IN THE NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH
COURT NO. 1

ITEM No.301
(MP) CP(IB) 26 of 2019

Proceedings under Section 9 IBC

IN THE MATTER OF:

Minni Katariya **........Applicant**
V/s
MB Power (MP) Ltd **........Respondent**

Order delivered on 08/07/2022

Coram:
Madan B. Gosavi, Hon'ble Member(J)
Kaushalendra Kumar Singh Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

-Sd- -Sd-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

MADAN B. GOSAVI
MEMBER (JUDICIAL)

Braj Mohan

BEFORE THE ADJUDICATING AUTHORITY
THE NATIONAL COMPANY LAW TRIBUNAL
INDORE BENCH

CP(IB) 26/2019

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

<u>In the Matter of:</u>

Mini Katariya
D-101, Bhawalpur Appartment
Plot No.30, Sector-6
Dwark, New Delhi-110075

Applicant/ Operational Creditor

Versus

MB Power (MP) Limited
Reg. Offfice
Laharpur Jaithari
Anuppur, Anuppur
MP-484330

Respondent/ Corporate Debtor

Order reserved on: 10.06.2022
Order pronounced on: 08.07.2022

Coram: Hon'ble Madan B Gosavi, Member (J)
Hon'ble Kaushalendra Kumar Singh, Member (T)

<u>Present:</u>

For the Applicant: Ld. Advocate Mr.Manoj Munshi

For the Respondent: Ld. Advocate Mr.Alok Dhir a.w. Ld. Advocate Ms.Varsha Banarjee

<u>ORDER</u>

1. The instant Application is filed by Mini Katariya ('**the Applicant**') former employee of the company- MB Power (MP) Limited, under Section 9 of the Insolvency and Bankruptcy Code, 2016 (**'Code'**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 claiming to be an Operational

Creditor for initiation of Corporate Insolvency Resolution Process ('**CIRP'**) against the MB Power (MP) Limited ('**Respondent**'). The amount of claimed debt in default is Rs.1,36,11,236/- (Rupees one crore thirty-six lakhs eleven thousand two hundred and thirty-six).

2. The respondent is a Non-Govt Company, duly registered with Registrar of Companies, Gwalior with CIN: U40101MP2008PLC022066. The Authorized share capital and the Paid-up share capital of the respondent is Rs.505,50,00,000/- and Rs.451,54,78,000/- respectively.

3. The averments made by the applicant/operational creditor in its application and presented/argued by the learned counsel for the applicant are summarized hereunder:

(i) The applicant is a former employee of the respondent company. She was appointed through letter dated 01.08.2014 as Chief Legal Counsel and Head Secretarial of the respondent at New Delhi, with the gross monthly salary of Rs.5,34,464/-and performance linked annual incentive of Rs.24,93,344/- at the time of joining the respondent company.

(ii) The applicant performed duties with utmost sincerity which was also acknowledged by the respondent company and on that basis the package of the applicant, including the performance linked annual incentive, has been enhanced from time to time. Further, the applicant was within a short period of time promoted to the level of Executive Vice President on 01.06.2016.

(iii) On 03.06.2016, the respondent company informed the applicant, regarding the revised compensation with effect from

01.06.2015, based on which the variable pay (annual incentive) was fixed at Rs.31,27,650/-. Subsequently, on 10.07.2017, the respondent company issued Circular containing the Annual Increment Guidelines for FY 2016-17, wherein it was mentioned that the variable payout for 2015-16 & 2016-17, shall be released separately in due course (within 2-3 month upon fund availability).

(iv) That the applicant resigned from the respondent company company on 18.04.2019 and served the notice period of three months and the applicant wrote an e-mail dated 05.07.2019 to the concerned person/ department of the respondent company for completion of relieving formalities and the payment including the variable pay component for the financial years 2015-16 to 2018-19 amounting to Rs. 1.36 crore approx.

(v) The aforesaid dues of the applicant were never denied by the respondent company and through informal communication the applicant was assured regarding the payment of the variable pay and therefore the default is acknowledged by the respondent company.

(vi) The applicant was finally relieved from her services w.e.f. 30.07.2019. Subsequent to her relieving, the applicant received a letter dated 27.08.2019 from the respondent company enclosing therewith a full and final statement of the dues of the applicant amounting to Rs.8,89,830/- which was transferred to the bank account of the applicant, however, nothing was neither the said letter nor the enclosed full and final statement mentioned anything about the variable pay component of the applicant.

(vii) The applicant through letter dated 29.08.2019 objected to the full and final statement made by the respondent company and reiterated regarding the outstanding variable pay component for the financial years 2015-16, 2016-17, 2017-18 and 2018-19 amounting to Rs. 1.36 Cr approx. The respondent company neither replied to the said letter nor any payment was made to the applicant.

(viii) The applicant then sent a demand notice dated 26.09.2019 to the respondent company under Section 8 of the Code, to which the respondent company through its reply dated 14.10.2019 denied to pay the claim of the applicant for the period of 2015-16 only and did not offer any reasons for non-payment of the dues of the applicant for the remaining period and thus in fact admitted its liability.

(ix) The cancellation of variable pay for financial year 2017-18 and 2018-19 was done on 19.10.2019, however, there was no denial of variable pay of the said financial years during the period of employment and the settlement was offered on 21.10.2021 for the variable pay of 2015-16 and 2016-17, but the applicant refused the settlement, to maintain the present application under the threshold limit of the Code.

4. In the context, the defence placed by the respondent company/corporate debtor and as presented/argued by the learned counsel for the respondent are summarized as under:

(i) The full & final settlement of the dues of the applicant was settled and paid by the respondent company amounting to Rs.8,89,830/- on 26.08.2019 and the same was also acknowledged by the applicant through its email dated

29.08.2019. However, the applicant raised the claim as regards variable pay component for the first time after the aforesaid letter and issued the demand notice dated 26.09.2019, which cannot be the basis of initiating proceedings under IBC due to pre-existing dispute between the parties. Further the claim of the applicant for the year 2015-16 and 2016-17 is barred by limitation.

(ii) The applicant vide email dated 18.04.2019 communicated about her resignation from the post of Group General Counsel and Head of Secretarial of the respondent company and therefore, the applicant was to be relieved from duties on or before 18.07.2019 i.e. three months from the date of issue of notice of resignation. However, the respondent company has never at any point of time through email or through any other mode of communication acknowledged any pending amount of variable payout to be due and payable to the applicant.

(iii) The claim of the applicant is solely for the variable payout which is dependent upon various factors including but not limited to the profitability performance of the respondent company and the same cannot be considered as an operational debt under section 5(21) of the IBC. The respondent company has through its letter dated 03.06.2016 disbursed the variable payout for the period 2014-15 to the applicant.

(iv) Further, Clause 5 of the Circular dated 10.07.2017, Annual Increment Guidelines-FY 2016-17 issued by the respondent company states that the variable payout will be paid subject to the availability of funds with the respondent company and therefore, the performance of the respondent company had a direct connection with the disbursal of the variable payout by the respondent company to its employees and accordingly, no claim can be made against the respondent company for the variable payout being due and payable w.e.f. 10.07.2017, 31.05.2018 and 31.05.2019 as alleged by the applicant.

(v) The applicant has without any prejudice to the right of the respondent company taken the date of 10.07.2017, 31.07.2018 and 31.07.2019 as the date of default, however, on perusal of the appointment letter dated 01.08.2014 of the applicant along with the salary structure annexed to the said letter of appointment, nowhere it is mentioned about the time period or the date on which the variable payout will accrue or be held to be due and payable to the applicant and further neither the Circular nor any other document as provided by the applicant establishes the fact about that the date of default for the payment of variable pay and therefore, such period computed by the applicant is without any reasonable basis.

(vi) The respondent company through its additional affidavit dated 06.01.2022, submitted that, the respondent company had vide email dated 21.10.2021, informed the applicant about the declaration of the variable payout to all employees of the company for the financial years 2015-16 and 2016-17 and that the demand draft in the name of the applicant amounting to Rs.43,40,140/- is ready for collection and the amount of Rs.19,15,160/- has been deposited with the Income Tax Authority as tax deducted at source.

Further, the respondent company has in the said email also informed the applicant about the corporate announcement dated 19.10.2021, which states that there will be no variable payout for the employees for the financial years 2017-18 and 2018-19. However, the applicant refused to accept the said amount vide its reply dated 08.11.2021 for the financial years 2015-16 and 2016-17.

5. We have heard the learned Counsels appearing from both the sides and have perused the relevant documents available on record. It is noted that the applicant was the former employee of the respondent company and that the issue pertains to the variable pay of the applicant for the financial year 2015-16 to 2018-19, amounting to Rs.1,36,11,236/-.

6. It is also noted that it is only at the time of resignation that the applicant raised the claim for the financial years 2015-16 to 2018-19 and no claim was ever raised by the applicant for the said financial years prior to the resignation and the demand notice was issued by the applicant on 26.09.2019 to which the respondent raised dispute objecting the claim raised by the applicant.

7. In view of the facts, the variable pay for the financial year 2014-15 has already been paid to the applicant for Rs.25,13,291/- and for the financial year 2015-16 & 2016-17 the variable pay of the applicant was declared by the respondent through email dated 21.10.2021 for an amount of Rs. Rs.43,40,140/- (after deducting tax of Rs.19,15,160/-) after the filing of the present application, however, the acceptance of the same being the part payment was denied by the applicant. The respondent has through corporate announcement dated 19.10.2021, announced that there will be no variable pay for all the employees for the financial years 2017-18 and 2018-19 due to financial challenges and the relevant part of the said announcement is reproduced below:

"The company has faced some turbulent times as well as financial challenges. To be able to deal with the same, certain prudent actions are the need of the hour. Accordingly, it has been decided that there will be No Variable Pay payout for the fiscal years: ***2017-18, 2018-19 and 2019-20****."*

8. As a result, the application, i.e. CP(IB) 26/2019 is rejected and disposed of with no cost. Registry is directed to serve a copy of this order to the applicant and the respondent.

-sd-	**-sd-**
Kaushalendra Kumar Singh	**Madan B. Gosavi**
Member (Technical)	**Member (Judicial)**

Swati-LRA