

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1596 of 2023

[Arising out of order dated 16.10.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench in Intervention Petition No.31/2023 in CP (IB) No.728/ND/2021]

IN THE MATTER OF:

MR. AMIT JAIN

LIQUIDATOR OF EICHER POLARIS PVT. LTD

Address: KPMG Restructuring Services LLP, Building
10, Tower B, 8th Floor, DLF Cyber City Phase II,
Gurugram 122002

Email: amitj1@kpmg.com

...Appellant

Versus

1) MULTIX OWNERS AND USERS WELFARE SOCIETY

Address: 8/353-C, Kottayil House, SS Road, Vengara
P.O Malappuram District Kerala - 676304

Email: pervinderchatrapati@gmail.com

2) EICHER POLARIS PVT. LTD

Address: 3rd Floor, Select City Walk, A-3, District
Centre, Saket, New Delhi-110017

Email: liquidator.eppl@kpmg.com

...Respondents

Present:

For Appellant: **Mr. Arun Kathpalia, Sr. Advocate with Ms. Ruby Singh Ahuja, Mr. Ishan Gaur, Ms. K. Sachdeo, Mr. J. Preet Hora, Advocates**

For Respondents: **Mr. Sumant Batra, Ms. Nidhi Yadav, Mr. Varun Kalua, Mr. Samir Malik, Advocates.**

Judy James, Advocate.

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by the Liquidator of the Corporate Debtor has been filed challenging the order dated 16.10.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Court V in Intervention Petition No.31/2023 in CP (IB) No.728/ND/2021. The Intervention Petition was filed by Respondent No.1 which has been allowed by the impugned order. Aggrieved by the order dated 16.10.2023, this appeal has been filed by the Liquidator of the Corporate Debtor. Brief facts of the case necessary to be noticed for deciding this appeal are:

- (i) A Joint Venture Agreement was entered between M/s Polaris Industries Inc. and M/s Eicher Motors Ltd. on 23.07.2012 in connection with incorporation and governance of Eicher Polaris Pvt. Ltd. (EPPL), the Corporate Person. Eicher Polaris Pvt. Ltd. was incorporated and registered on 10.10.2012. By amendment in the Joint Venture Agreement made on 20.11.2012, the Corporate Person became a party to the Joint Venture Agreement. EPPL was operating a manufacturing facility in Jaipur and began commercial production of a four-wheel vehicle named 'Multix'. Board of Director of the EPPL decided to shutdown the operation due to extraneous and macroeconomic factors.
- (ii) On 01.06.2019, Consumer Case No.1178 of 2019 titled "*Multix Owners and Users Welfare Society (Through its Secretary) vs. Eicher*

Polaris Pvt. Ltd. & Ors.” was filed before the NCDRC, New Delhi by 274 persons alleging deficiency of goods, restrictive trade practices etc.

- (iii) On 14.01.2020, EPPL entered into Service Provider Agreement with TVS Automobile Solution Pvt. Ltd. (TVS) for 5 years for providing repair, warranty & maintenance services and to provide spare parts during the remaining useful life of the vehicles sold with the warranty by the Corporate Person.
- (iv) On 18.02.2020, a special resolution was passed by the shareholders of the Corporate Person to initiate voluntary liquidation of the Corporate Person and appointment of Mr. Hitesh Goel as the Liquidator.
- (v) On 18.02.2020, Eicher Motors as well as Polaris terminated their Joint Venture Agreement vide a Termination Agreement dated 18.02.2020.
- (vi) On 20.02.2020, a meeting of creditors of EPPL convened wherein creditors representing at least two-thirds in value of the debt of the Corporate Person approved the special resolution to initiate voluntary liquidation of the Corporate Person and appointment of Mr. Hitesh Goel as the liquidator w.e.f. 18.02.2020.
- (vii) On 22.02.2020, proclamation of liquidation was published by Mr. Hitesh Goel in newspapers which publication was made in Dainik Bhaskar and Financial Express on 22.02.2020.

- (viii) Between 07.07.2021 and 22.07.2021, out of total 274 members of Multix Society only 134 persons submitted their claims before the Liquidator.
- (ix) Liquidator sent letters dated 14.09.2021 and 27.09.2021 to all 134 claimants mentioning that their claim has been rejected along with grounds for rejection. The Corporate Person has entered into the Service Provider Agreement with TVS was also informed to the members of the Multix Society.
- (x) On 29.09.2021, the Liquidator completed the voluntary liquidation process of the Corporate Person and erstwhile Liquidator filed CP (IB) No.728 of 2021 before the Adjudicating Authority under Section 59(7) of the Code seeking dissolution of the Corporate Person.
- (xi) In the Company Petition detailed synopsis was filed by the Appellant on 01.05.2023, on which date order was reserved by the Adjudicating Authority in the Company Petition.
- (xii) On 17.07.2023, an Intervention Petition was filed by Multix Owners and Users Welfare Society – Respondent No.1 being Intervention Application No.31/2021. Reply to the Intervention Application was filed by the Liquidator.
- (xiii) The Adjudicating Authority after hearing the Intervenor as well as the Liquidator, by the impugned order has allowed the Intervention Application and directed for impleadment of Intervenor. The Adjudicating Authority while allowing the Intervention Application has also observed that Service Provider Agreement was concealed

before the Adjudicating Authority. The argument of the Intervenor that the Liquidator has concealed Service Provider Agreement was held to be substantiated. Liquidator of the Corporate Person aggrieved by the order has come up in this appeal.

2. In this Appeal notices were issued on 08.12.2023, in response to which reply has been filed by Respondent No.1 to which rejoinder has also been filed by the Appellant.

3. Learned counsel for the Appellant in support of the Appeal contends that there was no concealment of Service Provider Agreement and the Service Provider Agreement was disclosed in multiple places in the Company Petition. It is further submitted that Liquidator has communicated about the Service Provider Agreement by letter dated 14.09.2021 to the customers who have filed the claim. It is submitted that, however, due to inadvertent mistake as annexure to the Company Petition in place of Service Provider Agreement another document came to be annexed which was an inadvertent error. Subsequently, by Additional Affidavit dated 20.07.2022, the Service Provider Agreement was brought on record before the Adjudicating Authority. In the Company Petition dispute before the NCDRC was also disclosed and in NCDRC also Service Provider Agreement has already been disclosed and filed. It is submitted that the Respondent No.1 who had filed the Intervention Application has no locus to file the Application. In the voluntary liquidation proceeding, in pursuance of the publication by the Liquidator, 134 customers have filed

claim, the Respondent No.1 never filed its claim in the voluntary liquidation process. Against the rejection of application of 134 Customers matter was not proceeded any further by the claimants. It was open for the claimants whose claim was rejected to file appeal under Section 42 of the I&B Code. The Respondent Society who was not claimant has no locus to file Intervention Application in the Company Petition. Liquidation process started in the year 2020 and the Intervention Application has been filed only on 17.07.2023 after the Company Petition was heard and reserved for orders on 01.05.2023. The Respondent Society was well aware of the entire proceeding. The Respondent No.1 whose no claim is pending before the Liquidator is not creditor in terms of the Code. Respondent No.1 not being creditor cannot be impleaded in the Company Petition. The Adjudicating Authority has made serious adverse observation against the Appellant that it has concealed the Service Provider Agreement in the Company Petition and further it has not approached the Adjudicating Authority with clean hands which observation shall be prejudicial to the Appellant when the Company Petition comes for hearing. It is submitted that the Adjudicating Authority committed error in making the observation that there is concealment of Service Provider Agreement by the Appellant which observation is incorrect and against the record. The Adjudicating Authority failed to consider that by an Additional Affidavit, Service Provider Agreement was brought before the Adjudicating Authority much before filing of Intervention Application by Respondent No.1. It is further submitted that interest of customers including that of Respondent No.1 are

taken care of by the stakeholders of the Corporate Person who has made provision of Rs.5 Crores to meet the future claims, if any crystalized pursuant to final judgment in the Consumer Case. It was further provided that in event the amount higher than the provisional amount is awarded, both the stakeholders undertake to make good any shortfall by sharing the additional liability equally, terms of which are recorded in the Termination Agreement.

4. The submission made by the Appellant has been refuted by learned counsel appearing for the Respondent No.1. It is submitted that the Adjudicating Authority has only allowed opportunity to the Respondent No.1 to intervene in the matter and allowed impleadment of the Intervenor holding the Intervenor as necessary party to the proceeding. It is submitted that initiation of Voluntary Liquidation is bad in law, non-est in the eyes of law, illegal and void ab initio. Corporate Person has committed default and committed breach of their own Termination Agreement. It is submitted that Service Provider Agreement dated 14.01.2020 executed a month prior to Joint Venture Termination Agreement was not filed along with the Company Petition which was malafidely done. The Corporate Person never shared any information of set-up of TVS Centers since inception and Service Provider Agreement was an afterthought. The initiation of Voluntary Liquidation Proceeding was counter to litigation pending in the NCDRC. The impugned order does not cause any prejudice to the Appellant since the Appellant is at liberty to make final arguments in respect of liquidation before the Adjudicating Authority and at the time of final

hearing the Court shall not be bound by the reasoning given in the order allowing the Intervention Application. It is further submitted that in event any finding of the Adjudicating Authority in the impugned order is interfered with, the same shall adversely impact the case of the Respondent. Litigation pending as well as the Service Provider Agreement shall stand terminated after Adjudicating Authority passes a dissolution order under Section 59(8) of the I&B Code.

5. We have considered the submissions of learned counsel for the parties and perused the record.

6. From the facts which have been noticed above, it is clear that the Intervention Application was filed by the Respondent No.1 being Intervention Petition No.31/2023 on 17.07.2023 i.e. subsequent to the Adjudicating Authority hearing the Company Petition and reserving the order. The Adjudicating Authority by the impugned order has allowed the Intervention Application and has also returned certain findings against the Corporate Person. The findings have been returned by the Adjudicating Authority in Para 9, which are to the following effect:

“9. It is clearly evident from the facts of the present case, i.e. concealment of the Service Provider Agreement by the Corporate Person in C.P. (IB) NO. 728/ND/2021, and the dispute which is raised before the Hon'ble NCDRC (in which the Corporate Person is the respondent along with 23 other respondents), that the Corporate Person has not approached this Adjudicating Authority with clean hands. Therefore, a

dissolution order under Section 59 (8) of the Code, if passed, without hearing the claimants would tantamount to enable the Corporate Person to evade claims and statutory duties owed by them to various stakeholders.”

7. The first issue which need to be considered in this Appeal is as to whether the Corporate Person has not approached the Adjudicating Authority with clean hands and there was concealment of Service Provider Agreement by the Corporate Person in Company Petition - CP (IB) No.728/ND/2021.

8. The copy of the Company Petition has been brought on the record as Annexure A-8 to the Appeal. In the ‘List of Dates and Events’ of the Company Petition against date 14.01.2020 Service Provider Agreement has been mentioned. It is further relevant to notice that case filed by the Respondent No.1 before NCDRC being Consumer Complaint CC No.1178 of 2019 has also been disclosed in the ‘List of Dates and Events’. Against date 01.06.2019 and 14.01.2020 following has been stated:

01.06.2019	<i>Case titled as Multix Owners and Users Welfare Society (Through its Secretary) Vs. Eicher Polaris Pvt. Ltd. & Ors Consumer Complaint C.C. No. 1178 of 2019 was filed before the Hon'ble National Consumer Dispute Redressal Commission, by 274 persons alleging that the Corporate Person, along with other parties, is responsible for unfair trade practices, deficiency of goods, restrictive trade practices etc.</i>
14.01.2020	<i>The Corporate Person entered into a service provider agreement with TVS automobile solution Pvt. Ltd for 5 Years.</i>

9. It is further relevant to notice that in the 'List of Dates and Events', date of publication made in the newspaper on 22.02.2020 was mentioned. Claims received has also been noticed. In Para 5.6 of Company Petition Service Provider Agreement dated 14.01.2020 was mentioned. It is useful to extract Para 5.6, which is as follows:

*“5.6. To ensure continuity of repair and maintenance services and availability of vehicle spare parts to the purchasers of vehicles, Corporate Person entered into a service provider agreement with TVS Automobile Solutions Private Limited dated January 14, 2020 ("TVS ASPL") for 5 years. As per the agreement TVS ASPL shall provide repair, warranty & maintenance services and provide spare parts during the remaining useful life of the vehicles sold with warranty. A copy of the service provider agreement entered between Corporate Person and TVS ASPL is annexed and marked as **Annexure 9.**”*

10. It is relevant to notice that although Annexure 9 was mentioned as copy of Service Provider Agreement but Annexure 9 to the Company Petition was not Service Provider Agreement but was another document which was JV Termination Agreement dated 18.02.2020. The JV Termination Agreement was also clearly mentioned in the 'List of Dates and Events'. In the Consumer Case filed by Respondent No.1 before the NCDRC, it is not disputed that Service Provider Agreement has been filed. In Para 17 of the Reply filed by the Liquidator to the Intervention Application following has been pleaded:

“17. It is submitted that the Service Provider Agreement was filed before the Hon'ble NCDRC on 22.08.2022. The same is evident from the Index of Documents filed by the Corporate Person herein before the Hon'ble NCDRC, which has been annexed by the Applicant alongwith the present Application on Page 74.”

11. The Service Provider Agreement was thus before the NCDRC which was filed by the Corporate Person himself. The mention of Service Provider Agreement in the Company Petition at various places indicate that there was no intention of concealment of Service Provider Agreement or its date before the Adjudicating Authority. In Para 13.1 of the Company Petition following pleadings were made:

“13.1. It is also pertinent to mention that the Corporate Person together with the JV Parties had entered into a 'Service Provider Agreement' dated January 14, 2020 ("Service Provider Agreement") with M/s TVS Automobile Solutions Private Limited ("TVS") for providing the repair and maintenance services for the vehicles manufactured and sold by the Corporate Person, irrespective of whether such vehicles are under warranty or not, for a period of 5 (five) years from November 01, 2019. A copy of the Service Provider Agreement is annexed herewith as Annexure-9.”

12. Thus, the categorical pleading in the Company Petition with regard to Service Provider Agreement dated 14.01.2020, as noted above, clearly indicate that the Service Provider Agreement was specifically disclosed and pleaded in the Company Petition, hence, allegation of Respondent No.1 that

Liquidator has concealed the Service Provider Agreement from the Adjudicating Authority is clearly unfounded.

13. The fact that in Annexure 9 instead of Service Provider Agreement another document was annexed is inadvertent mistake on part of the Liquidator. It is relevant to notice that the Service Provider Agreement was brought before the Adjudicating Authority by an Additional Affidavit dated 20.07.2022. Copy of the Additional Affidavit dated 20.07.2022 which was filed in pursuance of the order of the Adjudicating Authority dated 07.07.2022 has been filed as Annexure A-3 to the Rejoinder Affidavit. Along with the Additional Affidavit, Service Provider Agreement which was referred as After Sale Agreement with TVS was filed as Annexure A-7 to the Additional Affidavit. The Service Provider Agreement, thus, was brought on the record which was initially not filed as Annexure 9 although pleaded in the Company Petition. Hence, it cannot be imputed on the Appellant that they have not come with clean hands before the Adjudicating Authority and they concealed Service Provider Agreement. Finding recorded by the Adjudicating Authority in Para 9, as noted above that there is concealment of Service Provider Agreement by the Corporate Person is unfounded as there are categorical pleading of Service Provider Agreement with the exact date and no intention of concealment can be read.

14. Further the Adjudicating Authority also erred in observing that the Corporate Person has not approached the Adjudicating Authority with clean hands. The said observation was made by the Adjudicating Authority

after coming to the conclusion that there was concealment of Service Provider Agreement. We having found that there is no concealment of Service Provider Agreement, the next finding that the Corporate Person has not come with clean hands falls on ground.

15. It is also relevant to notice that in the Present case, the Liquidator has issued proclamation of liquidation which was published in two newspapers on 22.02.2020. The claims were also filed by 134 consumers before the Liquidator. The claims submitted by the consumers were not accepted by the Liquidator, which claims were rejected by letter dated 14.09.2021. Copy of letter dated 14.09.2021 is on the record. Copy of letter was sent to the consumers who had filed claim in Form F claiming different amounts, which was not accepted and letter was issued. In the letter dated 14.09.2021 there was specific communication with regard to Service Provider Agreement dated 14.01.2020. Copy of letter sent to various claimants who have filed claim has been Annexed as Annexure 7 of the Appeal. It is useful to extract one letter addressed to Mr. Gopalan who had filed Form F dated 07.07.2021 claiming an amount of Rs.5 Lakh against the Corporate Person – Eicher Polaris Private Limited. It is useful to notice letter dated 14.09.2021, which is as follows:

“WITHOUT PREJUDICE”

Date: September 14, 2021

*To
Gopalan
Naduvile, Moothaparambil, Vdayattoor, Kozhikkallur.
Thurayar, Kozhikode, Payyoli Angadi, Kerala-673523*

Sub: Form F dated July 07, 2021 claiming an amount of INR 5,00,000/- against Eicher Polaris Private Limited ("Company")

Dear Sir.

- 1. On 6 April 2018, the Company filed a notice of closure of its operations to Government of Rajasthan Pursuant to the provisions of Section 59 of the Insolvency and Bankruptcy Code, 2016 (the "Code") and other applicable provisions of the Code, in the extraordinary general meeting of the members of the Company held on February 18, 2020, a special resolution was passed to voluntary liquidate the Company with effect from February 18, 2020 ("Liquidation Commencement Date") and to appoint the undersigned as the Liquidator of the Company with effect from the Liquidation Commencement Date.*
- 2. I, have received a claim of INR 5,00,000/- submitted by you against the Company towards compensation including interest for all the losses incurred due to the purchase of the vehicle from EPPL vide Form F dated July 07, 2021 under the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017.*
- 3. Further, you have not provided any specific particulars with respect to the manufacturing defects claimed by you and you have not provided any correspondence which is available on record to demonstrate that the Company was approached but failed to look into or rectify the*

defects/resolve consumer complaints of the Society and/or any of its members.

- 4. I have nevertheless carefully verified and considered your claim after going through the information and material submitted by you and that made available with the Company.*
- 5. I find you have not provided any particulars or details in support of the break-up of the amounts claimed despite requests from my end for the same. You have filed the claim for settlement towards payment of cost of vehicles and interest. However, you have not submitted any proof of claim and/or documents which evidence your claim to payment of such amounts by the Company including without limitation: (A) proof of the defect of the vehicle and which defects were in the nature of manufacturing defects and which were not caused due to misuse/negligent use of the vehicle; (B) various correspondences exchanged with the Company; (C) proof of claims with respect to the amounts and interest amounts claimed; (D) proof whether repairs were conducted on the vehicle through third-party repairers and the documentation available for the same. (E) proof whether the vehicle was in warranty period when the same was presented; (F) proof of purported misrepresentations/misleading statements were made in the advertisements, media releases, investor presentations etc.; (G) proof and/or correspondence which refer to the fact that EPPL*

was approached but has failed to look into or rectify the defects/resolve consumer complaints; (H) proof and/or correspondence which refer to the fact that specific complaints were addressed to the Company citing manufacturing defects within or post the warranty period, and (1) proof of the fact that supply of spare parts and servicing was denied. The said information was requested vide email dated August 02, 2021 followed by another email dated August 19, 2021

6. *Please note that the Company has entered into 'Service Provider Agreement dated January 14, ("Service Provider Agreement") with M/s TVS Automobile Solutions Private Limited (TVS) for 2020 providing the repair and maintenance services for the vehicles manufactured and sold by the EPPL irrespective of whether such vehicles are under warranty or not, for a period of 5 (five) years from November 01, 2019. This service was/is available during the warranty period as per the terms of warranty of the vehicle purchased by you. You were free to avail such services from TVS as available in accordance with the terms of warranty.*

...X...X...X...

In view of the above, I find that the Claim of Ra. 5 lakh made by you against the Company cannot be accepted. However, before rejecting your claim, I am offering final opportunity to produce the documents and material in support of your claim including the material mentioned

in paras 5 and 9 above, within 5 days, failing which I will assume you have nothing further to say.

This letter is being issued without prejudice to any rights, recourses and/or remedies available under law.

*Yours Sincerely,
For Eicher Polaris Private Limited*

Hitesh Goel

*Liquidator for Eicher Polaris Private Limited
IP Registration no. IBBI/IPA-001/IP-P-01405/2018-2019/12224
Contact Email-liquidator.eppl@kpmg.com
hiteshgoel83@gmail.com
07678679143
KPMG Restructuring Services LLP
Building No. 10, Tower B, 8th Floor,
DLF Cyber City, Phase II,
Gurgaon, Haryana, 122002*

(Eicher Polaris Private Limited, is a Company under Voluntary Liquidations per the Insolvency and Bankruptcy Code 2016 business and assets are being managed by the Liquidator, Mr. Hitesh Goel, napointed by the members of the Company in the Extraordinary General Meeting held on February 18, 2020 under the provisions of the Code and the Companies Act, 2013)"

16. All letters sent to different claimants specifically mentions Service Provider Agreement dated 14.01.2020. When the claimants who have filed claim before the Liquidator were communicated as early as 14.09.2021 i.e. before filing of Company Petition on 01.10.2021, there can be no question of any concealment by the Liquidator of Service Provider Agreement. The Adjudicating Authority ignored all the relevant facts and has come to erroneous finding that there is concealment by Liquidator of the Service Provider Agreement in the Company Petition. We, thus, are satisfied that

finding returned by the Adjudicating Authority in Para 9 are wholly unfounded and deserve to be set aside.

17. We now come to direction issued in Para 12 of the impugned order where the intervention of Respondent No.1 has been allowed and Respondent No.1 has impleaded in the Company Petition. The Adjudicating Authority has also held the Applicant as necessary party.

18. The Respondent No.1 is an association of consumers, owners and users of Multix which has not filed claim before the Liquidator. 134 consumers who are members of Respondent No.1 have filed their claim which claim was not accepted and rejected by the Liquidator to which effect letter dated 14.09.2021 was sent. As noted earlier, Respondent No.1 has not filed claim, it cannot be held to be creditor of the Corporate Person. Respondent No.1 not being creditor, we fail to see how Respondent No.1 becomes necessary party to the Liquidation Proceeding. We, thus, are of the view that direction of the Adjudicating Authority to implead Respondent No.1 in Company Petition is unsustainable.

19. We, however, are of the view that since Consumer Case filed by Respondent No.1 before the NCDRC is still pending, Adjudicating Authority did not commit any error in permitting Respondent No.1 to intervene in the matter. We, thus, do not find any ground to interfere with the decision of the Adjudicating Authority permitting Respondent No.1 to intervene in the Company Petition - CP (IB) No.728/ND/2021.

20. In view of the foregoing discussion, we dispose of this appeal with following directions:

(i) The Appeal is partly allowed and observation and finding in Para 9 are set aside. Direction of the Adjudicating Authority in Para 12 impleading Respondent No.1 as one of the Respondent to the Company Petition is set aside.

(ii) The order of the Adjudicating Authority permitting Respondent No.1 to intervene in the Company Petition is upheld.

(iii) The Adjudicating Authority may proceed to decide the Company Petition - CP (IB) No.728/ND/2021 in accordance with law without being influenced by any observation made in the order dated 16.10.2023.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

5th April, 2024

Archana