

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH**

IA (IBC)/187/KOB/2022

IN

IBA/37/KOB/2020

&

IA (IBC)/250/KOB/2022

IN

IBA/37/KOB/2020

*(Under Section 65 and 60(5) of the IBC, 2016 read
with Rule 11, NCLT Rules, 2016)*

***In the matter of KOYENCO AUTOS PRIVATE
LIMITED***

IA (IBC)/187/KOB/2022 IN IBA/37/KOB/2020

MEMO OF PARTIES:

Ashique Ponnamparambath,

Suspended Board of Director, Koyenco Autos
Private Limited, Ponnamparambath House,
Konad beach, West Hill Post, Calicut 673005

... Applicant No.1

Shameena P P,

Suspended Board of Director, Koyenco Auto
Private Limited, Ponnamparambath House,
Konad beach, West Hill Post, Calicut.

... Applicant No.2

-Vs-

BMW India Financial Services Private Limited,

The Oberoi Corporate Tower, Building No. 11,
1st Floor, DLF Cyber City, Phase 2, Gurugram,
Haryana 122002

... Respondent No.1

BMW India Private Limited,

Tower B, 7th Floor, Building No. 8, DLF Cyber
City, Phase 2, Gurugram, Haryana 122002

... Respondent No.2

Platino Classic Motors (India) Private Limited,

Through its Resolution Professional, Mr.
Reuben George Jospeh, 37/20389, 1st Florr,
Muttathil Lane, Kadavanthara, Kochi, Kerala
682020

... Respondent No.3

Koyenco Autos Private Limited,

Through its Resolution Professional, Mr. Vipin
Vincent, Chakiath House, Elavoor P.O,
Angamaly, Near Elavoor Market, Ernakulam,
Kerala 683572

... Respondent No.4

IA (IBC)/250/KOB/2022 IN IBA/37/KOB/2020

MEMO OF PARTIES:

Ashique Ponnampambath,

Suspended Board of Director, Koyenco Autos
Private Limited, Ponnampambath House,
Konad beach, West Hill Post, Calicut 673005

... Applicant

-Vs-

Mr. Vibin Vincent,

Liquidator, Chakiath House, Elavoor P.O,
Angamaly, Near Elavoor Market, Ernakulam,
Kerala 683 572

... Respondent No.1

BMW India Financial Services Private Limited,
The Oberoi Corporate Tower, Building No. 11,
1st Floor, DLF Cyber City, Phase 2, Gurugram,
Haryana 122002

... Respondent No.2

Platino Classic Motors(India) Private Limited,
Through its Liquidator, Mr. Reuben George
Jospeh, 37/20389, 1st Florr, Muttathil Lane,
Kadavanthara, Kochi, Kerala 682020

... Respondent No.3

Order delivered on: 21.12.2023

Coram:

Hon'ble Member (Judicial) : TMT. (Retd.) Justice T Krishna Valli

Hon'ble Member (Technical) : Shri. Shyam Babu Gautam

Appearances:

For the Applicant : Mr. Arjun Sheth, Ms. Kriti Kothari,
Advocates

For the Respondent : Mr. Diwakar Maheshwari, Advocate
(R1 & R2/R2)
Mr. Vibin Vincent, Liquidator(R4/R1)

ORDER

Per Coram

1. As the facts and question of law are common in both these applications, matter is heard together and common order is passed;
2. These Applications are filed under Section 65 and Section 60(5) of the IBC, 2016 by suspended board of directors of Koyenco Autos Private Limited, the Corporate Debtor under liquidation against the original Financial Creditor, BMW India Financial Services Private Limited and the liquidator of the Corporate Debtor seeking following reliefs: -
 - a. *Pass appropriate order setting aside/recalling the order dated 06/10/2021 in CP (IB) No. 37 of 2020 freeing the Corporate Debtor from the rigors of CIRP*
 - b. *Pass appropriate order declaring that CP (IB) No. 37 of 2020 has been initiated by Respondent No. 1 and/or Respondent No. 2 fraudulently and/or with malicious intent for purpose other than for the resolution of insolvency of the Corporate Debtor and further this Adjudicating Authority be pleased to pass appropriate order levying penalty as per Section 65 of the IB Code on the Respondent No. 1 and/or Respondent No. 2.*
 - c. *Pending admission, hearing, and final disposal of the present interlocutory Application, this Hon'ble Adjudicating Authority be pleased to:*

(i) Pass order staying the CIRP proceedings and/or liquidation of the Corporate Debtor;

&

a. Direct the Respondent No. 1 Resolution Professional to accept the claim of the Financial Creditor BMW India Financial Services Limited at notional value of Rupee One being disputed claim in line with the judgment of the Hon'ble Supreme Court Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta and Other;"

The Brief facts of the case are as follows: -

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3. The Koyenco Autos Private Limited, Corporate Debtor (hereinafter 'CD') was admitted into CIRP vide order of this Tribunal dated 06.10.2021 and is now under liquidation vide orders of this Tribunal. The section 65 application is filed on 07.07.2022 and section 60(5) application filed on 17.08.2022.
4. The applicant state that Platino Classic Motors(India) Private Limited, (R3/R3), another corporate debtor which is a group company of applicant promoters also under insolvency had a nonexclusive dealership right to sell BMW vehicles in Kerala as per Annexure A agreement dated 09.05.2008 which was renewed from time to time till end of 2018. It is stated that applicant through R3 performed the sale of vehicles exceptionally well and has won awards from BMW for best dealer in India. R3 initiated to expand

its dealership through 2 new establishment in Trivandrum and Calicut from assurances from R2 and financial facility from R1. The establishment need to meet BMW specification and involved huge capital investment of 35 crore approx met by R3. It is stated that this investment needed atleast 7 years of business to recoup. R3 therefore entered into financial credit agreement with R1, i.e., Floorplan financing agreement dated 24.09.2010, Working capital credit facility agreement dated 30.11.2011, and spare part financing agreement dated 14.01.2015. It is stated that due to market condition and harsh internal policy of R2, the revenue deteriorated as evident from Annexure G produced.

5. It is stated that there was 'territory' specifically assigned as per dealership agreement and without R2's consent no dealer could sell or advertise vehicles/parts outside their territory. Any such sale will be intrusion and their sale volume was to be reduced by such sale. It is stated that when sale reduced in Kerala in 2013-14, R2 allowed outside territory dealers to do business in R3's territory for an indirect tax advantage. It is stated that R3 informed R2 of this infringement vide Annexure I emails and R3's sale also decreased and no positive adjustment given to R3.
6. Applicant state that R3 has to keep BMW vehicles as display and demo cars and in stock as per dealership agreement. There was a deferred payment facility where R2 would defer payments for stock vehicles taken by R3. As per floorplan financing agreement and spare part agreement R1 would give advance to R3 for making

payment to R2. As per finance agreements, R3 had to pay interest for any default of period to R1 and such interest could be increased by R1 without consulting R3. It is stated that R1 and R2, who form BMW group colluded on R3 by R2 invoicing vehicles to R3 without necessity in other words 'dumping of vehicles' and R3 was forced to rely on R1 to make payments. As a result of market condition vehicle remained unsold and R3 had to pay huge interest. This was communicated to R2 by R3 vide Annexure K emails. It is stated that a penalty of 62.25 lakh was borne by R3. It is also stated that when BMW vehicles had engine failures, the cost had to be borne by R3 which R2 rejected to compensate. With dishonest intention, R2 made R3 invest in 2 new showrooms with heavy capital investment knowing fully well the situation. It is stated that in the year 2016, R2 entered to dealership with another party in R3's same territory on flexible conditions for showroom specification and as a result, the new dealer could sell vehicles at discount which also affected R3.

7. Further R2 put a condition that R3 dealership would be terminated provided R4, the corporate debtor had become coborrower in financing facilities. Applicants agreed to same and Term loan agreement dated 17.05.2017 and addendum to floor plan agreement, credit facility and spare part agreements dated 17.05.2017 was signed by mortgaging R4's assets. It is stated that in 2018, inspite of all conditions, R2 terminated the dealership vide Annexure N letter with R3. In 14.01.2019, R1 issued notice of payment of credit facilities knowing that R3 had lost its business.

On request of R3, R2 agreed to take back stock lying with R3 but on a discounted price of 65% on original value whereby causing huge loss to R3. Further after several correspondences and discussions, R1 and R2 agreed for Annexure X1 settlement dated 04.09.2019. It is stated that BMW agreed for compensation but no such document was executed in spite of assurance to applicants.

8. Applicant was cheated by R1 and R2 putting into financial difficulty wherein Annexure AA FIR was filed with JFCM along with complaint before State Police Chief on 14.12.2019. Annexure AC notice for compensation was issued to R2 for termination of dealership.
9. It is stated that R1 and R2 filed section 7 application against R4, CD with ulterior motives and for depriving R3 from claiming loss. Hence it is a clear case of fraud. No time was granted to R3 and R4 for repayment even after making R4 create mortgage in favour of R1. As management of R1 and R2 are same BMW AG, Germany, the fraud was perpetrated on R3 and R4. The applicant state that object of IBC is resolution however the respondents have acted in collusion knowing that R4 CD had no business to resolve but only assets which is under mortgage. It is also stated that applicants proceeded for Arbitration as per settlement agreement and filed request before Delhi High court. It is also stated that RP/liquidator instead of prosecuting the R1 and R2 in Arbitration has sided with them because COC is controlled by R1 and R2.

10. Applicant relies on **Annexure J Tehla Sareshwala vs Parsoli Motorworks Pvt Ltd** judgement to state that in similar case involving BMW group, the NCLT had given an order under section 65 IBC and set aside CIRP order.
11. The answering respondent on the other side, R1 against whom fraudulent initiation of CIRP is alleged states that the application under section 65 is not maintainable as there should be ingredient of 'fraudulent or malicious' initiation of CIRP for 'purpose other than for resolution of debts'. It is stated that there is no material on record to prove fraud or malicious action by R1.
12. It is stated that this application was filed in 07.07.2022 i.e. after 275 days of CIRP order when resolution plan of applicants themselves was under consideration. R1 relies on judgement of Apex Court in **Embassy Property Developments(P) Ltd v. State of Karnataka(2020) 13 SCC 308** to show that section 65 is not an alternate remedy to appeal under section 61 IBC. It is stated that prayer (a) and (c) is not maintainable for reason it is beyond the scope of section 65 IBC and applicant is only forum shopping. It is stated that the applicant moved 3 writ petitions before Hon'ble Kerala High Court, a criminal case alleging fraud before JFCM which was put to stay by Hon'ble Kerala High Court, and Arbitration case. This Tribunal had considered counter as well as additional counter of applicants in section 7 petition and was convinced of 'debt and default' by CD and no allegation of 'fraud' was made by CD. It is stated that applicant went on appeal before NCLAT against CIRP

order but appeal was dismissed on 27.07.2023. It is further submitted that the prayer (a) also cannot be passed by this Tribunal as the Hon'ble NCLAT has already passed the orders on appeal and is sub judice and beyond jurisdiction as the NCLT cannot review its own order.

13. R1 state that in **Monotrone Leasing Private Limited vs PM Cold Storage Private Limited**, Hon'ble NCLAT has stated that there shall be 'documentary evidence' to prove fraud in order for section 65 to be invoked. In this case, no such document is proved by applicant. Further it is argued that that the alleged 'coercions', 'collusion', 'dumping' or 'territory infringement' was not raised in counter in section 7 matter before this Tribunal or in appeal. Hence it is stated these allegations are an afterthought. It is stated that even in correspondences between R1 and R3, there had been no subject of 'coercions', 'collusion', 'dumping' or 'territory infringement'.

14. It is stated that CD and R3 jointly requested R1 to disburse loan for working capital dated 17.05.2017 which is clear as per Annexure R1/O request letter and Annexure R1/P Board resolutions of CD dated 16.05.2017. It is in pursuance of the request loan was granted and property of CD mortgaged. The reply to loan recall notice dated 14.01.2019 also acknowledges the credit facilities by CD and applicant. R1 state that even in SARFAESI proceeding initiated by R1 no such allegation of 'coercions', 'collusion', was raised. It is stated that the settlement agreement mutually among

parties uninfluenced by any other consideration. It is also stated that the policy of 'territory infringement' was clear that it should be reported with proof to R2 within 12 months. That no such evidence is seen as per email dated 28.03.2014, 28.05.2014, 09.01.2017 by R3 which is also not addressed to R1. As to 'dumping' raised by R3 has no connection with default made by CD to R1. It is further stated that the '**Parsoli Order**' is under stay by Hon'ble Apex Court. It is stated that the application pertains to debt in 2017 and hence barred by limitation also. It is stated that dealership agreement is a subject matter between R3 and R2 and a business agreement and not a financial agreement as under section 7 IBC. It is stated that R1 has no privity of contract under the dealership agreement as it is only an NBFC and as far as section 7 is concerned, it is a financial creditor of CD. It is stated that R3 could have taken finance from any institution and there was no coercion under any agreement to take same from R1. The applicants have intermingled business agreement with financial agreements. Hence intent of CD is only to disparage the CIRP/liquidation. R1 exercised its statutory remedy as per financial arrangement and the Tribunal had considered same and admitted the CD into CIRP. The settlement agreement was also considered and provided explicitly and no other promises have been entered between CD and R1. It is further stated that the settlement agreement did not have any arbitration clause as alleged by applicants and the said arbitration request is dismissed by Hon'ble Delhi High court. It is also stated that only upon dismissal of the arbitration request,

applicant took up to inform and take up prosecution of Arbitration petition. Hence it is stated that the application is not maintainable under law and for not having any material to prove the allegation.

15. R2 submitted their reply stating that applicants are confusing the factual issues as the entity that shared contractual relationship with R2 is R3 and not the corporate debtor. The CIRP against CD was initiated for alleged default of financial facility with R1 and R4 where R2 has not been a signatory. It is stated that R1 and R2 are separate entities. It is stated that it is at instance of R1 that CIRP was initiated and going by section 65, the penalty can be imposed against the 'person who initiated the IRP or liquidation' and for that matter, R2 who is a third party in the financial contract has no role in the current scenario. The R2 relies on decision of Hon'ble NCLAT **in Unigreen Global Private Limited vs Punjab National Bank and Ors., , and Amit Katyal v. Meera Ahuja & Ors.** to state that applicant cannot enlarge scope of Section 65 IBC by arraigning other parties. It is also stated that the **Parsoli Motors** case which applicant relies on is stayed by Apex court. It is stated that applicants by unnecessarily arraying R2 assail an issue not concerning the CIRP process under section 7. R2 and CD has no contractual relationship at all and CD or R2 does not owe each other anything. The contract between R2 and R3 cannot and is not a subject matter which led to CIRP of CD.

16. It is stated that R2 is a car manufacturer independent of R2 which is a NBFC. The allegation of 'territory infringement' against R2 is

not proved as the R3 has not reported of such an activity as per dealership agreement conditions. The alleged email dated 28.03.2014 was sent between R3's own employees and not to R2. Similarly email dated 28.05.2014 and 09.01.2017 does not show any proof of infringement. In relation to 'dumping' the email shown are 10 years old and were never raised after and all cars were supplied as per orders placed by R3. It is also stated that the dealership with R3 was not terminated but expired after time. It is stated that R2 never coaxed R3 to expand business as it was purely commercial wisdom exercised by R3 and applicants. The failure of applicant to do business as expected cannot be fault of R2. It is also denied that no assurance was given to R3 and it was in a prudence of applicant to engage and decide business matters and to take loan from R1. As a business icon, R2 expects certain specification to its showroom which R3 had to comply. It is stated that any penalty charges levied to R3 was purely as per business dealership agreement and nothing unfair. Further the dealership given to EVM, by R2 was independent contract and has nothing to do with R3. R2 being a manufacturer is concerned with profits and sales and not concerned with financing arrangement with R3 and had not coerced the CD to mortgage its properties for R3. It was their own voluntary choice. It is stated that the allegation of 'coercion', 'collusion' are farce. It is also stated that the 65% reduction in value of stock lying with R3 is incorrect as the old stocks were liquidated through third parties and the amount realised by R3. It is stated that no compensation was promised to R3 by R2 other

than settlement agreement dated 04.09.2019 and its intent was smooth discharge of liabilities due to R1 as well as R2. Further the FIR filed by R3 for fraud was stayed by Kerala High Court. Lastly it is stated that section 7 was an independent decision of R1 and not concerned with R2. It is also stated that the settlement agreement had no arbitration clause which was communicated to R3 and the said arbitration request was dismissed by Hon'ble Delhi High Court.

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17. The applicant in this application over and above the contention raised above state that the CD herein had signed amendment agreement dated 17.05.2017 to be added as a co-borrower along with R3 who had entered into a dealership agreement with BMW India Private Limited. Subsequently this Agreement was supplemented by a Deed of Settlement dated 04.09.2019. The applicant upon dispute raised notice for arbitration containing above allegations. The arbitration demand was rejected by R2 which resulted in Arbitration petition before Delhi High Court. Applicant state that in pendency of dispute and CIRP/ liquidation against CD, and in light of judgement of Hon'ble Supreme Court in **Committee of Creditors of Essar Steel India Ltd through Authorised signatory v Satish Kumar Gupta and Others.**, applicant contends that the claim of R2/ original Financial creditor, i.e BMW India Financial Services Private Limited should be admitted by RP/liquidator at notional value of Re.1.

18. R1/Liquidator state that it was after considering the counter by applicant that CIRP/liquidation was initiated by this Tribunal. The claim of R2 has been accepted by RP and the liquidator based on the admission order as well as the agreement as co borrower as per books of CD.
19. The FC/R2 state that applicant has no locus standi to question RP/liquidator in admission of his claims. R2 relies on Hon'ble NCLAT in **Gurdeep Singh Sahani v. Berger Paints India Ltd & Ors.** It is stated that the application filed on 18.08.2022, and CIRP was admitted on 16.10.2021 and claims were filed on 18.12.2021 and R2 was admitted as FC into COC. It is stated that resolution plan was submitted by applicant was rejected by COC. Now CD is in liquidation. It is stated that the terms of settlement agreement are final and CD is to make payment as per its terms. It is further stated that Arbitration request before Delhi High Court was rejected. The applicant state that the judgement of Hon'ble Supreme Court in **Committee of Creditors of Essar Steel India Ltd through Authorised signatory v Satish Kumar Gupta and Others.,** have no relevance in this scenario as the RP had properly verified and accepted the claim of the FC/R2.
20. Heard the submissions and perused the documents on record. The applicants in this case have filed application under section 65 of IBC, 2016 which is as follows: -
- “65. (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.”

It is clear from plain reading of the above that the application is only maintainable against the ‘person who initiates the insolvency resolution process’ which in this case is R1, BMW India Financial Services Private Limited who initiated the section 7 application against the CD.

It is also clear from above that the word used is ‘initiates’ for which we look at section 5(11) and 5(12) of IBC which are:-

“(11) “initiation date” means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process 1[or pre-packaged insolvency resolution process, as the case may be;

(12) “insolvency commencement date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be”

In reading the above, we understand that the application is intended to stop ‘initiation’ of a fraudulent or malicious CIRP which is otherwise for resolution of insolvency or liquidation. In this case, the application is filed on 07.07.2022 and the CIRP was admitted in 06.10.2021, which is way after the ‘initiation date’ and even after the ‘insolvency commencement date’ as above. Therefore, the application filed unaccompanied by a delay condonation petition is hopelessly time barred.

Also, we find that the applicant has assailed the CIRP order with Hon’ble NCLAT and Hon’ble Supreme Court which had dismissed the same nevertheless raised the dispute before Hon’ble Kerala High Court and through other forums. The applicant instead of bringing forth such allegation at time of CIRP initiation was sitting on the fence to exhaust all other remedies before finding a way

under section 65 IBC. Hence the petition is liable to be rejected for this reason alone.

Moving into the merit of the case also, the applicant has by way of above averments have failed to produce any 'valid evidence' to prove fraud and malicious intent by BMW India Financial Services Private Limited, the FC against CD. There was a financial contract with BMW India Financial Services Private Limited, the FC and CD and CD had by way of board resolution executed agreement with consent. The failure to do business properly and make revenue and any bad commercial decision by applicant does not qualify as a reason to allege fraud or malicious intent.

Even as the situation may stand as of today, the CIRP has been put to finality by Hon'ble NCLAT and to pass an order setting aside the CIRP is impossible at this stage by this Tribunal.

Now as to merit in the application to accept the claim of FC, BMW India Financial Services Private Limited at notional value of Re.1 for reason of pendency of dispute, it is clarified that as far as CIRP/liquidation of CD is concerned the claim is accepted by RP/liquidator after verification and FC is part of COC/SCC. In this scenario and also the submission from the liquidator that the CD has been liquidated and distributions are in place, there exist no reason to interfere in the admitted claims.

Hence for above reasons we find that these applications are liable to be dismissed.

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA (IBC)/187/KOB/2022 & IA (IBC)/250/KOB/2022 INIBA/37/KOB/2020
In re Koyenco Autos Private Limited

21. In view of the aforesaid, **IA (IBC)/187/KOB/2023** and **IA (IBC)/250/KOB/2023** is, **dismissed** and disposed of, accordingly.
22. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsel.
23. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.
24. File be consigned to records.

SHYAM BABU GAUTAM
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SHYAM BABU GAUTAM
Date: 2023.12.21
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SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

T.KRISHNAVALLI
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T.KRISHNAVALLI
Date: 2023.12.21
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T KRISHNA VALLI
(MEMBER JUDICIAL)

Signed on this, the 21st day of December, 2023.

Rohit/LRA