NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI

(APPELLATE JURISDICTION)
Company Appeal (AT) (CH) (Ins) No.301/2021
(IA Nos.638/2021, 84/2022)
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)
(Arising out of the Impugned Order dated 06.10.2021 in IBA/37/2020 & IA(IBC)107/KOB/2021, passed by the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench)

In the matter of:

Ashique Ponnamparambath & Anr. … Appellants

V

BMW India Financial Services Pvt. Ltd. ...Respondent

Present :

For Appellant: Mr. P.H. Arvindh Pandian, Sr. Advocate.

For Respondent: Mr. Diwahar Maheshwari, Advocate for R-1.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is filed by two members of the suspended board of directors of Koyenco Autos Pvt. Ltd. (Co-Borrower) against the order dated 06.10.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Kochi Bench, Kerala) by which an application i.e. IBA/37/KOB/2020 filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by BMW India Financial Services Pvt. Ltd. (Financial Creditor) on 16.10.2020 against M/s Koyenco Autos Pvt. Ltd. (Corporate Debtor) for the resolution of a debt of Rs. 24,20,59,951.14/- determined as on 29.02.2020 out of which Rs. 19,86,17,729/- is towards outstanding principal under various financial facilities and Rs. 4,34,42,222.12/- towards interest has been admitted.

2. Shorn of unnecessary details, the brief facts of this case are that the Financial Creditor, registered as a non-banking financial institution, granted four financial facilities to the Corporate Debtor (as a Co-borrower) (i) Floorplan Financial Agreement dated 06.09.2010 for Rs. 11,00,00,000/- (ii) Working Capital Demand Credit Facility Agreement dated 30.11.2011 for Rs. 6,50,00,000/- (iii) Term Loan Agreement dated 17.05.2017 for Rs. 13,00,00,000/- and (iv) Spare Parts Financing Facility Agreement dated 14.01.2015 for Rs. 3,00,00,000/-.

3. However, the Financial Creditor filed the application for initiation of CIRP of the Corporate Debtor on account of its failure to make repayment of the overdue amount lying in default under the first three facilities. The Adjudicating Authority extensively referred to the pleadings set up by the parties and observed that "the documents produced on record prove the disbursement of various loan facilities granted by the Financial Creditor to the Corporate Debtor.". The Adjudicating Authority held that the Corporate Debtor committed default in repayment of the loan amount to the Financial Creditor and as such the application filed under Section 7 of the Code was admitted by the impugned order, imposed moratorium under Section 14 of the Code and appointed IRP as suggested by the Financial Creditor.

4. The only point raised in this appeal by the Counsel for the Appellant is that the Appellant who is recorded as a Co-borrower has never been disbursed any amount of loan under any of the loan facilities, therefore, it does not fall under the definition of Section 5(8) and 5(7) of the Code. It is contended that as per

Section 5(8) ‘financial debt’ means a debt alongwith interest, if any, which is disbursed against consideration for the time value of money and as per Section 5(7) of the Code a ‘financial creditor’ means any person to whom a financial debt owed and includes a person to whom such debt has been legally assigned or transferred to. He laid strong emphasis on the issue of disbursement of the amount of loan under the aforesaid three facilities to the Appellant who was stated to be added only as a Co-borrower but no amount was disbursed whereas the Adjudicating Authority has recorded a finding that the documents produced on record prove the disbursement of various loan facilities granted by the Financial Creditor to the Corporate Debtor (as a Co-borrower).

5. In support of his submission, Counsel for the Appellant has relied upon a decision of the Hon’ble Supreme Court rendered in the case of ‘Anuj Jain (IRP) Vs. Axis Bank Limited, Civil Appeal Nos. 8512-8527 of 2019 in which Para 47.2 is relevant and is reproduced as under:-

> “47.2. Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third-party securities), even if falling within the description of ‘secured creditor’ by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of ‘financial creditors’ as per the definitions contained in subsections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of ‘debt’ under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a ‘financial debt’ within the meaning of Section 5(8) of the Code.”

6. Counsel for the Respondent has submitted that the board of directors of the Appellant passed a resolution in its meeting held on 16.05.2017 consenting for the Corporate Debtor to be a Co-borrower alongwith Platino Classic Motors

(India) Pvt. Ltd. in the financial facilities secured by Platino Classic Motors (India) Pvt. Ltd. from BMW India Financial Services Pvt. Ltd. The said resolution dated 16.05.2017 is produced as under:-

KOYENCO KOYENCO AUTOS PRIVATE LIMITED

CIN : U50104KL2003PTC015959
SERVICE TAX NO :AACCK2659LSD004
TIN : 32110217155
CST : 1102C001715

CERTIFIED TRUE COPY OF THE RESOLUTION PASSED IN THE MEETING OF BOARD OF DIRECTORS OF KOYENCO AUTOS PRIVATE LIMITED HELD ON 16th MAY 2017 AT KOYENCO AUTOS PRIVATE LIMITED, II/6B, NH 47 BYPASS ROAD MARADU. PO KOCHI 682304

RESOLVED THAT pursuant to the provisions of Section 179 of the Companies Act, 2013 and the relevant Rules thereunder, the consent of the Board of Directors be and is hereby granted to be a Co-borrower along with Platino Classic Motors(India) Pvt Ltd in the finance facilities taken by Platino Classic Motors(India) Pvt Ltd from BMW India Financial Services Private Limited as per details below:

Table A

S No.	Facility	Dated	Existing Borrower	Facility Amount	Purpose of the facility
	Floorplan Facility	06/09/10	Platino Classic Motors India Pvt Ltd	100,000,000/-	Purchase of BMW India Private Limited products and to make payments to BMW India Private Limited towards the outstanding invoices raised under the Deferred Payment Facility
	Spare Parts Facility	14/01/15	Platino Classic Motors India Pvt Ltd	30,000,000/-	For Spare Parts
	Working capital	13/12/2010	Platino Classic Motors India Pvt Ltd	65,000,000/-	For Working Capital
	Deferred payment facility	06/09/10	Platino Classic Motors India Pvt Ltd	60,000,000/-	For Purchase of BMW India Private Limited products

For KOYENCO AUTOS (P) LTD.
Director

For KOYENCO AUTOS (P) LTD.
P.P. ASHIQUE
Managing Director

For KOYENCO AUTOS (P) LTD.
P.P. ASHIQUE
Managing Director

For KOYENCO AUTOS (P) LTD.
Director

Address : NH Byepass Maradu P.O., Cochin- 682 304, Tel : 0484-6696619 Fax : 0484 - 6696877, 99958 01063

RESOLVED FURTHER THAT pursuant to the provisions of Section 179 of the Companies Act, 2013 and the relevant Rules thereunder, the consent of the Board of Directors be and is hereby granted to Co-borrow alongwith Platino Classic Motors(India) Pvt Ltd) INR 130,000,000/-(Rupees OneHundred&ThirtyMillion only) from BMW India Financial Services Private Limited (**"BMW Financial Services"**)for the purpose of Takeover of Cash Credit limit from The Federal Bank amounting to INR85Mn& Additional working Capital Term Loan(WCTL)to the tune of 45Mn to support the working capital requirement under the working Capital Term Loan(WCTL) Facility.

RESOLVED FURTHER THAT consent of the Board be and is hereby accorded to the Company for creation of charge / hypothecation / security in the above arrangement in form and manner and with such ranking and at such time and on such terms as the Board may determine, on the following property/asset of the Company, both present and future and / or the whole or any part of the undertaking(s) of the Company, as the case may be in favour of BMW India Financial Services Private Limited for securing the borrowings availed / to be availed by the Company by way of loan(s):

Sl No.	Property/Asset	Address
	Property Located at 25.98 Ares of property in Re-Survey Nos.26/17&26/18 in block no13, Thandaper No.7365, Ernakulam Dist, Maradu Sub District, Kanayannur Thaluk, Maradu Village	NH By Pass Maradu Ernakulam

RESOLVED FURTHER THAT the securities to be created by the Company as aforesaid may rank prior / pari passu / subservient with / to the mortgages and /or charges already created or to be created in future by the Company or in such other manner and ranking as may be thought expedient by the Board and as may be agreed to between the concerned parties.

RESOLVED FURTHER THAT all the terms and conditions as set out in the respective facility agreements for sanction of the facility and any amendments thereto, which shall govern and regulate the obligations of the Company as co-borrower, be and is hereby approved.

RESOLVED FURTHER THAT the Company do secure the due repayment of the Facility along with all interest, fees, costs, charges, expenses and all other monies payable in respect thereof, inter alia by such collateral as described in the schedule hereto. (if applicable)

RESOLVED FURTHER THAT Mr Ashique PP and Mrs.SHAMEENA ASHIQUE (the "authorized directors/ members") be and are hereby authorised severally to convey to BMW Financial Services the acceptance on behalf of the Company of the Facility Terms and agree to such changes and modifications as may be suggested by BMW Financial Services from time to time and to execute such security documents and other writings as may be necessary

For KOYENCO AUTOS (P) LTD.

P.P. ASHIQUE
Managing Director

For KOYENCO AUTOS (P) LTD.

Shamina

Director

or required for this purpose. The authorised [1]directors/members be and are hereby severally authorised to execute all agreements, deeds, documents, undertakings and other writings as may be necessary or required for the purposes aforesaid, and to accept and execute any amendments or modifications to any agreements, deed, documents, undertakings and other writings, including acknowledgement of debt/balance confirmation(s) and/or any renewal documents, as and when necessary.

RESOLVED FURTHER THAT copies of the aforesaid resolutions certified to be true be furnished to BMW Financial Services and they be requested to act thereon.

RESOLVED FURTHER THAT the common seal of the Company be affixed in the presence of Mr Ashique PP Managing Director and Mr SHAMEENA ASHIQUE Director are hereby authorised severally on such of the aforementioned documents as may be required by BMW Financial Services in connection with the Financing Facility

The specimen signature/s of the aforesaid authorized Officials of the Company are as follows:

Signature of Mr. Ashique PP　　　Signature of Mrs.SHAMEENA ASHIQUE

For KOYENCO AUTOS (P) LTD.
For Koyenco Autos Pvt Ltd
P.P. ASHIQUE
Managing Director

For KOYENCO AUTOS (P) LTD.
Director

Name: Mr. Ashique PP
Designation:

7. It is further submitted that in the same meeting, vide resolution dated 16.05.2017, it was resolved to Co-Borrower alongwith Platino Classic Motors (India) Pvt. Ltd. Rs. 130,000,000/- from BMW India Financial Services Pvt. Ltd. for the purpose of takeover of Cash Credit Limit from the Federal Bank amounting to INR 85MN & Additional working Capital Term Loan to the tune of 45MN to support the working capital requirement under the working capital term loan facility. It was also resolved that all the terms and condition set out in the respective facility agreements for sanction of the facility and any amendments thereto shall govern and regulate the obligation of the company as co-borrower.

8. It is submitted that pursuant thereto the Corporate Debtor and Platino Classic Motors India Pvt. Ltd. made a joint request on 17.05.2017 for adding the

Corporate Debtor as a Co-borrower in the aforesaid three facilities. The letter dated 17.05.2017 is also reproduced as under:-

BMW Dealer Platino Classic ON DEALER'S LETTER HEAD

To,

BMW India Financial Services Private Limited

Tower C, 14th Floor, Building 10

DLF Cyber City, Phase – II

Gurgaon – 122002

Haryana

Date: 17th May 2017

Dear Sir

Re: Request for addition of M/S.KOYENCO AUTOS INDIA PVT LTD as Co-Borrower to the existing finance facility agreements. In furtherance of our discussions and mutual understanding, we request you to please consider the addition of M/S.KOYENCO AUTOS ~~INDIA~~ PVT LTD as Co-Borrower to the Floorplan Agreement dated 06/09/10, Spare Parts Facility Agreement dated 14/01/15 and Working Capital Agreement dated 8/12/16 each of which is entered into between M/S PLATINO CLASSIC MOTORS INDIA PVT LTD and BMW India Financial Services Private Limited ("Lender") (as amended from time to time) ("Agreements")

Please note that terms and conditions of the said Agreements shall continue in full force and effect in every respect, and shall continue to bind the Parties.

Thanking you.

For PLATINO CLASSIC MOTORS INDIA PVT LTD

For Platino Classic Motors India Pvt. Ltd.

[ASHIQUE PP]

[Managing Director]

Managing Director

For KOYENCO AUTOS INDIA PVT LTD

For KOYENCO AUTOS (P) LTD

P.P ASHIQUE
Managing Director

[ASHIQUE PP]

[Managing Director]

TRUE COPY

This is the true copy of the document marked as Annexure "IX" referred in the above Case

ADVOCATE

9. It is argued that an addendum agreement dated 17.05.2017 was executed amongst Platino Classic Motors India Pvt. Ltd, Corporate Debtor and the Financial Creditor. It is submitted that it has been categorically mentioned in the

agreement that "all rights and obligations under the agreement remains the same and be jointly and severally shared by the borrower and co-borrower". The Co-Borrower agreed that all rights and obligations of borrower under the agreement shall also vest with himself alongwith borrower and be shared jointly by both. It was also agreed that "w.e.f the date as specified in clause 1 above, Co-borrower shall be treated as if it had originally been a party to the agreement and all references in the agreement and documents executed alongwith the agreement, in any capacity shall be read and construed as if they were references to the Co-borrower." The addendum agreement dated 17.05.2017 is reproduced as under:-

കേരളം केरल KERALA

ADDENDUM AGREEMENT

This Addendum Agreement ("**Addendum**") is made on the **17th Day of May 2017**set out in hereto by and between:

Koyenco Autos India Pvt Ltd. Having registered office at 2/6 NH 47 Bypass Raod Maradu Kochi (hereinafter referred to as "**Co-borrower.**"), which expression shall, unless it be repugnant to the subject or context hereof be deemed to mean and include its successors and permitted assigns) of the One Part;

AND

Platino Catssic Motors India Pvt Ltd, a Company incorporated under the Companies Act, 1956 and having its registered office at NH 47 Bypass Raod Maradu Kochi hereinafter referred to as "**Borrower**"), (which expression shall, unless it be repugnant to the subject or context hereof be deemed to mean and include its successors and permitted assigns) of One Part.

AND

BMW India Financial Services Private Limited, a Company incorporated under the Companies Act, 1956 and licensed as a non banking financial corporation under Reserve Bank of India Act, 1934 and having its registered office at DLF Cyber City Phase II, Building No. 10 Tower C, 14th Floor, Gurgaon, Haryana 122002, India (hereinafter referred to as "**BMW Financial Services**"), (which expression shall, unless it be repugnant to the subject or context hereof be deemed to

For KOYENCO AUTOS (P) LTD.

Managing Director

For Platino Classic Motors India P

Managing D

No. 4275 Date 17.5.17

STAMP VALUE Rs. 100/-

Sold to Koyenco Autos (P) Ltd

Maradu Kochi.

SOMASEKHARA MENON
STAMP VENDOR, SRO MARADU

TRUE COPY

mean and include its successors and permitted assigns) of the Other Part.
(BMW Financial Services, Co-borrower and Borrower are hereinafter collectively referred to as the "**Parties**" and individually as the "**Party**").

RECITALS:
WHEREAS

A. The Parties have entered into a Floorplan Facility Agreement on 06.09.2010, Working Capital Agreement on 13.12.2010, Spare Parts facility agreement on 14.01.2015 and its subsequent amendments whereunder BMW Financial Services has granted finance to Borrower in the capacity of a borrower (together referred to as "Agreement").

B. The Borrower is desirous to add Co-borrower as the Co-borrower and the Co-Borrower is desirous of being added as Co-Borrower to the aforesaid Agreement.

C. All the rights and obligations under the Agreement remains the same and be jointly and severally shared by the Borrower and Co-borrower.

D. In order to give effect to the amendment thereof, Borrower has requested BMW Financial Services to consider the same on the terms and conditions contained herein.

All capitalized terms used herein would have the same meaning as provided under the Agreement unless expressly defined herein.

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES, UNDERTAKINGS AND COVENANTS CONTAINED HEREIN, THE PARTIES HERETO HEREBY AGREE AS FOLLOWS:

1. With effect from 17.05.2017 Co-Borrower shall assume as Co-borrower, the rights, interests and liabilities of Borrower to the Agreement referred to above. Co-Borrower undertakes to comply with all the terms and conditions specified in the Agreement along with the Schedules and related documents executed along with the Agreement and to be bound by the terms and conditions of this addendum.

2. Co-Borrower hereby agree that all rights and obligations of borrower under the Agreement shall also vest with himself alongwith Borrower and be shared jointly by both.

3. With effect from the date as specified in clause 1 above, Co-Borrower shall be treated as if it had originally been a party to the Agreement and all references in the Agreement and documents executed along with the Agreement, in any capacity shall be read and construed as if they were references to the Co-borrower;

4. Borrower and Co-borrower agrees to release, indemnify and keep indemnified from and against any liability incurred as a result of any action, demand, claim or proceeding against BMW Financial Services at any time by any party under or in respect of the Agreement relating to any act or omission of the Borrower and Co-borrower at any time (including prior to the Date of this addendum).

5. The following definitions shall be added to Article 2

(_) "**SARFAESI**" means the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 as amended from time to time; and"

(_) "**DRT**" means the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 as amended from time to time"

For Platino Classic Motors India Pvt. Ltd.

Managing Director

Page 2 of 3

For KOYENCO AUTOS (P) LTD.

P.P. ASHIQUE
Managing Director

6. Article __ shall be amended and restated as follows:

"Any dispute, controversy or claim arising out of or relating to this Financing Agreement or any related agreement or other documents or the validity, interpretation, breach or termination thereof ("Dispute"), including claims seeking redress or asserting rights under applicable law, shall be resolved and finally settled in accordance with the provisions of the Arbitration and Conciliation Act, 1996 as amended from time to time (the "Arbitration Act"). The Parties consent to a single, consolidated arbitration for all Disputes that may at the time exist. The arbitral tribunal shall comprise of a sole arbitrator to be appointed by the BMW Financial Services. The arbitration proceedings shall be conducted in English. The arbitration shall be conducted in Delhi. The arbitral tribunal shall determine the Dispute in accordance the law of India and the award passed by the Arbitral Tribunal shall be final and binding on the Parties.

Notwithstanding anything contained in this Financing Agreement including in particular this clause, the Parties agree that the BMW Financial Services (i) is a "financial institution" under SARFAESI and (ii) shall at all times retain and have the benefit of all its rights under SARFAESI and DRT relating to the enforcement of its security interests relating to this Agreement."

7. All of the terms and provisions as stated in the Agreement except as herein modified are to remain in full force and effect during the term of agreement.

THIS ADDENDUM SHALL BE TREATED AS PART AND PARCEL OF THE AGREEMENT MENTIONED AS ABOVE AND ALL OTHER TERMS AND CONDITIONS OF THE AGREEMENT DATED SHALL APPLY TO THIS ADDENDUM AND SHALL REMAIN IN FORCE AND EFFECT DURING THE TERM OF THE AGREEMENT THEREOF.

IN WITNESS WHEREOF, the Parties have executed this Addendum on the date provided hereunder.

For and on behalf of

BMW India Financial Services Private Limited

Name: ____________

Designation: ____________

Name: Ashique.P.P.

For and on behalf of Koyenco Autos Pvt Ltd

Name: Ashique.P.P.

Designation: Mangaing Director

For KOYENCO AUTOS (P) LTD.

P P ASHIQUE

Managing Director

10. It is further submitted that on 23.02.2018, the Corporate Debtor passed a resolution in the meeting of Board of Directors consenting to assume the liability. The said resolution dated 23.02.2018 is reproduced as under:-

CERTIFIED TRUE COPY OF THE RESOLUTION PASSED IN THE MEETING OF BOARD OF DIRECTORS OF KOYENCO AUTOS PRIVATE LIMITED ("Company") HELD ON FEBRUARY 23, 2018 AT _NH BYEPASS ROAD,MARADU PO, KOCHI

RESOLVED THAT pursuant to the provisions of Section 179 of the Companies Act, 2013 and the relevant Rules thereunder, the consent of the Board of Directors be and is hereby granted to revision of facility amount under the Floorplan Financing Agreement dated September 6,2010 with BMW India Financial Services Private Limited ("BMW Financial Services"). The Company is hereby authorized to revise the facility amount in following manner:

Facility	Current Facility Amt.	Revised Facility amount
Floorplan Financing Agreement	55,600,000.00	110,000,000.00

RESOLVED FURTHER THAT the Company may revise the facility amount for any additional amounts as may be agreed by the authorised director/signatories up to an aggregate amount of INR 136,000,000/- under Floorplan Financing Agreement.

RESOLVED FURTHER THAT all the terms and conditions as set out in the Facility Agreement for sanction of the facility and any amendments thereto, which shall govern and regulate the obligations of the Company as Co-borrower, be and is hereby approved.

RESOLVED FURTHER THAT Mr Ashiq PP, and Ms Shamina Ashique (the "authorized directors/ members") be and are hereby authorised severally to convey to BMW Financial Services the acceptance on behalf of the Company of the Facility Terms with regard to revision of facility amount and agree to such changes and modifications as may be suggested by BMW Financial Services and to execute such security documents and other writings as may be necessary or required for this purpose. The authorised [1]directors/members be and are hereby severally authorised to execute all agreements, deeds, documents, undertakings and other writings as may be necessary or required for the purposes aforesaid, and to accept and execute any amendments or modifications to any agreements, deed, documents, undertakings and other writings, including acknowledgement of debt/balance confirmation(s) and/or any renewal documents, as and when necessary.

RESOLVED FURTHER THAT copies of the aforesaid resolutions certified to be true be furnished to BMW Financial Services and they be requested to act thereon.

RESOLVED FURTHER THAT the common seal of the Company be affixed in the presence of _Managing Director ** on such of the aforementioned documents as may be required by BMW Financial Services in connection with the Financing Facility. (**As per the Articles of the Company)

KOYENCO **KOYENCO AUTOS PRIVATE LIMITED**

CIN : U50101KL2003PTC015959
SERVICE TAX NO AACCK2659LSD004
TIN : 32110217155
CST : 1102C001715

(The specimen signature/s of the aforesaid authorized Officials of the Company are as follows:

(Signature of Mr. Ashique PP) (Signature of Mr.Shamina Ashique PP)

For KOYENCO AUTOS PRIVATE LIMITED

KOYENCO AUTOS (P) Ltd. COCHIN-2

Name: Ashique PP

For KOYENCO AUTOS (P) LTD.

Designation: Managing Director

P.P. ASHIQUE
Managing Director

11. Counsel for the Respondent has submitted that the Judgment relied upon by the Appellant in the case of Anuj Jain (Supra) is not applicable because it is not a case of mortgage of a property for the purpose of ensuring the debt of the principal debtor rather it is a case where the Corporate Debtor has taken over the role of Co-borrower from the inception of the facilities in view of the various documents executed from time to time which we have referred to in the earlier part of this order.

12. Counsel for the Respondent has relied upon a decision of the NCLAT in the case of Maitreya Doshi Vs. Anand Rathi Global Finance Ltd. & Anr., CA (AT) (Ins) No. 191 of 2021 decided on 25.08.2021 in which it has been held that :-

> "26. In judgment in the matter of 'Anuj Jain vs. Axis Bank Ltd.' (supra), the issue before the Hon'ble Supreme Court was whether the Respondents (Lenders of Jai Prakash Associate Ltd. – JAL) could be recognized as Financial Creditors of the Corporate Debtor – Jaypee

Infratech Limited (JIL) on the strength of the mortgage created by the Corporate Debtor, as collateral security of the debt of its holding company JAL. In Para 33.2 of the judgment, Hon'ble Supreme Court referred to Para 13 and 14 of the judgment of NCLT in that matter where Resolution Professional had pointed out contents of the mortgage deed concerned to submit that Corporate Debtor had only agreed to create the mortgage in favour of the Applicant towards the financial assistance granted to the holding company JAL. On facts in that matter it was pointed out before NCLT that perusal of the mortgage made it clear that the Corporate Debtor had neither given any guarantee to repay or any indemnity qua the repayment of loans granted by the Applicant to JAL. With such and other facts discussed by the Hon'ble Supreme Court, Hon'ble Supreme Court in Para 47.2 of the judgment concluded the question of law as under:

> "47.2. Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third party securities), even if falling within the description of 'secured creditor' by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of 'financial creditors' as per the definitions contained in subsections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of 'debt' under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a 'financial debt' within the meaning of Section 5(8) of the Code. The respondent mortgagees are not the financial creditors of corporate debtor JIL" [Emphasis supplied]

27. Thus on facts the matter is different here. If there had been 'only a security interest' like pledging of shares, it would have been different. However, in the present set of facts considering the documents executed between the parties, apart from the pledging of shares, the Corporate Debtor – Doshi Holdings entered into agreement with the Financial Creditor as Coborrower and as the Co-borrower a loan was received.

28. We thus, agree with the Adjudicating Authority when the Adjudicating Authority admitted the Application under Section 7 of IBC although there was error in observations where reference is made interchangeably to Co-borrower and Guarantor. The Adjudicating Authority at the same time dealt with the case as a matter of Co-borrower. It is a case of Co-borrower and for reasons recorded by us in this judgment we decline to interfere with the impugned order admitting the Application."

13. He has further submitted that the aforesaid decision of the NCLAT was challenged in Civil Appeal No. 6613 of 2021 before the Hon'ble Supreme Court in which the following averments have been made:

> "36. The proposition of law which emerges from the judgment is that a pledgor per se may not be a Financial Debtor. However, in this case, as observed above, the Appellate Authority arrived at a factual finding that Disha Holdings was a borrower. In Lalit Kumar Jain v. Union of India 5, this Court held that the approval of a resolution plan in relation to a Corporate Debtor does not discharge the guarantor of the Corporate Debtor. On a parity of reasoning, the approval of a resolution in respect of one borrower cannot certainly discharge a co-borrower.
>
> 37. If there are two borrowers or if two corporate bodies fall within the ambit of corporate debtors, there is no reason why proceedings under Section 7 of the IBC cannot be initiated against both the Corporate Debtors. Needless to mention, the same amount cannot be realised from both the Corporate Debtors. If the dues are realised in part from one Corporate Debtor, the balance may be realised from the other Corporate Debtor being the co-borrower. However, once the claim of the Financial Creditor is discharged, there can be no question of recovery of the claim twice over."

14. We have thoughtfully considered the rival contention of the parties and perused the record of the case.

15. There is no doubt that as per Section 5(8) of the Code a financial debt means a debt alongwith interest, if any, which is disbursed against consideration for the time value of money and as per Section 5(7) financial creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. The contention of the Appellant that the Appellant having been added as a Co-borrower though with respect of the loan facilities created in favour of the Platino Classic Motor India Pvt. Ltd. yet no disbursement has been made, therefore, the Respondent would not fall within the definition of financial creditor. The argument though appears to be attractive

but in view of the fact that the Appellant has itself chosen to join hands with the Co-borrower and owned all its right and liabilities as a Co-borrower, passed a resolution on 16.05.2017 and made a joint request on 17.05.2017 to add the Corporate Debtor as a Co-borrower in the aforesaid three facilities coupled with the fact that an addendum agreement was also executed on 17.05.2017 itself wherein the Appellant had taken over all rights and liabilities alongwith Co-borrower in respect of the facilities extended by the Financial Creditor and the Corporate Debtor passed a board resolution on 23.02.2018 consenting to assume the liability would cumulatively prove that the Appellant is a Co-borrower against whom the application under Section 7 of the Code is maintainable. In this regard, the judgment relied upon by the Appellant in the case of Anuj Jain (Supra) is not applicable to the facts of this case rather the judgment relied upon by the Respondent in the case of Maitreya Doshi (Supra) covers the issue involved.

16. Therefore, in the light of the aforesaid discussion, we are of the considered opinion that there is no error in the order passed by the Adjudicating Authority in admitting the application under Section 7 of the Code against the Appellant as a Co-borrower. Consequently, we do not find any merit in the present appeal and the same is hereby dismissed, though without any order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mrs. Shreesha Merla]
Member (Technical)

New Delhi
27th July, 2023.
Sheetal