BEFORE THE NATIONAL COMPANY LAW TRIBUNAL, PRINCIPAL BENCH

NEW DELHI

Company Petition No. 55/2017

Present: CHIEF JUSTICE (RETD.) SHRI M.M KUMAR, HON'BLE PRESIDENT

&

SHRI R.VARADHARAJAN, MEMBER (JUDICIAL)

In the matter of:

Corporate Insolvency Resolution Process under Section 7 of the Insolvency and Bankruptcy Code, 2016 read with the Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

INDIAN BANK
HAVING ITS HEAD OFFICE AT:
66, RAJAJI SALAI,
CHENNAI- 600001 (TAMIL NADU)

AND ZONAL OFFICE AT;
2ND FLOOR, WORLD TRADE CENTRE,
BABAR ROAD, NEW DELHI

THROUGH ITS COMPETENT ATTORNEY,
SHRI RAM MEHAR SAROHA,
ASSISTANT GENERAL MANAGER,
ARMB-DELHI, NEW DELHI

.....Financial Creditor/Applicant

VERSUS

M/s ATHENA DEMWE POWER LIMITED
J-38,2ND FLOOR, B.K.DUTT COLONY,
NEAR PARYAVARAN BHAWAN, JOR BAGH,
NEW DELHI -110 003

.....Corporate Debtor

Counsel for the Petitioners: (i) Shri Brijesh Kumar Tamber, Advocate

ORDER

This CP is filed for mooting the Corporate Insolvency Resolution Process (CIRP) under the provisions of Insolvency & Bankruptcy Code (IBC), 2016 in relation to the respondent company named as 'Corporate Debtor'. The Petition has been has been filed by a Financial Creditor namely Indian Bank through its authorized person being the Assistant General Manager, ARMB-Delhi, World Trade Centre, Babar Road, New Delhi vide Power of Attorney dated 30.6.2006 annexed as Annexure-A to the above Petition.

2. The following facts can be ascertained ona perusal of the application and also on the representation of the Learned Counsel for the Petitioner namely:

The Corporate Debtor named above is a (Special Purpose Vehicle) SPV company specifically incorporated in the year 2007 for the purpose of generating

and distribution of electricity. Pursuant to its objects and for putting up a electricity generation plant in Arunachal Pradesh it had approached the Financial Creditor for multiple credit facilities in the form of term loan as well as non-fund based facilities as supplement to term loan. Request for financial facilities by the Corporate Debtor was accepted by the Financial Creditor vide sanction letter dated 30.7.2010, which comprised of term loan to the extent of Rs.200 crores and non-fund based loan facilities of Rs.100 crores and the sanction was valid for a period of 6 months with pre disbursement conditions as detailed in the sanction letter. Since the pre-disbursement conditions were not met by the Corporate Debtor, request to extend the validity of the sanction letter dated 30.7.2010 was sought by the Corporate Debtor vide letter dated 30.1.2011 and 1.2.2011. On 11.4.2011 based on the request of the Corporate Debtor for urgent project implementation expenses, a sum of Rs.200 crores for a duration of 6 months was sought by the Corporate Debtor from the Financial Creditor, and acceding to the said request of the Corporate Debtor, as compared to the earlier sanction letter, a term loan of Rs.269 crores, short-term loan of Rs.200 crores and non-fund based facilities such as FLC/ILC/BG/LOCwere sanctioned in a sum of Rs.100 crores. The short-term loan facility granted was in the nature of bridge loan, in order to assist the Corporate Debtor, to meet the urgent project expenses till the disbursal of

the regular funding for the project from the consortium of lenders. As a security to the short-term financial facilities, pari pasu charge on all the immovable assets of the company, both present and future, as well as inter alia, corporate guarantee of one M/s Athena Infra Projects Ltd was given and pledge of shares in the Corporate Debtor held by M/s Athena Infra Projects Ltd in Athena Energy Ventures Private Limited along with its promoters to the tune of Rs.150 crores was also offered as collaterals. Corporate Debtor in acceptance of revised sanction letter dated 6.6.2011 had executed documents in favour of the financial creditor, including an agreement for bridge loan dated 17.6.2011, in relation to Rs.200 crores sanctioned by the Financial Creditor towards the bridge loan repayable within a period of 6 months from the date of first disbursement of loan. Various other documents have also been executed, all of which have been annexed along with the Petition, according to the submission of the Financial Creditor. The sum of Rs.200 crores as sanctioned and approved by the Financial Creditor had been disbursed to the Corporate Debtor which it is claimed by the Financial Creditor is evidenced by letter dated 20.10.2011 wherein it has also been acknowledged by the Corporate Debtor at paragraph 1, Annexure A-22 of the Petition, as follows:

> At the outset we would like to thank you for sanctioning the short term loan assistance of Rs.200 Crs to 1750 MW Demwe Lower HEP. We have utilized the entire short term loan of Rs.200 Crs sanctioned by Indian Bank towards project implementation expense. As you are aware, we have executed the Common Loan Agreement with consortium lenders for the loan component of Rs.9659 Crs on 9th September 2011.

3. However, the Corporate Debtor did not repay the short-term loan/bridge loan within the period of 6 months as undertaken by it, and instead, submitted a revised proposal vide Annexure A-22 of the Petition and the revised proposal was duly taken into consideration by the Financial Creditor and accordingly sanction, it is claimed by the Financial Creditor, was further revised as follows:

Term loan	Rs.200 crores
Non-fund based financial facilities	Rs.100 crores
Short-term loan	Rs.200 crores

Despite the above revised sanction letter dated 12.03.2012 by the Financial Creditor, Corporate Debtor failed to repay the loan availed by it as a short-term loan and instead sought for extension of time for repayment of the same vide letters dated 14.06.2012, 21.06.2012 and 4.7.2012. Heeding to the repeated

request of the Corporate Debtor, the Financial Creditor it is averred, had conditionally accepted the request and the time limit for repayment was extended upto 28.02.2013 upon the execution of the additional securities. However, instead of repaying the amount within the extended period, Corporate Debtor vide letter dated 25.02.2013 sought for another extension for a period of 2 months upto 31.05.2013 in order to enable it to repay the short term loan. The Financial Creditor, taking into consideration the above request of the Corporate Debtor for further extension, granted time till 28.02.2014 for repayment of the short-term loan and for early closure of the conditions prescribed originally and subsequently revised from time to time for availing financial facilities as granted to the Corporate Debtor vide letter dated 17.06.2013. However, despite the cooperation and support extended by the Financial Creditor to the Corporate Debtor and despite personal visits and reminders, Corporate Debtor failed to repay the amounts due to the Financial Creditor which forced it to classify the accounts of the Corporate Debtor as non-performing asset (NPA) on and from 31.5.2013 in accordance with the instructions /circular of the Reserve Bank of India.

4. It is contended that the Financial Creditor was forced, in view of the defaults committed as detailed above on the part of the Corporate Debtor, to

issue a letter dated 21.5.2013 to the Corporate Debtor calling upon it to remit the overdue amount of Rs.207,51,07,223.34 with the then up-to-date interest immediately. However, even though no payment was forth coming, Corporate Debtor had acknowledged on 28.02.2014, the debt owed in a sum of Rs.211,96,68,427.34 to the Financial Creditor as due and payable, vide acknowledgement of debt-cum-security annexed at Annexure A-38 to the Petition. Despite the acknowledgement by the Corporate Debtor it is claimed by the Financial Creditor, no payment was forth coming, and hence the Financial Creditor, it is submitted, had issued a notice on 11.7.2014 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002) invoking the securities. Ultimately, the Financial Creditor, due to persistent defaults committed on the part of the Corporate Debtor, was forced to recall the entire loan and demand monies due to it vide a loan recall-cum- demand notice dated 22.3.2016 which notice of recall, it is submitted, is annexed as Annexure A-42 to the Petition. Other notices it is claimed have also been issued without much avail. It is averred by the Financial Creditor that it is a nationalized bank and has been maintaining regular books of accounts in the ordinary course of business and as per the same a sum of Rs.320,40,38,089.52 is due and payable by the Corporate Debtor

including interest payable as on 31.03.2017. In evidence of the same it is claimed that a certificate under the Bankers Book of Evidence Act, 1891 has been annexed as Annexure A-45 to sustain the plea of default on the part of the Corporate Debtor and since the amount owed and defaulted is in excess of Rs.1,00,000/-, it is contended that the Petition is maintainable under the provisions of IBC.

5. It is also submitted by the Financial Creditor that it has also initiated in OA No.218/2016 titled as 'Indian Bank' vs. Athena Demwe Power Ltd. and Others for recovery of the amounts due under the provisions of recovery of Debts Due to Banks and Financial Institutions Act, 1993 before DRT-I, New Delhi claiming a sum of Rs.284,35,10,320.52 as on 5.5.2016against the Corporate Debtor and others and the same is pending disposal.

6. The Financial Creditor, it is seen has filed the necessary application under Form-I to initiate CIRP under IBC, 2016 read with Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity AAA Rules). In view of the default as narrated above it is claimed, proceedings herein have been preferred and an Interim Resolution Professional as mandated has also been named as one Mr. Anil Kohli, duly registered Insolvency and Bankruptcy Board of

India (IBBI), and who, it is claimed, has also submitted his consent to act as an Interim Resolution Professional in the prescribed format.

7. We have carefully considered the averments contained in the Petition as well as the submissions of the learned counsel appearing for the Financial Creditor/Petitioner. Going through the records, it is seen that the above Petition at the request of the Financial Creditor had been posted by the Registry before us on 18.04.2017 which is evidenced by the mentioning letter circulated on behalf of the Financial Creditor to the Registrar of this Tribunal to have the matter listed on 18.04.2017. In the circumstances, Company Petition, as above was placed before us on 18.04.2017 on which date at the request of the learned counsel for the petitioner, time was given to enable him to file the tracking report with respect to service of notices of the Petition on the Corporate Debtor and in the circumstances the matter was posted on 19.04.2017. On 19.04.2017, tracking report in relation to notice dispatched to the Corporate Debtor was filed by the Financial Creditor and upon a perusal of the same it is evident that the consignment bearing identical consignment number, both in the postal receipt as well as in the tracking report, seem to have been delivered to the Lodi Road H.O, however delivery on the Corporate Debtor is not conclusive . Despite notice of the Petition/application as represented by Financial Creditor on the Corporate

Debtor, none appeared for it, as is evident from the attendance sheet of the respective hearing dates and in the circumstances we were constrained to proceed in its absence. With a view to ascertain if any payments towards the short term loan had been made by the Corporate Debtor, the Financial Creditor was directed to furnish the statement of accounts in full concerning the Corporate Debtor particularly in view of the absence of the Corporate Debtor and the concise accounts reflecting only interest calculation as and from 22.03.2016 as produced by the Financial Creditor avowedly under Certificate issued under Section 2A of the Bankers' Book of Evidence Act, 1891 and lacking in other material particulars reflective of the accounts of the Corporate Debtor as maintained by it.

8. Despite the absence of the Corporate Debtor and since the process of Insolvency is attendant with serious consequences to all the stake holders concerned, this Tribunal after careful appraisal of the pleadings and evidence available on record as filed by the Financial Creditor is constrained to reach the following conclusions based on pertinent facts relevant to the present proceedings :-

9. The Corporate Debtor seems to have been incorporated originally as Athena Demwe Power Private Limited on 03.08.2007 and subsequently on and from 17.12.2010 had changed its name to Athena Demwe Power Limited, all of which are evidenced from the Fresh Certificate of Incorporation. Consequent upon change of name on conversion into public limited company by the Corporate Debtor, issued by the Registrar of Companies, NCT of Delhi and Haryana dated 29.03.2010. It is pertinent to note that the address of the registered office as reflected in the Fresh Certificate of Incorporation dated 29.03.2010 issued by ROC, NCT Delhi is given as 1st Floor NBCC Tower, 15 Bhikaji Cama Place, New Delhi 110 066 and the said address is also reflected in the Certificate of Registration of Charges of Assets detailed in the certificate under Section 132 of the erstwhile provisions of the Companies Act, 1956 dated 21.06.2011 issued by ROC, NCT of Delhi & Haryana in favour of the Financial Creditor.

10. Further a perusal of all the documents annexed by the Financial Creditor along with the Petition/Application discloses the address of the registered office of the Corporate Debtor at 1st Floor NBCC Tower, 15 Bhikaji Cama Place, New Delhi 110 066, including the Sanction Letter dated 30.07.2010 and 06.06.2011 annexed as Annexure A-1 and Annexure A-5. Further even the notice under

Section 13(2) of SARFAESI Act, 2002 sent by the Petitioner to the Corporate Debtor and annexed as Annexure A-39 dated 13.05.2014 discloses the above address Bhikaji Cama Place as registered office address. The same is the case with Annexure A-40 being the reply sent by the Corporate Debtor dated 11.07.2014, wherein at the bottom of the first page of the reply, the registered office is stated to be that of 1st Floor NBCC Tower, 15 Bhikaji Cama Place, New Delhi 110 066. It is also seen that the counsel for the Financial Creditor on 22.03.2016 while issuing a notice on behalf of the Financial Creditor to the Corporate Debtor had dispatched the same to its registered office address at 1st Floor NBCC Tower, 15 Bhikaji Cama Place, New Delhi 110 066 and to another address at Connaught Place, New Delhi as evident from Annexure A-42.

11. While so in relation to the above petition/application as well as in the prescribed format filed in Form I of the Adjudicating Authority Rules 2016, the registered office of the Corporate Debtor is stated to be J-38, 2nd Floor, B.K.Dutt Colony, Near Paryavaran Bhawan, Jor Bagh, New Delhi – 110 003 and prima facie it is seen from the postal receipt dated 11.03.2017 issued by the postal authorities as well as the related tracking report extracted and produced by the Financial Creditor discloses the delivery at Lodi Road H.O of postal authorities. The postal receipt produced by the Counsel for the Financial Creditor dated

22.04.2017 is also addressed to Jor Bagh, Lodi Road, New Delhi 110 003 address allegedly of the Corporate Debtor which address curiously is not seen anywhere in the documents as filed by the Financial Creditor itself.

12. The above facts becomes incumbent to be extracted as Rule 4 as applicable to the Application by financial creditor and more particularly sub rule (2) of Rule 4, both of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 specifically directs that the applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the ***registered office*** of the corporate debtor (Italics supplied). In the absence of any material or document to demonstrate that the registered office of the Corporate Debtor having been shifted from 1st Floor NBCC Tower, 15 Bhikaji Cama Place, New Delhi 110 066 to any other address, particularly to the address as claimed to be registered office address by the Financial Creditor in the application, we are constrained to hold that the application has not been properly served on the Corporate Debtor and that we consider basically explains the absence of the Corporate Debtor before us, more so, when according to the records produced by the Financial Creditor, the Corporate Debtor seems to be defending its cause in the proceedings pending before DRT I, Delhi as manifest vide order dated 01.03.2017 passed in O.A.218 of 2016.

13. It is also pertinent to note that in **Company Appeals (AT)(Ins) No.31 of 2017** in the matter of ***Era Infra Engineering Ltd Vs. Prideco Commercial Projects Pvt.Ltd,*** the Hon'ble NCLAT has laid down, albeit in the case of an `Operational Creditor' that in view of the mandatory provision under Section 8 of the I & B Code read with Rule 5 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 the same are strictly required to be complied with, failing which the application under Section 9 of IBC, 2016 is to be dismissed. In a similar vein in relation to a 'Financial Creditor' too as in the present instance service of the application at the registered office of the Corporate Debtor is a pre-requisite as required under Rule 4(2) of the AAA Rules for entertaining the application, all the more so when a notice of demand as contemplated under Section 8 for an `Operational Debtor' is not mandated and notice of application being the only one to put on notice about the initiation of a Corporate Insolvency Resolution Process by a Financial Creditor against the Corporate Debtor.

14. Finally for the above reasons and despite considerable opportunity being afforded to the Financial Creditor to rectify the defects in relation to service of proper notice of the application as required under IBC, 2016 read with AAA Rules, 2016 on the Corporate Debtor not done , we are constrained to dismiss this Company Petition.

15. However before parting we make it clear that any observations made in this order shall not be construed as an expression of opinion on the merit of controversy as we have refrained from entertaining the application at the initial stage itself. Therefore the right of the applicant before any other forum shall not be prejudiced on account of dismissal of instant application.

16. A copy of the instant order shall be communicated by the Registry to the Financial Creditor within a period of 7 days from the date of this order as required under Section 7(b) of IBC, 2016.

Sd/-

(CHIEF JUSTICE M.M.KUMAR)
PRESIDENT

Sd/-

12.05.2017

(R.VARADHARAJAN)
MEMBER (JUDICIAL)

CP No.55/2017
Indian Bank Vs. M/s Athena Demwe Power Ltd.

U.D.Mehta