further clarified that:

"The value for which the two passed by the Corporate Debtor Guarantees were executed on 28.06.2013 and 06.05.2017 were different. The value of passed by the Corporate Debtor Guarantee executed on 28.06.2013 was Rs. 3347.44 lacs whereas the value of



Guarantee executed on 06.05.2017 was Rs. 3007.85 Lacs. The Corporate Guarantee executed on 06.05.2017 was a fresh Guarantee for the total amount at that time and the same was not in continuation of earlier Guarantee for Rs. 3347.44 dated 28.06.2013. Thus, the Guarantee executed on 06.05.2017 could not be said to be in perpetuity of the earlier Guarantee dated 28.06.2013.

Further, the text of Board Resolution of Corporate Debtor, dated 06.05.2017, further clarified that there were certain modifications in the terms & conditions of the sanctioned credit limits.

Further, the Respondent Bank itself asked the Guarantor to furnish new guarantee and same was executed on 06.05.2017, in pursuance of the Board Resolution dated 06.05.2017.

Further, the Corporate Guarantee executed on 28.06.2013 was not in perpetuity and since a new Corporate Guarantee was executed therefore, the same must be executed after complying all the relevant provisions of the Companies Act 2013, applicable on the date of execution of Corporate Guarantee. The Applicant specifically put forth to the Respondent Bank his concern regarding the noncompliance of Section 185 and 186 of the Companies Act, 2013, in relation to furnishing of the Corporate Guarantee in 2017 by Corporate Debtor. For the said purpose, the Respondent Bank was required to confirm/ prove that guarantee was squarely covered under the exception of Section 185 (1) of the Companies Act, 2013 (pre 2017 amendment) and the said guarantee executed did not pertain to any person/ entity in whom the director is interested. The Respondent Bank was asked to provide the immediate confirmation of the aforesaid compliance. A true copy of letter dated 14.08.2020 issued by the Applicant is annexed herewith and marked as Annexure 9.”

37. Further, on 21.08.2020, the applicant sent an email to the respondent bank rejecting the claim filed by the respondent bank



on account of non-compliance as required in his letter dated 14.08.2020.

38. Further, thereafter on 07.09.2020, the applicant sent an email to the respondent bank requesting it to release the charge and hand over the original lease deed of the Subject Property as the claim submitted by the respondent bank on the basis of the Corporate Guarantee furnished by the Corporate Debtor was found to be legally invalid and unenforceable under the Companies Act.
39. Further, the mortgaged over the subject property purportedly created by the Corporate Debtor as guarantor was declared to be invalid and the Corporate Debtor was the absolute owner of the subject property and the applicant further informed that the respondent bank that he had taken symbolic possession of the subject property on 25.08.2020 and demanded return of Rs. 1.40 crore which the respondent bank had received as an advance against the agreement to sell executed by the Corporate Debtor with the buyer for selling the subject property.
40. Further, that it is noteworthy that as per Section 126, Indian Contract Act, 1971, a contract of guarantee is an independent contract, making the liability of the guarantor co-extensive with that of the principal debtor, unless otherwise agreed upon. The said Guarantee however could be considered as perpetual only if there is no time line and there is no material alteration in terms and condition of the Guarantee. Further, if any material alteration in the Guarantee is to be effectuated, a new Guarantee is to be executed in terms of law applicable on that date. In the present case, the Guarantee executed between Corporate Debtor and Respondent Bank in 2017 was a new Guarantee and is thus to be construed as a fresh Guarantee since even the amount under consideration was different from the previous Guarantee executed on 28.06.2013 and further the terms and conditions too changed under the subsequent sanction letter preceding the Guarantee



executed on 06.05.2017. Since there was material alteration in the terms and conditions agreed between the Corporate Debtor and the Respondent Bank, the purported Corporate Guarantee executed on 06.05.2017 was/is to be considered independent of the Corporate Guarantee executed in 2013, and could by no means be considered to be part of the previous Corporate Guarantee allegedly executed in perpetuity nor it qualifies to be a continuing guarantee under Section 129 of the Contract Act, 1872. Supplementary Affidavit filed on behalf of the applicant.

41. By filing the supplementary affidavit on 05.10.2020, the applicant produced following documents notice of 30 days for the sale of the immovable secured assets under Rule 9(1) of the Security Interest (Enforcement) rules 2002 and terms and conditions of the sale.
42. We have heard the Ld. Counsel for the petitioner and respondent in IA-3642/2020 and Ld. Counsel for the petitioner and respondent in IA-3790/2020
43. Since the arguments of the petitioner in IA-3642/2020 is the reply in IA-3790/2020 and the arguments of the petitioner i.e. the RP in IA-3790/2020 is the reply in IA-3642/2020, therefore, we would like to mention the common submissions made by the counsels in both the IAs.
44. Ld. Counsel for the petitioner in course of his arguments submitted that the subject property was mortgaged in pursuance to sanction letter reference no ZO:DLI:CSI:ZLCC:M051213:A02:184:2013 dated 05.12.2013 in order to secure the liability i.e Adhoc PCL of Rs. 2 crores and FDBN/FDBP/FDBD of Rs. 2 Crores (Annexure R 7- Page 60 of the reply provides the details of the subject property). Board Resolution of the Corporate Debtor dated 09.12.2013 in furtherance to the sanction letter was duly executed by way of special majority as it is signed by M/S Sheen India (P)



Ltd/Principal Borrower (98% shareholder of the corporate Debtor) (Annexure- R 8 of the Reply, Page 62). The sanction Letter for enhanced facility and additional property as mortgage was duly accepted by the Principal Borrower vide its Board Resolution dated 06.12.2013 (Annexure R 9 of the Reply, Page 63). He further submitted in pursuance to that the Guarantee agreement was executed on 10.12.2013 by M/S Sheen India Pvt Ltd/Principal Borrower (98% shareholder of the Corporate Debtor), Mrs. Geetika Kweera (1% shareholder of the Corporate Debtor) & Mrs Apoorva Joshi ((1% shareholder of the Corporate Debtor) and other Guarantors and so the mortgage has been created with the consent of 100% shareholders of the corporate debtor. He further submitted the subject property is under equitable mortgage of the respondent bank since 15.04.2014 and Charge has been duly created in respect of the subject property and the amount thus secured is Rs. 36,79,00,000/- and subsequently the CMTSC Limit was enhanced from Rs. 3 crore to Rs. 4 Crore and cash credit Limit cum WCDL was sanctioned to the extent of Rs. 5 Crores vide sanction letter dated 31.03.2017. He further submitted in order to secure the enhanced limit Equitable mortgage was created in respect of additional property being B-152, Sector-63, Noida. (Annexure- R11 sanction letter dated 31.03.2017 Page 73 of reply) and the terms & conditions of sanction was accepted vide Board Resolution dated 06.05.2017 of the Principal Borrower (98% shareholder of the corporate debtor). He further submitted that the Board Resolution categorically states the facility for which additional property was mortgaged. He further submitted that both the resolution is to be read together thus evidently it has been resolved by way of special resolution with 100% shareholder giving consent too providing guarantee for enhanced limit and acceptance of creating charge in respect of additional property and the guarantee agreement was executed in pursuance to Board

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Resolution. He further submitted that the guarantee agreement executed on 28.06.2013, 06.12.2013 & 06.05.2017 are each Independent, continuing, enforceable (evident from the guarantee clause) and duly authorized by Board Resolution. He further submitted that there exist no provisions under which acts done in furtherance to Board Resolution can be set aside until the Board Resolution is revoked.

45. He further submitted that the Contention of the Resolution Professional is hit by the Doctrine of Estoppel and Section 70 of the Contract Act, which says "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered." He further submitted that the Corporate Debtor after having benefited from the loan transactions and thus being the ultimate beneficiary (Principal Borrower is 98% of the Shareholder of Corporate Debtor) can be estopped from denying its liability and he also placed reliance upon the decision of S. Shanmugam Pillai v. K. Shanmugam Piilai reported MANU/SC/0398/1972 AIR 1972 SC 2069 in which Hon'ble Supreme Court held that there are three classes of estoppels that may arise for consideration; being: (1) that which is embodied in Section 115 of the Evidence Act, (2) election in the strict sense of the term whereby the person electing takes a benefit under the transaction, and (3) ratification i.e.. agreeing to abide by the transaction. Action of the second and Corporate Debtor falls under the the third category.

46. He further submitted that the contention is barred by Limitation because the account was classified as NPA on 30.08.2017 and the creation of charge has not been challenged before Competent authority. He further submitted that CIRP proceedings were admitted on 13.02.2020 and it is not denied



that the corporate Debtor and the principal borrower corporate debtor) has availed 98% shareholder of the facilities and so same cannot be challenged after a period of six years. He further submitted that no provision under 1BC has been cited by the professional wherein the look back period can exceed 2 years from the date of CIRP admission.

47. He further submitted that the contention is hit by Doctrine of Indoor Management and placed reliance upon the decision of Royal British Bank v. Turquand, [1856] 6E & B 327, in which it is held that a person dealing with a company is not affected by internal irregularities. He is entitled to assume that the internal procedure required by the articles of association of the company has been complied with. He further submitted that in the instant matter, the Article of association permits the corporate debtor to provide property for security. Equitable Mortgage has been created in respect of the subject property and Guarantee agreement has been duly executed by all the shareholders of the Corporate Debtor. He further submitted that yet for the sake of argument if it is assumed that there is breach then penal provisions as laid down under section 185 & 186 operates against the Directors, who are guilty of contravention. This further reflects that the intent of the legislature behind the amendment was to ensure that directors who hold a fiduciary position with respect to shareholders do not utilize the funds of the company for their own benefit.

Written submissions in IA-3642/2020: -

48. Ld. Counsel for the RP/respondent in IA-3642/2020 submitted that the captioned application has been filed by the Union Bank of India (erstwhile Corporation Bank) (hereinafter referred as 'Applicant Bank') assailing the communication dated 24.08.2020, whereby the claim of Applicant Bank as a secured



creditor was rejected by the Resolution Professional (hereinafter referred to as 'RP') primarily on the following grounds:

a) The Corporate Guarantee Executed on 06.05.2017, on the basis of which the Applicant Bank filed the claim as a secured creditor, is in noncompliance of Sections 185 and 186 of the Companies Act, 2013, as it existed on the date when the said Corporate Guarantee was executed.

b) There is no perpetuity of Corporate Guarantee dated 28.06.2013 after execution of Corporate Guarantee Executed on 06.05.2017 between Corporate Debtor and Applicant Bank, and hence no claim is maintainable on that basis either.

49. He further submitted that the holding Company of the Corporate Debtor, M/s Sheen India Pvt. Ltd. ("Principal Debtor") had approached the Applicant Bank in the year 2013 for a financial assistance, which was later sanctioned by the Applicant Bank vide Sanction Letter dated 01.02.2013. Further, in order to secure the said financial facility, a Guarantee Agreement was executed between the Corporate Debtor and Corporation Bank (now Applicant Bank) on 28.06.2013 and the said Guarantee Agreement was executed in pursuance to a Board Resolution dated 28.06.2013 passed by the Corporate Debtor. Subsequent thereto, by virtue of the said Guarantee Agreement and other documents, the Applicant Bank has claimed that a charge was created in respect of certain immovable properties belonging to the Corporate Debtor, including B-58, Sector 63, Noida, Uttar Pradesh ("Subject Property").

50. He further submitted that the financial facilities sanctioned to M/s Sheen India Pvt. Ltd. were revised/modified subsequently, including in the year 2017. He further submitted in 2017, the financial facilities sanctioned to M/s Sheen India Pvt Ltd were reviewed/revised/enhanced vide sanction letter no. CDS: CSI:GLN:HLCC:185:2016-17 dated 31.03.2017 on new terms and



conditions. He further submitted that in order to secure the aforesaid enhanced financial facilities having new terms and conditions a fresh Guarantee Agreement was purportedly executed between Corporate Debtor and Applicant Bank on 06.05.2017. He further submitted that between 2013 and 2017, this was the first time, when a fresh Corporate Guarantee was executed and on no other occasion prior to 06.05.2017, when the financial facilities were revised/modified, any new guarantee agreement was executed.

51. He further submitted that the claim filed by the Applicant Bank as a secured creditor on the basis of the aforesaid Corporate Guarantee dated 06.05.2017 has been rejected by the Resolution Professional.
52. He further submitted that the Corporate Guarantee dated 06.05.2017 is not in consonance with the Companies Act, 2013 because it has not complied the provision contained under Section 185 and 186 of the Companies Act, 2013.
53. He further submitted that in view of the proviso of Section 185 of the Companies Act, 2013 no subsidiary company could execute Corporate Guarantee in favour of any lender in respect of any facility availed by its holding company.
54. He further submitted that Section 186 of the Companies Act, 2013 restricted a company for giving loan or guarantee or provide security in connection with a loan to any 'person' or body corporate where such loan, guarantee or security in connection with any loan exceeding the thresholds specified therein, without the shareholders passing a special resolution permitting such loan, guarantee or security in excess of such threshold and in the present case, no special resolution was even passed by the Corporate Debtor under Section 186 of the Companies Act, 2013.



55. He further submitted that corporate guarantee executed on 28.06.2013 not a continuing guarantee and rendered invalid prior to 2017 due to revision/modification of the financial facilities.
56. He further submitted that Upon realizing that the Corporate Guarantee dated 06.05.2017 is illegal/invalid and unenforceable in law, the Applicant Bank sought to rely on the previous corporate guarantee executed in 2013 and has contended that the same is a continuing guarantee in any case.
57. He further submitted that in view of Section 126 of the Indian Contract Act a contract of guarantee is an independent contract, making the liability of the guarantor co - extensive with that of the principal debtor and he has also placed reliance upon the decision of Hon`ble Allahabad High Court in the case of Shesh Narain Awasthi and Ors. vs. Chairperson Debts Recovery Appellate Tribunal and Ors., Civil Miscellaneous Writ Petition No. 9031 of 2014 and he also placed reliance upon the decision of Hon`ble High Court in the case of State Bank of Patiala vs. Ganesh Trading Co., Regular Second Appeal No. 185 of 1985.
58. He further submitted that by execution of Corporate Guarantee dated 06.05.2017 the corporate guarantee dated 28.06.2013 is impliedly revoked.
59. He further submitted that there is also difference in the amount of guarantee, which was executed on 28.06.2013 and 06.05.2017 and he further submitted that in the guarantee dated 06.05.2017, there is no reference regarding the guarantee dated 28.06.2013.
60. He further submitted that Form No. CHG-1 uploaded by the Corporate Debtor on the Ministry of Corporate Affairs website, the date of creation of charge on the Subject Property is 15.04.2014 and the Applicant Bank in its rejoinder has contended that the Subject Property was mortgaged vide sanction letter dated 05.12.2013, and the same is further in terms of the Guarantee



Agreement dated 28.06.2013, therefore, date when the charge was purportedly created on 15.04.2014, Section 185 of the Companies Act, 2013 had already come into force, therefore, creation of charge is thus improper and invalid.

61. He further submitted that doctrine of indoor management is not applicable in the present case and in this regard, he has placed reliance upon the decision of Hon'ble Bombay High Court in the case of 'Nirad Amilal Mehta vs Genelec Limited and Ors.' (Manu/MH/1169/2008) and he also placed reliance upon the decision of Hon'ble Madras High Court in the case of Thakur J Bakshani & Ors. vs Shriutivinda Agro Farms Pvt Ltd (C.S Nos 877/2005).
62. He further submitted that the RP has also filed an application which is numbered as IA-3792/2020 seeking directions to the present Applicant Bank to release charge and hand over the original lease deed in respect of Subject Property belonging to the Corporate Debtor and amount of Rs. 1.40 crores belonging to the corporate debtor (illegally being retained by it).
63. Now, in the light of the submissions made on behalf of the parties, we shall consider the case in hand. On the basis of the averments made in the application as well as reply and rejoinder filed by the respective parties, we find that the petitioner claimed the amount on the basis of Guarantee Agreement dated 28.06.2013 and 06.05.2017, the contention of the petitioner is that the property in question which the respondent in IA-3790/2020 prayed for release is in terms of the guarantee agreement dated 28.06.2013 and in continuation of that agreement, a fresh guarantee was executed on 06.05.2017, therefore, the claim of the petitioner is that guarantee agreement executed on 06.05.2017 is in continuation with the earlier guarantee agreement, which is executed on 28.06.2013 and on the basis this agreement, which was executed in the year 2013, the



petitioner claimed that the provision of Section 185 and 186 of the Companies Act are not applicable and we further noticed that the petitioner has enclosed the email dated 14.08.2020 and on the basis of that, the petitioner submitted that claim of the petitioner was rejected by the RP on the ground that the deed of guarantee was executed on 06.05.2017 is a fresh guarantee for the fresh amount and same is not in continuation of the earlier guarantee agreement for Rs. 3347.44 lakhs rather it of Rs. 3007.85 lakhs.

64. We further noticed that in course of arguments, Ld. Counsel for the RP referred the two guarantees and submitted that the deed of guarantee executed on 06.05.2017 is a fresh guarantee, which would be evident from the variation in the amount mentioned in both the deed of guarantees and in the light of that facts, at first we would like to examine the deed of guarantee, which was executed on 06.05.2017, the petitioner has enclosed this deed of guarantee at page 119 of the application and we have gone through the deed of guarantee, which is available at page 119 and we noticed that at page 122, it is mentioned that "whereas the bank has accordingly sanctioned to the borrower an aggregate sum of Rs. 3007.85 (Rs. Thirty Crore Seven Lakh and Eighty Five Thousand Only) who has agreed to repay the same together with interest as stipulated in the loan documents executed by the borrower or at such other rate that the bank may determine to charge from time to time from the date of granting the credit facilities till its repayment, which total liability shall be payable on demand made by the bank upon the guarantor.

65. Now, this agreement witnessed that the guarantor doth hereby agree to indemnify the bank against all loss and to pay and satisfy the bank on demand "the general balance" due from the borrower and the expression "general balance" shall be deemed to include all and every sum and sums of money which are now or shall at any time be owing to the bank in all of its offices on any



account whatsoever whether from the "Borrower" solely or from the Borrower jointly with any other or others in partnership or otherwise whether as principal or surety, or otherwise and whether such liabilities have matured or not and whether they are absolute or contingent including all liabilities in respect of advances, letters of credit, Bank, Guarantees, Cheques, Hundies, Bills, Notes, Drafts and other negotiable instruments drawn, accepted endorsed or guaranteed by the borrower and in respect of interest, at the rate agreed upon with monthly quarterly/half yearly / annual rests commission and bank charges and in respect of all costs, charges and expenses with the Bank may incur in paying any rent, rates, taxes, duties calls, instalment, legal and other professional charges or other outgoings whether for the insurance, repair, maintenance, management, realization or otherwise in respect of any property movable or immovable or any chattles or actionable claims or scrip securities or title deeds pledged, mortgaged or assigned to or deposited with the bank as security for the due payment and discharge of the Borrower's liability to the Bank."

66. At this juncture, we would like to refer the averments made at page 123 of the application "the guarantee shall be continuing guarantee notwithstanding the death of any one or more of the Guarantor(s) and shall be binding on the representatives and the estates of the deceased guarantor or guarantor(s)".
67. At this juncture, we would also like to refer the averment made at page 125 of the application, which is the part of the deed of guarantee "This guarantee shall be in addition to and shall not in any way be prejudiced or affected by any collateral or other security or guarantee now or hereafter to be held by the bank".
68. At this juncture, we would also like to refer the averment made at page 91 of the application, which is deed of guarantee dated 28.06.2013 and we have gone through the averment made in this deed of guarantee and we noticed that at page 93 of the



application, which is part of the deed of guarantee dated 28.06.2013, it is mentioned that "whereas the bank has accordingly sanctioned to the borrower an aggregate sum of Rs. 3347.44 (Rs. Thirty three Crore forty Seven Lakh and forth four Thousand Only) who has agreed to repay the same together with interest as stipulated in the loan documents executed by the borrower or at such other rate that the bank may determine to charge from time to time from the date of granting the credit facilities till its repayment which total liability shall be payable on demand made by the bank upon the guarantor.

69. Now, this agreement witnessed that the guarantor doth hereby agree to indemnify the bank against all loss and to pay and satisfy the bank on demand "the general balance" due from the borrower and the expression "general balance" shall be deemed to include all and every sum and sums of money which are now or shall at any time be owing to the bank in all of its offices on any account whatsoever whether from the "Borrower" solely or from the Borrower jointly with any other or others in partnership or otherwise whether as principal or surety, or otherwise and whether such liabilities have matured or not and whether they are absolute or contingent including all liabilities in respect of advances, letters of credit, Bank, Guarantees, Cheques, Hundies, Bills, Notes, Drafts and other negotiable instruments drawn, accepted endorsed or guaranteed by the borrower and in respect of interest at the rate agreed upon with monthly quarterly/half yearly / annual rests commission and bank charges and in respect of all costs, charges and expenses with the Bank may incur in paying any rent, rates, taxes, duties calls, instalments, legal and other professional charges or other outgoings whether for the insurance, repair, maintenance, management, realization or otherwise in respect of any property movable or immovable or any chattles or actionable claims or scrip securities or title deeds pledged, mortgaged or



assigned to or deposited with the bank as security for the due payment and discharge of the Borrower's liability to the Bank.”

70. At this juncture, we would also like to refer the averment made at page 95 of the application which is part of the deed of guarantee dated 28.06.2013 “The guarantee shall not revoke this guarantee during the subsistence of the loan documents executed by the borrower.”
71. When we shall read these two guarantee deeds together then we noticed that the language of these two guarantee deeds are almost similar, which we have referred in the aforementioned paras and we also noticed that admittedly, at page 93 of the deed of guarantee dated 28.06.2013, the sanctioned amount is Rs. 3347.44 lakhs only, whereas sanctioned amount of deed of guarantee which is at page 119 amount of Rs. 3007.85 lakhs only.
72. We further noticed that the language of both the sanctioned order mentioned in the deed of guarantee are the same, if, we shall read these two sanctioned orders together then we can say that by the first guarantee deed amount of Rs. 3347.44 lakhs was sanctioned whereas by the second guarantee deed, a fresh amount of Rs. 3007.85 lakhs was sanctioned. Since, the word **“accordingly”** is mentioned in both of deed of guarantee, which means that the amount was sanctioned on the date when the deed of agreement was executed.
73. We further noticed in both deeds of guarantee, it is mentioned that the guarantee shall be continuing guarantee notwithstanding the death of any one or more of the Guarantor(s) and shall be binding on the representatives and the estates of the deceased guarantor or guarantor(s), which means even after the death of anyone or more of the guarantors, the deed of guarantee shall be binding on the representative and the estates of the deceased guarantor, so long the debt exists. Here in the case in hand, when we shall read both the guarantee deeds together then



the inference can be drawn that the amount, which was sanctioned in the first guarantee deed and the amount which has been sanctioned in the second guarantee deed are different, therefore, that is the reason the fresh deed of guarantee was executed by the guarantor on 06.05.2017 and nowhere it is mentioned in the deed of guarantee that it is in continuation of the earlier deed of guarantee rather it is in respect for the amount of Rs. 3007.85 lakhs sanctioned on 06.05.2017, whereas the first deed of guarantee was in respect of the amount of Rs. 3347.44 lakhs sanctioned on 28.06.2013.

74. At this juncture, we would also like to refer the arguments advanced on behalf of the Ld. Counsel for the petitioner, who in course of her arguments submitted that it is mentioned in the second deed of guarantee dated 06.05.2017, Guarantee shall be in addition to and shall not in any way be prejudiced or affected by any collateral or other security or guarantee now or hereafter to be held by the bank and by placing reliance upon this line, the Ld. Counsel for the petitioner submitted that this deed of guarantee is in continuation with the earlier deed of guarantee and when we shall read the entire averment in this deed of guarantee then we noticed that nowhere it is mentioned in the deed of guarantee that it is in continuation of the earlier deed of guarantee, therefore, in our considered view that sentence which have been referred by the Ld. Counsel for the petitioner in course of arguments is not in respect of the earlier deed. It is also because of the fact it is mentioned in the said sentence that "guarantee now or hereafter" which in our considered view that the guarantee from the deed of execution of the guarantee deed or thereafter not prior to the execution of the guarantee deed or in continuation of the earlier guarantee deed and if the intention of the executor of the guarantee deed dt.06/05/2017 was so then it must have been mentioned in the deed of guarantee that it is in continuation of



earlier deed of guarantee dt. 28/06/2013 and it must have been mentioned in the deed of guarantee that it is in respect of the amount of Rs. 3347.44 lakhs sanctioned on 28.06.2013. But it is not mentioned rather it is specifically mentioned that it is for the sanctioned amount of Rs. 3007.85 lakhs, therefore, we are unable to accept the contention of the petitioner that second deed of guarantee executed on 06.05.2017 is in continuation of the earlier deed of guarantee dated 28.06.2013.

75. Now the question is whether the guarantor can execute the deed of guarantee which is in contravention of the provision of Section 185 and 186 of the Companies Act. As we have already referred the submissions made by the parties on this issue.

76. At this juncture, we would like to refer the relevant provision of Section 185 of the Companies Act and the same is quoted below:-

185. Loan to directors, etc.

(1) Save as otherwise provided in this Act, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person:

Provided that nothing contained in this sub-section shall apply to—

(a) the giving of any loan to a managing or whole-time director—

(i) as a part of the conditions of service extended by the company to all its employees; or

(ii) pursuant to any scheme approved by the members by a special resolution; or

(b) a company which in the ordinary course of its business provides loans or



gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the bank rate declared by the Reserve Bank of India.

Explanation.—For the purposes of this section, the expression “to any other

person in whom director is interested” means—

- (a) any director of the lending company, or of a company which is its holding company or any partner or relative of any such director;
- (b) any firm in which any such director or relative is a partner;
- (c) any private company of which any such director is a director or member;
- (d) any body corporate at a general meeting of which not less than twentyfive per cent. of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or
- (e) any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

(2) If any loan is advanced or a guarantee or security is given or provided in contravention of the provisions of sub-section (1), the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, and the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or



with both.

77. Mere plain reading of the provision shows that no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt or to give any guarantee or provide any security in connection with any loan taken by any Director or any director a company which is its holding company or any partner or relative of any such director but herein the case in hand, there is no dispute that directors of both the subsidiary or holding company were the same, therefore, Section 185 prevent a director to stood as a guarantor, of course there is an exception under Section 185 (2), an exception it can be done by Special Resolution passed by the company in a general meeting. Similarly Section 186(5) of the Companies Act also says No investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained.

78. At this juncture, we would like to refer the arguments advanced on behalf of respondent of IA-3640/2020 and the petitioner of IA-3790/2020, Ld. Counsel for the RP submitted that the resolution which the petitioner has enclosed at page 126 of the application is in respect of the property, which has already been sold and in the light of the submission, we have again gone through the resolution referred at page 126 of the application then we noticed that this Resolution is in respect of the property situated at Sector-63 Noida and the description of the property is as follows:- B-156, Sector-63, Noida, UP and we further noticed that the petitioner has enclosed memorandum of deposit of title deeds dated 15.04.2014 and by this memorandum of deposit of title deeds of the two property situated at Sector-63 Noida are



mortgaged, one is B-152, Sector-63 Noida, District Gautam Budh Nagar, UP and the other one is B-107, Sector-63, Noida, District Gautam Budh Nagar, UP, this memorandum of deposit of title deed was prepared on 15.04.2014. Whereas the resolution, which the petitioner has enclosed at page 126 of the application was taken on 06.05.2017 and it is only in respect of one of the properties situated at Noida.

79. At this juncture, we would also like to refer the averment made in IA-3790/2020 filed by the RP for the release of charge and hand over the original lease deed of the subject property that is situated at Noida, which is B-58, Sector-63, Noida, UP and this property for which the prayer has been made by the RP to release the property from the possession of the petitioner of IA-3642/2020 is not the part of the resolution, which has been attached by the petitioner at page 126, therefore, the property shown in IA-3790/2020 is not a part of resolution upon which the petitioner has placed reliance.

80. At this juncture, we would also like to mention this fact that if the deed of guarantee executed on 06.05.2017 was in continuation with the earlier deed of guarantee then there was no reason for taking a Resolution in respect of the property situated at B-152, Sector-63, Noida, admittedly, there is no resolution as required under Section 185 and 186 of the Companies Act in respect of the property situated at B-58, Sector-63, Noida, UP.

81. At this juncture, we would like to refer the provision of Section 185(4) as well as Section 186(13) of the Companies Act, the Sections says that if any loan, guarantee, security is given or provided or utilized in contravention of the provision of Section 185 the company shall punishable with fine as well as the officer of the company who is in default shall be punishable with imprisonment for the term which may extend to 6 month or fine, similarly, if a person contravened the provision of Section 186 then



under Section 186(13) of the Companies Act, the company shall be punishable with fine and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to two years with fine, therefore, there is specific provision of Section 185 and 186 of the Companies Act which says that if any person contravened the provision then the company as well as the officer who are liable for that shall be punished which means any agreement which is in contravention of the provision of Section 185 and 186 of the Companies Act are illegal and punishable.

82. When we shall consider the case of the petitioner in the light of the aforesaid provision of law then we noticed that in the absence of special resolution as required under Section 185 and 186 of the Companies Act, deed of the guarantee executed by the Directors is in contravention of the provision of Section 185 and 186 of the Companies Act.

83. But at this juncture, we would like to refer the submission made on behalf of the Ld. Counsel for the petitioner, who in course of argument submitted that the Doctrine of Indoor Management as well as Section 70 of the Contract Act are applicable. Ld. Counsel appearing for the petitioner submitted that in the Article of Association Directors have been vested with the power to enter into the contract and sign the same therefore, the special resolution is the internal matter of the company and petitioner will be protected under the Doctrine of Indoor Management. On the other hand, ld. Counsel appearing for the R.P submitted that ignorance of law is not excuse, because it was the duty of the petitioner to verify it before entering into the agreement therefore, Doctrine of indoor Management is not applicable.

84. Before considering the submissions, we would like to refer Section 399 of the companies Act 2013 and same is quoted below:

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“399. Inspection, production and evidence of documents kept by Registrar.—

(1) Save as otherwise provided elsewhere in this Act, any person may—

(a) inspect by electronic means any documents kept by the Registrar in accordance with the rules made, being documents filed or registered by him in pursuance of this Act, or making a record of any fact required or authorised to be recorded or registered in pursuance of this Act, on payment for each inspection of such fees as may be prescribed;

(b) require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document to be certified by the Registrar, on payment in advance of such fees as may be prescribed:

Provided that the rights conferred by this sub-section shall be exercisable—

(i) in relation to documents delivered to the Registrar with a prospectus in pursuance of section 26, only during the fourteen days beginning with the date of publication of the prospectus; and at other times, only with the permission of the Central Government; and

(ii) in relation to documents so delivered in pursuance of clause (b) of subsection (1) of section 388, only during the fourteen days beginning with the date of the prospectus; and at other times, only with the permission of the Central Government.

(2) No process for compelling the production of any document kept by the Registrar shall issue from any court or the Tribunal except with the leave of that court or the Tribunal and any such process, if issued, shall bear thereon a statement that it is issued with the leave of the court or the Tribunal.

(3) A copy of, or extract from, any document kept and registered at any of the offices for the registration of companies under this Act, certified to be a true copy by the Registrar (whose official position it shall not be necessary to prove), shall, in all legal proceedings, be admissible in evidence as of equal validity with the original document.”



85. Mere plain reading of the provision shows that under this provision any person may inspect the documents, which are kept in the office of Registrar regarding the incorporation of the company, which includes the Article of Association and Memorandum of Association. The documents which a person is entitled to get from the office of Registrar u/s 399 of the Companies Act and if he fails to get and verify it prior to entering with a contract with the company then the company is not liable for that act, if it is done by the Director, because it comes under the doctrine of constructive notice. But the question is "does the doctrine of constructive notice allow the outsiders to have notice of internal affairs of the company", the answer is no, because doctrine of constructive notice is subject to exception i.e Indoor Management and that is the reason petitioner has taken this plea.

86. At this juncture, we would like to peruse the Article of Association and on perusal we noticed in clause 50 of the Article of Association the power of the Directors are given and we noticed Director are vested with the power to make and sign the contract and on the basis that the petitioners claimed that so far the special resolution is concerned since it is the internal affairs of the company and so they are not supposed to have a knowledge of the same and he is protected under doctrine of Indoor Management and also U/S 70 of the Contract Act. When we shall consider this submission of the petitioner in the light of Section 399 of the Companies Act then we are of the considered view, in view of Section 399 of the Companies Act, whether the special resolution as required under the law has been passed by the Company or not, it is not covered under the doctrine of constructive notice, therefore, in my opinion, the petitioner is protected under doctrine of Indoor Management.



87. Apart from that, in view of Section 70 of the Contract Act, “where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such another person enjoys the benefit thereof, the letter is bound to make compensation to the former in respect of , or to restore, the thing so done or delivered”. If we shall consider the case in hand in the light of this provision then we noticed that on the basis of deed of guarantee, the corporate debtor had availed the benefit, now they can not be permitted to raise this issue at this stage, that in the absence of special resolution as required under Section 185 and 186 of the Companies Act, deed of the guarantee executed by the Directors is in contravention of the provision of Section 185 and 186 of the Companies Act.
88. Since the R.P is raising the issue on behalf of the corporate debtor at this stage, specially when it is not in dispute that the corporate debtor had not availed the facilities on the basis of the deed of guarantee, therefore, in our considered view, R.P can not be permitted to raise this issue at this stage , when it was not raised by the original signatory of the deed of guarantee and permitted the petitioner Bank to keep the document under charge.
89. For the reasons discussed above, we are of the considered view that the respondent/RP has wrongly refused to accept the claim of the applicant, therefore, we are unable to accept the contention of the R.P that the petitioner is not Secured Financial Creditor rather we are of the considered view that the petitioner is the Secured Financial Creditor
90. Accordingly, it is therefore,

ORDERED

that the application filed by the petitioner is hereby ALLOWED. The R.P is directed to treat the petitioner Bank as Secured Financial Creditor and further directed to accept the claim of the applicant bank



91. So far IA-3790/2020 is concerned, in the light of the order passed in IA-3642/2020, since we have already directed the R.P to treat the petitioner Bank as Secured Financial Creditor and further directed to accept the claim of the applicant bank, therefore, in the light of order passed in IA 3642/20, the prayer of the R.P is not liable to be accepted.

92. Hence we hereby reject the prayer of R.P and IA 3790/20 is DISMISSED.

Sd/-

K. K. VOHRA
Member (T)

Sd/- 2022

ABNI RANJAN KUMAR SINHA
Member (J)