

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1006, 1007 & 1008 of 2024

(Arising out of Order dated 09.04.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench (Court-II) in IA No.3163/2023, IA No.2146/ND/2018 and IA No.2230/2019 in (IB)-244(ND/2017)

IN THE MATTER OF:

Sikkim Power Investment Corporation Ltd.
Through Mr. Sonam Rinchen Bhutia,
Executive Director,
Beside Manan Bhawan, Development Area,
Jeevan Theng Marg, Gangtok, Sikkim-737101 ... Appellant

Versus

1. Mr. Umesh Garg, Resolution Professional
of Athena Demwe Power Limited,
1413-1416, 14th Floor, Devika Tower,
New Delhi – 110019.
2. Committee of Creditors of Athena Demwe Power Ltd.
Front Side, Third Floor,
Part of Property No.E-561, 561-A,
G.R. Plaza, Palam Sector,
Dwarka, New Delhi – 110075.
3. Athena Demwe Power Ltd.
(Through its RP Mr. Umesh Garg)
Front Side, Third Floor,
Part of Property No.E-561, 561-A,
G.R. Plaza, Palam Sector,
Dwarka, New Delhi – 110075.
4. THDC India Ltd.
(AR, Mr. L.P. Joshi, CGM),
A-141, Portion B, Neeti Bagh,
New Delhi – 110049. ... Respondents

Present:

**For Appellant : Mr. Busava Prabhu Patil, Mr. Vidhan Vyas, Mr.
Mayur Punjabi, Mr. Haider Shah, Advocates.**

For Respondent : Mr. NPS Chawla, Mr. Vibhor Kapoor, Mr. Aarshey A Sharda, Advocates for R1

Mr. Brijesh Kumar Tamber, Mr. Vinay Singh Bist, Mr. Prateek Khuswaha, Mr. Sahas Bhasin, Mr. Yashu Rustogi, Advocates for R3.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by the Appellant challenging order dated 09.04.2024 passed by National Company Law Tribunal, New Delhi Bench (Court-II) in IA No.3163 of 2023, IA No.246/ND/2018 and IA No.2230/2022 in CP No.(IB)-244(ND)/2017. The Appellant aggrieved by the order dated 09.04.2024 passed in above IAs, has come up in these Appeal(s).

2. Brief facts necessary to be noticed for deciding these Appeal(s) are:

- (i) Athena Energy Ventures Pvt. Ltd. (Holding Company of the Corporate Debtor) was awarded the development and implementation of 1750 Mw Hydro Electric Power Project at river Lohit, Arunachal Pradesh. On 03.08.2007, Athena Demwe Power Ltd. (Corporate Debtor) was incorporated as a Special Purpose Vehicle (“**SPV**”) to implement the Project.
- (ii) On failure of the Corporate Debtor in repayment of facilities availed, on an Application filed by the Indian Bank under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter

referred to as the “**IBC**”), the Adjudicating Authority vide order dated 28.09.2017, initiated the Corporate Insolvency Resolution Process (“**CIRP**”) against the Corporate Debtor.

- (iii) The Resolution Professional (“**RP**”) issued Form-G on 11.01.2018 and 01.06.2018, in pursuance of which two Resolution Plans were submitted, one by the Appellant and another by Navayuga Engineering Company Ltd. (“**NECL**”). The Committee of Creditors (“**CoC**”) declared NECL as disqualified under Section 29A and approved the Resolution Plan submitted by the Appellant on 25.06.2018 and on the same day an Application was filed by the RP seeking approval of the Resolution Plan of the Appellant.
- (iv) Under the RFRP, the Successful Resolution Applicant (“**SRA**”) was to provide Performance Bank Guarantee (“**PBG**”), which is 20% of the bid amount within two days. The RP after submitting the Application before the Adjudicating Authority for approval of Resolution Plan of the Appellant, sent several emails to the Appellant to submit the PBG of Rs.72.73 crores as per the obligation of SRA. Several reminders were sent by the RP to the Appellant for submitting the PBG. The Appellant entered into correspondence with the RP and promised to submit the PBG. Several dates were given by the Appellant to deposit the PBG, which, however, was not submitted.

- (v) The Adjudicating Authority vide order dated 26.05.2023 dismissed the IA filed by the NECL, challenging its disqualification. Company Appeal (AT) (Insolvency) No.783 of 2023 was filed by the NECL, in which initially an order of status qua was passed, but the Appeal came to be dismissed on 16.02.2024.
- (vi) CA No.1683 of 2019 was filed by the Government of Arunachal Pradesh praying for liberty to submit a Resolution Plan for resolving the Corporate Debtor. Another IA No.2230 of 2022 was filed by THDC, a Government Company with 100% paid up share capital owned by the Government of Arunachal Pradesh and NTPC. The THDC also prayed that it be permitted to submit a Resolution Plan to resolve the road map, device to put the CD back to its feet and rescue the same. An IA No.3163 of 2023 was filed by the Appellant seeking intervention in the Application filed by the RP as well as THDC.
- (vii) After judgment of this Tribunal on 16.02.2024 dismissing the Appeal of NECL, THDC filed an IA on 01.03.2024 for hearing of the matter. The CoC filed a reply in IA No.2230 of 2022, pleading that the Appellant having not complied the requirement of submitting PBG of Rs.72.73 crores, the CoC has no objection in

event the Applications filed by THDC and Government of Arunachal Pradesh be allowed.

- (viii) The Adjudicating Authority heard all the Applications and by the impugned order dated 09.04.2024, held that SRA having not deposited the PBG, the Resolution Plan submitted by Appellant cannot be approved and CA No.246 of 2018 was disposed of accordingly. In consequence to the order passed in CA No.246 of 2018, IA No.2230 of 2022 filed by THDC and IA No.1683 of 2019 filed by Government of Arunachal Pradesh were allowed. The Adjudicating Authority directed the CoC to invite the fresh Expression of Interest (“**EoI**”), so that all interested party may submit their Resolution Plan and CIRP was extended for a period of 120 days. IA No.3163 of 2023, which was filed by the Appellant for intervention, the Adjudicating Authority has permitted the Appellant to be also entitled to submit a Resolution Plan. Operative portion of the order passed by Adjudicating Authority in paragraph 9, is as follows:

“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 CA1683/2019 & IA-2230/2022.

The IA stands disposed of.

IA-3163/2023: In the wake of the order passed in CA-246/2019 & IA2230/2022 (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.”

(ix) Aggrieved by the order dated 09.04.2023, these Appeal(s) have been filed by the Appellant.

3. We have heard Shri Busava Prabhu Patil, learned Counsel appearing for the Appellant; Shri Brijesh Kumar Tamber, learned Counsel appearing for Respondent No.3; and Shri NPS Chawla, learned Counsel appearing for the RP.

4. Shri Busava Prabhu Patil, learned Counsel for the Appellant challenging the impugned order submits that the Appellant was always ready and willing to submit the PBG and has requested for extension of time and last request was made for extension of time till 15.06.2024 to deposit the PBG, which remained pending consideration, hence the view of the Adjudicating Authority that there is non-compliance of requirement of submission of PBG is not correct. It is submitted that CoC was empowered to cancel the LoI, which cancellation having never been taken place, no non-compliance can be read. It is further submitted that Regulation 36-B, (4-A) of the CIRP Regulations, 2016, was subsequently added in the Regulations, which was not operative on the date when Resolution Plan of the Appellant was approved. The consequences provided under Regulation 36-B, (4-A) shall not ensue. It is

submitted that Regulation 36-B, (4-A) is not attracted in the facts of the present case and Adjudicating Authority committed error in relying on the said Regulation. It is submitted that the Adjudicating Authority committed error in allowing the Application filed by the State of Arunachal Pradesh and THDC, who had no right to submit a Resolution Plan, they having not submitted their EoI in response to Form-G issued by RP. The Adjudicating Authority had no jurisdiction to permit participation of the Applicants, who were not part of the CIRP. It is submitted that IA No.3163 of 2023, which was filed by the Appellant for intervention was never heard and order passed by Adjudicating Authority dated 09.04.2024, is in violation of principles of natural justice.

5. learned Counsel for the RP refuting the submissions of learned Counsel for the Appellant submits that the Appellant has not deposited the PBG, which was required to be deposited as per RFRP. The Appellant was liable to comply with the provisions of RFRP, which mandates deposit of PBG equivalent to 20% of the bid consideration amount within two days in favour of the Corporate Debtor. The RP sent several reminders and requested the Appellant to deposit the PBG, which was not complied by the Appellant. The Appellant having not complied the requirement of submission of PBG of Rs.72.73 crores, the Appellant is non-compliant to be a Resolution Applicant and as such, the Appellant cannot be allowed to implement the Resolution Plan. It is submitted that several reminders from the year 2018 to 2023 were sent to the Appellant

for deposit of the PBG and in spite of opportunities having been given to the Appellant to deposit the PBG, the PBG was never deposited. It is submitted that CoC in its Meeting dated 04.05.2023 took a decision that the Appellant is a non-compliant Resolution Applicant, hence, the Application filed by State of Arunachal Pradesh and THDC be allowed and they will be permitted to submit a Resolution Plan. It is submitted that Appellant in last five years could not deposit the PBG, hence, the Appellant is not entitled to implement the Resolution Plan.

6. The learned Counsel for the CoC refuting the submissions of learned Counsel for the Appellant submits that the Appellant was required to deposit the PBG as per clauses of RFRP and immediately after the approval of Resolution Plan. The Appellant was informed by the RP to submit the PBG. Large number of reminders were sent by the RP in this regard and in 41st CoC Meeting held on 04.05.2023, discussion was made on non-submission of PBG by the Resolution Applicant within the stipulated time and noticed several reminders sent to the Appellant. Email communication sent by the Appellant was also noticed. It is submitted that in IA No.2230 of 2022, reply was filed by the CoC, where the CoC took the stand that Appellant having not given any heed to submit PBG, it raises serious doubt on the conduct of the management of the Appellant and the CoC has now lost confidence in the Appellant. It was further deliberated and opined that in the current situation, the CoC is not objecting to the Applications filed by the State of Arunachal

Pradesh and THDC in the best interest of the Corporate Debtor. It is submitted that Resolution Plan, which was approved five years ago is no more relevant and in the interest of justice, it is necessary that fresh Resolution Plans be invited to give opportunity to all intending parties to come forward to revive the huge power Project. The Appellant, who could not deposit even the PBG in five years, cannot be allowed to further delay the process.

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

8. We may first notice the clauses of RFRP under which the Resolution Plan was submitted by the Appellant. Clause 1.9.3 of the RFRP provides for 'submission of Performance Bank Guarantee', which is as follows:-

"1.9.3 Submission of Performance Bank Guarantee"

Upon approval of the Resolution Plan by CoC, the Successful Resolution Applicant shall cause to furnish a performance bank guarantee of an amount equivalent to 20% of the Bid Consideration amount, within 2 (two) business days of issuance of Lol 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 on 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.”

9. Learned Counsel for the parties has referred to provisions for Regulation 36B of the Insolvency and Bankruptcy of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 in which Regulation clause (4-A) was also added w.e.f. 24.01.2019. Clause 36-B is as follows:-

“36B. Request for resolution plans. (1) *[The resolution professional shall, within five days of the date of issue of the final list under sub-regulation (12) of regulation 36A, issue the information memorandum, evaluation matrix and a request for resolution plans to every resolution applicant in the final list:*

Provided that where such documents are available, the same may also be provided to every prospective resolution applicant in the provisional list.]

(2) The request for resolution plans shall detail each step in the process, and the manner and purposes of interaction between the resolution professional and the prospective resolution applicant, along with corresponding timelines.

(3) The request for resolution plans shall allow prospective resolution applicants a minimum of thirty days to submit the resolution plan(s).

(4) The request for resolution plans shall not require any non-refundable deposit for submission of or along with resolution plan.

[(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.]”

10. From the above, it is clear that although Regulation (4-A) was added on 24.01.2019 i.e. subsequent to issuance of RFRP in the present case. RFRP itself contains stipulation of submission of Performance Bank Guarantee to the extent of 20% of the bid consideration amount within two business days which was termed as Performance Bank Guarantee. Plan having been approved on 25.06.2018, the Appellant was required to submit Performance Bank Guarantee within two days. Numerous reminders were sent by the Resolution Professional to the Appellant for depositing the Performance Bank Guarantee of Rs.72,72,00,000/-. We may refer to the e-mail dated 18.10.2018 sent by the Resolution Professional which have been brought on the record by the Appellant along with Additional-Affidavit which e-mail provided as follows:-

“Dear Sir

Ref. trailing mail and telephonic conversations, being a successful Resolution Applicant you were advised to submit performance Guarantee which you have not provided till date.

In terms of conditions of Resolution Plan, as already advised you are reminded once again to provide the G'lee from Govt. of Sikkim equivalent to Rs. 72,72,15,464/- (Rupees Seventy Two Crore Seventy Two Lac Fifteen Thousand Four Hundred Sixty Four only) is. 20% of the Bid Consideration amount).

An immediate action in the matter will be highly appreciated.”

11. Further reminder was issued on 30.01.2019 to the Appellant. On 28.09.2020, e-mail was received from Appellant praying for two more weeks' time beyond 28.09.2020 for submission of the Performance Bank Guarantee. Liquidator on 29.09.2020 wrote back to the Appellant to submit the Performance Bank Guarantee latest by 13.10.2020. The Adjudicating Authority in the impugned order has noticed the several reminders given by the Resolution Professional requiring the Appellant to submit Performance Bank Guarantee. The e-mail dated 17.06.2024 was sent by the Resolution Professional to the Appellant where Appellant was requested to deposit the amount latest by 30.06.2022. It is useful to extract the e-mail dated 17.06.2022, which is as follows:-

“Dated: 17th June, 2022

To

1. Sikkim Power Investment Corporation Ltd.

*NH-31. Near UD&HD Office,
Gangtok, Sikkim-737101*

2. Sh. Nirmal Aggarwal (Chief General Manager)

*Sikkim Power Investment Corporation Ltd.
NH-31, Near UD&HD Office, Gangtok, Sikkim-737101*

3. Sh. Ganesh Chettri

MD SPICL and PCE Cum Secretary
Power Department, Government of Sikkim
Power Secretariat, Kazi Road,
Gangtok, Sikkim-737101

4. Sh. VB Pathak

Chairman, SPICL
Tashling Secretariat, Kazi Road,
Gangtok, Sikkim-737101

5. Sh. SC Gupta, IAS

Chief Secretary, Govt of Sikkim
Tashiling Secretariat
Gangtok, Sikkim-737101

6. Sh. Sunil Sarangi

Executive Chairman
Teesta Urja Limited
Aapian Building, Plot No. 38
Ground Floor, Unit A,
Sector-44, GURGAON-122003

Ref : Resolution Plan submitted be SPICL in the matter of Athena Demwe Power Limited

Sub : Performance Guarantee (PG) from Govt. of Sikkim amounting to Rs. 72,72,15,464/- overdue by 4 years to be provided by SPICL

Dear Sir(s),

This is in continuation to numerous letters & reminders sent to you by RP on his own and also on behalf of Committee Creditors (CoC) of M/s. Athena Demwe Power Ltd. to remind you that in terms of Resolution Plan submitted by you on dated 4th June, 2018 (which includes all subsequent amendments thereto as submitted from time to time during the CIRP process, the last one submitted on 25th June, 2018) which was approved by CoC in presence of SPICL GM Mr. Nirmal Kumar in COC meeting dated 25th June, 2018 and the same was subsequently submitted to Hon'ble NCLT for its approval in same day i.e. 25th June 2018 itself.

In terms of clause 1.9.3 of Process Memorandum and clause 1.13 of Format V (Financial Proposal) of the Resolution Plan, the Resolution Applicant/you were/ are required to provide a Performance Guarantee (PG) from Government of Sikkim amounting to Rs. 72,72,15,464/- (Rupees Seventy-Two Crore Seventy-Two Lac Fifteen Thousand Four Hundred Sixty-Four only) by 27th June, 2018, which is still awaited.

Despite several repeated reminders, you/the Resolution Applicant have failed to fulfil your obligations in term of clause 1.9.3 of Process Memorandum and clause 1.13 of Format (Financial Proposal) of the Resolution Plan and consequently the Performance Guarantee is yet to be submitted by you. Pursuant to this, in the past the undersigned met various officials of SPICL apart from Chief Secretary of Government of Sikkim, but nothing has moved forward to far. On the date of this letter, you have not provided the PG even after a delay of 4 years of it's getting due.

It is pertinent to point out that this is a breach of terms and conditions of Resolution Plans and Process Memorandum which renders the Resolution Plan Non-Responsive and gives power to CoC to declare SPICL in breach of terms of Resolution Plan/ Process Memorandum and consequently reject the resolution Plan of SPICL on these grounds and also withdraw your Resolution Plan which was earlier submitted for approval of Hon'ble NCLT.

Last chance

Due to non-fulfilment of your obligation to provide the Performance Guarantee amounting to Rs. 72,72,15,464/-. CoC has decided to provide you one last opportunity to furnish the PG from Government of Sikkim/Demand Draft in favour of Corporate Debtor. CoC has viewed the matter seriously and CoC is duty bound to protect the value of Assets of the Corporate Debtor which is premise of the Code. Hence, CoC hereby provides you one last opportunity to submit the performance guarantee within 13 days of receipt of this communication.

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.

Best Regards

Umesh Garg /+91 9818990001

Resolution Professional

M/s. Athena Demwe Power Limited

Office: 1413-1416, 14th Floor, Devika Tower, New Delhi 110019”

12. In the year 2023 also emails were sent by the Resolution Professional to the Appellant for submitting the Performance Bank Guarantee. A letter dated 04.03.2024 was sent by the Appellant where it was informed that the budget for the year 2023-24 does not include provision in regard to Performance Bank Guarantee and further time was prayed till 15.06.2024. The said letter has been brought on record by the Appellant as Annexure 30 to the Additional Affidavit.

13. The CoC in its meeting held on 04.05.2023 has discussed the non-submission of the Performance Bank Guarantee by Appellant which notices the various reminders sent to the Appellant to submit the Performance Bank Guarantee. The Agenda Item No.6 of the minutes of the meeting dated 04.05.2023 has been extracted in paragraph 2 of the impugned order of the Adjudicating Authority which is extracted herein:-

“ITEM NO. 6

TO DISCUSS NON-SUBMISSION OF PERFORMANCE GUARANTEE BY SPICL

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, 01 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 perusal. 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."

14. The Adjudicating Authority also in the impugned order has extracted Clause 1.9.3 of the RFRP which contains requirement of submission of Performance Bank Guarantee of an amount equivalent to 20% of the bid consideration amount within two business days.

15. From the facts as noticed above, it is clear that the Performance Bank Guarantee was not submitted by the Appellant despite dozens of reminders sent by the Resolution Professional to the Appellant. There was clear non-compliance of provisions of the RFRP Clause 1.9.3 which oblige the Resolution Applicant after approval of the Resolution Plan by the CoC to furnish the Performance Bank Guarantee of an amount equivalent to 20% of the bid consideration amount within two business days. We have also noticed that the two applications one by the State of Arunachal Pradesh and another by THDC were filed before the Adjudicating Authority praying for liberty to submit the Resolution Plan for resolution of the corporate debtor. In IA No. 2330 of 2022, CoC has filed its reply. The reply submitted by CoC has been noticed by the Adjudicating Authority in paragraph 1(d). Paragraph 1 (d) of the order of the Adjudicating Authority is as follows:-

“(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 Gout 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.”

16. The stand which was taken by the CoC before the Adjudicating Authority is that the Appellant did not give any heed to submit Performance Bank Guarantee and it failed to adhere to the terms and conditions. CoC in its reply, therefore, clearly stated that after deliberation CoC is not objecting to the applications filed by the State of Arunachal Pradesh and the THDC and which applications need to be allowed in the interest of the Corporate Debtor.

17. The submission which has been pressed by the Counsel for the Appellant is that reference by the Adjudicating Authority to Regulation 36B (4-A) is erroneous since Clause (4-A) was inserted in the Regulation on 24.01.2019 i.e. much after submission of the Resolution Plan and approval of the Resolution Plan. As noted above, the requirement of submission of Performance Bank Guarantee was contained in the RFRP. RFRP was dated 21.05.2018. Clause (4-A) which was inserted in Regulation 36B only made it mandatory for Request of Resolution Plan to provide a performance security within time specified therein. There is no conflict in the provisions of the RFRP in the present case and Regulation 36B (4-A). The fact that Clause (4-A) was added subsequently has no bearing in the present case since in the present case RFRP dated 21.05.2018 itself contained Clause 1.9.3 requiring submission of the Performance Bank Guarantee of an amount equivalent to 20% of the bid consideration amount within two business days.

18. Counsel for the Appellant has also relied judgment of the Hon'ble Supreme Court in ***"Ebix Singapore Private Limited vs. Committee of Creditors of Educomp Solutions Limited & Anr. (Civil Appeal No. 3224 of 2020)"*** to contend that the CoC has no jurisdiction to withdraw from Resolution Plan already approved. The present is a case where CoC is not withdrawing the Resolution Plan which was approved by it whereas the Adjudicating Authority rejected the application for approval of the Resolution Plan on the ground that Applicant failed to deposit the Performance Bank Guarantee despite several reminders in period of five years. The judgment of the Hon'ble Supreme Court in ***"Ebix Singapore Private Limited"*** (supra) has no application in the facts of the present case.

19. Counsel for the Appellant contended that the State of Arunachal Pradesh and the THDC could not have permitted to submit Resolution Plan since they are not part of the CIRP process. The fact is undisputed that the State of Arunachal Pradesh and the THDC did not file any plan in the CIRP of the Corporate Debtor. The eligibility to submit the Resolution Plan by the State of Arunachal Pradesh and the THDC arose only after the application for approval of the plan of the Appellant was rejected by the Adjudicating Authority on account of non-compliance by the Appellant itself. Thus, present is not a case that the State of Arunachal Pradesh and the THDC who were not part of the CIRP are permitted to file Resolution Plan rather their Resolution

Plans required to be submitted in pursuance of the fresh Form-G which was to be issued under the directions of the Adjudicating Authority in the impugned order.

20. Counsel for the Appellant has also submitted that the Appellant had filed intervention application being IA No.3163 of 2023 and Appellant was not heard, hence, the order is in violation of principle of natural justice.

21. The Application for approval of the Resolution Plan being CA No. 246 of 2019 was heard by the Adjudicating Authority and by impugned order, the said application stood rejected. The application for intervention filed by the Appellant became inconsequential when the application for plan approval of the Appellant stood rejected on account of non-compliance by the Appellant. We, thus, do not find any substance in the submission of the Appellant that the order passed by the Adjudicating Authority is in violation of principle of natural justice.

22. As noticed above, the Corporate Debtor was awarded a huge project of 1750 MW Hydro Electric Power Project at River Lohit, Arunachal Pradesh. The Resolution Plan submitted by the Appellant was approved on 25.06.2018. More than five years have elapsed when the Adjudicating Authority had occasion to consider the plan approval application. The view taken by the CoC that Resolution Applicant who has not been able to deposit the Performance Bank Guarantee of Rs.72.72 Crores it cannot be trusted for implementation

of the huge project. Adjudicating Authority in the impugned order has considered all aspects of the matter and has rightly come to the conclusion that Appellant having not deposited the Performance Bank Guarantee inspite of several opportunities/reminders given to the Appellant, Adjudicating Authority has no option except to reject the application for approval of the Resolution Plan. Giving opportunity to the State of Arunachal Pradesh and the THDC to submit a Resolution Plan is in consequence of rejection of the application for approval of the Resolution Plan. The Adjudicating Authority by the impugned order has also clearly given liberty to the Appellant to submit a Resolution Plan in response to EoI. Counsel for the Respondent submitted that in response to the EoI issued in pursuance of the impugned order large number of Resolution Applicants have submitted EoI and the process is proceeding further.

23. In view of the foregoing discussions and our conclusion, we are of the view that no grounds have been made out to interfere with the impugned order. Looking to the fact that Appellant has filed this appeal and Appellant was already permitted by the Adjudicating Authority to submit a Resolution Plan, we are inclined to grant two weeks' time to the Appellant to submit a Resolution Plan before the Resolution Professional which may also be considered along with the other Resolution Plans which have already been received in the CIRP of the Corporate Debtor.

24. Subject to the above liberty granted to the Appellant, the Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical**

NEW DELHI

26th July, 2024

Ashwani/Anjali