IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH COURT III

C.P. No. 2492/IBC/MB/2019

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

Pradeep Thakore

W 037, Third Floor, Regency Park-II, DLF-IV, Gurgaon, Haryana- 122001

……**Operational Creditor**

Vs

MFC Transport Pvt. Ltd.

1201, 12th Floor, DLH Park S.V. Road, Goregaon (W), Mumbai, 400062

…….Corporate Debtor

Order delivered on: 10.08.2021

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

For the Applicant: Mr. Zaman Ali, Advocate

For the Respondent: Ms. Vikranti Rao, Advocate

Per: Shri H.V. Subba Rao, Member (Judicial)

ORDER

1. This Company petition is filed by *Pradeep Thakore* (hereinafter called "Operational Creditor") seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *MFC Pvt. Ltd.,* (hereinafter called "Corporate Debtor") alleging that the

Corporate debtor committed default in making payment to the Financial Creditor. This petition has been filed by invoking the provisions of Section 9 Insolvency and Bankruptcy Code, 2016 (hereinafter called "Code") read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

2. The present petition is filed before this Adjudicating Authority on the ground that the Corporate Debtor failed to make payment of a sum of Rs. 23,00,000/- to the Operational Creditor.

3. **Background of Facts leading to the present petition**:-

    i. The Operational Creditor is a former employee of the Operational Creditor who started working as 'Head Project Division – Delhi' with the Corporate Debtor from 08.12.2010 at a Gross Salary of Rs. 2,00,000/- per month. The Operational Creditor retired from services with effect from 30.03.2019 on attaining the age of superannuation with the Corporate Debtor sending an email of appreciation of his past performance, which stated that the Operational Creditor has been an asset to the Company because of the ability of the Operational Creditor to execute projects during his full service to the Corporate Debtor.

    ii. Without any written communication to the Operational Creditor of whatsoever nature, the Corporate Debtor commenced paying reduced Gross monthly salary to the Operational Creditor from Rs. 2,00,000/- to Rs. 1,00,000/- beginning from August, 2017 and the same continued till the date of his superannuation, viz. 30.03.2019. The reason stated by Corporate Debtor orally in August, 2017 for such reduction was that there was financial crisis in the Company and the outstanding salary would be made in due course of time when the situation improves. In complete trust and faith on account of having already worked with the Corporate Debtor for 7 years by then, the Applicant agreed to assist the Corporate Debtor and accordingly, accommodated his personal liabilities.

iii. On 06.04.2018 (after 8 months of reduced salary since August 2017), the Operational Creditor has written an email expressing his anguish on the continuing arbitrary reduced salary and requested to restore the salary as it was getting impossible to manage affairs and sought CD's support to the extent. No response was received to this email.

iv. Upon having more than 14 months passed since the arbitration reduction in the salary, Operational Creditor wrote another email dated 10.10.2018 again requesting Corporate Debtor to immediately restore the salary since the Operational Creditor was facing health issues and had to invest in hearing devices for personal use. No response was again received tot his email.

v. Five months thereafter, the Operational Creditor attained the age of superannuation (was asked by Corporate Debtor to retire with effect from 30.03.2019). After handing over office equipment, the office vehicle and admittedly after adhering to all company requirement, the Operational Creditor requested Corporate Debtor for settling the rest of all legitimate dues vide email dated 23.04.2019. Upon sending the second reminder for the same, the Corporate Debtor responded vide email dated 27.04.2019 and stated that "*I will speak to the management & let you know.*" Upon receiving no response whatsoever from the Corporate Debtor, the Operational Creditor sent 4 more reminder vide emails dated 29.04.2019, 03.05.2019, 07.05.2019 &10.05.2019. Therefore, in total 7 reminders were issued to Corporate Debtor for settlement of his dues, but to no avail.

vi. On receiving no response even after sending various reminders as stated above, the Operational Creditor was constrained to issue a Demand Notice under Section 8 of Code, 2016 dated 20.05.2019 demanding payment in respect of unpaid operational debt. Due to clerical errors as regards computation of the amount, the Operational Creditor issued a Supplementary Demand Notice dated 12.06.2019 that correctly stated the calculation of unpaid operational debt commencing from August, 2017 until March, 2019 for a total amount of Rs. 23,00,000/- (Rs. 20,00,000 as arrears of Salary 7 Rs. 3,00,000/- as Gratuity) Corporate Debtor filed its response to both demand notices dated 30.05.2019 & 21.06.2019 respectively by which a sham and spurious defence was put up that due to poor performance levels of the Operational Creditor, the Corporate Debtor had reduced the salary and if further stated that the performance report and relevant excel sheets shall be placed on record before this Hon'ble Tribunal.

4. Submissions of the Corporate Debtor are as follows:

i. The Operational Creditor joined the services of Corporate Debtor in December, 2010 as per offer letter dated 08.12.2010.

ii. It is admitted position that the starting salary of the Operational Creditor was Rs. 2,00,000/- (Rupees Two Lakhs Only) per month, including a basic pay of Rs. 65,000/- (Rupees Sixty Five Thousand Only) per month.

iii. It is also an admitted position that, the salary of the Operational Creditor was reduced from Rs. 2,00,000/- per month to Rs. 1,00,000/- from August, 2017 till his retirement up till 30.03.2019.

iv. In the background of these admitted facts, the Operational Creditor has approached this tribunal for recovery of the differential amount of reduced salary, by falsely asserting that his salary was reduced because of the Corporate Debtor company is undergoing financial constraints.

v. The corporate Debtor on the other hand has contended that, the salary of Operational Creditor was reduced due to lack of performance. Thus, there is contemporaneous material on record to support the case of Corporate Debtor that the salary of the Operational Creditor was reduced. The Operational Creditor never raised any objections in this regard. Hence, it is evident that the Operational Creditor accepted the reduction of salary without any protest.

The present claim for the differential amount of reduced salary is liable to be rejected.

vi. The aforesaid facts shows that there is a pre-existing dispute between the parties herein. The fact of reduction of money is not disputed. The cause for the reduction i.e. whether it was on account of Corporate Debtor's financial constraints or because of lack of performance of the Operational Creditor is the dispute that exists between eh parties. It is therefore submitted that in view of the pre-existing dispute, the Operational Creditor cannot maintain the present application under the provisions of the code. It is further submitted that the Operational Creditor had never objected or raised any grievance on the ground of reduction of salary. It is inconceivable that Operational Creditor had been paid half of his salary for over two years and he did not raise any objection throughout the said period. In fact the contention of the Corporate Debtor is eminently more plausible that the salary of the Operational Creditor was reduced because of lack of performance to his knowledge and it is in that background that the Operational Creditor has received the reduced salary without any protest. Furthermore, it is pertinent to note that, in fact during this period from August 2017 to March 2019 whereby reduced salary is received by Operational Creditor has availed of loan from the Corporate Debtor. The Corporate Debtor Company had infact advanced the loan as requested by Operational Creditor.

vii. For the aforesaid facts, the present petition is liable to be rejected.

FINDINGS

1. Heard both sides and perused the record.
2. After hearing the submissions of both sides and upon perusing the material available on record the following issues that falls for consideration?
   i. Whether there is a pre-existing dispute between the parties?
   ii. Whether a petition under section 9 of the Code for arrears of salary is maintainable?
3. Before examining the first issue, it is important to mention here that the Operational Creditor's gross salary was reduced by the Corporate Debtor from 2 lakhs to 1 lakh with effect from August 2017 and the said reduction continued till the Operational Creditor attained the age of superannuation on 30.03.2019. The above Company Petition was filed on 29.06.2019. It is an admitted case of the Operational Creditor that in August 2017, he was orally informed that his salary was reduced due to the Financial ill health of the Company. It is also an admitted fact from record that in August 2017, the Operational Creditor was called upon by the management of Corporate Debtor and was informed about his under performance for the past few years compared to other employees having very less experience and was low to an extent that the performance does not even cover the own costs of the Operational Creditor. Therefore, it is very clear from the admitted facts that the Operational Creditor and the Corporate Debtor were in loggerheads since 2017 with regard to the reduction of salary of Operational Creditor which itself a

pre-existing dispute and accordingly the above issue no. 1 goes against the Operational Creditor.

4. The next issue is with regard to the issue of maintainability. Admittedly, the amount claimed by the Operational Creditor in the above Company Petition is towards arrears of difference salary. This Tribunal is of the considered opinion that the above claim does not qualify within the definition of 'Operational Debt' and this issue also goes against the Operational Creditor.
5. In view of the above negative findings on both the above issues against the Operational Creditor, the above Company Petition is liable to be rejected.
6. Accordingly, the above Company Petition is dismissed.
7. However, this order does not preclude the Operational Creditor from recovering the above amount from the Corporate Debtor by approaching an appropriate legal forum.

Sd/-	**Sd/-**
CHANDRA BHAN SINGH **MEMBER (TECHNICAL)**	**H.V. SUBBA RAO** **MEMBER (JUDICIAL)**