

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH

IA(IBC)/183/KOB/2022

IN

IBA/37/KOB/2020

(Under Section 66(1) of IBC, 2016)

In the matter of M/s. BMW India Financial Services Private Limited vs M/s Koyenco Autos Private Limited

MEMO OF PARTIES:

VIBIN VINCENT,

Liquidator, M/s Koyenco Autos Private Limited, Chakiath House, Elavoor PO,
Angamaly, Ernakulam 683572;

...Applicant

-Versus-

1. P.P. Ashique, S/o PP Koya, 28/729, Ponnamparambath House, Chevayur Post, Kozhikode, Kerala 673017
2. Shameena Ashique, W/o PP Ashique, 28/729, Ponnamparambath House, Chevayur Post, Kozhikode, Kerala 673017
3. Platino Classic Motors (India) Private Limited, 11 6B, NH 47 Bypass Road, Maradu P O, Cochin, 682304, Represented by Liquidator, Mr. Reuben Joseph.

... Respondents

Coram:

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

Appearances (through video conferencing)

For Applicants : Mr. A C Venugopal, Advocate
Mr. Vibin Vincent, Liquidator

For Respondents : Mr. Arjun Sheth,
Advocate (R1& R2)
Mr. Reuben Joseph,
Liquidator(R3)

Order reserved on: 08.02.2023

Order pronounced on: 22.06.2023

ORDER

1. This application has been filed by the liquidator of the Koyenco Autos Private Limited under section 66 of the IBC for direction directing the 1st and 2nd respondents to pay the amount, which was fraudulently siphoned by them
2. Koyenco Autos Private Limited (CD) was admitted to CIRP vide order dated 06.10.2021. Thereafter a stay was granted by Honourable High Court on 13.10.2021 which got vacated on 15.12.2021. Since then CIRP continued and COC appointed the applicant as the RP which was confirmed by order of this Tribunal dated 17.01.2022. Subsequently vide order dated 04.11.2022, CD was admitted to liquidation.

Brief facts of the Petitioner: -

3. Applicant submits that after analysing the books of CD certain anomalies were noted and in the 4th COC, it was decided to conduct a forensic audit for a period of 01.04.2016 to 06.10.2021. The forensic auditor submitted his report dated 15.06.2022 wherein following irregularities has been noted: -
 - A. As on 06.10.2021, Rs. 34,17,335/- is shown as loan outstanding from R2 which is in violation of section 185 of Companies Act, 2013.
 - B. An amount of Rs.3.69 crore has been taken as loan from IDBI Bank for business purposes by R1, R2 and CD as co borrowers providing CD's 29500 sq. ft commercial property as security and the amount was released to R1 account by the Bank.
 - C. It is observed that CD has 84% share in Platino Classic Motors Private Limited, R3 on 31.03.2018 where R1 and R2 are the only shareholders and directors. On 20.04.2017, R1 was allotted 7156000 shares in R3 by conversion of loan. On 31.10.2017, R3 allotted 2340014 shares to R1 and 99986 share to R2 as bonus shares. Together in 2017-18, R3 allotted 9596000 shares of 10 each to R1 and R2. It was these shares which was bought by CD for consideration of Rs. 95960000/- . R3 had 8.06 crore and 2.06 crore as loss during 2016-17 and 2017-18. On 18.11.2018, the dealership agreement with R3 was terminated by BMW India. BMW Financial Services had extended loan to R3 on April and May, 2018. It is stated that CD sourced the fund for this purchase from loan taken from

IDBI Bank and proceeds from sale of land in a joint development agreement with Hilite Builders. It is stated that enterprise evaluation was not carried out by CD before such purchase of shares and no share transfer documents were provided for verification by suspended board. It is further noticed that R3 went into CIRP on 08.03.2021. It is hence stated that this transaction was with an intent to defraud the creditors of the CD.

D. An amount of Rs. 3,60,000/- which was rent amount from Autostarke Private Limited due to CD on 02.11.2021 and 01.12.2021 was transferred directly to suspended MD's personal account instead of CD account. The amount due pertains to CIRP period and suspended MD is not legally bound to collect the same and is alleged as intentional diversion of funds.

4. It is stated by applicant that the suspended directors were sought explanation for the above transaction and the same were not found satisfactory and determined to be a plot to siphon asset and defraud creditors of CD. It is stated that no resolution of board or general body is seen authorising the loan to directors. It is stated in the resolution passed by directors on 31.10.2017 that as already an amount of 10 crore is paid to R1 and R2, it is resolved to convert same to equity share of 95,96,000 of 10 each. Hence there is no intention to purchase the share of R3 when loan was granted to them which in turn violate section 62 of companies act, 2013.

Brief facts of the counter: -

5. On respondents' side, submitted that the applicant has not placed any material on record to prove any intent of fraud or a fraudulent purpose. Respondents placed judgement of Hon'ble Supreme Court in *Anuj Jain vs Axis Bank Limited & Ors.* to substantiate the contention that without element of fraud or dishonest intention to defraud creditors or a fraudulent purpose, the case would not stand under surmise of section 66 IBC. It is stated that there are 2 financial creditors BMW India Financial Services and IDBI Bank having claim of 29.41 Crore and 9.90 crore respectively. It is stated that R3 company was profit making till 31.03.2016 and in result of several representations and talks a turnaround

package was sanctioned by BMW group to R3. It is stated that it was in 2015-2017 that the company came in for loss. It is stated that Koyenco Autos Private Limited (CD) was also looking for new dealerships in automobile and it is in this interest that CD decided to invest in R3 for restarting operations of CD. Board resolutions and return of allotment in Form PAS-3 is submitted by respondents evidencing same. It is stated that the said transfer was intimated to BMW India Pvt Ltd vide email on 20.07.2018 by R3. Hence the respondents state that they had no intention to defraud creditors.

6. It is further stated that it was to restart the operation of CD that loan from IDBI was taken by the CD on 30.07.2016 and the amount was disbursed to the account of CD as seen by Bank statement of CD. It was from this that an amount of 4.5 crore was transferred to R1 account on 11.08.2016 and the said amount was invested in Platino Classic Motors(R3) on 16.08.2015. It is stated that out of 2 FC's that CD had, it was BMW India Financial Services Private Limited is a FC only because the CD had acted as co borrower to loan agreements with R3. The respondents argued that bad commercial decisions cannot be considered as wrongful or fraudulent under section 66 of the IB Code. Respondents further submitted proofs of the amount of money infused in CD in order to prevent insolvency. It is further stated that the respondent has from his personal account tried to repay the IBI Bank loan and there is no intent to defraud.
7. With regard to diversion of fund to personal account of R1 it is stated that the said amount was transferred to carry out repair work, tax payments and to meet out expenses of CD as the account of CD was not able to be operated. The transaction receipts are submitted by the respondents. Further the respondent stated that merely transfer of loan to R1 account is not illegal and the Bank has itself transferred the same.
8. W.r.t violation of section 185 of Companies Act, 2013, it is stated that mere violation of section 185 does not mean there is a fraudulent intention on part of respondents.
9. Heard both sides and perused documents on record. It is settled position of law that regulation 35A of Insolvency Bankruptcy and (Insolvency Resolution

Process for Corporate Persons) Regulation 2016 is directory in nature because no consequential effect is mentioned therein for non-compliance of time limit. As this view is expressed and fortified in Madras High Court Judgment Shahji Purushutom -vs- Union of India, there it is observed that when there is no consequential result as prescribed it will consider as only a directory. Therefore limitation is not an issue to consider in this application.

10. Next it is to be seen whether the RP determined the occurrence of fraudulent transaction. Here the RP has stated that he found certain anomalies in the books of accounts of CD and consequently decided to conduct forensic audit by delegating power to the expert. Further the Resolution Professional accepted the Forensic Auditor's report and determined on his own and filed this application. Thus, there is independent determination by RP to file the application.

The Points for determination are: -

- a) Whether, the Respondents are indulged in fraudulent Transactions?
- b) Whether the applicant is entitled for recovery of the amounts as prayed in the application?

Point No 1 and 2: -

11. The applicant alleged that the 1st and 2nd respondents had indulged in certain fraudulent transactions covers under Section 66 of the Insolvency and Bankruptcy Code, 2016. The allegations made against the respondents are that they have diverted the funds of the Corporate Debtor in to their personal accounts and siphoned the amounts.

12. The allegation levelled against the 2nd respondent is that during the financial year 2016-2017, she being the director of the corporate debtor, abused her position and taken the amount of Rs.29,53,488.95 as interest free loan advanced by the corporate debtor. This is in violation of section 185 of the Companies Act 2013. From the forensic report it appears that on the 2nd respondent side not given any satisfactory reply to this allegation. Further there is no loan agreement executed by the 2nd respondent in favour of the corporate debtor. The amount payable by the 2nd respondent to corporate debtor as on 06.01.2021 is Rs.34,17,335/- On the 2nd



respondent side not denies this allegation but taken a plea that violation of section 185 of Companies Act 2013 ipso facto does not attract section 66 IBC 2016.

13. The allegation levelled against the 1st respondent is he availed a personal loan of Rs.3.69 crores from the IDBI Bank during the financial year 2016-2017. The corporate debtor and 2nd respondent are added as co-applicant and given the immovable property of the corporate debtor as security. When the 1st respondent failed to repay the loan, the IDBI Bank submitted a claim for a sum of Rs.4,02,94,433.70/- against the corporate debtor since immovable property of the corporate debtor was given as security. The 1st respondent created charge against the immovable property of the corporate debtor in violation of section 185 of companies Act 2013. Here also on the respondent side not denies the transaction narrated above but pleaded that the violation of section 185 of companies Act 2013 ipso facto does not attract transaction under section 66 IBC 2016.

14. The other allegation is the 1st and 2nd respondents with an ulterior motive transferred their 95,96,000 total shares in 3rd respondent company to the corporate debtor. For the consideration of these acquisition of shares, amount was adjusted from the loan amount repayable by the respondents 1 and 2 to the corporate debtor. The respondents 1 and 2 are directors of the 3rd respondent company also. They know that the 3rd respondent company is facing difficulties and suffered loss to an extent of 8.06 crores and 2.62 crores during the financial year 2016-2017 and 2017-2018. The dealership agreement also terminated by BMW on 18.11.2018. At this stage the 1st and 2nd respondents transferred their shares to the corporate debtor on the face value of shares, the respondents wantonly not done enterprise valuation of 3rd respondent. The 84% shares of 3rd company respondent were transferred by the 1st and 2nd respondents to the corporate debtor. In the relevant period the BMW financial services extended loan to the R3 company. For the consideration of purchase of these shares the corporate debtor applied for loan from IDBI Bank, the loan amount of Rs.5 crores was credited into the account of corporate debtor on 30.07.2016 and out of the said amount a sum of Rs.4.5 crore was retransferred to the accounts of 1st respondent on 11.08.2016. Further the amount payable to the corporate debtor for the sale of land by a joint venture Development agreement with Hilite Builders also taken by the respondents for the sale consideration of

shares. Thus, totally the 1st and 2nd respondents received total consideration of Rs.9,59,60,000/- The 1st and 2nd respondents not furnished any share transfer documents in this regard either before the forensic auditor nor before this Adjudicating Authority. Thus, both the respondents are liable for these share transfers.

15. On the respondent side not disputed the transfer of shares but denies that there was any fraudulent transaction. It is submitted by the respondents that the amount transferred into 1st respondent account was invested with 3rd respondent company on 16.08.2016 in this regard relies upon the copy of ledger, but on the respondents, side not produced bank statements to show that when the amount was transferred into the 3rd respondent company. It is noticed that 3rd respondent company also admitted into CIRP on 08.03.2021. Further it is argued that bad commercial decision cannot be construed as fraudulent transactions.

16. The next allegation against the 1st respondent is that the corporate debtor was admitted into CIRP on 6.10.2021. The show room building of corporate debtor at Maradu Panchayat, Ernakulam has been leased out to Autostarke Private Ltd on a monthly rent of Rs.1,80,000/- After ordering the CIRP the rents for the months of November & December 2021 were credited into the personal account of 1st respondent on 2.11.2021 and 1.12.2021. As per section 17 of IBC 2016 after ordering CIRP the management of the corporate debtor comes under IRP, the suspended directors are prohibited from dealing with the affairs of corporate debtor. In this case in utter violation of provisions of IBC 2016, the 1st respondent clandestinely received the rent amount in his personal account. Section 66 of IBC 2016 not restricted to pre CIRP period, the section covers even the post CIRP period, if the fraudulent business conduct of the suspended board of directors are found during the CIRP process period.

17. In this regard on the respondent side submitted that sine there was some issue in operating the Bank accounts of the corporate debtor, the rents were credited into the Bank account of 1st respondent. On the respondent side further stated that the rent amounts were utilized for repairing of the property and payment of public dues. After ordering the CIRP there is no need for the 1st respondent to carry out any repair work and making any payment to the public authorities, it is

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against the provision of the IBC 2016, the moment CIRP is ordered the property of the corporate debtor vest with the IRP then RP. If any payment is made after the CIRP order by the suspended Board of directors of corporate debtor to any of the creditor it is void ab initio. In this situation the amount credited into the personal account of 1st respondent a sum of Rs.3,60,000/- has to be credited to the accounts of applicant. If any amount is spent towards the repairs or payment of public dues or other dues since the said payments were allegedly paid without sanction of law and against the law the same cannot be considered.

18. On the respondents side not denies the facts narrated above, instead pleaded that the violation of section 185 of the companies Act 2013 ipso facto does not come under the fraudulent transaction under section 66 of IBC 2016.

The applicant alleged that the 1st and 2nd respondents with fraudulent intention acted against the interest of corporate debtor and acted for their personal interest. It is alleged that the respondents in violation of section 185 of the companies Act 2013 availed the loan from the corporate debtor and used the immovable property of the corporate debtor as security to avail loan from the Bank. It is also alleged that the 1st and 2nd respondents sold their shares in the 3rd respondent company to the corporate debtor knowing that the 3rd respondent is sinking ship and also alleged that the 1st respondent even after order of CIRP against the corporate debtor collected monthly rents of the property of corporate debtor in his personal accounts.

19. Section 66 IBC 2016 defines that if the business is carried on with intent to defraud creditors or for **any fraudulent purpose** it comes under section 66 of IBC 2016. In this case the respondents availed the loan from the Bank in the name of corporate debtor and transferred the amount into their personal accounts. Similarly, the loan availed from the Bank in the name of corporate debtor and the amount paid towards the joint venture agreement to the corporate debtor were utilized by the 1st and 2nd respondents as consideration towards the share transfer. These factors shows that the respondents utilized the name of the corporate debtor to avail loans from the Bank and instead of using the loan amounts to the business of corporate debtor, taken the amount to themselves. The respondents' availed the loan from the corporate debtor in violation of section 185 of Companies Act 2013.



20. The fraud is defined under section 447 Explanation of the companies Act 2013 as follows:

Explanation. -- For the purposes of this section--

(i) "fraud", in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;

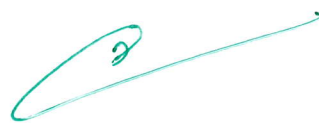
(ii) "wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled;

(iii) "wrongful loss" means the loss by unlawful means of property to which the person losing is legally entitled.

21. In our case the 1st and 2nd respondents knowing that they are forbidden under section 185 of the companies Act 2013 to avail the loan from the corporate debtor, and to create charge over the property of the corporate for the loan availed by the 1st respondent, but the respondents carried out these acts by abusing their position as directors of the corporate debtor with intent to gain undue advantage and cause injuries to the interest of the corporate debtor. Further Section 17 of the Indian Contract Act 1872 defines the fraud, section 17 (5) of the Indian Contract Act, 1872 runs as follows:

“Any such act or omission as the law specially declares to be fraudulent”.

22. In this case the 1st and 2nd respondents acted in violation of section 185 of companies Act 2013, by abusing their position as directors, with intent to gain undue advantage and injury to the company. This act is specially declared by the Companies Act 2013 as fraud. Thus, the acts of the 1st and 2nd respondents comes under the purview of fraud, in consequences it proves that the 1st and 2nd respondents indulged in fraudulent transaction as provided under section 66 IBC 2016.



23. The respondents 1 and 2 indulged in fraudulent transactions with an intention to gain unlawfully and cause injury to the interest of corporate debtor, hence the respondents are liable for their acts. In these circumstances 1st and 2nd respondents are liable to pay the amount as claimed in this application. In the result:

(i) The 1st and 2nd respondents are directed to pay jointly and severally a sum of Rs. 9,59,60,000/- to the applicant within one month from today, failing which the amount Rs. 9,59,60,000/- will carry 12% interest per annum from the date of this order to till the date of realisation,


(ii) The 1st respondent is directed to pay a sum of Rs. 4,06,54,435/- to the applicant within one month from today, failing which the amount Rs. 4,06,54,435/- will carry 12% interest per annum from the date of this order to till the date of realisation of amount and

(iii) The 2nd respondent is directed to pay a sum of Rs. 34,17,355/- to the applicant within one month from today, failing which the amount Rs. 34,17,355/- will carry 12% interest per annum from the date of this order to till the date of realisation of amount.

24. The Registry is hereby directed to send e-mail copies of the order forthwith to all the parties and their counsel for information and for taking necessary steps.

25. Let the certified copy of the order be issued upon compliance with requisite formalities.


Satya Ranjan Prasad
Member (Technical)


P. Mohan Raj
Member (Judicial)

Signed on this the 22nd day of June, 2023.

Rohit/Kaushal P.S.