

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE
JURISDICTION)

Company Appeal (AT)(CH) (Ins.) No. 275/2023
(IA Nos.849 & 850/2023)

(Under Section 61 of the Insolvency and Bankruptcy
Code, 2016)

(Arising out of the Impugned order dated 22.06.2023 in
I.A. (IBC) 183/KOB/2022 in IBA No.37/KOB/2929 passed
by the 'Adjudicating Authority', National Company Law
Tribunal, Kochi Bench, Kerala)

In the matter of:

Ashique Ponnamparambath **...Appellant No. 1**
Suspended management of the Corporate Debtor,
Having his address at: Ponnamparambath House,
Konad Beach, West Hill Post,
Calicut-673005.

Shameena Ashique, **...Appellant No. 2**
Suspended management of the Corporate Debtor,
Having his address at: Ponnamparambath House,
Konad Beach, West Hill Post,
Calicut-673005.

Vs.

Mr. Vibin Vincent, **.....Respondent**
Liquidator of M/s. Koyenco Autos
Having address at:
Chakiath House, Elavoor P.O. Angamaly,
Ernakulam-683 572.

Company Appeal (AT)(CH) (Ins.) No. 275/2023
(IA Nos.849 & 850/2023)

Present :

**For Appellant : Mr. Mr.Arjun Sheth, Advocate
for Mr. Eshwar, Advocate**

For Respondents : Mr. Vibin Vincent, Advocate for Liquidator

**Judgment
(Date: 29.8.2023)
(Virtual Mode)**

[Per.: Dr. Alok Srivastava, Member (Technical)]

1. The present appeal has been filed by Ashique Ponnamparambath, Suspended Management of the Corporate Debtor assailing order dated 22.6.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Kochi Bench, Kerala) in I.A. (IBC) 183/KOB/2022 in IBA No. 37/KOB/2020 under section 61 of the Insolvency and Bankruptcy Code, 2016 (in short “IBC”).

2. IA No. 849 of 2023 in CA(AT)(CH)(Ins) 275 of 2023 was filed for condoning the delay of 13 days, which by a separate order and looking to the grounds provided in the condonation of the delay application, this bench was pleased to condone the delay.

*Company Appeal (AT)(CH) (Ins.) No. 275/2023
(IA Nos.849 & 850/2023)*

3. The Appellant is aggrieved by the Impugned Order in that the Learned Adjudicating Authority has erred in law and facts by labelling the two transactions carried out by the Appellant as fraudulent, which are detailed in paragraphs 13 and 14 of the Impugned Order.

4. We heard the Learned Counsel for Appellants regarding admission of the appeal. The Learned Counsel for Appellant has submitted that Platino Classic Motors Private Limited was a dealer of BMW cars in the State of Kerala and was a profit-making company till 31.3.2016, but thereafter suffered financially as the sale of BMW cars declined at the global level. To overcome the financial distress being faced by the Platino Classic Motors, a turnaround package was sanctioned by the BMW Group on 23.7.2017 and since the corporate debtor Koyenco Autos Private Ltd. was looking for new dealership in auto industry, the Board of the corporate debtor decide to make an investment in Platino Classic Motors and obtain shares of this company. He has further submitted that thereafter an investment of Rs.9,59,60,000 was made in Platino classic Motors by the corporate debtor, and this

amount has not been utilized by the Appellants for the personal purposes.

5. The Learned Counsel for Appellants has also submitted that it was decided by the corporate debtor to restart its business and a loan of Rs. 5 crores was taken from IDBI Bank for the same, which was disbursed on 30.7.2016. He has added that from this amount of Rs. 5 crores, an amount of Rs. 4.5 crores from the account of the corporate debtor was transferred to the account of Ashique Ponnamparambath, Managing Director of the corporate debtor on 11.8.2016 to invest the said amount in the account of Platino Classic Motors and the said amount was transferred to the Platino Classic Motors and no amount was withheld by the appellants. He has further submitted that the buying of these shares may be bad commercial decision, but cannot be considered as wrongful or fraudulent trading under section 66 of the IBC. He has further submitted that the investment of the corporate debtor in Platino Classic Motors has become 'nil' cannot be a reason to conclude that the investment undertaken by the Appellants on behalf of the corporate debtor are fraudulent or wrongful in nature.

6. On the above submissions of the Appellants, the following portions of the affidavit in reply submitted by the appellants before the Adjudicating Authority in IA No. 183 of 2022 are worth noticing, which are reproduced below:-

“23. At the same lime the present Corporate Debtor le Koyenco Autos Private Limited was looking for new dealerships in the automobile industry, Therefore, after due deliberations, It was decided by the board of the Corporate Debtor to invest in the Platino Classic Motors Private Limited and obtain shares of the same.

24. It was decided by the directors of the Corporate Debtor to invest in Platino Classic Motors Private Limited in consonance with the object clause of the Corporate Debtor and in order to restart the business operations of the Corporate Debtor. Therefore, resolutions were passed regarding to the same. Copies of the board resolutions and return documents i.e. FORM NO. PAS -3 enunciating the share transfer is annexed hereto and marked as Annexure E lo the present affidavit in reply.

xx xx xx xx

28. It is further submitted that from the said amount an amount of 4.5 Crores was transferred to the account of the managing director of the Corporate Debtor i.e. Respondent No. 1 on 11.08.2016 to invest the said amount in Platino Classic Private Motors Limited. Ledger of Respondent No. 1 for the account of the Corporate Debtor is annexed hereto as Annexure H to the present Affidavit-in-Reply.”

7. We this note that it is admitted by the Appellants in their reply before the Adjudicating Authority that an amount of Rs.4.5

crores was transferred to the account of the Managing Director i.e. Ashique Ponnamparambath on 11.8.2016. Thus, it is clear that the said amount was transferred from the account of the corporate debtor to the account of Appellant No. 1 and thereafter an investment was made in Platino Classic Motors. Quite clearly this transaction infringes section 66 of the IBC as it was made by Appellant No. 1 from his account.

8. It is also clear from the Impugned Order, particularly, paragraphs 13, 14 and 18, which are reproduced below that the allegations levelled against Appellant No. 1 were clearly regarding using the funds and immovable property of the corporate debtor for his personal benefit:-

“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 Rs. 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.

Xx xx xx xx

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 personnel accounts.”

9. Paragraph 18 of the Impugned Order very clearly record that the Appellants have taken the defence that the transactions carried out by them were not fraudulent transactions, but merely violation of section 185 of the Companies Act, 2013. In paragraphs 20 and 21 of the Impugned Order, the Adjudicating Authority has given a finding regarding the fraud committed by the Appellants which is borne by the nature of transactions made by the Appellants, whereafter order has been given to make good the amounts siphoned from the account of the corporate debtor by the Appellants for their personal benefit.

10. In the light of the above, this Tribunal is objectively convinced that the Impugned Order does not suffer from any infirmity and the Appellants have been unable to make out a case for admission of the present appeal. Therefore, the instant appeal

is dismissed at the stage of Admission itself. No order as to costs.

The connected pending IA No. 850 of 2023 is closed.

[Justice M.Venugopal]
Member (Judicial)

(Dr. Alok Srivastava)
Member (Technical)

Chennai
29th August, 2023

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