

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

Company Petition No. (IB)-300(PB)/2020

Order under Section 7 of Insolvency & Bankruptcy Code, 2016

IN THE MATTER OF:

Asset Care and Reconstruction Enterprises Ltd ... Financial Creditor/Applicant
Vs
Sare Gurugram Pvt Ltd. ... Corporate Debtor / Respondent

Order delivered on 09.03.2021

CORAM:

SH. B.S.V. PRAKASH KUMAR
HON'BLE ACTG. PRESIDENT

SH. HEMANT KUMAR SARANGI
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Applicant : Mr. Arun Kathpalia (Sr. Adv.), Mr. Ananya Kumar,
Mr. Rajat Joneja, Mr. Kartikey Gupta (Adv.)
For Intervenors : Ms. Pooja M. Saigal, Shantanu Chaturvedi,
Mr. Venket Rao, Ms. Ankita Saikia, Advocates

AS PER: B.S.V. PRAKASH KUMAR, ACTG. PRESIDENT

Heard and Dictated in the open Court on 01.03.2021

It is a Company Petition filed u/s 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') against the Corporate Debtor stating that since the Corporate Debtor defaulted in making repayment of ₹4,62,34,02,742, the petitioner has sought for initiation of Corporate Insolvency Resolution Process against the Corporate Debtor.

2. On perusal of the petition, it appears that one Company called Altico Capital India Ltd. (for brevity 'Altico') disbursed to the Corporate Debtor an amount aggregating to ₹375,00,00,000 through two Debenture Trust Deeds dated 04.12.2015 and dated 24.11.2016 and through one Facility Agreement dated 14.05.2018 as mentioned in the chart given below: -



PARTICULARS OF FINANCIAL DEBT

1. TOTAL AMOUNT OF DEBT GRANTED DATE(S) OF DISBURSEMENT	Total amount of debt disbursed to the Corporate Debtor is ₹375,00,00,000. The debt was disbursed by Altico Capital India Ltd. under Debenture Trust Deed dated 4 December 2015, Debenture Trust Deed dated 24 November 2016 and Facility Agreement dated 14 May 2018. The schedule of disbursement of ₹95cr NCDs is as follows: <table border="1" data-bbox="523 577 1385 981"> <thead> <tr> <th>Date of Disbursals/Adjustments</th><th>Amount of Disbursals/Adjustments (in INR)</th></tr> </thead> <tbody> <tr> <td>23 November 2016</td><td>95,00,00,000/-</td></tr> <tr> <td>TOTAL</td><td>95,00,00,000/- (wrongly mentioned as 95,00,000/-)</td></tr> </tbody> </table>	Date of Disbursals/Adjustments	Amount of Disbursals/Adjustments (in INR)	23 November 2016	95,00,00,000/-	TOTAL	95,00,00,000/- (wrongly mentioned as 95,00,000/-)												
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23 November 2016	95,00,00,000/-																		
TOTAL	95,00,00,000/- (wrongly mentioned as 95,00,000/-)																		
	The schedule of disbursement of ₹220cr NCDs is as follows: - <table border="1" data-bbox="523 1093 1385 1552"> <thead> <tr> <th>Date of Disbursals/Adjustments</th><th>Amount of Disbursals/Adjustments (in INR)</th></tr> </thead> <tbody> <tr> <td>25 November 2016</td><td>188,00,00,000/-</td></tr> <tr> <td>25 November 2016</td><td>23,47,50,000/-</td></tr> <tr> <td>8 June 2018</td><td>3,66,50,000/-</td></tr> <tr> <td>20 March 2019</td><td>4,86,00,000/-</td></tr> <tr> <td>TOTAL</td><td>220,00,00,000/-</td></tr> </tbody> </table> The schedule of disbursement of ₹60crore Term Loan is as follows: - <table border="1" data-bbox="523 1702 1385 1984"> <thead> <tr> <th>Date of Disbursals/Adjustments</th><th>Amount of Disbursals/Adjustments (in INR)</th></tr> </thead> <tbody> <tr> <td>25 May 2018</td><td>12,22,20,000</td></tr> <tr> <td>12 June 2018</td><td>2,71,30,000</td></tr> </tbody> </table>	Date of Disbursals/Adjustments	Amount of Disbursals/Adjustments (in INR)	25 November 2016	188,00,00,000/-	25 November 2016	23,47,50,000/-	8 June 2018	3,66,50,000/-	20 March 2019	4,86,00,000/-	TOTAL	220,00,00,000/-	Date of Disbursals/Adjustments	Amount of Disbursals/Adjustments (in INR)	25 May 2018	12,22,20,000	12 June 2018	2,71,30,000
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25 May 2018	12,22,20,000																		
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	25 June 2018	2,11,00,000
	30 July 2018	12,40,00,000
	14 September 2018	8,77,34,444
	31 October 2018	3,75,00,000
	6 November 2018	4,02,61,258
	7 December 2018	3,80,00,000
	29 January 2019	10,20,54,298
	TOTAL	₹60,00,00,000

The entire debt has thereafter been assigned to the Applicant by way of Assignment Agreement dated 23 March 2019.

A copy of the Assignment Agreement dated 23 March 2019 is enclosed and marked as **Annexure F**.

Copy of the Amended and Restated Declaration of Trust dated 22 March 2019 appointing the Financial Creditor as the trustee of ACRE-81-Trust is enclosed and marked as **Annexure G**.

3. Altico disbursed monies through three transactions to the corporate debtor as mentioned. Soon thereafter, the entire debt has been assigned to the present petitioner by way of Assignment Agreement dated 23.03.2019. The petitioner has also filed an Amended and Restated Declaration of Trust dated 22.03.2019 appointing the Financial Creditor as the trustee of ACRE-81-Trust.

4. The petitioner submits that upon execution of Debenture Trust Deed dated 04.12.2015 between Ramprastha SARE Reality Pvt. Ltd. and Axis Trustee Services Ltd. for issuance of 9,500 secured, rated, to be listed, redeemable, non-convertible debentures of a face value of ₹1,00,000 each aggregating to nominal value of ₹95,00,00,000 being issued for cash, on private placement basis, in single series. Altico has also subscribed for another 2,200 secured, unlisted, redeemable, non-convertible debentures of a face value of ₹10,00,000 each aggregating to ₹220,00,00,000 upon execution of Debenture

Trust Deed dated 24.11.2016 between Ramprastha SARE Reality Pvt. Ltd. and Axis Trustee Services Ltd. for the debentures subscribed by Altico.

5. Over and above the subscription of debentures, Altico and one KKR India Asset Financial Pvt. Ltd. (for brevity 'KKR') has entered into a Facility Agreement on 14.05.2018 with SARE Gurugram Private Limited, Altico and KKR extended a term loan facility of an aggregate value of ₹100,00,00,000. The disbursement commitment was divided between Altico and KKR as being ₹60,00,00,000 and ₹40,00,00,000 respectively. Therefore, the total amount disbursed to the Corporate Debtor by Altico under the abovementioned agreements is ₹375,00,00,000.

6. To secure the amounts paid to the Corporate Debtor under the agreements aforementioned, the Corporate Debtor provided Share Pledge Agreements, Deeds of Hypothecation, Mortgages, Corporate Guarantees, Non-Disposal Undertakings for securing the interests of the Debenture Holders and the Original Lenders. The debt owed to Altico by the Corporate Debtor was subsequently assigned to the present Financial Creditor vide an Assignment Agreement dated 23.03.2019. As on the date of the institution of the present application, the Corporate Debtor owes monies to the tune of ₹462,34,027,742 to the Financial Creditor including interest and penalty levied as per the agreement entered in between them. When the Corporate Debtor defaulted in making payment and also failed to rectify the same, the Financial Creditor issued an acceleration cum enforcement notice to the Corporate Debtor recalling all the financial assistances and declaring the entire outstanding amount of ₹441,05,66,602 as due and payable. The Corporate Debtor, despite notice being issued, failed to make payment to the Financial Creditor. In view thereof this application is filed for initiation of CIRP.

7. As against this application, the Corporate Debtor has not filed any objection to the Company Petition nor even filed reply but whereas a Company called SARE Public Company Ltd. through its Receiver Mr. Augoustinos Papathomas filed an intervener application (IA3783/2020) before this Bench stating that in the year 2011, one Wafra Capital Partners L.P ('Wafra'), a Cayman Islands Limited Partnership had through one of its managed funds

invested US \$50 Million in convertible bonds issued by S.A.R.E Public, to which Wafra and SARE Public Company Ltd., in between them, executed a Secured Convertible Bond Purchase Agreement dated 28.04.2011 for the purpose of investments in India by SARE Public. Upon such investments, the Purchase Agreement was executed by SARE Public for itself and on behalf of all its subsidiaries through the Purchase Agreement dated 28.04.2011.

8. In addition to this Purchase Agreement, Wafra and SARE Public had entered into several other supporting/ancillary agreements forming part of the composite transaction entered between them. The purpose of these supplementary and ancillary agreements was only to aid the execution and performance of the Purchase Agreement which is the Principal Agreement. This agreement has been entered into on 28.04.2011 between Wafra and SARE Public inter-alia providing that the Security created under the Debentures becomes enforceable upon occurrence of an Event of Default and upon the Security become enforceable, Wafra will have right to appoint a Receiver to perform various functions as illustrated under the Debenture Trust Deed.

9. Similarly, Share Pledge and Assignment Agreement dated 28.04.2011, was also executed between Wafra, SARE Public and SARE Cyprus. By virtue of this Share Pledge and Assignment Agreement, the entire shareholding of SARE Cyprus was pledged in favour of Wafra by SARE Public. Due to default in repayment on the bond by SARE Public and upon the request of SARE Public, Wafra refinanced and restructured the original bond into two separate bonds with aggregate original principal amount of US \$37,944,000 of SARE Public's Series A Secured Convertible Senior Bonds due 2020, and an aggregate original principal amount of US\$12,056,000 of SARE Public's Series A Secured Convertible Junior Bonds due 2017. In the agreement entered into between Wafra and SARE Public, the intervener submits that there is a clause categorically prohibiting its subsidiaries from creating any lien/pledge/encumbrance/charge or for that matter any third party right whatsoever on their respective Properties until the time the Bonds have remained outstanding. The properties have been defined in the Purchase

Agreement to mean all real and personal property or assets of any kind, tangible or intangible, choate or inchoate.

10. The amount payable to Wafra has not been paid and SARE Public having defaulted repeatedly, Wafra had exercised its right to appoint a Receiver as per the terms of the Debenture dated 28.04.2011. In pursuance thereof, the present applicant was appointed as Receiver and Manager on all Secured Assets of Applicant Company on 10.08.2018.

11. Later, Wafra had initiated proceedings against SARE Public before the Hon'ble Supreme Court of the State of New York, County of New York claiming a sum of US \$64,064,696, upon which the Hon'ble Supreme Court of New York passed an order on 13.08.2018 restraining SARE Public and its subsidiaries from taking any action, directly or indirectly, to sell, remove, transfer, pledge, assign, encumber, secrete, destroy or otherwise dispose of any other asset in which Defendant or its Subsidiaries have an interest, to the extent of US\$64,064,696 and said order was confirmed on 04.09.2018.

12. Based on this order, when this Receiver filed a declaration and injunction suit before the Hon'ble High Court of Delhi inter alia against Altico seeking a decree of declaration declaring that any and all the securities and or documents whatsoever such as power of attorneys, Non-disposable undertakings, charge on assets, encumbrance, mortgage, lien, pledge of shares, etc. already created/sought to be created by the Defendant Nos. 1 to 15 in favour of Defendant Nos. 16 to 19 or any other person or entity pursuant to and/or in furtherance of the Facility Agreement dated 14.05.2018 or any other agreement are non-est, null and void.

13. On hearing the submissions of various parties including Altico and KKR, the Hon'ble High Court passed a judgment/order on 08.01.2020 discussing various issues with regard to jurisdiction, binding nature of the Facility Agreement entered into between SARE Public and Wafra, and held that defendants in the suit are permitted to create charge over the assets of the subsidiary Company, when appeal was filed by KKR over the said order dated 08.01.2020, Division Bench of Hon'ble High Court of Delhi on 07th & 17th July, 2020 restrained the mandate given by Single Judge to the extent saying that

the defendant Nos. 1 to 15 shall not create any charge over the assets of the respective companies.

14. On appointment of Receiver for the reason SARE Public failed to repay around US\$60 Million repayable to Wafra, the intervener counsel has submitted that since holding company of the subsidiary having entered into purchase agreement in between SARE Public and Wafra and since a clause has been executed stating that the said agreement is not only binding upon SARE Public but also upon its subsidiaries, this Bench cannot pass an admission order to initiate Corporate Insolvency Resolution Process under the Code as because these subsidiary companies have no right to enter into any transaction with regard to their assets for they have already been bound by the clause in the Purchase Agreement executed between SARE Public and Wafra.

15. While dictating this order, the intervener counsel has stated that the order dated 12.10.2018 of the Hon'ble High Court discloses as follows:

Plaintiff has made out a prima facie case in its favour. Defendants No.1 to 10 are restrained from creating any encumbrance/charge or lien or mortgage of any of their assets, shares, properties (movable or immovable) to any third party till the next date of hearing. Defendants 16 and 17 are also restrained from giving effect to the Facility Agreement dated 14.5.2018 to the extent of their taking lien charge, security, mortgage or pledge of any of the assets of defendants No.1 to 15 till the next date of hearing.

16. By showing the abovesaid para, the intervener counsel submits this para reflects two directions, one is restraining defendant nos. 1 to 10 wherein the Corporate Debtor is also one of the defendants, from creating any charge or any third party rights over the assets of the respective companies, Altico and KKR (defendant no. 16 & 17) are also restrained from giving effect to the Facility Agreement dated 14.05.2018 to the extent of their taking lien, charge, security, mortgage or pledge of any of the assets of the defendants 1-15 till the next date of hearing.

17. Intervener counsel further submits while this order is in force, Altico executed an Assignment deed in favour of petitioner herein i.e Asset Care and

Reconstruction Enterprises Ltd. which is in violation of the orders passed by Hon'ble High Court of Delhi therefore this petition shall be dismissed.

18. Upon hearing the submissions of this applicant/intervener as well as the Financial Creditor counsel, Ms. Pooja Mehra Saigal and Mr. Kathpalia, Senior Advocate, the point left for consideration is, as to whether or not this Bench can pass Section 7 petition order on the application moved by Creditor i.e. Asset Care and Reconstruction Enterprises Ltd. based on the Assignment deed dated 23.03.2019.

19. It is evident on record and it is also not in dispute that the Corporate Debtor is a subsidiary to its holding Company i.e. SARE Public and distinct entity having its properties in its name. The case of the intervener is that the Receiver has been appointed to take the control of the assets of the SARE Public upon which Receiver obtained a default judgment from Hon'ble Supreme Court of the State of New York thereafter the said Receiver has filed a declaration suit before the Hon'ble High Court of Delhi against its Indian Subsidiary Companies as well as the Lenders who have provided loans to Indian Subsidiaries for development of their projects. It is no doubt that on 12.10.2018 Hon'ble High Court of Delhi passed an interim order restraining this Corporate Debtor from creating any third party rights and the defendant nos. 16 & 17 i.e. KKR and Altico are restrained from giving effect to the Facility Agreement dated 14.05.2018 to the extent of charge, security, mortgage or pledge of any of the assets of defendant nos. 1 to 15 till the next date of hearing. Thereafter, the Hon'ble High Court heard at length and passed an order holding that subsidiaries are not bound by the undertaking or agreement entered into by the Holding Company. It has not decided the main relief sought by the applicant herein. It has been stated that clarification dated 01.11.2018 shall continue to operate.

20. It is no more *res integra* that once IBC petition is filed, the only point i.e. to be decided is whether debt and default have been proved by the petitioner who has filed an application for initiation of Corporate Insolvency Resolution Process regardless of the proceedings pending before various Courts. Here this order is passed in a declaration suit filed by Receiver appointed to take control

of the Corporate Debtor holding company. In the order under Order 39 Rule 1 & 2 CPC, it has been made clear that undertaking given by the holding company on behalf of Subsidiaries Company is not binding on the subsidiary companies because they are distinct entities having freedom to take actions as per its requirement. Therefore, once IBC proceeding is initiated, unless the proceeding in which order has been granted has overriding effect over IBC, such proceeding or order cannot come in the way of admitting a Company Petition under Section 7 of the Code.

21. Notwithstanding the fact whether or not an order has been passed against the Corporate Debtor, Section 7 proceedings could be decided based on the debt and default proved by the petitioner. In this case, it is pertinent to mention that the Corporate Debtor being a subsidiary company, it is to be presumed that whatever decisions taken in the subsidiary companies is within the know of its holding company. This SARE Public, by virtue of this presumption is to be deemed that it is in know of the decisions taken and monies received by this Corporate Debtor from various lenders, now after money has been taken, it has filed this application stating that there is an agreement between SARE Public and Wafra therefore the Facility Agreement is declared as null and void. Of course, the contending party herein is a Receiver appointed upon the proceedings initiated by Wafra, but the fact of the matter is the Corporate Debtor taking loans from this lender is very much known to its holding company.

22. Upon perusal of the documents, it appears that these loans were given to the Corporate Debtor in between 2015 and 2018 i.e. before the Hon'ble High Court of Delhi passed order on 12.10.2018. In the said order, it has only been said that Altico should not create any third party right in favour of others. However, since there are two transactions one is Debenture transaction and another is Facility Agreement, out of these two, none being repaid by the Corporate Debtor despite notice has been served upon it, even if Facility Agreement issue is excluded as per the order of Honourable High Court of Delhi passed on 12.10.2018 then also, the financial creditor could establish its case by saying that Assignment with respect to Debentures is valid and not in

violation of the orders of Hon'ble High Court and there being no contest with regard to the debt and default from the Corporate Debtor side, we believe that the applicant herein has proved the existence of debt and default under both the transactions. With regard to facility agreement, that issue being pending before the Hon'ble High Court of Delhi, since the petitioner has proved existence of debt and default in relation to debentures issued for an amount of ₹95Crore and ₹220Crore along with interest, we hereby hold that it is a case fit for admission to initiate CIRP taking default of repayment of debenture amounts by the corporate debtor, in view thereof, this petition is hereby admitted by appointing CA Ajit Gyanchand Jain having Registration No. IBBI/IPA-001/IP-P00368/2017-18/10625 and email-id ajit@vcanca.com as Interim Resolution Professional with directions as follows: -

- (1) In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 9 of the Code. The expression 'immediately' means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (2) We also declare moratorium in terms of Section 14 of the Code. It is made clear that the provisions of moratorium are not to apply to transactions which might be notified by the Central Government. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (3) Directions are also issued to the Ex-Management/Auditors etc. to provide all the documents in their possession and furnish every information in their knowledge as required under Section 19 of the



Code to the Interim Resolution Professional within a period of one week from today otherwise coercive steps to follow.

23. The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its Master data & its website by updating the status of 'Corporate Debtor' and by making a specific mention regarding admission of this petition.

24. A copy of this order shall also be sent to the Secretary, Ministry of Corporate Affairs, New Delhi to ensure compliance of directions issued in para 23 above.

25. Accordingly, Company Petition is admitted and **IA 3783-2020 is hereby dismissed.**

- Sd -

(B.S.V PRAKASH KUMAR)
ACTG. PRESIDENT

- Sd -

(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)

01.03.2021
Vineet