

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Item No. 208
(IB)-244(ND)/2017
CA-246/2018, CA-1683/2019,
IA-2230/2022, IA-4045/2023 and IA-3163/2023

IN THE MATTER OF:

(Under Section: 7 of IBC, 2016)

Indian Bank

... Applicant/Financial Creditor

Versus

M/s. Athena Demwe Power Ltd.

... Respondent/Corporate Debtor

AND IN THE MATTER OF IA. NO. 246/ND/2018:

(Under Section: 30(6) & 31 of IBC, 2016)

Mr. Umesh Garg

(RP of Athena Demwe Power Limited)

F-33/3. Okhla Industrial Area,

Phase-II, New Delhi-110020

... Applicant/RP

AND IN THE MATTER OF IA. NO. 2230/ND/2022:

(Under Section: 60(5) of IBC, 2016)

THDC India Limited

(AR Mr. L.P. Joshi, CGM)

A-141, Portion B, Neeti Bagh,

New Delhi-110049

... Applicant

Versus

Mr. Umesh Garg

(RP of Athena Demwe Power Limited)

2nd Floor, 3 Scindia House, Janpath,

Central, National Capital Territory of

Delhi-110001

... Respondent No. 1

Committee of Creditors of Athena Demwe Power Limited

Front Side, Third Floor, Part of Property No. E-561, 561-A,

G.R. Plaza, Palam, Sector 7, Dwarka,

New Delhi-110075

... Respondent No. 2

Athena Demwe Power Limited

(Through its RP Mr. Umesh Garg)

Front Side, Third Floor, Part of Property No. E-561, 561-A,
G.R. Plaza, Palam, Sector 7, Dwarka,
New Delhi-110075

... **Respondent No. 3**

Order Delivered on: 09.04.2024

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Vidhan Vyas, Adv. Syes Haider Shah in IA-3163/2023.

For the RP : Adv. Vibhor Kapoor along with Mr. Umesh Garg Adv. Shashwat Anand, Adv. Shashwat Parihar, Adv. Dhruva Vig, Adv. Deepanshu Badiwal, Adv. Gunjan Rathore in IA-4045/2023.

For the CoC : Mr. Brijesh Kumar Tamber and Mr. Prateek Kushwaha Advocates.

For Navayuga Engineering : Ms. Simran Malhotra.

For State of Arunachal Pradesh : Mr. Sriharsha Peechara, Adv. with Ms. Harshita Gupta, Adv. in CA-1683/2019.

For the THDC : Adv. Ajay Kumar, Adv. Vijayant Goel, Adv. Vaibhav Tiwari, Adv. Stuti in IA 2230/2022.

Hearing Through: VC and Physical (Hybrid) Mode

ORAL ORDER

CA-246/2019 & IA-2230/2022: The prayer made in CA-246/2019 is for approval of the Resolution Plan. Indubitably, the application was preferred in the year 2019 and is still pending for consideration. The Ld. Counsel for the RP and CoC are ad-idem that the SRA viz. Sikkim Power Investment Corporation Limited did not furnish the bank guarantee despite being so asked specifically. Referring to the reply filed by CoC in IA-2230/2022, the Ld. Counsel appearing for the CoC (Committee of Creditors) espoused thus:

- (a) In the meeting of CoC dated 04.05.2023 issue pertaining to submission of performance guarantee even after five years by SPICL (Sikkim Power Investment Corporation Limited) was discussed. The RP apprised the committee that an E-mail dated 17.06.2022, on behalf of CoC was sent, in terms of which the SRA was warned about the consequences of the non-submission of performance security/ guarantee.
- (b) The RP further informed the CoC that the reminder e-mails dated 27.02.2023, 13.03.2023, 20.03.2023, 27.03.2023, 03.04.2023, 10.04.2023, 17.04.2023, 24.04.2023, 01.05.2023 and 03.05.2023 were sent to the SRA, calling upon it to submit performance guarantee, but all in vain.
- (c) Since the SRA (SPICL) did not give any heed to submit performance security/guarantee, it raised serious doubt qua the conduct of its management. The management of SRA could delay the furnishing of PPG by five years at the time of filing reply to IA-2230/2022.
- (d) In the meeting of CoC held on 04.05.2023, the issue of filing of applications by Government of Arunachal Pradesh and THDC India Limited were discussed. On deliberation the CoC viewed that the SRA (SPICL) is in default and breach of its own Resolution Plan. Nevertheless, for maximization of value of the plan and repayment of the debt of creditors, a decision was taken not to oppose/object the application filed by the Government of Arunachal Pradesh. The relevant excerpt viz. paras 14 to 19 of the reply filed by CoC to IA-2230/2022 reads thus:

“14. That in the recent meeting of CoC dated 04.05.2023 the issue pertaining to the non-submission of performance guarantee even after 5 years by SPICL was discussed. The Resolution Professional apprised that on behalf of the CoC an email

dated 17.06.2022 was sent wherein the SPICL was warned about the consequences of non-submission of Performance Security/Guarantee. The Excerpts of the email are reproduced below:

"Consequences of non-submission of Performance Guarantee within stipulated time

- 1. Due to your failure to fulfil your prime obligations of providing the PG in terms of provisions of the Resolution Plan and the Process Memorandum even after 4 years of due date, SPICL will be treated as a Resolution Applicant in default.*
- 2. EMD amounting to Rs 5,00,00,000/- deposited by you will stand forfeited.*
- 3. CoC will withdraw your Resolution Plan from NCLT.*
- 4. CoC will initiate necessary action to invite fresh Resolution Plans for Resolution of the Corporate Debtor.*

CAUTION

No further reminders will be sent after this communication. We are hopeful that you will take this notice seriously and submit the PG /deposit the amount latest by 30th June 2022."

- 15. That the Resolution professional further informed that the reminder email were also sent vide an email dated 27.02.2023, 13.03.2023, 20.03.2023, 27.03.2023, 10.04.2023, 17.04.2023, 24.04.2023, 01.05.2023 and on 03.05.2023. The Resolution professional further shown disappointment that the SPICL did not submit Performance Guarantee. Copies of emails sent to the SPICL are annexed herewith and marked as **ANNEXURE R-4(COLLY)**.*
- 16. That since the SPICL did not give any heed to submit performance security/ guarantee. It further raises serious doubt on the conduct of the management of the SPICL, the management of SPICL have delayed providing performance security by 5 years now. The CoC have now lost confidence in the SPICL as the SPICL failed to adhere to the terms and conditions and took the CIRP process and its compliance under the law very lightly.*
- 17. That in the 41st meeting of CoC dated 04.05.2023, applications filed by Govt of Arunanchal Pradesh and by THDC India limited was discussed wherein vide an order dated 25.04.2023 this Hon'ble Adjudicating Authority has directed the CoC to file reply.*

18. *The members of CoC deliberated upon the applications filed by the Govt of Arunanchal Pradesh and THDC India limited i.e., the present Applicant with respect to the reply to be filed before this Hon'ble Adjudicating Authority. The COC deliberated that considering the present scenario wherein the SPICL the successful Resolution Applicant is in default and in breach of its own Resolution Plan it was decided that for the maximization of value for all stakeholders the CoC should not object to the Applications filed by the Applicant and the Govt. of Arunanchal Pradesh for consideration of Resolution Plan/EoI submitted. The CoC further deliberated that it is the best possible step to avoid the Corporate Debtor going into the liquidation in line with the objective of the Code, 2016 in the best interest of the Corporate Debtor.*
19. *Therefore, in view of the detailed deliberation by the CoC based on the current situation as elaborated hereinabove. The CoC is not objecting to the Application filed by the Applicant in the best interest of the Corporate Debtor.*

In view of the above, the Answering Respondent prays that the Application may please be allowed in the interest of the Corporate Debtor.”

2. The Ld. Counsel for the CoC could draw our attention to minutes of 41st meeting of CoC enclosed as Annexure R-1 to reply to IA-2230/2022 and submitted that the CoC could even view that as a consequence of non-submission of Performance Guarantor within stipulated time limit the CoC might withdraw the Resolution Plan from NCLT. Such position is recorded in the minutes only to question the SRA. The discussion held in the meeting of CoC qua item No. 6 reads thus:

“ITEM NO. 6

TO DISCUSS NON-SUBMISSION OF PERFORMANCE GUARANTEE BY SPCL

Chairman informed the members that in addition to numerous communications / reminders already sent to SPICL in this regard, a communication on behalf of CoC was sent to SPICL on dated

17th June, 2022 wherein the communication clearly warned SPICL about the consequences of non-submission which are being repeated hereunder in italics:

"Consequences of non-submission of Performance Guarantee within stipulated time-

1. Due to your failure to fulfil your prime obligations of providing the PG in terms of provisions of the Resolution Plan and the Process Memorandum even after 4 years of due date, SPICL will be treated as a Resolution Applicant in default.
2. EMD amounting to Rs 5,00,00,000/- deposited by you will stand forfeited.
3. CoC will withdraw your Resolution Plan from NCLT.
4. CoC will initiate necessary action to invite fresh Resolution Plans for Resolution of the Corporate Debtor.

CAUTION

No further reminders will be sent after this communication.

We are hopeful that you will take this notice seriously and submit the PG/deposit the amount latest by 30th June 2022."

Chairman further informed that since last CoC meeting held on dated 27th February, 2023 RP has sent further reminders to SPICL to submit the PG on dated 27th February, 2023, 13th March, 2023, 20th March, 2023, 27th March, 2023, 03rd April, 2023, 10th April, 2023, 17th April, 2023, 24th April, 2023, 01st May, 2023 and 03rd May, 2023 but is disappointed to inform that SPICL did not submit the Performance Guarantee till the date of this meeting.

Copy of CoC letter dated 17th June, 2022 and latest reminder dated 3rd May, 2023 is attached herewith as **Annexure-A & B** respectively.

Chairman further informed that just before commencement of this CoC meeting, Mr. Sunil Saraogi, CMD of SPICL has sent an email communication dated 04th May, 2023 to RP wherein Mr. Sunil is seeking 30 days' time from order of 29A matter which is reserved, to submit the PG. Relevant extract of said email communication is reproduced hereunder:

"We request you to kindly appreciate that we are Government Company, and have our own limitations and accountability. However, we are serious on the project, and therefore, request you to kindly accord us 30 days'

time (as per discussions with our proposed strategic partner) from the date of the pronouncement of this qualifications - disqualification judgment."

*Chairman also placed the said email communication before the CoC members for their pursual. Copy of email communication received from SPICL on 04th May, 2023 is attached herewith as **Annexure-C**.*

Chairman invited CoC members to deliberate the matter and take a decision in this regard.

COC DELIBERATION & DECISION:

CoC deliberated the matter and decided that in view of the fact that even if we deliberate this matter now and take a final call on Resolution Plan of SPICL because of pending PG it will be of little use because we can't initiate further actions till 29A application of NEC is pending. As such, CoC decided that it will be appropriate to discuss this agenda after judgement on 29A application of NEC is pronounced. CoC requested RP to call a meeting thereafter on short notice.

CoC further decided that communication from SPICL dated 4th May 2023 will also be taken up for consideration in the next meeting itself."

3. From the aforementioned analysis/discussion and deliberation transpired in CoC meeting, it is apparent that the SRA did not act in terms of the Regulation 36B (4A) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which provides that the RFRP shall require the Resolution Applicant in case it's Resolution Plan is approved under sub-section 4 of Section 30 to provide a performance security within the time specified therein and such performance security shall stand forfeited if the Resolution Applicant of such plan after its approval by the Adjudicating Authority fails to implement or contributes to failure of implementation of that plan in accordance with the

terms of the plan and its implementation schedule. The Regulation 36B (4A) reads thus:

“36B. Request for resolution plans.

.....

(4A) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.

Explanation I. – For the purposes of this sub-regulation, “performance security” shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.

Explanation II. – A performance security may be specified in absolute terms such as guarantee from a bank for Rs. X for Y years or in relation to one or more variables such as the term of the resolution plan, amount payable to creditors under the resolution plan, etc.”

4. The Ld. RP who is present in person submitted that in the RFRP (request for Resolution Plan), the SRA was specifically required to furnish the performance guarantee. The relevant except of the RFRP reads thus:

3.	Performance Guarantee	<i>The GoS as promoter of SPICL will provide guarantee in the specified format as given in the process memorandum in lieu of Bank Guarantee as asked for.</i>
-----------	------------------------------	---

“1.93 Submission of Performance Bank Guarantee

Upon approval of the Resolution Plan by CoC, the Successful Resolution Applicant shall cause to furnish the performance bank guarantee of an amount equivalent to 20% of the Bid Consideration amount, within 2 (two) business days of issuance of LoI by the CoC, in favour of the Corporate Debtor, in the form of

a bank guarantee, issued by any scheduled commercial bank in India (“Bank”) which shall be in accordance with Format VIII (Performance Bank Guarantee) of this PM (“PBG”).

The PBG shall be valid for entire tenure of the Resolution Plan submitted by the Successful Resolution Applicant and shall be subject to re-issuance/renewal or extension by the Successful Resolution Applicant as may be required by the CoC (“PBG Validity”). It is hereby clarified that non-submission of the PBG by the Resolution Applicant, along with the acceptance of the Lol, shall lead to cancellation of Lol issued by the CoC, unless otherwise determined by the CoC at its sole discretion.

*Provided further that payment of the amount of the PBG by an Associate Company shall be accompanied by a letter in the format as set out in **Format VIII-A** (PBG Amount payment by an Associate Company) of this PM, which shall be acknowledged by the Resolution Applicant in the format as set out therein.*

Provided further that where the payment of the amount of the PBG by an Associate Company is made on behalf of the Resolution Applicant, and is due to be refunded in terms of this PM, such refund shall be made to the Associate Company.”

5. It is also seen from the Resolution Plan that the SRA had committed to furnish the performance guarantee, but the pre-condition required to be fulfilled in terms of RFRP as also commitment made in the Resolution Plan has not been satisfied/fulfilled.

Section 30(2)(e) of IBC, 2016 specifically provides that this Adjudicating Authority will examine as to whether the Resolution Plan is not in contravention of any of the provisions of law for the time being in force.

“Section 30. Submission of resolution plan —

.....

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(e) does not contravene any of the provisions of the law for the time being in force;”

6. In **Ebix Singapore Private Limited Vs Committee of Creditors of Educomp Solutions Limited & Anr.**, (Civil Appeal No. 3224 of 2020) Hon'ble Supreme Court categorically ruled that while examining an application filed for approval of plan, the Tribunal need to satisfy that the provisions of Section 30(2)(a) to (f) are complied with. In the present case, apparently the provisions of Regulation 36B(4A) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 have not been carried out. The Regulations were notified by the IBBI in terms of the notification No. IBBI/2016-17/GN/REG004 dated 30.11.2016 and could be framed/made by the board in exercise of the powers conferred under Sections 5, 7, 9, 14, 15, 17, 18, 21, 24, 25, 29, 30, 196 and 208 r/w Section 240 of IBC, 2016, thus have statutory flavor. One may say that the Regulation 36B(4A) (ibid) was inserted in IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 only by way of amendment dated 24.01.2019, thus its applicability with reference to the date of operation need to be examined. A plan turn binding in terms of the provisions of Section 31(1) of IBC, 2016 only after it is approved by this Tribunal. As can be seen from Section 31(1), while examining the application for approval of plan, we need to satisfy ourself, as to whether Section 30(2) stand complied with. When we are examining the application for approval of plan today, the Regulation 36B(4A) is in vogue and we need to satisfy ourself regarding the compliance thereof. Once the aforementioned regulation has not been complied with and both the CoC and RP are of the view that the SRA has violated the relevant provisions of law and the plan does not deserve to be approved, **we have no option but to reject the application filed for approval of plan.**

The prayer made in IA-2230/2022 filed by THDC India Ltd. reads thus:

CA-246/2019 & IA-2230/2022 in CP(IB)-244/ND/2017
Indian Bank vs. M/s. Athena Demwe Power Ltd.

- (a) *“allow the present Application in favour of the Applicant;*
- (b) *direct the Resolution Professional to table before the Committee of Creditors of Athena Demwe Power Limited the proposal of the Applicant THDC India Limited desirous of participating and presenting its Resolution Plan as a Resolution Applicant in terms of its Letter dated May 9, 2022;*
- (c) *direct the Committee of Creditors to consider the proposal of the Applicant-THDC India Limited desirous of participating and presenting its Resolution Plan as a Resolution Applicant in terms of its Letter dated May 9, 2022;*
- (d) *direct the Resolution Professional to provide access to the data room and other information/documents sought with respect to the Corporate Debtor to the Applicant so as to enable it to submit a duly formulated Resolution Plan;*
- (e) *permit the Applicant to submit its proposal/bid/resolution plan with respect to the Corporate Debtor;*
- (f) *during the ad-interim stage, pending the adjudication of this Application, direct that no further steps are taken with respect to the Application for Approval of Resolution Plan being CA/235/2019 filed in the present Company Petition;*
and
- (g) *consequently, pass any such other order/directions as may be necessary to meet the ends of the present Application.”*

7. The Ld. Counsel appearing for the Applicant submitted that the THDC India Limited is a Government Company and the 100% paid up share capital qua the same is owned by Govt. of Arunachala Pradesh and NTPC. Making reference to the report of Standing Committee of Energy (2018-2019) constituted by 16th Lok Sabha, the Ld. Counsel for the Applicant submitted that in terms of view of the committee, the private entities or individuals may not be capable to evolve a road map/devise to put the CD viz. Athena Demwe Power Ltd. back to its feet and rescue the same. The relevant excerpt of the application reads thus:

“Private Sector Participation

4.42 When the Committee desired to know the reasons for very less participation of private entrepreneurs in the hydro sector, the Ministry have stated as under:

"In the early 1990s, the power sector was opened for private sector participation mainly to bring in additional resources. Subsequently, a large number of hydro projects were allotted by the respective State Governments for implementation in private sector. However, in spite of a number of policy measures and initiatives taken by the Government to accelerate the development of hydro power in the country, the performance of private sector in hydro power sector leaves much to be desired.

High construction cost of Hydro Projects, cost escalation due to longer gestation periods, R&R issues, land disputes, law and order issues, lack of long term finance, difficulty in signing of long term PPAs, obtaining environmental and forest clearances and geological uncertainties, lack of enabling infrastructure like roads and bridges, judicial challenges to clearances already granted, lack of funding for flood management component etc. are some of the reasons making investment in hydro power development less attractive for private participation."

4.43 The Committee pointed out that the States have expressed their opinion that in the given circumstances the private players will not be able to implement the project. The Committee, therefore, asked the Ministry whether Central PSUs would be in position to take up those projects. While replying to this the Secretary, Power deposed before the Committee as under:

"Very much, rather, we have four PSUs and all of them are sitting here. They will agree with me that they are underworked. They do not have too many projects to undertake. State Governments have to agree to give and we are willing at a joint venture model also. J&K explained about Chenab Valley Power Project. One project is under implementation; two are under approval. Some more are under discussion on JV model. If the States do not have resources of their own, it can be implemented on commercial terms."

4.44 On being asked by the Committee about the initiative taken by the Government to give impetus to the development of hydro power sector, the Ministry have stated as under:

"The Government has taken several policy initiatives to tap the hydro potential and to boost hydro power development in the country. The details are given below:

(i) National Electricity Policy, 2005: Salient Features

- The policy lays maximum emphasis on full development of the feasible hydro potential in the country which will facilitate economical development of States, particularly North Eastern States, Uttarakhand, Himachal Pradesh and Jammu & Kashmir.*
- Full support of Central Government has been extended for hydel development by offering the services of CPSUs like NHPC, NEEPCO, SJVNL, THDC etc.*
- Since the hydel projects call for comparatively larger capital investment, debt financing of longer tenure has been recommended.*
- The State Governments have been advised to review procedure for land acquisition and other approvals/clearances for speedy implementation of hydro projects.*

(ii) Hydro Power Policy, 2008

- Transparent selection procedure/criteria to be followed by the States for awarding sites to private developers.*
- The dispensation regarding exemption from tariff-based bidding, available to the Public Sector under the National Tariff Policy 2006, also extended to private sector hydroelectric projects up to January 2011 (since extended up to 15.08.2022 in Revised Tariff Policy, 2016).*
- To enable the project developer (public as well as private sector hydro developers) to recover the costs incurred by him in obtaining the project site, the policy allows a special incentive to the developer by way of merchant sale of upto a maximum of 40% of the saleable energy.*
- An additional 1% free power from the project (over and above 12% free power earmarked for the host State) would be provided and earmarked for a Local Area Development Fund, aimed at providing a regular stream of revenue for income generation and welfare schemes, creation of additional infrastructure and common facilities etc. on a sustained and continued basis over the life of the project.*
- Developer to provide 100 units of electricity per month to each Project Affected Family in cash or kind or a combination of both for 10 years from the COD.*

- *Developer to assist in implementing rural electrification in the vicinity of the project area & contribute 10% share of the State Govt. under the RGGVY scheme.*
- (iii) National Rehabilitation & Resettlement Policy 2007*
- (iv) Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013*
- (v) Tariff Policy, 2016 (Portions relevant to Hydro power)*
- *Intent of Government for promotion of HEP emphasized in the objective of the Policy "To promote HEP generation including PSP to provide adequate peaking reserves, reliable grid operation and integration of variable RE sources".*
 - *Hydro power to be excluded for estimating Solar Purchase Obligation.*
 - *Certainty of long term PPA for min. 60% of capacity, balance through merchant sale-Provision for extension of PPA beyond 35 years for a further period of 15 years.*
 - *Enabling provision for suitable regulatory framework incentivizing the developers of HEPs for using long term financial instruments-in order to reduce tariff burden in the initial years.*
 - *Depreciation - Developer shall have the option of charging lower rate of depreciation vis-a-vis the ceiling determined by CERC.*
 - *Exemption from competitive bidding extended up to 2022.*
- (vi) A proposal 'Measures to promote Hydro power sector' is under consideration of Government."*

8. It is also the plea espoused in the application that the Applicant has sufficient credibility to be considered as a Resolution Applicant by CoC for submitting the Resolution Plan, as NTPC viz. a government entity is one of its shareholders. Para 3 to 17 of the application reads thus:

"3. Amongst similar trends across India, taking into consideration the delay in the implementation of the Project by the Corporate Debtor, the Standing Committee of Energy (2018-19) constituted by 16th Lok Sabha, Government of India had, in its 43rd Report published in January 2019, stated that the States had noted the inability (in the given circumstances) of privates players to implement hydro projects in India and accordingly requested the Ministry of Power

to recommend whether Central Public Sector Undertakings ("**CPSUs**") would be in a position to take up such projects. The report also recorded the policy initiatives by the Government of India and extension of support by offering services of CPSUs such as, inter alia, the Applicant – THDC India Limited. Subsequently, the Ministry of Power, Government of India vide its office memorandum dated December 22, 2021 bearing reference number F.No. 14-15/16/2021-H.I (259535) stressed and indicated that the Project should be implemented by the Applicant. Further, GoAP has also issued a letter/office memorandum in January 2022 bearing reference number CE (M)/HPD/W-140/2012-13/Pt to the Applicant, wherein it has communicated about the ongoing insolvency resolution process of the Corporate Debtor and that the Project requires immediate attention of the Applicant. Copy of 43rd Report published in January 2019 by the Standing Committee of Energy (2018-19) constituted by 16th Lok Sabha, Government of India is annexed hereto as **Annexure A-2**. Copy (along with true typed copy) of Office Memorandum dated December 22, 2021 bearing reference number F.No. 14-15/16/2021-H.I(259535) issued by Ministry of Power is annexed hereto as **Annexure A-3**. Copy of letter/office memorandum issued by GoAP in January 2022 bearing reference number CE (M)/HPD/W-140/2012-13/Pt is annexed hereto as **Annexure A-4**.

4. The Ministry of Power had also convened a meeting on May 4, 2022 regarding the hydro power projects that have been pending for completion and directed (as also communicated vide its Email dated May 5, 2022) the Applicant to stake its claim in the present Corporate Insolvency Resolution Process of the Corporate Debtor in respect of the Project. Copy of Email dated May 5, 2022 of Ministry of Power is annexed hereto as **Annexure A-5**.
5. It is submitted that in light of the directions and recommendations of the MoP, GoAP and other departments of the Government of India, while the Applicant has the vested interest and rights in relation to the Project, it is also incumbent upon the Applicant to adhere to the recommendations of the Governments and implement the Project in an expeditious manner so that the public interest as well national interest is served and safeguarded.
6. The Applicant further submits that it is a bona fide party who seeks to submit a Resolution Plan before the COC of the Corporate Debtor, which Resolution Plan will be intended/ directed, in the best belief and endeavor of the Applicant, towards: (a) value maximization;

(b) viability and feasibility; (c) expeditious completion of the Project; (d) achievement of public interest; and (e) last but most important, achievement of national goal of energy sufficiency. While it is undisputed that the Applicant, being a CPSUs and backed by the Government of India, has necessary resources and financial ability to ensure completion of the Project in timebound manner, it is also (after significant deliberation and analysis) the entity that has been recommended by the Government for implementation of the Project. The credentials of the Applicant have been discussed hereinafter to demonstrate the capabilities of the Applicant to implement the Project.

*In this context, it pertinent to highlight that the Applicant has eminence presence and recognition outside India as well and has been able procure funds for its projects from financial institutions/organizations such as the World Bank. Notably, the World Bank had extended US \$ 648 million (i.e. more than INR 4500 crore) loan to the Applicant in 2011 for construction and implementation its Vishnugad Pipalkoti H.E. Project on River Alakhnanda in Chamoli, Uttarakhand. Copy of Press Release dated June 30, 2011 recording the extension of US \$ 648 million loan to the Applicant by the World Bank is annexed hereto as **Annexure A-6.***

- 7. It is submitted that the Applicant is fully aware of the topography and all other factors relevant to the Project, and has already preliminarily analyzed and reviewed the viability of the Project and believes that it is in a position to submit a Resolution Plan which besides being feasible and viable would also meet the requisite compliances that are required as per the provisions of the Code, and adhere to the specific environmental conditions that have been specified by the National Board for Wildlife post approval (by COC) of the currently approved resolution plan pending before this Hon'ble Tribunal. In this respect, it is pertinent to mention that the current Resolution Plan (that is pending before this Hon'ble Tribunal for approval) does not factor and has not been tested against the conditions that have been imposed by Standing Committee of National Board of Wildlife subsequent to the approval of the Resolution Plan by COC.*
- 8. It is submitted that any additional time or cost implications arising out of compliance with such conditions, which may be relevant to assess from the perspective of feasibility and viability of the approved Resolution Plan, in any case, could not have been examined and evaluated at the stage the COC approved the Resolution Plan. In this regard, it is submitted that feasibility and viability assessment with respect to Resolution Plan is a mandatory requirement under the provisions of the Code read with the Insolvency and Bankruptcy*

Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"). Any variation in the fundamentals of the Corporate Debtor or the Project or the contours of the Evaluation Matrix requires fresh assessment of feasibility and viability and should lead to reconsideration of resolution plans. Since, the commercial wisdom of the COC is sacrosanct and cannot be interfered by the Adjudicating Authority, in such situation where fundamentals of the Project (that is under resolution) have changed, it is incumbent upon the COC to address such variation or eliminate the inadequacies that arises on account of such change. It is most humbly submitted that since this Hon'ble Tribunal is not empowered under the Code to eliminate such inadequacies or amend the Resolution Plan, the present circumstances of the case demands the entire process to be remanded back to the COC for reconsideration of plans including the Resolution Plan of the Applicant.

Details and Credentials of the Applicant

9. *That the Applicant is a subsidiary of NTPC Limited and a leading Power Sector and profit making public sector enterprise under the administrative control of Ministry of Power. The Applicant was upgraded to 'Schedule A' of Central Public Sector Enterprises in July 2010 by the Government of India.*
10. *That the Applicant was incorporated with the objective to develop, operate and maintain 2400 MW Tehri Hydro Power Complex and other Hydro Projects in India. It is one of the premier power generators in the country with currently installed capacity of 1513 MW with commissioning of Tehri Dam and Pumped Storage Plant Stage-I (1000MW), Koteshwar Hydroelectric Plant (400MW) and Dhukwan Small Hydroelectric Plant (24MW). Besides the above the Applicant at present has projects spread across various states (as detailed below) as well as in neighbouring countries. The Applicant has a portfolio of 16 hydroelectric and wind energy projects which includes projects at the stage of under construction or implementation. List along with current status of the said projects is as under:*

S. No.	Type of Project	Project Name	Project Stage
1	Hydro	Tehri Dam & HPP (Stage I), river Bhagirathi	Operational
2	Hydro	Koteshwar Hydro Power Project	Operational
3	Hydro	Dhukwan SHP, Jhansi, Uttar Pradesh	Operational
4	Hydro	Jhelum Tamak H.E. Project, Chamoli, Uttarakhand	Survey and Investigation
5	Hydro	Bokang Bailing H.E. Project, Pithoragarh, Uttarakhand	Survey and Investigation
6	Hydro	Malshej Ghat PSS, Maharashtra	Survey and Investigation
7	Hydro	Bunakha H.E. Project, Bunakha, Western Bhutan	Survey and Investigation
8	Hydro	Sankosh H.E. Purpose Project, Sarpang District, Bhutan	Survey and Investigation
9	Hydro	Tehri Pump Storage Plant	Under Construction
10	Hydro	Vishnugad Pipalkoti H.E. Project, Chamoli, Uttarakhand	Under Construction
11	Wind	Patan Wind Power Project, Patan, Gujarat	Operational
12	Wind	Devbhumi Dwarka Wind Power Project, Gujarat	Operational
13	Solar	Solar PV Power Plant, Kasaragod, Kerala	Operational
14	Solar	Ultra Mega Renewable Energy Parks, Uttar Pradesh	Survey and Investigation
15	Thermal	Khurja Super Thermal Power Project	Under Construction
16	Thermal	Amelia Coal Mine, Madhya Pradesh	Under Construction

11. The Applicant has, besides having the bandwidth and experience to implement various power projects, been performing financially well. The Applicant has, as per its last audited balance sheet, asset size of more than INR 18,000 crore and has (as of March 2021) generated revenues of more than INR 2500 crore with profit exceeding INR 1000 crore. The Applicant has expertise more than 30 years in handling and implementing complex power projects in India. In fact, most of the power projects implemented or being implemented by the Applicant are of national importance and prestigious projects. Copy of relevant extract of 33rd Annual Report containing brief profile and financial statements of the Applicant is annexed hereto as **Annexure A-7.**

12. Besides the aforementioned credentials, the Applicant has also bagged various awards and appreciations for the projects it has implemented:

- a) *The Applicant is winner for PMI India Best Project of the Year (long Term Duration (More than 3 years) for its Koteshwar Hydro Electric Project (KHEP) 400MW, Uttarakhand. Copy of certificate of award given to the Applicant in Project Management National Conference 2012 is annexed hereto as **Annexure A-8;***
- b) *The Applicant has won CBIP Award 2019 for Best Performing Utility in Hydro Power Sector on January 4, 2019 from Central Board of Irrigation & Power. Applicant was awarded for outstanding contribution to the Nation by use of latest Technologies and Smart Solutions for Efficient Development and Operation and Maintenance of Hydro-electric Projects in Country. Copy of certificate of CBIP Award 2019 is annexed hereto as **Annexure A-9;***
- c) *The Applicant has also won award of Milestone Project for its Tehri Dam in the category of International Rockfill Dam from International Commission of Large Dams and Chinese National Committee on Large Dams. Copy of certificate of award of Milestone Project in International Rockfill Dam for Tehri Dam is annexed hereto as **Annexure A-10;** and*
- d) *The Applicant has won Best Maintained Project (Fully completed and Functional for over 10 years) for Tehri Hydro Power Plant (1000MW) from Central Board of Irrigation & Power. Copy of certificate of award for Best Maintained Project from Central Board of Irrigation & Power is annexed hereto as **Annexure A-11.***

13. *It is also pertinent to mention that since NTPC Limited has acquired stake in the Applicant, NTPC Limited and the Applicant have been working together where performance of the Applicant is monitored by NTPC Limited basis the balance score card approach and includes financial and non-financial targets. As per the Department of Public Enterprises, Government of India, financial parameters include targets for various parameters to reflect the size and productivity performance. Non-financial parameters include targets for parameter related to Human Resource Management, Corporate Social Responsibility, Project Implementation, Sector Specific and Enterprises Specific Parameters. The evaluation of the Applicant's performance against pre- identified parameter is carried out every year and*

performance rating has been assigned by the Department of Public Enterprise on a five point scale. It would be relevant to mention that the Applicant, for the last couple of years, has been assigned as Very Good. The Applicant has also been awarded "Excellent" rating for compliance with 'DPE Guidelines on Corporate Governance'.

14. From the foregoing, the Applicant believes that it has sufficiently demonstrated its credentials and financial capabilities to implement the Project. It is submitted that the objective (as has been held in catena of judgments by various courts) of the Code is resolution of a corporate debtor and not recovery, which in ordinary prudence (in the present case) would essentially mean implementation of the Project in a timely and effective manner. The Applicant believes that, with the exposure and expertise it has in the sector of the Hydro Power Projects, it has the capabilities and necessary support (including from NTPC Limited, being its shareholder and consultant counterpart) to implement the Project and thus, achieve the resolution of the Corporate Debtor.
15. As mentioned above, the Applicant intends to submit a Resolution Plan with respect to the Corporate Debtor and has also written on May 9, 2022 to the COC of the Corporate Debtor expressing its intent to submit a Resolution Plan with respect to the Corporate Debtor and the Project so as to adhere to the recommendations of the Ministry of Power and the GoAP. Copy of the letter dated May 9, 2022 issued by the Applicant containing its expression of interest is annexed hereto as **Annexure A-12.**
16. It is respectfully submitted that the CIRP of the Corporate Debtor is ongoing and no resolution plan has attained approval of this Hon'ble Tribunal. In fact, one of unsuccessful resolution applicant, Navyuga Engineering Company Limited, has already filed an Application bearing number CA/237/2018 challenging determination of its disqualification under Section 29A of the

Code. It is not the case, where the approval of Resolution Plan is any way near to finality. Considering the same and that major stakes and national interest is involved it would not be out of place nor beyond time limits to seek indulgence by this Hon'ble Tribunal.

Brief Facts

17. *The brief facts germane for the adjudication of the instant application are as follows:*

A. Award of Project to the Corporate Debtor

- (a) The Government of India launched 50,000 MW Hydro-electric Initiative with the objective of increasing the hydro power capacity in India, out of which more than half the capacity was identified in the State of Arunachal Pradesh.*
- (b) GoAP vide its advertisement dated May 4, 2007 and the Amendment thereto dated June 6, 2007 invited Expression of Interest/Bids for the development and commissioning of 3000 MW Demwe Hydroelectric Project in Rover Lohit Basin, Demwe, Arunachal Pradesh on Build Own Operate and Transfer basis. The 3000 MW Demwe Hydroelectric Project was proposed to be established on Lohit River Basin of Arunachal Pradesh in one or more schemes/stages to capture 3000 MW capacity between elevation 589 m and 300 m including complete hydroelectric power generating facility covering all components such as dam, intake works, water conductor system, power station, generating units and other connected facilities including the interconnection facilities.*
- (c) AEVPL along with the other bidders submitted their bids in accordance with the terms and conditions of the bidding documents provided by GoAP. The evaluation committee after thoroughly evaluating and examining the bids recommended the name of AEVPL as successful bidder for the development and commissioning of 3000 MW Demwe Hydroelectric Project. Subsequently, GoAP and AEVPL entered into Memorandum of Agreement dated July 9, 2007 ("MOA") for the implementation of entire Demwe Hydro Electric Project (3000 MW). It was the responsibility of AEVPL/developer to obtain all clearances from the Central Government in connection with the implementation of said project.*
- (d) In terms of Clause 2.22 of MOA, AEVPL and GoAP had agreed that AEVPL was permitted to implement the aforementioned 3000 MW*

Hydroelectric Project through its Special Purpose Vehicle, and GoAP was required to transfer/issue all permissions and approvals as well as the right and obligations of AEVPL under MOA to such Special Purpose Vehicle.

- (e) *Subsequently, since the 3000 MW Hydroelectric Project in the Lohit River Basin was within 10 Kilometers protected area of Kamlang Wildlife Sanctuary, the said project was bifurcated into Demwe Lower and Demwe Upper Hydroelectric Projects. Accordingly, the Project i.e. Demwe Lower Hydroelectric Project of capacity 1750 MW to be implemented at river Demwe, District Lohit, Arunachal Pradesh was decided/agreed to be implemented through the Corporate Debtor, a Special Purpose Vehicle incorporated by AEVPL in terms of MOA. In this regard, a Tripartite Agreement dated September 14, 2011 was entered between GoAP, AEVPL and the Corporate Debtor. Copy of Tripartite Agreement dated September 14, 2011 is annexed hereto as **Annexure A-13**.*

B. Clearances with respect to the Project

- (f) *Ministry of Environment and Forest (FC Divisions), vide its letter dated March 1, 2012, informed GoAP that pursuant to the recommendations of the Forest Advisory Committee the Central Government has accorded Stage I approval under the Forest Conservation Act, 1980, in favour of the Corporate Debtor subject to the satisfaction of the conditions laid down. It was also informed that pursuant to the receipt of report on compliance of the conditions stipulated, Stage II approval will be granted in terms of Section 2 of Forest Conservation Act, 1980. Copy of the Letter dated March 1, 2012 addressed by Ministry of Environment and Forest is annexed hereto as **Annexure A-14**.*
- (g) *On May 3, 2013, Ministry of Environment and Forest informed that on the basis of the compliance report furnished by the GoAP on March 22, 2012 final approval is accorded under Section 2 of Forest Conservation Act, 1980 in favour of Corporate Debtor for the Project. Copy of the letter dated May 3, 2013 addressed by Ministry of Environment and Forest (along with true typed copy) is annexed hereto as along with true typed copy Annexure A-15.*

- (h) *The aforementioned clearance and subsequent extension/clearances were challenged before the Hon'ble National Green Tribunal. An Appeal was filed before National Green Tribunal, Southern Zone, Chennai ("NGT"), challenging the environmental clearance accorded by Ministry of Environment, Forest and Climate Change ("MoEF") for diversion of 1415.92 hectare of forest land for construction of the Project. The Hon'ble NGT, vide judgment dated October 24, 2017 passed in the Appeal No. 30 of 2015 titled Bimal Gogoi vs State of Arunachal Pradesh & Ors., directed suspension of permission and clearance granted by MoEF until appropriate directions were passed by the Standing Committee of National Board for Wildlife ("NBWL"). Copy of the Judgment dated September 24, 2017 in Appeal No. 30/2015 is annexed hereto as Annexure A-16.*
- (i) *Pursuant to suspension of forest clearance by the NGT, MoEF had published the Minutes of 50th Meeting of the Standing Committee of NBWL convened on September 26, 2018 recording that developer of the Project is bound by several conditions not limited to submission of undertakings, analysis of impact of Lower Demwe Hydroelectric Project on the Riverine Ecosystems of Lohit Basin and submission of compliance reports annually. Copy of Minutes of 50th Meeting of the Standing Committee of NBWL convened on September 26, 2018 is annexed hereto as Annexure A-17.*
- (j) *It is important to take note that the conditions have been imposed subsequent to the approval of the Resolution Plan of successful resolution applicant Sikkim Power Investment Corporation Limited ("SPICL") by the COC and therefore, any additional time or cost implications arising out of compliance with such conditions, which may be relevant to assess from the perspective of feasibility and viability of the approved Resolution Plan, appear to not have been examined and evaluated by SPCIL or at the stage the COC approved the Resolution Plan.*

C. CIRP of the Corporate Debtor

(k) *The Corporate Debtor had, for the purpose of implementation of the Project, availed loans from various banks/lenders including Indian Bank (Financial Creditor in the present proceedings). Upon default in repayment of the facilities, Indian Bank had filed the present Company Petition. Vide order dated September 28, 2017 ("CIRP Order") in the present Company Petition, this Hon'ble Tribunal had directed commencement of CIRP of the Corporate Debtor and appointed Mr. Mukesh Mohan as Interim Resolution Professional. Subsequently, Mr. Mukesh Mohan was replaced and Mr. Umesh Garg ("Resolution Professional") was appointed as Resolution Professional of the Corporate Debtor.*

D. Resolution Plan with respect to the Corporate Debtor

- (l) *As part of the CIRP, resolution plans were invited from prospective resolution applicants in terms of the provisions of the Code. Per the latest Form G (invitation for resolution plans) issued on June 1, 2018 under Regulation 36A of the CIRP Regulations the last date for submission of the resolution plan was June 4, 2018. Pursuant thereto, Resolution Plans were submitted by SPICL (a wholly owned public limited company of Government of Sikkim) and Navyuga Engineering Company Limited ("Navyuga").*
- (m) *Upon consideration of eligibility of the respective resolution applicants, the COC had in its 12th meeting declared Navyuga to be ineligible under Section 29A of the Code.*
- (n) *The resolution plan as submitted by SPICL was approved by COC and an application being CA/235/2019 ("Application for Approval of Resolution Plan") was filed by the Resolution Professional for approval of the Resolution Plan of SPICL in terms of Section 30(6) and 31 of the Code.*
- (o) *Apart from the Application for Approval of Resolution Plan, inter alia, following relevant applications (that have a bearing on approval of Resolution Plan with respect to Corporate Debtor) are also pending before this Hon'ble Tribunal:*

- (i) Application bearing number CA/237/2018: Application filed by Navyuga challenging determination of its disqualification under Section 29A of the Code; and
- (ii) Application bearing number CA/246/2019: Application challenging the approval of the resolution plan.

The same is evidenced from the orders dated October 7, 2021 and April 6, 2022 in the present case. Copy of Order dated October 7, 2021 in the present Company Petition is annexed hereto as **Annexure A-18**. Copy Order dated April 6, 2022 in the present Company Petition is annexed hereto as **Annexure A-19**.

E. Government according Emphasis on Implementation of the Project by the Applicant

(p) The Standing Committee of Energy (2018-19) constituted by 16th Lok Sabha, Government of India had, in its 43rd Report published in January 2019, stated that the States had noted the inability (in the given circumstances) of private players to implement hydro projects in India and accordingly requested the Ministry of Power to recommend whether Central Public Sector Undertakings ("CPSUs") would be in a position to take up such projects. The report also recorded the policy initiatives by the Government of India and extension of support by offering services of CPSUs. Relevant extract from the aforementioned 43rd Report is reproduced below for ease of reference:

"4.43 The Committee pointed out that the States have expressed their opinion that in the given circumstances the private players will not be able to implement the project. The Committee, therefore, asked the Ministry whether Central PSUs would be in position to take up those projects. While replying to this the Secretary, Power deposed before the Committee as under:

"Very much, rather, we have four PSUs and all of them are sitting here. They will agree with me that they are underworked. They do not have too many projects to undertake. State Governments have to agree to give and we are willing at a joint venture model also. J&K explained

about Chenab Valley Power Project. One project is under implementation; two are under approval. Some more are under discussion on JV model. If the States do not have resources of their own, it can be implemented on commercial terms."

... ..

... The Government has taken several policy initiatives to tap the hydro potential and to boost hydro power development in the country. The details are given below:

(i) National Electricity Policy, 2005: Salient Features

- The policy lays maximum emphasis on full development of the feasible hydro potential in the country which will facilitate economical development of States, particularly North Eastern States, Uttarakhand, Himachal Pradesh and Jammu & Kashmir.
- Full support of Central Government has been extended for hydel development by offering the services of CPSUs like NHPC, NEEPCO, SJVNL, THDC etc.
- Since the hydel projects call for comparatively larger capital investment, debt financing of longer tenure has been recommended.
- The State Governments have been advised to review procedure for land acquisition and other approvals/ clearances for speedy implementation of hydro projects."

(q). On December 22, 2021, Ministry of Power addressed a letter/office memorandum [Annexure A-3] ("**MoP Office Memorandum**") to the CPSUs, wherein it stressed upon the need for the CPSUs to take up the Hydropower projects at certain identified sites, in order to enhance the hydro power capacity in the country. **It was also recommended by MoP that the Project be implemented by THDC.**

(r). GoAP has also issued a letter/office memorandum in January 2022 bearing reference number CE (M)/HPD/W-140/2012-13/Pt [Annexure A-4] to the Applicant, wherein it has communicated about the ongoing insolvency resolution process of the Corporate Debtor and that the Project requires immediate attention of the Applicant.

(s). On May 5, 2022, an email [Annexure A-5] was received by the Applicant from the Ministry of Power, wherein it was recorded that a meeting was convened on May 4, 2022 under the chairmanship of

the Hon'ble Minister of Power and NRE regarding pending hydro power projects and to say that Hon'ble Minister has directed that the Applicant may stake claim before this Hon'ble Tribunal with respect to the Project.”

9. As it may, it is not for this Adjudicating Authority to consider the eligibility or suitability or competence of Resolution Applicant to submit the Resolution Plan, far less to comment upon the viability or acceptability of plan. It is stare decisis that it is for CoC to take a decision in this regard. In the present case, once the Resolution Plan submitted by Sikkim Power Investment Corporation Limited is found not in conformity with the relevant regulations the same is rejected. **The CA-246/2019 stands disposed of accordingly.** It would be advisable that the CoC may invite fresh expression of interest, so that there is healthy competition and all interested parties may submit their Resolution Plan. On invitation of such EoI in prescribed form i.e. Form-G, the Applicant hereinabove us i.e. THDC India Limited would also be entitled to submit its plan. **The IA-2230/2022 stands allowed with the following direction:**

- (1) The period of CIRP stands extended by 120 days.
- (2) The RP will ensure that entire process till the stage of approval of Resolution Plan is completed within the extended period.
- (3) The form-G would be given wide publicity.
- (4) All interested parties would be entitled to submit their Resolution Plan.

CA-1683/2019: In terms of the order passed in IA-2230/2022, it would be open also to the Applicant in the captioned IA viz. CA-1683/2019 to submit its plan in response to expression of interest, to the RP. It is made clear that

the RP will specifically communicate the EoI to the Applicant in CA-1683/2019 & IA-2230/2022.

The IA stands disposed of.

IA-3163/2023: In the wake of the order passed in CA-246/2019 & IA-2230/2022 (ibid), the application is disposed of with the direction that in response to press EOI, the Applicant in the present application would also be entitled to submit its Resolution Plan.

We are sanguine that while following the fresh process, the RP/CoC will keep in mind the contentions raised in the present application.

The IA stands disposed of.

IA-4045/2023: There is no appearance on behalf of the Respondent i.e. Income-Tax Department despite service of notice. In the wake, the proceedings qua it are said set ex-parte. Let a copy of this order be sent to the Chairman (CBDT) for his information.

List on 22.05.2024.

Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)

Upasana/Tarun