NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 359 of 2021

(Arising out of Order dated 01/09.03.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench in Company Petition No. (IB)-300(PB/2020)

IN THE MATTER OF:

S.A.R.E Public Company Limited through its
Receiver Mr. Augoustions Papathomas,
Vyronos, 36, Nicosia Tower Centre, 8th Floor,
Flat/ Office 801, PC 1506, Nicosia Cyprus.

Rep. by its Power of Attorney Holder
Mr. Rajesh Panayathatta,
Flat No.503, Tower No.22, Paras Tierea,
Sector – 137, Noida UP .... Appellant

Vs

1. SARE Gurugram Pvt. Ltd.
E-7/12, LGF, Malviya Nagar,
Delhi – 110017.
Rep. by the Interim Resolution Professional
Mr. Ajit Gyanchand Jain,
204, Wall Street – 1 Near Gujrat College,
Ellis Bridge, Ahmedabad – 380 006.

2. Asset Care and Reconstruction Enterprises Ltd.
2nd Floor, Mohan Dev Building,
13, Tolstoy Marg,
New Delhi – 110001. ... Respondents

Present:

For Appellant: **Ms. Pooja M. Saigal, Ms. Anshul Bajaj, Simrat Singh Pasay, Mr. Chaitanya Pandey, Advocates**

For Respondent: **Mr. Bhargav K.Hemmige, Advocate for R1**

Mr. Arun Kathpalia, Sr. Advocate, Mr. Rajat Joneja, Mr. Ananya Kumar, Mr. Kartikeya Gupta, Advocates for R2

Mr. Ritin Rai, Sr. Advocate, Mr. Siddharth Dutta, Advocate for Interveners

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against order dated 09.03.2021 passed by National Company Law Tribunal, New Delhi, Principal bench admitting the Company Petition No. (IB)-300(PB)/2020 filed by Respondent No.2-Asset Care and Reconstruction Enterprises Ltd. under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Code'). The Appellant had filed an IA No. 3783 of 2020 for intervention, which Application was dismissed by admitting the Company Petition filed by Respondent No.2.

2. We need to notice certain background facts and sequence of the events giving rise to this Appeal for deciding the issues raised in this Appeal are:

(i) The Appellant S.A.R.E Public Company Limited is a Company existing under the laws of Cyprus. One Wafra Capital Partners L.P (Wafra) a Cayman Islands Limited Partnership having its office at New York, United States of America. In the year 2011 Wafra had invested US$ 50 million in convertible bonds issued by S.A.R.E Public and a Purchase Agreement dated 28.04.2011 was entered between Wafra and Appellant. Several other supporting/ ancillary agreements forming part

of the composite transaction were also entered. A Share Pledge and Assignment Agreement dated 28.04.2011 was executed between Wafra and S.A.R.E Public and SARE Cyprus (a wholly owned subsidiary of S.A.R.E. Public). In terms of Clause 12 of the Purchase Agreement, S.A.R.E. Public has *inter-alia* undertaken that so long as any Bond remains outstanding the S.A.R.E. Public shall not itself shall cause each of its Subsidiaries not to, directly or indirectly create Liens upon any of their properties, assets or revenues, whether now owned or thereafter acquired.

(ii) SARE Gurugram Pvt. Ltd., the Corporate Debtor in order to obtain funds entered into Debenture Trust Deed dated 04.12.2015 (DTD1), whereby non-convertible debentures worth INR 95 crores was issued by Corporate Debtor and purchased by Altico Capital India Ltd. (Altico) (A private limited Company incorporated under the provisions of Companies Act, 1956, having its registered office at Bandra (East), Mumbai, Maharashtra). Another Debenture Trust Deed (DTD2) dated 24.11.2016 was entered, whereby non-convertible debentures worth INR 220 crores were issued by the Corporate Debtor and purchased by Altico.

(iii) A Facility Agreement dated 14.05.2018 had been executed amongst SARE Gurugram (Corporate Debtor), KKR India Asset Finance Private Limited (KKR) and Altico, in pursuant to which

loan facility for an amount of INR 100 crores was being advanced by KKR and Altico to SARE Gurugram. Altico was to advance INR 60 crores and KKR to INR 40 crores. Securities were created by the Company forming part of SARE Group.

(iv) On 30.06.2018 an amount of US $ 60,162,463 was due and payable by SARE Public to Wafra on account of outstanding Bonds. Due to repeated defaults of SARE Public, Wafra had exercised its right to appoint a Receiver as per the terms of the Debenture Deed dated 28.04.2011 and had appointed Mr. Augoustinos Papathomas as Receiver and Manager on all secured assets of SARE Public on 10.08.2018. Receiver issued letters to SARE Public and subsidiaries of SARE Public informing about his appointment as Receiver / Manager of SARE Public.

(v) Wafra had initiated proceedings against SARE Public before the Hon'ble Supreme Court of the State of New York, claiming a sum of USD 64,064,696 and seeking restraint order from transferring, converting, encumbering, selling, assigning, withdrawing, perfecting etc. the assets of SARE Public. Hon'ble Supreme Court of the State of New York, County of New York passed order dated 13.08.2018 granting temporary injunction as prayed for.

(vi) The SARE Public through its Receiver had filed Civil Suit in the High Court of Delhi CS (COMM) No.1179 of 2018 through its

Receiver Mr. Augoustinos Papathomas seeking *inter alia* declaration that all securities such as power of attorney, Non-Disposable Undertaking, charge on assets/ encumbrances/ lien/ pledge of shares etc., already created or sought to be created by the companies forming part of the SARE Group in favour of KKR and Altico in furtherance of a Facility Agreement dated 14.05.2018 are non-est, null and void. In the suit, Corporate Debtor SARE Gurugram was Defendant No.3 and Altico was Defendant No.17.

(vii) The Delhi High Court passed an interim order dated 12.10.2018 restraining Altico from giving effect to the Facility Agreement dated 14.05.2018 to the extent of taking lien, charge, security, mortgage or pledge of any of the assets of the companies forming part of SARE Group.

(viii) On 23.03.2019, the Altico has assigned entire financial assistance aggregating to INR 370 Crores to Asset Care and Reconstruction Enterprises Ltd. - Respondent No.2 (hereinafter referred to as 'ACRE'). As per the Assignment Agreement all the facilities advanced by Altico to SARE Gurugram have been assigned in favour of ACRE.

(ix) On 07.01.2020, ACRE filed an Application under Section 7 of the Code against SARE Gurugram.

(x) On 08.01.2020, the Delhi High Court modified the interim order dated 12.10.2018 to the extent that it permitted SARE

Gurugram and other Group Companies to raise further funding to complete the pending projects. Against the order of Delhi High Court dated 08.01.2020 of learned Single Judge, KKR filed an FAO(OS) (COMM) No.69 of 2020, where Division bench vide order dated 17.07.2020 has directed the Companies forming part of the SARE Group (including SARE Gurugram) not to mortgage, charge or create a lien on their movable/ immovable assets till the next date of hearing.

(xi) Hon'ble Supreme Court of the State of New York vide judgment dated 25.08.2020 awarded an amount of US$ 82,388,841.

(xii) The Appellant herein filed an Intervention Application being I.A. No.3783 of 2020 in the Company Petition (IB)-300(PB)/2020 seeking intervention as well as dismissal of Section 7 petition. Reply to the intervention was filed by Respondent No.2.

(xiii) The Adjudicating Authority vide its order dated 09.03.2021 admitted Section 7 petition filed by Respondent No.2 and rejected the Intervention Application filed by the Appellant. Aggrieved against the order dated 09.03.2021, this Appeal has been filed by SARE Public.

3. We have heard Ms. Pooja M. Saigal, learned Counsel for the Appellant, Shri Arun Kathpalia, learned Senior Counsel appearing for Respondent No.2 (ACRE), both of them have placed their submissions with ability and clarity. Mr. Ritin Rai, learned Senior Counsel appearing for

Intervener and Mr. Bhargav K. Memmige, learned Counsel for Respondent No.1 SARE Gurugram.

4. Learned Counsel for the Appellant challenging the impugned order stated that Adjudicating Authority committed error in entertaining the Application of Respondent No.2 under Section 7 of the Code, which was filed on the strength of Assignment Agreement 23.03.2019. The Assignment dated 23.03.2019 in favour of Respondent No.2 was in violation of interim order passed by the Delhi High Court dated 12.10.2018, hence was void and unsustainable. The Assignment, which was very basis of the Application filed by Respondent No.2 being invalid, the Application ought not to have been entertained by the Adjudicating Authority and same deserves to be rejected. The Delhi High Court by interim order dated 12.10.2018 has specifically restrained the Altico (Defendant No.17) in suit. not to give effect to the Facility Agreement dated 14.05.2018 to the extent of taking lien, charge, security, mortgage or pledge of any of the assets of the Company forming part of SARE Group. The Assignment by Altico in favour of Respondent No.2 dated 23.03.2019 being in teeth of interim order dated 12.10.2018, the Application ought to have been rejected. In filing the Application, Respondent No.2 had colluded with Respondent No.1, which is apparent from the fact that Respondent No.1 neither filed the reply in Section 7 application nor contested the Application. Specific plea of intervening raised by the Appellant before the Adjudicating Authority, which was not even considered by the Adjudicating Authority. Respondent No.2 had no locus to file and maintain Section 7 Application before the

Adjudicating Authority, in view of the restraint order passed of the Delhi High Court of 12.10.2018. The Adjudicating Authority failed to consider the fact that Assignment Agreement does not permit severance/ bifurcation of the Facility. The Adjudicating Authority committed an error in taking the view that even if Facility Agreement dated 14.05.2018 is ignored, there was debt under DTD1 and DTD2, hence, default being admitted, Section 7 Application was maintainable. The Assignment Agreement dated 23.03.2019 being not severable. The above view taken by the Adjudicating Authority is erroneous and deserves to be set aside by this Tribunal. The impugned order is non-speaking order, since the issues raised by the Appellant in the Intervention Application has not been appropriately considered. The Corporate Debtor, a second step subsidiary of SARE Public is the recipients of funds availed from Wafra Capital Partners, hence it was bound by Clause 12 of the Purchase Agreement dated 28.04.2021.

5. Shri Arun Kathpalia, learned Senior Counsel for Respondent No.2 refuting the submissions of the learned Counsel for the Appellant submits that the Appellant has no locus to challenge the order dated 09.03.2021. There is no dispute raised by the Corporate Debtor or the Appellant with respect to the debt owed by the Corporate Debtor. At the stage of proceeding under Section 7 of the Code, Adjudicating Authority is only required to examine the existence of debt and whether there has been a default by the Corporate Debtor in repayment of the debt. The Corporate Debtor or other subsidiaries of SARE Public were not party to Purchase Agreement dated 28.04.2011. There were three financial debts owned by

the Corporate Debtor namely – (i) Debenture Trust Deed dated 04.12.2015 worth Rs.95 crores; (2) Debenture Trust Deed dated 24.11.2016 worth Rs.220 crores; and (3) Facility Agreement dated 14.05.2018 for a facility of Rs.100 crores. The Delhi High Court in its order dated 08.01.2020 has also clearly held that the Purchase Agreement between Plaintiff (SARE Public) and Defendant No.20-Wafra was executed by Defendant Nos. 1 to 15 and there is no commitment or promise by Defendant Nos.1 to 15 of the suit. In the suit, which was filed in Delhi High Court, only document sought to be challenged by the Intervener was the Facility Agreement and no relief was claimed in relation to DTD1 and DTD2. The interim order dated 12.10.2018 was restricted with regard to only Facility Agreement dated 14.05.2018. In any way, the order dated 12.10.2018, does not in any manner restrain the Altico from assigning its right under the Facility Agreement. There being no restraint with regard to DTD1 and DTD2, Assignment of the said loan did not suffer from any error or invalidity and admitted default being there with regard to DTD1 and DTD2, Adjudicating Authority did not commit any error in admitting Section 7 Application. For argument sake, even if it is assumed that there was any restraint with regard to Facility Agreement dated 14.05.2018, other two loans remained untouched, hence, default at the part of Corporate Debtor was an admitted fact, which could have been very well taken note on the basis of Section 7 Application. In the present case, debt and default having not been disputed either by the Corporate Debtor or by the Intervener herein, the Intervention

Application was not maintainable and has rightly been rejected by the Adjudicating Authority.

6. Shri Ritin Rai, learned Senior Counsel for Interveners submits that homebuyers are already part of the CoC and there is a Resolution Plan which is pending consideration.

7. We have considered the submissions of learned Counsel for the parties and have perused the record.

8. We need to first notice the Section 7 Application filed by Respondent No.2 and the basis given in the Application for initiating insolvency proceedings. Section 7 Application has been brought on the record by Appellant as Annexure A-22 (Volume-V). The Application has been filed in Form-1 and Part-IV of the Application deals with 'Particulars of financial Debt'. It is useful to notice the particulars of 'Financial Debt' as mentioned in Part-IV of Section 7 Application:

"**Part-IV**

<table>
<tr><th colspan="3">PARTICULARS OF FINANCIAL DEBT</th></tr>
<tr><td>1.</td><td>Total amount of Debt granted date(s) of disbursement</td><td>Total amount of debt disbursed to the Corporate Debtor is INR 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 14th May, 2018.

The schedule of disbursement of Rs.95 crs NCDs is as follows: -
<table>
<tr><th>Date of Disbursals/ Adjustments</th><th>Amount of Disbursals/ Adjustments (in INR)</th></tr>
<tr><td>23 November 2016</td><td>95,00,00,000/-</td></tr>
<tr><td>TOTAL</td><td>95,00,00,000/-</td></tr>
</table></td></tr>
</table>

The schedule of disbursement of Rs.220 crs NCDs is as follows: -

Date of Disbursals/ Adjustments	Amount of Disbursals/ Adjustments (in INR)
23 November 2016	188,00,00,000/-
23 November 2016	23,47,50,000
8 June 2018	3,66,50,000/-
20th March 2019	4,86,00,000/-
TOTAL	**220,00,00,000/-**

The schedule of disbursement of Rs.60 crores Term Loan is as follows: -

Date of Disbursals/ Adjustments	Amount of Disbursals/ Adjustments (in INR)
25 May 2018	12,22,20,000
12 June 2018	2,71,30,000
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."

9. The above indicates that there are three independent and separate transactions by which Altico has extended financial facility/ loan to Corporate Debtor, they are – (i) Non-convertible debenture of face value of INR 95 crores issued by the Corporate Debtor and purchased by Altico on 04.12.2015; (ii) Non-convertible debenture aggregating to INR 220 crores executed by Corporate Debtor and purchased by Altico dated 24.11.2016; and (iii) Facility Agreement dated 14.05. 2018 executed between Corporate Debtor in its capacity as borrower and Altico Capital India Ltd. and KKR India Asset Finance Limited for extending a Term Loan Facility for aggregating INR 100 crores, out of which Rs.60 crores was to be financed by Altico. The total defaulted amount claimed in Section 7 Application is INR 462,34,02,742. The learned Counsel for the Appellant's argument is based on the interim order dated 12.10.2018 passed by the Delhi High Court in CS (COMM) No.1179 of 2018. It is useful to extract the entire order dated 12.10.2019 passed in the above suit and in I.A. No.14239 of 2018 filed by the Plaintiff under Order 39 Rule 1 and 2 CPC to the following effect:

> *"**IA No.14239/2018***
>
> *Issue notice to the defendants by ordinary process and speed post, returnable for the date fixed above.*
>
> *This application is filed under Order 39 Rule 1 and 2 CPC seeking ex parte ad interim injunction restraining the defendants No.1 to 15 from pledging, mortgaging, encumbering, disposing of, selling or alienating any of their assets, shares, properties (movable and immovable)*

in any manner whatsoever without obtaining the prior written permission of the Receiver of the plaintiff. Other connected reliefs are also sought. The suit is filed seeking a decree of declaration that all the securities and documents, power of attorneys, non-disposable undertakings, charge on assets etc. sought to be created by the defendants No.1 to 15 in favour of defendants No.16 to 19 or any other person or entity pursuant to and/or in furtherance of the Facility Agreement dated or any other agreement are nonest, null and void. Other connected reliefs are also sought.

The case of the plaintiff and the defendants No.1 to 15 form part of S.A.R.E.Group of companies which are all inter related to each other. SARE Public is the parent/holding company of the entire SARE Group and the entire group is controlled by it through its controlled subsidiaries. It is stated that in the year 2011 Wafra had invested US $50 Million in convertible bonds issued by SARE Public. The said funds were to be utilised by SARE Public through its controlled subsidiaries to acquire develop and sell middle-income residential projects across India. Wafra and SARE Public had also executed a secured convertible bond purchase agreement dated 28.4.2011, pursuant to which Wafra had purchased

SARE Public's Series A Secured Convertible Bonds subject to terms and conditions of the purchase agreement. It is further pleaded that by virtue of Purchase Agreement SARE Group i.e. SARE Public and its subsidiaries were categorically barred from creating any lien/pledge/encumbrance/charge and any third party right whatsoever on their respective properties until the time the bonds are outstanding. It is further pleaded that the investments were made by SARE Public in India through its controlled subsidiaries and the entire SARE Group including the Indian Subsidiaries were a part of the agreement and were governed by the terms and conditions thereof.

Learned senior counsel appearing for the plaintiff has relied upon the Purchase Agreement dated 28.4.2011 Sub Clause 3 which stipulates that the Issuer (SARE Group) shall use the net proceeds of the sale of the Bonds to the Purchaser to acquire, develop, sell, middle-income residential projects across India with supporting infrastructure by Controlled Subsidiaries. Reliance is also placed on clause 12 which states that so long as the Bond remains outstanding the issuer shall cause each of its Subsidiaries not to directly or indirectly create, incur, assume or suffer to exist any Lien upon any of its

property, assets or revenues etc. It is also pointed out that this agreement is signed on behalf of the subsidiaries.

It is pleaded that a Facility Agreement has now been executed on 14.5.2018 by defendant No.3/ SARE Gurugram Private Limited with defendants No.16 and 17 pursuant to which the loan facility vide an aggregate amount of INR 100 Crores is proposed to be advanced to defendant No.3 on security of the assets of defendant No.3 and other subsidiaries of SARE Group. It is pleaded that this arrangement which has yet not been completed is wholly contrary to the Agreement between the parties and will cause irreparable loss and injury to the WAFRA Group if the securities are allowed to be further pledged or given as lien.

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.

Plaintiff to comply with provisions of Order 39 Rule 3 CPC within three days.

A copy of the order be given dasti under signatures of the Court Master to learned counsel for the plaintiff"

10. In the suit, Defendant No.16 was the KKR India Asset Finance Pvt. Ltd. and Defendant No.17 was Altico Capital India Ltd. The interim injunction passed by the Delhi High Court against Defendant No.16 and 17 is to the following effect:

> *"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."*

11. One of the submission advanced by learned Counsel for Respondent No.2 was that the above interim injunction order dated 12.10.2018 does not restrain Defendant No.17 to assign its debt. It is submitted that injunction was to restrain from giving effect to the Facility Agreement dated 14.05.2018, but there was no restraint of assignment. The tenor of the order dated 12.10.2018 is restraint to give effect to the Facility Agreement dated 14.05.2018. Any action taken in pursuance of Facility Agreement dated 14.05.2018 may be in teeth of the said injunction. The Assignment dated 23.03.2019 by Defendant No.17 in favour of ACER – Respondent No.2 was also for the loan which was advanced by Facility Agreement dated

14.05.2018. Thus, taking a broad view of the matter, we are inclined to agree with the learned Counsel for the Appellant that assignment of Facility Agreement dated 14.05.2018, ought not to have been done by Defendant No.17 as per the spirit of the order dated 12.10.2018. Now the question to be answered is as to whether when loan extended by Facility Agreement dated 14.05.2018, could not have been assigned to Respondent No.2. Whether assignment of non-convertible debentures (Debenture Trust Deed) of INR 95 crores dated 04.12.2015 and INR 220 crores by non-convertible debentures also could not have been assigned by Altico to Respondent No.2 and when default in pursuance of Facility Agreement dated 14.05.2018 could not have been looked into when the assignment of Facility Agreement dated 14.05.2018 was prohibited, what is the consequence on the Application filed by Respondent No.2 under Section 7 of the Code?

12. As noted above, the Application under Section 7 in Part-IV contains three separate transactions, on the basis of which default was claimed. Copies of Debentures Trust Dees dated 04.12.2015 as well as 24.11.2016 were part of the Section 7 Application. The Facility Agreement dated 14.05.2018 was also filed along with Section 7 Application. Total default on the basis of the aforesaid three financial transactions were amounting to INR 462,34,02,742. On 01.10.2019, Respondent No.2 issued an acceleration cum enforcement notice to the Corporate Debtor recalling all financial assistance and declaring outstanding amount as on 16.09.2019 as due and payable. As per Section 7, sub-section 4, the Adjudicating Authority has to ascertain the existence of a default from the records of the

information utility or on the basis of other evidence furnished by the Financial Creditor. Under Section 7, sub-section (5) it is mentioned when the Adjudicating Authority is satisfied that ***"a default has occurred and the application under sub-section (2) is complete .... it may, by order, admit such application"***. The Hon'ble Supreme Court in ***(2018) 1 SCC 407 in Innoventive Industries Limited vs. ICICI Bank and Another*** while considering statutory scheme under Section 7 of the Code, laid down following in paragraph 29 and 30:

> *"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.*
> *30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless*

interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

13. The Adjudicating Authority has merely to see the records of information utility and other evidence produced by the Financial Creditor to satisfy itself that a default has occurred.

14. We may also now look into the Assignment Agreement dated 23.03.2019. The Assignment Agreement dated 23.03.2019 executed between Altico Capital India Ltd. and Asset Care and Reconstruction Enterprises Ltd. – Respondent No.2. In Schedule 1 of the Assignment Agreement details of the 'Financing Documents' has been mentioned and 'Facility wise Principal Outstanding as on March 22, 2019 has been mentioned in Schedule 1, Item 3 to the following effect:

"3	Facility wise Principal Outstanding as on March 22nd, 2019 (Date of SMA II: March 2nd, 2019)	Nature of facility	Principal outstanding as on 22nd Mar-2019
		NCD – 220 Crores	2,20,00,00,000
		NCD – 95 Crores	90,00,00,000
		Term Loan – 60 Crores	60,00,00,000
		TOTAL	**3,70,00,00,000**"

15. We may also notice that interim order dated 12.10.2018 came to be modified by the Delhi High Court by subsequent order dated 08.01.2020. The modification as directed by the Delhi High Court on 08.01.2020 did not modify or vacate the interim direction and modification was to the limited extent that Defendant No.1 to 10 were permitted to mortgage,

charge or create a lien on their movable/ immovable assets. In paragraph 49 of the judgment, following has been held:

> *"49. I accordingly modify the interim order dated 12.10.2018 read with order dated 01.11.2018. Subject to further orders of the court, defendants No.1 to 10 are permitted to mortgage, charge or create a lien on their movable/ immovable assets subject to filing an undertaking in the court by way of an affidavit that the same is being done bonafidely for the purpose of completion of the pending real estate projects of defendants No.1 to 10 or for its day to day operations. Any such lien, mortgage or charge would be created only to complete the pending projects or for carrying out normal day to day running of the companies. Full amounts of the funds so generated by creation of such lien, mortgage or charge including how the amounts are expanded shall be filed in court on an affidavit of a director every quarterly. Subject to above modification, the interim order dated 12.10.2018 read with clarification dated 01.11.2018 shall continue to operate."*

16. The interim order dated 12.10.2018 as extracted above was confined to injunction against Defendant No.17 regarding Facility Agreement dated 14.05.2018. The interim injunction was not with regard to non-convertible Debenture Trust Deed dated 04.12.2015 and Debenture Trust Deed dated 14.11.2016 and the debt due under the aforesaid Debenture Trust Deed as was detailed in Section 7 Application were unaffected by the interim order dated 12.10.2018. Hence, the debt under the aforesaid financial

transaction was due and default was there with regard to the said financial transactions.

17. It is not the case of the Appellant that there was no default on the part of the Corporate Debtor with regard to Debenture Trust Deed dated 04.12.2015 and 24.11.2016. It is not even the case that there is no default with regard to Facility Agreement dated 14.05.2018, but the submission is that there being interim injunction on 12.10.2018, assignment of debt under the Facility Agreement dated 14.05. 2018 could not have been made in favour of defendant No.3.

18. At this juncture, we may notice one of the Clauses of the Assignment Agreement dated 23.03.2019, which is Clause 10.5 dealing with 'Severability' to the following effect:

> "***10.5 Severability***
>
> *If any provision of this Agreement is held to be illegal, invalid, or unenforceable under Applicable Law, and if the rights or obligations under this Agreement of the Parties will not be materially and adversely affected thereby (a) such provision will be fully severable; (b) this Agreement will be construed and enforced as if such illegal, invalid, or unenforceable provisions had never comprised a part hereof; and (c) the remaining provisions of the Agreement will remain in full force and effect and will not be affected by the illegal, invalid, or unenforceable provision or by its severance here from."*

19. The Assignment Agreement, thus, does contain a 'Severability' clause specifically providing that if any provision in the Agreement is unenforceable under applicable law, such provision will be fully severable. Provision of the Agreement insofar as it assigns the debts arising out of the Facility Agreement dated 14.05.2018 being under the injunction of the Delhi High Court vide order dated 12.10.2018, this could not have been given effect to and the Facility Agreement, thus, can be held to be unenforceable under the applicable law. There being three financial transactions dated 04.12.2015, 24.11.2016 and 14.05.2018, even if, 18.05.2018 was unenforceable, there was no cloud on the enforceability of other two transactions i.e. 04.12.2015 and 24.11.2016 and they were clearly severable by virtue of Clause 10.5 as noted above. The Adjudicating Authority, thus, has not committed any error in taking the view that even if, the Facility Agreement dated 14.05.2018 is ignored, there was still default on the part of the Corporate Debtor on the basis of which IBC proceedings under Section 7 can be proceeded. The findings in the above context recorded by the Adjudicating Authority in paragraph 22 of the judgment.

20. The learned Counsel for the Appellant submits that Clause 10.5 did not permit any severability into three facilities. In support of her submission, learned Counsel Ms. Pooja M. Saigal relied on judgment of Hon'ble Supreme Court in ***(1972) 3 SCC 799, Mattapalli Chelamayya and Another vs. Mattapalli Venkataratnam and Another***. Hon'ble Apex Court in the above case had occasion to consider the severability with

regard to an Award, which was unregistered and which embodied partition of the immovable property. On the same Award, the Hon'ble Apex Court held that it contains two distinct transactions. In paragraph 11 and 12, following has been laid down:

> *"11. The direction to pay a sum of money which has been held due and payable by the appellants to the respondents is a direction giving effect to a liability which already existed. It does not create the liability for the first time but merely works out the liability. But the same thing cannot be said about the charge. The charge is created for the first time. The case, therefore, involves two distinct matters — one is a personal liability to pay a certain amount, and the second is an additional relief to recover that amount from the immovable property of the appellants, should they fail to pay as ordered. It is, therefore, clear that the two do not form one transaction but two severable transactions. As pointed out long ago by Muttusami Ayyar, J., in Sambaya v. Gangayya [13 Mad 308, 311] : "The test, therefore, is whether the transaction evidenced by the particular instrument is single and indivisible or whether it really evidences two transactions which can be severed from each other, the one as creating an independent personal obligation and the other as merely strengthening it by adding a right to proceed against immovable property. But it should be remembered that it is not enough that there is an obligation to pay a sum of money, but that it is also necessary that the obligation should have an independent existence, and be in no way contingent or conditional on the breach of some obligation relating to immovable property created by the same instrument, for*

the contingency or the condition and the obligation would then be parts of one indivisible transaction". In the present case the document evidences two transactions which can be severed from each other. One transaction creates an independent personal obligation to pay a certain sum of money and the other transaction, namely, the charge merely strengthens the first transaction by adding a right to proceed against the charged property. In our opinion the High Court was right in directing that the second transaction with regard to the charge being a severable transaction can be validly ignored and to the extent that it declares the personal obligation to pay the transaction, not being required to be compulsorily registered, the award was admissible in evidence.

12. It was further contended for the appellants that an award is one and indivisible and to direct that effect be given to a part of the award and not to the whole of the award would amount to modifying the award and that was impermissible. We do not think that there is any substance in this contention also. Where a severable part of an award cannot be given effect to for a lawful reason, there is no bar to enforce the part to which effect could be justly given. See Mst Amir Begam v. Badr-ud-din Hussain [AIR 1914 PC 105 : 12 ALJ 537 : 16 Bom LR 413] where as a general principle it is laid down that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained. By giving effect to a part of the award in this case no prejudice is caused to the appellants. In fact they stand to benefit. As the award stands, the appellants would have been responsible not only to pay the amounts personally, but also from the property which was

charged. Since the charge part is eliminated for want of registration, they are freed from the additional liability. It is true that judgment should be pronounced according to the award, but that does not bar giving effect to the severable part of the award if it could be justly done. Departure from the award or a part of the award is barred only in those cases where the award or a severable part of it is lawful and capable of being given effect to."

21. The Hon'ble Supreme Court had approved the judgment of the High Court, which directed that second transaction with regard to the charge being a severable transaction can be validly ignored and the personal obligation to pay the transaction, not being required to be compulsorily registered can be enforced, the Award was admissible in the above respect.

22. In the present case, we have noticed that there were three financial transactions, which were assigned by Agreement dated 23.03.2019. Even if, one transaction that is Facility Agreement dated 14.05.2018 was under cloud due to interim order passed by the Delhi High Court dated 12.10.2018, there was no cloud on other financial transactions, which were much before of passing of the interim order. There can be no illegality with regard to assignment of debt in favour of Respondent No.2 with regard to above two transactions and there being default with regard to above two transactions, which is an admitted fact, no exception can be taken to the admission of Application under Section 7 of the Code.

23. The judgment of Kerala High Court in ***(1985) KLT 87, Varkey vs. Subromonia Iyer*** has also been relied by the learned Counsel for the

Appellant, where the High Court itself has relied on judgment of Hon'ble Supreme Court, reiterated the same principle and laid down following in paragraphs 14, 15, 16, 17 and 18:

> *"14. Counsel for the respondent relying on the decision reported in M. Chelamayya v. M. Venkataratnam (1972) 3 SCC 799 : AIR. 1972 SC. 1121) submits that even if the agreement contains certain provisions which require registration, without affecting the body and main purpose of the agreement, the part that is required to be registered can be severed and the document could be used. In (1972) 3 SCC 799 : AIR. 1972 SC. 1121, it was observed:-*
>
> > *"Thus where one transaction creates an independent personal obligation to pay a certain sum of money and the other transaction merely strengthens the first transaction by adding the right to proceed against the charged property, the second transaction with regard to the charge being a severable transaction can be validly ignored and the award to the extent it declares the personal obligation to pay is admissible in evidence the transaction not being required to be compulsorily registered."*
>
> *15. The counsel submits that part which provides for interest can be severed and the document can be used even without registration. Here also, the plaintiff has got another difficulty that there is a charge by the document Ext. A2.*
>
> *16. If applying the principle of separability, this part also is severed, the plaintiff has to fall back on the charge in the original mortgage. If he wants to enforce*

the charge created on the property by the original mortgage as stated earlier, it is not enforceable in this suit since it is barred by limitation.....

17. We also agree that if a transaction is distinct and divisible and one part of the transaction can be validly effected by an unregistered instrument and the other part requires registration, the instrument may be used as evidence of the part which does not require registration. We are of opinion that the part which is not required to be registered must be collateral and not dependent upon the part which requires registration. In a Madras case (Sambayya v. Gangayya (1890) 13 Mad. 308) Muttusami Ayyar, J. said: -

> *"The test therefore is whether the transaction evidenced by the particular instrument is single and indivisible, or whether it really evidences two transactions which can be severed from each other, the one as creating an independent personal obligation and the other as merely strengthening it by adding a right to proceed against immovable property. But it should be remembered that it is not enough that there is an obligation to pay a sum of money, but that it is also necessary that the obligation should have an independent existence, and be in no way contingent or conditional on the breach of some obligation relating to immovable property created by the same instrument, for the contingency of the condition and the obligation would then be parts of one indivisible transaction."*

18. Normally an agreement has to be considered as a whole. Of course, severance can be effected without affecting or damaging the core of the transaction.

Severability which takes in the rule of separability is a principle which can be applied only if it does not affect the main aim and intention of the transaction and only if the objectionable part can be severed without affecting the validity of the remaining part."

24. We, thus, are of the view that the three loans which were assigned by Altico in favour of Respondent No.2 were severable and even if the Facility Agreement dated 14th May, 2018, which was sought to be given effect to be excluded from consideration, the assignment cannot be held to be illegal with regard to other two transactions that is Debenture Trust Deeds dated 04.12.2015 and 24.11.2016. There being default under the above two transactions being INR 111,55,88,511 + INR 2,73,76,59,666 as mentioned in Column 2 of Part-IV of the Section 7 Application and default being more than Rs.1 crore, the Application has rightly been admitted by the Adjudicating Authority. We, thus, are of the view that no error has been committed by the Adjudicating Authority in admitting the Section 7 Application. There is no merit in the Appeal, the Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Dr. Ashok Kumar Mishra]
Member (Technical)

NEW DELHI

24th January, 2022

Ash/NN