

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH-V**

(IB)-2016(ND)2019

**In the matter of**

**M/S PERIGON CAPITAL  
SOLE PROPRIETORSHIP  
C-435, SUSHANT LOK-1,  
GURUGRAM-122009**

**THROUGH ITS SOLE PROPRIETOR  
MR. VINAY AWASTHY**

**.....Operational Creditor**

**V/s**

**GOPALJEE DAIRY FOODS PRIVATE LIMITED  
41-42, PANDAV NAGAR, NEW DELHI  
DL-110008**

**ALSO AT:  
H-112. ANANDA HOUSE,  
SECTOR-63, NOIDA  
U.P.-201301**

**....Corporate Debtor**

**SECTION: 9 of IBC, 2016**

**Order delivered on: 29.05.2020**

**CORAM:**

**MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)**

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

**PRESENT- Mr. Anish Gupta for the Petitioner**

**Mr. Darshan Paliwal and Mr. Pankaj Paliwal for the Respondent**

**ORDER**

**Per Mr. Abni Ranjan Kumar Sinha (Member Judicial)**

1. The present application is filed on behalf of the Operational Creditor under Section 9 of the IBC, 2016 ("Code") read with Rule 6 of the

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Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, praying therein to initiate CIRP against the Respondent / Corporate Debtor.

2. The facts of the case in short is that the Operational Creditor (hereinafter referred to as the Applicant/Petitioner) is a sole proprietorship firm having its office at C-435, Sushant Lok-1, Gurugram-122009 and is engaged in providing consultancy services to various national and multi-national companies/firms/organizations in raising funds from different national banks and other financial institutions in India.
3. The Corporate Debtor namely Gopaljee Dairy Foods Pvt. Ltd. (hereinafter referred to as 'Respondent/Respondent Company') incorporated on 27<sup>th</sup> July 2004 under the provisions of the Companies Act, 1956, having its registered office at 41-42, Pandav Nagar, New Delhi-110008. The authorized share capital to the best of the knowledge of Petitioner is Rs. 1000.0 Lakhs and its paid up capital is Rs.488.7 Lakhs. The Respondent Company is principally engaged in manufacturing, supplying and exporting wide range of Dairy products. A true copy of the Company Master Data of the Corporate Debtor downloaded from the website of the Ministry of Corporate Affairs has been annexed herewith.
4. Briefly the facts in the present case are that in and around year 2017, the Corporate Debtor approached the Petitioner/Operational Creditor



seeking its consultancy services for raising funds from different banks. Both the parties corresponded through emails as well as telephonically on various occasions and finally entered into an oral understanding whereby the Corporate Debtor engaged the Petitioner to provide its consultancy services and help in raising funds from different banks and in exchange of the same the Corporate Debtor would pay consultancy service fee to the Operational Creditor. It was orally agreed that once the Operational Creditor managed to arrange first tranche of the funds for the Corporate Debtor, the Operational Creditor can start raising its invoices for the services rendered which the Corporate Debtor assured to be cleared within the period of 15 days from the date when the invoice is raised. Herein, it is further submitted that the consultancy fee was 1.25 % of the amount finally arranged from the Bank by using the services of Petitioner.

5. Based on the above understanding, the Operational Creditor started providing its services and in connection with the same the Petitioner duly contacted the ICICI Bank, HDFC Bank and Axis Bank for raising of funds for the Corporate Debtor. The Operational Creditor also arranged various meetings and conference calls between the concerned banks and the Corporate Debtor for raising of funds. After using best of its abilities and efforts, the Operational Creditor managed to get a loan sanctioned from Axis Bank. Accordingly, the Petitioner was informed by Axis Bank that a sanction letter has been issued to the Corporate Debtor during the end of August, 2018 for an



amount of INR 36 crores. A true copy of the whatsapp conversation with Axis Bank around the month of July, 2018 is attached herewith.

6. Simultaneously, the Petitioner informed about the same to Corporate Debtor over the whatsapp messages in July itself regarding the progress being made in Axis Bank. In fact, not just approval of loan was informed, but the terms on which the loan was approved by the Bank were also informed. This was duly acknowledged by the Corporate Debtor over the whatsapp. A true copy of the whatsapp conversation with the Corporate Debtor dated 10.07.2018 is attached herewith.
7. It is pertinent to mention here that the Petitioner has been party to all the communications between the Axis bank and the Corporate Debtor and there have been constant efforts on the part of the Petitioner in getting a loan from Axis Bank in favour of the Corporate Debtor. True copies of the relevant whatsapp messages/text messages from the period between 12.01.2018 to 26.05.2019 exchanged between Sh. Vinay Awasthy and the Corporate Debtor as well as the Axis Bank are annexed herewith. True copies of the relevant email trail from the period between January 2017 till June 2019 exchanged between the Operational Creditor and the Corporate Debtor are annexed herewith.
8. That during the initial period of fund raising, the Corporate Debtor never raised an issue or any objection, whatsoever, regarding availing the services of the Petitioner. Rather, the Corporate Debtor shared

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various confidential documents with the Operational Creditor in order to avail loans from the banks. The same can be seen from the emails annexed above which clearly shows that the Operational Creditor was providing consultancy services to the Corporate Debtor without any objection whatsoever from the end of the Corporate Debtor.

9. That after providing the consultancy services and getting the loan approved from the Axis Bank, the Operational Creditor raised the invoice for part payment bearing no. VAC/18-19/003 dated 17<sup>th</sup>December 2018 for an amount of INR 5, 90,000/- and bearing no. PC/19-20/001 dated 29<sup>th</sup>April 2019 for an amount of INR 53,10,000/- (inclusive of invoices bearing no. VAC/18-19/003 dated 17<sup>th</sup>December 2018 for an amount of INR 5, 90,000/-) based on the oral understanding with the Corporate Debtor. It is pertinent to mention here that no objection to the same was ever made by the Corporate Debtor till April 2019. True copies of emails dated 17<sup>th</sup> December 2018 and 29<sup>th</sup> April 2019 containing invoices raised for providing consultancy services are annexed herewith.
10. During this period, several reminders for clearing the said dues were made by the Operational Creditor via email, whatsapp messages and over the telephone. True copies of the relevant whatsapp messages from the period between December 2018 to April 2019 exchanged between Operational Creditor and the Corporate Debtor are annexed herewith.



11. Almost after 6-7 months of sending the invoices, the Operational Creditor for one last time wrote to the Corporate Debtor reminding about the payments and mentioning the evidence available with the Operational Creditor for the same. For the first time, the Corporate Debtor replied to this e-mail, whereby, all fictitious disputes have been created to surpass its liability to pay the Petitioner. In fact, the Corporate Debtor went to the extent of writing that no services were ever availed, despite there being sufficient material to evidence that due service were rendered and acknowledged by the Corporate Debtor. Hence, for the first time after 7 months of the raising of invoices, the Corporate Debtor attempted to create a frivolous and fictitious dispute. The true copies of the email exchange during the month of June, 2019 are annexed herewith.

12. Left with no option, the Petitioner, sent a notice dated 30<sup>th</sup> June 2019 under Section 8 of Insolvency and Bankruptcy Code, 2016 demanding INR 53,10,000/- via speed post. However, the Corporate Debtor in reply dated 11<sup>th</sup> July 2019, outrightly denied availing of consultancy services from the Petitioner and that the corporate debtor never accepted any services in regards with arranging funds from Axis bank through Operational Creditor. This stand is completely fictitious and in contradiction to the various prior communications that exist between the parties. True Copies of Demand Notice dated 30<sup>th</sup> June 2019 of the Operational Creditor and Reply to demand notice dated 11<sup>th</sup> July 2019 of the Corporate Debtor are annexed herewith.



13. It is pertinent to mention here is that the Corporate Debtor never raised any issue, whatsoever, while availing the services of the Operational Creditor and even at the time of raising of aforesaid invoices, the Corporate Debtor never disputed the same and raised any objections to the Operational Creditor. Since the Corporate Debtor never had any issue and objection in availing services and even at the time of raising of the invoices, the Corporate Debtor is bound to pay the amount due to the operational Creditor.
14. Further in response to the summons, respondent submitted that present application is not maintainable and there is pre-existing dispute in between the parties regarding the amount claimed by the applicant, therefore, in view of ***Mobilox Innovations Private Ltd. Vs. Kirusa Software Pvt. Ltd. (Civil Appeal No. 9405 of 2017)*** by which present application is not maintainable. Further, petitioner not to show that the respondent contacted him and agreed to provide professional fee and expenditure claimed by the petitioner, vide e-mail dated 24.06.2019 the respondent requested the petitioner not to initiate the false and frivolous proceedings against the corporate Debtor in the grab of alleged facilitation of funding from the AXIS Bank, further the said e-mail was prior to the demand notice issued by the petitioner. Further one Mr. Vaibhav Mohan on behalf of AXIS Bank on 27.05.2019 sent a mail to the operational creditor stated that AXIS Bank had not involved the services of Mr. Vinay Awasthi at any point of time for sanction of facilities to Ananada Group which is



enclosed at Annexure R-3 of the reply. Further apart from that there are several other e-mails also which the respondent enclosed at Annexure R-4 & 5 of the reply shows that there are pre-existing disputes. Further the alleged invoices never been accepted by the Corporate Debtor and the applicant has never provided any of the services to the Corporate Debtor. The applicant initially negotiating with respect to be the consultant on behalf of the corporate debtor, however nothing concrete materialized between the parties and therefore, there was no agreement/contract ever drawn between the parties. However, messages adduced with the instant application do not prove any contract and it do not show or establishes the fact that the corporate debtor even hired/authorized the applicant to provide any services for fund raising from AXIS Bank and no fees with respect to the above said was promised by the Corporate Debtor to the applicant. Further, in response to the e-mails AXIS Bank have not extended the credit facility to the Corporate Debtor on the basis of applicant's relationship with the bank and AXIS bank never availed applicant's services for the same. Further, the present application is liable to be rejected for want of compliance of Section 9(3)(b) of the IBC. Further, the applicant relied upon the invoices dated 07.12.2018 and 29.04.2019, however, no invoices are produced with the instant application and even that invoices are never been accepted by the Corporate Debtor. However, invoices dated 17.12.2018 and 29.04.2019 have been allegedly raised after the sanctioning of the loan by the AXIS Bank.

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15. In response to the reply, rejoinder filed by the petitioner and by filing rejoinder, the Operational Creditor admits this fact that he received the e-mail dated 24.06.2019 sent by the Corporate debtor by that e-mail, raised some issues regarding availing the services or being associated with the operational creditor. Further the Operational Creditor also sent a letter dated 10.07.2019 to SHO in response to the police complaint. Further, on several occasions has shared its company's confidential and other sensitive data with the Operational Creditor multiple times throughout the duration of securing funds assuming but not admitting that the operational creditor was in fact not appointed as consultant to raise funds as alleged by the Corporate Debtor. Further the Corporate Debtor failed to explain why the operational creditor was copied on the various emails sent on number of occasions by AXIS bank, in which the Operational Creditor was copied showed that the Operational Creditor played a vital role in getting the financial facilities from the AXIS Bank and so the claim of the Corporate Debtor is false.

16. We have heard the Ld. Counsel for applicant as well as Corporate Debtor and perused the averments made in the application as well as documents enclosed with the main application, reply and the rejoinder.

17. He further submitted that there are various correspondence between the parties through whatsapp as well as e-mails which shows that applicant was engaged by the Corporate Debtor getting financial



facilities from the AXIS Bank and he further submitted that whatsapp communication was made between the representative Corporate Debtor and the applicant shows that applicant was engaged in getting financial facilities to the Corporate Debtor from the AXIS Bank. He further submitted that e-mails which the Operational Creditor enclosed shows that correspondence made in between the parties i.e. AXIS Bank and Corporate Debtor regarding financial facilities and the copy of that e-mails was also sent to the Operational Creditor which shows that Operational Creditor was engaged by Corporate Debtor and playing active role in getting financial facilities from the AXIS Bank.

18. On the other hand Corporate Debtor submitted that the contention of the Ld. Counsel for Operational Creditor is false which is supported by Annexure R-3, the e-mail sent by authorized person of AXIS Bank Mr. Vibhav Mohan to Mr. Vinay Awasthy, in which it is mentioned that AXIS Bank had not involved the services of Vinay at any point of time for sanction of facilities to Ananda Group and this e-mail was sent prior to the issuance of demand notice. He further submitted that thereafter vide e-mail dated 24.06.2019, the Corporate Debtor denied all the false claim raised by the applicant and he further submitted that since there is pre-existing dispute, therefore, the present application is not maintainable.

19. Now, in the light of the submissions made on behalf of parties, we have gone through the averment made in the application, reply and



the rejoinder filed by the parties and the documents enclosed with the application, reply and rejoinder and the decisions upon which the respondent placed reliance and we find that admittedly there is no written agreement in between the parties regarding the services provided by the applicant to the Corporate Debtor in getting loan facilities from the AXIS Bank and this fact is admitted by the applicant in course of argument, the claim of the applicant is that although there is no written agreement but there is oral agreement between the parties and on the basis of that applicant was provided the services to the Corporate Debtor for getting loan facilities service for raising funds from different banks and to substantiate his claim the Operational Creditor placed reliance upon the Whatsapp messages and the emails exchanges between the two and on the basis of that, he provided consultancy services to the Corporate Debtor for getting loan facilities from the Axis Bank.

20. On the other hand, Ld. Counsel for Corporate Debtor claimed that before receiving the demand notice by email dated 24.06.2019, the Corporate Debtor refused the claim of the applicant and submitted, he never provided consultancy services in raising the funds from the AXIS Bank, which would be evident from the Annexure P-7 enclosed with the application filed by the applicant at page 107 of the paper book and from the perusal of the same, we find that Corporate Debtor had raised issue that the applicant had never provided any service and at this juncture, we would like to refer the Annexure R-3 filed by

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the Corporate Debtor alongwith the reply, at page 32 of the reply that is the e-mail of Mr. Vibhav Mohan authorized representative of AXIS Bank sent to Mr. Vinay Awasthy in which it is specifically mentioned that AXIS Bank had not involved his services at any point of time for sanction of facilities to Ananda Group. If we shall read this email along with the email of 24.06.2019 sent by the Corporate Debtor to Operational Creditor then it can be said that the bank provided the financial facilities to the Corporate Debtor denied this fact that the Operational Creditor ever rendered their services at any point of time for sanction of facilities to Ananda Group. Since there is no written agreement and both the applicant as well as respondent placed reliance upon the correspondence made between the two. Therefore, on the basis of email sent by the AXIS Bank to the Operational Creditor, it can be said that AXIS bank denied that Operational Creditor had ever rendered their services for getting loan facilities. Whereas on the other hand Operational Creditor claimed that Whatsapp communication and the emails exchanged between the Operational Creditor and the Corporate Debtor show that Corporate debtor had shared various confidential documents with the Operational Creditor in order to avail loan from the AXIS Bank. The Corporate Debtor in para 7 of the reply admit that applicant initially was negotiating with respect to be the consultant on behalf of the Corporate Debtor, however nothing concrete materialized between the parties and therefore there was no agreement/contract ever drawn between the parties.



21. Whether there is any agreement in between the parties for providing consultancy services to the Corporate Debtor by the Operational Creditor for getting loan facilities from the different banks or not ?
22. Since both the parties filed several documents and one of the email, which the Corporate Debtor has annexed in its reply show that the representative of the AXIS bank says that bank had never obtain the services of the Operational Creditor for providing the loan facilities to the Corporate Debtor. Therefore, in our considered view, these are disputed questions, which are required to be considered by court having competent jurisdiction to decide the issues, whether there is any agreement between the parties or not? Here in exercise of the powers under Section 9 the Adjudicating Authority is required to see only whether there is existence of dispute between the parties or the record of pendency of suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute or not. If it appears to the Adjudicating Authority that there is pre-existing dispute in between the parties, which cannot be determined without giving opportunity to the parties to adduce the evidence, in that case ,in view **of Mobilox Innovations Private Ltd. Vs. Kirusa Software Pvt. Ltd. (Civil Appeal No. 9405 of 2017)**, if there is pre-existing dispute available on record in that case prior to the receipt of demand notice in that circumstances in view of Section 9(5)(ii)(b) application has to be rejected.



23. In the light of aforesaid facts and decision, when we shall consider the case in hand then we find that dispute has been raised prior to the issuance of demand notice and in support of that he also referred the email of AXIS Bank, which is also prior to the issuance of demand notice. Therefore, in our considered view after receiving the Demand Notice, Under Section 8 of IB Code, the Corporate Debtor has raised dispute, which is prior to the issuance of demand notice.

24. Therefore, we would like to refer Section 9 of the Code and the same is quoted below:-

**Section-9**

*(1) After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.*

*(2) The application under sub-section (1) shall be filed in such form and manner and accompanied with such fee as may be prescribed.*

*(3) The operational creditor shall, along with the application furnish—*

*(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;*



*(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;*

*(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt 1[by the corporate debtor, if available;]*

*[(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and*

*(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.]*

*(4) An operational creditor initiating a corporate insolvency resolution process under this section, may propose a resolution professional to act as an interim resolution professional.*

*(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order—*

*(i) admit the application and communicate such decision to the operational creditor and the corporate debtor if,—*

*(a) the application made under sub-section (2) is complete;*

*(b) there is no 3[payment] of the unpaid operational debt;*

*(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;*



*(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and*

*(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.*

*(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—*

*(a) the application made under sub-section (2) is incomplete;*

*(b) there has been 4[payment] of the unpaid operational debt;*

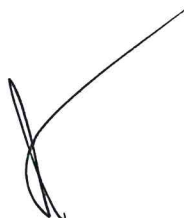
*(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;*

*(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or*

*(e) any disciplinary proceeding is pending against any proposed resolution professional:*

*Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.*

*(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of this section”.*



25. Now in the light of aforesaid provision we shall consider the case in hand and we find, in view of Section 9(5)(ii) (d) of the Code. If the notice of dispute has been received by the Operational Creditor or there is a record of dispute in the information utility in that case the Adjudication Authority has no option but to reject the application. Since, there is existence of dispute which has been raised prior to the issuance of demand notice, therefore, the prayer of applicant is liable to be rejected. Accordingly, we hereby **DISMISS** the application.

Sd/-

**K. K. VOHRA**

**Member (T)**

Sd/-

**ABNI RANJAN KUMAR SINHA**

**Member (J)**