

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
KOCHI BENCH**

**CP(IBC)/36/KOB/2023**

*(Under Section 95(1) of the IBC, 2016 read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Persons) Rules, 2019)*

**&**

**IA(IBC)/96/KOB/2024**

**IN**

**CP(IBC)/36/KOB/2023**

*(Under Section 99 of the Insolvency and Bankruptcy Code, 2016)*

**AND**

**CP(IBC)/37/KOB/2023**

*(Under Section 95(1) of the IBC, 2016 read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Persons) Rules, 2019)*

**&**

**IA(IBC)/97/KOB/2024**

**IN**

**CP(IBC)/37/KOB/2023**

*(Under Section 99 of the Insolvency and Bankruptcy Code, 2016)*

***In the matter of:***

**Piramal Trusteeship Services Private Limited v Mr Kakkanattil Ibrahimkutty Mohammed Rafi Mather**

CP(IBC)/36/KOB/2023 &  
IA(IBC)/96/KOB/2024 in CP(IBC)/36/KOB/2023  
*In re: M/s.Piramal Trusteeship Services Pvt Ltd. Vs. Mr. Kakkanattil Ibrahimkutty  
Mohammed Rafi Mather*  
CP(IBC)/37/KOB/2023 &  
IA(IBC)/97/KOB/2024 in CP(IBC)/37/KOB/2023  
*In re: M/s.Piramal Trusteeship Services Pvt Ltd. Vs. Mr. Kakkanattil Abdul  
Rahiman Siraj Mather*

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**&**

**Piramal Trusteeship Services Private  
Limited v Mr Kakkanattil Abdul Rahiman  
Siraj Mather**

*Memo of Parties:*

**CP(IBC)/36/KOB/2023**

**M/s. Piramal Trusteeship Services  
Private Limited,**

4th Floor, Piramal Tower Annexe, Ganpatrao  
Kadam Marg, Lower Parel, Mumbai,  
Maharashtra- 400 013.

**... Applicant/ Creditor**

**-vs-**

**Mr. Kakkanattil Abdul Rahiman Siraj  
Mather, 33/29A, The Promenade Mather  
Projects, Pavoov Road, Padivattom, Edapally,  
Kochi- 682 024.**

**... Respondent/Personal Guarantor**

**IA(IBC)/96/KOB/2024**

**Mr. T. Narayana Swamy**

Resolution Professional,  
Subhadeepa, 7<sup>th</sup> cross,  
Bhuvaneshwarinagar,  
Hebbal-Kempapura, Bangalore-560

CP(IBC)/36/KOB/2023 &  
IA(IBC)/96/KOB/2024 in CP(IBC)/36/KOB/2023  
*In re: M/s.Piramal Trusteeship Services Pvt Ltd. Vs. Mr. Kakkanattil Ibrahimkutty  
Mohammed Rafi Mather*  
CP(IBC)/37/KOB/2023 &  
IA(IBC)/97/KOB/2024 in CP(IBC)/37/KOB/2023  
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Rahiman Siraj Mather*

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**... Applicant**

*Memo of Parties:*

**CP(IBC)/37/KOB/2023**

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Bhuvaneshwarinagar,

Hebbal-Kempapura, Bangalore-560

**... Applicant**

**Order delivered on: 19.06.2024**

***Coram:***

**Hon'ble Member (Technical)**

**Hon'ble Member (Judicial)**

**Shri. Shyam Babu Gautam**

**TMT. Justice T Krishna Valli**

***Appearances:***

For the Applicant : Ms. Nikita M, Advocate  
For the Respondents : Ms. Stiya Sivan, Advocate  
For the Resolution Professional : Mr. Shiyas K R, Advocate

**ORDER**

***Per Coram***

1. The present applications have been filed by Applicant Creditor, under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 ("Code") read with rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 ("Rules") by **M/s. Piramal Trusteeship Services Private Limited** for initiation of the insolvency resolution process of **Mr. Kakkanattil Ibrahimkutty Mohammed Rafi Mather.**, and **Mr. Kakkanattil Abdul Rahiman**

**Siraj Mather**, the Personal Guarantors of the Corporate Debtor M/s. Asten Realtors Private Limited (hereinafter referred to as "Corporate Debtor"),

**CP(IBC)/36/KOB/2023 and CP(IBC)/37/KOB/2023**

The brief facts of the case are as follows:

2. The Applicant M/s Piramal Capital and Housing Finance Limited (PCHFL) vide sanction letter dated 19.11.2018 had sanctioned a loan of Rs. 55,00,00,000/- (Rupees Fifty-Five Crores Only) to Corporate Debtor. The loan agreement dated 22.01.2019 was executed by the Corporate Debtor as the borrower, Mr. Kakkanattil Ibrahimkutty Mohammed Rafi Mather., and Mr. Kakkanattil Abdul Rahiman Siraj Mather, as the obligor 1 and obligor 2 respectively
3. The Personal Guarantors thereafter executed a Deed of Guarantee dated 22.01.2019 in favour of the Petitioner inter alia providing irrevocable, absolute and unconditional guarantee to secure the repayment of the outstanding loan amounts payable by the Corporate Debtor
4. It is stated that according to the terms of the Loan Agreement, a total amount of Rs. 54,99,00,000/- (Rupees Fifty-Four Crores Ninety-Nine Lakhs Only) was disbursed. After the disbursements, the Corporate Debtor failed to adhere to the terms of the Sanction Letter and Loan

Documents and committed default in repayment of the financial facility on 05.01.2023.

5. Accordingly, the Applicant invoked the Corporate Guarantee vide a notice dated 17.03.2023 Calling upon the Corporate Debtor to make the payment of Rs.55,07,65,717/- (Rupees Fifty-Five Crores Seven Lakh Sixty-Five Thousand Seven Hundred and Seventeen Only) within 7 days from the receipt of the said notice.
6. The Corporate Debtor and the Personal Guarantors paid no heed to the repeated requests and continued to default for more than 90 days, and the account of the Corporate Debtor was declared as NPA in terms of the extant guidelines of the Reserve Bank of India.
7. It is further stated that on the failure of the Corporate Debtor, Personal Guarantors and Mortgagors to pay the outstanding amount within the given time, the Financial Creditor had no choice but to invoke the Deed of Guarantees amounting to Rs. 55,07,65,717/- as on 16.03.2023 executed by them in favour of the Creditor.
8. The Applicant accordingly issued a Form B Demand Notice dt. 10.06.2023 demanding the respondent to pay Rs.56,81,65,656/- together with interest, penal interest, and cost and charges, etc. The Corporate Debtor or the personal guarantors have not made any payment towards the amount due despite acknowledgement of notice of demand.

9. The Applicant has submitted the Record of default of Corporate Debtor filed with NESL (Information Utility) evidencing default on the part of the Corporate Debtor in repayment of the amount.
10. Despite of receiving all the notices, the Corporate Debtor and the Personal Guarantors have failed to repay the amount. Therefore, the Financial Creditor is constrained to initiate the present proceedings under Section 95 of the Insolvency and Bankruptcy Code, 2016 before this Tribunal.
11. The total amount of default under the Loan Agreement is Rs. 56,81,65,656/- (Rupees Fifty-Six Crores Eighty-One Lakhs Six Five Thousand Six Hundred and Fifty-Six Only) as on 31.05.2023.
12. The amount of default is greater than the minimum threshold of Rs.1 Crore for application under Part III of the code. The date of default stated in Part III of the petition is 25.03.2023.
13. On presentation of the application by the Applicant/Creditor, this Adjudicating Authority vide order dated 16.01.2024 appointed **Mr. T. Narayana Swamy**, as Resolution Professional directing him to file a report under Section 99 of the Code.

**IA(IBC)/96/KOB/2024 in CP(IBC)/36/KOB/2023**

**and**

**IA(IBC)/97/KOB/2024 in CP(IBC)/37/KOB/2023**

14. Both these applications were filed by the Resolution Professional under Section 99 of IBC, 2016 recommending the admission of the Company Petition filed under Section 95 of IBC, 2016. The grounds for admission of the application as per the Report are as follows: -

- a) The Application filed by the Financial Creditor satisfies the requirement as set out in Section 95 of the Code and is duly filed within the limitation period of 3 years from the date of default.
- b) The principal borrower M/s Asten Realtors Private Limited is a defaulter based on the records pursued from the Application under sec 95(1) of the Code.
  - a) Mr. Kakkanattil Ibrahimkutty Mohammed Raft Mather and Mr. Kakkanattil Abdul Rahiman Siraj Mather, Personal Guarantors to the Corporate Debtor have committed default on repayment of Loan, demanded by the Financial Creditor after the invocation of personal guarantee vide notice dated 10.06.2023.
  - b) Mr. Kakkanattil Ibrahimkutty Mohammed Rafi Mather and Mr. Kakkanattil Abdul Rahiman Siraj Mather has not denied the existence of the debt, and further, both confirmed that they have not made any repayment towards the unpaid debt claimed by the creditor. Therefore, it is hereby concluded that the default in repayment still exists.



- c) The Financial Creditor had served a statutory demand notice on the Personal Guarantors under Rule 7 (1) of the Personal Guarantor Insolvency Rules on 10.06.2023 and the same was duly received by Mr. Kakkanattil Ibrahimkutty Mohammed Rafi Mather and Mr. Kakkanattil Abdul Rahiman Siraj Mather on 15.06.2023.
15. The Personal Guarantors herein filed their reply and stated that the guarantee was intended to secure repayment of a loan owed by the principal borrower. After another party filed a petition under section 7 of the Code 2016, the principal borrower entered the Corporate Insolvency Resolution Process on 25/01/2023 vide order in CP(IBC)/54/KOB/2022. Therefore, the financial debt currently cannot be considered as due or payable, and there is no default against the transaction because financial debt is not yet due or payable since the default date claimed by the petitioner is during the period of the insolvency process against the principal borrower.
16. The petitioner was well aware of the principal borrower's CIRP during the alleged default period, and yet they intentionally concealed this fact in the above petition.
17. And stated that the Corporate Debtor had not defaulted on payments owed to the petitioner before entering CIRP, so invoking the personal guarantor is unnecessary. Typically, guarantors have the right of subrogation, allowing them to recover their losses from the principal

borrower if held liable. However, since the principal borrower is in insolvency, this right cannot be exercised, making it unjust to enforce obligations on the guarantor.

18. Additionally, the petitioner's evidence of the financial debt is incomplete and omits the fact that the principal borrower was undergoing CIRP during the alleged default period.
19. We have heard the learned counsels for both parties and perused the entire case records/documents. We have also gone through the report dated 22.02.2023 filed by the Resolution Professional. It is observed that the respondents, in their reply, have acknowledged the letter of guarantee, confirming that it was intended to secure the repayment of the outstanding loan amount owed by the Principal Borrower/Corporate Debtor to the Financial Creditor. Therefore, the question to be considered here is
  - whether the Personal Guarantors are liable under the Deed of Guarantee dated 22.01.2019 to secure repayment of the loan sanctioned to the Corporate Debtor by the Financial Creditor.
  - whether the default on the part of the Corporate Debtor after the initiation of CIRP proceedings can trigger proceedings against the Personal Guarantors.
20. In terms of Section 128 of the Indian Contract Act, 1872, the liability of a guarantor/ surety is coextensive, joint and several with that of the

principal borrower unless the contrary is provided by the contract. Thus, the creditors may initiate legal proceedings against both the corporate debtor and its personal guarantor simultaneously, or they may decide to proceed in any other preferred sequence for the debt in default. As per the judicial precedents set up by the Apex Court and Hon'ble NCLAT, it is up to the creditors to file for insolvency proceedings against the personal guarantors of a Corporate Debtor.

21. In this connection, it is profitable to quote Clause 2.1 the Deeds of Guarantee which is as under:

*2. GUARANTEE*

*2.1 The Guarantor, irrevocably, absolutely and unconditionally:*

*2.1.1 guarantees to the Security Trustee (acting on behalf, and for the benefit, of the Lender): (a) the due and punctual observance and performance by the Company of all its obligations under, or pursuant to, the Facility Agreement (including the Secured Obligations and the Guarantee Amount set out in SCHEDULE 4); (b) to forthwith pay to the security Trustee, from time to time, or on demand (by way of a Demand Notice (as defined below)), all sums of money that the Company is at such time, or upon such demand, required to pay to the Lender under, or pursuant to, the Finance Documents, but has not paid; and (c) that the Guarantor shall Upon the occurrence of an Event of Default and upon issuance of the Demand Notice by the Security Trustee, forthwith pay to*

*the Security Trustee, without any demur or protest, the amount stated in the Demand Notice.*

22. Upon examining the relevant clauses of the Deeds of Guarantee, it is evident that the Guarantors are obligated to pay the amount specified in the Demand Notice immediately upon the occurrence of an event of default by the Principal Borrower. According to the terms of the guarantee, when the Principal Borrower defaults in payment to the Creditor, the Personal Guarantors herein, under their irrevocable, absolute, and unconditional guarantee, must secure the repayment of the outstanding amounts. Thus, from the above terms of the agreement the Personal Guarantor's liability is contingent upon the existence of a default by the principal debtor.
23. It is important to emphasize that the CIRP against the Corporate Debtor was initiated by some of the homebuyers of the Corporate Debtor in CP(IBC)/54/KOB/2022 during November 2022. Subsequently, this petition was reserved for orders on 21.12.2022, and the CIRP commenced on 25.01.2023. According to the Applicant, as stated in Part III of the petition, the Corporate Debtor made its last payment on 31.12.2022. Notably, there was no default on the part of the Corporate Debtor until 31.12.2022.

24. The Applicant claims that the debt became due on 05.01.2023, which is after the CIRP petition was reserved for orders. Furthermore, the Applicant asserts that the date of default is 25.03.2023.
25. While it is true that a guarantor's liability is co-extensive with that of the Principal Borrower, this liability is fundamentally derived from the default of the Principal Borrower. In the absence of a default by the Principal Borrower, the guarantor cannot be held liable. The timing and circumstances of the default are critical in determining the point at which the guarantor becomes liable.
26. Given that the Principal Borrower had not defaulted on any payment due before the initiation of CIRP, and specifically before the CIRP Petition was reserved for orders, and considering that the claimed default date, it is our view that the guarantor's liability is not automatically triggered merely by the initiation of CIRP and the subsequent moratorium without an independent default by the Corporate Debtor.
27. Consequently, the Creditor cannot initiate insolvency proceedings against the Personal Guarantors based solely on the initiation of CIRP without establishing an independent default by the Corporate Debtor. This interpretation aligns with the principles laid down in relevant judicial precedents, emphasizing the necessity of a clear and distinct default by the Principal Borrower to trigger the guarantor's liability.

28. The Hon'ble Supreme Court in the judgement of Dilip B. Jiwrajka V/s Union of India & Ors held that

*ii. The resolution professional appointed under Section 97 serves a facilitative role of collating all the facts relevant to the examination of the application for the commencement of the insolvency resolution process which has been preferred under Section 94 or Section 95. The report to be submitted to the adjudicatory authority is recommendatory in nature on whether to accept or reject the application;*

29. The Resolution Professional has recommended the admission of the Company Petitions mentioned above, despite not addressing the specific dispute in question. It is crucial to note that the report submitted by the Resolution Professional under Section 99 of the Code, recommendatory in nature. In light of this, **IA(IBC)/96/KOB/2024** and **IA(IBC)/97/KOB/2024** are take on record the report filed by the Resolution Professional under Section 99 of IBC, 2016.

30. For the reasons stated aforesaid, **CP(IBC)/36/KOB/2023** and **CP(IBC)/37/KOB/2023** filed under the provisions of Section 95 of Code to initiate the Insolvency Resolution Process against the Respondents/Personal Guarantors Mr. Kakkanattil Ibrahimkutty Mohammed Rafi Mather., and Mr. Kakkanattil Abdul Rahiman Siraj Mather is **dismissed** and disposed of accordingly.

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KOCHI BENCH

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Rahiman Siraj Mather*

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31. The Registry is directed to communicate this order to the respective parties through email.
32. A certified copy of the order be issued on request of the parties as per the procedure.
33. File be consigned to records.

**SHYAM BABU GAUTAM**  
**(MEMBER TECHNICAL)**

**T KRISHNA VALLI**  
**(MEMBER JUDICIAL)**

Signed on this the 19<sup>th</sup> day of June, 2024.

*Krishna. /LRA*