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

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*(Under Section 7 of Insolvency and Bankruptcy Code, 2016 read with  
Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating  
Authority) Rules 2016)*

Order delivered on: 6<sup>th</sup> October, 2021

Coram:

**Hon'ble Mr. Rajesh Sharma  
Member (Technical)**

**Hon'ble Mr. Ashok Kumar Borah  
Member (Judicial)**

BMW India Financial Services Private Limited,  
The Oberoi Corporate Tower, Building No. 11,  
First Floor, DLF Cyber City, Phase II,  
Gurugram, Haryana 122 002

**... Financial Creditor**

Versus

M/s. Koyenco Autos Private Limited,  
53 C, Koyenco House, West Hill P. O.,  
Kozhikode, Kerala 673 005

**... Corporate Debtor**

**Appearance (through video conferencing)**

For Financial Creditor  
For Corporate Debtor

...Shri. Diwakar Maheshwari, Advocate  
... Shri. Joseph Kodianthara, Senior Advocate

**Per: Ashok Kumar Borah, Member (J)**

This IBA/37/KOB/2020 has been filed by BMW India Financial Services Private Limited, The Oberoi Corporate Tower, Building No. 11, First Floor, DLF Cyber City, Phase II, Gurugram, Haryana 122 002 (hereinafter called as '**Financial Creditor**') on 16.10.2020 by invoking the provisions of Section 7(4) of the Insolvency and Bankruptcy Code (hereinafter called as **Code**) against Koyenco Autos Private Limited, 53 C, Koyenco House West Hill P. O., Kozhikode, Kerala 673 005. (hereinafter called as '**Corporate Debtor**') stating that the total amount of admitted default from time to time, including interest, under three financial facilities as on the latest date of default being

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29.02.2020 is Rs. 24,20,59,951.14/- (Rupees Twenty-Four Crores Twenty Lakhs Fifty-Nine Thousand Nine Hundred Fifty-One and Fourteen Paise Only), out of which Rs. 19,86,17,729.02/- (Rupees Nineteen Crores Eighty-Six Lakhs Seventeen Thousand Seven Hundred Twenty-Nine and Two Paise Only) is towards outstanding principal under the various financial facilities and Rs. 4,34,42,222.12/- (Rupees Four Crores Thirty-Four Lakhs Forty-Two Thousand Two Hundred Twenty-Two and Twelve Paise Only) towards interest.

2. The Corporate Debtor is a private limited company incorporated on 20.02.2003. The Authorised Share Capital of the Corporate Debtor Company is Rs. 5,00,00,000 (Rupees Five Crores) and the Paid-up Share Capital is Rs. 10,60,00,00 (Rupees Ten Crores and Sixty Lakhs Only).

The brief facts of the case are as under: -

3. The Financial Creditor, being a registered non-banking financial institution, inter alia, carries on business of financing or assisting in financing the sale of automobiles and all kinds of goods, articles, vehicles, machineries or equipment, by way of hire purchase, instalments sale, leasing, loans, deferred payments system and to enter into agreements for promoting the sale and maintenance of auto mobiles and all other kinds of goods, articles, vehicles, machineries or equipment either by buying, selling, letting on hire, hire purchase or credit sale systems or by financing or subsidizing or by assisting in subsidizing or financing the sale and maintenance of such automobiles, goods, articles, vehicles, machinery or equipment.

4. The Financial Creditor had, from time to time, granted the following financing facilities to the Corporate Debtor (as a co-borrower):

- 1) Floorplan Financial Agreement dated 06.09.2010 for Rs. 11,00,00,000/- (Rupees Eleven Crore Only);
- 2) Working Capital Demand Credit Facility Agreement dated 30.11.2011 for Rs. 6,50,00,000/- (Rupees Six Crore Fifty Lakh Only);
- 3) Term Loan Agreement dated 17.05.2017 for Rs. 13,00,00,000/- (Rupees Thirteen Crore Only); and

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4) Spare Parts Financing Facility Agreement 14.01.2015 for  
Rs. 3,00,00,000/- (Rupees Three Crore Only).

5. The present application is for initiating Corporate Insolvency Resolution Process/CIRP of the Corporate Debtor filed on account of its failure to make repayment of the overdue amount which is lying in default under the first three facilities. The default amount in the present matter is clear and admitted in terms of the various communications exchanged between the parties and in terms of the Settlement Agreement dated 04.09.2019 whereunder the Corporate Debtor duly agreed and acknowledged that there was a default of Rs. 25,18,33,300/- (Rupees Twenty-Five Crores Eighteen Lakhs Thirty-Three Thousand and Three Hundred Only) as on 31.05.2019 and agreed to pay the same in the matter stated and agreed in the Settlement Deed.

6. Since, the Corporate Debtor failed to make the payment of the admitted default amount in spite of agreeing as per the Settlement Deed, the Financial Creditor issued a notice of default/notice under Section 13(2) of the SARFAESI Act, 2002 on 29.11.2019. The Corporate Debtor continued to be default as it failed to pay the admitted outstanding amount and at the request made by Corporate Debtor on 24.01.2020, the Financial Creditor vide letter dated 13.03.2020 shared the update and revised amount of default as of 29.02.2020, being Rs.24,20,59,951.14/- (Rupees Twenty Four Crores Twenty Lakhs Fifty Nine Thousand Nine Hundred Fifty One and Fourteen Paise Only), which still continues to be default as the Corporate Debtor has failed to make the payment, in spite of agreeing to do so in terms of the Settlement Agreement.

7. It is stated that the Platino Classic Motors India Private Limited ("Platino") being an erstwhile dealer of BMW India Private Limited ("BMW"), until 31 December, 2018, was engaged in the sale, distribution and maintenance of BMW vehicles and BMW parts, within the State of Kerala. For the purposes of smooth functioning and operation of its (then existing) dealership, Platino had approached the Financial Creditor for various financial facilities from time to time.

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8. It is stated that during the financial year 2017-2018, when Platino was finding it difficult to fulfil its repayment obligations under the various financial facilities sanctioned by the Financial Creditor, one of the promoter group companies of Platino, Koyenco Automobiles Private Limited on 17.05.2017 along with Platino requested the Financial Creditor to add the Corporate Debtor as a co-borrower to all the financial facilities availed by Platino. The said letter was signed by and between Platino and the Corporate Debtor. Subsequently a common Addendum dated 17.05.2017 was executed by and between Financial Creditor, Corporate Debtor and Platino, whereby the Corporate Debtor was added as a co-borrower to all the financial facilities executed between the Financial Creditor and Platino. Through the Addendum Agreement, the Corporate Debtor, as a co-borrower, assumed all the rights, interest and liabilities of Platino.

9. A brief description of all such financial facilities disbursed to the Corporate Debtor as a co-borrower are detailed as under:

a). **Floorplan Financing Agreement:**

On 24.09.2010 the Financial Creditor issued a sanction letter to Platino, sanctioning the floorplan financing facility as per the terms and conditions indicated in the said sanction letter. The sanction letter was signed by Platino in acknowledgement and acceptance of the terms and conditions contained therein. Basis the aforementioned sanction letter, the Financial Creditor and Platino entered into a Floorplan Financing Agreement dated 24.09.2010 (effective from 06.09.2010) ("Floorplan Facility") whereby the Financial Creditor agreed to sanction financing facility of Rs. 1,63,27,000 (Rupees One Crore Sixty-Three Lakhs Twenty-Seven Thousand Only) to Platino along with interests payable therein for the purpose of purchase of BMW cars from BMW India Private Limited ("BMW") and to make payments to BMW towards outstanding invoices raised under a separate agreement executed between BMW and Platino, i.e., Deferred Payment Facility. The loan was granted at the rate of interest of

9.50% p.a and a Default Interest of 4% p.a. Pursuant to the aforesaid Floorplan Facility and sanction letter, various amendments were carried out to the Floorplan Facility whereby, *inter alia*, the parties agreed to modify (i) the amount sanctioned under the Floorplan Facility and (ii) the rate of interest applicable therein. The latest applicable rate of interest is 11.25%.

The Floorplan Facility was also secured by, *inter alia*, the personal guarantees furnished by Mr. P.P. Ashique and Ms. Shamina Ashique. In relation to such personal guarantees, the Financial Creditor reserves its rights to initiate appropriate proceedings. That the Floorplan Facility was also secured by way of Demand Promissory Note issued by Platino for an amount of Rs. 11,00,00,000 (Rupees Eleven Crore) and Deed of Hypothecation dated 15.10.2016. The Financial Creditor had received an amount of Rs. 2,75,673 (Rupees Two Lakhs Seventy-Five Thousand Six Hundred and Seventy-Three Only) from the Platino on 01.12.2018. However, no clarification was provided by Platino to the Financial Creditor as to against which of the Financing Facilities the aforesaid payment was made. In absence of any such clarification, the Financial Creditor had adjusted the same against the outstanding under the Floorplan Financing Facility. After such adjustment, the total amount payable by the Corporate Debtor towards outstanding principal under the Floorplan Financing Facility as on 29.02.2020 is Rs. 1,46,46,494.41 (Rupees One Crore Forty-Six Lakhs Forty-Six Thousand Four Hundred Ninety-Four and Forty-One Paise Only)

b). **Working Capital Demand Credit Facility Agreement:**

On 28.11.2011 The Financial Creditor issued a sanction letter to Platino sanctioning Working Capital Facility of Rs. 5,00,000,000 (Rupees Five Crore) as per the terms and conditions indicated in the said sanction letter. The rate of interest was 12.75% per

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annum. On 30.11.2011 pursuant to issuance of the sanction letter, a Working Capital Demand Credit Facility Agreement was executed between the Financial Creditor and Platino ("Working Capital Facility"). In terms of the said Working Capital Agreement, the Financial Creditor initially extended a financial facility to the tune of Rs. 5,00,00,000 (Rupees Five Crore) to Platino at rate of interest of 12.75% per annum and an additional interest rate of 4% (subject to periodic revision from time to time).

The Working Capital Facility was renewed in favour of Platino and modified from time to time and various amendments were carried out to the Working Capital Facility whereby, *inter alia*, the parties agreed to modify (i) the amount sanctioned under the Working Capital Facility and (ii) the rate of interest applicable therein. The Working Capital Facility, *inter alia*, is also secured by the personal guarantees issued by Mr. P.P. Ashique and Ms. Shamina. Ashique. In relation to such personal guarantees, the Financial Creditor reserves its right to initiate appropriate proceedings. The Working Capital Facility was further secured by way of a Promissory Note for an amount of Rs. 7,50,00,000/- (Rupees Seven Crores Fifty Lakhs Only) and Deed of Hypothecation.

The total outstanding under the Working Capital Facility as on 29.02.2020 is Rs. 6,49,97,203.80/- (Rupees Six Crores Forty-Nine Lakhs Ninety-Seven Thousand Two Hundred and Three and Eighty Paise Only) towards outstanding principal.

c). **Term Loan Agreement:**

On 12.05.2017 upon a request made by the Corporate Debtor and Platino on, the Financial Creditor sanctioned a Term Loan Facility of Rs. 13,00,00,000 (Rupees Thirteen Crores Only) at the rate of 10% p.a., subject to terms and conditions stated therein. On 17.05.2017 pursuant to issuance of the aforesaid sanction

letter, a Term Loan Agreement was executed between Financial Creditor, Corporate Debtor and Platino on 17.05.2017 for an amount of Rs. 13,00,00,000 (Rupees Thirteen Crores Only) at the rate of 10% p.a. for a term of 10 years. The Term Loan Facility is secured by the personal guarantees furnished by Mr. Shamina Ashique and Mr. P.P. Ashique. In relation to such personal guarantees, the Financial Creditor reserves its rights to initiate appropriate proceedings. Further promissory note and Deed of Hypothecation was also provided to secure the said facility

The total outstanding under the Term Loan Facility as on 29 February, 2020 is Rs. 11,89,74,030.81 (Rupees Eleven Crores Eighty-Nine Lakhs Seventy-Four Thousand and Thirty and Eighty-One Paise Only) towards principal and Rs. 1,61,92,168.18 (Rupees One Crores Sixty-One Lakh Ninety-Two Thousand One Hundred and Sixty-Eight and Eighteen Paise Only) towards outstanding interest, thereby, as on 29 February, 2020 totalling to Rs. 13,51,66,198.99 (Rupees Thirteen Crores Fifty-One Lakhs Sixty-Six Thousand One Hundred and Ninety-Eight and Ninety-Nine Paise Only)

d). **Spare Part Financing Agreement:**

It is submitted that there is no default amount outstanding under this facility qua to the Corporate Debtor, as it paid the entire outstanding amount on 16.10.2018, however, only for the sake of completeness in relation to all the financial facilities *qua* the Corporate Debtor, this being be stated below.

10. On 13.01.2015 the Financial Creditor issued a sanction letter in favour of Platino sanctioning Spare Part Financing Facility of Rs. 3,50,00,000 (Rupees Three Crore Fifty Lakhs Only) as per the terms and conditions stated therein. The regular rate of interest was 13% per annum and additional interest was 8% per annum. On 14.01.2015 pursuant to the aforesaid sanction letter, a Spare Part Financing Agreement ("Spare Part Facility")

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came to be executed between the Financial Creditor and Platino. In terms of the said Spare Part Facility, the Financial Creditor extended a financial facility to the tune of Rs. 3,50,00,000 (Rupees Three Crore Fifty Lakhs Only) to Platino at an interest rate of 13% per annum (subject to periodic revision from time to time) and repayment period of 60 days. The amount under the Spare Parts Facility and the applicable rate of interest 'thereon was amended from time to time whereby amount sanctioned and interest levied were modified from time to time.

11. It is stated that there were various defaults in payment of the amounts under the aforesaid facilities sanctioned in favour of the Corporate Debtor and Platino. In response to such communications, Platino and the Corporate Debtor also issued various communications to the Financial Creditor undertaking to the Financial Creditor to make payments, which were not adhered to. On 13.12.2018, an email was issued by the Managing Director of the Corporate Debtor and Platino, assuring the Financial Creditor that overdue amounts will be paid at the earliest. Similar emails were addressed on 28.12.2018 also.

12. It is also stated that the continuation of defaults in payment of amounts due under all the four aforesaid facilities, the Financial Creditor was constrained to issue Loan Recall Notice (LRN) on 14.01.2019 ("LRN") to the Corporate Debtor, Platino and Mr PP. Ashique (another co-borrower and one of the Personal Guarantors for the aforesaid facilities. In response to the LRN, Platino (on behalf of itself and the Corporate Debtor), replied to the Financial Creditor on 18.01.2019, wherein, *inter alia*, it admitted to availing all the financial facilities and without denying its liability to repay the amounts under the said facilities, provided unrelated and vague headings for set-off which were purportedly in relation to its business with BMW India Private Limited, and not the Financial Creditor.

13. It is further stated that, in order to minimize its total outstanding exposure towards the Financial Creditor, the Platino for itself and the Corporate Debtor wrote a letter dated 02.05.2019 for handing over of the hypothecated vehicles which were lying in its possession. It was accordingly



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requested by them to Financial Creditor to adjust the net realized value from hypothecated vehicles against the total outstanding. Subsequently, Mr PP Ashique for Platino and the Corporate Debtor sent an email dated 11.06.2019 whereby he requested for revised outstanding and dues from the Corporate Debtor and Platino payable to the Financial Creditor. Vide email dated 21.06.2019, it was jointly communicated by BMW India and the Financial Creditor to Platino and the Corporate Debtor that its dues and outstanding towards the Financial Creditor stood at Rs. 25,18,33,300/- (as of 31.05.2019).

14. It is stated that in relation to the above exchanges, a meeting was convened amongst the representatives of Platino, Corporate Debtor, BMW India and the Financial Creditor on 25.06.2019 wherein various ways of resolving the payment default, including liquidation of mortgaged property at Maradu, Ernakulam, Kerala which stands as a security to the financial facilities provided by the Financial Creditor. Subsequently, Mr PP Ashique for and on behalf of Platino and the Corporate Debtor issued another letter dated 29.07.2019 whereby he consented to handing over of remaining cars hypothecated to the Financial Creditor.

15. It is stated that on 04.09.2019 both the parties entered into a settlement agreement. In the date of Deed of Settlement, being 04.09.2019, an amount of Rs. 22,26,57,300 (Rupees Twenty-two crores twenty-six lakhs fifty-seven thousand and three Hundred only) was in default and payable in terms of the said deed of settlement. This reduction was on account of adjustment, made towards estimated realized value on the sale of surrendered vehicles made in the month of July, 2019. Since the Corporate Debtor failed to comply with its obligations under the Deed of Settlement and pay the admitted outstanding defaulted amount in the manner mentioned therein, the Financial Creditor was constrained to issue Notice of Default/ Notice under Section 13(2) of the SARFAESI Act, 2002 on 29.11.2019 demanding the outstanding amount (as on 31.10.2019) of Rs. 23,43,94,264 within 60 days of receipt. It is also stated that a reply dated 24.01.2020 was issued to the Financial Creditor by the Corporate Debtor.

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The Financial Creditor duly replied to the said reply on 13.03.2020 whereby the Corporate Debtor was intimated about the amounts in default as well as provided the updated statement of accounts to that effect as on 29 February, 2020.

16. Since, the Corporate Debtor has failed to comply its repayment obligations under various facilities extended by the Financial Creditor as per the agreements mentioned above. Therefore, the present application has been filed by the Financial Creditor to initiate Corporate Insolvency Resolution Process against the Corporate Debtor under Section 7(4) of Insolvency and Bankruptcy Code, 2016.

17. To fortify the above arguments the learned counsel for the Financial Creditor, has referred to the following case laws:

- ***Innoventive Industries Ltd Vs. ICICI Bank & Anr.*** (CA No. 8337 OF 2017).
- ***Dr. B.V.S. Lakshmi Vs. Geometrix Laser Solutions Pvt. Ltd.*** (Company Appeal (AT) (Insolvency) No. 38 OF 2017).
- ***AU Small Finance Bank Ltd. Vs. Prabhu Shanti Real Estate (P) Ltd.*** ((IB)-477 (PB)/2017).

#### **Submission by the Corporate Debtor**

18. The Corporate Debtor stated that the application filed by the Financial Creditor is not maintainable and also barred by limitation. It is stated that in the year 2007, a Dealership Agreement was stated to have been entered into between M/s. Platino Classic Motors (India) Pvt. Ltd. ("Platino") and BMW India Private Limited ("BMW") which was extended periodically till the end of the year 2018. The dealership commenced without any term loans. Platino was the exclusive dealer of BMW in Kerala and had made record sales of BMW cars. Owing to this stellar performance of Platino, BMW wheedled and coaxed Platino into expanding the dealership in the State of Kerala. Pursuant to the above, several meetings were held between the Managing Director of Platino, representatives of BMW and the Financial Creditor, wherein the Financial Creditor constantly exercised undue pressure on Platino by forcing it to

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expand its operations. However, when Platino refused to take up such a huge investment, the Financial Creditor, particularly the then President of BMW made several representations, assurances and promises to Platino that they will make good such payments in some other way, even if the said investment does not yield desired results. Therefore, based on the express representations and warranties made by BMW in collusion with its finance arm (the Financial Creditor herein), Platino set up the establishment at Trivandrum as well as at Calicut. During the year, 2011, Platino was asked to expand its network and open a showroom in Thiruvananthapuram according to the specifications of BMW for which a sum of Rs. 35 Crores was required for investment in land, buildings, fixtures, equipment's, tools, etc. It is for this purpose that BMW forced Platino to borrow from its financial arm, the Financial Creditor herein. Thus, this had become an established modus operandi of the Financial Creditor and BMW wherein they would first allure the dealer to invest more in the business on the promise that more discounts will be given to it in the future business dealings so as to compensate the same and as a result, Platino was coerced and left with no choice to take heavy loans from time to time. It was only later that Platino found out that the promises were given only to induce the Platino to take a loan from the Financial Creditor for the progression of their business only. The entire transaction is clouded by fraud, undue influence, coercion and centered around purely on profits arising to the Financial Creditor and BMW herein to the utter risk and peril of the Corporate Debtor and Platino. In short. in order to fund the expansion of BMW in Kerala. Platino was compelled to borrow from the financial arm of BMW (Financial Creditor herein) and further from other banks. The only revenue for Platino was from the sale of products/ cars purchased from BMW. On 31 December 2018, BMW refused to extend the franchisee agreement to Platino, effectively ensuring that Platino does not have any revenue.

19. It is further stated that the scheme of the Insolvency and Bankruptcy Code, 2016, it is obvious that with respect to one and the same debt, several Insolvency Proceedings at whatever stage they may be, is impermissible. "The Borrower Platino" to whom alone funds have been disbursed is under

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Insolvency Proceedings before this Hon'ble Tribunal on Applications filed by Federal Bank Ltd. The Application is barred in view of the provisions of Section 60 of the IB Code on account of the fact that, insolvency proceedings have already been initiated against the alleged principal debtor being, Platino Classic Motors (India) Private Limited. The Financial Creditor having made a claim for amount claimed herein before the Resolution Professional of Platino Classic Motors (India) Private Limited by filing Form-C, the claim made hereunder, vide a separate application is not sustainable in law or in equity. To the best of the understanding of the Corporate Debtor herein, the Claim filed by the Financial Creditor has not been admitted. In the event, the claim of the Financial Creditor is dismissed, the claim of the Financial Creditor will also be rendered void and unsustainable. Therefore, in view of Section 60(2) and Section 60(3) above, it is imperative that both matters are heard together as both matters pertain to the same set of claims, and an independent application is not maintainable in law.

20. It is also stated that the nature of dispute between the Financial Creditor and Corporate Debtor herein is a mixed question of fact and law, which can be decided only by appreciation of evidence let in during trail. The Financial Creditor and BMW has caused huge losses to the Corporate Debtor and Platino and coerced the Corporate Debtor into entering financial agreements only to further its own interests. The adjudication of the instant dispute necessarily involves addition of Platino and BMW as parties to the proceeding. Adjudication of the same involves interpretation of substantial questions of law and fact that can be raised before an Arbitral Tribunal. The summary proceedings under Section 7 clearly cannot be permitted to precede, such arbitration which will cause extreme prejudice and loss to the Corporate Debtor. A perusal of the criminal complaint filed by Platino against BMW, Financial Creditor and its related entities will clearly indicate that there are several emails exchanged between the Financial Creditor and Platino as well as BMW and Platino and the same can only be testified by Platino. The Corporate Debtor is not a signatory or recipient of these emails and can therefore not attest to the same. Further, for a determination of the element

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of fraud involved in the whole transaction, it is crucial that these emails be examined. This necessarily involves addition of Platino and BMW as parties and examination several connected witnesses.

21. The application has been filed for alleged funds due under the Addendum Agreement dated 17.05.2017 in which Clause 6 provides for an arbitration clause which is extracted herein below for reference:

*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 my 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 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 decide the Dispute in accordance the law of India and the award passed by the Arbitral Tribunal shall be final and binding on the Parties."*

The aforementioned arbitration clause, Section 8 of the Arbitration Act in clear terms mandates that the judicial authority before which an action is brought in a matter which is subject of an arbitration agreement ought to refer such parties to arbitration. The reliefs sought by the Financial Creditor directly arises out of the Addendum Agreement dated 17.05.2017 and further agreements as to payment obligations in relation to the same. In any view of the matter, in the facts of the present case, where several parties are involved, and all-pervasive adjudication is required to be done, in the arbitration proceedings the present application under Section 7 apart from being not maintainable is premature unjust, unreasonable and prejudicial. The dispute arising in this case is not only as between the Financial Creditor and the Respondent herein, but also essentially and intricately involves Platino and BMW India Ltd. When such disputes involving third parties are pending Insolvency Proceedings initiated against another for adjudication of such

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dispute at a Forum where all concerned have a say is against the very scheme of Insolvency.

22. It is also stated that according to Schedule I of Floor Plan Financing Agreement, the repayment period is 100 days for stock car and 60 for demo cars. If any default shall have occurred in the repayment, it is considered as an event of default. The Floor Plan Agreement is dated 06.09.2010. The Financial Creditor has not produced the statement of accounts in the Floor Plan Financing Facility. To the knowledge of the respondent there has been default in repayment exceeding 100 days for stock car and 60 for demo cars on the part of Platino Classic Motors India Pvt Ltd, and that there has been default in repayment exceeding the repayment provision in Schedule I of Annexure IV/4 on the part of Platino Classic Motors India Pvt Ltd. In the absence of valid and legal statement of accounts\ adverse inference has to be drawn against the Financial Creditor.

23. It is stated that Annexure IV/8 -9 produced by the Financial Creditor shows that the Working Capital Demand Credit Facility dated 30.11.2011 was repayable by January 31, 2017. The present application being filed in October 2020 which is after 3 years, the application is barred by the law of limitation and is liable to be dismissed. The Financial Creditor has not produced the statement of accounts in the Working Capital Demand Credit Facility. In the absence of valid and legal statement of accounts adverse inference has to be drawn against the Financial Creditor. It is further stated that the Board Resolution of Koyenco Autos Private Limited and the Board Resolution of Platino Classic Motors India Private Limited not produced. It is also stated that the debt claimed by the Financial Creditor is not due as it is not payable in law or in fact. The Financial Creditor does not have the right to recover the amount claimed to be due in the above application. There is no default of any financial debt much less a financial debt and hence the application has to be rejected. The application has been filed merely on the basis of a computer printout stating to be the outstanding amount as per SOA. The Financial Creditor has neither produced the statement of accounts nor produced any certified entries. The Financial Creditor has not produced any documents to

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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. The addendum agreement dated 17.05.2017 shows that the Corporate Debtor was added as a co-borrower to the Floor Plan Facility Agreement dated 06.09.2010, Working Capital Agreement dated 13.12.2010 and Spare Parts Facility Agreement dated 14.01.2015. As could be seen from the documents that, the Corporate Debtor was added as a co-borrower for the Floor plan agreement dated 06.09.2010, working capital agreement dated 13.12.2010 and spare parts facility agreement dated 14.01.2015.

24. It is also stated that the Floor Plan Financing Agreement dated 06.09.2010 produced by the Financial Creditor was superseded by the Floor Plan Financing Agreement dated 01.02.2011 produced by the Financial Creditor, wherein there is an over-riding provision which states that "This Financing Agreement and any other documents attached hereto or referred to herein, integrate all the terms and conditions mentioned herein or incidental hereto and supersedes all oral negotiations and prior writings in respect of the subject matter hereof, except for those provisions of the sanction letter, issued prior or post to the execution of this Financing Agreement which are in addition to and are not the same or in conflict with, the terms of this Financing Agreement which are in addition to and are not the same or in conflict with, the terms of this Financing Agreement. In the event of any conflict between the terms, conditions, and provisions of the latest sanction letter shall prevail". Hence the Floor Plan Financing Agreement dated 06.09.2010 has been superseded by the Floor Plan Agreement dated 01.02.2011 and hence the Floor Plan Financial Agreement dated 06.09.2010 is not in existence after 01.02.2011. There is no mention about the Floor Plan Agreement dated 01.02.2011 that superseded the Floor Plan Agreement dated 06.09.2010 in the Addendum Agreement dated 17.05.2017. It is evident from the recitals in the Addendum Agreement dated 17.05.2017 that the respondent has not been added as a co-borrower in the Floor Plan Financial Agreement dated 01.02.2011. Hence the Corporate Debtor is not bound by

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any of the documents or amendments executed by Platino with regard to the Floor Plan Facility Agreement dated 01.02.2011 or documents pursuant thereto.

25. It is further stated that the Working Capital Agreement dated 13.12.2010 was superseded by the Working Capital Agreement dated 30.11.2011 produced by the Financial Creditor as Annexure IV/7 wherein there is an over-riding provision which states that "This Agreement and any other documents attached hereto or referred to herein, integrate all the terms and conditions mentioned herein or incidental hereto and supersedes all oral negotiations and prior writings in respect of the subject matter hereof, except for those provisions of the Sanction Letter, issued prior or post to the execution of this Agreement which are in addition to and are not the same or in conflict with, the terms of this Agreement. In the event of any conflict between the terms, conditions and provisions of this Agreement and any other agreements or document attached hereto or referred to herein, then in such event, the terms, conditions and provisions of the latest sanction letter shall prevail". Hence the Working Capital Agreement dated 13.12.2010 has been superseded by the Working Capital Agreement dated 30.11.2011 and hence the Working Capital Agreement dated 13.12.2010 is not in existence after 30.11.2011. It is evident from the recitals in the Addendum Agreement dated 17.05.2017 that the Corporate Debtor has not been added as a co-borrower in the Working Capital Agreement dated 30.11.2011. Hence the Corporate Debtor is not bound by any of the documents executed by Platino with regard to the Working Capital Agreement dated 30.11.2011 dated or any documents or Capital amendments pursuant thereto.

26. It is further stated that without prejudice to the contention that the Corporate Debtor is not a party to the Working Capital Agreement dated 30.11.2011, the Working Capital Agreement dated 13.12.2010 is an existence alter execution of the Floor Plan Financing Agreement dated 30.11.2011, by virtue of the Addendum Agreement dated 17.05.2017, the Corporate Debtor cannot be considered as a Financial Creditor of the Financial Creditor for the Working Capital Agreement dated 13.12.2010, with effect from original dates



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mentioned in those agreements, but only from 17.05.2017. No amount has been disbursed by the Financial Creditor to Platino Classic Motors India Pvt. Ltd. or this respondent after 17.05.2017 under the working capital demand credit facility agreement so as to fasten any legal liability on this Corporate Debtor. Hence the Corporate Debtor cannot by any stretch of imagination be deemed to be a Corporate Debtor of the Financial Creditor. It is also stated that there is no amount is due under the Spare Parts Financial Facility.

27. It is also stated that the Term Loan Agreement dated 17.05.2017 produced by the Financial Creditor is only for an amount of Rs.13,00,000/-. The Term Loan Agreement does not state about the schedule for repayment hence there has been no default in the said facility. The said amount has been granted by the Financial Creditor without any specific stipulation for repayment. The term of loan for the amount of Rs.13,00,000/- is 10 years commencing from 17.05.2017. No amortization schedule is annexed to the term loan agreement dated 17.05.2017 and hence there are no specific due dates with respect to the repayment of the amount of Rs.13,00,000/-. Though the agreement does not provide any schedule for repayment, the Corporate Debtor has already paid the amount of Rs.13,00,000/- payable under the said Agreement and hence there is no default on the part of the Corporate Debtor. Apart from the term loan agreement dated 17.05.2017 has been produced by the Financial Creditor, no other term loan agreement dated 17.05.2017 has been produced by the Financial Creditor which shows that there is a term loan for Rs. 13,00,00,000/- availed by the Corporate Debtor from the Financial Creditor. The Corporate Debtor having already paid the amount of Rs.13,00,000/- under the term loan agreement produced dated 17.05.2017 and there being neither default under the said agreement nor any specific date for repayment, the Financial Creditor ought not to have included the inflated amount of Rs. 13,00,00,000/-in this application. It is further stated that the allegation relates to guarantees furnished by P. P. Ashique and Shamina Ashique which are not within the knowledge of the Corporate Debtor.

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28. It is stated that as admitted by the Financial Creditor, an amount of Rs. 2,75,673/- was received by the Financial Creditor under the Floor Plan Financing Facility. The Corporate Debtor denies the amount of Rs. 1,46,46,494.41/- as stated by the Financial Creditor in Floor Plan Financing Facility and the Corporate Debtor is not liable for the same. It is also stated that the Memorandum of Entry dated 06.06.2017 and Amendment to the Memorandum of Entry dated 06.06.2017 executed on 23.07.2018, purports to create a charge on the immovable property scheduled in the agreement and hence is compulsorily registrable. In the absence of registration, the document cannot be relied on or admissible in evidence. The Memorandum of Entry dated 06.06.2017 and Amendment to the Memorandum of Entry dated 06.06.2017 executed on 23.07.2018 produced along with Annexure IV purports to constitute the important terms of the transaction and in the absence of registration as required by law, the said agreement and its terms cannot be admitted in evidence to prove the transaction.

29. It is further stated that the Deed of Settlement dated 04.09.2019 produced by the Financial Creditor is inadmissible in evidence. Clause No. 11 of the Deed of Settlement states that " In the event, Platino Group fails to pay the entire full and final settlement amount within the period specified in clause 6 above, this Deed of Settlement shall be rendered null and void." The Financial Creditor ought not to have produced a document which is null and void before this Tribunal. The Corporate Debtor cannot be fastened with any liability on the basis of a document which is null and void. It is also stated that the allegation that the Corporate Debtor failed to honour its repayment obligations under various facility agreements is false and hence denied. The Corporate Debtor was liable to repay only an amount of Rs. 13,00,000/- under the term loan agreement which the Corporate Debtor has already paid and all the allegations to the contra made by the Financial Creditor are false and hence denied. The respondent is not liable for the amount of Rs. 24,20,59,951.14/-. The Financial Creditor has not produced any document admissible in evidence to prove default. The total amount of debt in default/overdue as on 29.02.2020 stated as Rs.24,20,59,951/- is false and

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hence denied. The Financial Creditor has not produced any document which is admissible in evidence to show default of Rs. 24,20,59,951/- by the Corporate Debtor. The documents produced by the Financial Creditor alleged to be the accounts of the Corporate Debtor is inadmissible in evidence and is not a valid document.

30. The Corporate Debtor further stated that the Security Documents submitted in the application are not valid in law and is inadmissible in evidence. In the absence of a valid document whereby the Corporate Debtor is a co-borrower to the various facilities which were in force as alleged by the Financial Creditor as being extended to Platino Classic Motors India Pvt Ltd, the Corporate Debtor cannot be fastened with any liabilities. The documents as stated in the table of mortgage and MOE cannot create any charge on the properties of the Corporate Debtor in the absence of any legally valid and enforceable liability. The table of personal guarantee and the documents relied on by the Financial Creditor for creating personal guarantee as stated and produced by the Financial Creditor are not valid and the allegations relating to the promissory furnished by Platino Classic Motor India Pvt. Ltd., P. P. Ashique and Shamina Ashique are not within the knowledge of this Corporate Debtor. The promissory notes as stated by the Financial Creditor and produced by the Financial Creditor are not executed by the Corporate Debtor. The allegations relating to guarantees furnished by P.P. Ashique and Shamina Ashique which are not within the knowledge of the Corporate Debtor.

31. It is also stated that the submission that the amounts were sanctioned in favour of the corporate debtor is false. No amount has been sanctioned to the Corporate Debtor as stated in the application under the Floor Plan Financing Facility dated 06.09.2010 and Working Capital Agreement dated 13.12.2010. The Financial Creditor has only sanctioned an amount of Rs. 13,00,000/- under the Term Loan Agreement dated 17.05.2017. There was no correspondence between the Financial Creditor and the Corporate Debtor on 18.01.2019. The allegation that the Corporate Debtor wrote letters dated 02.05.2019 and 11.06.2019 is false. It is further stated that the Financial Creditor is falsely attributing letters and correspondences issued by the

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Financial Creditor as that issued to the Corporate Debtor. The Corporate Debtor denies all such correspondences referred by the Financial Creditor in this application as being done jointly by a different entity by the name Platino Classic Motors India Pvt Ltd, for and on behalf of the Corporate Debtor. The respondent is a legal entity and only those correspondences issued by the Corporate Debtor could be attributed to the Corporate Debtor and correspondence made by Platino cannot be attributed as that of the Corporate Debtor.

32. The Corporate Debtor further stated that there is no debtor creditor relationship between the Financial Creditor and the Corporate Debtor. There is no undertaking to repay the amount with interest within the specified period, hence there is no default. On the basis of documents which is not enforceable by 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) & 8 of the IBC, 2016. It is also stated that the application filed by the Financial Creditor Bank 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. 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, there is no other alternative documents specified and, therefore, the only record of default is the record maintained by the Information Utility. 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 into force with effect from 25<sup>th</sup> September, 2017. The Financial Creditor Bank has not produced any 'evidence of default' from the Information Utility as required under the provisions of IBC. It is further stated that, as far as the Financial Creditors are concerned, IBC mandates a stricter proof regarding the 'default' in the form of a duly validated certificate from a regulated body as against the requirements for the Operational Creditors. In the absence of any authenticated certificate regarding the evidence of default from a

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regulated body, the adjudicating authority cannot rely upon the figures furnished by the Financial Creditor Bank and entertain the application.

**Rejoinder by the Financial Creditor**

33. In the rejoinder it is stated that in the Addendum Agreement, the Corporate Debtor, as a Co-borrower, assumed all the rights, interests and liabilities of Platino. The relevant clauses of the Addendum Agreement clearly establish the assumption of liability by the Corporate Debtor as a co-borrower, which is as under: -

- i. *“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 undertake 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.*
- ii. *Co-Borrower hereby agree that all rights and obligations of borrower under the Agreement shall also vest with himself along with Borrower and be shared jointly by both.*
- iii. *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.*
- iv. *Borrower and Co-borrower agree 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 the addendum)”*

34. It is also stated that the Corporate Debtor became a borrower for a fresh Term Loan that was jointly borrowed by the Corporate Debtor and Platino from the Financial Creditor, wherein Mr P.P. Ashique subsequently joined as

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a co-borrower by way of an addendum. Pursuant to the aforesaid Addendum, a Working Capital Term Loan was executed on 17.05.2017 amongst Financial Creditor as the lender, and Platino and Respondent as the co-borrowers. It would be pertinent to note that pursuant to the defaults, even a loan recall notice dated 14.01.2019 was issued to the Corporate Debtor intimating it about the recall of the entire loan facilities that were provided in view of the continuous defaults committed in its payment obligations. It is further stated that the Corporate Debtor did not object to the said loan recall, and subsequently, entered into a Deed of Settlement whereunder it committed to make payment of dues under all the loan facilities. Therefore, the frivolous objection with respect to the statement has no basis for the Respondent to disclaim its liability under the loan facilities. Further, on account of continuing default by the Corporate Debtor, the Financial Creditor even issued the statutory Notice under the SARFAESI Act on 29.11.2019, which was not complied with by the Corporate Debtor. As such, the default continued qua the Respondent even after the Deed of Settlement. All the loan facilities in default were running until the loan recall notice dated 14.01.2019 was issued. It is only on the said date, that the dues under the said loan facilities were accelerated and the Respondent and the other co-borrowers were demanded to make payment of the dues in terms of the statement of account.

35. It is further stated that after the loan recall on 14.01.2019, and upon non-compliance of the Deed of Settlement dated 04.09.2019, the Financial Creditor was constrained to issue a Notice under Section 13(2) of SARFAESI Act on 29.11.2019. In response thereto, the Corporate Debtor asked for an updated statement of account from the Financial Creditor with respect to the dues, and the question of limitation was ever raised as the loans were continuing. Thereafter, when the updated loan statements (as on 28 February, 2020) were sent to the Corporate Debtor vide letter dated 13.03.2020, the Corporate Debtor never questioned the said statement of account and its indebtedness, and the present frivolous objection on

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statement of account has only been made now as an afterthought and to wriggle out of its liability.

36. The defaults under the loan accounts are continuing defaults, and therefore, the objection of limitation would not be of any avail more so when the loan was recalled only in the year 2019 and the admission of such defaults was reduced in writing vide the Deed of Settlement dated 04.09.2019. As such, the question of limitation would not arise.

37. It is stated that the MOE with respect to equitable mortgage are not required under law to be registered, however, the present Insolvency Application has been filed to determine the default of Corporate Debtor with respect to the loan facilities. Hence, the Corporate Debtor cannot deny the default. The objection on the Deed of Settlement is only on account of Corporate Debtor's own non-compliance. The Corporate Debtor states that Clause 11 of the Deed provides that if the payment of dues is not made by the Corporate Debtor in terms of Clause 6, the Deed of Settlement shall be rendered null and void. It is stated that such a statement can only be an oversight of the Corporate Debtor whereby it is highlighting its own financial indiscipline as to even after entering a Settlement, it did not comply with the terms of the settlement. Such being the case, the Corporate Debtor has not only admitted to its defaults, but has also casted aspersions on its financial conduct. Such conduct of the Corporate Debtor also makes it a wilful defaulter, who even after promising at multiple occasions of payment through its Director, is deliberately indulging in defaults to cause losses to a non-banking financial company and consequently, to the economy at large.

#### Findings

38. We have heard learned counsel for the parties and perused the whole case records including documents appended with the case records. On perusal of the documents and arguments advanced by both the sides, this Bench finds it necessary to deal with each issue separately.

- i. Whether the application is maintainable?*
- ii. Whether this application will come in the purview of multiple proceeding with respect to the same debt?*

iii. *Whether there is a Creditor-Debtor relationship between the Financial Creditor and Corporate Debtor herein?*

39. **Point No (i):** On perusal of the records, we find out that Section 7 of the Code propounds the manner in which Corporate Insolvency Resolution Process (CIRP) is to be initiated by the “financial creditor” against a “corporate person being the corporate debtor”. It predicates that a financial creditor either by itself or jointly with other financial creditors or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating CIRP against a corporate debtor before the Adjudicating Authority when a default is committed by it. Section 7 is an enabling provision, which permits the financial creditor to initiate CIRP against a corporate debtor. The corporate debtor can be the principal borrower. It can also be a corporate person assuming the status of corporate debtor having offered guarantee, if and when the principal borrower/debtor (be it a corporate person or otherwise) commits default in payment of its debt. The term “financial creditor” has been defined in Section 5(7) read with expression “Creditor” in Section 3(10) of the Code to mean a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. This means that the Financial Creditor should be a person to whom a financial debt is owed. The expression “financial debt” has been defined in Section 5(8). Amongst other categories specified therein, it could be a debt along with interest, which is disbursed against the consideration for the time value of money and would include the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of the same clause. Indubitably, a right or cause of action would ensue to the lender (financial creditor) to proceed against the principal borrower, as well as the co-borrower in equal measure in case they commit default in repayment of the amount of debt. As a consequence of such default, the status of the co-borrower metamorphoses into a debtor or a corporate debtor, if it happens to be a corporate person, within the meaning of Section 3(8) of the Code. For, as aforesaid, expression “default” has also been defined in Section 3(12) of the



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Code to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due or payable and is not paid by the debtor or the corporate debtor, as the case may be. A priori, in the context of the provisions of the Code, if the guarantor is a corporate person (as defined in Section 3(7) of the Code), it would come within the purview of expression “corporate debtor”, within the meaning of Section 3(8) of the Code. We have also gone through the Addendum Agreement dated 17.05.2017. By way of the Addendum Agreement, the Corporate Debtor, as a Co-borrower assumed all the rights, interest and liabilities of Platino. Certain relevant clauses of the Addendum Agreement, inter alia, are provided below: - *“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 undertake 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.*

- I. *Co-Borrower hereby agree that all rights and obligations of borrower under the Agreement shall also vest with himself along with Borrower and be shared jointly by both.*
- II. *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.*
- III. *Borrower and Co-borrower agree 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 the addendum)”.*

The aforementioned clauses clearly show that in spite of signing a common Addendum which executed by and amongst the Financial Creditor, Corporate

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Debtor and Platino, whereby the Corporate Debtor was added as a Co-borrower to all the financial facilities initially executed between the Financial Creditor and Platino. In this connection, the decision of the Hon'ble Supreme Court in ***Laxmi Pat Surana Versus Union Bank of India & Anr.*** (CIVIL APPEAL NO. 2734 OF 2020) may be referred to, wherein the Hon'ble Supreme Court held that the financial creditor has not only the right to recover the outstanding dues by filing a suit but also has a right to initiate resolution process against the corporate person (being a corporate debtor) whose liability is coextensive with that of the principal borrower and more so when it activates from the written acknowledge of liability and failure of both to discharge hat liability and that a fresh period of limitation is required to be computed from the date of acknowledgment of debt by the principal borrower from time to time.

40. On perusal of the documents, it is seen that the defaults under the loan accounts are continuing defaults, and therefore, the objection of limitation would not be of any avail more so when the loan was recalled only in the year 2019 and the admission of such defaults was reduced in writing vide the Deed of settlement dated 04.09.2019. Suffice it to conclude that there is no substance even in the second ground urged by the Corporate Debtor regarding the maintainability of the application filed by the Financial Creditor under Section 7 of the Code on the ground of being barred by limitation. Hence, the contentions regarding maintainability/limitation will not stand for scrutiny and are to be rejected.

40. **Point No. (ii).** The Corporate Debtor mentions that the Application cannot be maintained against M/s Koyenco Autos Private Limited Private Limited, the Corporate Debtor/Co-borrower, for the same debt arising out of identical loan in IBA/25/KOB/2020, in the matter of M/s. Platino Classic Motors (India) Private Ltd. This Bench takes note of the above contention and is of the view that the present application IBA/37/KOB/2020 has been filed by M/s. BMW India Financial Services Private Limited is only against

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Corporate Debtor herein i.e., Koyenco Autos Private Limited and not against M/s. Platino Classic Motors (India) Private Ltd. The Bench also noted that IBA/25/KOB/2020 was admitted on 08.03.2021. Since this application has been filed by the Financial Creditor against the Co-borrower, M/s. Koyenco Autos Private Limited and not against M/s. Platino Classic Motors (India) Private Limited, there is no bar in admitting the present application against the Corporate Debtor.

41. **Point No. (iii)** From the records filed by both the parties we could find that there is a Creditor- Debtor relationship between the Financial Creditor and Corporate Debtor, since the Corporate Debtor admitted that they received money from the Financial Creditor through various documents produced before this Tribunal and the Corporate Debtor has no case that they have repaid the money received from the Financial Creditor.

42. 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 satisfies all the definitions of “Financial Creditor”, “Default” and “Financial Debt” and qualifies for filing an application under Insolvency and Bankruptcy Code. By mentioning 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.

43. Therefore, this Tribunal is of the view that the application filed in the capacity of a ‘Financial Creditor’ for a ‘Financial Debt’ of Rs. 24,20,59,951/- (Rupees Twenty-Four Crores Twenty Lakhs Fifty-Nine Thousand Nine Hundred and Fifty-One Only), out of which Rs. 19,88,93,402.02/- (Rupees Nineteen Crores Eighty-Eight Lakhs, Ninety-Three Thousand Four Hundred Two and Two Paise Only) is towards outstanding principal under various facilities and Rs. 4,31,66,549.12 (Rupees Four Crores Thirty-One Lakhs Sixty-Six Thousand Five Hundred Forty-Nine and Twelve Paise Only) towards outstanding interest which is recoverable from the Corporate Debtor viz., M/s.

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Koyenco Autos Private Limited 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.

44. 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 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.

45. 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/37/KOB/2020** is admitted and the following order has been passed: -

### **ORDER**

- i. Having admitted the 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.
- ii. The Financial Creditor has suggested the name of Mr. **Sankar P. Panicker**, Advocate for appointment as Interim Resolution Professional (IRP). Accordingly, the IRP proposed by the Financial Creditor, **Mr.Sankar P. Panicker**, Advocate, **Paniker and Paniker Advocates, Jaikunj, Chittoor Road, Kochi 682 035 e-mail id: [sankarpaniker@gmail.com](mailto:sankarpaniker@gmail.com), IBBI Registration Number: IBBI/IPA-003/IP-N00037/2017-2018/10300**, is hereby appointed as Interim Resolution Professional to conduct the Insolvency Resolution Process. 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.

- 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 issued 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 receipt of this order, 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 C.I.R.P. and the compliance of the directions of this Order within 30 days to this Bench. 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 Directors/Officers and Managers of the Corporate Debtor shall

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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 coercive steps will follow.

- 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.

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46. This IA has been filed by the Applicant/ Corporate Debtor seeking the relief to refer the matter for arbitration as per Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996. In view of the admission of the application IBA/37/KOB/2020, this IA become infructuous. Hence dismissed.

Dated this the 6th day of October, 2021

Sd/-

**(Rajesh Sharma)**  
**Member (Technical)**

Raja

Sd/-

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