

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

**IBA/25/KOB/2020**

(Under Section 7 (4) of Insolvency and Bankruptcy Code 2016)

Order delivered on 8<sup>th</sup> day of March, 2021

**Coram:**

***Hon'ble Shri Ashok Kumar Borah, Member (Judicial)***

**In the matter of**

**The Federal Bank Limited  
Having its Regd. Office at Federal Towers,  
Bank Junction, Aluva, Ernakulam District,  
Kerala and Branch Office at the Main Avenue,  
Near KC Abraham Master Road, Paampilly Nagar,  
Ernakulam, Kerala, India-682036.**

..... **Applicant/Financial Creditor**

Vs.

**M/s Platino Classic Motors (India) Pvt.Ltd.  
Having Registered Office at No.II, 6B,  
NH Bye Pass Road, Maradu PO  
Kochi-682304.**

. .... **Respondent/Corporate Debtor**

**Parties/Counsel present (through video conferencing)**

For the Financial Creditor : Shri Leo George, Advocate  
For the Corporate Debtor : Shri Jithin Saji Issac, Advocate

The Financial Creditor/Applicant viz. The Federal Bank Ltd (hereinafter called as '**Financial Creditor/ the Bank**') has furnished Form No. 1 under Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (hereinafter called as '**Rules**') on 17-03-2020 by invoking the provisions of Section 7(4) of the Insolvency and Bankruptcy Code (hereinafter called as '**Code**') against Platino Classic Motors (India) Private Ltd (hereinafter called as '**Corporate Debtor**').

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2. As per the statement of account submitted by the Financial Creditor the total amount of debt is Rs. 63913042.98/- (Rupees Six Crore Thirty-Nine Lakhs Thirteen Thousand and Forty-Two and Paise Ninety-Eight Only)

3. The Corporate Debtor is a private limited company incorporated on 28.05.2007, having CIN No. U50100KL200PTC020847. The registered office of the Corporate Debtor is at No,II 6B, N. H. 47 Bye Pass Road, Maradu P. O., Kochi- 682 304. The Paid-up Share Capital of the Corporate Debtor Company is ₹114400000 and the Authorised Capital is ₹ 114400000.

**Submissions by the Financial Creditor:**

4. The Financial Creditor/ Bank submitted that on 30.06.2019 the Corporate Debtor had availed inter alia a Term Loan of Rs. 10,00,00,000/- from the Financial Creditor, agreeing to repay the same in 120 monthly instalments together with interest and charges set forth in the loan documents. Towards collateral Security the Corporate Debtor created equitable Mortgage in favour of the Applicant. Due to non-payment of monthly instalments the Account of the credit facility turned to the status of a Non-Performing Asset with effect from 29.10, 2019. The Financial Creditor caused a Demand Notice dated 16.12.2019 to the Corporate Debtor requiring them to repay the entire outstanding in the Loan Account. Though the said notice was served on the borrowers including the Corporate Debtor, they did not pay the amounts demanded.

5. As on 16-03-2020 an amount of Rs. 6,39,13042/- is due from the Corporate Debtor and the Corporate Debtor is unable to pay its debt. Therefore, the present application has been filed by the Financial Creditor to initiate Corporate Insolvency Resolution Process (CIRP for short) against the Corporate Debtor.

**Submissions by the Corporate Debtor**

6. The Corporate Debtor submitted that the application has been filed by Maya C. who is a power of attorney holder without any specific authorization by the Board of Directors of the Financial Creditor. The power of attorney produced only states that Maya C. Could appear before Tribunal and states

to act as presenting officer before the Tribunals specified in the power of attorney. The power of attorney does not grant a general authorization to present before all Tribunals nor does the power of attorney specify to present before this Tribunal under the Insolvency and Bankruptcy Code, 2016 or to do needful in any legal proceedings. No authorization whatsoever granted by the Financial Creditor in the power of attorney as filed and given to Smt. Maya C. In the absence of a specific application the Applicants cannot be entertained by this Tribunal. Hence this application filed by the Financial Creditor has to be dismissed at the threshold.

7. It is also stated that the application has been filed merely on the basis of bank statement. The financial creditor has not produced any valid documents to show that the corporate debtor had actually received the alleged amounts that could be termed as financial debt under Section 5(8) with promise to repay within a stipulated time and that there has been default in terms of the agreement. It is further stated that the Board Resolution produced by the Financial Creditor is not sufficient for borrowing money. Section 180(1) (c) of the Companies Act, 2013 clearly shows that approval the members by way of special resolution passed at the general meeting that the company is allowed to borrow monies in excess of the paid-up share capital and free reserves of the company, specifying thereby the maximum amount upto which monies could be borrowed by the company is mandatory. It is evident from Document No. 1, the Board Resolution produced by the firm Financial Creditor that the consent accorded to avail financial assistance from Federal Bank, Panampilly Nagar, Ernakulam is subject to the approval of members at the extra ordinary general meeting complying with Section 180(1)(c) of Companies Act. In the absence of approval of members at the |extra ordinary general meeting as required by Section 180(1)(c), there can be no financial debt that could be legally enforceable against the Corporate Debtor, Company. The Financial Creditor themselves being aware of the restrictions on the power of the Board as envisaged in the Companies Act and as stated in clear terms in the Board Resolution, the debt is not recoverable as against the Corporate Debtor. The amount advanced by the applicant being in excess of the paid-up share capital and free reserves of the company,

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the amount advanced by the Financial Creditor is not valid and effectual so as to bind the Corporate Debtor, company. Hence the Corporate Debtor submits that there is no debt that is legally recoverable as against the company

8. The Corporate Debtor further stated that the Document No. 2 is a document which purports to create right, title and interest in immovable property of the value of more than Rs.100/- and is compulsory registerable. In the absence of registration and payment of registration fee and stamp duty, Document No.2 cannot be relied on. It is also stated that the term loan agreement produced by the Financial Creditor is bad in law, The Board Resolution requires affixing the Company seal, which is not present in the documents produced. In the absence of the Common seal as required by the resolution and articles of association of the Corporate Debtor, the documents produced by the Financial Creditor are not valid. The Board Resolution specifically requires affixing common seal of the company, which is not present in the case of the documents produced and so the documents cannot bind the Company for any debt. The terms and conditions of the documents produced also are not binding on the Corporate Debtor Company. Absence of common seal as required by the Board Resolution would go to show that the company had not accepted the loans under consideration with the terms and conditions as specified in Document Nos. 1 to 10. Hence the agreements cannot be considered as valid contracts capable of being enforced.

9. The Corporate Debtor stated that the Document No.8 produced by the Financial Creditor, letter stating about the deposit will have no further force as the mortgage and the term loan agreement was already created on 30.06.2014. By the deposit of title deeds on 30.06.2014 and the creation of charge in the term loan agreement, the parties have by their act created a mortgage on the immovable property and there is also transfer of interest in the property on 30.06.2014. Having reduced the terms in the agreement and having deposited the title deeds on the same date, creating a mortgage on the property, the term loan agreement is compulsorily registrable. Document No. 8, letter evidencing deposit of title deeds is not valid as the mortgage was already created on 30.06.2014 by the term loan agreement and the deposit

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was also made on 30.06.2014. Transfer of interest in the property having already taken place on 30.06.2014 by the term loan agreement which reduces the terms of the bargain in writing, no further transfer could be made by Document No. 8 on the next date. Deposit accompanied by an actual written charge in the term loan agreement creates the mortgage on 30.06.2014 itself and the document is compulsorily registrable. No evidence that is legal has been adduced by the applicant to show that money has been disbursed to the Corporate Debtor which is repayable with or without interest.

10. It is also stated that no consideration has passed from the Financial Creditor to the Corporate Debtor for the promissory note. No evidence to show that the amount of Rs. 10 Crores has been disbursed to the respondent under the promissory note. In the absence of any evidence to the effect that the amount covered under the promissory note has been disbursed merely because of the promissory note, it cannot be taken as a debt. No demand has been made by the applicant for the amount covered under the promissory note, which itself shows that no separate amount has been disbursed.

11. The Corporate Debtor also stated that there is no Debtor Creditor relationship between the Financial Creditor and Corporate Debtor. There is no undertaking to repay the amount with interest within the specified period and hence there is no default. On the basis of documents which are not enforceable in law, the Financial Creditor cannot claim to owe 'Financial Debt' from the 'Corporate Debtor' and thereby cannot be claimed to be a 'Financial Creditor' as defined under Section 5(7) and (8) of the Insolvency and Bankruptcy Code, 2016. Though the Financial Creditor had given money to the Corporate Debtor, there is no undertaking to repay the amount by the Corporate Debtor nor is there any agreement for payment of interest.

12. It is further stated that the application filed by the Financial Creditor under Section 7 of the IBC is not complete as it is not supported by the documents mandated under the IBC, especially under Section 7. The Financial Creditor submits that as per Section 7(3), the Financial Creditor shall furnish a 'record of the default' recorded with the information utility or such other document that may be specified. At present, to the knowledge of the Corporate Debtor, there is no other alternative documents specified and,

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therefore, the only record of default is the record maintained by the Information Utility. It is also stated that the Financial Creditor has not produced any record of default from the information utility. The only Information Utility registered by Insolvency and Bankruptcy Board of India is National E-Governance Service Limited (NeSL) and the same has come in to force with effect from 25 September 2017.

13. Under these circumstances, the Corporate Debtor prayed for dismissing the application to initiate Corporate Insolvency Resolution Process.

**Rejoinder by the Financial Creditor**

14. The Financial Creditor stated that the contention taken by the Corporate Debtor that the above IBA has been filed by an incompetent person is incorrect and false. The respondent at the very inception had filed an Interlocutory Application as IA No 105/KOB/2020 questioning the maintainability of the above IBA. In the said Interlocutory Application the Corporate Debtor disputed the competency of the person who has verified signed and presented the above IBA on behalf of the Financial Creditor contenting that she cannot do so based on the Power of Attorney produced as document No.18 and contented that the above IBA is not maintainable. This Tribunal meticulously considered the contention of the Corporate Debtor including the one of competency to the person who has verified, signed and presented the above IBA on behalf of the Financial Creditor based on the Power of Attorney referred to above, dismissed the same holding that Smt: Maya C, who is the Assistant Vice President /Br.Head of the Financial Creditor/Applicant is the right person for filing the IBA on behalf of the Financial Creditor. The Corporate Debtor though challenged the order of this Tribunal before the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (insolvency) No.952/2020, the same was dismissed by the Appellate Tribunal confirming the order of this Tribunal. Now, the Respondent cannot agitate the very same issue before this Tribunal at a subsequent stage of the proceedings as the same is hit by the principles of Constructive res judicata.

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15. It is also stated that the contentions taken by the Corporate Debtor under the head 'No Debt is Due and Payable' are all incorrect and unsustainable. The contention that the debt as claimed by the Financial Creditor is not due as it is not payable in law is incorrect and baseless. The very contention presupposes admission of a debt. The further contention that there is no default of any financial debt is also incorrect and unsustainable. The averment that the Financial Creditor has not disbursed any money to the Corporate Debtor as debt as the documents produced by the applicant are unenforceable against the Corporate Debtor Company is incorrect and unsustainable. The contention that the Financial Creditor has not produced any documents to show that the Corporate Debtor had actually received any amount as financial debt with a promise to repay within a stipulated time and that there has been default in the terms of the agreement etc are false and misleading.

16. The Board of directors of the Corporate Debtor Company has exercised the powers of borrowings only after obtaining the consent of the company by a Special Resolution as contemplated under section 180(1)(c) of The Companies Act 2013. The Notice for convening Extra Ordinary General Meeting of the Corporate Debtor Company to be held on 20.06.2014 issued by the Authorised persons dated 15.05.2014 including the statement annexed to the rejoinder as Document No. 21.

17. The Financial Creditor stated that the contention of the Corporate Debtor that Absence of Common Seal vitiates the documents and consequently the Company is not bound by same is also incorrect and unsustainable. The contention that the Board Resolution requires affixing of the company seal in documents to be executed in favour of the Financial Creditor is incorrect and misleading. The Board Resolution which is produced as Document No.1 along with the IBA does not contain such a requirement as a *sine qua non* for execution any agreement for and on behalf of the Corporate Debtor. The Common Seal of the Corporate Debtor Company has been affixed in the Term Loan Agreement and that the same is not visible in the copy furnished as the same is an impressed one. The contention regarding

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Agreement to create floating charge that the same is not valid for want of registration is incorrect and unsustainable. It is submitted that Common Seal of the Corporate Debtor Company has been affixed in the Agreement to create floating charge and that the same is not Visible in the copy furnished as the same is an impressed one.

18. It is also stated that the contention that there is no Creditor Debtor Relationship between Financial Creditor and the Corporate Debtor is incorrect and unsustainable. The Corporate Debtor has categorically admitted in Page 12 of their Counter Statement that it has received money from the Applicant. The Corporate Debtor has no case that the Applicant has paid money to it graciously Further the Corporate Debtor has also no case that it has repaid the money so received from the Applicant. The Documents produced by the Financial Creditor along with the Application would categorically prove that the Corporate Debtor owe a financial debt to the Financial Creditor.

**Findings:**

19. I have heard counsel for the parties and perused the whole case records including documents and photocopies appended with the case records. On perusal of the arguments of both the sides and the documents and evidences placed on record, this Bench finds it necessary to deal with each issue separately.

- i. Whether the application is filed by the competent person?
- ii. Whether the documents filed by the Financial Creditor is having the common seal?
- iii. Whether there is a Creditor-Debtor relationship between the Financial Creditor and Corporate Debtor herein?

**Point No (i)** On perusal of the record, I found out that Smt. Maya C. is the Assistant Vice President/ Branch Head of the Financial Creditor has the proper authority to file the present application, and the objection raised by the counsel for the Corporate Debtor is merely incongruous, and therefore, holds no water. Moreover, this issue was decided by this Tribunal vide order dated 24.09.2020 in IA/105/KOB/2020, which was affirmed by the NCLAT. Hence, that contention will not stand now, and it is only to be rejected.

**Point No. (ii)** On 26.02.2021 this Tribunal verified original documents produced by the Financial Creditor in compliance with the order passed by this Tribunal dated 16.02.2021 and made sure that the documents alleged by the Corporate Debtor having the impressed seal of the Financial Creditor.

**Point No. (iii)** From the records filed by both the parties I found out that there is Creditor- Debtor relationship between them, since the Financial Creditor admitted that they received money from the Financial Creditor and the Corporate Debtor has no case that he has repaid the money received from the Financial Creditor.

20. As there is a default in the payment of the financial debt, which has been confirmed by them in the counter affidavit that the Financial Creditor paid the money to the Corporate Debtor. This Tribunal is of the view that, the present application filed by the Financial Creditor is satisfies all the definitions of “Financial Creditor”, “Default” and “Financial Debt” and qualifies for filing an application under Insolvency and Bankruptcy Code. By making various technical snags the Corporate Debtor cannot wash its hands in repaying the amount borrowed which is a financial debt owed by them. Hence, there is a Creditor-Debtor relationship with them. However, in the counter nowhere it is stated that the Corporate Debtor has not financial transactions with the Financial Creditor Bank.

21. Therefore, this Tribunal is on the view that the application is filed in the capacity of a ‘Financial Creditor’ for a ‘Financial Debt’ of Rs. 6,39,13042/- (Rupees Six Crore Thirty-Nine Lakhs Thirteen Thousand and Forty-Two and Paise Ninety-Eight Only), recoverable from the Corporate Debtor viz Platino Classic Motors (India) Pvt Ltd is a fit case for admission and initiation of CIRP against the Corporate Debtor. The documents produced on record prove the disbursement of various loan facilities granted by the Financial Creditor to the Corporate Debtor.

22. The Corporate Debtor committed default in repayment of the loan amount to the Financial Creditor, and hence its Loan account was declared as NPA. In the light of above facts and circumstances, the existence of debt

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and default is reasonably established by the Financial Creditor as a major constituent for admission of an application under Section 7(4) of the I&B Code.

23. The Application under Sub-Section (4) of Section 7 of I&B Code, 2016 is complete in all respects. Accordingly, the application filed under Section 7 of the Insolvency and Bankruptcy Code for initiation of corporate insolvency resolution process against the corporate debtor deserves to be admitted. Hence, the Application No. IBA/25/KOB/2019 is admitted and the following order has been passed: -

### **ORDER**

24. Having admitted the Petition/Application, the provisions of **Moratorium** as prescribed under Section 14 of the Code shall be operative henceforth with effect from the date of order shall be applicable by prohibiting institution of any suit before a Court of Law, transferring/encumbering any of the assets of the Debtor etc.

- i. The Financial Creditor has suggested the name of Mr. **Sathiq Buhari, Sagreen Law Chamber, Vanchiyoor, Thiruvananthapuram- 695 035, e-mail id: [sathiq33@gmail.com](mailto:sathiq33@gmail.com), IBBI Registration Number: IBBI/IPA-001/IP-P00758/2017-2018/11307** for appointment as Interim Resolution Professional (IRP). The Insolvency Resolution Professional is directed to submit the copy of AFA (Authorization for Assignment) issued by the Insolvency Professional Agency within 2 days from the date of receipt of this order.
- ii. Accordingly, the IRP proposed by the Financial Creditor, **Mr. Sathiq Buhari, Sagreen Law Chamber, Vanchiyoor, Thiruvananthapuram- 695 035, e-mail id: [sathiq33@gmail.com](mailto:sathiq33@gmail.com), IBBI Registration Number: IBBI/IPA-001/IP-P00758/2017-2018/11307**, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process.

- iii. The Financial Creditor shall deposit an amount of Rs. 2,00,000/- (Rs. Two Lakhs Only) with the IRP to meet the expenses towards issue of public notice and inviting claims etc. These expenses are subject to approval by the Committee of Creditors (COC)
- iv. The fee payable to IRP or as the case may be to RP shall comply with such regulation/circular and direction as may be issue by the IBBI and the IRP shall carry out his duties as contemplated by Section 15, 17, 18, 19, 20 and 21 of the IBC.
- v. The supply of essential services to the “Corporate Debtor” shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan prescribed under Section 31 of the Code, by the Adjudicating Authority.
- vi. That as prescribed under Section 13 of the Code on declaration of Moratorium the next step of Public Announcement of the Initiation of Corporate Insolvency Resolution Process shall be carried out by the IRP immediately on appointment, as per the provisions of the Code.
- vii. That the Interim Resolution Professional shall perform the duties as assigned under Section 15 and Section 18 of the Code and inform the progress of the Resolution Plan and the compliance of the directions of this Order within 30 days to this Bench. A liberty is granted to intimate even at an early date, if need be.
- viii. The commencement of the Corporate Insolvency Resolution Process shall be effective from the date of the Order of admission.
- ix. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within a period of one week from the date of receipt of this Order, in default of which coercive steps will follow.

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- x. The Registry is directed to communicate this order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and e-mail within two days from the date of this Order.
  - xi. A copy of this Order be also sent to the Registrar of Companies, Kerala, for updating the Master Data of the Corporate Debtor, who shall send a compliance report in this regard to the Registry within seven days.
25. Accordingly, **IBA/25/KOB/2020** is admitted.

Dated the 8<sup>th</sup> day of March, 2021

Sd/-

**(Ashok Kumar Borah)**  
**Member (Judicial)**