

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins) No. 1115 of 2020

IN THE MATTER OF:

**Telha Sareshwala
S/o Yunus Sareshwala
6, Faize Mohammedi Society
Paldi, Ahmedabad – 380 007,
Gujarat**

....Appellant

Vs.

**1. Parsoli Motors Works Pvt. Ltd
Represented through Resolution Professional
Mr. Krishna Chamadia
B1804, Raheja Heights,
Off Gen A K Vaidya Marg,
Dindoshi, Malad East,
Mumbai City – 400 097**

...Respondent No.1

**2. BMW India Pvt. Ltd
Tower B 7th floor, Building No.8,
DLF Cyber City Phase II
Gurgaon HR 122 002**

...Respondent No.2

**3. BMW India Financial Services Pvt. Ltd
Tower C, 14th Floor, Building No.10,
DLF Cyber City Phase -II
Gurgaon HR 122 002**

...Respondent No.3

Present:

For Appellant: Mr. Arjun Sheth and Ms. Heena George, Advocates.

For Respondents : Mr. Kunal Tandon, Ms. Richa Sandilya and Ms. Hita Sharma, Advocates for R-1. Mr. Diwakar Maheshwari

**and Mr. Aditya Vikram Singh, Advocates for R-2 & 3.
Mr. Shobhit Jain, Advocate for R-2.**

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The appeal has been filed by the ‘Appellant’- ‘Talha Yunus Sareshwala’, under Section 61 of the ‘Insolvency and Bankruptcy Code, 2016’ (in short ‘Code’) against the impugned order dated 04.06.2020 passed by the ‘Adjudicating Authority’ (National Company Law Tribunal), Ahmedabad Bench in I.A. No. 300 of 2018 (under Section 65 of the Code) in CP (IB) No.161/2017.
2. It is the case of the Appellant that R3 - BMW India Financial Services Pvt. Ltd has fraudulently filed the petition before the ‘Adjudicating Authority’ and has put the ‘Corporate Debtor’ (CD) into ‘Corporate Insolvency Resolution Process’ (CIRP). It is alleged by the Appellant that the R2- BMW India Pvt. Ltd has fraudulently induced the CD in entering into the dealership agreements from 2014 -2017 and induced the CD to invest approx. Rs. 30 Crore for setting up showrooms and service center to be exclusively used only

for selling and servicing BMW vehicles. At a later stage in the year 2017 while dealership agreement was enforced, the R3 being a group company of BMW asked R3 to file Section 7 of the Code petition against the CD and put the CD into CIRP to stifle the legitimate claims of the CD against the BMW group who is presently controlling the 'Committee of Creditors' (CoC) at 88.57% of voting power and implicitly controlling the actions of the Resolution Professional (RP). Presently, as per updated information the company has been put into liquidation.

3. The Adjudicating Authority vide its impugned order dated 04th June 2020 has made the following observations before admitting the Section 7 of the Code petition filed by R3- BMW India Financial Services Pvt. Ltd. The relevant clauses are reproduced below for ease of reference:

“18.Before pronouncement the judgment in the matter of CP (IB) 161 of 2017, this Adjudicating Authority would like to deliberate on the IA No. 300 of 2018 filed by the CD.

18.1. The IA No. 300 of 2018 has been filed by the CD on the ground that CP(IB) No. 167 of 2017 is a fraud committed by BMW India Pvt Ltd, the R2 in the IA in collusion with the Financial Creditor and filed

the IA u/s 65 of the Code. Section 65 of the Code read as under:

“....If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.....”

18.2. This Adjudicating Authority, on perusal of the records, documents and the arguments put forth by the counsels of both the parties, has observed that BMW India Pvt. Ltd., the R2 in the IA No. 300 of 2018 is not a party in the main petition no. 161 of 2017 and has no locus and cannot be impleaded in the main petition no 161 of 2017.

18.3 Further, the Petitioner of IA no. 300 of 2018/ Respondent of CP (IB) No. 161 of 2017 has vide numerous communications exchanged with the financial creditor in CP (IB) No. 161 of 2017 and has owned full responsibility for the default committed by

the CD and promised on number of occasions to make payment of the defaulted amount. Moreover, no one either BMW or BMW dealer can force any customer of Gujarat to buy from the Petitioner only. Customer is at liberty and he can purchase BMW car from any part of the country. The concept that a customer to purchase from a particular dealer is not tenable and it may be considered as an attempt to infringe on the right of a customer. Hence, we do not find any merit in the IA. Hence, the prayer made in IA No. 300 of 2018 is hereby rejected.

Main Petition No. 161 of 2017

19. The CD has defaulted in making repayment of financial facilities/ debt to the Petitioner and the date of default is from 10.04.2016 and onwards as per Annexure -IV/27. The statement of accounts and the CIBIL Reports submitted by the application confirm the default committed by the CD.

20. Considering the material, papers filed by the Petitioner, facts mentioned hereinabove and the arguments of both sides, the Adjudicating Authority is satisfied that,

a.The CD availed Financial Facilities from the Petitioner.

b.Existence of debt is above Rs. One lac;

c.Debt is due and defaulted;

d.Default has occurred on various dates starting from 10.04.2016 onwards as per Annexure IV/27

e.Petition has been filed on 13.11.2017 i..e within the limitation period

f. Copy of the Application filed before the Tribunal has been sent to the CD and the Application filed by the Petitioner under Section 7 of the IBC is found to be complete for the purpose of initiation of CIRP against the CD Company.

Hence, the present CP(IB) No. 161 of 2017 is admitted with the following directions/ observations.

The date of admission of the petition is 04.06.2020”

4. The Ld. Counsel for the Appellant has submitted that the CD and the Respondent No.2- BMW India Pvt. Ltd. has entered into dealership agreement for selling BMW Vehicles in the state of Gujarat since 2007. Since then either new agreements were executed or renewal letters were signed to continue the dealership. The dealership agreement duration every time was only for one

year and it continued to be renewed or new agreements used to be signed. The CD performed extremely well and CD was given territory of Gujarat and no other dealer in India was given the territory of Gujarat for the sale of the BMW Vehicles. The last dealership agreement entered into between the CD and Respondent No.2 was on 14th January, 2015 which contains an arbitration clause. The same agreement was renewed on 09th December, 2017 which was expired by 31st December, 2017. The CD has also entered into a 'Deferred Payment Facility Agreement' dated 15th November, 2010 between the CD and R2 in relation to the sale of BMW vehicles by the R2- BMW India Pvt. Ltd to the CD which was also aiming arbitration clause. The R3 - BMW India Financial Services Pvt. Ltd and CD have also entered into an agreement for 'Financing and Working Capital Demand Facilities Agreement'. However, during the year 2014, the R2 - BMW India Pvt. Ltd allowed the dealers from outside Gujarat to sale to customers based in Gujarat. The CD has opposed this as it is a territory violation and it has an adverse impact on CD. In terms of dealership agreement, the CD was required to spend a minimum amount based on projected turnover of the CD towards promotion/advertisement. All this made revenue to deplete while expenditure is to increase. As a result of this, it became impossible to the CD to survive and caused injury to the CD.

As a result of territory infringement correspondence commenced exchange between the CD and the R2- BMW India Pvt. Ltd during the year 2014 and 2015. The CD considered this as an absolute fraud on the part of the R2- BMW India Pvt. Ltd. All this resulted into revenue loss of approx. Rs.70 Crore every year. The number of vehicles sold for customer based in Gujarat was approx. 150-200 vehicle each year to be sold by outside Gujarat dealers of BMW. BMW group/ R2 made the CD to invest large amount of capital in setting up showroom and service center at Rajkot in the year 2014 for sale and service of BMW vehicle and also during 2015, the CD was made to invest large amount of capital funds in the setting up of new showroom and facility at Ahmadabad and Surat. All this investment involved approx. Rs.30 Crore from CD and CD was supposed to recover in 10 years or so, its investment value recovery based on payback period. The Appellant is alleging that R2- BMW India Pvt. Ltd induced the CD to make such heavy investment to retain the dealership of Gujarat but at a later stage it allows outside Gujarat dealers to sale vehicles of resident of Gujarat. The Appellant is alleging the BMW group another finance company – R3 filed Section 7 of the Code petition around November, 2017 for the dues of sale of BMW vehicles by R2 to CD without placing any bank statement that R3 has made any payment towards R2 and

the petition was filed to stifle any kind of prosecution against R2/BMW group by the CD. It is the case of the Appellant that since the management of the R2 - BMW India Pvt. Ltd and R3 being the part of same group of the BMW Company the aforesaid events are fraud perpetrated by R2 - BMW India Pvt. Ltd towards the CD with the connivance of R3 for filing of 'Insolvency Application' and bringing the CD to a liquidation stage and even involving the 'Directors' of the CD personal wealth at risk for having their personal guarantees. All this suggests that the proceedings initiated by the R3/ BMW Group Companies is a fraudulent or malicious initiation of proceedings and is covered by Section 65 of the Code for further actions.

5. In addition, the Appellant has also mentioned that the RP has done nothing to prosecute the claim of Rs.110 Crore against BMW Finance. The Appellant has also mentioned that BMW group appointed KPMG to get the audit / valuation of the CD done and pursuant to the same bids from 3rd parties were invited to take over the CD. BMW India Pvt. Ltd/R2 did not renew the dealership agreement for the year 2018. As a result, the business of the CD has collapsed by using Section 7 of the Code by initiating CIRP by another BMW Group of Companies /R3. The Appellant has also mentioned that they have filed petition under 'Writ Jurisdiction' before the Hon'ble High Court of

Delhi to appoint arbitrators between the CD and BMW Group and lodge a claim of Rs.110 Crore against BMW Group by the CD but RP who works as per instruction of the CoC is doing nothing to pursue the claim and all this has laid to the Appellant to a disastrous financial situations and are, therefore, sought the relief from this 'Appellate Tribunal' for setting aside the order dated 04th June, 2020 passed by the 'Adjudicating Authority' and even orally pleaded to refer the matter back to the Adjudicating Authority to prosecute under Section 65 of the Code. In order to supplement its claim for remanding back the matter to the Adjudicating Authority it has cited the Judgment of Hon'ble Supreme Court in *Beacon Trusteeship Limited Vs. Earthcon Infracon Pvt. Ltd. & Anr. Civil Appeal No. 7641 of 2019* at para 7, 8 & 9 is depicted below:

“7.Considering the provision of Section 65 of the IBC, it is necessary for the Adjudicating Authority in case such an allegation is raised to go into the same. In case, such an objection is raised or application is filed before the Adjudicating Authority, obviously, it has to be dealt with in accordance with law. The plea of collusion could not have been raised for the first time in the appeal before the NCLAT or before this Court

in this appeal. Thus, we relegate the appellant to the remedy before the Adjudicating Authority.

8. In case, a proper application is filed, aspect whether the proceedings have been initiated in collusive manner will be looked into, in accordance with law and the appropriate orders have to be passed, considering the facts and circumstances of the case. We have made it clear that we have not commented on the merit of the case. We set aside the impugned order passed by the NCLAT and dispose of the appeal in accordance with the aforesaid direction.

9. The interim protection granted by this Court vide order dated 30.09.2019 shall continue to operate for a period of four weeks from today. In the meantime, it is open to the appellant to file appropriate application for interim protection, if any, before the Adjudicating Authority.”

The Appellant has further cited the judgment of ‘Embassy property Vs. State of Karnataka & Ors.’ 2019 (17) Scale 37 to its stands for fraudulent or malicious proceedings initiated by BMW Group companies. The relevant portions are given hereunder:

“46. The second question that arises for our consideration is as to whether NCLT is competent to enquire into allegations of fraud, especially in the matter of the very initiation of CIRP.

47. This question has arisen, in view of the stand taken by the Government of Karnataka before the High Court that they chose to challenge the order of the NCLT before the High Court, instead of before NCLAT, due to the fraudulent and collusive manner in which the CIRP was initiated by one of the related parties of the Corporate Debtor themselves. In the writ petition filed by the Government of Karnataka before the High Court, it was specifically pleaded (i) that the Managing Director of the Corporate Debtor entered into an agreement on 06.02.2011 with one M/s. D. P. Exports, for carrying out mining operations on behalf of the Corporate Debtor and also for managing its affairs and selling 100% of the extracted iron

ore; (ii) that the said M/s. D. P. Exports was a partnership firm of which one Mr. M. Poobalan and his wife were partners;

(iii) that another agreement dated 11.12.2012 was entered into between the Corporate Debtor and a proprietary concern by name M/s. P. & D. Enterprises, of which the very same person namely, Mr. M. Poobalan was the sole proprietor; (iv) that the said agreement was for hiring of machinery and equipment; (v) that a finance agreement was also entered into on 12.12.2012 between the Corporate Debtor and a company by name M/s. Udhyaman Investments Pvt. Ltd., represented by its authorized signatory Mr. M. Poobalan; (vi) that there were a few communications sent by the said Mr. Poobalan to various authorities, claiming himself to be the authorized signatory of the Corporate Debtor; (vii) that an MOU was entered into on 16.04.2016 between the Corporate Debtor

and M/s. Udhyaman Investments Pvt. Ltd., represented by the said Mr. Poobalan, whereby the Corporate Debtor agreed to pay Rs.11.5 crores; (viii) that the said agreement was purportedly executed at Florida, but witnessed at Chennai; (ix) that Mr. Poobalan even communicated to the Director, Department of Mines & Geology as well as the Monitoring Committee, taking up the cause of the Corporate Debtor as its authorized signatory; (x) that the CIRP was initiated by M/s. Udhyaman Investments Pvt. Ltd. represented by its authorized signatory, Mr. Poobalan; (xi) that the Resolution Applicant namely, M/s. Embassy Property Development Pvt. Ltd. as well as the Financial Creditor who initiated CIRP namely, M/s. Udhyaman Investments Pvt. Ltd. are all related parties and (xii) that Mr. Poobalan had not only acted on behalf of the Corporate Debtor before the statutory

authorities, but also happened to be the authorized signatory of the Financial Creditor who initiated the CIRP, eventually for the benefit of the Resolution Applicant which is a related party of the Financial Creditor.

48. In the light of the above averments, the Government of Karnataka thought fit to invoke the jurisdiction of the High Court under Article 226 without taking recourse to the statutory alternative remedy of appeal before the NCLAT. But the contention of the appellants herein is that allegations of fraud and collusion can also be inquired into by NCLT and NCLAT and that therefore the Government could not have bypassed the statutory remedy.

49. The objection of the appellants in this regard is well founded. Section 65 specifically deals with fraudulent or malicious initiation of proceedings. It reads as follows:

“65. Fraudulent or malicious initiation of proceedings. – (1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency or liquidation, as the case may be, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(1) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.”

50. Even fraudulent tradings carried on by the Corporate Debtor during the insolvency resolution, can be inquired into by the Adjudicating Authority under Section 66. Section 69 makes an officer of the corporate debtor and the corporate debtor liable for punishment, for carrying on transactions with a view to defraud creditors. Therefore, NCLT is vested with the power to inquire into (i) fraudulent initiation of proceedings as well as (ii) fraudulent transactions. It is significant to note that Section 65(1) deals with a

*situation where CIRP is initiated fraudulently
“for any purpose other than for the resolution of
insolvency or liquidation”.*

51. Therefore, if, as contended by the Government of Karnataka, the CIRP had been initiated by one and the same person taking different avatars, not for the genuine purpose of resolution of insolvency or liquidation, but for the collateral purpose of cornering the mine and the mining lease, the same would fall squarely within the mischief addressed by Section 65(1). Therefore, it is clear that NCLT has jurisdiction to enquire into allegations of fraud. As a corollary, NCLAT will also have jurisdiction. Hence, fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in Section 61.”

The Appellant has further cited the judgment of Hon’ble Supreme Court in ‘State of Orissa & Ors. Vs. Chandra Nandi’ in Civil Appeal No. 10690 of 2017 held that there should be a reasoned order and if the order is without

reason the matter can be remanded back to the lower Authority. Para 10 11, 12, 13 & 14 are depicted below:

“10. This Court has consistently laid down that every judicial or/and quasi judicial order passed by the Court/Tribunal/Authority concerned, which decides the lis between the parties, must be supported with the reasons in support of its conclusion. The parties to the lis and so also the appellate/revisionary Court while examining the correctness of the order are entitled to know as to on which basis, a particular conclusion is arrived at in the order. In the absence of any discussion, the reasons and the findings on the submissions urged, it is not possible to know as to what led the Court/Tribunal/Authority for reaching to such conclusion. (See State of Maharashtra vs. Vithal Rao Pritirao Chawan, (1981) 4 SCC 129, Jawahar Lal Singh vs. Naresh Singh & Ors., (1987) 2 SCC 222, State of U.P. vs. Battan & Ors., (2001) 10 SCC 607, Raj Kishore Jha vs. State of Bihar & Ors., (2003)

11 SCC 519 and State of Orissa vs. Dhaniram Luhar, (2004) 5 SCC 568).

11. The order impugned in this appeal suffers from aforesaid error, because the High Court while passing the impugned order had only issued the writ of mandamus by giving direction to the State to give some reliefs to the writ petitioner (respondent) without recording any reason.

12. We are, therefore, of the view that such order is not legally sustainable and hence deserves to be set aside.

13. In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned order is set aside. The case is remanded to the High Court for deciding the writ petition afresh, out of which this appeal arises, for its disposal in accordance with law keeping in view the observations made above.

14. Since we have formed an opinion to remand the case to the High Court for its fresh disposal on merits,

we have not expressed any opinion on the merits of the case while deciding this appeal. The High Court will, therefore, decide the appeal uninfluenced by any observations made by this Court in this order.”

6. The Ld. Counsel for the R1/RP has stated that R1 has issued numerous emails to provide details of Rs.110 Crore claim lodged on R2 so that he can proceed against R2 but the Appellant has not provided the details. GST Authority have also issued notice on the CD for an amount of Rs. 35.63 Crore. The RP remuneration is not paid by the CD but is being paid by the CoC members in proportion of their voting percentage. It has also been stated by him that no potential Resolution Applicant filed their plan for the Resolution of the CD, the CoC in the 4th CoC meeting considering that there were no interested potential Resolution Applicant, the CoC with 100% voting favored the liquidation of the CD and accordingly, an application seeking liquidation of the CD has been filed before the Adjudicating Authority.
7. The Ld. Counsel for the R2 – BMW India Pvt. Ltd has stated that they are only concerned with the IA No. 300 of 2018 which was filed by the CD under Section 65 of the Code. They have also stated that the said IA has been rightly dismissed by the Adjudicating Authority and the impugned order does not

merit any interference as it is without jurisdiction and is not maintainable qua R2. They are abusing the process of the Code and delayed the outcome. They are bringing the trade disputes into the Code jurisdiction. It has also stated that Section 65 of the Code proceedings can be initiated only against a 'Financial Creditor' & 'Operational Creditor' who have initiated the process. Since R2 has not initiated the process, it is not within the ambit of Section 65 of the Code. It has also stated that the petition of the CD under Section 9 of the 'Arbitration and Conciliation Act, 1996' was dismissed by the Hon'ble Delhi High Court OMP (1) (Comm) No. 559 of 2017 because the Court has observed that *"it is not possible at least at an ad interim stage in exercise of its power under Section 9 of the Arbitration and Conciliation Act, 1996 to direct BMW mandatorily to renew the contract with the petitioner"*. They have also stated that the CD filed a petition before the 'Competition Commission of India' (CCI) vide Case No.11 of 2018 under section 19 of the Competition Act, 2002 but it was also dismissed for not having made out a prima facie case. It has also alleged that the Appellant is indulging in forum shopping and have malafidely intention of initiating vexatious of litigation against R2- BMW India Pvt. Ltd.

8. The Ld. Counsel for the R3 - BMW India Financial Services Pvt. Ltd has stated that the debt and default is proved and this is sufficient for initiating the CIRP. The loan transactions between the CD and Financial creditor are stated below:

a.Floorplan financing agreement dated 15th November, 2010 (FPA) providing credit line, enhanced from time to time to INR 33 Crore (disbursed/utilized : INR 30,37,04,771.98 as on 31.10.2017) @ page 513/515/524/541/563

b.Working capital demand facility agreement dated 28th June 2014 providing credit limit of INR 20 Crore (disbursed/utilized:INR17,49,99,800.01 as on 31.10.2017) (@page 628/637/642/650/659 of Appeal paper book); and

c.Spare Parts Financing Agreement dated 13.04.2014 (SPA) (disbursed/utilized : INR 3,16,82,078.36 as on 31.10.2017) (@page592/594/621 of Appeal Paper Book)

(Note : the above loan facilities were secured by way of Deed of Hypothecation, bank Guarantee (invoked and encashed post-filing of Insolvency Application), Promissory Notes and Personal guarantees provided by, inter alia, Mr. Talha Sareshwala, the Appellant herein @page 467-475 of Appeal paper book)

[Note: The above loan facilities were secured by way of Deed of Hypothecation, bank Guarantees (invoked and encashed post-filing of Insolvency Application), Promissory Notes and personal Guarantees provided by, inter alia, Mr. Talha Sareshwala, the Appellant herein (page 467 -475 of Appeal paper book)

The FPA was utilized from time to time, as indicated by the statement of account at page no.661 to 805 of the Appeal paper book, while the statement of account providing details of utilisation under the SPA is provided at page 806 to 814 of the Appeal paper book. Further, the utilisation under WC is provided at page no.815 to 816 of the Appeal paper book.

The said statement clearly state that Parsoli had an aggregate outstanding of INR 51,03,86,650.35 as principal as of 31.10.2017.

9. Evidence of default and admission thereof are stated below:

... apparent that the evidence of default and admission thereof by Parsoli are plenty, and the most pertinent amongst them are as follows:

Sl.	Date(s)	Evidence of Admission of Default	Page No.
a.	12.03.2016	FC issued a show-cause notice to Parsoli for breach of Clause 21 of the Deed of Hypothecation dated 15.12.2016 and Clause 5.5 of FPA as Parsoli was avoiding to immediately deposit the sale proceeds of cars sold ("Sold out of Trust/SGT"). A list of such unsold cars was also provided as Annexure B of the show-cause notice.	@page 822-825 of Appeal Paper-book
b.	30.08.2016	Parsoli replied to the show-cause, undersigned by the Appellant herein, taking moral responsibility for the violation incurred by Parsoli Motors towards the Floor Plan Financing Agreement and Deed of Hypothecation. The Appellant, himself, termed the said violations as gross violation and apologised for such financial indiscipline.	@page 817 of Appeal Paper-book
c.	15.12.2016	Due to ongoing defaults, a meeting was convened on 07.12.2016 after which a letter recording the understanding of parties was issued on 15.12.2016. The letter records Parsoli's commitment to mitigate the financial exposure to ensure its contractual commitments towards the FC. The letter recorded the amount in dues.	@page 828-830 of Appeal Paper-book
d.	01.02.2017	Yet another show-cause notice was issued by FC to Parsoli referring back to the audit discrepancies committed vide the earlier show-cause notice of 12.08.2016 and the meeting dated 07.12.2016. It was again highlighted that Parsoli is continuing to default by not making payments forthwith the sale of cars.	@page 812 of Appeal Paper-book
e.	01.02.2017	Parsoli wrote a letter to BMW India, marking a copy to FC that it was searching for an investor to clear its outstanding.	@page 816 of Appeal Paper-book
f.	06.02.2017	Parsoli's Board of Directors passed a Board Resolution to initiate process of selling, leasing or disposing the whole of undertaking, thereby indicating that it had no wherewithal to make payments of dues by itself.	@page 849-50 of Appeal Paper-book
g.	29.06.2017	Parsoli wrote a letter to BMW India and FC undertaking, <i>inter alia</i> , to infuse approximately INR 60 Crore by first week of August 2017 out of which the dues of FC would also be cleared.	@page 812 of Appeal Paper-book
h.	18.07.2017	FC along with BMW India issued a letter asking <i>inter alia</i> the source of fund that Parsol. would infuse to clear dues and requested to provide additional Bank Guarantees of INR 10 Crore.	@page 874-75 of Appeal Paper-book
i.	17.08.2017	In view of the continuing defaults by Parsoli, FC issued a reminder notice which intimated Parsoli about the outstanding of INR 57,90,32,142.27 out of which INR 54,11,43,429.56 was already overdue as on 16.08.2017. FC demanded Parsoli to make immediate payment (by 25.08.2017) of INR 25,22,99,678.64 which were overdue against cars sold out of trust.	@page 876-877-878 of Appeal Paper-book

Evidence of Admission of Defaults			3
Sr.	Date(s)		Page No.
j.	23.08.2017	Parsoli, through the Appellant, issued a response to 17.08.2017 reminder notice whereby it reaffirmed its commitment to repay due and clear SOTs at the earliest. Parsoli and the Appellant requested for 2-3 weeks' time to clear the dues and undertook to immediately release INR 8-10 Crore	@page 879 of Appeal Paper-book
k.	30.08.2017	Another reminder email and a letter were issued by FC to Parsoli wherein it was informed about the continuing defaults and warning reporting of its account to CIBIL if payments were not immediately released as was promised in Parsoli's 23.08.2017 letter	@page 880/906 of Appeal Paper-book
l.	11.09.2017	On the last day of the extension for repayment granted, Parsoli fraudulently sent an email wherein it enclosed a fictitious Bank Draft, Bank Covering Letter and Swift Code for payment of USD 2 million, which till date has not come to FC	@page 907 of Appeal Paper-book
m.	13.09.2017	The Appellant sent another email seeking time until 20.09.2017 to repay and undertook to 'quit gracefully' if Parsoli failed to pay by then. The Appellant also thanked FC for its support	@page 912 of Appeal Paper-book
n.	30.09.2017	Balance Sheet of Parsoli - Parsoli shows outstanding towards WC facility of INR 17,49,99,800	@page 918 of the Appeal Paper-book
o.	31.03.2017	Balance Confirmation: Parsoli admits dues of INR 52,74,44,701 and interest dues of INR 2,59,00,591 as of 31.03.2017	@page 929 to 932 of the Appeal Paper-book
p.	-	Default Records @CIBIL: FC had also filed on record the data from CIBIL which clearly establishes the indebtedness and defaults by Parsoli	@page 1342 onwards of the Appeal Paper-book

Based on the above evidence of default, FC filed the Insolvency Application on 13.11.2017, to which an objection was filed by Parsoli on 29.11.2017, raising the following frivolous and hyper-technical objections:

- a. The computation of default, though contained the date of default, however the number of days in default was missing (page 1445 of the Appeal paper book);
- b. No evidence provided by FC that it made payment to BMW India under FPA for the cars purchased by Parsoli (page 1446 of the Appeal paper book);
- c. FC was actually an operational creditor as it stepped into the shoes of BMW India which sold cars to Parsoli (page 1447 of the Appeal paper book);

d.Default of Parsoli was on account of inaction on the part of BMW group and since BMW group decided to give a fair exit to Parsoli, FC could not have initiated the Insolvency Application (page 1451 of the Appeal paper book);

e.The loans were not recalled by the FC, and that Parsoli was a solvent Company (page 1453 of the Appeal paper book).

Note: it is apparent that no other objection was ever raised at the time of filing counter on 29.11.2017. However, suddenly Parsoli filed a Further Affidavit in December, 2017, as an afterthought, raising objection inter alia (i) on sale of cars by outside dealer to the customers of Gujarat (page 1828/1830/1851 of the Appeal paper book) and (ii) regarding alleged erroneous recognition of date of default (page 1829 of the Appeal paper book). The said objections, as apparent, pertained to its business dealings with BMW India, and not with FC.

It is also stated that on 06.01.2018, FC filed its rejoinder affidavit rebutting all such allegations by providing inter alia (i) bank details of payments made by FC to BMW India against the cars, (ii) the email communication whereby Parsoli was informed by FC about

payment upon utilisation of FPA, (iii) reiterating the contents of clause 5.5 of FPA i.e. sale proceeds ought to be utilized to repay dues under FPA and (iv) admission of default by Parsoli and the Appellant vide their emails (page 1864-66 of the Appeal paper book).

The FC filed its response to the said IA on 25.09.2018 demonstrating as to how the IA was filed to cause delay in the insolvency proceedings. A reply to the said IA was also filed by BMW India (page 2743-2746 of the Appeal paper book) pointing out that Parsoli has no locus to file such an application in view of the provision contained in Section 65 of the Code as it was not BMW India who had initiated the Insolvency Application. Parsoli filed its rejoinder to the contentions of BMW India (page 2756 of the Appeal paper book) without any tenable response to the issue of locus.

It is also stated that the Adjudicating Authority has also recorded its satisfaction for all parameters of compliances under Section 7 of the Code, including completeness of the Insolvency Application and proposal of an IRP (page no. 80/81 of the Appeal paper book consisting of para 20-21 of the order. Thus,

a.FC completely fulfilled the requirements of being a financial creditor in view of the loan facilities provided to Parsoli, a fact which was never denied by Parsoli in its contemporaneous communications;

b.Parsoli defaulted in its repayment obligations under the loan facilities as described under Section 3(12) r/w section 7(1) of the Code;

c.The Insolvency Application fulfilled all the mandatory requirements as laid down under Section 7(3) of the Code by adducing the relevant records to showcase default for the consideration of the Adjudicating Authority and proposed an IRP.

In view of the above stated facts, the Respondent No.3 is praying for dismissal of the Appeal.

10.We have gone through the submissions made by the parties and pleadings available on record and Hon'ble Supreme Court Judgment cited above and how to move where fraudulent or malicious initiation of proceedings are involved under Section 65 of the Code and are having following observations:

a. It is not in dispute that there is no 'debt' and 'default which is the basic requirement of the Section 7 of the Code. However, the

‘Adjudicating Authority’ has the inherent power to restrict the perpetuation of applications motivated by fraud or malice under section 65 of the code which is reproduced below for ease of convenience:

“Section 65: Fraudulent or malicious initiation of proceedings.

(1) If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

[(3) If any person initiates the pre-packaged insolvency resolution process—

(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or

(b) with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.]”

- b. This Tribunal has already held in the case of Amit Katyal Vs. Meera Ahuja in CA(AT)(Ins) No. 1380 of 2019 that Section 65 of the Code explicitly said that if any person initiates the Insolvency Resolution Process or Liquidation proceedings fraudulently or with malicious intends for any purpose other than for resolution of insolvency or liquidation, as the case may be, the Adjudicating Authority may impose the penalty. This Tribunal is also of the view that Section 65 of the Code could not mean the imposition of penalty alone.
- c. This Tribunal has also held in Company Appeal (AT) (Insolvency) No. 258 of 2021 in Hystone Merchants Pvt. Ltd Vs. Satabadi Investment Consultants Pvt. Ltd has held that the Adjudicating Authority can refuse to admit an application that is otherwise complete in all respects under Section 7 of the Code if there are visible science of fraud, collusion or malicious intents under Section 65 of the Code.
- d. The Hon'ble Apex Court has also observed in 'Embassy property development Pvt. Ltd' as stated (supra) vide para 51 that if the CIRP had been initiated by one and the same person taking

different avatars not for the genuine purpose of Resolution Insolvency or Liquidation but for the collateral purpose of cornering the mine and mining lease the same would fall squarely within the mischief by Section 65(1) of the Code. The Adjudicating Authority has jurisdiction to enquire into the allegation of fraud and so also with this Appellate Tribunal.

- e. The Hon'ble Apex Court in 'Beacon Trusteeship Limited' as stated (supra) has also held that "whether the proceedings have been initiated in a collusive manner will be looked into in accordance with law and appropriate orders have to be passed considering the facts and circumstances of the case".
- f. What we are observing in this case is that the 'Adjudicating Authority' has not gone into the reasons put forth by the counsels in IA No. 300 of 2018 but has simpliciter mentioned that R2/BMW India Pvt. Ltd is not a party in the main petition no. 161 of 2017. The Appellant has elaborately given the reasons for invoking Section 65 of the Code and has elaborately explained how the territory infringement has been committed by R2 a group company of R3 leading to a financial mess and putting the Indian company

into such adverse situation leading to lodging a claim of Rs.110 Crore (appearing at page no. 2171 -2400 of the Appeal paper book).

- g. We, therefore, would like to point out some extracts from Hon'ble Supreme Court Judgment in 'Swiss Ribbons pvt. Ltd & Anr. Vs Union of India & ors' in Writ Petition (Civil) No. 99 of 2018 that it may be prescience, distortion and abuses of the provisions of the Code which may in the form of Section 7 of the Code initiation where group companies are involved in providing different facilities and in order to supplement the same the certain extracts are depicted below:

“Para 8 ,....There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a

legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.¶ (emphasis supplied)

Para 8..... Moreover, as already pointed out above, the trial and error method is inherent in every legislative effort to deal with an obstinate social or economic issue and if it is found that any immunity or exemption granted under the Act is being utilized for tax evasion or avoidance not intended by the legislature, the Act can always be amended and the abuse terminated.

Para 9.....The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend

the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

Para 10 - The Preamble of the Code states as follows: —An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote

entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

Para 12. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters / those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate

debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.

- h. There are several issues (violation of dealership agreement, vis a vis invocation of code for default concurrently happening under floorplan financing agreement of dealership agreement provided by same BMW Group Company) raised by the Appellant on Respondent No.2- BMW India Pvt. Ltd discreetly covering Respondent No.3- BMW India Financial Services Pvt. Ltd. Since, some collusion seems to be apparently existing to thwart the claim of the Corporate Debtor and other related issues. Impugned order dated 04th June, 2020 has not dealt with this IA and has dismissed on the ground that BMW India Pvt. Ltd/R2 in the IA No.300 of 2018 is not a party in the main petition no.167 of 2017. Although

IBC is a summary proceeding but if large business houses with multiple business arms are allowed to disrupt on its whims & fancies small business firm then how IBC can promote entrepreneurship which is also its objective. Hence it is in the fitness of justice to remand the matter back in respect of IA 300 of 2018 to the 'Adjudicating Authority' to go into the details of the allegations & decide either way by giving reasonable & proper opportunity to all the parties involved. Section 9 of the Code meant for 'Operational Creditors' have a protection mechanism that if there is a genuine dispute then even the debt is due and default has happened, the case is not admitted. However, as far as Section 7 of the Code is concerned here protection mechanism is provided not in that section but through Section 65 of the Code, if there is fraudulent or malicious initiation of proceedings. The Objective of the Code is to ensure revival and continuation of Corporate Debtor by protecting the Corporate Debtor from its death. The Court /Tribunal has to ensure that the Code is not being used by perverted human ingenuity and to protect against distortion and abuses.

- i. However, we made it very clear that we are not going deep in the matter and hence not commenting on the merit of the case. However, we relegate the appeal partially for the remedy before the ‘Adjudicating Authority’ in respect of I.A No. 300 of 2018 and accordingly, we are remanding the matter back to the ‘Adjudicating Authority’ by setting aside para 18.2 of the impugned order dated 04th June, 2020 in I.A No. 300 of 2018 in CP(IB) No. 161 of 2017.
- j. Accordingly, we dispose of the Appeal. No order as to costs.
- Pending Application, if any, stands disposed of.
- Interim order, if any, passed by this Tribunal stands vacated.

[Justice M.Venugopal]
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

28th February, 2022

New Delhi

Raushan.K