



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

**IA(IBC)/182/KOB/2022
IN
CP(IB)/37/KOB/2020
(Under Section 43(1) read with Section 44 of IBC, 2016)**

In the matter of Koyenco Autos Private Limited

MEMO OF PARTIES:

Vibin Vincent

Liquidator, M/s Koyenco Autos Private Limited

...Applicant

-Versus-

P.P. Ashique

S/o P.P. Koya, 28/729, Ponnamparambath House, Chevayur Post, Kozhikode,
Kerala – 673017

Shameena Ashique

W/o P.P. Ashique, 28/729, Ponnamparambath House, Chevayur Post,
Kozhikode,
Kerala – 673017

Platino Classic Motors (India) Private Limited

11 6B, NH 47, Bypass Road, Maradu P.O., Cochin – 682304, Represented by the
Liquidator, Mr. Reuben Joseph
e: reuben.joseph@gja.co.in

...Respondents

-In-

In the matter of:

BMW India Financial Services Private Limited

...Financial Creditor

-Versus-

Koyenco Autos Private Limited

...Corporate Debtor



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/182/KOB/2022 IN IBA/37/KOB/2020

In Re: BMW India Financial Services Private Limited v. M/s Koyenco Autos Private Limited

Coram:

Shri P. Mohan Raj : Member (Judicial)
Shri Satya Ranjan Prasad : Member (Technical)

Appearances:

For the Applicant/ RP : Mr. A.C Venugopal, Advocate and
Mr. Vibin Vincent, Liquidator
For the Respondent : Mr. Arjun Sheth (Advocate for R1 & R2)
and Mr. Ruben George Joseph
(Liquidator for R3)

Order Pronounced on: 27.04.2023

ORDER

1. This application has been filed under Section 43 (1) read with Section 44 of the Insolvency and Bankruptcy Code, 2016 (“Code”) for avoidance of preference transactions and appropriate orders by the Liquidator (Mr. Vibin Vincent having IBBI registration number IBBI/IPA-001/IP-P-01997/2020-2021/13134) of the Corporate Debtor.

Brief facts of the petition

2. The order initiating Corporate Insolvency Resolution Process (“CIRP”) was passed against the Corporate Debtor, Koyenco Autos Private Limited, in the petition filed under section 7 of the Code by BMW India Financial Services Private Limited on 06.10.2021. Mr. Sankar P. Paniker (IBBI Reg. No. IBBI/IPA-003/IP- N00037/2017-2018/10300) was appointed as the Interim Resolution Professional. The Applicant, Mr. Vibin Vincent, was appointed as the Resolution Professional vide order dated 17.01.2022.
3. The applicant came to the opinion that certain anomalies existed in the books of accounts of the company. Pursuant to the approval of the Committee of



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/182/KOB/2022 IN IBA/37/KOB/2020

In Re: BMW India Financial Services Private Limited v. M/s Koyenco Autos Private Limited

Creditors at the 4th meeting dated 21.03.2022, the applicant appointed Mr. Krishna Raj M, Chartered Accountant as Forensic Auditor on 25.02.2022 for the period of 01.04.2016 to 06.10.2021. The Forensic Auditor submitted his report on 15.06.2022.

4. The forensic auditors requested clarifications from the 1st respondent, the erstwhile director of the corporate debtor, on 05.05.2022 requesting clarifications on the audit observations. The 1st respondent submitted their reply on 17.05.2022. The forensic auditors requested further clarifications on 18.05.2022, to which no response was received.
5. The Applicant has determined that the Corporate Debtor has been subjected to transactions covered under section 43 to extent of INR 8,79,357.00

Brief facts of the reply of Respondent No.1

6. The application is improper and ambiguous, as the applicant has stated that respondents have committed fraudulent transactions which would fall under section 66 of the Code but filed an application under Section 43. Further, the respondents have submitted that the transactions are not on account of any antecedent debt, and thus not improved the position of the respondent with respect to other creditors. Further, the respondent has transferred amounts aggregating to INR 49 lakhs (Forty-Nine Lakhs only) to the corporate debtor.

Brief facts from the rejoinder filed by the applicant to the reply.

7. The applicant submits that an amount of INR 36,03,970.50 was an amount due to respondent no. 1 as per the ledger accounts of the respondent in the books of accounts. Further, INR 28,55,932.00 of the amount transferred by respondent no.1 was utilised for the payment of loan instalments of a loan availed from IDBI Bank.
8. We have heard the matter in detail and perused the application and counter filed. It is found that the petition was amended as per the order dated 01.12.2022



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/182/KOB/2022 IN IBA/37/KOB/2020

In Re: BMW India Financial Services Private Limited v. M/s Koyenco Autos Private Limited

in IA(IBC) No. 410/KOB/ 2022. The Points for determination In This Application are: -

Whether the respondents have been given a preference in transactions at a relevant time by the Corporate Debtor? If yes, whether the applicant is entitled for order under section 44?

9. The Hon'ble Supreme Court, in the case of '*Anuj Jain Interim Resolution Professional For Jaypee Infratech Limited vs Axis Bank Limited Etc*' [2020] *ibclaw.in 06 SC*, has laid down the criteria to find as to whether a transaction, of transfer of property or an interest thereof of the Corporate Debtor, falls squarely within the ambit of Section 43 of the Code as following:

- i. As to whether such transfer is for the benefit of a creditor or a surety or a guarantor?
- ii. As to whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor?
- iii. As to whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53?
- iv. If such transfer had been for the benefit of a related party (other than an employee), as to whether the same was made during the period of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, as to whether the same was made during the period of one year preceding the insolvency commencement date?
- v. As to whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?

10. Now we have to see whether the transactions in the petition as mentioned below are preferential transactions:



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/182/KOB/2022 IN IBA/37/KOB/2020

In Re: BMW India Financial Services Private Limited v. M/s Koyenco Autos Private Limited

No.	Ledger/Party name	Date of payment	Amount (INR)	Mode/Description
1	P.P. Ashique	08.07.2021	2,44,352.00	Through SBI
2	P.P. Ashique	22.06.2021	37,000.00	Through SBI
3	P.P. Ashique	24.06.2021	50,000.00	Through SBI
4	P.P. Ashique	14.09.2021	2,70,000.00	Rent - Showroom
5	P.P. Ashique	30.09.2021	1,80,000.00	Rent - Showroom
6	Platino Classic Motor India Pvt Ltd	18.11.2019	98,005.00	Through SBI
Total			8,79,357.00	

11. We proceed to see whether transfers 1 to 6 are for the benefit of a creditor or a surety or a guarantor?

In the case of transfer no. 1 to 5 which are made to the 1st respondent and transfer no. 6 to the 3rd respondent, the applicant has averred that such transfers have put the 1st and 3rd respondents in a beneficial position, and thus can be said to be transferred for the benefit of a creditor or a surety or a guarantor.

12. The next question to be answered is whether such a transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor.

In the case of transfers 1 to 5 which are made to the 1st respondent, the applicant in his rejoinder dated 14.12.2022 has stated that an amount of INR 36,03,970.50 was payable to the 1st respondent as on 06.10.2019, hence these transfers can be said to be on account antecedent debt or liability as per section 43(2)(a).

However, in case of the transfer no. 6 to the 3rd respondent, the applicant has failed to show in his petition that such a transfer has been made to the 3rd respondent on account of an antecedent debt or liability. As conditions



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/182/KOB/2022 IN IBA/37/KOB/2020

In Re: BMW India Financial Services Private Limited v. M/s Koyenco Autos Private Limited

specified in section 43(2)(a) have not been satisfied, transfer no. 6 to the 3rd respondent cannot be said to be a preferential transaction.

13. For transfers 1 to 5, the next question is **whether such transfers have the effect of putting the 1st respondent in a more beneficial position than it would have been in the event of the distribution of assets being made in accordance with Section 53**. Considering the averments of the applicant that such transfers have placed the 1st respondent in a beneficial position along with the factual position that the 1st respondent is an unsecured creditor who is also a related party and the corporate debtor is in liquidation, it is answered affirmatively that the transfers 1 to 5 have placed the 1st respondent in a more beneficial position as per section 43(2)(b).
14. The next question to be answered is **whether the preference was given at a relevant time**. Since 1st respondent is the erstwhile director of the Corporate Debtor, he is a “related party” under section 5(24), and according to section 43(4)(a), a preference is deemed to be made to a related party, if the same was made during the period of two years preceding the insolvency commencement date. In the present case, transfers 1 to 5 have been made within the period of two years prior to 06.10.2021, hence the transfers have been made within the relevant time as per Section 43(4).
15. The final question to be answered is **whether such a transfer is not an excluded transaction in terms of sub-section (3) of Section 43** i.e., such transfer is (a) in the ordinary course of business or (b) creates a security interest in property which secures new value. In the present case, there is no case made that security interest has been created or that new value has been secured. It only remains to be examined if the transfers 1 to 5 were made in the ordinary course of business. The main business of the company is wholesale and retail sales of new passenger motor vehicles and lorries, trailers and semi-trailers under the division of sale, maintenance and repair of motor vehicles. The payment made to the 1st respondent cannot be said to be transferred in furtherance of the above business of the corporate debtor. Further, no



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/182/KOB/2022 IN IBA/37/KOB/2020

In Re: BMW India Financial Services Private Limited v. M/s Koyenco Autos Private Limited

documents have been brought on record to show that transfers 1 to 5 were made in the ordinary course of business as per an agreement or decided payment schedule. Thus, transfers 1 to 5 are not excluded transactions as per section 43(3).

16. The only remaining submission to be considered is whether the transfer of INR 49 lakhs as claimed by the 1st respondent is a mitigating factor. The Supreme Court in **Anuj Jain** (supra) has considered the impact of the use of the word “deemed” in sub-sections (2) and (4) of Section 43 and paragraphs 19.3 and 19.5 of the said judgement is reproduced below:

“**19.3.** On a conspectus of the principles so enunciated, it is clear that although the word ‘deemed’ is employed for different purposes in different contexts but one of its principal purpose, in essence, is to deem what may or may not be in reality, thereby requiring the subject-matter to be treated as if real. Applying the principles to the provision at hand i.e., Section 43 of the Code, it could reasonably be concluded that any transaction that answers to the descriptions contained in sub-sections (4) and (2) is presumed to be a preferential transaction at a relevant time, even though it may not be so in reality. In other words, since sub-sections (4) and (2) are deeming provisions, upon existence of the ingredients stated therein, the legal fiction would come into play; and such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per Section 44 of the Code, irrespective whether the transaction was in fact intended or even anticipated to be so.

19.4. ...

19.5. Thus, the net concentrate of Section 43 is that if a transaction entered into by a corporate debtor is not falling in either of the exceptions provided by sub-section (3) and satisfies the three-fold



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/182/KOB/2022 IN IBA/37/KOB/2020

In Re: BMW India Financial Services Private Limited v. M/s Koyenco Autos Private Limited

requirements of sub-sections (4) and (2), it would be deemed to be a preference during a relevant time, whether or not in fact it were so; and whether or not it were intended or anticipated to be so.”

Additionally, a relevant extract from paragraph 29.1 of the Anuj Jain (supra) is given:

“29.1. As noticed, the question of intent is not involved in Section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time.”

It is thus clear that in the context of section 43, the question of whether such transfers were intended or anticipated to give preference does not arise, but rather whether the conditions specified in section 43 are satisfied. Hence, the submissions made by the 1st respondent that no preference was intended or that other amounts were transferred to the Corporate Debtor that does not rebut the fact that ingredients of section 43 have been met are not relevant. In the case of transfers 1 to 5, all conditions specified in sub-section (2) and (4) of Section 43 are satisfied, and the transactions are not saved by sub-section (3) of Section 43.

Thus, by virtue of the deeming fiction in section 43, the transfers 1 to 5 are deemed to have given preference to the 1st respondent.

17. It is thus found that the 1st respondent has been given a preference in the transactions. Further, the applicant is entitled to orders under section 44.

18. Accordingly, the application is ordered as follows:

The 1st respondent is directed to pay a sum of Rs. 7,81,352.00 (Rupees Seven Lakh Eighty-one Thousand Three Hundred and Fifty-two only) to the applicant within one month from today, failing which the amounts mentioned supra will carry 12% simple interest per annum from the date of this order to till the date of realization of amount. Thus, the application is ordered against respondent 1; and with respect to respondents 2 and 3, the application is dismissed. No cost.



IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/182/KOB/2022 IN IBA/37/KOB/2020

In Re: BMW India Financial Services Private Limited v. M/s Koyenco Autos Private Limited

19. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
20. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Sd/-
Satya Ranjan Prasad
Member (Technical)

Sd/-
P. Mohan Raj
Member (Judicial)

Signed on this the 27th of April, 2023.

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