

and its affiliates on 30.12.2014 and of ₹ 16,00,00,000 availed by Abloom Infotech Pvt. Ltd. (Abloom) and other borrowers, affiliates of Abloom on 27.04.2016 from DMI Finance in the event the co-borrowers failed to repay the loans availed by them.

The present applicant is a Financial Creditor entered into a loan agreement (loan agreement 1) with Ninex and its affiliates, whereupon a loan facility of ₹ 27Crore was extended to Ninex and other borrowers, and affiliates of Ninex, to which RM Garg executed personal guarantee to secure the payment obligation under loan agreement 1 (LA-1). Likewise this creditor also entered into another loan agreement dated 27.04.2016 (LA -2) with Abloom and its affiliates, by which a loan of ₹ 16Crore was extended to Abloom, here also RM Garg executed a deed of personal guarantee to secure the payment obligation under loan agreement 2. Upon failure of the borrowers to honour the repayment obligation under the respective loan agreements, the creditor invoked the guarantee against the Respondent in respect to both LF1 and LF2 vide two notices of even date of 03.01.2020. For the guarantee being invoked against RM Garg, he is bound to make payment of total outstanding debt of ₹ 10,82,71688 to the creditor. Upon failure to pay the due payable to the creditor by the borrowers as well as the

guarantor in terms of invocation notice dated 03.01.2020, the creditor served a demand notice dated 16.01.2020 under Section 95 of the Code to RM Garg calling upon him to pay the entire due of ₹ 10,83,57,515. The demand notice was delivered to the guarantor on 20.01.2020.

It is also pertinent to mention here NCLT, Delhi in BDR Finvest Private Limited v. Ninex Developers Ltd. bearing CP No. (IB)-281(PB)/2019 vide order dated 25.07.2019 has initiated CIRP process against Ninex. Likewise, on 23.08.2019 the same Bench initiated CIRP process against M/s. Red Topaz Real Estate Private Limited in the case in between M/s. Renu Proptech Pvt. Ltd. v. Red Topaz Real Estate Pvt. Ltd. bearing CP No. (IB)-667(PB)/2019.

For this guarantor having failed to make payment despite demand notice given on 16.01.2020 under Section 95 of the Code, the creditor is constrained to file this application for initiation of Insolvency Resolution Process and for appointment of Resolution Professional as stated under Section 97 of the Code, 2016.

When this application has come before this Bench, this Bench initially sought for the appearance of the respondent, when the respondent was not present, again another date was given

expecting that he would place his case before this Bench, finally the respondent side was present and placed a short response stating that he has filed a Writ Petition bearing No. WP (C) No. 6209/2020 before Hon'ble Delhi High Court along with an application for stay against the present proceeding, wherein the Hon'ble High Court instead of granting stay, posted this matter on 06.10.2020. In this short response, the respondent says that he has not received the copy of the order dated 09.09.2020 passed by this Tribunal and respondent did not receive the copy of any notice therefore, the respondent was not represented. Since notice was not served upon him, for Hon'ble Supreme Court in ***Swiss Ribbons Pvt Ltd. v. Union of India, 2019 (4) SCC 17 (para 58)*** held that the corporate Debtor is required to be served with a copy of the application filed with the Adjudicating Authority, he says this application is not maintainable. He has further stated that respondent appeared first time before this Bench on 16.09.2020 therefore, one day time given for filing reply not being enough, he should be provided time to file detailed reply to the present petition spread in 342 pages.

On hearing the submissions of either side with regard to providing opportunity to the respondent, since this Bench was told

that application copy was served long before but date of hearing was not informed. However, this Bench, though cause list of NCLT shows on its website, issued notice to the respondent to appear and place its defence before this Bench.

It is the case of the petitioner, copy of this application was served upon the respondent long before filing this application. In fact this application appears to have been filed in the month of August, 2020 after serving application copy upon the respondent. Therefore, it cannot be the case of the respondent that adequate opportunity has not been given to him to place his defence against this application.

When he has time to file a writ petition after receipt of copy of this application, it could not be said that he needs time to file a reply after application copy was served and then subsequently notice of hearing was informed to the respondent, therefore we have not found any merit in saying that the opportunity has not been given to the respondent to place his case.

However, the respondent has filed short response about filing of writ petition and quoting Hon'ble Supreme Court decision to say that adequate opportunity has not been given. It is nowhere

mentioned in his response that he has not given personal guarantee to the creditor on behalf of the companies aforementioned and it is not his case that CIRP process was not initiated against both the companies and not even disputed the notice invoking guarantee given by him. Thereafter demand notice was issued under Section 95 of the Code, 2016. As to factual aspect is concerned for there being no defence except asking for time, the only point now left to this Bench is to see whether or not this Bench could pass an order under Section 95 of the Code, 2016.

Upon perusal of Section 95 of the Code 2016, it is evident that upon filing an application under Section 95 of the Code 2016 it has to be seen that whether the applicant provided details and documents relating to debt owed by the debtor to the creditor and creditors submitting claim to IRP as on the date of application.

As to this Application, it has to be seen as to whether or not 14 days' demand notice time is complete as stated under Section 95 (4) (b) of the Code 2016 and whether relevant material is filed reflecting default of payment of the outstanding debt against the principal borrowers. In this case, the applicant has placed material reflecting that the principal borrowers failed to pay money


thereafter CIRP initiated against both the companies, when notice was given to this guarantor he has also failed to pay the money, for the applicant has issued demand notice on 20.01.2020 and filed this application on 11.08.2020, the statutory notice period of 14 days is also complete before filing of this application, therefore we are satisfied that the applicant has furnished all the details and complied with all the clauses of Section 95 (4) of the Code 2016 with respect to compliance of Section 95 (5) of the Code 2016, copy of the application was sent to the respondent and has filed proof of service before this Bench. Since this Bench has observed that the application filed under Section 95 of the Code 2016 is in compliance of all the conditions laid under Section 95 of the Code 2016, it goes without saying that Section 96 of the Code 2016 would commence from the date of the application, Section 96 of the Code 2016 will automatically trigger once application is filed under Sections 94 & 95 of the Code 2016.

The 'Financial Creditor'-Applicant has proposed the name of Insolvency Professional, Shri Vijay Kumar Gupta with the address 1209-1210, Sector-15, Escorts Nagar, Faridabad, Haryana,121007, Mobile No. 98100-50029 and email id – vkgupta2004@yahoo.co.in. His Registration number is IBBI/IPA-

001/IP-P00262/2017-18/10500. In order to comply with Section 97 (6) of the Code 2016, NCLT Registry is directed to forward this order to IBBI to confirm that no disciplinary proceedings pending against the Resolution Professional. Upon receipt of these directions as stated in sub section (3) of section 97 of the Code, IBBI shall confirm or reject the appointment of the RP within seven days of receipt of this order.

List this matter on 23.11.2020 for confirmation of IBBI.


(B.S.V PRAKASH KUMAR)
ACTG. PRESIDENT


(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)

04.11.2020
VINEET