

Koyenco Autos: Liquidation Realized 77% of Claims

This is a classic case of a company experiencing financial collapse, primarily due to prevalent avoidance transactions by the directors, including siphoning of funds, and compounded by management inefficiencies. The Corporate Debtor (CD) was unable to obtain a viable resolution plan during the Corporate Insolvency Resolution Process (CIRP). However, 77% of its total claims were realized through the liquidation process by employing effective marketing techniques and pursuing avoidance transactions in an innovative manner.

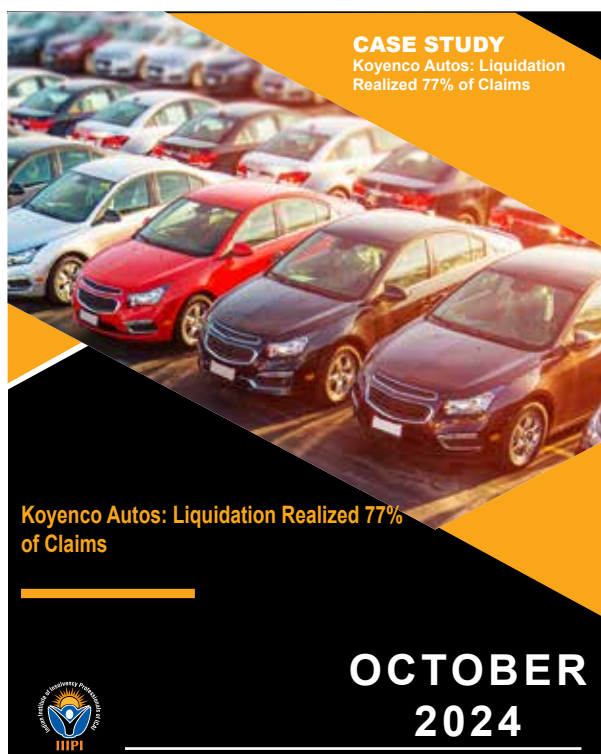
Platino Classic Motors Private Limited (Platino), an authorized dealer of BMW India in the State of Kerala, obtained loans from BMWFS through various agreements and included its sister company Koyenco Autos Pvt. Ltd. (Koyenco) as coborrower in an agreement. On default, insolvency proceedings were initiated against Platino. Subsequently, Koyenco (CD) was also admitted to CIRP via an order of NCLT on October 06, 2021. The total claims against the CD amounted to about ₹39 crore with BMWFS holding a majority share of 74.80% and IDBI Bank holding 25.20%.

*In the present case study, Mr. Vibin Vincent, the RP and Liquidator of the CD, has highlighted the challenges faced during the CIRP and Liquidation, value maximization, Avoidance Transactions etc. **Read on to know more...***



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1. Introduction

This case study examines the Corporate Insolvency Resolution Process (CIRP) of M/s Koyenco Autos Private Limited (Koyenco) and its subsidiary Platino Classic Motors Private Limited (Platino), which faced financial stress primarily due to financial mismanagement and fraudulent activities leading to the initiation of insolvency proceedings under the Insolvency and Bankruptcy Code (IBC) 2016. The case highlights the complexities of CIRP in India, particularly when the sister concerns are involved, and financial irregularity leads to financial crisis of the Corporate Debtor (CD).

2. Background

BMW India appointed Platino as an authorized dealer in the state of Kerala. Over the years, the dealership agreement was extended multiple times, with the final extension lasting until December 31, 2018.

To support its dealership operations, Platino made substantial investments primarily financed through loans from BMW India Financial Services Private Limited

(BMWFS). These loans were governed by several agreements, including a Floor Plan Agreement, Credit Facility Agreement, and Spare Part Financing Agreement.

To accommodate Platino's growing financial needs, BMWFS agreed to provide additional funding on the condition that Koyenco, a related entity with common directors, would serve as a co-borrower. A Term Loan Agreement was subsequently executed among Koyenco, Platino, and BMWFS, enabling Platino to borrow an additional ₹13 Crores. The funds were disbursed to Platino, with Koyenco's assets, particularly its land and building, serving as collateral for the loan through an Addendum Agreement that added Koyenco as a co-borrower to the existing agreements.

Platino's business and financial health gradually declined due to a confluence of internal and external factors, including global economic downturns, inadequate marketing strategies, and customer dissatisfaction. These challenges resulted in Platino's default on its loan and credit facility repayments to BMWFS. As Platino's financial difficulties intensified, BMW India appointed a new dealer in Kerala, ultimately leading to the termination of Platino's operations.

3. Initiation of CIRP against of Koyenco

Federal Bank Limited, a secured creditor of Platino, initiated CIRP against Platino, which were subsequently admitted by the National Company Law Tribunal (NCLT), Kochi Bench (Adjudicating Authority or AA). Subsequently, BMWFS filed a CIRP application against Koyenco, the CD, due to its failure to fulfil its co-borrower obligations.

The promoters argued that, according to the IBC, to be considered a financial creditor, funds must be disbursed to the debtor, and in this case, the funds were disbursed to Platino, with Koyenco only added as a co-borrower. However, the AA clarified that, under Section 7 of the IBC, a financial creditor, either alone, jointly with other financial creditors, or through a representative, may initiate CIRP proceedings against a CD, including cases where the CD is a co-borrower or guarantor. As per Section 5(7), a financial creditor is defined as one to whom a financial debt is owed, and financial debt includes liabilities related to guarantees or indemnities. Therefore, a lender can pursue both the

principal borrower and the co-borrower in the event of default, making Koyenco, as a co-borrower, liable and qualifying it as a CD under Section 3(8) of the IBC.

“ NCLT observed that in the case of default, a lender can pursue CIRP against principal borrower as well as co-borrower and ordered initiation of insolvency against Koyenco. ”

Further, the promoters contended that Section 7 application filed by BMWFS against Koyenco was not admissible since a similar CIRP application had already been admitted against Platino, and BMWFS was claiming the same debt from Platino. The AA addressed this by noting that the current application was filed exclusively against Koyenco but not Platino, and earlier application was based on a filing by another secured financial creditor - Federal Bank Limited. Since the current application was solely directed at the co-borrower Koyenco, there was no legal impediment to admitting it against the CD. The AA admitted¹ the Section 7 application and appointed the Interim Resolution Professional (IRP) to conduct the CIRP and dismissed Koyenco's Interlocutory Application (IA) to refer the matter to arbitration, as no disputes regarding the financial debt were identified under Section 7 of the IBC.

Promoters preferred an appeal to the National Company Law Appellate Tribunal (NCLAT), seeking to overturn the initiation of CIRP against Koyenco. However, NCLAT dismissed this appeal, emphasizing that Koyenco had willingly assumed joint liability² as a co-borrower in the loan agreements between BMWFS and Platino. The tribunal noted that Koyenco's participation in the loan agreements established its liability as a financial debtor, regardless of the direct disbursement of funds. This ruling was consistent with established legal principles, notably in the case of *Maitreya Doshi vs. Anand Rathi Global Finance Ltd. & Anr.*, which affirmed that a co-borrower could be classified as a financial debtor under the IBC.

¹ NCLT Kochi, IBA/37/KOB/2020, dated October 06, 2021.

² NCLAT Chennai, Company Appeal (AT) (Ins) - 301/CN/202, dated 27th July 2023.

The promoters escalated their appeal to the Supreme Court, but it was dismissed reinforcing the validity of the CIRP against Koyenco.

4. Commencement of CIRP

4.1 Key Issues and Challenges

Interconnected Liabilities: The close relationship between Koyenco and Platino made it challenging to disentangle their financial liabilities. This resulted in both companies being embroiled in the insolvency proceedings, despite Platino's primary role in the financial distress.

Fraudulent Investment: Koyenco's fraudulent investment in Platino created a complex legal and financial situation. The NCLT was required to address the implications of this illegal act on the insolvency proceedings.

Co-Borrower Liability: Koyenco's liability as a co-borrower for Platino's debts exposed its own assets to creditor claims. This highlighted the risks associated with entering into such arrangements, particularly when the financial health of the primary borrower is uncertain.

Diversion of Funds: The diversion of funds by Koyenco and Platino contributed to their financial downfall. This case underscores the importance of effective corporate governance and internal controls to prevent such practices.

4.2 Promoters' legal efforts to avoid insolvency proceedings

The insolvency process of Koyenco was characterized by multiple attempts by the suspended management to impede the proceedings, employing various legal avenues to challenge and delay the CIRP. These efforts culminated in multiple litigations aimed at contesting the initiation and conduct of the CIRP, each of which ultimately proved unsuccessful. The following is an analysis of the key litigations pursued by the suspended management and their outcomes.

(a) Writ Application at the High Court of Kerala

Among the earliest attempts by the former directors to impede the insolvency proceedings was the filing of a

writ application in the High Court of Kerala. The directors sought a temporary injunction on the CIRP proceedings, arguing that they were unable to appeal the CIRP order to the NCLAT due to the Appellate Tribunal's closure during the Dussehra and Milad-Un-Nabi holidays. The High Court granted a temporary injunction for one month, effectively halting the CIRP. This injunction was subsequently extended twice, resulting in a suspension of 60 days during the CIRP period³.

“ The injunction by the High Court of Kerala resulted in the suspension of CIRP for 60 days. Finally, the injunction was vacated and the CIRP resumed. ”

The temporary relief granted by the High Court, while a short-term victory for the promoters, had minimal impact on the overall course of the CIRP. The delay caused by this injunction was eventually overcome, and the CIRP proceedings resumed, leading to the continuation of the insolvency process. The High Court's involvement, while notable, ultimately did not prevent the CIRP from progressing, as the legal basis for the injunction was time-limited and related solely to procedural delays at the NCLAT.

(b) Application for Appointment of Sole Arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996

Following the initiation of CIRP against the CD, the management filed a petition under Section 11(5) of the Arbitration and Conciliation Act, 1996, seeking the appointment of a Sole Arbitrator. The intent behind this petition was to transfer the dispute to arbitration, potentially circumventing the CIRP. However, after the CD was admitted into CIRP, the Resolution Professional (RP) pursued the application on behalf of the CD and informed the court that the CIRP had already been initiated by the AA, following an application under Section 7 of the IBC filed by BMWFS.

The admission of the Section 7 application by the AA rendered the arbitration application under Section 8

³ High Court of Kerala, WP(C) 22280/2021, dated November 16, 2021.

of the Arbitration Act as infructuous. The Delhi High Court, aligning with the established legal precedent that insolvency proceedings are in rem (i.e., against the company and its assets), ruled that the request for arbitration was unsustainable while the CIRP was active. Hon'ble High Court of Delhi relied upon the judgments of the Supreme Court in the case of Indus Bio-Tech Pvt. Ltd. vs. Kotak India (Offshore) Fund (2019) and Anil vs. Rajendra, (2015) rejected the petition, highlighting that the initiation of CIRP nullified the arbitrability of the dispute⁴.

(c) Application under Sections 65 and 60(5) of the IBC: Allegations of Fraudulent or Malicious Initiation of Proceedings

In a final bid to derail the insolvency process, the suspended board of directors of Koyenco filed applications under Sections 65 and 60(5) of the IBC, accusing BMWFS of initiating CIRP with fraudulent or malicious intent. The directors alleged that BMWFS had filed the Section 7 application not to resolve insolvency but to obstruct Platino Classic Motors' claim for compensation related to the termination of its dealership with BMW India. They argued that the initiation of CIRP was part of a collusive effort between BMWFS and BMW India to strip Koyenco of its assets under mortgage, rather than to pursue a legitimate insolvency resolution.

“ NCLT Kochi Bench dismissed the Section 65 application filed by promoters noting that it was filed after the initiation of liquidation. ”

The NCLT, Kochi, rejected these applications, noting that the petition under Section 65 of the IBC was filed long after the CIRP was initiated and even after the commencement of liquidation. The tribunal emphasized that the application was not only time-barred but also lacked substantive evidence to support the claims of fraud or malicious intent. The NCLT pointed out that the directors had already exhausted their legal remedies by challenging the CIRP order before the NCLAT and the

Supreme Court, both of which dismissed the appeals. Furthermore, the court observed that the directors failed to raise these allegations during the initial stages of CIRP, choosing instead to wait until other legal avenues had been exhausted. As a result, the tribunal dismissed the applications, upholding the legitimacy of the CIRP and rejecting the notion of malicious intent on the part of BMWFS.

5. Outcomes of the CIRP

5.1. Constitution of the CoC

Following the lifting of the stay by the Kerala High Court on December 15, 2021, CIRP for Koyenco was resumed. The IRP quickly moved forward, inviting claims from creditors through public advertisement. Two secured financial creditors, BMWFS and IDBI Bank, submitted their claims, which were duly verified and admitted. The total claims amounted to ₹393,260,723, with BMWFS holding a majority share of 74.80% and IDBI Bank holding 25.20%. These verified claims formed the basis for constituting the Committee of Creditors (CoC), which was officially recognized by the AA.

As the IRP did not consent to act as the RP, the CoC recommended the appointment of another Insolvency Professional (IP). However, the Hon'ble NCLT rejected the appointment of IP other than the IRP, proposed by the CoC because the proposed IP was not part of the panel maintained by the Insolvency and Bankruptcy Board of India (IBBI). The NCLT appointed another IP, Mr. Viben Vincent, from the IBBI panel as RP of the CD.

The AA's decision was based on the provisions of Section 22(3)(b), (4), and (5) of the IBC. Sections 22(3)(b), (4), and (5) of the IBC set forth the procedure for replacing the IRP and appointing another IP as the RP. These sections require that the AA must forward the name of the RP proposed by the CoC to the IBBI for confirmation. The appointment be made only after the confirmation by the IBBI.

5.2. Handover and Preparation of Information Memorandum

After the new RP was appointed, the IRP promptly handed over all necessary documents, records, and assets, which were verified and taken into custody. The

⁴ High Court of Delhi, ARB.P. 870/2021, dated September 06, 2022.

RP then undertook the preparation of the Information Memorandum (IM) as per Section 29(1) of IBC read with Regulation 36(1) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), drawing from the company's books of accounts, audited financial statements, and other records. The IM provided a comprehensive overview of Koyenco's financial status, assets, liabilities, and other critical information essential for prospective resolution applicants (PRAs).

“ The RP ensured that IM provided a comprehensive overview of CD's financial status, assets, liabilities, and other critical information essential for prospective resolution applicants. ”

5.3. Appointment of Professionals for Valuation, Auditing, and Legal Assistance

To ensure compliance of Regulation 27 of CIRP Regulations and a thorough and accurate resolution process, the RP appointed two registered valuers for each category of Koyenco's assets, including 'land and building', 'plant and machinery', and 'securities & financial assets'. These valuers conducted independent assessments to determine the fair and liquidation values of the CD's assets. Additionally, the RP appointed a statutory auditor to address the pending audits of the company's financial statements, which had not been completed for several years. To further scrutinize Koyenco's financial transactions, a forensic auditor was engaged to investigate any Preferential, Undervalued, Fraudulent, or Extortionate (PUFE) transactions.

For handling legal matter, a legal firm was appointed which provided essential legal support and representation in various court proceedings. An accountant was also engaged to update and maintain Koyenco's books of accounts, ensuring that financial records were accurate and up to date during the CIRP. Moreover, a caretaker was hired to protect and maintain the physical assets of the company during the resolution process.

5.4. Publication of Form G

With the CoC's approval, the RP issued Form G as per Regulation 36A of CIRP Regulations to invite Expressions of Interest (EoI) from PRAs. However, only one EoI was received, which came from the suspended Managing Director of Koyenco. Despite this initial response, the suspended director failed to submit a resolution plan within the stipulated deadline, leading to the failure of the first Form G issuance.

In a subsequent CoC meeting, the RP was authorized to re-publish Form G to attract more resolution applicants. Once again, only the suspended director expressed interest by submitting an EoI. After verification, the suspended director was declared an eligible resolution applicant under Section 29A, considering the exemption available under Section 240A of the IBC, which applies to Corporate Insolvency Resolution Process for Micro, Small, and Medium Enterprises (MSMEs). This exemption waives the applicability of clauses (c) and (h) of Section 29A. The RP ensured that the CD qualified as an MSME.

The director then requested an extension to submit the resolution plan. After careful deliberation, the CoC, by majority vote, granted a 30-day extension to provide the director with additional time to complete and submit the resolution plan. This decision reflected the CoC's willingness to explore all possible avenues for resolving the insolvency, despite limited interest from external applicants.

Eventually, the director submitted the resolution plan along with the Earnest Money Deposit (EMD). After scrutiny, the RP presented the plan to the CoC, accompanied by a note highlighting the deficiencies and non-compliances for further deliberation. Upon review, the CoC found that the resolution plan was vague and lacked key details. Critical information regarding the source of financing, which is essential for the plan's feasibility, was missing. Moreover, the financial bid was significantly below the liquidation value, and there was no clarity on the business structure post-approval. The applicant's request for the release of a personal guarantee upon plan acceptance further complicated the plan's viability.

“ Even after granting an additional time of over 30 days, the director of the CD, an MSME, failed to submit a viable resolution plan. ”

Despite the CIRP period nearing its conclusion, the CoC granted the director additional time to submit a revised resolution plan with an improved offer and to rectify the deficiencies. However, the revised plan was largely similar to the initial one, with only minor technical changes. It still failed to comply with the Request for Resolution Plan (RFRP) conditions, lacked clarity regarding the source of financing, and omitted necessary declarations as required by Regulations 37 and 38(1B) of the CIRP Regulations.

5.5. Final Decision and Liquidation

Dissatisfied with these shortcomings, the CoC exercised its commercial wisdom and decided that liquidation of the CD was the only viable option. It was noted that the CD had been a non-going concern for several years and had actively attempted to dispose of its assets. Therefore, liquidation was deemed inevitable. Furthermore, in accordance with Regulation 39AB, the CoC did not recommend exploring a compromise or arrangement under sub-regulation (1) of Regulation 2B of the IBBI (Liquidation Process) Regulations, 2016.

6. Liquidation Process

6.1. Order of liquidation

The Hon'ble NCLT, Kochi bench ordered initiation of liquidation of the CD and appointed the RP as its Liquidator. As directed by the order and in compliance with the IBC and IBBI (Liquidation Process) Regulations, 2016, the Liquidator made a public announcement in one Malayalam and one English newspaper inviting claims from creditors and informed the same to the CoC and directors of the CD. Besides, statutory authorities including SEBI, the Income Tax Department, the State Tax Department, the PF Department, the GST Department, and the Labour Department were also informed via email about the initiation of the liquidation process. A separate liquidation account was opened with

IDBI Bank for receiving all money due to the CD.

Following the public announcement, the liquidator received two claims from financial creditors and three claims from statutory/government authorities, which were verified and admitted in accordance with Section 41 of the IBC, 2016. In compliance with Regulation 31A (6) of the IBBI (Liquidation Process) Regulations, 2016, the liquidator conducted the first Stakeholders Consultation Committee (SCC) meeting within one week. In the first SCC meeting, it was decided to rely on the existing valuation conducted during the CIRP, negating the need for a separate valuation.

6.2. Realisation of Readily Realisable Assets

The CD had two properties as assets, which included 26.67 acres of land and the building thereon, along with plant and machinery (office equipment) of the BMW showroom, and 29,500 sq. ft. of commercial office space and cafeteria, along with proportionate common area and car parking space on the basement floor, ground floor, and 1st floor of the High-lite Platino commercial building. These properties were specifically mortgaged to BMWFS and IDBI Bank, respectively.

Both secured financial creditors submitted their claims in time and in the appropriate form. IDBI Bank Ltd., one of the secured financial creditors, opted to realize its security interest under Section 52(1)(b) of the IBC, in conjunction with Regulations 21A(2) and 37 of the IBBI (Liquidation Process) Regulations, 2016. In contrast, BMWFS, the other secured financial creditor, chose to relinquish its security interest to the liquidation estate under Section 52(1)(a) of the IBC and receive proceeds from the sale of assets by the liquidator in accordance with Section 53 of the IBC.

The first auction for the property, for which the security interest had been relinquished by BMWFS, failed due to the lack of EMD from bidders, despite the reserve price being set at the fair value determined by registered valuers and approved by the SCC. A second auction, advertised more widely but with the same reserve price, also failed for the same reason. Following the SCC's recommendation, a third auction was held with a 10% reduced reserve price, but it too failed due to non-submission of EMD by bidders.

“ Ultimately, the property was sold in this fourth auction to a single bidder at a price significantly higher than the liquidation value. ”

The Liquidator then explored private sale options as per the IBC Regulations and received interest from two potential buyers. To promote competition in the bidding process and maximize the realizable value of the CD's assets, the Liquidator proposed another public auction, setting the highest private offer as the new reserve price. Ultimately, the property was sold in this fourth auction to a single bidder at a price significantly higher than the liquidation value.

However, IDBI Bank Ltd., which had opted to realize its security interest, was unable to do so within 180 days from the liquidation commencement date and failed to deposit the surplus amount with the liquidator as required under Regulation 21A of the IBBI (Liquidation Process) Regulations, 2016. When the bank's application for an extension of time was rejected by the Hon'ble NCLT, Kochi Bench, possession of the asset was transferred back to the liquidator following the NCLT's order.

Subsequently, the liquidator conducted an auction of the repossessed property at the reserve price of the two previously failed auctions held by IDBI Bank. The property was sold in the first auction conducted by the liquidator after its repossession into the liquidation estate.

As a result, the total amount realized from readily realizable assets, including immovable property, closure of fixed deposits and interest thereon, as well as interest for the delayed remittance of sale proceeds by the successful bidder, amounted to ₹33,20,99,493, against a liquidation value of ₹29,48,97,324, resulting in a recovery rate of 113%.

Subsequently, the proceeds from the realization of assets were distributed according to the waterfall mechanism outlined in Section 53 of the IBC.

6.3. Realisation of Not Readily Realisable Assets

The insolvency process of Koyenco uncovered significant instances of preferential transactions and fraudulent

trading and wrongful conduct by the company's former directors under Section 43 and 66 of the IBC. These findings were brought to light following a meticulous examination of Koyenco's financial statements, books of accounts, and other relevant documents by the RP. The identification of these anomalies led to the decision to conduct a transaction audit which further exposed the preferential and fraudulent transactions carried out by the directors, necessitating legal action.

(a) Fraudulent Share Transfer by Directors to the CD to Settle Personal Liabilities

The additional shares allotted to the promoters in Platino (a sister concern), in violation of the provisions of the Companies Act, 2013, were subsequently transferred to Koyenco. This transfer, carried out by the suspended directors, was highly questionable, involving a series of dubious transactions that primarily benefited the directors at the expense of Koyenco and its creditors.

It was discovered that ₹10 crore had been illicitly diverted to the personal accounts of the suspended Managing Director (MD) of Koyenco, which was recorded as a 'Loan to Director.' These funds were sourced from the proceeds of a Joint Development Agreement involving the sale of Koyenco-owned land, as well as from a loan Koyenco had obtained from IDBI Bank, using the company's property as collateral.

“ Total 95,96,000 shares were transferred to Koyenco at face value, offsetting the ₹10 crore liability of the director. ”

Simultaneously, Platino, issued 71,56,000 shares at a face value of ₹10 to the directors by converting an accumulated loan payable to one of them. However, there was no formal agreement governing this loan, nor any provision allowing its conversion into equity shares. Additionally, 24,40,000 bonus shares were issued to the promoters in proportion to their existing holdings. These 95,96,000 shares were then transferred to Koyenco at face value, offsetting the ₹10 crore liability of the director as recorded in Koyenco's financial statements.

The former MD's alleged settlement of a ₹10 crore liability to Koyenco through a share transfer of Platino

raised significant concerns. No valuation was conducted prior to the acquisition, and the share transfer documents were missing. Despite Platino's deteriorating financial condition and negative net worth, the directors transferred their shares at face value. Platino's subsequent admission into CIRP and the resulting loss of Koyenco's investment strongly indicated fraudulent intent behind these transactions.

(b) Director's Loan

Another irregularity uncovered during the forensic audit was related to a loan of ₹34,17,335 that was shown as outstanding from one of Koyenco's directors. This loan was in direct violation of Section 185 of the Companies Act, 2013, which restricts companies from providing loans to their directors without proper approval and adherence to specific conditions. In this case, there was no formal agreement to support the loan, and Koyenco did not receive any interest on the amount, even though the company was burdened with interest payments on other loans taken for business purposes. Furthermore, Koyenco was already defaulting on loan repayments to financial creditors, making the director's loan even more questionable and detrimental to the company's financial health.

(c) Loan from IDBI Bank

The forensic audit also revealed a particularly concerning misuse of funds obtained through a loan from IDBI Bank. The former directors of Koyenco had secured a loan of ₹3.69 crore from IDBI Bank for business purposes, with Koyenco serving as a co-borrower. The loan was secured against Koyenco's 29,500 square feet of commercial property. However, instead of using the loan amount for the intended business purposes, the funds were disbursed directly into the former MD's bank account. This misuse of borrowed funds not only constituted a breach of fiduciary duty but also placed Koyenco in a precarious financial position, as the company was liable for the loan despite not benefiting from it.

6.4. Legal Actions and NCLT Ruling

In light of these findings, the Liquidator, acting in the interest of Koyenco's stakeholders, filed an application under Section 66 of the IBC. This section empowers the NCLT to hold directors personally liable for engaging in fraudulent or wrongful trading that leads to the

company's insolvency. The evidence presented in the application demonstrated that the respondents, in their capacity as directors, had obtained loans in the name of Koyenco and then diverted the funds into their personal accounts. Additionally, the funds obtained through the Joint Development Agreement were used by the directors as consideration for the share transfer in Platino, rather than being utilized for the benefit of Koyenco.

The NCLT, in its order dated June 22, 2023, upheld the Liquidator's claims and found the respondents guilty of engaging in fraudulent transactions under Section 66 of the IBC. The AA ruled that the directors had knowingly violated Section 185 of the Companies Act, 2013, by obtaining loans from Koyenco and creating charges over the company's property to secure personal loans. The NCLT held that these actions were a clear abuse of their positions as directors, with the intent to gain undue advantage and harm the interests of Koyenco. As a result, the tribunal classified these actions as fraud under the Companies Act, 2013.

6.5. NCLT Orders for Financial Recovery

The NCLT issued a detailed order directing the directors to make significant financial restitution to the liquidation estate. The directors were jointly and severally ordered to pay a sum of ₹9,59,60,000 to the applicant within one month from the date of the order. In case of failure to comply, the amount would accrue interest at 12% per annum until realization. Additionally, the former MD was ordered to pay a further sum of ₹4,06,54,435, and another director was directed to pay ₹34,17,335, both within the same timeframe and subject to the same interest conditions.

“ NCLT issued a detailed order directing the directors to make significant financial restitution to the liquidation estate. ”

Despite appeals filed by the directors at the NCLAT in Chennai and subsequently at the Supreme Court of India, both appellate forums dismissed the appeals, thereby upholding the NCLT's orders. This legal victory crystallized a due amount of ₹14,00,31,770 against the directors, along with 12% interest per annum from the date of the order until full realization.

The liquidation estate's successful pursuit of these fraudulent transaction applications not only provided a

Table 1: Realization from the Corporate Debtor as on December 19, 2023

| S. N. | Heads | Details of Property | Amount (₹) | Percentage of Liquidation Value | Percentage of Claim Value |
|-------|---|--|---------------------|---------------------------------|---------------------------|
| 1. | Realization from sale of Assets mortgaged to BMW Financial Services | Land and Building of BMW Showroom (Plant and Machinery) and plot | 20,65,00,000 | 115% | 65% |
| 2. | Realization from sale of assets mortgaged to IDBI Bank | Commercial Office, Building, Parking etc. | 12,47,79,595 | 109% | 113% |
| | Total Realization | | 33,12,79,595 | 113% | 77% |

Note: The claim of statutory authorities, which come under Operational Creditors, amounting ₹1,41,32,251 has not considered while calculating the above ratio of percentage of claim.

substantial recovery of funds for the creditors but also served as a strong deterrent against future instances of fraudulent trading by corporate directors. The case reinforced the importance of holding directors accountable for their actions and demonstrated the effectiveness of the IBC in addressing and rectifying corporate fraud.

6.6. Recovery of Preferential Transactions under Section 43 of IBC

During the insolvency process, the RP identified certain transactions that were categorized as preferential under Section 43 of the IBC.

The RP's investigation into Koyenco's financial dealings revealed that a total amount of ₹7,81,352 had been transferred as a preferential payment to the suspended MD of the CD. These transactions were considered preferential because the transfers placed the MD in a more beneficial position than he would have been if the assets had been distributed in accordance with Section 53 of the IBC. The MD is an unsecured creditor and a related party, which led to the conclusion that these transfers gave him an undue benefit, as per Section 43(2) (b) of the IBC. Since he is the former director of the CD, he qualifies as a related party under Section 5(24). As per Section 43(4)(a), a preference is deemed to have been given to a related party if the transaction occurred within two years preceding the Insolvency Commencement Date (ICD). In this case, the transfers were made within the two-year period prior to the ICD, making them fall within the relevant timeframe under Section 43(4).

It was also noted that these transfers were made to settle an antecedent financial debt of ₹36,03,970.50 owed to the MD as of that date. Moreover, these transactions do not qualify as excluded transactions under Sub-section (3) of

Section 43, as they were neither made in the ordinary course of business nor involved the creation of a security interest in property to secure new value.

Recognizing the need to recover this amount for the benefit of the company's creditors, the RP/Liquidator filed an application with the AA under Section 43 of the IBC. The application sought the reversal of the preferential transaction, and the recovery of the funds transferred to the MD. The NCLT, upon reviewing the evidence and the arguments presented by the Liquidator, issued an order directing the suspended MD to repay the sum of ₹7,81,352 to the liquidation estate within one month from the date of the order. The tribunal also stipulated that if the payment was not made within the specified period, the amount would accrue simple interest at the rate of 12% per annum until full realization.

Following the NCLT's order, the suspended MD challenged the decision by filing appeals at both the NCLAT in Chennai and the Supreme Court of India. However, both appellate forums upheld the NCLT's ruling, dismissing the appeals and affirming the Liquidator's right to recover the preferential payment. This outcome further solidified the Liquidator's position in reclaiming funds that had been unjustly transferred, thereby reinforcing the principles of fairness and equitable treatment of creditors as enshrined in the IBC.

As a result of this order and the direction on fraudulent transactions under Section 66 of the IBC, the total crystallized dues from the respondent directors reached ₹14,08,13,122. The addition of 12% interest per annum from the date of order until realization further augmented the liquidation estate, ensuring that creditors received the maximum possible recovery from the company's assets.

The Liquidator's diligent efforts in identifying and pursuing both fraudulent and preferential transactions

under the IBC underscore the importance of thorough financial scrutiny during the insolvency process. By addressing these improper transactions, the Liquidator not only maximized the value of the liquidation estate but also upheld the integrity of the insolvency process, ensuring that all creditors were treated equitably in accordance with the law.

6.7. Assignment of Non-Readily Realizable Assets (NRRA)

The liquidation process of Koyenco formally commenced on November 04, 2022, and the liquidator was tasked with realizing the maximum possible value for the company's assets within the statutory period of one year. Despite the liquidator's diligent efforts, including repeated attempts to recover the dues from the respondent directors as per the NCLT orders, the respondent directors failed to comply with the payment directives. Consequently, the liquidator, in consultation with the SCC, decided to classify these unresolved dues as Non-Readily Realizable Assets (NRRA).

Given the complexity of recovering NRRA, which typically includes assets that are difficult to realize within the usual timeframe of liquidation, the Liquidator and the SCC devised a strategic plan to address the situation. Four potential avenues were identified for the assignment of these assets:

1. Any SCC member belonging to the class of Financial Creditor could opt to take responsibility for pursuing the recovery and continue litigation related to the transaction applications filed under Sections 43, 45, and 66 of the IBC. This would involve a direct assignment of the NRRA to an interested member who would then lead the recovery efforts.
2. In the absence of interest from SCC members, the Liquidator could invite EoI from the public through a formal notice. These EoIs would be evaluated against the liquidation value of the NRRA, if any, and after considering the advice of SCC members, a decision on the assignment would be finalized.
3. The Liquidator could engage professional services from a consultant or law firm, assigning the litigation rights to pursue NRRA recovery. This would be done after thorough consultation with the SCC, and the plan would be reported to the NCLT in compliance with Regulation 44A of the IBBI (Liquidation Process) Regulations, 2016.
4. The liquidator could continue to manage the NRRA litigation personally, utilizing legal tools such as execution and contempt applications, with ongoing guidance and input from the SCC members.

Table 2: PUFЕ Transactions on which recovery order has been passed by NCLT

| S. N. | Official | Amount (₹) | Status |
|-------|-------------------|---------------------|--|
| 1. | PUFE (MD) | 15,93,94,740 | NCLT order passed, Appeals filed by MD & Directors of the CD were dismissed by NCLAT and the Hon'ble Supreme Court. However, recovery is pending |
| 2. | PUFE (Directors) | 39,64,132 | |
| | Total PUFЕ | 16,33,58,872 | |

Note: This PUFЕ amount is inclusive of interest till date 12% per annum.

Following the exploration of these options, the liquidator took proactive steps by sending a formal proposal to financial creditors within the SCC, seeking their interest in the assignment of NRRA. However, no expressions of interest or responses were received from financial creditors, which necessitated a continuation of the NRRA recovery efforts by the Liquidator.

In the absence of immediate solutions, the Liquidator pressed on with efforts to realize the NCLT-ordered dues, filing contempt applications and enlisting appropriate agencies to trace the assets of the respondent directors. This asset tracing yielded some positive results, as certain assets were identified by detective agencies, indicating

potential avenues for recovery.

In parallel, the Liquidator pursued the publication of EoI to attract potential assignees for the NRRA. The first EoI was published following the NCLAT's decision to uphold the NCLT's original order. However, this initial attempt did not garner any expressions of interest, likely due to the ongoing challenge before the Supreme Court. The situation changed after the Supreme Court's final order, which crystallized the dues amounting to ₹14,08,13,122. Subsequently, a second EoI was published, which elicited a strong response from over five prospective assignees, which were processed in consultation with the SCC.

Case Study

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This strategic approach to managing NRRAs exemplifies the liquidator's commitment to fulfilling the liquidation objectives within the constraints of the IBC, while also navigating the complexities associated with realizing non-liquid assets.

“ Realization in this case has already reached approximately 77% of the total claims admitted. ”

7. Conclusion

The insolvency of Koyenco and Platino serves as a cautionary tale about the risks associated with interconnected corporate structures, fraudulent activities, and the complexities of corporate insolvency in India. The case underscores the critical importance of robust corporate governance, effective risk management, and

transparency in financial dealings to prevent similar situations in the future.

In this instance, the resolution stage of the insolvency process was not successful, primarily due to the CD's prolonged non-operational status and lack of viable business operations. Consequently, liquidation became inevitable. However, despite the challenges, the liquidation process has yielded positive results so far. Realization in this case has already reached approximately 77% of the total claims admitted. If the recovery from Not Readily Realisable Assets (NRRAs) is successful, there is a strong possibility of generating a surplus that could be distributed to shareholders.

This case highlights the significance of diligent recovery efforts during liquidation and demonstrates that, even in seemingly dire circumstances, substantial recoveries can be achieved through methodical and strategic liquidation processes.

