

**(2021) 04 NCLT CK 0053**

**In the National Company Law Appellate Tribunal, Principal Bench, New Delhi**

**Case No :** Company Petition No. IB-441/ND Of 2020

Anil Kumar

APPELLANT

Vs

G.K. Dairy And Milk Products Pvt. Ltd.

RESPONDENT

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**Date of Decision :** 29-04-2021

**Acts Referred:**

Insolvency And Bankruptcy (Application To Adjudicating Authority) Rules, 2016 — Rule 6  
Insolvency And Bankruptcy Code, 2016 — Section 8, 9, 14, 15, 17, 18

**Citation :** (2021) 04 NCLT CK 0053

**Hon'ble Judges :** Dr. Deepti Mukesh, J; Sumita Purkayastha, Member (Technical)

**Bench :** Division Bench

**Advocate :** Gurmeet Singh, Manoj Kumar Garg

**Final Decision :** Allowed

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## **Judgement**

1. The present application is filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'code') read with Rules 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), 2016 (for brevity 'the Rules') by Anil Kumar (for brevity 'Applicant') with a prayer to initiate the Corporate Insolvency process against G.K. DAIRY AND MILK PRODUCTS PVT. LTD (for brevity 'Corporate Debtor').

2. The Respondent G.K. DAIRY AND MILK PRODUCTS PVT. LTD is a company incorporated on 15.11.1995 under the Companies Act, 1956 having its registered office at B-5/6 Pragati Chambers Ranjit Nagar New Delhi 110008 and CIN U74899DL1995PTC073843. It is involved in the business of production and supply of milk and other dairy products.

3. As per the averments in the Application the Applicant was appointed as the "Business Head" with the Corporate Debtor vide appointment letter dated 08.01.2018 and was posted at its registered office. The Applicant worked under the control and supervision of the directors of the Corporate Debtor Mr. Gopal

Dixit and Mr. Gaurav Dixit. The Applicant submits that payment of his salary has not been made for a period from December 2018 to May 2019. The Applicant on various occasions had followed up however, he was informed that there are financial issues and the Corporate Debtor has no working capital to run the business due to which there is a delay in payment of the salary. The Applicant therefore resigned from the Corporate Debtor Company effective from 15.05.2019. The Applicant was assured that the clearance of his dues/pending salary for the period from December 2018 to May 2019. Despite follow up of the Applicant, the dues were not cleared and the Applicant vide email dated 01.10.2019 informed the Corporate Debtor about initiating a legal action against them in case of further delay in payment. The Applicant further submits that the Corporate Debtor despite admitting the claim dishonestly impute allegations vide email dated 17.10.2019 pertaining to customer's dues in order to deny payment even after availing the services of the Applicant and depositing the due TDS for the salary payable to the Applicant. The Corporate Debtor in the said email states that "there have been several replies regarding from the Company side, regarding your pending salary, company has no intention of holding it. With several communications while you leaving the company we have also conveyed several times about pending dues from several parties of both Polypack fresh and Ghee vertical is pending but there is no proper reply from your side. Please make sure there due payments are credited in the company's accounts from SS and distributors, otherwise company is forced to take legal action as well."

4. As per the averments mentioned in the application the Corporate Debtor failed to make payment and therefore, a Demand Notice under section 8 of the Code, dated 19.12.2019 was issued at the registered office of the, Corporate Debtor vide speed post thereby calling upon the Corporate Debtor to make payment of the unpaid debt of Rs. 8,07,750/-.

5. The Corporate Debtor replied on 27.12.2019 to the Section 8 Demand notice stated that after few months of the Applicant's resignation from the post of "Business head" the management enquired about the customers of which the applicant was responsible for sale of Company's products and collection of the price thereof, it was revealed that the said customers had withheld a sum of Rs. 10,00,000/- against the goods supplied on Applicant's instruction. It is further stated that the Applicant being the business head was exclusively responsible for collection of the said amount. The Company has no intentions to hold the salary. In spite of the emails being sent, the Applicant did not collect the outstanding dues from the dealers made by the Applicant and the amount of Rs. 10,00,000/- is still reflecting against your account. The Corporate debtor has further averred that a Legal Notice dated 10.12.2019 was sent to the Applicant to collect the outstanding dues and the salary shall be remitted post the outstanding payment being collected. It is stated in the reply that the terms and conditions of the appointment letter dated 08.01.2018 in condition (9) specifies the obligation of the business head "to ensure recovery of dues if the transaction has been entered by the business head with any party on behalf of the Company, if any

outstanding remains at the time of leaving the services of the company, it shall be the duty of the business head to recover the outstanding dues before settling its dues with the company."

6. The Applicant has filed this Application under Section 9 on 01.02.2020 as an Operational Creditor praying for initiation of Corporate Insolvency Resolution Process of the Corporate Debtor for its inability to liquidate their claim of Rs. 8,07,750/-. Further a notice was issued to the Corporate Debtor for the Section 9 Application vide order dated 07.02.2020 of the Adjudicating Authority and the reply to the Section 9 application was filed by the Corporate Debtor as on 15.12.2020.

7. The Corporate Debtor in its reply dated 15.12.2020 to the Section 9 Application stated the application filed by the Operational Creditor is liable to be dismissed on the ground of pecuniary jurisdiction being specified as minimum Once Crore Rupees as per the Notification of the MCA dated 24.03.2020. The Corporate Debtor submits that he is entitled to recover money of a sum of Rs. 10,00,000/- from the Operational Creditor since after few months of the Operational Creditor's resignation from the post of "Business head" the management enquired about the customers of which the Operational Creditor was responsible for sale of Company's products and collection of the price thereof, it was revealed that the said customers had withheld a sum of Rs. 10,00,000/- against the goods supplied on Operational Creditor's instruction. It is further stated that the Applicant being the business head was exclusively responsible for collection of the said amount. The Corporate debtor has further submits in this reply that a Legal Notice dated 19.12.2019 was sent to the Applicant to collect the outstanding dues post which the salary shall be remitted post the outstanding payment being collected. It is submitted that the terms and conditions of the appointment letter dated 08.01.2018 in condition 9 specifies the obligation of the business head to ensure recovery of dues if the transaction has been entered by the business head with any party on behalf of the Company, if any outstanding remains at the time of leaving the services of the company, it shall be the duty of the business head to recover the outstanding dues before settling its dues with the company.

8. The Operational Creditor filed its rejoinder dated 07.01.2021 and stated that the Corporate Debtor has been guilty of rendering false and fabricated documents which can be gauged from bare perusal of the documents. The Corporate Debtor has rendered two different dates i.e 10.12.2019 and 19.12.2019 for the alleged legal notice. The alleged dispute raised in the said legal notice is an afterthought and contrary to the stand taken by the Corporate Debtor.

9. The date of default is 01.06.2019 that is the date of the salary to be remitted for the concerned month which was unpaid, and the present application is filed on 01.02.2020. Hence the application is not time barred and filed within the period of limitation.

10. The registered office of corporate debtor is situated in Delhi and therefore this Tribunal has jurisdiction to entertain and try this application.

11. Having considered that facts and circumstances and the materials available on record, the Adjudicating Authority is of the view that the Corporate Debtor in its reply to the demand Notice dated 19.12.2019 does not dispute the fact that the salary to the Operational Creditor has to be paid however, a condition has been laid that the Operational Creditor has to first recover the outstanding dues of Rs. 10,00,000/- from the customers therefore, it is a clear admission of default and this Adjudicating Authority does not have to indulge in the details or the terms of the Contract/Appointment letter. Further in order to deal with issue in hand with respect to "pre-existence of dispute" as alleged by the Corporate Debtor in the Legal Notice dated 19.12.2020 we are of the view that the Corporate Debtor has rendered two different dates i.e. 10.12.2019 and 19.12.2019 for the alleged legal notice. The alleged dispute raised in the said legal notice is an afterthought and contrary to the stand taken by the Corporate Debtor. The Corporate Debtor has failed to produce any tracking report which could depict that the said Legal Notice dated 19.12.2019 was ever delivered to the Operational Creditor. Therefore, the defense of pre-existence of dispute can be categorized as a moonshine dispute as explained in the judgment of "Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software (P) Limited? 2017 1 SCC OnLine SC 353", of the Hon'ble Supreme Court. Therefore, the Application is admitted and the commencement of the CIRP is ordered.

12. Since there was no name proposed by the Applicant for the appointment of the IRP hence, We hereby appoints the interim resolution professional ("IRP"), Mr. Prabhakar Kumar, IBBI/IPA-002/IP- N00774/2018-2019/12373 mail id: prabhakar\_acs@rediffmail.com Phone No. 9810011532. He shall take such other and further steps as are required under the statute, more specifically in terms of Section 15, 17 and 18 of the Code and file his report within 30 days before this Bench.

13. A moratorium in terms of Section 14 of the Code is imposed forthwith in following terms:

"(a) the institution of suits or continuation of pending suits or proceedings against the Respondent including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the Respondent any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the Respondent in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is

occupied by or in the possession of the Respondent.

(2) The supply of essential goods or services to the Respondent as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process."

14. The Applicant shall deposit a sum of Rs. 2 lakhs to enable the IRP to meet the immediate expenses. The same shall be accounted for by the IRP and shall be reimbursed to the Applicant to be recovered as costs of the CIRP.

15. A copy of the order shall be communicated to the Applicant and the Corporate Debtor by the Registry. The said order shall be communicated to the IRP above named and intimate of the said appointment by the Registry. Applicant is also directed to provide a copy of the complete paper book with copy of this order to the IRP. In addition, a copy of said order shall also be forwarded to IBBI for its records and to ROC for updating the Master Data. ROC shall send compliance report to the Registrar, NCLT.