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

CP (IB) No. 155/MB/2023

Under Section 95 of the Insolvency and Bankruptcy Code, 2016 read with Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.

In the matter of:

Piramal Trusteeship Services Private Limited, having its address at: 04th Floor, Piramal Annex, Ganpatrao Kadam Marg, Lower Parel, Mumbai-400013.

….. Applicant/Creditor

Versus

Mr. Haresh Hirani
Residing at: - 802, Rudraksh Building, Nariman Road, Vile Parle (East), Mumbai-400005.

….. Personal Guarantor/Respondent

Order Delivered on :- 02.12.2024.

Coram:

Shri. Anil Raj Chellan **Member (Technical)**

Mr. Kuldip Kumar Kareer **Member (Judicial)**

Appearances (in Physical mode):

For the Petitioner : Adv. Saif Dingankar a/w Adv. Rushab Chopra a/w Adv. Saloni Sulakhe.

For the Personal Guarantor : Adv. Mitali Bhatt a/w Adv. Ayush Rajani.

ORDER

Per: - Coram.

1. This is an application filed under Section 95 of the Insolvency and Bankruptcy Code. 2016 (hereinafter referred to as 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 Debtors) Rules, 2019 ('PG AAA Rules') by **Piramal Trusteeship Services Private Limited** (hereinafter referred to as "Financial Creditor" or "Piramal" or "Creditor") for initiating the Personal Guarantor's Insolvency Resolution Process ('PGIRP') of Mr. **Haresh Hirani** (hereinafter referred to as "Personal Guarantor"). As stated in Part III of the Petition, the date on which default occurred is 19th March, 2022 and the **amount in default is stated to be INR 8,89,49,651/-** (Rupees Eight Crores, Eighty-Nine Lakhs, Fourty Nine Thousand, Six Hundred and Fifty-One only).

Case of the Applicant (in brief):

2. A Loan Agreement dated 22.03.2018 was entered into by the Corporate Debtor viz. Shamik Enterprises Private Limited, and Piramal Finance Limited, now known as Piramal Capital and Housing Finance Limited, under which a loan of Rs. 52 crores (inclusive of Rs. 12 crores as revolving credit facility) was advanced. By mutual agreement, the rate of loan was fixed at 16.96% p.a. and the said interest was agreed to be compounded monthly but payable quarterly. The tenure of the loan was 18 quarters from the date of disbursement of the principal moratorium of 6 quarters. The repayment of loan was to be made in 12 quarter instalments commencing from the end of quarter 7 since the date of disbursement. The date of first disbursement of the loan was 27th March, 2018.
3. By and under the Security Trustee Agreement dated 21st March, 2018 executed between the Corporate Debtor (i.e. the Borrower), Piramal Capital and Housing Finance Limited (i.e. the Lender) and Piramal Trusteeship Services Private Limited (hereinafter also referred to as "the Security Trustee"), Piramal Trusteeship Services Private Limited was jointly appointed to act as a Trustee for and on behalf of and for the benefit of the Lender therein and to hold the Securities created pursuant to the Loan Agreement between the Borrower, the Lender and the Security Trustee.
4. An unconditional and irrevocable Personal Guarantee was given by the Respondent under the Deed of Guarantee dated 22nd March, 2018 executed in favour of Piramal Trusteeship Services Private Limited guaranteeing the repayment of loan by the Corporate Debtor.
5. By an Order dated 03.02.2022 passed by this Tribunal, the CIRP against the Corporate Debtor commenced.

6. On 04.03.2022, the Applicant issued a Demand Notice to the Respondent under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. Reply to the aforesaid Demand Notice on behalf of the Respondent was received by the Applicant on 22.03.2022; however, no dues were paid. Despite receipt of the aforesaid Demand Notice, the Respondent failed to pay the amount claimed therein. Hence this application.

Report of the Resolution Professional u/s 99 of the Code

7. The Resolution Professional ('RP'), namely, Mr. Arun Kapoor has placed on record his Report dated 09.01.2024, u/s 99 of the Code. The said Report has recommended for admitting the Respondent-Personal Guarantor into PGIRP. The following observations have been made by the Ld. RP in his report:

a. The Applicant has, vide Demand Notice dated 04th March 2022, invoked the Personal Guarantee furnished by the Respondent. The said Demand Notice has been served on the Respondent/Personal Guarantor; however, no payments were made till date.

b. The RP has demanded proof of repayment u/s 99(2) of the Code, if any amount of debt, which is claimed by the Creditor as unpaid, has been paid by the Debtor/Respondent herein. The RP received a vague and unsatisfactory reply from the Respondent/Personal Guarantor dated January 03, 2024. However, no proof of repayment of debt was provided by the Personal Guarantor.

c. The RP vide email dated December 30, 2023 sought information and clarity from the Creditor/Applicant as per Section 99(1) of the

Code. The RP informed that an amount of INR 16,41,52,845/- is due and payable by the Personal Guarantor as on January 02, 2024 towards the Principal and Interest.

d. The Applicant/Petitioner's claim is not barred by limitation.

8. **<u>Reply of the Respondent/Personal Guarantor to this Petition:</u>**

i. The Loan Recall notice was never issued to the Personal Guarantor. The Respondent submits that a recall notice is an essential document that shows the Applicant has invoked the personal guarantee. Hence the present application is not maintainable as the default never occurred.

ii. The Corporate Debtor's loan account was never classified as Non-Performing Asset ('NPA') by the Applicant which itself demonstrates that the Corporate Debtor never committed default and thus, without default, the Applicant has wrongly filed the present petition.

iii. Prior the service of demand notice under the provisions of the Code, the Applicant never invoked the personal guarantee which was furnished by the Respondent and hence, there is no question of default on the part of the Personal Guarantor.

iv. In the present case, the date of demand notice is 04th March, 2022 which is prior to the date of default i.e. 19th March, 2022. The Respondent has taken a plea that default is committed first and then the demand notice is served, and not vice versa.

9. **Rejoinder by the Applicant/Creditor:**

i. It is contended by the Personal Guarantor that no loan recall notice was ever issued to him. According to the Respondent, issuing a loan recall notice is a prime requirement u/s 95 of the Code and therefore, the instant petition is not maintainable. In this regard, the Applicant submits that the aforesaid contention is misplaced, as the guarantee executed by the Respondent/Personal Guarantor does not stipulate any requirement for issuance of a loan recall notice to the Personal Guarantor. The only obligation cast upon the Creditor is to issue a Demand Notice seeking payment of outstanding dues from the Personal Guarantor.

ii. Harmonious reading of Clauses 20.16 and 20.17 of the Term Loan Agreement reveals that an event of default is deemed to have transpired when the borrower fails to settle its outstanding obligations as they become due or if a moratorium is declared in furtherance to an application under the Code. It is an admitted fact that CIRP against the Corporate Debtor commenced by virtue of Order dated February 03, 2022 and therefore, as per the above-referred clauses, the event of default is deemed to have occurred on 03.02.2022.

FINDINGS

10. We have heard the learned counsels for the Petitioner and the Respondent/Personal Guarantor and we have carefully gone through the records.

11. On perusal of records, we find that the Corporate Debtor had availed a loan facility of Rs. 52 crores from M/s. Piramal Finance Limited in pursuance of the Loan Agreement dated 22nd March, 2018. As per the provisions of the Loan Agreement, the Guarantors viz. Mr. Haresh Hirani, Mr. Suresh Hirani, Mr. Sandeep Hirani, Mr. Shamik Hirani, Mr. Vinod Hirani and Mr. Chintan Hirani were required to provide an unconditional and irrevocable guarantee in favour of the Security Trustee i.e. the Applicant/Creditor herein, to secure the repayment of the outstanding loan. Accordingly, the Deed of Guarantee was executed on 22nd March, 2018 between Piramal Finance Limited and the Personal Guarantor in favour of the Applicant in relation to the debts owed by the Corporate Debtor. Further, we find that the Personal Guarantee furnished by the Respondent is continuing, irrevocable and unconditional in nature. Thus, the existence of personal guarantee obligation on the part of the Respondent in favour of the Applicant, who is a Security Trustee of Piramal Finance Ltd, has been satisfactorily established from the records.

12. We shall now look into the factum of default. As per the terms and conditions of the Loan Agreement dated 22nd March, 2018, the loan was granted for a period of 18 quarters which would begin from March, 2018 with a principal moratorium of 6 quarters. Accordingly, the 18th quarter of the loan ended in September 2022. However, as the Corporate Debtor was admitted into the Corporate Insolvency Resolution Process ('CIRP') u/s 7 of the Code on 03.02.2022, the Lender could not recover its loan from the Corporate Debtor and thus, filed its claim before the Resolution Professional of the Corporate Debtor. As the Lender could not recover its loan from the Corporate Debtor, the Applicant herein invoked the Personal Guarantee vide

Demand Notice dated 04th March, 2022 calling upon the Personal Guarantor to repay the outstanding debt of INR 8,89,49,651/- within fourteen days from the receipt of notice failing which the insolvency resolution process against the Personal Guarantor would be initiated.

13. The Respondent, through his Advocate Mr. Maulik Chokshi, has replied to the Applicant's Demand Notice dated 04th March, 2022 on 22nd March, 2022. In the said reply, the Respondent/Personal Guarantor has admitted that after March 2020, the Corporate Debtor has been unable to pay the EMI to the Applicant/Lender due to the pandemic and the drastic fall in its revenue. Para 4 of the reply is reproduced hereinbelow:

"4. My Client states that, when the CIRP was initiated against the principal borrower, the principal borrower had made payment of EMI instalment of Rs. 1,83,99,991 (Rupees One Crore Eighty-Three Lakhs Ninety-Nine Thousand Nine Hundred and Ninety-One Only)/- on 04.02.2022, which your good office had not taken into consideration nor it had returned back the said instalment to the Insolvency Resolution Professional who was in the helm of the affairs of the principal borrower of which your good office may take note off. ***Hence the outstanding amount which My Client has to pay is Rs. 5,69,00,000*** *(Rupees Five Crore Sixty-Nine Lakhs Only) the amount mentioned in the demand notice is false, frivolous and void ab initio. A copy of the Bank statement where it is clearly evident that payment was made on 03.02.2020 by the principal borrower is hereby annexed and marked as "Exhibit A" for your kind perusal."*

(Emphasis Supplied)

13.2. Thus, on perusal of Para 4 of the reply reproduced hereinabove, we find that the Respondent/Personal Guarantor has admitted his default to the tune of INR 5.69 crores. It is a settled position in law that at the stage of admission, the Adjudicating Authority is not required to adjudicate, determine or ascertain the exact amount of default so long as the default meets the statutory threshold. The minimum amount of default required to trigger the PGIRP against the Personal Guarantor, as stipulated u/s 78 of the Code, is Rupees One Thousand Only. In the present case, since the Respondent has admitted his default to the tune of INR 5.69 crores, which is far more than the minimum threshold of default of Rs. 1,000/- laid down in Section 78 of the Code, we are not required to determine or adjudicate the exact quantum of default.

14. We have also considered the report of the Resolution Professional dated 09.01.2024, recommending the initiation of insolvency resolution process against the Personal Guarantor. The said Report gives the following reasons for the above recommendation:

a. That the Petition filed by the Creditor satisfies the requirements as set out in Section 95 of the Code;

b. That the Corporate Debtor, Shamik Enterprises Private Limited, has committed a default in repayment of loan amounts granted by the Creditor;

c. That Mr. Haresh Hirani, who is the Personal Guarantor to Shamik Enterprises Private Limited, has committed default in repayment of the loan facility demanded by the Creditor after the invocation of personal guarantee.

d. That the Applicant's claim is not barred by limitation.

15. The period of limitation stipulated under Article 137 of the Schedule to the Limitation Act, 1963 is three years from the time when the right to

apply accrues. In cases of personal guarantee, the right to apply accrues when the guarantee is invoked but remains undischarged. In the present case, the guarantee was invoked by the Creditor on 04th March 2022, and the present Petition was filed on 03rd November 2022, which is within three years from the date when the personal guarantee (which remains undischarged till date) was invoked. Hence, the present Petition is held to be within limitation. Also, since the Corporate Debtor is into CIRP pursuant to the Order dated 03.02.2022 passed by this Bench in CP(IB) No.4362/MB/2018, we are satisfied that this Bench has jurisdiction u/s 60(1) of the Code to entertain the above-captioned application against the Personal Guarantor to Corporate Debtor.

16. We shall now deal with the objections of the Respondent. The Respondent has pleaded in his reply that prior to the service of demand notice under the provisions of the Code, the Applicant never invoked the personal guarantee which the Respondent furnished and hence, there is no question of default on the part of the Personal Guarantor. The Respondent further pleads that the date of demand notice is 04th March 2022, which is prior to the date of default i.e. 19th March, 2022. According to the Respondent, the date of default has to precede the date of demand notice and not vice versa. In this regard, we observe that under the provisions of the IB Code or under the regulations laid thereunder, there is no specific requirement to invoke the guarantee otherwise than by way of demand notice u/s 95(4)(b) of the Code read with Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. The demand notice in Form 'B' is addressed to the personal guarantor giving details of default

by the Corporate Debtor, referring to the personal guarantee, and granting opportunity to the personal guarantor to make good the default within 14 days of receipt of notice or demonstrate if the debt has been repaid before the receipt of notice. Thus, in our considered view, all the essential ingredients for invocation of the guarantee are satisfied upon serving the Demand Notice in Form 'B' to the Personal Guarantor. Further, there is no embargo or contraindication in the Code that the demand notice u/s 95(4)(b) of the Code cannot be treated as an invocation of personal guarantee. Hence, we are unable to appreciate the aforesaid contentions of the Respondent.

17. 1. The Respondent has further contended that the Personal Guarantor was not served with the demand notice in the form or proforma prescribed in the contract of guarantee i.e. Notice of Demand as per Schedule II to the Deed of Guarantee dated 22nd March 2018, and therefore, the Petition should be dismissed as there is no default on the part of the Personal Guarantor. We find that the Applicant/Creditor in its Rejoinder has not denied or disputed the fact that the Respondent/Personal Guarantor was not served with the Notice of Demand in the form and manner required by Schedule II to the aforesaid Deed of Guarantee. We notice that as per Clause 2.1.2 of the Deed of Guarantee dated 22nd March, 2018, the Personal Guarantor undertook that whenever the Borrower does not pay any amount due under or in connection with the Finance Documents, the Security Trustee shall be entitled to call upon the Personal Guarantor to make payments, as stated in the Notice of Demand in the form and manner set out in Schedule II to the aforesaid Deed of Guarantee. We also notice that as per Clause 2.1.3 of the aforesaid Deed of Guarantee, the Personal Guarantor undertook that he shall, on receipt of the Notice of

Demand by the Security Trustee, without any demur, contest or delay, pay to the Security Trustee within a period of three days from the date of such Notice of Demand, the guaranteed amount as stipulated in the Notice of Demand.

17.2. On comparing the Demand Notice in Form 'B' dated 04th March 2022 with the Notice of Demand in Schedule II, we find that in the Demand Notice vide Form 'B', the Personal Guarantor was given 14 days from the receipt of notice to make good the default, which is far more than the period of 3 days required under the Notice of Demand in Schedule II to the Deed of Guarantee. Further, we find that the Demand Notice in Form 'B' dated 04th March, 2022 has all the essential contents of the Notice of Demand in Schedule II to the Deed of Guarantee. Therefore, when the Demand Notice vide Form 'B' dated 04th March 2022 is in substantial compliance with the Notice of Demand referred to in Schedule II, we find it inappropriate to dismiss this Petition on a hyper-technical ground that, the Personal Guarantor was not served with the Notice of Demand in the form and manner required under Schedule II to the above-referred Deed of Guarantee, as we have already hereinabove indicated that the Demand Notice in Form 'B' is in substantial compliance with the contractual requirements pertaining to the invocation of guarantee. Accordingly, we reject the aforesaid contention of the Respondent to dismiss the petition on the ground discussed above.

18. The Respondent has objected to the maintainability of the petition on the ground that the loan account of the Corporate Debtor was not classified as Non-Performing Asset ('NPA') and thus, there was no default on the part of the Corporate Debtor which gave cause of action

to the Lender to invoke the guarantee. However, we find that there is no merit in the aforesaid objection. In our considered view, the classification of Corporate Debtor's loan account as NPA is not a sine qua non to establish the factum of default. It is pertinent to note that u/s 128 of the Indian Contract Act, 1872, the liability of surety is co-extensive with that of the principal borrower and thus, a creditor can directly proceed against the surety without necessarily exhausting his remedies against the principal borrower. Therefore, even if the Applicant/Lender could not proceed against the Corporate Debtor under the SARFAESI Act, 2002 for enforcement of its security interest u/s 13 of the said Act on account of the alleged fact that the loan account was not classified as NPA, yet the Applicant is not precluded from filing an insolvency petition against the Personal Guarantor u/s 95 of the Code and hence, the aforesaid objection, being irrelevant, cannot be entertained.

19. Additionally, we wish to highlight that Clause 20 of the Term Loan Agreement explicitly sets out the events that constitute an Event of Default. Specifically, under Clauses 20.16 and 20.17 of the Term Loan Agreement, the declaration of a moratorium with respect to the indebtedness of the Borrower (i.e., the Corporate Debtor) is classified as an Event of Default. In the present matter, a moratorium was imposed on the Corporate Debtor pursuant to Section 14 of the Insolvency and Bankruptcy Code, 2016, by the Admission Order dated 3rd February 2022. Consequently, in accordance with Clauses 20.16 and 20.17 of the Term Loan Agreement, the date of 3rd February 2022 constitutes an Event of Default by the Corporate Debtor, thereby providing the Applicant/Lender with the right to invoke the personal guarantee furnished by the Respondent/Personal Guarantor.

Furthermore, it is undisputed that the Personal Guarantor failed to repay the outstanding loan dues to the Applicant/Lender, despite the invocation of the personal guarantee. Therefore, the Respondent's argument—that the Corporate Debtor did not default, and thus the Applicant has erroneously filed the present petition—lacks merit and cannot be sustained.

20. No other contentions have been advanced by the Respondent and there is no other issue which remains to be addressed.

21. In view of the foregoing analysis and discussions, we are satisfied that the Personal Guarantor has defaulted in repayment of debt to the Applicant despite invocation of personal guarantee. Further, we hold that the present petition is within our jurisdiction and it is not barred by limitation. Hence, we are inclined to allow the present Petition and accordingly, we pass the following orders:

ORDER

I. Initiate Insolvency Resolution Process against the Respondent/Personal Guarantor named **Mr. Haresh Hirani** and moratorium in relation to all the debts is declared, from today i.e. date of admission of the application and shall cease to have effect at the end of the period of 180 days, or this Tribunal passes order on the repayment plan under Section 114, whichever is earlier, as provided under Sec 101 of IBC, 2016. During the moratorium period, a) Any pending legal action or proceeding against the Respondent/Personal Guarantor in respect of any debt shall be deemed to have been stayed; b) The creditors of the personal guarantor shall not initiate any legal action or proceedings in respect of any debt; and c) The Personal Guarantor shall not transfer, alienate, encumber, or dispose of any of his assets or his legal rights or beneficial interest therein.

II. The Resolution Professional viz., **Mr. Arun Kapoor** (having Registration No. IBBI/IPA-003/IP-N00030/2017-18/10230, email: arun.kapoor58@yahoo.in), who was appointed vide Order dated 20.12.2023, is directed to cause a public notice to be published on behalf of the Adjudicating Authority within 7 days of uploading of this order on the website of NCLT, inviting claims from all Creditors within 21 days of such issue. The notice under Sub Section (1) of Section 102(2) shall include: -

a) details of the order admitting the application;

b) particulars of the resolution professional with whom the claims are to be registered; and

c) the last date for submission of claims.

III. The Petitioner is directed to deposit an advance payment of INR **1,00,000/- (Rupees One Lakh only)** to the bank account of Resolution Professional within one week, so as to initiate the process. This shall be adjusted towards the fee and expenses payable to the Resolution Professional.

IV. The publication of notice shall be made in two newspapers, one in English and other in Vernacular, which are in circulation in the state where the Personal Guarantor resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry for the record.

V. The Resolution Professional in exercise of the powers conferred under Section 104 shall prepare a list of creditors on the basis of:

a. the information disclosed in the application filed by the Petitioner under Section 95 and

b. claims received by the Resolution Professional under Section 102 within 30 days from the date of the notice.

VI. The Personal Guarantor shall prepare a repayment plan under Section 105, in consultation with the Resolution Professional, containing a proposal to the Creditors for restructuring of his debts or affairs. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Authority within a period of 21 days from the last date of submission of claims, as provided under Section 106.

VII. The meeting of the creditors shall be conducted in accordance with Sections 108, 109, 110 & 111 of IBC, 2016. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 of IBC, 2016 and submit the same to this Tribunal, copies of which shall be provided to the Debtor and the Creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of IBC, 2016.

VIII. The Registry is directed to communicate a copy of order to the Petitioner, the Respondent and the Resolution Professional within three working days from the date of uploading of this order.

IX. In terms of the above, **CP(IB) No. 155/MB/2023** filed under Section 95 of the IBC, 2016 **is hereby admitted** and the Insolvency Resolution Process stands initiated against the Personal Guarantor.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)