ANNEXURE-V

CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 244/GT/2020

Coram:

Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Date of Order: 3rd October, 2022

IN THE MATTER OF

Determination of tariff of Koteshwar Hydroelectric Project (400 MW) for the period from 1.4.2019 to 31.3.2024.

AND

IN THE MATTER OF

THDC India Limited,
(A Joint Venture of Govt. of India and Govt. of UP)
Pragatipuram, Bypass Road,
Rishikesh – 249201 (Uttarakhand) **...Petitioner**

Vs

1. Punjab State Power Corporation Limited,
   The Mall, Near Kali Badi Mandir, Patiala - 147 001 (Punjab)

2. Haryana Power Utilities,
   (DHBVNL & UHBVNL),
   Shakti Bhawan, Sector – 6, Panchkula-134 109 (Haryana).

3. Uttar Pradesh Power Corporation Limited,
   Shakti Bhawan, 14 Ashok Marg, Lucknow – 226001

4. BSES Rajdhani Power Limited,
   BSES Bhawan, Nehru Place,
   Behind Nehru Place Bus Terminal, New Delhi-110019

5. BSES Yamuna Power Limited,
   3rd Floor, Shakti Kiran Building,
   Karkardooma, Near Court, New Delhi-110092.

6. Tata Power Delhi Distribution Limited,
   33 kV, Grid Sub-Station Building,
   Hudson Lines, Kingsway Camp, Delhi-110009

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Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

7. Engineering Department,
   Chandigarh Administration, 1st Floor,
   UT Secretariat, Sector 9-D, Chandigarh-160009

8. Uttarakhand Power Corporation Limited,
   Urja Bhawan, Kanwali Road, Dehradun-248001

9. Himachal Pradesh State Electricity Board,
   Vidyut Bhawan, Shimla-171004

10. Jaipur Vidyut Vitran Nigam Limited, Vidyut Bhawan,
    Janpath, Jyotinagar, Jaipur-302005 (Rajasthan)

11. Ajmer Vidyut Vitran Nigam Limited,
    Old Powerhouse, Hatthi Bhatta, Jaipur road,
    Ajmer-305001 (Rajasthan)

12. Jodhpur Vidyut Vitran Nigam Limited,
    New Powerhouse, Industrial Area
    Jodhpur-342003 (Rajasthan)

13. Power Development Department (PDD),
    Govt. of J&K, Civil Secretariat, Jammu -180001

14. Madhya Pradesh Power Management Company Limited,
    3rd Floor, Block No. 11, Shakti Bhawan,
    Rampur, Jabalpur-482008

15. Rajasthan Urja Vikas Nigam Limited,
    Vidyut Bhawan, Jyoti Nagar, Jaipur – 302005 (Rajasthan)

16. Jammu and Kashmir State Power Trading Company Limited,
    PDD Complex, Bemina, Srinagar – 190010 (J& K) **...Respondents**

Parties Present:

Ms. Anushree Bardhan, Advocate, THDC
Shri Rajesh Sharma, THDC
Shri Mukesh Kumar Verma, THDC
Shri Ajay Vaish, THDC
Shri Rakesh Singh, THDC
Shri Brijesh Kumar, UPPCL
Shri R.B. Sharma, Advocate, BRPL
Ms. Megha Bajpeyi, BRPL
Shri Mohit Mudgal, Advocate, BYPL
Shri Sachin Dubey, Advocate, BYPL
Shri Abhishek Srivastava, BYPL
Shri Sameer Singh, BYPL
Shri Ravindra Khare, MPPMCL

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ORDER

This petition has been filed by the Petitioner, Tehri Hydro Development Corporation. Ltd. for determination of tariff of the generating station for the period from 1.4.2019 to 31.3.2024, in accordance with the provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 (hereinafter referred to as "the 2019 Tariff Regulations").

Background

2. The Petitioner is a joint venture company of Government of India (GOI) and Government of Uttar Pradesh, with GOI holding majority and controlling shares. The generating station form part of the Tehri Hydro Power Complex with an aggregate capacity of 2400 MWs, which comprises of Tehri HPP Stage-I (1000 MW), Tehri Pumped Storage Plant (1000 MW) and downstream power station Koteshwar Hydroelectric Project (400 MW) in Tehri Garhwal in the State of Uttarakhand. The Koteshwar reservoir is designed to function as lower reservoir for Tehri Pumped Storage Plant and to regulate the water release from main Tehri reservoir for irrigation and drinking water requirements. The Ministry of Power GOI vide its letter dated 8.8.2007, had allocated the power from the generating station to various beneficiaries. Accordingly, the Petitioner has entered into Power Purchase Agreements with the Respondents for the capacity generated from the project. The generating station with a total capacity of 400 MW comprises of four units of 100 MW each and the COD of the units / generating station is given below:

	Date
Unit-I	1.4.2011
Unit-II	26.10.2011
Unit-III	13.2.2012
Unit-IV / Generating Station	1.4.2012

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3. The Commission vide its order dated 9.10.2018 in Petition No. 117/GT/2018 had determined the tariff of the generating station for the 2014-19 tariff period. Thereafter, the Commission vide its order dated 4.6.2019 in Review Petition No. 47/RP/2018 (in Petition No. 117/GT/2018), revised the capital cost and annual fixed charges for the 2014-19 tariff period. Further, the Commission vide its order dated 14.9.2022 in Petition No. 245/GT/2020 revised the tariff of the generating station for the 2014-19 tariff period after truing-up exercise and accordingly, the capital cost and the annual fixed charges approved by the said order are as under:

Capital Cost allowed

(Rs. in lakh)

	2014-15	2015-16	2016-17	2017-18	2018-19
Opening Capital Cost	262240.26	266477.38	272373.24	273011.24	282089.81
Admitted additional capitalization	4237.12	5895.86	638.01	9078.57	3922.27
Closing Capital Cost	266477.38	272373.24	273011.24	282089.81	286012.08

Annual Fixed Charges allowed

(Rs. in lakh)

	2014-15	2015-16	2016-17	2017-18	2018-19
Depreciation	12529.83	12672.93	12960.70	13106.26	13427.33
Return on Equity	12392.76	12772.42	12978.21	13284.05	13729.07
Interest on Loan	21094.10	19790.25	18294.32	13497.69	12294.88
Interest on Working Capital	1377.39	1380.53	1379.99	1304.00	1319.57
O&M Expenses	5759.61	6142.05	6549.88	6984.79	7448.58
Total	**53153.68**	**52758.19**	**52163.11**	**48176.79**	**48219.43**

4. The Petitioner vide its affidavit dated 23.10.2019 has filed the present petition for determination of tariff of the generating station for the 2019-24 tariff period, in terms of the provisions of the 2019 Tariff Regulations. The capital cost and the annual fixed charges claimed by the Petitioner for the 2019-24 tariff period are as follows:

Capital Cost claimed

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Opening capital cost	286903.95	289426.99	290105.20	290378.20	290390.20
Add: Additional during the year	2160.48	678.21	273.00	12.00	23.00

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180

	2019-20	2020-21	2021-22	2022-23	2023-24
Less: De-capitalisation during the year	0.00	0.00	0.00	0.00	0.00
Add: Discharges during the year	362.56	0.00	0.00	0.00	0.00
Closing capital cost	289426.99	290105.20	290378.20	290390.20	290413.20
Average capital cost	288165.47	289766.09	290241.70	290384.20	290401.70

Annual Fixed Charges claimed

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Depreciation	13643.79	13714.36	13735.77	13741.52	13742.88
Interest on Loan	11253.60	10090.24	8853.83	7621.88	6338.13
Return on Equity	13262.83	13316.93	13333.11	13338.51	13339.10
Interest on Working Capital	1405.16	1420.90	1448.01	1477.53	1508.89
O&M Expenses	17444.24	18404.84	19421.27	20498.49	21637.58
Total	**57009.63**	**56947.28**	**56791.99**	**56677.94**	**56566.59**

5. The Petitioner had filed the additional information vide its affidavit dated 15.12.2020 and has served copies on the Respondents. The Respondent UPPCL, Respondent MPPMCL and the Respondent BRPL have filed their replies vide affidavits dated 9.9.2020, 2.2.2021 and 1.4.2021, respectively. The Petitioner has filed its rejoinder affidavits on 9.11.2020, 9.3.2021 and 25.5.2021 respectively to the above replies. The matter was heard through video conferencing along with Petition No. 245/GT/2020 (for truing up of tariff of the generating station for the period 2014-19 tariff period) on 17.3.2021 and the Commission directed the Petitioner to file certain additional information. In compliance to the directions, the Petitioner has filed the additional information on 25.5.2021, after serving copies on the Respondents. Thereafter, this Petition was heard along with Petition No.245/GT/2020 through video conferencing on 25.1.2022, and the Commission, after hearing the parties and directed the Petitioner to submit certain additional information, which was submitted by the Petitioner on 19.2.2022. The Commission reserved its order in these matters. Based on the submissions of the parties and the documents available on record and

on prudence check, we proceed to determine the tariff of the generating station for 2019-24 tariff period as stated in the subsequent paragraphs.

Capital Cost

6. Clause (1) of Regulation 19 of the 2019 Tariff Regulations provides that the capital cost as determined by the Commission, after prudence check, in accordance with this regulation, shall form the basis of determination of tariff for existing and new projects. Further, capital cost for an existing project is governed as per clause (3) of Regulation 19 of the 2019 Tariff Regulations, which provides as under:

> *"The Capital cost of an existing project shall include the following:*
>
> *(a) Capital cost admitted by the Commission prior to 1.4.2019 duly trued up by excluding liability, if any, as on 1.4.2019;*
>
> *(b) Additional capitalization and de-capitalization for the respective year of tariff as determined in accordance with these regulations;*
>
> *(c) Capital expenditure on account of renovation and modernization as admitted by this Commission in accordance with these regulations;*
>
> *(d) Capital expenditure on account of ash disposal and utilization including handling and transportation facility;*
>
> *(e) Capital expenditure incurred towards railway infrastructure and its augmentation for transportation of coal up to the receiving end of generating station but does not include the transportation cost and any other appurtenant cost paid to the railway; and*
>
> *(f) Capital cost incurred or projected to be incurred by a thermal generating station, on account of implementation of the norms under Perform, Achieve and Trade (PAT) scheme of Government of India shall be considered by the Commission subject to sharing of benefits accrued under the PAT scheme with the beneficiaries...."*

7. The Petitioner vide Form-1(i) of the petition, has claimed the capital cost as follows:

(Rs. in lakh)

		2019-20	**2020-21**	**2021-22**	**2022-23**	**2023-24**
A	Opening Capital Cost	286903.95	289426.99	290105.20	290378.20	290390.20
B	Addition during the year / Period	2160.48	678.21	273.00	12.00	23.00
C	De-capitalisation during the year/period	0.00	0.00	0.00	0.00	0.00
D	Discharges during the year	362.56	0.00	0.00	0.00	0.00
E	Closing Capital Cost (A+B-C+D)	**289426.99**	**290105.20**	**290378.20**	**290390.20**	**290413.20**

8. The Commission vide order dated 14.9.2022 in Petition No. 245/ GT/2020 had approved the closing capital cost of Rs.286012.08 lakh, as on 31.3.2019. Accordingly, in terms of Regulation 19 of the 2019 Tariff Regulations, the capital cost of Rs.286012.08 lakh, as on 31.3.2019, has been considered as the opening capital cost as on 1.4.2019, for the purpose of determination of tariff of the generating station, for the 2019 tariff period.

Additional Capital Expenditure

9. Clause (2) of Regulation 9 of the 2019 Tariff Regulations provide that the application for determination of tariff shall be on admitted capital cost including additional capital expenditure already admitted and incurred up to 31.3.2019 (either based on actual or projected additional capital expenditure) and estimated additional capital expenditure for the respective years of the 2019-24 tariff period along with the true up for the 2014-19 period in accordance with the 2014 Tariff Regulations. The year wise additional capital expenses claimed by the Petitioner are as follows:

(Rs. in lakh)

2019-20	2020-21	2021-22	2022-23	2023-24
2160.48	678.21	273.00	12.00	23.00

10. Regulation 25(1) of the 2019 Tariff Regulations provides as under:

> *"25. Additional Capitalization within the original scope and after the cut-off date:*
>
> *(1) The additional capital expenditure incurred or projected to be incurred in respect of an existing project or a new project on the following counts within the original scope of work and after the cut-off date may be admitted by the Commission, subject to prudence check:*
>
> *(a) Liabilities to meet award of arbitration or for compliance of the directions or order of any statutory authority, or order or decree of any court of law;*
>
> *(b) Change in law or compliance of any existing law;*
>
> *(c) Deferred works relating to ash pond or ash handling system in the original scope of work;*
>
> *(d) Liability for works executed prior to the cut-off date;*
>
> *(e) Force Majeure events;*

183

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(f) *Liability for works admitted by the Commission after the cut-off date to the extent of discharge of such liabilities by actual payments; and*

(g) *Raising of ash dyke as a part of ash disposal system.*

(2) In case of replacement of assets deployed under the original scope of the existing project after cut-off date, the additional capitalization may be admitted by the Commission, after making necessary adjustments in the gross fixed assets and the cumulative depreciation, subject to prudence check on the following grounds:

(a) The useful life of the assets is not commensurate with the useful life of the project and such assets have been fully depreciated in accordance with the provisions of these regulations;

(b) The replacement of the asset or equipment is necessary on account of change in law or Force Majeure conditions;

(c) The replacement of such asset or equipment is necessary on account of obsolescence of technology; and

(d) The replacement of such asset or equipment has otherwise been allowed by the Commission.

11. Regulation 26 of the 2019 Tariff Regulations provides as under:

26. Additional Capitalization beyond the original scope

(1) The capital expenditure, in respect of existing generating station or the transmission system including communication system, incurred or projected to be incurred on the following counts beyond the original scope, may be admitted by the Commission, subject to prudence check:

(a) Liabilities to meet award of arbitration or for compliance of order or directions of any statutory authority, or order or decree of any court of law;

(b) Change in law or compliance of any existing law;

(c) Force Majeure events;

(d) Need for higher security and safety of the plant as advised or directed by appropriate Indian Government Instrumentality or statutory authorities responsible for national or internal security;

(e) Deferred works relating to ash pond or ash handling system in additional to the original scope of work, on case to case basis:

Provided also that if any expenditure has been claimed under Renovation and Modernization (R&M) or repairs and maintenance under O&M expenses, the same shall not be claimed under this Regulation;

(f) Usage of water from sewage treatment plant in thermal generating station.

(2) In case of de-capitalisation of assets of a generating company or the transmission licensee, as the case may be, the original cost of such asset as on the date of de-capitalisation shall be deducted from the value of gross fixed asset and corresponding loan as well as equity shall be deducted from outstanding loan and the equity respectively in the year such de-capitalisation takes place with corresponding adjustments in cumulative depreciation and cumulative repayment of loan, duly taking into consideration the year in which it was capitalized.

12. The Petitioner has submitted that the projected additional capital expenditure has been claimed under various provisions of Regulation 25 and Regulation 26 of the 2019 Tariff Regulations, wherein, some of the admitted capital works have spilled over from the 2014-19 tariff period.

13. The Commission vide ROP of the hearing dated 17.3.2021 directed the Petitioner to submit the year-wise detailed justification for the new additional capital expenditure incurred and details of approvals for incurring the additional capital expenditure over and above the expenditure approved by the Commission. In response, the Petitioner vide its affidavit dated 19.2.2022 has resubmitted Form 9A i.e. justification for additional capital expenditure along with the regulations. It is noticed that the Petitioner has claimed most of the projected additional capital expenditure under more than one Regulation of the 2019 Tariff Regulations. Based on the submissions of the parties on the individual items and applicable Regulations thereof, the additional capital expenditures are examined in subsequent paragraphs:

2019-20

(Rs. in lakh)

Sl No	Head of Works/ Equipment's	Claim	Justification	Remarks for Admissibility	Amount allowed
Regulation 26(1)(c), 26(1)(d), 76 & 77 of the 2019 Tariff Regulations					
1	Works at Power-house building	225.64	The Petitioner submitted that due to geological reasons and to control seepage in and around powerhouse- cladding wall, flooring, and false ceiling these works are necessary for safety and efficient plant operation.	It is observed that the Petitioner has claimed the asset / work due to force majeure events under Regulation 26(1)(c) of the 2019 Tariff Regulations. However, the Petitioner in its rejoinder to the reply of the Respondent BRPL, has clarified that the asset has been claimed under Regulation 26(1)(d) of the 2019 Tariff Regulations. It is observed that the Petitioner has not submitted any documentary evidence, in support of the claim under this head. However, keeping in view that the proposed expenditure is	225.64

				only on account of geological reasons and to control seepage, the same is **allowed** under Regulation 26(1)(d) of the 2019 Tariff Regulations. It is also noticed that the Petitioner has claimed Rs. 397.20 lakh towards 'Wall cladding false ceiling flooring work for powerhouse building' during 2014-19 tariff period and the same was allowed in order dated 14.9.2022 in Petition No. 245/GT/2020. The Petitioner is directed to submit relevant supporting documents along with complete details of the subject works and total expenditure envisaged for the same including details of the amount already claimed, allowed by Commission, balance amount to be claimed, decapitalization etc, at the time of truing up of tariff.	
2	Extension of Existing Jetty	36.00	The Petitioner submitted that during monsoon season, there is frequent road blockage. The alternate way to reach powerhouse for operation of plant is by mooring and extension of jetty for boarding of KHEP staff. The work is essential for safety and efficient plant operation.	After considering the submissions of the parties, it is noticed that the Petitioner has already claimed boats, approach road to boat point etc, in Petition no. 245/GT/2020 and the same were allowed by the Commission vide order dated 14.9.2022 in Petition no. 245/GT/2020. Considering the nature of works, the proposed claim is **allowed** under Regulation 26(1)(d) of the 2019 Tariff Regulations. The Petitioner is however directed to submit relevant supporting documents to substantiate its claim under this head, at the time of truing up of tariff.	36.00
3	Drilling Grouting Work at left Bank	30.24	The Petitioner submitted that, there were landslides due to geology of area and	It is noticed that the proposed expenditure are on account of geological reasons and excessive rainfall in left bank of dam.	30.24

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4	Stabilization of left bank in D/S of Dam	137.49	excessive rainfall in left bank, of dam. Stabilisation work like walls, bundled anchors and drilling grouting was essentially required for uninterrupted operation. This work is essentially required for safety operation of the plant.	Further, the said works were recommended by Dr. P C Nawani, Consultant of the Petitioner, in his reports dated 2.5.2017, 20.3.2018 and 8.5.20218. It is also noticed that the Petitioner had claimed Rs. 1404.50 lakh during the 2014-19 tariff period towards works related to the left bank and the same was allowed by order dated 14.9.2022 in Petition No. 245/GT/2020. In view of this, the claim of the Petitioner is **allowed** under Regulation 26(1)(c) of the 2019 Tariff Regulations. However, the Petitioner is directed to submit the complete details of subject works and total expenditure envisaged for the same along with amount already claimed, allowed by the Commission, to be claimed, decapitalization etc, and necessary supporting documents thereof at the time of truing up of tariff.	137.49
5	Stabilization work at right bank for dump muck piles	87.22	The Petitioner submitted that slide of dumped muck material at right bank maybe obstruction in river flow. Due to this stabilization / protection of the dumped muck piles at the right bank are very essential for safe and uninterrupted operation of power plant and for environmental aspect this work is essential for safety and efficient plant operation.	It is noticed that the proposed expenditure is to avoid obstruction in river flow and impact operation of the plant. Further, the said works are recommended by Dr. P C Nawani, Consultant of the Petitioner, in his reports dated 2.5.2017 and 20.3.2018. It is also noticed that the Petitioner had claimed Rs. 652.41 lakh towards works associated with 'Right Bank' and Rs. 3388.06 lakhs towards works associated with 'Right Bank and Diversion Tunnel' during 2014-19 tariff period and the same was allowed vide order dated 14.9.2022 in Petition No. 245/GT/2020. In view of this, the claim of the Petitioner is **allowed** under Regulation 26(1)(c) of the 2019 Tariff Regulations. However, the Petitioner is directed to submit the complete details of subject works and total	87.22

				expenditure envisaged for the same along with amount already claimed, allowed by the Commission, to be claimed, decapitalization etc, and necessary supporting documents thereof at the time of truing up of tariff.	
6	Works at Main Access Tunnel to Powerhouse	39.04	The Petitioner submitted that to protect the ribs from corrosion and to control the seepage in Main Access tunnel, wet shot created with chain link fabric is very essential safety and efficient plant operation.	It is noticed that the proposed additional capital expenditure is to protect the ribs from corrosion and to control the seepage in main access tunnel. It is also noticed that the Petitioner has claimed Rs. 667.45 lakh during the 2014-19 tariff period and the same was allowed vide order dated 14.9.2022 in Petition No. 245/GT/2020. However, the Petitioner has not submitted any documents in support of the said claim. Considering the nature of works, the claim is **allowed** under Regulation 26(1)(c) of the 2019 Tariff Regulations. Accordingly, the Petitioner is directed to submit the complete details of subject works and total expenditure envisaged for the same along with amount already claimed, allowed by the Commission, to be claimed, decapitalization etc, and necessary supporting documents thereof at the time of truing up of tariff.	39.04
7	Automatic data acquisition system, uplift measuring device, inclinometer, surface crack meter read out unit	55.00	The Petitioner submitted that to monitor the behaviour of rock and structures, instruments were installed as advised by Design department and Russian experts. This work is essential for safety and efficient plant operation.	It is noticed that the proposed additional capital expenditure is for installation of instruments and automatic data acquisition to monitor the behaviour of rocks and structures. Considering the nature of works, the same is **allowed** under Regulation 26(1)(d) of the 2019 Tariff Regulations. However, the Petitioner is directed to submit relevant supporting documents to substantiate the claim under this head, at the time of truing up of tariff.	55.00

(188)

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				It is also noticed that the said works include replacement of old assets as well. However, the Petitioner has not provided any information regarding the de-capitalization of old asset / work. Accordingly, the de-capitalization of old asset has been dealt with under "Assumed Deletions".	
8	Collateral damages / Rehabilitation works	200.00	The Petitioner submitted that to release of payments as per the recommendation of Committee of Experts constituted by GoUK for the investigation of the land sliding near reservoir area for collateral damages and rehabilitation including left out properties. This work was necessary for safety of the power plant. The Respondents, BRPL, UPPCL and MPPMCL have submitted that, the Petitioner has claimed certain costs in under Regulation 76 and Regulation 77 of the 2019 Tariff Regulation without any specific justification for the same. The Respondent BRPL further submitted that the works claimed by the Petitioner are not related to the 'Force Majeure' event or circumstances or combination of events or circumstances including those which are mentioned under the 'Force Majeure' clause. The respondent BRPL further submitted that all the 26 items of works proposed would show that the works proposed be carried out either under the O&M expenses or undertaken under the Corporate Social Responsibility (CSR) of the Petitioner. The respondent BRPL further submitted that	It is noticed that the proposed additional capital expenditure is based on the recommendation/report dated 14.1.2013 of committee of experts, constituted by the Government of Uttarakhand, for investigation of land sliding near reservoir area for collateral damages and rehabilitation. Accordingly, the Petitioner has claimed the expenditure under Regulation 26(1)(c) and Regulation 26(1)(d) read with Regulation 76 and 77 of the 2019 Tariff Regulations. It is also noticed that the Petitioner has claimed Rs. 127.48 lakh during the 2014-19 tariff period and the same was allowed vide order dated 14.9.2022 in Petition No. 245/GT/2020. Considering the nature of works, the claim of the Petitioner is **allowed** under Regulation 26(1)(b) in exercise of the power under Regulation 76 of the 2019 Tariff Regulations. Accordingly, the Petitioner is also directed to submit the complete details of subject works and total expenditure envisaged for the same along with amount already claimed, allowed by the Commission, to be claimed, amount of interest etc, and necessary supporting documents thereof at the time of truing up of tariff.	200.00

			the Petitioner has not filed any documents in support of the relevant authorities in support of his projection for additional capital expenditure.		
9	Construction of multipurpose hall building at KHEP	135.00	The Petitioner submitted that the KHEP project is located at remote area, there is no place for entertainment of employees. therefore, it is essential to construct a community building in Project for sports and cultural activities and welfare of employees. This work was necessary for safety and efficient plant operation.	It is noticed that the proposed additional capital expenditure claimed does not directly pertain to the operation of the generating station. Accordingly, the additional capital expenditure claimed is **not allowed.**	0.00
10	Procurement of Twin Engine 20 PAX FRP passenger Boat	15.85	The Petitioner submitted that it is necessary for pick-up and dropping of O&M staff in case of road closed in between Zero Bridge to Koteshwar. This work is essential for safety of the power plant.	It is noticed that the Petitioner has claimed additional capital expenditure of Rs. 159.84 lakh towards the said work, during the 2014-19 tariff period and the Commission vide its order dated 14.9.2022 in Petition No. 245/GT/2020 had allowed the same. In view of this, the claim of the Petitioner under this head is **not allowed**. However, in case of unavoidable requirement, the Petitioner is granted liberty to the Petitioner to claim the same with relevant supporting documents, at the time of truing up of tariff.	0.00
11	Supply and installation of video wall along with accessories in machine hall at Powerhouse	60.00	The Petitioner submitted that display of various data, information, and photographs of Power-house operation. This work is essential for safety of the power plant.	Since no documentary evidence has been furnished by the Petitioner in terms of Regulation 26(1)(d) of the 2019 Tariff Regulations, the additional capital expenditure claimed is **not allowed.**	0.00
12	Procurement of hydraulic lifter	16.33	The Petitioner submitted that hydraulic lifter was required to carry out maintenance work at height safely. This work is essential for safety of the power plant.	Cconsidering the submissions of the parties and keeping in view the nature of the asset/item, the same is **allowed** under Regulation 26(1)(d) of the 2019 Tariff Regulations. The Petitioner is however, directed to submit the existing hydraulic lifting facilities for working at height and the relevant	16.33

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190

				supporting documents to substantiate the said claim under this head, at the time of truing up of tariff.	
13	Shed in O&M store, Shed in sub-station (DG Room) etc.	91.85	The Petitioner submitted that for the safety and security of sub-station equipment and accessories, covered sheds are required. This work is necessary for safety of DG set.	It is noticed that the Petitioner had claimed Rs. 307.03 lakh towards, O & M store and Rs. 15.62 lakh towards DG room during the 2014-19 tariff period, on account of geological surprises and the same was allowed by order dated 14.9.2022 in Petition No. 245/GT/2020. In addition, Rs. 6.00 lakh has been claimed in 2019-20 towards O & M store and the same has been allowed in this order. It is also noticed that the additional capital expenditure claimed is in addition to the expenditure already allowed during the period 2014 - 19 and 2019 – 20. However, the Petitioner has not submitted any reasons for the additional expenditure claimed. In view of this, the additional capital expenditure claimed is **not allowed**.	0.00
14	Park in front of dam Office.	40.00	The Petitioner submitted that KHEP is located at remote area, there is no place for entertainment of employees. therefore, it is essential to construct a Park in Project for sports and physical activities of employees. This work is essential for safety of the power plant.	It is noticed that the proposed additional capital expenditure claimed is not related to the operation of the generating station. Hence, the same is **not allowed.**	0.00

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15	Construction of Sewerage treatment plant at KHEP (at two locations)	5.00	The Petitioner submitted that it is necessary to construct a sewage treatment plant in the project area to reduce pollution and keep environment clear. This work is essential for safety of the power plant. The Respondents, BRPL, UPPCL and MPPMCL have submitted that, the Petitioner has claimed certain costs in under Regulation 76 and Regulation 77 of the 2019 Tariff Regulation without any specific justification for the same. The Respondent BRPL further submitted that the works claimed by the Petitioner are not related to the 'Force Majeure' event or circumstances or combination of events or circumstances including those which are mentioned under the 'Force Majeure' clause. The respondent BRPL further submitted that all the 26 items of works proposed would show that the works proposed be carried out either under the O&M expenses or undertaken under the Corporate Social Responsibility (CSR) of the Petitioner. The respondent BRPL further submitted that the Petitioner has not filed any documents in support of the relevant authorities in support of his projection for additional capital expenditure.	It is noticed that the Petitioner has also claimed projected additional capital expenditure for Rs. 5.00 lakhs in 2019-20 under Regulation 26(1)(c) or Regulation 26(1)(d) of the 2019 Tariff Regulations. Rs. 250.00 lakhs in 2020 – 21 under Regulation 29(1)(b) or Regulation 29(1)(c) of the 2019 Tariff Regulations and Rs. 250.00 lakhs in 2021 – 22 under Regulation 29(1)(b) or Regulation 29(1)(c) of the 2019 Tariff Regulations. However, the Petitioner has not submitted any documents in support of the same. As the proposed additional capital expenditure claimed is for construction of sewerage treatment plant, the same is **allowed** under Regulation 26(1)(b). The Petitioner is also directed to submit the complete details of subject works and total expenditure envisaged for the same along with amount already claimed, allowed by the Commission, to be claimed etc, and necessary supporting documents thereof at the time of truing up of tariff.	5.00
16	Extension of Pokhari Pendars motor marg up to Koteshwar	128.56	The Petitioner submitted that metalling and painting of 1.5 km kuccha road is required through PWD Uttarakhand and funded by THDCIL for use of KHEP staff for movement to Rishikesh,	Considering the submissions of the parties and keeping in view the nature of the works, the proposed additional capital expenditure is **allowed** under Regulation 26(1)(d) of the 2019 Tariff Regulations.	128.56

	Project 1.5 km PWD		Dehradun and vice versa. This work is essential for safety of the power plant.	However, the Petitioner is directed to submit the relevant supporting documents to substantiate the said claim under this head, at the time of truing up of tariff.	
17	Construction of approach road and fencing for O&M store at KHEP, Koteshwar	2.16	Earlier a kuccha link road was construct by PWD and funded by THDCIL. Now is has been decided to make it painted / concrete road. This work is essential for safety of the power plant.	It is noticed that the proposed additional capital expenditure clamed is in the nature of O & M and hence, the additional capital expenditure claimed is **not allowed**.	0.00
18	TV Projectors and other audio-visual equipment	5.79	Public address system for the conference rooms of admin building and powerhouse were purchased and installed for safety of power plant in emergent situation.	As the proposed additional capital expenditure claim is not related to the operation of the generating station, the same is **not allowed.**	0.00
A	**Sub-total**	**1311.17**			**960.52**
Regulation 26(1)(d) of the 2019 Regulations					
19	Supply and Installation of lighting fixtures at entrance of Koteshwar Powerhouse	5.00	The Petitioner submitted that for proper illumination at entrance for security and the safety of employees. This works necessary for safety and efficient plant operation.	As the proposed additional capital expenditure claimed is in the nature of O & M expenses, the claim is **not allowed**.	0.00
20	Supply and Installation of CCTV network as per IB report	42.00	The Petitioner submitted that as per IB report, installation of CCTV network for security of the Koteshwar HEP project area is required. This work is essential for safety of the power plant.	It is noticed that the Petitioner has claimed the proposed additional capital expenditure under Regulation 26(1)(d) of the 2019 Tariff Regulations, 2019 stating that the same was recommended by IB in its report. However, the copy of the said report has not been furnished. However, as the claim pertains to the safety and security of the plant, the proposed additional capital expenditure claimed is **allowed** under Regulation 26(1)(d) of the 2019 Tariff Regulations. The Petitioner is however, directed to submit the relevant documents in support of the said claim under this head, at the time of truing of tariff.	42.00
21	Boom Barriers	2.00	The Petitioner submitted that as per IB recommendation for security purpose of Koteshwar HEP. This work is essential for safety of the power plant.		2.00
22	Door frame metal detector	1.50			1.50
23	Electrification , firefighting, lighting system,	38.50	The Petitioner submitted that electrification work of the multipurpose hall has been carried out along with stage	Considering the fact that the proposed additional capital expenditure is not related to the	0.00

	curtain and line array sound system at multipurpose hall KHEP		curtain, sound system and fire-fighting system. This work is essential for safety of the power plant.	operation of the generating station, the claim is **not allowed.**	
24	Check post and 02 Nos water tank at fire station	49.15	The Petitioner submitted that as per IB requirement 02 nos additional check post for security purpose and 02 nos of water tanks for fire wing as per fire wing requirement. This work is essential for safety of the power plant.	It is noticed that the Petitioner has claimed the proposed additional capital expenditure under Regulation 26(1)(d) of the 2019 Tariff Regulations stating that the same was recommended by IB in its report. However, the Petitioner has not furnished the said report. However, considering the fact that the claim pertains to the safety and security of the plant, the proposed additional capital expenditure claimed is **allowed** under Regulation 26(1)(d) of the 2019 Tariff Regulations. The Petitioner is, however, directed to submit the reasons along with supporting documents for claiming the said expenses beyond original scope of works along with details of the existing scheme prior to the capitalization of this asset, at the time of truing up of tariff.	49.15
25	Procurement of mini fire tender	14.45	The Petitioner submitted that mini fire tender is required for fire-fighting purpose for narrow roads and sharp bends etc. to minimise the lead time. This is required for safety of the power plant.	It is noticed that the proposed additional capital expenditure claimed is towards mini firefighting system for narrow roads and sharp bends. In view of this, the claim of the Petitioner is **allowed** under Regulation 26 (1)(d) of the 2019 Tariff Regulations. The Petitioner is directed to furnish supporting documents in respect of the said claim at the time of truing up of tariff.	14.45
26	Procurement of firefighting material and equipment	27.25	The Petitioner submitted that it is required to strengthen the firefighting and other rescue operations executed by CISF Fire wing. This is required for safety of the power plant.	It is noticed that the proposed additional capital expenditure claimed is for procurement of firefighting system. However, the Petitioner has not furnished any supporting documents to substantiate the claim. However, considering the nature of asset/works, the claim is **allowed** under Regulation 26(1)(d) of the 2019 Tariff Regulations. **The** Petitioner is however, directed to	27.25
27	Procurement & installation of fire dampers	20.00	The Petitioner submitted that to minimize fire hazard in powerhouse area. This is required for safety of the		20.00

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THDC India Limited,Rishikesh

194

	system in ventilation system of powerhouse		manpower posted in power plant.	submit documentary evidence in support of the claim at the time of truing up of tariff of 2019-24. It is also noticed that the said asset/works are of replacement nature. However, the Petitioner has not provided any information on the same. Accordingly, the de-capitalization of old asset has been determined under "Assumed Deletions".	
28	Furniture and fixtures office	10.00	The Petitioner submitted that furnishing of training conference hall on 1st floor AC CISF office for safety of the power plant.	As the claim of the Petitioner is not related to the operation of the generating station, the additional capital expenditure claimed is **not allowed**.	0.00
B	**Sub-Total**	**209.85**			**156.35**
Regulation 26(1)(c) / 76 / 77 / 25(2)(d) of the 2019 Tariff Regulations					
29	Roads, culverts and bridge (steel bridge) and approach to boat point.	439.76	The Petitioner submitted that construction of box culvert, steel girder bridge etc. at d/s of dam is required for communication to left bank area and to provide approach to project affected villagers of left bank. These works are essential for safety and efficient plant operation. The Commission had admitted / allowed Rs. 400 lakh (Rs. 380 lakh + Rs. 20 lakh) in Order dated 9.10.2018 in Petition No. 117/GT/2018, in 2017-18 and 2018-19.	It is noticed that vide order dated 9.10.2018 in Petition No. 117/GT/2018, the Commission had allowed total amount of 400 lakh (Rs. 20 lakh in 2017 – 18 and Rs. 380 lakhs 2018 – 19) towards Steel Girder Bridge as a replacement of the existing bailey bridge. However, the Petitioner has included other scope of works, such as roads, culverts, approach road to boat point etc, to the works already allowed vide order dated 9.10.2018, but not submitted segregated claims for these works. It is also noticed that the expenses such as roads, culverts, approach road to boat point etc, were already claimed by the Petitioner in Petition No. 245/GT/2020 and the same were allowed vide order dated 14.9.2022. In view of this, **the claim of Petitioner for these works is restricted to Rs. 400 lakh**, as allowed in order dated 9.10.2018 for the steel bridge under Regulation 25(2)(d) in exercise of the power under Regulation 76 of the 2019 Tariff Regulations. However, the Petitioner is directed to submit the segregated	400.00

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(195)

				scope of works, the amount claimed, amount allowed and balance expenses envisaged in future along with the supporting documents at the time of truing up. Since the said works are replacement in nature, and the Petitioner has not provided any information on the same, the de-capitalization of old asset has been determined under "Assumed Deletions".	
C	**Sub-Total**	**439.76**			**400.00**
Regulation 25(2)(a) of the 2019 Tariff Regulations					
30	Electromechanical O&M Store	6.00	The Petitioner submitted that the release of final payment of (due to geological surprises and settlement of surroundings, the old E&M store got damaged, therefore new E&M store was constructed for inventory and management of O&M spares). This work is essential for safety of the power plant. The Respondents, BRPL, UPPCL and MPPMCL have submitted that, the Petitioner has claimed certain costs in under Regulation 76 and Regulation 77 of the 2019 Tariff Regulation without any specific justification for the same. The Respondent BRPL further submitted that the works claimed by the Petitioner are not related to the 'Force Majeure' event or circumstances or combination of events or circumstances including those which are mentioned under the 'Force Majeure' clause. The respondent BRPL further submitted that all the 26 items of works proposed would show that the works proposed be carried out either under the O&M expenses or undertaken under the Corporate Social Responsibility (CSR) of the Petitioner. The respondent BRPL further submitted that the Petitioner has not filed any	It is noticed that the Petitioner has claimed additional capital expenditure for Rs. 307.03 lakhs towards O & M store in 2014–19 on account of geological surprises and the same was allowed vide order dated 14.9.2022 in Petition No. 245/GT/2020. Even though Petitioner, has not provided any details for the additional expenditure claimed over and above Rs. 307.03 lakh, it is understood that the same is towards balance payment for the works of electromechanical O & M store. In view of this, the claim is **allowed** under Regulation 25(2)(b) in exercise of the power to relax under Regulation 76 of the 2019 Tariff Regulations. The Petitioner is directed to submit the complete details of subject works and total expenditure envisaged for the same along with the amount already claimed, amount allowed, amount to be claimed etc, with necessary supporting documents at the time of truing up of tariff. As the Petitioner has not provided any information regarding the decapitalization of the old assets, the same has been determined under "Assumed Deletions".	6.00

196

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			documents in support of the relevant authorities in support of his projection for additional capital expenditure.		
31	Bolero Jeep and Bolero Camper	110.00	The Petitioner submitted that jeeps and campers are to be procured to replace BER vehicles as per project requirement. Old vehicle was in the original scope of work and after completion of useful life, new vehicle was purchased in lieu of old vehicle. This work is essential for safety of the power plant.	It is noticed that the Petitioner has claimed the said items during the 2014 – 19 tariff period and on prudence check, the same were allowed vide order dated 14.9.2022 in Petition No. 245/GT/2020. In addition to that, the petitioner has claimed the subject items in 2019 – 24 tariff period. However, considering the nature of items, on prudence check, the claimed items are **not allowed** as an additional capital expenditure in 2019 – 24 tariff period.	0.00
32	Equipment and fittings for Guest House / Field Hostel / Clubs	1.50	The Petitioner submitted that requirement of change of old furniture in G.H. Old furniture was in the original scope of work and after completion of useful life new furniture was purchased in lieu of old for safety of the power plant.	It is noticed that the proposed additional capital expenditure does not pertainto the operation of the generating station. In view of this, the additional capital expenditure claimed is **not allowed.**	0.00
33	Procurement of Computer / Servers / Laptops and peripherals	62.20	The Petitioner submitted that purchase of computers & peripherals against BER declared IT assets purchase of servers & its OS, purchase of laptops by executives against laptop policy. Old items were in the original scope of work and after completion of useful life new computers was purchased in lieu of old for safety of the power plant.	It is noticed that the Petitioner has claimed additional capital expenditure of Rs. 62.20 lakh in 2019-20 and 8.00 lakhs in 2020-21 towards the said assets/items. Also, the expenditure claimed is primarily the replacement of old items, which form part of the original scope of works. Accordingly, the same is **allowed** under Regulation 25(2)(a) of the 2019 Tariff Regulations. The Petitioner is however, directed to submit the details of items within the original scope of works with regard to the number of computers, servers, laptops etc, and those claimed during the 2019-24 tariff period, at the time of truing of tariff. Even though the said works are replacement in nature, the Petitioner has not furnished any information regarding the de-capitalized value of old assets. Accordingly, the same has been	62.20

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				determined under "Assumed Deletions".	
34	Pump Set for Water Supply	5.00	The Petitioner submitted that water pumps are to be procured to replace unserviceable pumps installed at Koteshwar Project as per requirement. Old pumps were in the original scope of work and after completion of useful life new pumps was purchased in lieu of old pumps for safety of the power plant.	It is noticed that the additional capital expenditure claimed is primarily as replacement of old items, which form part of the original scope of works. Accordingly, the same is **allowed** under Regulation 25(2)(a) of the 2019 Tariff Regulations. Even though the said item is replacement in nature, the Petitioner has not furnished any information regarding the de-capitalized value of old asset. Accordingly, the same has been determined under "Assumed Deletions".	5.00
D	**Sub-Total**	**184.70**			**73.20**
	Regulation 26(1)(c), 76 and 77 of the 2019 Tariff Regulations				
35	Furniture and fixtures costing up to Rs. 5000/-	2.00	The Petitioner submitted this as miscellaneous requirement.	As the proposed additional capital expenditure claimed is in the nature of O & M expenses, the same is **not allowed.**	0.00
36	Supply and installation of air conditioners for multipurpose hall	13.00	The Petitioner has submitted for proper ventilation of multipurpose hall	As the proposed additional capital expenditure do not pertainto the operation of the generating station, the claim is **not allowed.**	0.00
E	**Sub-Total**	**15.00**			**0.00**
F	**Total amount claimed**	**2160.48**			
	Total amount allowed				**1590.07**

14. In view of the above, the total additional capital expenditure allowed in 2019-20 under the original scope of work, change in law and other than the original scope of work is Rs.473.20 lakh, Rs. 205.00 lakh and Rs.911.87 lakh respectively, on cash basis.

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2020-21

(Rs. in lakh)

Sl No	Head of works / Equipment's	Claim	Justification	Remarks for Admissibility	Amount allowed
Regulation 26(1)(d) of the 2019 Tariff Regulations					
1	Upgradation of SCADA system of Koteshwar HEP	200.00	The Petitioner submitted that in compliance to cyber security audit recommendations, upgradation of SCADA System of Koteshwar HEP is required for safety of the power plant. The Respondents, BRPL, UPPCL and MPPMCL have submitted that, the Petitioner has claimed certain costs in under Regulation 76 and Regulation 77 of the 2019 Tariff Regulation without any specific justification for the same. The Respondent BRPL further submitted that the works claimed by the Petitioner are not related to the 'Force Majeure' event or circumstances or combination of events or circumstances including those which are mentioned under the 'Force Majeure' clause. The respondent BRPL further submitted that all the 26 items of works proposed would show that the works proposed be carried out either under the O&M expenses or undertaken under the Corporate Social Responsibility (CSR) of the Petitioner. The respondent BRPL further submitted that the Petitioner has not filed any documents in support of the relevant authorities in support of his projection for additional capital expenditure.	It is noticed that the proposed additional capital expenditure is for compliance to the cyber security audit recommendations. However, the Petitioner, has not furnished any supporting documents in justification of the said claim. However, considering the nature of works the proposed additional capital expenditure is **allowed** under Regulation 25(2)(c) of the 2019 Tariff Regulations. The Petitioner is directed to submit the supporting documents at the time of truing of tariff. Even though the subject item is replacement in nature, the Petitioner has not furnished any information regarding the de-capitalized value of old asset. Accordingly, the same has been determined under "Assumed Deletions".	200.00
2	Supply and installation of lighting fixture at entrance of Koteshwar powerhouse	55.00	The Petitioner submitted that proper illumination at entrance is required for the safety of the power plant.	It is noticed that the proposed additional capital expenditure is in the nature of O & M expenses. Accordingly, the additional capital expenditure claimed is **not allowed**.	0.00
	Sub-Total (A)	**255.00**			**200.00**

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199

Regulation 26(1)(c), 26(1)(b) / 76 / 77 of the 2019 Tariff Regulations					
3	Construction of Sewage Treatment Plant at KHEP (at two locations)	250.00	The Petitioner submitted that it is necessary to construct a sewage treatment plant in the project area to reduce pollution and to keep environment clear in compliance to pollution control guidelines.	It is noticed that the Petitioner has also claimed projected additional capital expenditure of Rs. 5.00 lakhs, Rs. 250.00 lakh and Rs. 250.00 lakh in 2019 - 20, 2020 – 21 and 2021-22, respectively. However, the Petitioner has not submitted any documents in support of the same. Since the proposed additional capital expenditure claimed is for the construction of sewerage treatment plant, the same is **allowed** under Regulation 26(1)(b) of the 2019 Tariff Regulations. The Petitioner is also directed to submit the complete details of subject works and the total expenditure envisaged for the same along with amount already claimed, amount allowed, amount to be claimed etc, with necessary supporting documents thereof at the time of truing up of tariff.	250.00
	Sub-Total (B)	**250.00**			**250.00**
Regulation 26(1)(d) / 76 / 77 of the 2019 Tariff Regulations					
4	Park in front of dam	20.00	The Petitioner submitted that KHEP is located at remote area, therefore is no place for entertainment of employees. Hence, it is essential to construct a park in project for sports and physical activities of employees. This work is essentially required for safety of the power plant.	As the proposed additional capital expenditure is not related to the operation of the generating station, the claim is **not allowed.**	0.00
5	Boat point at Zero Bridge	15.00	The Petitioner submitted that it is necessary for pick-up and dropping of O&M staff in case of road blockage due to land slide during monsoons in between Zero bridge to Koteshwar for safe and successful plant operation during rainy season.	It is noticed that the Petitioner has already claimed items like boats, approach road to boat point etc, in Petition no. 245/GT/2020 and the same were allowed vide order dated 14.9.2022. It is observed that the plant already had boat points and the work claimed is over and above the same. However, the Petitioner has not furnished any justification for the same. In view of this, the claim of the Petitioner is **not allowed**.	0.00

200

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6	Construction of approach road for water supply scheme at u/s of jauasi Nala	41.21	The Petitioner submitted that existing kuccha road is required to be metalled for safety and uninterrupted water supply in Powerhouse.	Keeping in view the nature of the works, the claim of the Petitioner is **allowed** under Regulation 26(1)(d) of the 2019 Tariff Regulations. The Petitioner is directed to submit information along with supporting documents at the time of truing of tariff.	41.21
7	Hydraulic oil filtration machine	14.00	The Petitioner submitted that for filtration of hydraulic oil used in power pack chamber of penstock service gates. This work is necessary for safe and efficient plant operation.	As the proposed additional capital expenditure is in the nature of O&M expenses, the claim is **not allowed.**	0.00
8	Supply of Hoisting system for dewatering pump sets at Dam pit	8.00	The Petitioner submitted that for lifting and lowering of submersible pumps in dam pit. This work is necessary for safe and efficient plant operation.		0.00
	Sub-Total (C)	**98.21**			**41.21**
Regulation 26(1)(c) / 25(2)(a) / 76 / 77 of the 2019 Tariff Regulations					
9	Bolero jeep and Bolero camper	40.00	The Petitioner submitted that jeep and camper are to be procured to replace BER vehicles as per project requirement. Old vehicle was in the original scope of work and after completion of useful life new vehicle was purchased in lieu of old vehicle. This work is essential for safety of the power plant.	It is noticed that the Petitioner has claimed the said items during the 2014 – 19 tariff period and on prudence check, the same were allowed vide order dated 14.9.2022 in Petition No. 245/GT/2020. In addition to that, the petitioner has claimed the subject items in 2019 – 24 tariff period. However, considering the nature of items, on prudence check, the claimed items are **not allowed** as an additional capital expenditure in 2019 – 24 tariff period.	0.00
10	Procurement of computer /servers/ laptops and peripherals	8.00	The Petitioner submitted that purchase of laptops by executives against laptop policy. Procurement of computers and peripherals for safety of Power Plant.	It is noticed that the Petitioner has claimed additional capital expenditure for Rs. 62.20 lakhs in 2019 – 20 and Rs 8.00 lakh in 2020 – 21 towards the said items. Further, the additional capital expenditure claimed is primarily as replacement of old items, which form part of the original scope of works. Accordingly, the claim is **allowed** under Regulation 25(2)(a) of the 2019 Tariff Regulations. The Petitioner is however directed to submit the details of the original scope of works with regard to the	8.00

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201

				number of computers, servers, laptops etc, and those claimed during the 2019 – 24 tariff period, at the time of truing of tariff. Even though the said works are replacement in nature, the Petitioner has not furnished any information regarding the de-capitalized value of old assets. Accordingly, the same has been determined under "Assumed Deletions".	
11	Pump set for water supply	4.00	The Petitioner submitted that new motor and starter shall be procured to replace unserviceable items, as per project requirement. The old pumps were in the original scope of work and after completion of useful life new pumps was purchased in lieu of old pumps. This work is essential for safety of the power plant.	It is noticed that the additional capital expenditure claimed is primarily as replacement of old items, which form part of the original scope of works. Accordingly, the claim is **allowed** under Regulation 25(2)(a) of the 2019 Tariff Regulations. Even though the subject item is of replacement nature, the Petitioner has not furnished any information regarding the de-capitalized value of old asset. Accordingly, the same has been determined under "Assumed Deletions".	4.00
12	Furniture and fixtures office	10.00	The Petitioner submitted that the replacement is to be done in phases. Old furniture was in the original scope of work and after completion of useful life new furniture was purchased in lieu of old furniture. This work is essential for safety of the power plant.	It is noticed that the proposed additional capital expenditure claimed is in the nature of O & M expenses and hence the claim is **not allowed.**	0.00
13	Equipment and fittings for guest house/ field hostel/ clubs	10.00		It is noticed that the proposed additional capital expenditure claimed do not pertain to the operation of the generating station. Accordingly, the claimed additional capital expenditure claimed is **not allowed.**	0.00
	Sub-Total (D)	**72.00**			**12.00**
Regulation 26(1)(c) / 76 / 77 of the 2019 Tariff Regulations					
14	Supply and installation of air conditioners for multipurpose hall	3.00	The Petitioner submitted that for proper ventilation of multipurpose hall is required for the employees of power plant for safety of plant, as it is located at remote location.	It is noticed that the proposed additional capital expenditure claimed do not pertain to the operation of the generating station. Accordingly, the same is **not allowed.**	0.00
	Sub-Total (E)	**3.00**			**0.00**
	Total amount claimed	**678.21**			
	Total amount allowed				**503.21**

15. In view of the above, the total additional capital expenditure allowed in 2020-21 under the original scope, change in law and other than original scope of work is Rs.12.00 lakh, Rs.250.00 lakh and Rs.241.21 lakh respectively, on cash basis.

2021-22

(Rs. in lakh)

Sl No	Head of works / Equipment's	Claim	Justification	Remarks for Admissibility	Amount allowed
A	**Regulation 26(1)(c) / 25(2)(a) / 76/ 77 of the 2019 Tariff Regulations**				
1	Bolero Jeep	20.00	The Petitioner submitted that jeeps are to be procured to replace BER vehicles as per project requirement.	It is noticed that the Petitioner has claimed the said items during the 2014 – 19 tariff period and on prudence check, the same were allowed vide order dated 14.9.2022 in Petition No. 245/GT/2020. In addition to that, the petitioner has claimed the subject items in 2019 – 24 tariff period. However, considering the nature of items, on prudence check, the claimed items are **not allowed** as an additional capital expenditure in 2019 – 24 tariff period.	0.00
2	Pump Set for Water Supply	3.00	The Petitioner submitted that water pumps shall be procured to replace unserviceable pumps installed at Koteshwar Project as per requirement. Old pumps were in the original scope of work and after completion of useful life new pumps shall be purchased in lieu of old pumps. This work is essential for safety of the power plant.	It is noticed that the additional capital expenditure claimed is primarily towards replacement of old items, which form part of the original scope of work. Accordingly, the same is **allowed** under Regulation 25(2)(a) of the 2019 Tariff Regulations. Even though the said item is replacement in nature, the Petitioner has not furnished any information regarding the de-capitalized value of old asset. Accordingly, the same has been determined under "Assumed Deletions".	3.00
	Sub-Total(A)	**23.00**			**3.00**
B	**Regulation 26(1)(c) / 26(1)(b) / 76 / 77 of the 2019 Tariff Regulations**				

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Sl No	Head of works / Equipment's	Claim	Justification	Remarks for Admissibility	Amount allowed
3	Construction of Sewage Treatment Plant at KHEP (at two locations)	250.00	Necessary to construct a Sewage treatment Plant in the Project area to reduce pollution and keep environment clear in compliance of Pollution control guideline.	It is noticed that the Petitioner has also claimed projected additional capital expenditure for Rs. 5.00 lakh, Rs. 250.00 lakh and Rs. 250.00 lakh during 2019 - 20, 2020 – 21 and 22021-22, respectively. However, the Petitioner has not submitted any documentary evidence in support of the same. However, as the proposed additional capital expenditure is for the construction of sewerage treatment plant, the claim is **allowed** under Regulation 26(1)(b) of the 2019 Tariff Regulations. Further, the Petitioner is also directed to submit the complete details of subject works and total expenditure envisaged for the same along with amount already claimed, allowed by the Commission, to be claimed etc, and necessary supporting documents thereof at the time of truing up of tariff.	250.00
	Sub-Total (B)	**250.00**			
	Total amount claimed (A+B)	**273.00**			
	Total amount allowed				**253.00**

16. In view of the above, the total additional capital expenditure allowed in 2021-22 under the original scope and change in law are Rs.3.00 lakh and Rs.250.00 lakh, respectively on cash basis, and no additional capital expenditure has been claimed and allowed beyond the original scope of works.

2022-23

(Rs. in lakh)

Sl No	Head of works / Equipment's	Claim	Justification	Remarks for Admissibility	Amount allowed
A	**Regulation 26(1)(c) / 76 / 77 / 26(1)(d) of the 2019 Tariff Regulations**				
1	Submersible pump	12.00	Submersible pump is required for dewatering	It is noticed that the additional capital	12.00

Sl No	Head of works / Equipment's	Claim	Justification	Remarks for Admissibility	Amount allowed
			of water from sump of inspection galleries for safe and efficient plant operation. The Respondents, BRPL, UPPCL and MPPMCL have submitted that, the Petitioner has claimed certain costs in under Regulation 76 and Regulation 77 of the 2019 Tariff Regulation without any specific justification for the same. The Respondent BRPL further submitted that the works claimed by the Petitioner are not related to the 'Force Majeure' event or circumstances or combination of events or circumstances including those which are mentioned under the 'Force Majeure' clause. The respondent BRPL further submitted that all the 26 items of works proposed would show that the works proposed be carried out either under the O&M expenses or undertaken under the Corporate Social Responsibility (CSR) of the Petitioner. The respondent BRPL further submitted that the Petitioner has not filed any documents in support of the relevant authorities in support of his projection for additional capital expenditure.	expenditure is primarily for replacement of old items, which form part of the original scope of works. Accordingly, the claim is allowed under Regulation 25(2)(a) in exercise of the power to relax under Regulation 76 of the 2019 Tariff Regulations. Even though the subject item is replacement in nature, the Petitioner has not furnished any information regarding the de-capitalized value of old asset. Accordingly, the same has been determined under "Assumed Deletions".	
	Total amount claimed	**12.00**			
	Total amount allowed				**12.00**

205

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17. In view of the above, the total additional capital expenditure allowed in 2022-23 for items within the original scope of works is of Rs.12.00 lakh, on cash basis, and no additional capital expenditure has been allowed beyond the original scope of works.

2023-24

(Rs. in lakh)

Sl No.	Head of work / Equipments	Claim	Justification	Remarks for Admissibility	Amount allowed
Regulation 26(1)(c)/ 25(2)(a)/ 76/ 77 of the 2019 Tariff Regulations					
1	Bolero Jeep	20.00	Jeeps are to be procured to replace BER vehicles as per Project requirement. Old vehicle was in the original scope of work and after completion of useful life new vehicle shall be purchased in lieu of old vehicle. This work is essential for safety of the power plant.	It is noticed that the Petitioner has claimed the said items during the 2014 – 19 tariff period and on prudence check, the same were allowed vide order dated 14.9.2022 in Petition No. 245/GT/2020. In addition to that, the petitioner has claimed the subject items in 2019 – 24 tariff period. However, considering the nature of items, on prudence check, the claimed items are **not allowed** as an additional capital expenditure in 2019 – 24 tariff period.	0.00
2	Pump Set for Water Supply	3.00	Water pumps shall be procured to replace unserviceable pumps installed at Koteshwar Project as per requirement. Old pumps were in the original scope of work and after completion of useful life new pumps shall be purchased in lieu of old pumps. This work is essential for safety of the power plant.	It is noticed that the additional capital expenditure claimed is primarily for the replacement of old items, which form part of the original scope of works. Accordingly, the same is allowed under Regulation 25(2)(a) of the 2019 Tariff Regulations. Even though the said item is replacement in nature, the Petitioner has not furnished any information regarding the de-capitalized value of old asset. Accordingly, the same has been determined	3.00

Sl No.	Head of work / Equipments	Claim	Justification	Remarks for Admissibility	Amount allowed
				under "Assumed Deletions".	
	Total amount claimed	**23.00**			**3.00**
	Total amount allowed				**3.00**

18. In view of the above, the total additional capital expenditure allowed in 2023-24 for items within the original scope of works is of Rs.3.00 lakh, on cash basis, and no additional capital expenditure has been allowed beyond the original scope of work.

19. Accordingly, the total additional capital expenditure allowed during the period 2019-24, after considering the assets / works allowed, other than within the original scope of work of the project is summarised as under:

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Additional capital expenditure allowed within the original scope of work of project Regulation 25 **(A)**	473.20	12.00	3.00	12.00	3.00
Additional capital expenditure allowed under Regulation 26(1)(b) **(B)**	205.00	250.00	250.00	0.00	0.00
Additional capital expenditure allowed other than the original scope of work of project **(C)**	911.87	241.21	0.00	0.00	0.00
Total Additional capital Expenditure allowed (D)=(A)+(B)+(C)	**1590.07**	**503.21**	**253.00**	**12.00**	**3.00**

Decapitalization

20. As regards to De-capitalization, Regulation 26(2) of 2019 Tariff Regulations, states as follows:

> *"In case of de-capitalization of assets of a generating company or the transmission licensee, as the case may be, the original cost of such asset as on the date of de-capitalization shall be deducted from the value of gross fixed asset and corresponding loan as well as equity shall be deducted from outstanding loan and the equity respectively in the year when such de-capitalization takes place with corresponding adjustments in cumulative*

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depreciation and cumulative repayment of loan, duly taking into consideration the year in which it was capitalized"

21. The Petitioner has not claimed any decapitalization of assets/works on projection basis during the 2019-24 tariff period. Accordingly, the Petitioner is directed to submit the details of decapitalization and the year of put to use of the assets, at the time of truing-up of tariff. However, the decapitalized value of items / works allowed on replacement basis has been dealt with under the head 'Assumed Deletions' as under:

Assumed Deletion

22. As per consistent methodology adopted by the Commission, the expenditure on replacement of assets, if found justified, is allowed for the purpose of tariff, provided that the capitalization of the said asset is followed by de-capitalization of the original value of the old asset. However, in certain cases where the de-capitalization is affected in books during the following years, to the year of capitalization of the new asset, the de-capitalization of the old asset for the purpose of tariff is shifted to the very same year in which the capitalization of the new asset is allowed. Such de-capitalization which is not a book entry in the year of capitalization is termed as "Assumed deletion". Further, in the absence of the gross value of the asset being de-capitalized, the same is calculated by de-escalating the gross value of new asset @ 5% per annum till the year of capitalization of the old asset.

23. It is observed that the Petitioner has claimed many assets / works, such as data acquisition system, firefighting system, Road, culverts, electromechanical O&M store, Bolero jeep and camper etc. on replacement basis. However, the Petitioner, has not provided the de-capitalization value of the old asset/works which have been replaced. Accordingly, based on above methodology, the assumed deletion is as shown below. Accordingly, the total de-capitalization during the 2019-24 tariff period works out as follows :

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(Rs. in lakh)

	Additional Capital expenditure allowed	Assumed Deletions
2019-20		
Automatic data acquisition system, uplift measuring device, inclinometer, surface crack meter read out unit	55.00	39.09
Procurement of firefighting material and equipment	27.25	19.37
Procurement & installation of fire dampers system in ventilation system of powerhouse	20.00	14.21
Roads, culverts and bridge (steel bridge) and approach to boat point (pertaining to steel bridge).	400.00	284.27
Electromechanical O&M Store	6.00	4.26
Procurement of Computer /Servers/Laptops and peripherals	62.20	44.20
Pump Set for Water Supply	5.00	3.55
Total	**575.45**	**408.96**
2020-21		
Upgradation of SCADA system of Koteshwar HEP	200.00	135.37
Procurement of Computer /Servers/ Laptops and peripherals	8.00	5.41
Pump Set for Water Supply	4.00	2.71
Total	**212.00**	**143.49**
2021-22		
Pump Set for Water Supply	3.00	1.93
Total	**3.00**	**1.93**
2022-23		
Submersible pump	12.00	7.37
Total	**12.00**	**7.37**
2023-24		
Pump Set for Water Supply	3.00	1.75
Total	**3.00**	**1.75**

Discharge of Liabilities

24. The Petitioner has claimed discharge of liabilities of Rs. 405.06 lakh, associated with period upto 31.3.2019, during the 2019-24 tariff period. It is noticed that the closing liability allowed as on 31.3.2019 in order dated 14.9.2022 in Petition No. 245/GT/2020 is Rs.405.06 lakh. Out of this undischarged liability, the Petitioner has submitted the assets wise details for the discharge of liabilities claimed amounting to Rs.362.56 lakh in 2019-20, and the same are allowed.

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25. Further, the Petitioner has submitted that the actual discharge of liabilities for the 2019-24 tariff period will be submitted at the time of truing-up of tariff. Accordingly, the Petitioner is directed to submit the reconciliation statement, showing details of such liabilities as per balance sheet, for the 2019-24 tariff period, duly certified by auditor and also furnish the break-up of discharges included in the liabilities discharged against the admitted items within the original scope of work, or other than the original scope of work of the project, at the time of truing-up of tariff.

26. Accordingly, the summary of discharge of liabilities as allowed is as under:

(Rs. in lakh)

		2019-20	2020-21	2021-22	2022-23	2023-24
A	Opening undischarged liabilities	405.06	42.50	42.50	42.50	42.50
B	Liabilities corresponding to additional capital expenditure allowed during the year	0.00	0.00	0.00	0.00	0.00
C	Discharges of liabilities during the year	362.56	0.00	0.00	0.00	0.00
E	**Closing undischarged liabilities (A+B-C)**	**42.50**	**42.50**	**42.50**	**42.50**	**42.50**

Additional capital expenditure allowed (Net) for the 2019-24 period

27. In view of above, the net additional capital expenditure allowed for the 2019-24 tariff period is as under:

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Additional capital expenditure allowed (a)	1590.07	503.21	253.00	12.00	3.00
Less: De-capitalisation (Assumed Deletions) considered (b)	408.96	143.49	1.93	7.37	1.75
Discharge of liabilities (c)	362.56	0.00	0.00	0.00	0.00
Net additional capital expenditure allowed (d =a-b+c)	**1543.67**	**359.72**	**251.07**	**4.63**	**1.25**

Capital cost allowed

28. Accordingly, the capital cost allowed for the 2019-24 tariff period is as under:

210

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(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Opening Capital Cost	286012.08	287555.76	287915.47	288166.54	288171.17
Net Additional capital expenditure allowed during the year/ period	1543.67	359.72	251.07	4.63	1.25
Closing Capital Cost	**287555.75**	**287915.47**	**288166.54**	**288171.17**	**288172.42**

Debt-Equity Ratio

29. Regulation 18 of the 2019 Tariff Regulations provides as under:

"18. Debt-Equity Ratio: (1) For new projects, the debt-equity ratio of 70:30 as on date of commercial operation shall be considered. If the equity actually deployed is more than 30% of the capital cost, equity in excess of 30% shall be treated as normative loan:

Provided that:

i. where equity actually deployed is less than 30% of the capital cost, actual equity shall be considered for determination of tariff:

ii. the equity invested in foreign currency shall be designated in Indian rupees on the date of each investment:

iii. any grant obtained for the execution of the project shall not be considered as a part of capital structure for the purpose of debt: equity ratio.

Explanation-The premium, if any, raised by the generating company or the transmission licensee, as the case may be, while issuing share capital and investment of internal resources created out of its free reserve, for the funding of the project, shall be reckoned as paid up capital for the purpose of computing return on equity, only if such premium amount and internal resources are actually utilised for meeting the capital expenditure of the generating station or the transmission system.

(2) The generating company or the transmission licensee, as the case may be, shall submit the resolution of the Board of the company or approval of the competent authority in other cases regarding infusion of funds from internal resources in support of the utilization made or proposed to be made to meet the capital expenditure of the generating station or the transmission system including communication system, as the case may be.

(3) In case of the generating station and the transmission system including communication system declared under commercial operation prior to 1.4.2019, debt:equity ratio allowed by the Commission for determination of tariff for the period ending 31.3.2019 shall be considered:

Provided that in case of a generating station or a transmission system including communication, system which has completed its useful life as on or after 1.4.2019, if the equity actually deployed as on 1.4.2019 is more than 30% of the capital cost, equity in excess of 30%shall not be taken into account for tariff computation;

Provided further that in case of projects owned by Damodar Valley Corporation, the debt: equity ratio shall be governed as per sub-clause (ii) of clause (2) of Regulation 72 of these regulations.

(4) In case of the generating station and the transmission system including communication system declared under commercial operation prior to 1.4.2019, but

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211

where debt: equity ratio has not been determined by the Commission for determination of tariff for the period ending 31.3.2019, the Commission shall approve the debt: equity ratio in accordance with clause (1) of this Regulation.

(5) Any expenditure incurred or projected to be incurred on or after 1.4.2019 as may be admitted by the Commission as additional capital expenditure for determination of tariff, and renovation and modernisation expenditure for life extension shall be serviced in the manner specified in clause (1) of this Regulation."

30. In terms of the above regulations, the debt equity ratio of 76.97:23.03 has been considered as on 31.3.2019 and accordingly the debt equity ratio, arrived as on 31.3.2024, after net admitted additional capital expenditure (with adjustment of un-discharged liability) in the ratio of 70:30, is 76.92:23.08 i for the purpose of tariff.

	As on 31.3.2019		Net Additional Capitalization		As on 31.3.2024	
	Amount (Rs. in lakh)	(in %)	Amount (Rs. in lakh)	(in %)	Amount (Rs. in lakh)	(in %)
Debt	220146.53	76.97%	1512.23	70.00%	221658.76	76.92%
Equity	65865.56	23.03%	648.10	30.00%	66513.66	23.08%
Total	**286012.08**	**100.00%**	**2160.33**	**100.00%**	**288172.42**	100.00%

Return on Equity

31. Regulations 30 and 31 of the 2019 tariff Regulations provide as under:

"30. Return on Equity

(1) Return on equity shall be computed in rupee terms, on the equity base determined in accordance with Regulation 18 of these regulations.

(2) Return on equity shall be computed at the base rate of 15.50% for thermal generating station, transmission system including communication system and run-of river hydro generating station, and at the base rate of 16.50% for the storage type hydro generating stations including pumped storage hydro generating stations and run-of river generating station with pondage:

Provided that return on equity in respect of additional capitalization after cut-off date beyond the original scope excluding additional capitalization due to Change in Law, shall be computed at the weighted average rate of interest on actual loan portfolio of the generating station or the transmission system;

Provided further that:

i. In case of a new project, the rate of return on equity shall be reduced by 1.00% for such period as may be decided by the Commission, if the generating station or transmission system is found to be declared under commercial operation without commissioning of any of the Restricted Governor Mode Operation (RGMO) or Free Governor Mode Operation (FGMO), data telemetry, communication system up to load dispatch centre or protection system based on the report submitted by the respective RLDC;

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212

ii. in case of existing generating station, as and when any of the requirements under (i) above of this Regulation are found lacking based on the report submitted by the concerned RLDC, rate of return on equity shall be reduced by 1.00% for the period for which the deficiency continues;

iii. in case of a thermal generating station, with effect from 1.4.2020:

a) rate of return on equity shall be reduced by 0.25% in case of failure to achieve the ramp rate of 1% per minute;

b) an additional rate of return on equity of 0.25% shall be allowed for every incremental ramp rate of 1% per minute achieved over and above the ramp rate of 1% per minute, subject to ceiling of additional rate of return on equity of 1.00%:

Provided that the detailed guidelines in this regard shall be issued by National Load Dispatch Centre by 30.6.2019.

31. Tax on Return on Equity:

(1) The base rate of return on equity as allowed by the Commission under Regulation 30 of these regulations shall be grossed up with the effective tax rate of the respective financial year. For this purpose, the effective tax rate shall be considered on the basis of actual tax paid in respect of the financial year in line with the provisions of the relevant Finance Acts by the concerned generating company or the transmission licensee, as the case may be. The actual tax paid on income from other businesses including deferred tax liability (i.e. income from business other than business of generation or transmission, as the case may be) shall be excluded for the calculation of effective tax rate.

(2) Rate of return on equity shall be rounded off to three decimal places and shall be computed as per the formula given below:

Rate of pre-tax return on equity = Base rate / (1-t)

Where "t" is the effective tax rate in accordance with clause (1) of this Regulation and shall be calculated at the beginning of every financial year based on the estimated profit and tax to be paid estimated in line with the provisions of the relevant Finance Act applicable for that financial year to the company on pro-rata basis by excluding the income of non-generation or non-transmission business, as the case may be, and the corresponding tax thereon. In case of generating company or transmission licensee paying Minimum Alternate Tax (MAT), "t" shall be considered as MAT rate including surcharge and cess.

Illustration-

(i) In case of a generating company or a transmission licensee paying Minimum Alternate Tax (MAT) @ 21.55% including surcharge and cess: Rate of return on equity = 15.50/(1-0.2155) = 19.758%

(ii) In case of a generating company or a transmission licensee paying normal corporate tax including surcharge and cess:

(a) Estimated Gross Income from generation or transmission business for 2019-20 is Rs. 1,000 Crore;

(b) Estimated Advance Tax for the year on above is Rs. 240 Crore;

(c) Effective Tax Rate for the year 2019-20 = Rs. 240 Crore/Rs. 1000 Crore = 24%;

(d) Rate of return on equity = 15.50/ (1-0.24) = 20.395%.

213

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(3) The generating company or the transmission licensee, as the case may be, shall true up the grossed up rate of return on equity at the end of every financial year based on actual tax paid together with any additional tax demand including interest thereon, duly adjusted for any refund of tax including interest received from the income tax authorities pertaining to the tariff period 2019-24 on actual gross income of any financial year. However, penalty, if any, arising on account of delay in deposit or short deposit of tax amount shall not be claimed by the generating company or the transmission licensee, as the case may be. Any under-recovery or over-recovery of grossed up rate on return on equity after truing up, shall be recovered or refunded to beneficiaries or the long term customers, as the case may be, on year to year basis."

32. The Petitioner has furnished effective tax rate for 2019-20, duly certified by Chartered Accountant, which is same as the MAT rate and has applied the same for the period up to 2023-24. Accordingly, Return on Equity has been grossed up and allowed, as under:

Return on Equity at Normal Rate:

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Normative Equity- Opening (A)	65865.56	66076.90	66153.06	66228.38	66229.77
Addition of Equity due to additional capital expenditure (B)	211.34	76.16	75.32	1.39	0.37
Normative Equity – Closing (C=A+B)	66076.90	66153.06	66228.38	66229.77	66230.14
Average Normative Equity D=(A+C)/2	65971.23	66114.98	66190.72	66229.07	66229.96
Return on Equity (Base Rate) (E)	16.500%	16.500%	16.500%	16.500%	16.500%
Effective Tax Rate (F)	17.472%	17.472%	17.472%	17.472%	17.472%
Rate of Return on Equity (Pre-tax) (G) = (E)/(1-F)	19.993%	19.993%	19.993%	19.993%	19.993%
Return on Equity (Pre-tax) - (annualized) (H) =(D)x(G)	**13189.63**	**13218.37**	**13233.51**	**13241.18**	**13241.36**

Return on Equity at WAROI

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Normative Equity- Opening (A)	0.00	251.76	283.51	283.51	283.51
Addition of Equity due to additional capital expenditure (B)	251.76	31.75	0.00	0.00	0.00
Normative Equity – Closing (C=A+B)	251.76	283.51	283.51	283.51	283.51
Average Normative Equity D=(A+C)/2	125.88	267.64	283.51	283.51	283.51
Return on Equity (Base Rate) (E)	9.292%	9.296%	9.305%	9.350%	9.350%
Effective Tax Rate (F)	17.472%	17.472%	17.472%	17.472%	17.472%
Rate of Return on Equity (Pre-tax) (G) = (E)/(1-F)	11.260%	11.264%	11.274%	11.329%	11.329%
Return on Equity (Pre-tax) - (annualized) (H) =(D)x(G)	**14.17**	**30.15**	**31.96**	**32.12**	**32.12**

Interest on Loan

33. Regulation 32 of the 2019 Tariff Regulations provides as under:

"32. Interest on loan capital:

(1) The loans arrived at in the manner indicated in Regulation 18 of these regulations shall be considered as gross normative loan for calculation of interest on loan.

(2) The normative loan outstanding as on 1.4.2019 shall be worked out by deducting the cumulative repayment as admitted by the Commission up to 31.3.2019 from the gross normative loan.

(3) The repayment for each of the year of the tariff period 2019-24 shall be deemed to be equal to the depreciation allowed for the corresponding year/period. In case of decapitalization of assets, the repayment shall be adjusted by taking into account cumulative repayment on a pro rata basis and the adjustment should not exceed cumulative depreciation recovered up to the date of de-capitalization of such asset.

(4) Notwithstanding any moratorium period availed by the generating company or the transmission licensee, as the case may be, the repayment of loan shall be considered from the first year of commercial operation of the project and shall be equal to the depreciation allowed for the year or part of the year.

(5) The rate of interest shall be the weighted average rate of interest calculated on the basis of the actual loan portfolio after providing appropriate accounting adjustment for interest capitalized:

Provided that if there is no actual loan for a particular year but normative loan is still outstanding, the last available weighted average rate of interest shall be considered;
Provided further that if the generating station or the transmission system, as the case may be, does not have actual loan, then the weighted average rate of interest of the generating company or the transmission licensee as a whole shall be considered.

(6) The interest on loan shall be calculated on the normative average loan of the year by applying the weighted average rate of interest

(7) The changes to the terms and conditions of the loans shall be reflected from the date of such re-financing."

34. The salient features for computation of interest on loan are summarized below:

a) The gross normative loan amounting to Rs. 220146.53 lakh allowed in order dated 14.9.2022 in Petition No.245/GT/2020, as on 31.3.2019, has been considered as on 1.4.2019.

b) Cumulative repayment of Rs. 93089.15 lakh as on 31.3.2019 as considered in order dated 14.9.2022 in Petition No. 245/GT/2020 has been considered.

c) The repayment of normative loan for the 2019-24 tariff period has been considered equal to the depreciation allowed for that year. Further, the repayments have been adjusted for de-capitalization of assets considered for the purpose of tariff;

d) Interest on loan has been calculated on the normative average loan of the year by applying the weighted average rate of interest as claimed by the Petitioner.

35. Accordingly, Interest on loan has been worked out as under:

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Gross opening loan (A)	220146.53	221227.09	221478.90	221654.64	221657.89
Cumulative repayment of loan upto previous year / period (B)	93089.15	106465.19	120007.70	133632.01	147264.66
Net Loan Opening(C)=(A+B)	127057.38	114761.90	101471.20	88022.63	74393.23
Addition on account of additional capital expenditure (D)	1080.57	251.80	175.75	3.24	0.87
Repayment of loan during the year (E)	13527.67	13602.34	13625.22	13636.41	13636.81
Less: Repayment adjustment on account of de-capitalization (F)	151.63	59.84	0.90	3.76	0.98
Net Repayment (G)=(E)-(F)	13376.04	13542.50	13624.32	13632.64	13635.83
Net Loan Closing (H=C+D-G)	114761.90	101471.20	88022.63	74393.23	60758.27
Average Loan (I=(C+H)/2)	120909.64	108116.55	94746.92	81207.93	67575.75
Weighted Average Rate of Interest on Loan (J)	9.2923%	9.2956%	9.3045%	9.3500%	9.3500%
Interest on Loan (K=I*J)	**11235.24**	**10050.09**	**8815.73**	**7592.94**	**6318.33**

Depreciation

36. Regulation 33 of the 2019 Tariff Regulations provides as under:

"33. Depreciation:

(1) Depreciation shall be computed from the date of commercial operation of a generating station or unit thereof or a transmission system or element thereof including communication system. In case of the tariff of all the units of a generating station or all elements of a transmission system including communication system for which a single tariff needs to be determined, the depreciation shall be computed from the effective date of commercial operation of the generating station or the transmission system taking into consideration the depreciation of individual units:

Provided that effective date of commercial operation shall be worked out by considering the actual date of commercial operation and installed capacity of all the units of the generating station or capital cost of all elements of the transmission system, for which single tariff needs to be determined.

(2) The value base for the purpose of depreciation shall be the capital cost of the asset admitted by the Commission. In case of multiple units of a generating station or multiple elements of a transmission system, weighted average life for the generating station of the transmission system shall be applied. Depreciation shall be chargeable from the first year of commercial operation. In case of commercial operation of the asset for part of the year, depreciation shall be charged on pro rata basis.

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(3) The salvage value of the asset shall be considered as 10% and depreciation shall be allowed up to maximum of 90% of the capital cost of the asset:

Provided that the salvage value for IT equipment and software shall be considered as NIL and 100% value of the assets shall be considered depreciable;

Provided further that in case of hydro generating stations, the salvage value shall be as provided in the agreement, if any, signed by the developers with the State Government for development of the generating station:

Provided also that the capital cost of the assets of the hydro generating station for the purpose of computation of depreciated value shall correspond to the percentage of sale of electricity under long-term power purchase agreement at regulated tariff:

Provided also that any depreciation disallowed on account of lower availability of the generating station or unit or transmission system as the case may be, shall not be allowed to be recovered at a later stage during the useful life or the extended life.

(4) Land other than the land held under lease and the land for reservoir in case of hydro generating station shall not be a depreciable asset and its cost shall be excluded from the capital cost while computing depreciable value of the asset.

(5) Depreciation shall be calculated annually based on Straight Line Method and at rates specified in Appendix-I to these regulations for the assets of the generating station and transmission system:

Provided that the remaining depreciable value as on 31st March of the year closing after a period of 12 years from the effective date of commercial operation of the station shall be spread over the balance useful life of the assets.

(6) In case of the existing projects, the balance depreciable value as on 1.4.2019 shall be worked out by deducting the cumulative depreciation as admitted by the Commission up to 31.3.2019 from the gross depreciable value of the assets.

(7) The generating company or the transmission licensee, as the case may be, shall submit the details of proposed capital expenditure five years before the completion of useful life of the project along with justification and proposed life extension. The Commission based on prudence check of such submissions shall approve the depreciation on capital expenditure.

(8) In case of de-capitalization of assets in respect of generating station or unit thereof or transmission system or element thereof, the cumulative depreciation shall be adjusted by taking into account the depreciation recovered in tariff by the de-capitalized asset during its useful services."

37. Accordingly, the cumulative depreciation amounting to Rs.93089.15 lakh, as on 31.3.2019, as allowed vide order dated 14.9.2022 Petition No. 245/GT/2020, has been considered, as on 1.4.2019 for the purpose of tariff. In terms of the 2014 Tariff Regulations, the useful life of a hydro generating station was 35 years. However, the 2019 Tariff Regulations stipulates that the useful life of a hydro generating station is 40 years. Accordingly, the balance useful life of the generating station, as on 1.4.2019,

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has been considered as 33 years, in line with the 2019 Tariff Regulations. The weighted average rate of depreciation (WAROD) has been considered as submitted by the Petitioner. Accordingly, depreciation has been allowed, as under:

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Opening Gross block (A)	286012.08	287555.75	287915.47	288166.54	288171.17
Net Additional capital expenditure during 2019-24 (B)	1543.67	359.72	251.07	4.63	1.25
Closing gross block (C=A+B)	287555.75	287915.47	288166.54	288171.17	288172.42
Average gross block (D)=(A+C)/2	286783.92	287735.61	288041.00	288168.85	288171.79
Land Value (L)	461.78	461.78	461.78	461.78	461.78
Depreciable Value (E=(D-L)*90%)	257689.92	258546.45	258821.30	258936.37	258939.01
Remaining Depreciable Value at the beginning of the year (F=E-Cum Dep at 'K' at the end of previous year)	164600.77	152081.26	138813.61	125304.35	111674.36
Rate of Depreciation (G)	4.72%	4.73%	4.73%	4.73%	4.73%
Balance useful Life (H)	33.00	32.00	31.00	30.00	29.00
Depreciation (I=D*G)	**13527.67**	**13602.34**	**13625.22**	**13636.41**	**13636.81**
Cumulative Depreciation at the end of the year (J=I+ Cum Dep at 'K' at the end of previous year)	106616.82	120067.53	133632.91	147268.42	160901.47
Adjustment on account of decapitalization (L)	151.63	59.84	0.90	3.76	0.98
Cumulative Depreciation at the end of the year (J=K-L)*	**106465.19**	**120007.70**	**133632.01**	**147264.66**	**160900.49**

**Cumulative Depreciation as on 31.3.2019 is Rs. 93089.15 lakh*

Operation & Maintenance Expenses

38. Regulation 35(2)(a) of the 2019 Tariff Regulations provide as under:

> *"35. Operation and Maintenance Expenses*
> *xxxx*
> *(2) Hydro Generating Station: (a) Following operations and maintenance expense norms shall be applicable for hydro generating stations which have been operational for three or more years as on 1.4.2019:*

(in Rs. lakh)

Particulars	*2019-20*	*2022-21*	*2021-22*	*2022-23*	*2023-24*
KHEP	*13452.46*	*14093.68*	*14765.46*	*15469.26*	*16206.61*

Note: The impact in respect of revision of minimum wage, wage revision and GST, if any, will be considered at the time of determination of tariff.

39. The Petitioner has claimed total O&M expenses as follows:

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(Rs. in lakh)

Period	2019-20	2020-21	2021-22	2022-23	2023-24
Normative O&M expenses as per Regulation 35(2)(a) - (A)	13452.46	14093.68	14765.46	15469.26	16206.61
Additional O&M expenses due to pay revision - (B)	3012.00	3253.00	3513.00	3795.00	4098.00
Security Expenses (C)	979.78	1058.16	1142.81	1234.23	1332.97
Total O&M Expenses claimed (A+B+C)	**17444.24**	**18404.84**	**19421.27**	**20498.49**	**21637.58**

It is noticed that as on 1.4.2019, the generating station is in operation for more than three years and the normative O&M expenses claimed by the Petitioner are in line with the Regulation 35(2)(a) of the 2019 Tariff Regulations. Accordingly, the normative O & M expenses claimed by the Petitioner has been allowed.

Additional O&M Expenses

(a) Impact of pay revision of THDC staff

40. The Petitioner has claimed additional O&M expenses on account of the impact of pay revision of its staff as under:

(Rs. in lakh)

2019-20	2020-21	2021-22	2022-23	2023-24
3012.00	3253.00	3513.00	3795.00	4098.00

41. It is noticed that in order to estimate the year wise impact of pay revision during the 2019-24 tariff period, the Petitioner has considered Rs.2789.00 lakh as pay revision impact for its staff in 2018–19 and has escalated the same with an annual increment of 8% in every year thereafter. It is however observed that the Commission vide its order dated 14.9.2022 in Petition No.341/MP/2020 (filed by the Petitioner seeking recovery of impact of wage/pay revision for the 2017-19 tariff period for the generating station), had allowed an amount of Rs.2735 lakh in 2018-19 towards impact of pay revision of the Petitioner's staff. The provisions of the 2019 Tariff Regulations read with the Statement of Objects and Reasons (SOR) to the said regulations, provide for an annual escalation rate 4.77 % for the projected O & M expenses during

219

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the 2019 – 24 tariff period. Accordingly, the impact of pay revision for the Petitioner's staff during the 2019–24 tariff period, has been worked out and allowed as follows:

(Rs. in lakh)

2019-20	2020-21	2021-22	2022-23	2023-24
2865.46	3002.14	3145.34	3295.38	3452.57

Capital Spares, impact due to Minimum Wages and GST

42. As regard Capital spares, additional impact on account of Minimum Wages and GST, the Petitioner has submitted that the actual amount will be submitted at the time of truing-up of tariff. In view of this, the allowable capital spares, impact on account of revision in minimum wages and GST, shall be considered at the time of truing-up of tariff.

Security Expenses

43. Regulation 35(2)(c) of 2019 Tariff Regulations provide as under:

> *"(c) The Security Expenses and Capital Spares for hydro generating stations shall be allowed separately after prudence check:*
>
> *Provided further that the generating station shall submit the assessment of the security requirement and estimated expenses, the details of year-wise actual capital spares consumed at the time of truing up with appropriate justification."*

44. The Petitioner has claimed projected Security expenses, as part of the O&M expenses in terms of Regulation 35(2)(d) of the 2019 Tariff Regulations, as under:

(Rs. in lakh)

2019-20	2020-21	2021-22	2022-23	2023-24
979.78	1058.16	1142.81	1234.23	1332.97

45. It is noticed that, the Petitioner, in order to estimate the year wise security charges during the 2019-24 tariff period, has considered Rs.907.20 lakh as Security charges in 2018 – 19 and has escalated the same, with an annual increment of 8 % in every year, thereafter. It is pertinent to mention that the Petitioner in Petition No. 341/ MP/2020, had claimed an amount of Rs.907.20 lakh in 2018-19 as Security expenses. The provisions of the 2019 Tariff Regulations read with the SOR to the said

220

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regulations, provide for an annual escalation rate 4.77 % for projected O & M expenses during the 2019-24 tariff period. Accordingly, the projected security expenses during the 2019-24 tariff period has been worked out and allowed as follows:

(Rs. in lakh)

2019-20	2020-21	2021-22	2022-23	2023-24
950.47	995.81	1043.31	1093.08	1145.22

46. Accordingly, the O&M expenses allowed for the generating station are as summarized as under:

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Normative O&M expenses Regulation 35(2)(a) of the 2019 Tariff Regulations (a)	13452.46	14093.68	14765.46	15469.26	16206.61
Impact of pay revision of THDC staff (b)	2865.46	3002.14	3145.34	3295.38	3452.57
Total O&M Expenses allowed (a+b)	**16317.92**	**17095.82**	**17910.80**	**18764.64**	**19659.18**
Security Expenses allowed separately (c)	950.47	995.81	1043.31	1093.08	1145.22
Total O & M expenses including Security charges	**17268.39**	**18091.63**	**18954.12**	**19857.71**	**20804.39**

Claim on rebate provided to DISCOMs during COVID-19 pandemic

47. The Petitioner has claimed a rebate amount of Rs.1100.91 lakh provided by it to the Respondents beneficiaries, during Covid-19 pandemic. The Petitioner has also submitted that the MOP, GOI vide communication dated 15.5.2020 and Corrigendum dated 16.5.2020 had stated that all Central Public Sector Generation Companies under MOP, including their Joint Ventures/ Subsidiaries and Central Public Sector Transmission Company, may consider offering rebate to the Distribution Companies on account of Covid-19 pandemic. In line with the said directions, the Petitioner has prayed to allow the said claim as shown under:

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Sl. No.	Name of DISCOM	Koteshwar HEP (400 MW)	
		Amount of Rebate Offered by THDCIL (Rs.)	Amount of Rebate availed by DISCOMs as on 23.11.2020 (Rs.)
1	UT, Chandigarh	1401864	1401864
2	Delhi DISCOMs		
a	TPDDL, Delhi	3786300	3786300
b	BRPL, Delhi	8555109	8555109
3	HPPC, Haryana	5269502	5269502
4	JKPCL, J&K	13931018	13931018
5	PSPCL, Punjab	7960584	7960584
6	Rajasthan DISCOMs		
a	JVVNL, Rajasthan	4214213	0
b	AVVNL, Rajasthan	2839994	0
c	JdVVNL, Rajasthan	3409706	0
7	UPPCL, UP	50091601	50091601
8	UPCL, Uttarakhand	8419225	8419225
9	MPPMCL, MP	212779	212779
Total		**110091895**	**99627982**

48. The Commission noticed that the Petitioner has provided the rebate to the Respondents considering adversities faced by the Respondent beneficiaries on account of COVID – 19 pandemic, based on the communication of the MOP, GOI, as stated above. It is pertinent to mention that the communication of MOP, GOI is advisory in nature and cannot be said to be a mandate on the Petitioner. The Petitioner having granted rebate based on the said communication cannot seek to recover the same through the tariff order. Accordingly, the claim of the Petitioner is **not allowed**.

Interest on Working Capital

49. Sub-section (c) of clause (1) of Regulation 34 of the 2019 Tariff Regulations provide as under:

> *"34. Interest on Working Capital: (1) The working capital shall cover*
>
> *(c) For Hydro generating station (Including Pumped Storage Hydro Generating Station) and transmission system:*
>
> *(i) Receivables equivalent to 45 days of annual fixed cost;*
>
> *(ii) Maintenance spares @ 15% of operation and maintenance expense including security expenses; and*
>
> *(iii) Operation and maintenance expenses including security expenses for one month"*

222

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50. The Petitioner has claimed various components of working capital and interest on the working capital as follows:

(Rs. Lakhs)

	2019-20	2020-21	2021-22	2022-23	2023-24
O&M Expenses	1453.69	1533.74	1618.44	1708.21	1803.13
Maintenance Spares	2616.64	2760.73	2913.19	3074.77	3245.64
Receivables	7126.20	7118.41	7099.00	7084.74	7070.82
Total working Capital	11196.53	11412.87	11630.63	11867.72	12119.59
Rate of Working Capital	12.55%	12.45%	12.45%	12.45%	12.45%
Interest on Working Capital	**1405.16**	**1420.90**	**1448.01**	**1477.53**	**1508.89**

Working capital for Receivables

51. The receivable component of working capital has been worked out based on 45 days of fixed cost as under:

(Rs. in lakh)

2019-20	2020-21	2021-22	2022-23	2023-24
6953.92	6934.64	6885.35	6850.63	6793.78

Working capital for Maintenance Spares

52. The maintenance spares @15% of O&M expenses, including security charges, for working capital are worked out and allowed as under:

(Rs. in lakh)

2019-20	2020-21	2021-22	2022-23	2023-24
2590.26	2713.74	2843.12	2978.66	3120.66

Working capital for O&M Expenses

53. The O&M expenses for 1 (one) month for the purpose of working capital are as under:

(Rs. in lakh)

2019-20	2020-21	2021-22	2022-23	2023-24
1439.03	1507.64	1579.51	1654.81	1733.70

Rate of Interest on Working Capital

54. Regulation 34(3) of the 2019 Tariff Regulations provides as under:

223

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"34(3) Rate of interest on working capital shall be on normative basis and shall be considered as the bank rate as on 1.4.2014 or as on 1st April of the year during the tariff period 2019-24 in which the generating station or a unit thereof or the transmission system including communication system or element thereof, as the case may be, is declared under commercial operation, whichever is later." Provided that in case of truing-up, the rate of interest on working capital shall be considered at bank rate as on 1st April of each of the financial year during the tariff period 2019-24."

55. The Petitioner has submitted that it has computed IWC for 2019-24 period considering the SBI Base Rate plus 350 basis points as on 1.4.2019 i.e. 12.05 % (855 + 350). As the SBI base rates are already available as on 01.04.2019, 01.04.2020, 01.04.2021 and 01.04.2022, in terms of Regulation 34 of the 2019 Tariff Regulations, the rate of IWC of 12.05% (SBI 1-year MCLR applicable as on 1.4.2019 of 8.55% plus 350 basis points) for 2019-20, 11.25% (SBI 1-year MCLR applicable as on 1.4.2020 of 7.75% plus 350 basis points) for 2020-21, 10.50% (SBI 1-year MCLR applicable as on 1.4.2021 and 01.04.2022 of 7.00% plus 350 basis points) for 2021-22 and 2022–23 are considered and for 2023–24, the rate applicable for 2022 – 23 was considered. Accordingly, interest on working capital is allowed as under:

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Working capital for O&M expenses (one month)	1439.03	1507.64	1579.51	1654.81	1733.70
Working capital for Maintenance Spares	2590.26	2713.74	2843.12	2978.66	3120.66
Working capital for Receivables	6953.92	6934.64	6885.35	6850.63	6793.78
Total Working capital	**10983.22**	**11156.02**	**11307.98**	**11484.09**	**11648.14**
Rate of interest (%)	12.05%	11.25%	10.50%	10.50%	10.50%
Interest on Working capital	**1323.48**	**1255.05**	**1187.34**	**1205.83**	**1223.05**

Annual Fixed Charges

56. Based on the above, the annual fixed charges approved for the generating station for the 2019-24 tariff period are summarized as under:

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Depreciation	13527.67	13602.34	13625.22	13636.41	13636.81
Interest on loan	11235.24	10050.09	8815.73	7592.94	6318.33

	2019-20	2020-21	2021-22	2022-23	2023-24
Return on Equity	13203.80	13248.51	13265.47	13273.30	13273.47
Interest on Working Capital	1323.48	1255.05	1187.34	1205.83	1223.05
O&M Expenses	17268.39	18091.63	18954.12	19857.71	20804.39
Total	**56558.59**	**56247.63**	**55847.87**	**55566.19**	**55256.07**

Note: (1) All figures are on annualized basis. (2) All figures under each head have been rounded. The figure in total column in each year is also rounded. As such the sum of individual items may not be equal to the arithmetic total of the column.

57. The annual fixed charges approved as above are subject to truing up in terms of Regulation 13 of the 2019 Tariff Regulations.

Normative Annual Plant Availability Factor (NAPAF)

58. The Petitioner has claimed NAPAF of the generating station as 68% and the same is in terms of clause (4) of Regulation 50(A) of the 2019 Tariff Regulations. Accordingly, NAPAF of 68% is allowed for the generating station during the 2019-24 tariff period in terms of the said regulation.

Design Energy

59. CEA vide letter dated 6.8.2012 had approved the Design Energy (DE) of 1154.84 MUs. Accordingly, the same has been considered for the generating station month-wise as detailed under:

Months	Period (10 days monthly)	Design Energy (MUs)
April	I	29.81
	II	30.6
	III	35.61
May	I	40.11
	II	36.42
	III	42.81
June	I	40.01
	II	42.02
	III	12.6
July	I	13.6
	II	14.1
	III	20.41
August	I	52.12
	II	51.11
	III	67.73
September	I	31.51
	II	33.41

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Months	Period (10 days monthly)	Design Energy (MUs)
	III	20.31
October	I	22.91
	II	19.61
	III	14.9
November	I	18.91
	II	19.6
	III	20.31
December	I	32.5
	II	33.41
	III	37.81
January	I	35.8
	II	36.41
	III	41.82
February	I	39.42
	II	32.01
	III	28.31
March	I	35.31
	II	35.8
	III	35.71
Total		**1154.84**

60. Accordingly, the DE of 1154.84 MUs and NAPAF of 68% shall be considered for the purpose of billing.

Application Fee and Publication Expenses

61. The Petitioner has sought the reimbursement of fees paid by it for filing the tariff petition and for publication expenses in respect of the same. Accordingly, in terms of the Regulation 70(1) of the 2019 Tariff Regulations, the Petitioner shall be entitled for the reimbursement of filing fees and publication expenses in connection with the present petition, directly from the beneficiaries, on pro-rata basis.

62. Similarly, RLDC fees & charges paid by the Petitioner in terms of the Central Electricity Regulatory Commission (Fees and Charges of Regional Load Dispatch Centre and other related matters) Regulations, 2015, shall be recovered from the beneficiaries. In addition, the Petitioner is entitled to recovery of statutory taxes, levies,

226

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

duties, cess etc. levied by the statutory authorities in accordance with the 2019 Tariff Regulations.

63. Accordingly, the annual fixed charges for 2019-24 period allowed is as shown under:

(Rs. in lakh)

	2019-20	2020-21	2021-22	2022-23	2023-24
Annual fixed charges claimed	57009.63	56947.28	56791.99	56677.94	56566.59
Annual fixed charges allowed	**56558.59**	**56247.63**	**55847.87**	**55566.19**	**55256.07**

64. Annexure -I attached hereto form part of this order.

65. Petition No. 244/GT/2020 is disposed of in terms of the above.

(Pravas Kumar Singh)
Member

(Arun Goyal)
Member

(I. S. Jha)
Member

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

Annexure I

Sl. No.	Name of the Assets	Rate of Dep (%)	GB as on 01.04.2019	Depreciation	GB as on 01.04.2020	Depreciation	GB as on 01.04.2021	Depreciation	GB as on 01.04.2022	Depreciation	GB as on 01.04.2023	Depreciation	GB as on 01.04.2024
1	Land Freehold	0.00%	461.78	0.00	461.78	0.00	461.78	0.00	461.78	0.00	461.78	0.00	461.78
2	Land Leasehold	3.34%	49.18	1.64	49.18	1.64	49.18	1.64	49.18	1.64	49.18	1.64	49.18
3	Office Building	3.34%	4752.15	161.26	4904.15	167.97	5154.15	176.32	5404.15	180.50	5404.15	180.50	5404.15
4	Other Civil Works (TEMP STRU)	100.00%	5.25	5.25	5.25	0.00	5.25	0.00	5.25	0.00	5.25	0.00	5.25
5	Residential Buildings & Guest House	3.34%	3725.65	127.33	3899.15	130.23	3899.15	130.23	3899.15	130.23	3899.15	130.23	3899.15
6	Water Supply & Sewerage	5.28%	473.15	25.11	478.15	25.56	490.15	25.96	493.15	26.36	505.15	26.75	508.15
7	CONSTRUCTION PLANT AND MACHINERY	5.28%	277.14	14.63	277.14	14.63	277.14	14.63	277.14	14.63	277.14	14.63	277.14
8	Car, Bus, Trucks	9.50%	242.04	30.20	393.74	39.30	433.74	42.15	453.74	43.10	453.74	44.05	473.74
9	Boats & Helicopter	5.28%	233.70	12.76	249.55	13.18	249.55	13.18	249.55	13.18	249.55	13.18	249.55
10	Office & Misc. Equipment	6.33%	544.96	35.52	577.25	37.71	614.25	38.88	614.25	38.88	614.25	38.88	614.25
11	Plant & Machinery & Small Assets upto Rs.5000.00	100.00%	2.88	0.11	2.88	0.00	2.88	0.00	2.88	0.00	2.88	0.00	2.88
12	Intangible Assets	15.00%	0.19	0.03	0.19	0.03	0.19	0.03	0.19	0.03	0.19	0.03	0.19
13	Computers & Printers	15.00%	54.45	12.83	116.65	18.10	124.65	18.70	124.65	18.70	124.65	18.70	124.65
14	Elect. Sub Station & Transmission	5.28%	491.36	25.94	491.36	25.94	491.36	25.94	491.36	25.94	491.36	25.94	491.36
15	ROAD AND BRIDGES	3.34%	2047.12	78.50	2653.60	89.57	2709.81	90.51	2709.81	90.51	2709.81	90.51	2709.81
16	ENVIRONMENT & ECOLOGY	5.28%	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
17	DAM AND SPILLWAY	5.28%	111621.46	5902.43	111955.45	5911.78	111975.45	5912.30	111975.45	5912.30	111975.45	5912.30	111975.45

आर.के.वर्मा
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Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

Sl. No.	Name of the Assets[1]	Rate of Dep (%)	GB as on 01.04.2019	Depreciation	GB as on 01.04.2020	Depreciation	GB as on 01.04.2021	Depreciation	GB as on 01.04.2022	Depreciation	GB as on 01.04.2023	Depreciation	GB as on 01.04.2024
18	Power House Building	3.34%	61914.73	2071.80	62145.38	2076.57	62200.38	2077.49	62200.38	2077.49	62200.38	2077.49	62200.38
19	Tunnel, Penstock	5.28%	11347.76	599.16	11347.76	599.16	11347.76	599.16	11347.76	599.16	11347.76	599.16	11347.76
20	GENERATING PLANT AND MACHINERY	5.28%	71581.77	3784.71	71778.60	3795.19	71978.60	3800.47	71978.60	3800.47	71978.60	3800.47	71978.60
21	UNCLASSIFIED LAND	3.34%	4565.28	155.82	4765.28	159.16	4765.28	159.16	4765.28	159.16	4765.28	159.16	4765.28
	TOTAL		**274392.00**	**13045.05**	**276552.48**	**13105.74**	**277230.69**	**13126.77**	**277503.69**	**13132.29**	**277515.69**	**13133.64**	**277538.69**
	Weighted Average Rate of depreciation			4.717%		4.727%		4.730%		4.73%		4.73%	

Calculated as per rate of depreciation in Appendix-II of the 2019 Tariff Regulations.

229

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 244/GT/2020

Coram:

Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Date of Order: 03rd October, 2022

IN THE MATTER OF

Determination of tariff of Koteshwar Hydroelectric Project (400 MW) for the period from 1.4.2019 to 31.3.2024.

AND

IN THE MATTER OF

THDC India Limited,
(A Joint Venture of Govt. of India and Govt. of UP)
Pragatipuram, Bypass Road,
Rishikesh – 249201 (Uttarakhand) **...Petitioner**

Vs

1. Punjab State Power Corporation Limited,
   The Mall, Near Kali Badi Mandir, Patiala - 147 001 (Punjab)

2. Haryana Power Utilities,
   (DHBVNL & UHBVNL),
   Shakti Bhawan, Sector – 6, Panchkula-134 109 (Haryana).

3. Uttar Pradesh Power Corporation Limited,
   Shakti Bhawan, 14 Ashok Marg, Lucknow – 226001

4. BSES Rajdhani Power Limited,
   BSES Bhawan, Nehru Place,
   Behind Nehru Place Bus Terminal, New Delhi-110019

5. BSES Yamuna Power Limited,
   3rd Floor, Shakti Kiran Building,
   Karkardooma, Near Court, New Delhi-110092.

6. Tata Power Delhi Distribution Limited,
   33 kV, Grid Sub-Station Building,

A

(230)

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

Hudson Lines, Kingsway Camp, Delhi-110009

7. Engineering Department,
   Chandigarh Administration, 1st Floor,
   UT Secretariat, Sector 9-D, Chandigarh-160009

8. Uttarakhand Power Corporation Limited,
   Urja Bhawan, Kanwali Road, Dehradun-248001

9. Himachal Pradesh State Electricity Board,
   Vidyut Bhawan, Shimla-171004

10. Jaipur Vidyut Vitran Nigam Limited, Vidyut Bhawan,
    Janpath, Jyotinagar, Jaipur-302005 (Rajasthan)

11. Ajmer Vidyut Vitran Nigam Limited,
    Old Powerhouse, Hatthi Bhatta, Jaipur road,
    Ajmer-305001 (Rajasthan)

12. Jodhpur Vidyut Vitran Nigam Limited,
    New Powerhouse, Industrial Area
    Jodhpur-342003 (Rajasthan)

13. Power Development Department (PDD),
    Govt. of J&K, Civil Secretariat, Jammu -180001

14. Madhya Pradesh Power Management Company Limited,
    3rd Floor, Block No. 11, Shakti Bhawan,
    Rampur, Jabalpur-482008

15. Rajasthan Urja Vikas Nigam Limited,
    Vidyut Bhawan, Jyoti Nagar, Jaipur – 302005 (Rajasthan)

16. Jammu and Kashmir State Power Trading Company Limited,
    PDD Complex, Bemina, Srinagar – 190010 (J& K) **...Respondents**

CORRIGENDUM

The Commission vide order dated 3.10.2022 in Petition No. 244/GT/2020 had determined the tariff of Koteshwar Hydroelectric Project for the 2014-19 tariff period. It was found that some typographical error needs to be rectified. The same is rectified in the following manner: -

A.

(231)

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

2. In 4th line, paragraph 41 of the order: the sentence starting from "*It is however observed that .....*till *'in 2018-19 towards impact of pay revision of the Petitioner's staff'*, shall stand deleted and it be read as "*On preliminary scrutiny, it is noted that the impact of pay revision of the Petitioner's staff in 2018-19 is of Rs. 2735 lakh, however, the same is subjected to wage/pay revision impact allowed in Petition No.341/MP/2020 (filed by the Petitioner seeking recovery of impact of wage / pay revision for the 2017-19 tariff period for the generating station).*'

3. Except for the above, all other terms contained in the order dated 3.10.2022 shall remain unaltered.

Sd/-	*Sd/-*	*Sd/-*
(Pravas Kumar Singh)	**(Arun Goyal)**	**(I. S. Jha)**
Member	**Member**	**Member**

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

ANNEXURE - VI

Document No. 4 349

"हिन्दी को राजभाषा बनाना भाषा का प्रश्न नहीं अपितु देशाभिमान का प्रश्न है"

टिहरी हाइड्रो डेवलपमेण्ट कारपोरेशन लिमिटेड
(भारत सरकार एवं उत्तर प्रदेश सरकार का संयुक्त उपक्रम)
Tehri Hydro Development Corporation Ltd.
(A Joint Venture of Govt. of India & Govt. of U.P.)

NO.THDC/RKSH/CD-197/ 2462 Dated 31.8.2002

31.8.2002

M/s PCL-Intertech-Lennydro Consortium (Joint Venture),
704, Nilgiri Apartments,
9, Barakhamba Road,
New Delhi –110001 Fax No. 011-3354139

Sub: Tender for Construction of Civil works of Dam , Spillway & Power House of Koteshwar HEP (Tender No. THDC/RKSH/ CD-197)- **LETTER OF AWARD.**

Ref.: i) Your Bid vide letter No. Nil dated 30.1.2002.
ii) Our letter No. THDC/RKSH/CD-197/2381 dated 04.07.2002
iii) Your letter No. PCL/ND/RKSH/2263 dated 15.07.2002
iv) Your letter No. PCL/ND/RKSH/2273 dated 20.07.2002
v) Your letter No. PCL/ND/RKSH/2288 dated 08.08.2002
vi) Your letter No. PCL-ITLH/ND/RKSH/2298 dated 20.08.2002
vii) Your letter No. PCL/ND/RKSH/2299 dated 21.08.2002
viii) Your letter No. PCL-ITLH/ND/RKSH/3006 dated 29.8.2002

Dear Sirs,

This is with reference to your bid for the subject work submitted vide letter No. Nil dated 30.01.2002 and subsequent correspondence(s) confirming therein your unequivocal acceptance of tender terms and conditions and Amendments issued thereto and price negotiations/ discussions held with you on 6th & 7th July 2002 duly confirmed vide your letters referred at Sl. (iii) to (viii) above which will form part of the agreement.

We are pleased to award you the work of " Construction of Civil works of Dam Spillway & Power House of Koteshwar HEP" (Tender No. THDC/RKSH/CD-197) as per the Scope of work and Bill of Quantities at a total contract value of Rs.334,51,66,092.00 (Rupees Three Hundred Thirty Four Crore Fifty One Lac Sixty Six Thousand Ninety Two Only) at base date of 25.01.2002 .

contd...2/

(Y. [illegible])
Executive Director
Tehri Hydro Dev. Corp. Ltd.
Rishikesh

गंगा भवन, बाई पास रोड, प्रगतिपुरम, ऋषिकेश-249 201 दूरभाष 431517, 431457, 431522 फैक्स : 0135, 431520
Ganga Bhawan, Bye Pass Road, Pragathipuram, RISHIKESH-249 201 Tel. 431517, 431457, 431522 Fax : 0135, 431520
पंजीकृत कार्यालय :- भागीरथी भवन (टॉप टेरिस), भागीरथीपुरम, टिहरी - गढ़वाल - 249 001
Regd. Office : BHAGIRATHI BHAWAN (TOP TERRACE), BHAGIRATHIPURAM, TEHRI - GARWAL - 249 001

TRUE COPY

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

233

The entire work under the scope of the Contract shall be completed within 45 (Forty Five) months from the date of award as agreed vide your letter dtd. August' 29, 2002.

The construction methodology and work programme shall be discussed and mutually agreed to match the above completion period, which shall form an integral part of the Contract / Agreement. Any additional construction equipment required to be inducted to ensure adherence to the construction programme shall be provided by M/s PCL Intertech - Lenhydro J.V. without any extra financial implication to THDC.

In the event of ambiguity or conflict between the contract documents, following shall be the order of precedence :

a) Agreement.
b) Special Conditions of Contract
c) Technical Specifications & Drawings.
d) General Conditions of Contract.
e) Any other document.

The work shall be carried out as per instructions of the Engineer-in-Charge. The General Manager (Koteshwar HEP) shall be the Engineer-in-Charge for the Contract unless otherwise informed.

You are directed to furnish Initial Security Deposit of Rs. 16,72,58,305.00 (Rupees Sixteen Crore Seventy Two Lac Fifty Eight Thousand Three Hundred Five only) as per the terms and conditions of the bid documents.

You are advised to attend the office of Executive Director (Contracts) for taking further necessary action leading to signing of the contract/ agreement. All the partners of the Joint Venture shall sign the contract.

This letter is being issued to you in duplicate. You are requested to return the duplicate copy duly signed and stamped as a token of your unequivocal acceptance.

Thanking you,

Yours faithfully,
For & on behalf of THDC Ltd.

(S.K. Shukla)
General Manager (Contracts)

N.O.O.

1. ED (C), Rishikesh. }
2. GM (KHEP), Koteshwar. } For kind information please.
3. TS to CMD, Noida }
4. TS to D (T), Noida }
5. AES to D (F), Noida }
6. AGM (Laws), Noida

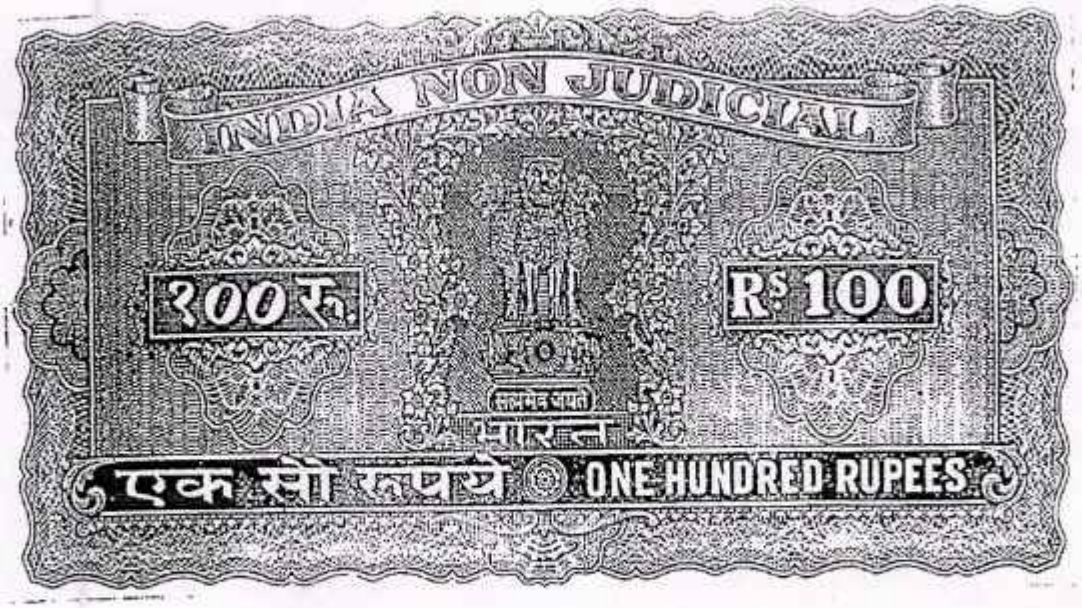
Executive Director
Tehri Hydro Dev. Corp. Ltd.
Rishikesh

TRUE COPY

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

Document No. 5

351 100Rs.



AGREEMENT

FOR "CONSTRUCTION OF CIVIL WORKS OF DAM , SPILLWAY & POWER HOUSE OF KOTESHWAR HYDRO ELECTRIC PROJECT, KOTESHWAR (UTTARANCHAL)"

No.THDC/RKSH/CD-197/AG DATE 14.11.2002

This agreement made this 14th day of November Two Thousand Two between Tehri Hydro Development Corporation Limited, a Company incorporated under the companies Act, 1956, having its registered office at Bhagirathi Bhawan, Bhagirathi Puram, Tehri-249001 (U.P.) (hereinafter referred to as 'OWNER' or THDC which expression shall include its administrators, successors, executors and assigns) of the one part, and M/s PCL- Intertech Lenhydro Consortium J.V., having its office at 704, Nilgiri Apartments, 9, Barakhamba Road, New Delhi-110001. (hereinafter referred to as "CONTRACTOR" or which expression shall unless the context requires otherwise include its administrators, successors, executors and permitted assigns) of the other part.

WHEREAS THDC desirous of setting up its Hydro Power Project at Koteshwar (hereinafter called the "Project") had invited tenders for the works "Construction of Civil Works of Dam , Spillway & Power House at Koteshwar" (Tender No.THDC/RKSH/CD-197).

And whereas M/s PCL- Intertech Lenhydro Consortium J.V. had participated in the above referred tendering vide their proposal No. Nil dated 30.1.02 and whereas subsequent to the submission of the bid by the contractor , several

contd...2/

Progressive Construction Ltd.

TRUE COPY

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

discussions/ negotiations have taken place and M/s PCL- Intertech Lenhydro Consortium J.V. confirmed vide their letters No. PCL/ND/RKSH/2263 dated 15.7.2002, No. PCL/ND/RKSH/2273 dated 20.7.2002 , No. PCL/ND /RKSH/2288 dated 8.8.2002, NoPCL-ITLH/ND/RKSH2298 dated 20.8.02, No. PCL/ND/RKSH/2299 dated 21.8.02 and No. PCL-ITLH /ND/RKSH/3006 dated 29.8.02 and THDC accepted their final negotiated offer and awarded the contract for "Construction of Civil Works of Dam , Spillway & Power House at Koteshwar" to M/s PCL- Intertech Lenhydro Consortium J.V. , New Delhi (THE CONTRACTOR) vide letter of Award no. THDC/RKSH/CD-197/ 2462 dated 31.08.2002, and whereas M/s PCL- Intertech Lenhydro Consortium J.V. have unequivocally accepted to undertake the work as per the terms and conditions mentioned therein and in contract documents attached herewith resulting into a "Contract"

Now therefore this deed witnesseth as under :

ARTICLE 1.0 CONTRACT DOCUMENTS

1.1 The contract shall be performed strictly as per the terms and conditions stipulated herein and in the documents mentioned below which are as fully a part of this contract as if herein setout verbatim or if not attached as if hereto attached

Volume-I

i) Letter of Award no. THDC/RKSH/CD-197 / 2462 dated 31.08.02
ii) Schedule of Quantities and Bids
iii) Original Price Bid.
iv) M/s PCL- Intertech Lenhydro Consortium J.V.'s letter of bid submission dated 30.1.2002
v) M/s PCL: Intertech - Lenhydro J.V. letter No. Camp/Rishikesh/ PCL-ITLH dtd. 11.9.02 regarding construction programme modified to the extent to complete the work in 45 months.
vi) Tender Form
vii) Warranty Form
viii) Statement of Deviation
ix) Joint Venture details / Agreement.
x) a) Power of Attorney (JV)
b) Power of Attorney (Progressive Constructions Ltd.)
c) Power of Attorney (Intertech Lenhydro Consortium)
xi) Form G
xii) Form H
xiii) Construction Methodology (original) and Clarifications thereon
xiv) Letter No. PCL/ND/RKSH/2263 dated 15.7.2002
xv) Letter No. PCL/ND/RKSH/2273 dated 20.7.2002
xvi) Letter No. PCL/ND /RKSH/2288 dated 8.8.2002
xvii) Letter NoPCL-ITLH/ND/RKSH2298 dated 20.8.02 (Revised Supplementary Construction Methodology)
xviii) Letter No. PCL/ND/RKSH/2299 dated 21.8.02

contd...3/

TRUE COPY

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

xix) Letter No. PCL-ITLH /ND/RKSH/3006 dated 29.8.02
xx) Information & Instructions to Tenderers
xxi) General Conditions of Contract
xxii) Special Conditions of Contract
xxiii) Changes / modifications issued vide letter No. THDC/RKSH/CD-197/ Camp Noida/7410 dated 16.1.2002.

Volume-II

I) Technical Specifications

xxiv) Changes / modifications issued vide letter No. THDC/RKSH/CD-197/ Camp Noida/7410 dated 16.1.2002.

Volume –III

i) Tender Drawings

1.2 The contract documents constitute full and complete understanding between the parties and terms of these presents. The parties declare that in entering the contract they do not rely upon any previous correspondence and representations whether express or implied and whether written or oral or any inducement, understanding or agreement of any kind not included within the contract documents and all prior negotiations, discussions, representations and understandings not included herein stand annulled.

1.3 Any Modifications/ Amendments to the contract shall be effected only by a written instrument signed by the authorised representatives of both the parties.

ARTICLE 2.0 SCOPE OF WORK

2.1 The contractor shall perform faithfully everything required to be performed and shall provide and furnish all the labour, materials and equipments required to perform and complete in a workman like manner, all the work covered under the contract in strict accordance with the drawings and specifications and conditions specified in contract Documents as mentioned herein above at Article 1.0

2.2 The scope of works shall also include all such items which are not specifically mentioned in the contract documents but which are necessary for the satisfactory completion of the entire scope of works envisaged under this contract unless otherwise specifically excluded.

contd....4/

TRUE COPY

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

2.3 The progress of the work shall conform to agreed Construction Programme as referred above. CONTRACTOR shall adhere to all requirements stipulated in Technical Specification & quality plan approved by THDC.

ARTICLE 3.0 TIME SCHEDULE

3.1 The work under this contract shall commence from the date of start i.e 31.08.02 and shall be completed and ready for handing over to the owner within 45 (forty five) months thereafter as per agreed construction programme/ Bar Chart.

ARTICLE 4.0 WAIVER OF RIGHTS

4.1 Neither the inspection by the OWNER or the Engineer-in-Charge or any of their officials, employees or agents nor any order by the OWNER or the Engineer-in-Charge for payment of money or any payment for or acceptance of the whole or any part of the works by the OWNER or the Engineer-in-Charge nor any extension of time nor any possession taken by the Engineer-in-Charge shall operate as waiver of any provisions of the contract, or any power herein reserved, nor shall any waiver of any breach in the contract be held to be a waiver of any other or subsequent breach.

ARTICLE 5.0 SETTLEMENT OF DISPUTES

5.1 It is specifically agreed by and between the parties that all the differences or disputes arising out of the contract or touching the subject matter of the contract shall be decided as per clause 60.0 of General Conditions of Contract.

ARTICLE 6.0 NOTICE OF DEFAULT

6.1 Notice of default given by either party to the other party under the agreement shall be in writing. The notice shall be served as per provision of General Conditions of Contract.

contd....5/

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THDC India Limited,Rishikesh

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In witness whereof, the parties through their, duly authorised representatives have executed these presents (execution where of has been approved by the competent authorities of both the parties) on the day, month and year first above mentioned at Rishikesh.

For & on Behalf of

i) For M/s INSTITUTE LENHYDROPROJECT

ii) For M/s INTERTECH SERVICE

iii) For M/s PROGRESSIVE CONSTRUCTIONS LTD.

For & on behalf of THDC Ltd.

(Y.Lal)
Executive Director (Contracts)

Place : Rishikesh
Date : 14.11.2002

WITNESSS :

1. Signature .....
   Name Irina Gribkova
   Address Russian Embassy

2. Signature .....
   Name R.P. BHATIA.
   Address 704 Nilgiri
   9. Barakhamba
   New Delhi

WITNESSS :

1. Signature .....
   Name N.T. RAVINDRAN
   Address Sr. Mgr (C), THDC Ltd.

2. Signature .....
   Name S.R. Mishra
   Sr. Manager, THDC
   Address Prajaltpuram
   Rishikesh.

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ANNEXURE-VIII

Document No. 2

दिल्ली DELHI

BEFORE THE TRIBUNAL COMPRISING JUSTICE MR. G.B. PATNAIK, FORMER CHIEF JUSTICE OF SUPREME COURT OF INDIA, PRESIDING ARBITRATOR, DR. B.K. MITTAL, FORMER CHAIRMAN CWC, ARBITRATOR & MR. L.V. SREERANGARAJU, FORMER GENERAL MANAGER, KPCL, ARBITRATOR

IN THE MATTER OF ARBITRATION IN RESPECT OF CONSTRUCTION OF CIVIL WORKS OF DAM, SPILLWAY AND POWER HOUSE WORKS OF KOTESHWAR HYDROELECTRIC PROJECT, KOTESHWAR, UTTARAKHAND (UTTARANCHAL) VIDE CONTRACT AGREEMENT NO. THDC/RKSH/CD-197/AG, DATED 14.11.2002

BETWEEN

M/S. PCL-INTERTECH LENHYDRO CONSORTIUM J.V.,
Plot No. 18, Kotla Lane, Rouse Avenue,
New Delhi-110002

CLAIMANT...

AND

M/S. TEHRI HYDRO DEVELOPMENT CORPORATION LTD.
Ganga Bhavan, Pragathi puram, Bypass road,
Rishikesh-249201, UTTARAKHAND

RESPONDENT...

आर.के.वर्मा
R.K.VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl.General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड,ऋषिकेश
THDC India Limited,Rishikesh

दिल्ली DELHI

Represented by:

1. Chairman-CUM-Managing Director,
   M/S. TEHRI HYDRO DEVELOPMENT CORPORATION LTD.
   Ganga Bhavan, Pragathi puram, Bypass road,
   Rishikesh-249201, UTTARAKHAND

2. The General Manager (Contracts),
   M/S. TEHRI HYDRO DEVELOPMENT CORPORATION LTD.
   Ganga Bhavan, Pragathi puram, Bypass road,
   Rishikesh-249201, UTTARAKHAND

3. The Chief Project Officer,
   Koteshwar Hydro Electric Project, THDC,
   Koteshwar puram, Dist. Tehri Garhwal, 249001
   UTTARAKHAND

4. The A.G.M. (Law & Arbitration)
   M/S. TEHRI HYDRO DEVELOPMENT CORPORATION LTD.
   Ganga Bhavan, Pragathi puram, Bypass road,
   Rishikesh-249201, UTTARAKHAND

AWARD

1. The Claimant and the Respondent entered into a contract for the construction of "CIVIL WORKS OF DAM, SPILLWAY AND POWER HOUSE WORKS OF KOTESHWAR HYDROELECTRIC PROJECT, KOTESHWAR, UTTARAKHAND (UTTARANCHAL)" vide

(241)

contract agreement no. THDC/RKSH/CD-197/AG, Dated 14.11.2002 with a contract period of 45 months from the date of letter of award i.e., 31.08.2002 and for a contract amount of Rs. 334,51,66,092/-. Certain disputes arose under the contract consequent upon the Claimant raising seven claims from CLAIM-1 to CLAIM-7 and the Respondent rejecting these Claims. The contract contained an Arbitration Clause for resolution of disputes through Arbitration comprising a panel of Three Arbitrators, each party appointing one Arbitrator and the two appointed Arbitrators appointing the Presiding Arbitrator.

2. The Respondent appointed Dr. B.K. Mittal, Ex Chairman CWC, as their nominee on 16.07.2007 and the Claimant appointed Mr. L.V. Sreerangaraju, Ex General Manager, Karnataka Power Corporation, as their nominee on 04.08.2007. The two appointed Arbitrators after mutual consultations agreed to appoint Justice Mr. G.B. Patnaik, former Chief Justice of Supreme Court of India as the presiding arbitrator on 12.10.2007. The first sitting of the Tribunal was held on 06.12.2007. The Claimant had referred additional claims from Claim Numbers 8 to 14 to the Respondent and these claims 8 to 14 also became disputes by virtue of the Respondent rejecting these claims. The Respondent appointed Dr. B.K. Mittal, Ex Chairman as their nominee Arbitrator in respect of these additional claims 8 to 14 in their letter dated: 03.12.2007 and the Claimant appointed Mr. L.V. Sreerangaraju, Ex General Manager, KPCL as their nominee Arbitrator in respect of these additional claims 8 to 14 on 07.12.2007. The nominated Arbitrators appointed by the parties came to a consensus and appointed Justice Mr. G.B. Patnaik as the Presiding Arbitrator in respect of these additional claims 8 to 14 on 11.12.2007. In the second meeting of the Tribunal held on 10.01.2008 directions were issued in respect of fresh set of additional claims from 8 to 14. Thus, the parties agreed that this Tribunal will adjudicate all the claims from 1 to 14.

3. It was agreed by the parties in the 3rd sitting held on 09.05.2008 that no issues need to be framed and the matter would be discussed claim wise. The parties were directed in the 4th sitting held on 13.08.2008 to file affidavit evidence if they intend to pose any witness for examination. During this sitting on

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242

13.08.2008 the Respondent filed an application taking additional grounds to contest this proceeding for which objections of the Claimant were permitted to be filed. The Claimant filed the affidavit evidence of 2 witnesses Mr. Kuljit Singh Narula and Mr. K. Harinath Babu. The Respondent filed the affidavit of Shri. K.P. Singh. The Respondent's counsel stated in the 5th & 6th sittings of the Tribunal on 03.10.2008 that he does not intend to cross examine the Claimant's witnesses. The Claimant's counsel also stated on 03.10.2008 that they would not cross examine the Respondent's witness. Consequently the affidavit evidence of the parties remained un-rebutted. It was agreed that the witness examination is complete and the matter was posted for hearing on 10th & 11th November 2008. In the 7th sitting held on 10.11.2008, when the matter was posted for hearing, the Respondent filed the Counter Claims in volumes IV, V & VI. The Claimant objected to the belated filing of such counter claims and the Tribunal considered that the better course could be to give the Claimant an opportunity of filing their response to the counter claim both on merits as well as on maintainability even though it is belated. The Claimant filed his response to the counter claims and the Respondent filed his rejoinders which are taken on record. The arguments were commenced on 22.12.2008. The arguments by both parties were concluded on 06.03.2010. The parties agreed that they would file written submissions of their respective arguments and these were submitted on 12.04.2010. The Claimant was represented by Ms. Kiran Suri, Advocate and Mr. Sunil Shetty and the Respondent was represented by Mr. S.K. Taneja, Senior Advocate and Mr. Puneet Taneja, Advocate.

4. The documents submitted by the parties are referred to and marked as follows:

By the Claimant:

a. C-1 : Statement of Claims, Volume-1 pages from 1-92 dated 08.02.2008.
b. C-1-2 : Statement of Claims Documents, Volume-2 pages from 93-417.
c. C-1-3 : Statement of Claims Documents, Volume-3 pages from 418-844.
d. C-2 : Rejoinder pages from 845-1061 dated 06.06.2008.
e. C-3 : Reply of Claimant to application under Sec.69 of Partner ship Act filed by the Respondent pages from 1 to 4 dated 10.09.2008.
f. C-4 : Defense to counter claim pages from 1 to 24.

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g. Additional document in support of the claim and replacement of some of the Annexures pages from 1 to 76.

h. Affidavit of CW-1 pages 1 to 114.

i. Affidavit of CW-2 pages 1 to 66.

j. Written submission of arguments in three volumes - One volume containing synopsis from pages 1-243 and two books viz; Volume-1 from pages 1-193 & Volume-2 from pages 1-198 contain citations.

By the Respondent:

p. C-0-1 : Contract Volume-1 pages from 1 to 393.

q. C-0-2 : Contract Volume-2 technical specification pages from 1 to 379.

r. Book-I : Reply in defense to the claims pages from 1 to 104 dated 12.04.2008

s. Book-II: Documents pages from 1 to 81.

t. Book-III : Additional Documents pages from 1 to 32.

u. Book-IV : Counter Claim pages from 1 to 28 dated 07.11.2008.

v. Book-V : Documents in support of counter claim pages from 1 to 259.

w. Book-VI : Documents in support of counter claim pages from 260 to 536.

x. Book-VII : Rejoinder to Counter Claims pages from 1 to 61 dated 16.12.2008.

y. Application dated: 12.04.2008 / 02.08.2008 regarding additional grounds under 69 of partnership Act.

z. Written submission of arguments in three volumes - One Volume from pages 1-166 containing arguments on claims, second volume from pages 1-27 contain arguments on counter claims & third volume pages 1-286 contain citations.

5. Based on the above submissions, documents, affidavit evidence, arguments & written submissions the Tribunal proceeds to make the award.

6. The undisputed facts of the case are that the Claimant and the Respondent entered into a contract on 14.11.2002 for the construction of "Civil Works Of Dam, Spillway And Power House Works Of Koteshwar Hydroelectric Project, Koteshwar, Uttarakhand (Uttaranchal)" pursuant to the letter of award issued by the Respondent on 31.08.2002. The contract is an item rate contract and the

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contract amount as per the scope of work and bill of quantities is Rs. 334,51,66,092/- (Rupees Three Hundred Thirty Four Crores Fifty One lakhs Sixty Six Thousand and Ninety Two Only). The period of completion of the contract is 45 months from the date of Letter of award 31.08.2002. Accordingly the end of contract period as per the contract is 31.05.2006. The scope of the work as set out under Clause-1 of the special conditions of contract at pages-336 & 337 includes.

i. Construction of river diversion works, i.e., lining of diversion tunnel along with intake structure and outlet works, upstream and downstream cofferdams, Sain Nala Cofferdam and its diversion, and concrete plug in diversion tunnel.

ii. Construction of concrete gravity dam comprising non-overflow blocks, spillway and stilling basin with training walls etc., under-sluices, bridge on the spillway, including foundation and abutment treatment and underground grouting works.

iii. Construction of power house complex, comprising power intakes, 4 Nos. shafts and penstocks, power house (4 x 100 MW), access tunnel, tail race channel, transformer platform over control rooms, switch yard platform, cable trench / gallery and permanent service road from dam crest to left abutment, power house and switch yard.

The nature of work includes dewatering and pumping, excavation and disposal, underground excavation of embankment, concreting, drilling and grouting, reinforcements etc., as set out in pages 336 & 337 of Volume-1 of the contract.

The exclusions from the contract are also agreed as specified at page-337 and these exclusions are: supply and installation of gates, guides; hoisting system for spillway intake structure, draft tubes; turbines, governors, generators, various electrical & mechanical systems; transformers, switch yard structures,

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245

internal and external electrification in dams, etc., as detailed in page-337 of Volume-1 of the contract.

The Major components under the scope of work are; Completion of the balance works of river diversion tunnel, construction of a concrete dam of 97.5mtrs height and 253mtr long, along with power intakes and spillway, sluice blocks, stilling basin for energy dissipation down stream of spillway; four numbers of pen stocks, pressure shafts and steel lined pressure tunnels; a surface power house complex to house, the turbines, governors, generators, electrical equipment etc., to accommodate 4 units of 100 MW each capacity as detailed in Sec. A.2 Page-T7 of Volume-2 of the contract.

7. Corresponding to the 45 months contract period agreed under the contract there are 6 mile stone activities to be completed at the specified months as per page-47 of Volume-1 of the contract noted below:

Sl. No.	Milestones Activities	Completion of Activities (From date of Award) by end of
1	River Diversion	14 months
2	Dam & spillway concrete up to EL. 550.5m	28 months
3	Dam up to EL. 618.5m	44 months
4	Concreting in Service Bay, column & roof up to EL. 563m	28 months
5	Concreting of Unit Bays in Machine Hall (1st unit)	40 months
6	Completion of works, site clearance and demobilization complete	45 months

A detailed construction schedule for each activity of construction was agreed under the contract as per pages-48, 49 & 50 of volume 1 of the contract for the construction period of 45 months. Admittedly the work could not be completed in the original contract period of 45 months between the commencement date of 31.08.2002 and the end date of 31.05.2006 as per the contract in accordance with the original schedule submitted by the Claimant. The completion time was extended by the Respondent on the request of the Claimant twice: The first extension being up to March-2008 without levy of Liquidated Damage (LD) and the Second extension being given till June-2009 by reserving the right to levy of LD.

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8. Consequent upon the various delays the Claimant raised claim No. 1-7 on the basis of breach of obligations on the part of Respondent. On 11.04.2007 and claims No. 8-13 were raised on the basis of delay on the part of the Respondent on 19.11.2007. The Respondent rejected these claims and these claims have become the disputes before this AT. The Claimant submits that several delays from the commencement date of the work were caused which were not attributable to the Claimant as per para-17 to para-31 pages-16 to 42 of the claim statement. The Various contentions of the Claimant's regarding the delays are briefly the following as reiterated during the oral submissions by the Claimant.

i. The Respondent was not ready with the possession of site for handing over to the Claimant and even land acquisition was not made.

ii. In this the main contention is that the dam site area, borrow areas B1 & B2 located in Mulani & Gairogisera villages were not handed over. Further, the disposal area for the muck was also not handed over.

iii. Delay in release of approved constructions drawings and their frequent revisions.

iv. Delay due to adverse geological conditions, slope failure and execution of increased quantities of excavation and slope stabilization works.

v. Delay in giving decisions and changes in concrete placement methodology.

vi. Delay due to changes in specification for cement from OPC/PPC to slag cement.

vii. Delay due to changes in fineness modulus of sand and the finalization of concrete mix designs.

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viii. Delay due to introduction of newer materials / items for slope stabilization measures such as geo-textiles / geo-grids, dry boulder pitching etc., due to adverse geological conditions.

ix. Delay due to frequent obstruction by villagers, including strikes etc.,

x. Delay due to adverse climatic conditions i.e., cloudburst/heavy rainfalls etc., including damages to slopes and access roads.

xi. Delay due to treatment of cracks in the foundation blocks of dam.

The Claimant submits that consequent to these delays caused by the Respondent which are not attributable to the Claimant, he is entitled to the following claims as per pages-82 & 83 of Document-C1 and the Claimant prays for award of the same.

CLAIMS	DESCRIPTION	AMOUNT IN RS.
CLAIM-1	Compensation for losses suffered due to non-handing over of land on right bank of village Pendaras.	Rs. 19,72,92,148/-
CLAIM-2	Right and left bank excavation and slope stabilization - extra rates and payments for working in hazardous conditions outside the project area.	Rs. 4,94,78,982/-
CLAIM-3	Payment for construction of approach road on right bank from Baily bridge to permanent road.	Rs. 14,39,800/-
CLAIM-4	Payment for construction of diversion structure: Upstream dyke.	Rs. 76,59,144/-
CLAIM-5	Payment for construction of approach (haul road) for development of B-1 & B-2 quarries.	Rs. 2,03,20,771/-
CLAIM-6	Payment for purchase of sand and coarse aggregates for tunnel lining, inlet and outlet works.	Rs. 45,31,500/-
CLAIM-7	Compensation for losses suffered due to abandonment of cable-way / cable crane system for Koteshwar dam and power house and extra payment for placement of concrete by Rotec.	Rs. 2,00,00,000/-
CLAIM-8	Compensation for losses suffered due to idling of plant and machinery.	Rs. 27,96,41,427/-
CLAIM-9	Compensation for losses suffered due to idling; Man power resources.	Rs. 17,28,64,620/-
CLAIM-10(A)	Compensation for losses suffered due to overheads.	Rs. 20,93,20,000/-
CLAIM-10(B)	Compensation for losses suffered due to non-realization of profit.	Rs. 31,41,30,000/-
CLAIM-11	Compensation for losses suffered due to undue increase in	Rs. 4,51,33,232/-

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	cost of input materials, during the 45 months original stipulated completion time in the contract.	
CLAIM-12	Compensation for losses suffered due to undue increase in cost of input materials: by way of revision of rates for works executed after the expiration of original stipulated completion time of 45 months in the contract (i.e., after May, 2006).	Claim is for actual quantity executed after May-2006
CLAIM-13(A)	Compensation towards extra costs / losses suffered on mobilization advance towards interests and BG's.	Rs. 10,59,30,259/-
CLAIM-13(B)	Compensation towards extra costs / losses suffered on performance B.G. due to 40 months delay.	Rs. 1,67,25,830/-
CLAIM-13(C)	Compensation for losses suffered due to 40 months delay on insurances.	Rs. 1,92,75,973/-
CLAIM-13(D)	Compensation for losses suffered due to the Interest levy on Risk and cost advance.	
CLAIM-14	Interest on Claims.	
CLAIM-15	Compensation on account of the cost incurred towards this Arbitral proceedings.	

The Claimant submits that consequent upon the various delays, obstructions and hindrances caused by the Respondent or by other agencies, on whom the Claimant has no control, the Claimant is entitled for the above claims.

9. The Respondent denies all the claims of the Claimant and submits that the Claimant had breached the contract on several grounds as stated in Book-I of the Respondent's reply to the statement of claims and reiterated in the arguments and synopsis submitted by the Respondent. The contention of the Respondent are briefly the following:

- The Preliminary objections is to the maintainability of claims due to:

A. No claim certificate issued by the claimant at the time of approval of sub Contractor.

B. Arbitration proceedings have been instituted/claims have been lodged against persons who are not parties to the arbitration agreement / contract.

C. Claimant being a unregistered partnership is barred by the provisions of Section 69 of Partnership Act to institute/ lodge any claims against THDC.

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- The Respondent denies the contentions regarding the alleged delays that are attributed to the Respondent by the Claimant and submits that all these delays are not attributable to the Respondent and on the contrary the Respondent submits that the Claimant is responsible for the delays & breaches committed by the Claimant due to the following:

i. The Joint Venture (JV) Partners of the Claimant are M/s. Intertech Lenhydro who were the Russian partners & M/s. PCL. Based on the past experience of the Russian partner of the JV only this JV was qualified and the work was awarded. But the Russian partner was not present to provide the technical expertise on which the JV was qualified to execute the work as per the responsibilities and experience on which the JV was qualified.

ii. The Claimant had sublet the work right from the beginning to M/s. Ritwik Swathi JV (herein after referred to as RSJV) without approval although this was ratified by the Respondent as a fait accompli.

iii. The Claimant failed to mobilize the required men, material and ensure presence of technical experts from M/s. Intertech Lenhydro who were required, under the contract, to be present and caused delays in the completion of the project.

iv. The Claimant failed in the proper methodology for planning of the concreting causing the delay.

v. The Respondent denies all the contentions taken by the Claimant for the delays that are alleged to be not attributable to the Claimant in the claim statement and denies all the claims of the Claimant and states that the Claimant is not entitled to the claims made in the claim statement.

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vi. The Respondent has filed the counter claim in Book-IV on the above grounds and also on the ground that due to the Claimant's failure to mobilize the finances an arrangement is made by making payments to various vendors / suppliers directly by the Respondent and charging it to the Claimant as advances under risk and cost account. The following counter claims are made by the Respondent and the Respondent submit that he is entitled for these counter claims and prays for award of the same.

Counter Claims	Description	Amount in Rs. Crores	Interest Amount in Rs. Crores
Counter Claim-1	Claim for Rs. 33.19 Cr towards advances made under the Risk and Cost Account	28.06	5.13
Counter Claim-2	Claim for Rs. 12.30 Cr towards Deferred recovery of Mobilization Advance.	6.35	5.95
Counter Claim-3	Claim for Rs. 10.45 Cr towards Deferred recovery of Equipment Advance.	10.45	-
Counter Claim-4	Claim for Rs. 11.73 Cr towards Departmentally issued steel at the request of the Claimant on Deferred cost recovery.	11.53	0.20
Counter Claim-5	Interest for the amount claimed against the claim 1 to 4		
Counter claim-6	Cost of arbitration		

10. We find that in order to adjudicate these disputes, the following questions deserve to be answered so as to resolve the disputes between the parties based on the documents and submissions made by the parties before the Tribunal.

Question-1: Whether the preliminary objections regarding the maintainability of the claims raised by the Respondent at A, B & C in para-9 above would disentitle the Claimant from his claims?

Question-2: Whether the Respondent is liable for the delays and breaches alleged by the Claimant in pages-19 & 20 of Document C-1 briefly stated in para-8 above at Sl. No. i to xi?

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Question-3: Whether the Claimant is liable for the breaches and delays alleged by the Respondent as per statement of defense briefly stated in para-9 above at Sl. No. i to v?

Question-4: Whether the Claimant is entitled to the claims made by him before the Tribunal?

Question-5: Whether the Respondent is entitled to the Counter claims made by him before the Tribunal?

These are dealt with in the following paras.

Question-1: Whether the preliminary objections regarding the maintainability of the claims raised by the Respondent at A, B & C in para-9 above would disentitle the Claimant from his claims?

Regarding No Claim Certificate

11. There are three preliminary objections raised by the Claimant as stated in para-9 above. The first objection is that the Claimant gave a no claim certificate (NCC1) at the time of approval of the sub-Contractor. Admittedly the work could not be completed on 31.05.2006 for various delays alleged by the Claimant and denied by the Respondent. We deal with these delays separately under other questions framed above. The contracted date of completion was 31.05.2006. The Claimant requested for the extension of time in his letter dated: 28.11.2005 at ANNEXURE-61 page-319 of Volume C-1-2. This letter, we find, is a letter indicating the reason for extension of time due to non handing over of the B2 quarry even as on 28.11.2005 and the B1 quarry was handed over only in October-2003 and stating further that the site of the diversion tunnel was vacated by an erstwhile Contractor, who was excavating the tunnel, only on 26.12.2002. This letter praying for extension also highlighted the non-handing over of the site on both sides of the river bank by September-2002 i.e., the commencement of the work. Further, it is also stated therein that the village Pendaras located on the right bank at EL. 623m and above was not

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252

handed over to the Claimant for execution which resulted in forcing the Claimant to take up part excavation from bottom upwards from EL. 610m. The letter also highlights the need for adopting mild control blasting by the Claimant on both the banks with a view to ensuring safety for the villagers and stated that this method of control blasting was slow and time consuming apart from being expensive. The Claimant submits that he has also furnished the reasons for the extension clearly in this letter regarding various hindrances, delays in drawings, the slip of the right bank slope and has clearly stated that the contract has got delayed mainly for the reasons beyond the control of the Claimant and had sought extension of time up to 30.06.2008 in terms of GCC Clause-58 of the contract.

12. This extension of time (EOT1) was granted by the Respondent on 16.06.2007 by extending the contract without levy of LD up to March-2008 vide page-459 of C-1-3. The Respondent contends that the Claimant having given a no claim certificate (NCC1) voluntarily, produced at page-59 Book-II of the Respondent, cannot make any claim for the period up to 31.03.2008. The Claimant submits that this no claim certificate (NCC1) is not a voluntary certificate and it was only due to coercion from the Respondent relying on the letter from the Respondent dated: 21.03.2006 wherein the Respondent has addressed the Claimant, inviting reference to the Claimant's request letter for extension dated: 28.11.2005, to submit the no claim certificate for the time extension which has been sought. Relying upon this letter the Claimant submits that the no claim certificate (NCC1) given at page-59 is under the above circumstances and therefore this NCC1 is not a voluntary certificate as contended by the Respondent to deprive the claims of the Claimant as it is only after the Respondent forced the Claimant to give a no claim certificate to approve the extension as per the contract. The Claimant contends that this NCC1 is undated and states that he was forced to give the no claim certificate so as to get the extension approval even though there is no such provision under the contract.

13. The Claimant submits that since the work could not be completed for the various delays he sought for second extension (herein after referred to as EOT2)

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in his letter dated 14.02.2007 at ANNEXURE-64, pages-334 to 342 at Document C-1-2 giving reasons from Sl. (a) to (l) under para-3 of the said letter. The Claimant states that this request for EOT2 is based on various delays such as non availability of borrow area, non-handing over of sites free from encumbrances, resistance from local inhabitants, incomplete land acquisition and rehabilitation, increase in volume of work, unforeseen geological conditions, forced abandonment of initially planned concrete placement system due to poor geology, frequent revisions of drawings, etc., as detailed in the said letter. The EOT2 was approved by the Respondent on 15.11.2007 page-460 of Document C-1-3 reserving the right to levy LD at a later date with the provisional extension approved up to June-2009 for completion of work. Subsequently on 18.07.2007 the Claimant submitted various details and a program for completion of the work by September-2009 in his letter at ANNEXURE-65, page-343 to346 at Document C-1-2. The Respondent refers to the no claim certificate (NCC2) given by the Claimant in ANNEXURE-3 page-993 of Document C-2 on 04.10.2007. The Claimant submits that he was again forced to give a no claim certificate as requested by the Respondent in his letter dated 04.10.2007 page-992 at Document C-2 wherein the Respondent has requested for submission of no claim certificate referring to the letters dated 14.02.2007 and 18.07.2007. This letter of the Respondent dated 04.10.2007 requests for submission of no claim certificate at the earliest so that further action can be taken at his end. The NCC2 given by the Claimant on 04.10.2007 states as follows: *"Pursuant to above referenced letter we here by submit that we are not going to make any claim in respect of grant of extension of time for 40 months, further i.e., completion of work by September, 2009. However, this is without prejudice to our rights available under the contract agreement".*

14. The contention of the Respondent is that the NCC1 given by the Claimant while according EOT1 would deprive the Claimant from raising any claims till 31.03.2008 which is the date up to which the EOT1 was given by virtue of NCC1. The Claimant contends that the NCC1 is not voluntary and so also the NCC2. The Respondent contends that in NCC2 the Claimant has stated *"However this*

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is without prejudice to our rights available under the contract agreement" but in NCC1 where the EOT1 is given up to 31.03.2008 the Claimant has agreed not to demand any claim or compensation on account of grant of this time extension and argues that this NCC1 is a bargain / a compromise / supplementary agreement / a package deal and the Claimant is therefore estopped from raising any claims and further denies the plea of the Claimant that there was any coercion on the part of the Respondent to seek submission of NCC1 in the form submitted by the Claimant while it is only in NCC2 that the Claimant has stated that it is without prejudice to the rights available to the Claimant under the contract.

15. Based on the above facts and documents we find that original period of contract was from 31.08.2002 to 31.05.2006. The EOT1 was up to 31.03.2008 for which the NCC1 was given by the Claimant and the period of EOT1 was 22 months from 31.05.2006. The EOT2 sought for by the Claimant was till September-2009 and the EOT2 granted by the Respondent was up to June 2009. The EOT1 was allowing the price adjustment as per the contract and was without levy of LD, while the EOT2 froze the indices for price adjustment as per the approved mile stone dates and reserving the right of the Respondent to levy the LD at a later date. The NCC2 given by the Claimant in respect of EOT2 is without prejudice to his rights where as NCC1 has no such reservations made by the Claimant. The Claimant contends that the mile stone-1 for river diversion was achieved on 28.12.2003 which is the achieved date as in both EOT1 & EOT2. The Claimant further contended that at the time of giving EOT1 on 16.06.2007 the approved extended dates for mile stone-2 & mile stone-4 which are Decemeber-2006 and November-2006 respectively had already passed. Further, the Claimant submits that on 14.02.2007 i.e., much prior to the date of approval of EOT1 he had already brought to the notice of the Respondent through his letter dated 14.02.2007 page-334 to342 at Document C-1-2 seeking extension of the time EOT2 up to September-2009. Thus, as on date of approval of EOT1 there was already in existence the request of EOT2 lodged by the Claimant with the Respondent.

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16. The Claimant contends that the extension of time shall have to be granted by the Respondent as provided under Clause-58 page-328 Volume-1 of the contract which reads as follows: *"Clause-58: Time is the essence of the contract. If however, the failure of the Contractor to complete any of the designated activities as per the dates stipulated in Clause 'Milestone Dates' of Special Conditions of Contract arising from delays on the parts of Corporation in supplying the materials or equipment, it has undertaken to supply under the contract or from delays in handing over sites, or in supplying the construction drawings or for any other reason not attributable to the Contractor or from increase in the quantity of work to be done under the contract, or special risks an appropriate extension of time will be given in writing by the Engineer-in-Charge. The Contractor shall request such extension within a month of the cause of such delay and in any case before expiry of the stipulated completion date for the designated activity"*. (Emphasis supplied by the AT). The Claimant, therefore, submits that the Extension of Time can be granted by the Respondent only for delays on the part of the Respondent in supplying materials or equipments or from delays in handing over sites or in supply of construction drawings or for any other reason not attributable to the Contractor. Therefore, the Extension that can be granted under the contract, as contended by the Claimant, is only in case of delays not attributable to the Contractor and not for delays, if any, which are attributable to the Contractor. Therefore, the Claimant contends that based on Clause-58 of the GCC the only interpretation would be that if extension can be granted it is only on account of the Respondent's fault and that extension cannot be granted when it is the Claimant's fault. The Respondent denies this contention and argued that even for delay of the Contractor the Respondent can give extension by inviting reference to Clause-48 of the GCC and the Respondent has the option to (a) terminate the contract (b) after termination to get the work done at the risk and cost of the Contractor and (c) Extend the time for getting the work completed with a right to impose LD. We find that the Clause-48 relates to the liquidated damages for delay and reads as follows:

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"Clause-48 - Liquidated damages for delay

i) If the Contractor fails to achieve milestone dates of the works within the time prescribed in this contract then the Contractor shall pay to THDC the sum stated in sub clause (iii) of this Clause as liquidated damages for such default and not as a penalty for every day or part of a day which shall elapse between the time prescribed for a particular milestone and the date of certified completion of that milestone. THDC may, without prejudice to any other method of recovery, deduct the amount of such damages from any amount in its hands, due or which may become due to the Contractor. The payment or deduction of such damages shall not relieve the Contractor from his obligation to complete the works or from any other of his obligations and liabilities under the contract.

ii) If, before the completion of the whole of the works, any part or section of the Works has been certified by the Engineer in Charge as completed, pursuant to Clause-18.0 herein before and occupied or used by THDC, the liquidated damage for delay shall, for any period of delay after such certificate and in the absence of alternative provisions in the contract, be reduced in the proportion which the value of the part or section so certified bears to the value of the whole of the Works.

iii) Pursuant to sub-Clauses (i) and (ii) of this clause, should the Contractor fail to complete the separable portion of the works or to complete the whole of the works within the periods and dates specified under the contract, the Contractor shall pay to THDC as liquidated damages at the rate of one tenth of one percent (0.1%) of value of each incomplete activity of the work per day of delay. If the liquidated damages are levied on any item of work on account of delay in some milestone and if, the Contractor achieves the next milestone within specified time, the liquidated damage already levied for that item of work shall be refunded.

iv) The aggregate of the liquidated damages payable to THDC under this Clause shall be subject to a maximum of ten percent (10%) of the contract price.

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257

All the works during the progress and after completion shall be subject to Technical Examination. Any defect of material or workmanship found during Technical Examination and established as such, shall be liable for the reduction of rate(s), considered necessary and shall be recovered from the Contractor even if it has been accepted by the Engineer-in-charge".

From this Clause-48, we find that this Clause is only relating to levy of L.D. But extension of time shall have to be given only under Clause-58.

17. Based on the provisions of Clause-58, we find that the extension of time can be granted admittedly only for delays clearly specified therein as arising from delays on the part of the corporation-Respondent. The delays specified in Clause-58 are supplying the materials and equipments which the Respondent had undertaken to supply under the contract or delays in handing over of sites or in supplying the construction drawings or for any other reason not attributable to the Contractor or from increasing the quantity of work to be done under the contract or special risks. All these delays set out in Clause-58 are according to us the obligations of the Respondent. The special risks specified under Clause-58 page-325 at Volume-1 of the contract are war, hostilities (whether war be declared or not), invasion, act of foreign enemies, the nuclear risks, rebellion, revolution, insurrection, military or usurped power, civil war, unprecedented flood, volcanic eruption and earth quake which are also not attributable to the Claimant. Further increase in quantity of work is a variation and the Claimant/Contractor is not responsible for such variations in quantities beyond the quantities specified in BOQ. We, therefore, find that none of the causes for delay specified and agreed as set out in Clause-58 are the causes which are attributable to the Claimant and that excepting the delay due to cause of special risks all delays specified under Clause-58 are attributable to the Respondent. Accordingly we find that the interpretation advanced by the Respondent that Clause-58 read with Clause-48 under the contract provides the afore contended options to the Respondent is not tenable as no such options are specified or can be inferred from Clause-58 of the GCC

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which is the only provision under the contract for extension of time. Hence, we find that the Claimant having sought for Extension under Clause-58 in the case of both the Extensions EOT1 & EOT2, having brought to the notice of the Respondent the various delays there under, and the Respondent having not denied these delays in the extension orders given for EOT1 & EOT2, the contention of the Respondent that he had three options and he choose the option to extend the time as per Clause-58 for delays which are attributable to the Claimant is not sustainable under the contract.

18. The Respondent relies on the Apex Court decision in the case of 1994(1) SCALE 135: Asst Excise Commissioner & Ors Vs Issac Peter & Ors stating that the doctrine of fairness and reasonableness cannot be invoked against the Respondent in a contract just because the Respondent is a State. We find that in this case the facts & circumstances are different and even in the relied case the Apex court has opined that in case of contracts freely entered into with the State there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State) for purpose of altering or adding to the terms and conditions of the contract merely because it happens to be the State. The Apex court has further held that in such cases the mutual rights and liabilities of the parties are governed by the terms of the contracts and the law relating to contracts. We find that this reliance made by the Respondent to advance his contention is of no avail for the following reasons based on facts and circumstances of the present case.

19. In the present case before us the EOT1 & EOT2 are given by the Respondent pursuant to the request of the Claimant under Clause-58 of the contract, EOT1 is given for 22 months up to March-2008 and EOT2 is given for 15 months up to June-2009. There is no provision under the contract for asking for a no claim certificate for purpose of giving such extension. The Respondent insisted on such no claim certificate for giving the extension and withheld the issue of EOT until the NCC was given by the Claimant even though there is no such provision under the contract. Insistence for such a no claim certificate would itself is not as per any term of the contract. Further, the Respondent in his letter dated

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259

04.12.2006 at page-76 of Book-II addressed to the Claimant admits at Sl. 1 that *"the time extension has been given as per the provisions of the contract in lieu of delay in handing over of excavation area"*. The EOT1 was given on 16.06.2007. Hence, we find that the reasons for delay given by the Claimant in his letter dated 28.11.2005 seeking EOT1 and the order of EOT1 dated 16.06.2007 read conjointly with the subsequent affirmation by the Respondent that the EOT1 is given in lieu of the delay in handing over of the Excavation area in the letter dated 04.12.2006 and the absence of any condition or qualifications imposed in EOT1 leads us to the logical conclusion that the no claim certificate (NCC1) sought for by the Respondent is not as per the contract and the NCC1 is undated while the EOT1 was given on 16.06.2007 further fortifies our view that the NCC1 given is not voluntary. Also the Claimant has invoked arbitration on 16.06.2007 itself in his letter at page-150 of Document C-1-2. The undated No Claim Certificate (NCC1) could be surmised to be on 16.06.2007 or shortly before that since the Respondent was with holding the issue of EOT1 dated: 16.06.2007 apparently insisting for the NCC1. Since the arbitration is invoked on 16.06.2007 the protest against the NCC1 is also clear as submitted by the Claimant. Insofar as NCC2 is concerned with respect to EOT2 the no claim certificate NCC2 itself records the protest of the Claimant as the NCC2 is without prejudice to the rights of the Claimant under the contract. The Claimant further contends that the no claim certificate NCC2 is without prejudice to the rights of the Claimant under the contract and this no claim certificate specifies the grant of extension of time for 40 months till September-2009 and further contends that this "without prejudice" would apply for the entire period of the contract for which the extension is sought which includes the period of EOT1 also.

20. The Claimant relies on 2004 (2) SCC 663: NTPC Ltd., Vs Reshmi Construction, 2006 (13) SCC 475: Ambika Construction Vs Union of India, 2006 (12) SCALE 654: Satyapalan Vs State of Kerala and 2009 (1) SCC 267: National Insurance Co. Ltd., Vs Bhogara Polyfab Ltd., in support of his contentions to advance the proposition that the no claim certificates given by the Claimant would not disentitle the Claimant from his legitimate claims. In 2004 (2) SCC 663: NTPC Vs

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260

Reshmi Construction, before the Apex court, the Contractor had issued a no demand certificate wherein he had confirmed that *"we would have no claims demands in future in respect of that contract"* and requested for release of security deposit, contract performance guarantee at the time of final bill. When the Contractor raised further claim the issue was finally brought to the Apex court to decide as to whether signing of such no demand certificate would disentitle the Contractor to his claims. The Apex court after adjudicating the matter held:

"27. EVEN when rights and obligations of the parties are worked out the contract does not come to an end inter alia for the purpose of determination of the disputes arising there under, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'no Demand Certificate' is signed. Each case, therefore, is required to be considered on its own facts.

28. FURTHER, necessitas non habet legem is an old age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of other party to the bargain who is a stronger position.

29. WE may, however, hasten to add that such a case has to be made out and proved before the Arbitrator for obtaining an award".

In the case before us we have already found that the NCC1 is sought by the Respondent for according extension of time admittedly for reasons of not handing over the site and that too when there is no such provision for seeking a NCC under the contract. While in the case of Reshmi Constructions the final bill was signed and subsequently the protest was made and Arbitration was invoked. In the present the Arbitration is invoked by the Claimant on

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16.06.2007 on the same day the EOT1 was given based on the undated NCC1. Hence, we find that the invoking of Arbitration is itself the protest and there is no delay in making the protest. Under these facts and circumstances we find that the Claimant has indeed made out the case and proved that the NCC1 issued is not voluntary, it was at the insistence of the Respondent and there is no provision for seeking the NCC under the contract and has invoked the Arbitration for his claims without any delay. Hence the ratio of Reshmi Constructions is applicable.

21. In the case of 2006 (13) SCC 475: Ambika Construction Vs Union of India, under a contract with the railways the Contractor was required to issue a no claim certificate as per the Clause of the contract after completion of the work. A no claim certificate was demanded while the work was still pending and the claims made by the Contractor were resisted based on this no claim certificate issued at intermediate point. Relying upon the Reshmi Construction Case cited above the Apex court held in para-18 *"having regard to the decision in Reshmi Constructions it can no longer be said that such a Clause in the contract would be an absolute bar to a Contractor raising claims which are genuine, even after submission of such no claim certificate"*. Further, under para-20 it is held *"in such circumstances we are inclined to hold that notwithstanding Clause-43(2) if the General Conditions of Contract and the submission of a no-claim certificate by the appellant, the appellant was entitled to claim a reference under the contract and the Division Bench of the Calcutta High Court was wrong in holding otherwise"*.

In the case of Ambika Constructions the facts are that despite there being a condition under the contract that there was a requirement to submit a No Claim Certificate and the Contractor having submitted the NCC it was held by the Apex Court that such a No Claim Certificate will not disentitle the Contractor from his claims. In the present case before us we find that because of: (i) firstly there is no Clause requiring the submission of No Claim Certificate under the contract, (ii) Secondly the NCC1 was at the insistence of the Respondent to give the extension of time when there was no such provision

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262

under the contract, (iii) Thirdly the Claimant had invoked the Arbitration on the same date of approval EOT1, (iv) fourthly the request of EOT2 included the total period and was submitted by the Claimant even before the EOT1 was granted, we find that the NCC1 cannot disentitle the Claimant of his legitimate claims.

Thus, we find that Reshmi constructions case and the Ambika Constructions case have a direct application in the present case before us to decide that the no claim certificates issued, both NCC1 & NCC2 would not disentitle the Claimant from making his claims based on the facts, circumstances and the law.

22. 2006 (12) SCALE 654: Satyapalan Vs State of Kerala, in this case the Apex court had to deal with the validity of the claims made by the Claimant Contractor towards escalation which was denied by the High Court in terms of a supplemental agreement executed between the parties and the arbitrator had allowed the escalation claim which was appealed before the Apex Court. After detailed analysis of various cases and the facts of that case the ratio is at para-28 of the judgment where it is held that *"the arbitrator appears to have acted within his jurisdiction in some of the claims on account of escalation of cost which was referable to the execution the work during the extended period. in our judgment the view taken by the high court was on a rigid interpretation of the terms of the contract and supplemental agreement executed between the parties which was not warranted by the turn of events"*. We find that this judgment supports the proposition that it is not illegal for the Arbitral Tribunal to adjudicate on the claims and award the claims on the facts and circumstances even in a situation contrary to a supplemental agreement executed by the parties. We find that the no claim certificate NCC1 or NCC2 cannot be construed as an agreement for reasons stated above and hence cannot be treated as creating a bar for raising the claims.

23. 2009 (1) SCC 267: National Insurance Co. Ltd., Vs Bhogara Polyfab Ltd., in this case the Apex court had to decide on a issue relating to the no due certificates

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or full and final settlement vouchers. It is held in para-49 of the judgment as follows:

"49. OBTAINING of undated receipts in advance in regard to regular/routine payments by government departments and corporate sector is an accepted practice which has come to stay due to administrative exigencies and accounting necessities. The reason for insisting upon undated voucher/receipt is that as on the date of execution of such voucher/receipt, payment is not made. The payment is made only on a future date long after obtaining the receipt. If the date of execution of the receipt is mentioned in the receipt and the payment is released long thereafter, the receipt acknowledging the amount as having been received on a much earlier date will be absurd and meaningless. Therefore, undated receipts are taken so that it can be used in respect of subsequent payments by incorporating the appropriate date. But many a time, matters are dealt with so casually, that the date is not filled even when payment is made. Be that as it may. But what is of some concern is the routine insistence by some government Departments, statutory Corporations and government companies for issue of undated 'no due certificates' or a 'full and final settlements vouchers' acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure requiring the claimant to issue an undated receipt (acknowledging receipt of a sum smaller than his claim) in full and final settlement, as a condition for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated". [Emphasis supplied]

Further, the Claimant relies on para-52(iii) of the same judgment reproduced below:

"52(iii). A contractor executes the work and claims payment of say rupees Ten Lakhs as due in terms of the contract. The employer admits the claim only for Rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format

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264

acknowledging receipt of Rupees six Lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration".

The Respondent argues that the reliance of the Claimant on this case is misplaced as this case is only for appointment of an arbitrator and reference to arbitration to adjudicate the disputes and submits that in the present case the AT has been constituted and the claims have been referred to arbitration but the Respondent has setup the defense of no claim certificate not to oppose arbitration but as to the maintainability of claims on merits in view of the no claim certificate. We have already traversed on the dates and circumstances of the request for no claim certificates by the Respondent and the dates of issue of these no claim certificates NCC1 & NCC2 and the dates of EOT1 & EOT2 which are detailed below even at the cost of repetition.

EOT1 was sought by Claimant on 28.11.2005, No claim certificate was requested by Respondent on 21.03.2006, undated NCC1 is given by the Claimant, EOT1 was given by the Respondent on 16.06.2007. Thus from 28.11.2005, the date of request for extension by the Claimant, the Respondent did not give the Extension of time till 16.06.2007 nearly 18 months of delay. It is only after the undated NCC1 was given the EOT1 was approved. EOT2 was sought by Claimant on 14.02.2007 & 18.07.2007 even before EOT1 was given, No claim certificate was requested for this EOT2 by Respondent on 04.10.2007, NCC2 is given by the Claimant on 04.10.2007, EOT2 was given by the Respondent on 15.11.2007. The EOT2 is given four months after the request and one month after the NCC2. These show that the Respondent did not give the extension of time until the Claimant submitted a no claim certificate for

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265

according such extension even though when there was no such provision under the contract and on the contrary the contract specifically provided that the extension shall be accorded as per Clause-58 of the contract. The Apex court in the National Insurance Company Limited case referred in para-48 to Central Inland Water Transport Corporation ltd., Vs Brojo Nath Ganguly 1986 (3) SCC 156 case and emphasized the inecuality of the relative bargaining powers of the parties therein and held that *"(This) principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable Clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a Clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can*

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neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances. [emphasis supplied]".

In the instant case before us the Respondent relies on the undated no claim certificate NCC1 issued by the Claimant based on which the Respondent contends that all claims up to 31.03.2008 of the Claimant are not entertainable in view of this NCC1. The Claimant relies on this judgment of the Apex court to advance his proposition that the undated no claim certificate NCC1 will not discharge the contract nor there is any accord and satisfaction and hence this NCC1 will not act as a waiver of his rights under the contract. We agree with this proposition of the Claimant based on the facts, circumstances and the law stated above and affirms that the undated No Claim Certificate NCC1 cannot disentitle the Claimant of his claims.

24. The Claimant relies on 2001 (8) SCC 593: Pure Helium India Pvt. Ltd., Vs ONGC and submits that it is with in the jurisdiction of the Arbitrators to adjudicate the matter referred to this Tribunal having regard to the wide nature, scope and ambit of the arbitration agreement. In that case the court was dealing with a challenge to a non speaking Award under 1940 Act and held that "53. *The court having regard to the proposition of law that the jurisdiction of the Arbitrator will be ousted in the event that there exists a specific bar in the contract as regards raising of particular claim, must necessarily hold that the award was sustainable. As in the instant case there did not exists any such bar, it is enforceable in law*". We find that in the present case before us there is no such Clause in the contract which either requires the Claimant to submit a no claim certificate or a Clause which bar the claims on the ground of issuance of such no claim certificate. Hence, the no claim certificate NCC1 or NCC2 sought for by the Respondent for purpose of according the extension as per the provisions of the contract and that too when the work is admittedly under progress even during the proceedings of the arbitration and that no discharge of the contract is made will not disentitle the Claimant from the claims keeping in view that the Claimant invoked arbitration on 16.06.2007 which is also the date on which the EOT1 was granted unconditionally.

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25. The Claimant relies on 1979 (2) SCC 70: Hind Construction Vs State of Maharashtra, and submits that, in the present contract before the Tribunal, the contract provides Clause for extension of time and also Clause for levy of damages for delay and therefore argued that time is not the essence of contract and therefore the claims of the Claimant are covered by Clause 2 of Sec. 55 of the Indian Contract Act, 1872 and the entitlement of the Claimant for claims is not discharged. The Claimant further relies on 2006 SCALE 220: Mc Dermott International Inc Vs Burns Std Co., wherein the Apex court has reiterated the principle laid down by the Supreme Court in the Hind Construction case that *"the question whether or not time was essence of the contract would essentially be a question of the intentions of the parties to be gathered from the terms of the contract"* and that *"even where the parties have expressly the provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental"*. Further, in the Mc Dermott case it is held that second part of Sec. 55 of the Indian Contract Act where time was not the essence of contract and therefore the Claimant argues that he is entitled to these claims and that the no claim certificates NCC1 & NCC2 would not disentitle for the claims.

26. We find that the Claimant's application for extension dated: 28.11.2005 gives the detailed reasoning why the work could not be executed within the contracted period and necessitated extension of time. A plain reading of the said letter leaves no room for doubt to come to a conclusion that the delay in execution is squarely attributed to the Employer; i.e. Respondent, and not the Claimant. The extension was sought for invoking Clause-58 GCC, which also stipulates that the extension can be granted if the delay is attributable to the Employer. The grant of extension without levying liquidated damages further fortifies the presumption that the Employer was satisfied that the delay is attributable to them and as such granted extension invoking Clause-58. It is a common knowledge that every Contractor is required to file a No Claim

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268

Certificate on the basis of which the extension is granted by the Employer. In fact, in the case in hand the Respondent by their letter dated 21.03.2006 requested the Claimant to submit a No Claim Certificate for the period for which time extension has been sought and in pursuance of the same No Claim Certificate was furnished by the Claimant, which is undated and which is at page-59 of Book-II filed by the Respondent and this also squarely states that no compensation whatsoever in future on account of grant of time extension to be claimed. A combined reading of the Respondent's letter dated 21.03.2006; the Claimant's undated No Claim Certificate and the final order granting extension without levy of liquidated damages, which is at page-459 of Vol-C-1-3 leads to the only conclusion that the contention no claim would be made for the work done during the extended period is not sustainable and that the said certificate will have no effect on the claim made up to the contractual period.

27. That apart, the scenario under which the No Claim Certificate was sought for and the Claimant submitted the No Claim Certificate persuades us to come to a conclusion that the said certificate was given not voluntarily but under compulsion faced with the huge investment already made by the Claimant and the various hindrances mostly attributed to the Respondent, as indicated in the Claimant's letter dated 28.11.2005 seeking extension of time. Thus, in our considered opinion the so called No Claim Certificate furnished by the Claimant undated is of no consequence disentitling him to claim the compensation and at any rate it would be of no relevance to the claim made for the contractual period.

28. In the light of our above findings and observations, the two no claim certificates NCC1 & NCC2 will not disentitle the Claimant to his claims.

Regarding Institution of Arbitral proceedings against parties who are not parties to the arbitration Agreement:

29. The second preliminary objection raised by the Respondent is that the Arbitration proceedings have been instituted / claims have been lodged against persons who are not parties to the arbitration / to the agreement / contract.

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269

The Respondent states that the present claim petition is liable to be rejected on the grounds that the same has been made against the parties who were not a party to the agreement and relies on the Letter of Award (LOA) dated: 31.08.2002 at pages-9 & 10 and the agreement from pages-4 to 8 contained in Volume-1 of the contract C-0-1. This contract was entered into between the Claimant and Tehri Hydro Development Corporation (THDC) and accordingly it is contended that the arbitration agreement Clause-60 at page-329 envisages the Respondent as THDC while the present claim petition is filed against the Chairman-Cum-Managing Director, G.M. Contracts, Chief Project officer & A.G.M (Law & Arbitration) of THDC as parties. The Claimant submitted an application dated: 07.07.2007 under Sec. 23 of the Arbitration & Conciliation Act stating their in that the Claimant has filed the aforesaid claim petition against THDC but has named the Chairman-Cum-Managing Director, THDC, G.M. Contracts, THDC, Chief Project officer, THDC & A.G.M (Law & Arbitration) THDC and the Claimant has not named anybody a party in personal capacity but has stated official status of the persons who represents the THDC. It is a technical objection raised by the Respondent that the party should be arrayed as THDC through Chairman-Cum-Managing Director as THDC is a company incorporated under the companies act 1956 and is a separate legal entity. In order to overcome this technical problem the Claimant prays this Arbitral Tribunal to permit to amend the cause title by amending the Respondent's name as "Tehri Hydro Development Corporation Ltd., Ganga Bhavan, Pragathi Puram, Bypass Road, Rishikesh-249201, Uttarkhand through its Chairman-Cum-Managing Director.

30. The Respondent filed his reply on 04.03.2010 to the Claimant's application under Sec. 23 and resists this amendment stating that the Respondent raised this objection in the very first opportunity at the time of filling its statement of defense and pressed his submission that the present claim petition is not maintainable and liable to be rejected. Further, the Respondent contended that the Claimant is seeking a major amendment of instituting the claim against a new party which was till date not a party to the proceedings in the present form of the claim petition and that the Claimant is estopped from praying for

this amendment before this Tribunal. In fact we find that the Respondent has filed his reply to the application of the Claimant dated 07.07.2007 under Sec. 23 of the Act only on 04.03.2010 after nearly 32 months after filing the application by the Claimant.

31. The Claimant submits that the application filed by him is only to avoid any technical objection and it is not a case of non-joinder of parties but it is only the case of mis-description of the names of the Respondent and relies on 1984 (4) SCC 343: Chhotelal Pyarelal Vs Shikarchand where the Apex Court allowed an application for amendment in the cause title by adding the names of the partners of the firm as the Respondent's along with the firm and argues that in that case suing the partners instead of partnership firm and the court held that *"it would be merely a case of mis-description of the Respondent's to the application and this mis-description can be corrected at any stage of the proceedings"* in para-2 of the said judgment.

32. The Claimant relied on ILR 1970 DELHI 621: Modi Industries Ltd., Vs. Union of India MANU/DE/0059/1970 para-19 which reads as follows:

"19. ISSUE No. 2 In view of my finding on issue No. 1, issue No. 2 has to be answered in the affirmative. The proceedings before the Arbitrator are not in the nature of a suit and neither the provisions of Order 29 nor Order 30 of the Civil Procedure Code govern the same and the procedural technicalities of law do not have any place in arbitration proceedings. The Arbitrator is a forum of the choice of the parties and is really intended to replace the civil Court and the procedural technicalities applicable to them. The Arbitrator has to follow the principles of natural justice and decide the dispute before him in a bona fide manner without committing misconduct of himself or the proceedings and his decision on the face of the record must not be contrary to law. Subject to the said limitations, he is, a judge both of facts and law and is entitled to mould his own procedure. The initiation of arbitration proceedings against the trade name Modi Oil Mills is only a mis-description of the incorporate-company Modi Food Products Ltd. which

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271

owns the said Oil Mill and which has entered into the contract in the same name. The reference to arbitration is, therefore, valid in law and the mis-description in the name of the party can if necessary be corrected by amendment of the cause title and there is no problem of the bar of limitation involved in the matter. Had the proceedings been instituted in a civil Court, it would have been open to the Court to allow the amendment of the plaint in order to correct the mis-description and bring the real matter in controversy between the parties under Order 1, Rule 10, as well as Order 6, Rule 17 of the Civil Procedure Code. The proceedings before the Arbitrator are not circumscribed by any such provisions of law and there is no doubt that the correction can as well be effected in arbitration proceedings. Even without the amendment, the reference is valid as the name Modi Oil Mills really means and represents the petitioners who were the contracting parties. The answer to issue No. 2 is in the affirmative" [Emphasis supplied by the Tribunal].

Thus we find, as per the above decision, the amendment as prayed by the Claimant can be permitted by the Arbitral Tribunal as the Respondent is Chairman-Cum-Managing Director, THDC and the amendment prayed for is to amend it as THDC represented by Chairman-Cum-Managing Director.

33. Further, the Claimant relies on Sec. 19 of the Arbitration and Conciliation Act 1996. Sec. 19(1) specifies that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure 1908 or the Indian Evidence Act 1872. Sec. 19(2) specifies that the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceedings. We find that in the instant case the parties have not agreed under the contract for any specific procedure. Hence, the provisions under Sec. 19(3) which specifies that, failing any agreement referred to in Sec. 19(2), the Arbitral Tribunal may, subject to this part conduct the proceedings in the manner it considers appropriate. In view of the absence of any agreement between the parties under the contract for the conduct of the Arbitral Proceedings and keeping in view that it is only a mis-description of the party in the cause title that is sought for being amended by

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272

the Claimant under Sec.23 of the Arbitration and Conciliation Act 1996 we find that it is just, fair and appropriate to allow the application of the Claimant under Sec. 23(3) of the Arbitration and Conciliation Act 1996.

34. The Claimant had filed the dispute case impleading Managing Director of the Corporation amongst some other officers of the company. The power of the management of the company vests with the Managing Director. The range of powers enjoyed by the Managing Director is spelled out usually in the Article of the company. Very often the substantial power of management is conferred upon the Managing Director by the Board, and the Managing Director acts as a delegate of the Board. In fact the Managing Director performs all the essential duties of management of the company and company is sued by the Managing Director. It is no doubt true that a company has its own individual identity in law. In construing whether there has been due representation or there has been any prejudice, the matter should be examined from a broader perspective and should not be construed in a narrow pedantic manner. It is not required to be construed in a manner completely divorced from common sense. Even in case of strict compliance Section-80 CPC Notice the strict rule held in S. N. Datta Vs. Union of India was later on over-ruled by the Supreme Court itself. The juristic principle behind is whether there has been proper representation of the person who is being sued or whether any prejudice can be said to have been caused to the defendant on account of any mis-description. Having regard to the entire conduct of the parties in the matter of contract, we are not persuaded to take a view that any prejudice has been caused to Tehri Hydro Development Corporation as the defendants were Managing Director and some of its officers. We need not further examine this aspect, since the Claimant invoking the provisions contained in Sub-Section-3 of Section-23 filed application for addition of Tehri Hydro Development Corporation as a party Respondent to which the Respondent initially has not filed any objection and it is only when the matter was moved by the Claimant objection was filed before this Tribunal by the Respondent. Though provisions of Civil Procedure Code in terms has no application to arbitration proceeding governed by the Arbitration & Conciliation Act, 1996, but it is open for a Tribunal to be guided by those provisions or

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273

procedures. While dealing with the question of amendment of plaint the Supreme Court has observed in several cases that the amendment sought for could be liberally examined and allowed, unless by allowing such amendment any prejudice is caused to the other side. In Section-23 of the Arbitration & Conciliation Act, 1996 more particularly in Sub-Section-3 there is no prescribed period for making application for amendment, though the intention is clear that the Arbitral Tribunal if considers it as inappropriate to allow the amendment having regard to the delay, it may refuse the amendment. In other words, the question of delay has to be borne in mind from the standpoint of prejudice which ultimately could be caused to the other side. But in the case in hand, we do not think any prejudice has been caused to the Respondent, who has all along fought the litigation through its Managing Director and in fact it is only the Managing Director who was representing company in the litigation. In this view of the matter, we are persuaded to allow the prayer of amendment made by the Claimant and permit impleadment of Tehri Hydro Development Corporation in this proceeding. Consequently, the objection of the Respondent that the Arbitral Proceedings would fail on account of non impleading of Tehri Hydro Development Corporation stands rejected.

35. In the light of this finding we reject this preliminary objection of the Respondent and allow the application of the Claimant under Sec. 23 by amending the cause title by adding "Tehri Hydro Development Corporation Ltd., through its Chairman-Cum-Managing Director" in place of Chairman-Cum-Managing Director, THDC in the cause title.

36. <u>Objection regarding non maintainability of arbitration proceeding as the Claimant is un-registered firm.</u> The Respondent raises this contention on the footing that Sec. 69 of the Indian Partnership Act debars an unregistered firm from enforcing rights arising from a contract and as such, such unregistered firm is not entitled to make this claim in the arbitration proceedings. The Claimant refutes this contention inter alia on the ground that this objection had not been taken in the written statement filed on behalf of the Respondent and as such the Respondent is not entitled to raise this contention at a later stage of the proceeding. It is also contended that the Claimant is a Joint Venture

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274

with one of its partners having no place of business in the territory to which the act extends and consequently the exception provided in Sub Sec. 4(a) of Sec. 69 would apply; Necessarily, therefore, the so called bar engrafted under 69(3) will not apply.

37. Admittedly the Claimant is a Joint Venture of an Indian Company and a Russian Company. It is true that under the Joint Venture Agreement entered into between themselves they have been described as partners, but it may not be correct to come to a conclusion that the Claimant constitutes a partnership firm requiring registration under the Partnership Act so that they can enforce their claim against somebody with whom they have entered into an agreement. A Joint Venture is itself a peculiar entity which conceives of its existence till the purpose for which they came into existence is achieved. In other words, Joint Venture stands dissolved moment when the purpose for which so called partnership had been entered into is achieved. It is, therefore, possible to take a view that a Joint Venture is not identical with partnership firm, though it may be similar in nature. Consequently, in the matter of strong relationship created by such Joint Venture, which is special relationship of combination of partners undertaking jointly some specific adventure, though for profit but without any actual partnership. It is no doubt true that the rights and liabilities of members of the Joint Venture are combined and several but without contract entered into and such Joint Venture providing for an arbitration Clause for resolution of the disputes between themselves, it may not be correct to state that Joint Venture is not entitled to invoke arbitration Clause being unregistered firm. In other words, a Joint Venture need not be a partnership firm in *stricto-sensu* and the Respondent having entered into an agreement with Joint Venture providing a Clause for arbitration of the dispute between the parties, the bar under Sec. 69 of the Partnership Act for enforcing claims under the contract may not arise. But we need not further delve in this aspect and in our view the Claimant Joint Venture will come under the exception 4 of Sec. 69 as one of the participants of the Joint Venture which is not having a place of business in India, which we will discuss later.

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275

38. Mr. Taneja, Learned Counsel, on behalf of the Respondent had placed before us copy of the Joint Venture Agreement wherein M/s. Intertech Lenhydro has been described as Lead Partner. The said Agreement dated 30.01.2002 is at page-62 Vol. I of the Respondent's compilation. According to Mr. Taneja the Joint Venture is neither a sole proprietorship concern nor a company registered under the Companies Act and only a partnership firm under Partnership Act and as such the bar under Sec. 69 would get attracted, if the said venture is not a registered firm. We are unable to accept this contention, since in our view a Joint Venture is though very much akin to a partnership firm, but in the eye of law cannot be treated to be a partnership firm. In New Horizon Ltd. and Others Vs. Union of India & Others (1995) 1 SCC page-478 the Lordship had indicated the meaning of the expression Joint Venture:

"The expression 'joint venture' is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses (Black's Law Dictionary, 6th Edn., P-839). According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (P-117 Vol.23). A joint venture can take the form of a corporation wherein two or more persons or companies may joining together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields (Black's Law Dictionary, 6th Edn. P-342) joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia; Viz; Japan, South Korea, Taiwan, China, Etc. (See Jacques Buhart; joint venture in East Asia - Legal Issues, 1991). There has been similar growth of joint venture in our country wherein foreign companies join with indian counterparts and

3182 के अनुसार

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276

contribute towards and capital and technical know-how for the success of the venture". In the case of GVPREL-MEE (JV) Vs. State of Andhra Pradesh (2008) 10 SCC page-345 the lordships have placed history of the exception in American jurisprudence and it is observed that it is a body formed to create a single business enterprise for profit by way of a contract combined their property, money and skills without creating a partnership pursuance to an agreement. We are, therefore, persuaded to come to a conclusion that a joint venture is not a partnership firm though it has got several indicia of partnership and consequently the bar under Sec.69 for enforcing rights arising under a contract may not get attracted. This view of ours is fortified from the fact that the constituents of the joint venture are entitled to continue their own business in the same field independently and a separate agreement or the joint venture defines roles, responsibilities, share of each firm as well as inter-se legal understanding.

39. It may be borne in mind that the Respondent did not take this objection in their written statement and on the other hand entered into an agreement with Joint Venture with eyes wide open and with full knowledge that the joint venture is unregistered JV and yet provided the Dispute Resolution Clause as Arbitration Clause. Sub Sec. 2 of Sec. 16 unequivocally stipulates that plea that Arbitral Tribunal does not have jurisdiction shall be taken not later than submission of Statement of Defense. It is true that this is not an absolute bar as it is apparent from later part of Sub Sec. 2 and Sub Sec. 4 of Sec. 16 confers jurisdiction on the Tribunal to entertain such a plea if it considers the delay is justified, but in the case in hand there is no indication in the application filed by the Respondent at a later stage as to why this objection has not been taken earlier. Thus there is considerable force in the submission of the Learned Counsel of Claimant that the Respondent is not justified with any reason of plea being taken at a later stage.

40. The Respondent in his rejoinder denying the objections of the Claimant states that the present application is as per the provisions of the settled law and that he is not estopped from taking any contention pertaining to Sec. 69(2) of the

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277

partnership act as the present application is filled immediately upon filing of the rejoinder to plead an additional ground as to the legal bar. It is further submitted by the Respondent that the mandatory requirement of law as to registration of partnership firm can not be allowed to be defeated by resorting to the rule of estoppel. The Respondent relied on 2007(4) Arb. L.R.353(Delhi): Himachal Pradesh Cooperative Vs Umesh Goel & Ors., AIR 1969 SC 1882: Jagdish Chandra Gupta Vs Kajaria Traders (I) Ltd., 2006(4) RAJ 474 (Del) (Para 5,6,7): Ess Vee Traders & Ors Vs Ambuja Cement, RAJ, AIR 1996 SC 2209 (Paras 7,8,10): Krishna Motors Vs. H.B Vittal Kamath, (2004) 3 SCC 155: Firm Ashok Traders & Ors Vs Gurmukh Das Saluja & Ors, AIR 1996 MP 139: Kamal Pushp Enterprises Vs D.R. Construction Co., (2002) 3 SCC 175: Inder Sain Mittal Vs Housing Board, Haryana & Ors and advanced his proposition that the Claimant being a partnership firm is bared under Sec. 69(2) & (3) of the Indian Partnership Act 1932. Sec. 69(2) & (3) of the Partnership Act specifies:

"Sec. 69:

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not effect,-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner".

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278

41. In the case of AIR 1969 SC 1882: Jagdish Chandra Gupta Vs Kajaria Traders (I) Ltd., the issue was relating to appointment of arbitrator under Sec. 8(2) of the Indian Arbitration Act 1940. The appellant Jagadish Chandra Gupta objected, besides the other ground, that the Respondent therein is an unregistered partnership firm and there is bar under Sec. 69(3). The Apex Court has held that "*9. In our judgment, the words 'other proceeding' in sub-section (3) must receive their full meaning untrammeled by the words 'a claim of set-off'. The latter words neither intend nor can be construed to cut down the generality of the words 'other proceeding'. The sub-section provides for the application of the provisions of sub-sections (1) and (2) to claims of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in sub-section (3) and sub-section (4)*". The Respondent contends that the 'other proceeding' includes the arbitral proceedings. In the case of 2006(4) RAJ 474 (Del) (Para 5,6,7): Ess Vee Traders & Ors Vs Ambuja Cement, the matter was regarding appointment of an arbitral tribunal under Sec. 11(4) of the Arbitration and Conciliation Act 1996. The Delhi High Court relied on the Apex Court judgment in case of Jagadish Chandra Gupta supra and held that the application under Sec. 11(4) is to be treated as other proceedings and would be barred under Sec. 69(3) of the Partnership Act. In the case of AIR 1996 SC 2209 (Paras 7,8,10): Krishna Motors Vs. H.B Vittal Kamath, the dispute was regarding the rights flown from dissolution of the partnership firm for settlement of accounts and in that case the partnership deed did not contained a Clause for reference to arbitrate the disputes arising under the contract and the apex court held that it is covered under the exception engrafted under sub-clause (3) of Sec. 69 of the Partnership Act relying on the decision of Jagadish Chardra Gupta case and did not appoint the arbitrator under Sec. 20 of the Arbitration Act 1940. We find that these cases are not applicable to the facts and circumstances of the present case before us as in this case there is an Arbitration Clause and the Respondent appointed their nominee on 16.07.2007 and the Claimant appointed his nominee on 04.08.2007 and the two nominated arbitrators of the parties appointed the presiding arbitrator on 12.10.2007. Hence, the parties have consensually appointed their nominees and the

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279

Tribunal is constituted for resolution of disputes as per the Arbitration Clause under the contract without the intervention of the Court. In the above cases relied by the Respondent the issue was regarding the application for appointment of Arbitrators and such proceeding was treated as other proceeding before the court. We find in the instant case the facts are different and hence it cannot create a bar for the proceeding before this arbitration. In case of (2004) 3 SCC 155: Firm Ashok Traders & Ors Vs Gurmukh Das Saluja & Ors, the Apex court was deciding on the maintainability of an application under Sec. 9 of the Arbitration and Conciliation Act 1996 filed by a partner of an unregistered firm, the Apex court held in Para-11 that *"Sub-Section (1) & (2) of Sec. 69 of the Partnership Act strike at the very root of the jurisdiction of the court to entertain a suit to enforce a right arising from the contract"* and held in Para-12 that *"the bar enacted by Sec.69 of the Partnership Act does not affect the maintainability of the application under Sec. 9 of the Arbitration and Conciliation Act"*. In para-13 it is observed that *"the Arbitration and Conciliation Act 1996 is a long leap in the direction of alternate dispute resolution system. It is based on UNCITRAL model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Sec. 9 under the scheme of the Arbitration and Conciliation Act is not a suit"*. Further, in this case the Apex court held in Para-13 that *"Sec. 69 of the Partnership Act has no bearing on right of a party to an arbitration Clause to file an application under Sec. 9 of the Arbitration and Conciliation Act"*. The Respondent relies on AIR 1996 MP 139: Kamal Pushp Enterprises Vs D.R. Construction Co., which was in appeal before the supreme court and is relied upon by the Claimant in (2000) 6 SCC 659: Kamal Pushp Enterprises Vs D.R. Construction Co. In appeal the Supreme Court has held while disposing the appeal filed before it against the order of Madhya Pradesh High Court held in para 9 that *"the prohibition in Sec. 69 is in respect of instituting a proceeding to enforce a right arising from a contract in any court by an unregistered firm, and it had no application to the proceedings before an arbitrator and that too when the reference to the arbitrator was at the instance of the appellant itself"*. Further the court observed in para-9 that *"the award in this case*

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280

cannot either rightly or legitimately be said to be vitiated on account of the prohibition contained in the Sec. 69 of the partnership act 1932 since the same has no application to proceedings before the arbitrator". Further, the Supreme Court in (2004) 3 SCC 155: Firm Ashok Traders & Ors Vs Gurmukh Das Saluja & Ors in para-14 observed that *"14. ..... In Kamal Pushp Enterprises this court held that the bar under Sec. 69 of the Partnership Act is not applicable at the stage of enforcement of the award by passing a decree in terms there off because the award crystallizes the rights of the parties and what is being enforced at that stage is not any right arising from the objectionable contract. None of the cases show any direct light on the issue at hand. Rather, the under current of dictum in Kamal Pushp Enterprises lends supports to the view we are tentatively taking here in"* and held that Sec. 69 of the Partnership Act has no bearing on right of a party to an arbitration Clause to file an application under Sec. 9 of the Arbitration and Conciliation Act.

42. The Claimant while refuting the contentions of the Respondent submits that this application of the Respondent is not maintainable on the following grounds. (i) JV is not a partnership firm and the Partnership Act does not apply. (ii) the said application is misconceived. (iii) Sec. 69(2) & (3) of Partnership Act does not apply to arbitration. (iv) The application is filed after filing of defense statement and the Respondent's are barred from raising the same. (v) Even assuming that Sec. 69 applies to the present case the Claimant contends that he is covered under Sec. 69(4) that is an exception. The Claimant refers to the contract volume-1 page-236 Clause-13 where the information and instruction to tenderers are given by Respondent Clause-13(iii) is applicable for partnerships and Clause-13(v) is applicable for joint ventures or group of firms and contends that a differentiation that the Respondent himself has made in Clause-13(iii) Respondent has sought for a certified copy of the partnership deed which is applicable to partnership firm, while in Clause-13(v) the partnership firm is differentiated and it is stated that if the tender is by a group of firms / joint ventures the sponsoring firm shall submit complete information pertaining to each firm in the group (as per agreement between group of firms) and state the responsibilities of the firm for tendering and completion of contract etc.

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281

Therefore it is contended by the Claimant that the Respondent himself had made a clear distinction between a partnership firm as at Clause-13(iii) and Joint Venture as at Clause-13(v) even at the stage of tendering itself. The nomenclature partner in the JV agreement, it is contended, will not make the joint venture a partnership firm. Relying on the power of attorney executed by the JV at page-82 of the contract document the Claimant states that PCL a company incorporated under the Companies Act 1956 intends to form an Unincorporated Joint Venture with Intertech-Len Hydro Corporation, Russia for the purpose of bidding and implementation of this project and hence the JV is not a partnership firm. Further reliance is placed on page-250 of the contract document by the Claimant referring to Clause-1(ii) states that "*'Contractor' means the person or persons, firm or company, group of firms or joint venture who have been awarded the works by THDC and his successors and permitted assigns*" and contends that even as per the contract the firm or a company is distinguished from group of firms or joint venture hence on this ground also the JV should not be held to be a partnership firm. The expression joint venture is explained in para-24 of (1995) 1 SCC 478: New Horizon Ltd., Vs Union of India which was relied by the Claimant to submit that in the circumstances in the present case the Claimant is a joint venture. It is further argued with reference to the partnership act under Sec. 6 the mode of determining the existence of partnership is to be determined with regard to the real relationship between the parties by all relevant facts taken together and the explanation 1 & 2 under Sec. 6 specifies mere sharing of profits or gross returns does not make such persons are partners and hence mere sharing of profit does not constitute a partnership. In the JV agreement of the Claimant there is no Clause for retirement of partner as is necessary under Sec. 32 of the Partnership Act. Hence, the Claimant argued that the JV is not a partnership firm. While the Respondent refutes these contentions and submits that even when the name is joint venture the constituents are partners and are bound by the partnership act as all the ingredients necessary for partnership are included in the joint venture, even when there is no provision for retirement, dissolution of the joint venture as is necessary for a partnership firm.

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202

43. The Claimant relies on 2008 (10) SCC 345: Fakir Chand Gulati Vs Uppal Agency Pvt. Ltd., wherein the expression Joint Venture as defined by the Supreme court in the case New Horizon Ltd., Vs Union of India supra was relied by the Apex court and relying on various authorities viz; the American Jurisprudence, Corpus Juris Secundum & Blacks Law dictionary and held in para-30 "*it is now well settled that the title or caption or the nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name may usually give some indication of the nature of the document. The nature and true purpose of a document has to be determined with reference to the terms of the document, which express the intention of the parties. Therefore, the use of the words 'joint venture' or 'collaboration' in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses*". Further, the Claimant contends that the necessary elements are an express or implied agreement, a common purpose that the group intends to carry out, shared profits and losses and each members equal voice in controlling the project and submits that in that case before the Apex court nature of agreement is one of collaboration, not joint venture.

44. The Claimant relies on AIR (2006) AP 169: GVPREL-MEE JV Vs State of Andhra Pradesh the court was seized of matter relating to award of tenders in a writ petition by the petitioner who was joint venture of GVPR Engineers Limited which is a company registered under the company's act 1956 & M/s. Megha Engineering enterprises which was a partnership firm and both these entered into a joint venture in the name and style of GVPREL-MEE JV. It is in this context the court was deciding on the effect of one of the joint venture partner viz; MEE withdrew and the impact of that on the JV. The court made its observations in paras-17 to 24 regarding the various attributes of a JV. In Para-17 the court observed that there is no law on the statute book of India or the state which defines a joint venture being un-incorporated associations, common law did not recognize the relationship of co-adventures, but the passage of time, the judicial decisions recognized what is known as "*joint venture of two*

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or more persons/undertaking to combine their property of labour in conduct of a particular line of trade or a general business for joint profits". After discussing on various definitions of the joint venture it was summarized by the Andhra Pradesh High Court in para-24 as follows: *"on reading decision of Supreme Court and two judgments of Gujarat High Court, it may be summarized that an informal partnership between two or more persons to take up a common enterprise on one time basis is a 'joint venture'. The 'joint venture' involves the factors, like (i) contribution by the parties of money, effort, knowledge and other assets to common undertaking; (ii) joint property interests in the subject matter of the venture; (iii) right of mutual control of management of the enterprise; (iv) expectation of profit; (v) right to participate in the profits; and (vi) limitation of the objective to a single undertaking".*

45. The Claimant relied on 2005 (3) Arb. LR 234 (DHC): Noida Toll Bridge Co. Ltd., Vs Mitsue Marubeni Corp decided by the Delhi High court in the case. The facts of this case are that Noida Toll Bridge is a company incorporated under company's act 1956 while the Respondent Mitsue Marubeni Corporation is an un-incorporated joint venture between two companies incorporated outside India. The contract for the execution of the Delhi Noida Bridge project was entered into between the Petitioner and the Respondent which contract contained an arbitration Clause. The disputes which arose under this contract was firstly referred to a dispute review board as per the contract and then the Respondent invoked arbitration as per the contract. The petitioner and the respondent appointed their respective arbitrators and the two appointed arbitrators appointed the presiding arbitrator and the Respondent who was the Claimant filed the claim petition before the Tribunal. The petitioner there upon filed an application for dismissal of claims, *inter alia* on the ground that the Respondent Claimant was unregistered partnership and therefore it cannot launch any proceedings to enforce a right arising of the agreement in view of Sec. 69(3) of the Partnership Act which was contested by the parties before the tribunal. The arbitral tribunal having considered all the submissions of the parties went to answer the question, whether the bar contained in sec. 69(3) of

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284

the partnership act is applicable to the proceedings before the arbitral tribunal and the court? The Delhi High Court relied on the decision of the Supreme Court in the case of Kamal Pusph Enterprises (supra) and held in para-6 that *"in view of the categorical pronouncement of the Supreme Court, there is no room for acceptance of the submission of the learned counsel of the petitioner that it was only an obiter. Supreme Court was directly concerned with the applicability of Sec. 69 of the partnership act to the arbitration proceedings. Moreover even an obiter dictum of Supreme Court has to be followed [Sarwan Singh Lamba and others Vs. Union of India and others, (1995) 4 SCC 546]. While holding that Sec. 69 of the Partnership Act has no application to the proceedings before the arbitrator, the Supreme Court has taken into consideration its decision in the case of Jagdish Chandra Gupta. In view of the observations made by the Supreme Court in Para-9 of the judgment in Kamal Pushp Enterprises the contention of the learned Counsel for the petitioner to the contrary cannot prevail. The finding of the arbitral tribunal on the point is unexceptionable"*. The Ratio of this case is squarely applicable to the case before this Tribunal as the Claimant is a joint venture and the Respondent is a state owned company and the facts are identical as in this case also the Respondent and the Claimant have appointed their Arbitrators who in turn have appointed the Presiding Arbitrator.

46. Further, in the present case before us the Respondent has invited tenders from Joint ventures as per information and instructions to the tenderers in para-13(v) page-237 of volume-1 of the contract distinctively different from para-13(iii) page-236 for a partnership firm. The Claimant is a joint venture of (i) PCL an incorporated company in India, (ii) Intertech Len Hydro Consortium. M/s. Intertech Service & M/s. Institute Len Hydro project having their registered offices in Russia formed into the said consortium referred to as Intertech Len Hydro Consortium and the registered office in Russia. Thus, the joint venture partners are in-fact co-ventures in terms of the joint venture agreement at Page-62 of volume-1 of the contract document. The Respondent has entered into contract for the said work with the Joint venture as noted above. Further we observe that under the contract entered into between the

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285

Claimant and the Respondent the mode of settlement of disputes is under Clause-60 page-329 & 330 of volume-1 of the contract. The Arbitration Clause under Clause-60(ii) reads as follows:

"60 (II): Arbitration:
Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specification, designs, drawings and instructions herein before mentioned and as to the quality of workmon-ship or material, used on the work or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, design, drawings, specifications, orders or these conditions or otherwise concerning the work, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be resolved through arbitration.

The Arbitral tribunal shall consist of three Arbitrators, each party to appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. The Arbitration shall be conducted in Delhi. The Arbitrators shall be of Indian Nationality".

From the arbitration agreement agreed between the parties we find that the arbitration Clause under the contract is wide enough to include all disputes, claims. Also in this case the Claimant and the Respondent both have appointed their arbitrators and the two appointed arbitrators have appointed the presiding arbitrator. The citation referred to by the Respondent are solely with respect to either appointment of the arbitrator or by the intervention of the court. But in the case before us distinguishingly is that the appointment of the arbitral tribunal is wholly by mutual consent of the parties strictly as per the arbitration agreement agreed under the contract without any intervention of the court. In the case of Jagdish Chandra Gupta Vs Kajaria Traders referred above the issue before the Apex Court was relating to the appointment of the Arbitrator wherein the Court held such application before the Court would fall under 'other proceedings' referred under Sec. 69(3) of the Partnership Act. This reliance is misplaced by the Respondent as in this case the Arbitrators are

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286

appointed by the parties as per the contract and the facts of this case are different. In 2004 (3) SCC 155 case of Ashok traders the Supreme Court held that an application under Sec. 9 of the Arbitration Act cannot be considered as other proceedings. Thus, in cases where there is an intervention by the court, the applications for an appointment of an arbitrator before the court, Sec. 69 (2) & (3) have been made mandatory as such application for appointment before the Court is considered as other proceedings. However we find that the arbitration Act 1996 is a special statute wherein the party autonomy in agreeing to resolution of disputes by a private arbitral tribunal constituted strictly as per the terms of the contract would over weigh the other mechanism of dispute resolution. It is in this context that the view held by the Supreme Court in Kamal Pushp Enterprises case has been relied upon and reiterated in case of Noida Toll Bridge case by the Delhi High Court.

47. There are two other grounds on which the Claimant objects to the application of the Respondent regarding the preliminary objection under Sec. 69(2) & (3) of the Partnership Act seeking rejection of the claims on the ground of non registration by the Claimant. The first one is regarding the delay in filing of this application after the filing of the defense statement. On facts it is found that the statement of defense was filed under Book-I by the Respondent of 12.04.2008. The application on behalf of Respondent taking a preliminary objection regarding non registration of the Claimant firm was filed in the 4th sitting of the Tribunal held on 13.08.2008. The Respondent has admitted in the rejoinder to this application filed on 03.10.2008 that the application is correctly dated 02.08.2008. Hence, the Claimant submits that the Respondent is estopped from raising this plea at a belated stage. The Respondent contends that as this application is regarding maintainability of the claims barred by provisions of Sec. 69(2)&(3) of the Indian Partnership Act there can be no estoppel for raising the legal objection arising out of the mandatory provisions of law and such objections can be raised at any stage during the proceedings. After hearing the parties we find that there can be no estoppel on this issue and the objection raised by the Claimant regarding delay in filing the application on additional ground is non sustainable.

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287

48. The other objection of the Claimant to the application under Sec. 69(2) & (3) of the Respondent is that without prejudice to the other objections raised that in case the arbitral tribunal holds that bar under Sec. 69 of the Partnership Act is applicable to the present case, the Claimants are covered under the exception under Sec. 69(4)(a) of the Partnership Act as the joint venture of the Claimant has two other partners who have their addresses in Russia and are of foreign origin as evidenced from the joint venture agreement at page-62 of Volume-1 of the contract. The power of attorney dated 18.01.2002 at page-84 of Volume-1 of the contract is furnished by Intertech-Len Hydro Consortium, the two Russian partners. Further, the Claimant relies on the correspondences placed in Book-II at page-45, 46 dated 25.04.2006, 51 dated 28.04.2006, 53 dated 29.04.2006, 58 dated 03.05.2006, 67 dated 22.05.2006, 77 dated 07.12.2006 & 83 dated 20.12.2006 which are the letters addressed to / copied to the Russian partners at their respective address in Russia by the Respondent. The Claimant submits that these show that the business of the foreign partners done directly from off shore / over seas / abroad and that they are not having any business place in India. The Claimant relies on Sec. 69(4)(a) which says that *"this section shall not apply to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories, or situated in areas to which by notification under Sec. 56 this chapter does not apply"* and contends that the first part of this Sec. 69(4)(a) would carve an exception for the applicability of Sec. 69 to the Claimant in the facts and circumstances of the case. The Respondent refutes this contentions on the ground that the firm / Claimant / PCL-Intertech Len Hydro Consortium JV has a place of business in India i.e., at Koteshwar and merely because two of the partners had no place of business in India the exception under Sec. 69(4) has no application.

49. Sec. 69(4) of the Partnership Act is an exception to the earlier provisions of the act, in other works, in respect of firm or partners in a firm if they have no place of business in India then Sec. 69 will have no application. Admittedly, the Joint Venture is between PCL and Intertech Lenhydro Consortium, the later

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288

entity is a Russian entity having no place of business in the territory of India to which the Indian Partnership Act apply. Sub Sec. 4 of Sec. 69 is a general exception to rule laid down in Sub Sec. 1 and Sub Sec. 2 of the said section. Even if the joint venture is held to be a partnership firm yet one of the constituents of the Joint Venture, namely, Intertech Lenhydro Consortium not having any place of business in India would be competent to file proceeding before an Arbitral Tribunal to enforce rights arising from the contract between Joint Venture and the Respondent, even if the said Joint Venture is not a registered body. The bar of the non registration engrafted in Sec. 69 of the Partnership Act will have no application. In aforesaid premises, we are of the considered opinion that the preliminary objection of the Respondent that Arbitral Tribunal is not maintainable as the Joint Venture is unregistered partnership firm is not sustainable. We are of the opinion that the claim of the Claimant has to be adjudicated on merits and cannot be thrown out on the grounds of maintainability.

50. In the light of the above facts and circumstances we find that:

(i) The parties have consciously agreed to under the contract for resolution of the disputes through arbitration as per Clause-60(ii) of Volume-1 of the contract.

(ii) The parties have appointed their arbitrators without any intervention of the court for resolution of disputes as per the agreement and the tribunal is constituted without any intervention of the Court.

(iii) The claims brought up before the tribunal by the parties cannot be termed as a suit before a court as per Sec. 69(2) and hence the proceedings are not proceedings before a court included in 'other proceedings' under Sec. 69(3) relying upon the squarely applicable decision in the case of Noida Toll Bridge by the Delhi High Court which relied on the Apex Court decision of Kamal Pusph Enterprises.

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289

51. From the above we find that the view of (2000) 6 SCC 659: Kamal Pushp Enterprises Vs D.R. Construction Co. and 2008 (10) SCC 345: Fakir Chand Gulati Vs Uppal Agency Pvt. Ltd., of the Apex court would lend support to the view that the Arbitral proceedings before this tribunal, where the arbitrators are appointed by the parties as per the agreed procedure under the contract and the tribunal has been constituted by the two appointed arbitrators, cannot be considered as a suit before a court as per Sec. 69(2) or it would come under the term other proceedings to enforce the provision of Sec. 69(2) as specified in Sec. 69(3) of the Partnership Act based on the facts and circumstances brought out above. Accordingly we reject the additional ground of the Respondent regarding the bar on non registration of the Claimant JV.

52. **In the light of the above observations and findings relying on pleadings, arguments putforth by the parties and based on the facts and circumstances of the case our answer to Question-1 is NO.**

Question-2: Whether the Respondent is liable for the delays and breaches alleged by the Claimant in pages-19 & 20 of Document C-1 briefly stated in para-8 above at Sl. No. i to xi?

53. The Claimant states that the various delays caused in the project are not attributable to him while the Respondent refutes that these delays are caused due to non-mobilization of the required men, material & machinery for executing the work by the Claimant and also the absence of the Russian partners on whose expertise the work was awarded to the joint venture. These are individually dealt within the following paragraphs.

54. **Delay in giving possession of work sites and borrow area sites:** Claimant submits that he had agreed for the program of completion of work in 45 months as per the schedule agreed at pages- 221 & 222 of the contract according to which the commencement of work is from September-2002 and completion is on May-2006 over a period of 45 months. Further, the Claimant submits that in this program it is stated *"note: The construction schedule is subject to*

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following: (1) The land and area for various construction fronts including land for approaches and other miscellaneous works made available by THDC in time (2) The construction drawings are made available well in advance of start of each construction activity". The Claimant contended that the original period of 48 months at the time of tendering was reduced to 45 months and the program was given accordingly and further contended that this reduction was at the instance of the Respondent. We find that except that it could be taken as a statement that has no relevance to the contract since the agreement entered into is for 45 months and the Claimant cannot putforth any claim on this account after agreeing & entering into the contract. Based on these conditions we find that it is the obligation of the Respondent under the contract to provide the land and drawings in time to achieve the progress as per the agreed schedule. The Respondent advanced his contention that as per Clause-10(ii) page-235 of Vol-1 of the contract that the Respondent was to handover the land on 'As is where basis' in phased manner depending upon the construction schedule and the requirement. The Claimant contested this proposition as this Clause is not applicable for the handing over of site for the execution of work. The Clause 10(ii) at page-235 of Vol-1 of the contract giving the information and instructions to tenders reads as follows: *"(ii) Requirement and availability of land and other facilities for his enabling works, colonies, stores and workshops etc. The areas for allocation to the Contractor for his infrastructure facilities, disposal etc. are marked in one of the tender drawings. The area(s) so given on 'As is where basis' will remain the property of THDC and will be handed over to THDC on completion of works".* We find from this Clause what is specified and agreed is regarding the requirement and availability of land and other facilities for ***(a) his (Contractor's) enabling works, colonies, stores and workshops etc. (b) The areas for allocation to the Contractor for his infrastructure facilities, disposal etc. are marked in one of the tender drawings. (c) The area(s) so given on 'As is where basis' will remain the property of THDC and will be handed over to THDC on completion of works.*** We find that this Clause does not speak of the work site but it speaks only of enabling facilities and infrastructure facilities such as colonies, stores, workshops etc., and therefore reliance of the Respondent that this Clause

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enables the Respondent to give the land for the execution of work site as per this Clause is not sustainable and therefore the contention that the Respondent can give the site in *"As is where basis in a phased manner"* based on this Clause is not borne out as per the Clause-10(ii) under the contract. Therefore the handing over of the site for the executions of the work under the scope of work and handing over of the necessary borrow areas as per the contract, according to us, is an obligation which the Respondent had to fulfill.

55. In order to appreciate the rival contentions of the parties regarding various aspects of delays and the disputes the details of construction covered & included in the scope of work are briefly stated here in below:

i. Diversion tunnel works at the dam site including upstream, downstream coffer dams and the concrete lining of the diversion tunnel to enable construction of the main dam and the power house across river Bhagirathi.

ii. Construction of a concrete gravity dam 97.5mtr high and 253mtr long at the top of dam located at elevation 618.5mtr. The length of left bank non overflow section, central spill way section, right bank non overflow section and power intake sections are 52mtr, 87mtr, 23.5mtr & 90.5mtr respectively.

iii. 4 power intakes spaced 18mtr apart and integrated right bank portion of the dam having 4 numbers of penstocks of 6.5mtr diameter each leading to power house.

iv. A surface power house at a distance of 125mtr of the axis of bank on the right bank of river Bhagirathi with a width of 48.5mtr, a length of 123mtr and 53mtr high above the deepest level to house 4 units each of 100MW installed capacity proposed near village Pendaras on the right bank of the river Bhagirathi.

56. As per the tender drawings under the agreement, the excavation for the dam was from the deepest foundation level of elevation 500mtr up to 635mtr in the

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left bank and 680mtr on the right bank in order to construct the dam of 253mtr length with its top level of 618.5mtr. The excavation drawings issued in the year 2003 also specified the same elevations. Further for various reasons as stated by the Claimant, not attributable to the Claimant, the top level of excavation on the right bank was increased from 675mtr to 780mtr i.e., by 105mtr and on the left bank the excavation level was increased from 630mtr to 750mtr i.e., by 120mtr. The Claimants contention is that this area of the site required for the excavation to be carried out and the execution of the work at the dam and power house site, and handing over of the land by the Respondent is a basic obligation of the Respondent as per the condition putforth in the schedule of program agreed under the contract. The Respondent failed to fulfill and hand over the area which was not acquired and was also not free from encumbrances. The other area on which the dispute lies is regarding the handing over of the borrow areas / quarries for extraction of aggregates for production of concrete. The tender drawing specifies the location of the two borrow areas B1 & B2 in Sera, Mulani & Gairogisera villages as in drawing at page-90 of the claim statement. The Respondent's contention is that this area for working on the site is to be handed over in a phased manner in 'As is where basis' which contention we have dealt with in the previous para, as not sustainable under the contract.

57. The status of the site and the land as on 31.09.2002 when the works were taken up after award, as stated by the Claimant is that

i. Right bank dam site work area, where Pendaras village is located, the land acquisition proceedings was still to be completed and the area was still to be cleared of hindrances from local living habitants and agricultural activities around.

ii. Borrow areas B1 & B2, which lies in villages Mulani and Gairogisera, the land acquisition proceedings was still to be completed and the area was still to be cleared of hindrances.

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iii. The work area on the left abutment was also not free from hindrances due to presence of electric poles.

iv. The local villagers continued to live in their dwellings located in the works area and quarry area sites, and caused frequent agitation and interruption to works.

v. The inlet area of the diversion tunnel was filled up with land slide materials and approach to tunnel was not available.

58. In support of this non-handing over of the land, the Claimant produced the copy of status report of work made by the Respondent for April 2008 at page-1024 & 1025 of C-2. Under para-5 of the status report of the Respondent regarding rehabilitation, we find at page-1024 the Respondent has stated that *"the villages Pendaras and Mulani have been evacuated completely in April-05 and January-06 respectively. The village Gairogisera has also been evacuated and quarrying of material has started from the village"*. Also the details of status of acquisition of the three villages Pendaras, Mulani & Gairogisera are indicated in ANNEXURE-10 at page-1027 to this report. From this Annexure at page 1027 we find the following recorded facts.

i. Pendaras Village: Area is 68.334 acres and the award towards the acquisition was made on 16.04.2003 and is fully evacuated in April-2005.

ii. Mulani Village: Area is 12.775 acres and the award towards the acquisition was made on 21.02.2003 and is fully evacuated in August-2005.

iii. Gairogisera Village: Areas is 16.177 acres and the award towards the acquisition was made on 21.10.2003 and is fully evacuated in March-2007.

As these details show the contemporaneous status admittedly by the Respondent stating that Pendaras village is fully evacuated in April-2005, Mulani village is fully

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294

evacuated in March-2007 which proves that hindrances and impediments due to non acquisition / non evacuation of the dam area in the Pendaras village and the borrow area B1 & B2 coming under Mulani & Gairogisera villages continued to persist till these dates. Further, the Claimant produced a plan of the Pendaras village superposed over various components of the dam and the power house at Plate-7, page-989 of the Rejoinder C-2 to depict the hindrances and obstructions due to non acquisition of the work site area for the dam and power house. An enlarged plan of the same was produced by the Respondent on 05.07.2009 showing the details of the interferences on the works site area on right bank due to the presence of groups of houses and fields in Pendaras Village. This drawing shows that there are a number of groups of houses and fields on the right bank even below the top of dam EL. 618.5m and also much above up to elevations of EL. 680m & 690m extending over the areas of the right bank excavation foundation, the power house adjacent to the spill way, stilling basin on the right side. This shows that factually hindrances and obstructions for the working on the right bank were present due to the groups of houses and the village which admittedly were evacuated only on April-2005.

59. The Respondent produced the extract of MB's in MB No. 2168 on 04.04.2009 and relied on this which is corresponds to period from 24.11.2002 up to 10.03.2003. This shows that the original ground levels were taken during this period and the Respondent submits along with that village wise detail of private and civil soyam land required for the Koteshwar Dam project. At Sl. No. 1 of this table against the Village Pendaras the private land holding area is shown as 68.334 acres and the purpose as indicated therein is *"for main works i.e., dam, spillway, power house, switch yard, slope stabilization, access tunnel, haul road, project safety zone, concrete mixing plant, work shop and other infrastructure for mechanical works, power equipment erection, site construction camps (I/C works colony)"*. Hence, undisputedly the village Pendaras and its acquisition is required for the total works to be executed under the contract. Also in the aforesaid statement at Sl. No's. 5 & 6, the villages Mulani & Gairogisera have been specified as required for the purpose of borrow area B1 quarry and borrow are B2 quarry respectively requiring an area

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295

of 12.775 acres and 15.981 acres. The Respondents document at page-1027 showing the project progress report dated April-2008 specifies the areas of Pendaras, Mulani & Gairogisera villages as 68.334, 12.775 & 16.177 respectively. Further, in this progress report the dates of acquisition awards made against these three villages are shown as 16.04.2003, 21.02.2003 & 21.10.2003 for Pendaras, Mulani & Gairogisera respectively.

60. After the acquisition award is made it is further reported that the three villages are fully evacuated in April-2005, August-2005 & March-2007 respectively for Pendaras, Mulani & Gairogisera villages. The Respondent produced 'ABHINIRNAYA' of one page in Hindi with respect to village Pendaras and relied that as per Sl. No. 8 the date of possession was 05.06.2002 and therefore contended that the work site area was in possession of the Respondent and denied the Claimant's contention that the village Pendaras was not acquired. We find from the above documents that the acquisition of Pendaras village is made under Sec. 17 of the Land Acquisition Act 1894 i.e., under the special powers in case of urgency. Further the Respondent document at page-1027 shows that even though the symbolical possession may have been with the Respondent on 05.06.2002, the full evacuation of the village Pendaras is admittedly made in April-2005, much after the acquisition award is made on 16.04.2003 and evacuated in April-2005. In view of the legal possession the original ground levels as per the extract of MB No. 2168 were apparently possible but we find that until the full evacuation of the village Pendaras is made, there were physical hindrances to the execution of work as the evacuation was fully made only in April-2005 and the site was not fully unencumbered, although, admittedly the work was being executed in available areas and in a haphazard manner, not as per the schedule or planning. Further, we find that regarding the borrow areas at Mulani and Gairogisera these were fully evacuated in August-2005 & March-2007, respectively, much after the acquisition award in respect of these two villages were made on 21.02.2003 & 21.10.2003 respectively. The letters dated 18.01.2003 at page-274 as a reply to memo dated 02.01.2003 of the Respondent at page-5 of Book-I, letter dated 21.03.2003 page-280 of Volume C-1-2, letter dated 29.03.2003 at page-283,

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letter dated 26.04.2003 at page-284, letter dated 12.07.2003 at pages-289 & 290, letter dated 13.02.2004 at page-296 and other letters were relied by the Claimant. The Claimant replying to the Respondent's communication dated: 23.06.2003 at page-9 Book-II submits that in his letter dated: 12.07.2003 at page-289 of C-1-2 that he has brought out the fact that even on that date when the Claimant was to work from elevation 670m he was forced to work from elevation 610m on the right bank due to the presence of villagers and not evacuating the people and that further he has stated that this was causing extra cost, dislocation of the Claimant's planning. The Claimant had stated in his letter dated 26.04.2003 at page-287 that the land for camp office, stores, shed, installation of crushing unit and batching plant are required to be handed over to the Claimant so as to achieve the progress. This letter also raises the issue of non handing over of the borrow area B2, non handing over of the right bank where the village Pendaras is situated. The Claimant further relies on the letter of the Respondent dated 16.04.2004 at page-298 where the Respondent has admitted the hindrance caused due to non handing over of the right bank. We find in this letter dated 16.04.2004 the Respondent has written *"Excavation of dam and power house area on right bank is going on. Some families of rehabilitees are still residing the Pendaras village. Proper approach for movement of these people needs to be provided during the excavation work. Therefore you are requested to provide proper approach to the residing families as per the convenience of your excavation work"*. This highlights and proves, admittedly by the Respondent, that people in the village Pendaras were living in the area required to be excavated for the purpose of the dam and that the village Pendaras was not fully evacuated till April-2005 as per the Respondents document as noted by us earlier. Further we find from the documents at page-328 at Volume C-1-2 dated 13.02.2006 the Respondent has written to the Claimant stating that *"Garogi Sera villagers held meeting with Dist. Magistrate, Tehri Garhwal on 25.01.2006 at New Tehri wherein they have agreed to allow start of work. Even house demolition work is in progress. You have been intimated at site & even joint site visit to Garogi Sera done. As discussed and finalized work at Garogi Sera be expedited by deploying proper manpower & Machinery so that quarrying of material can be started"*. Thus,

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we find that the borrow area B2 was admittedly not available to the Claimant till 13.02.2006 or at the most 25.01.2006 which is the date of the said meeting, while the borrow area B1 was evacuated admittedly in August-2005.

61. Taking an overall view of above situation we find that the borrow areas B1 & B2 for extraction of aggregates were not available until the evacuation was made, thereby the land for the borrow areas and the quarries for extraction of aggregates was not handed over to the Claimant unhindered for execution of the work and that the land in the working area of the site was also not handed over unhindered till April-2005 when the Village Pendaras was admittedly fully evacuated. The delay claimed on account of the non handing over of land and the borrow areas by the Claimant is from September-2002 to May-2005 accounting for 32 months for handing over of Pendaras village and from September-2002 to November-2006 for giving possession of the lands for the borrow areas B1 & B2. The effective delay is from September-2002 to November-2006 i.e., for a period 50 months as the 32 months delay in handing over of the Pendaras village is a concurrent and over lapping delay with the handing over of borrow areas B1 & B2 and this delay of 50 months according to us is not attributable to the Contractor for the reason of not handing over the land on the right bank around Pendaras Village and not giving possession of land in the borrow areas of B1 & B2.

62. **Delay due to geological reasons, slope failures on right bank and left bank and their stabilization:** The Claimant submits that as per the tender drawing at page-88 & 89 of Volume-C1 the top edge of excavation on the left bank was at elevation 630m and on the right bank it was 675m so as to excavate for the foundations of the dam and reach the level of 521.00m. The top of the dam is at elevation 618.50m. Because of the adverse geological conditions, the Claimant submits, that actual executed slopes had to be flattened to 1:1 as against ¼:1. The Claimant relies on his letter dated 28.11.2005 at page-372 notifying that because of the unstable mass at right bank, the work had to be stopped and that from 22.11.2005 major slides also started and the various benches of excavation and power house intake area have come under the

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danger zone and informed the Respondent of his fear that some major slide may paralyze the total activity on the right bank. On 02.07.2005 the Respondent in his letter at page-373 of volume C-1-2 enclosed revised sketch of typical stabilization of said zone between Ch. 60 & 110 downstream of the axis on the right bank. Further the Claimant relies on the drawings issued for construction in 2003, as stated in the Claimant's letter dated 08.07.2006 at page-363 of Volume C-1-2, and the Respondent's letter at page-367 dated 12.07.2006. We find from these letters that the Respondent after issuing the drawings in his letter dated 02.01.2006 states in his letter dated 12.07.2006 that *"further drawings shall be issued after assessing the EL 675.00 bench"*. The instability of the slopes and the treatment that has to be made for removal of loose rock / boulders involved safety and stability consideration, requiring further work to be carried out till the treatment was finalized by the Respondent as informed by the Claimant in his letter dated 13.12.2005 in page-359 of volume-C-1-2. The Claimant submits that the Respondent furnished the drawings for this treatment on 02.01.2006 at page-360 which had some short comings in the details and the Claimant requested for addressing these in his letter dated 04.01.2006. Thus the Claimant contends that the excavation were to be made up to the top level of 750m as against 630m on the left bank and upto 780m as against 675m on the right bank. Further, the Claimant contends that even after the excavation and stabilization of slope works were carried out as per the directions of Engineer-in-charge and as per drawings in consultation with the resident geologist, there occurred heavy slips of the slope and sloughing. Based on this the Claimant contends that the Respondent Engineer-in-charge and the resident geologist decided that the excavation work with suitable slope and benches be extended up to elevation 720m. Based on these and various documents produced before us the Claimant submits that there was an abnormal geological variations which resulted in (a) increased quantities of excavation, (b) the excavation elevations / heights are increased from the top elevation of 630m to 750m on the left bank and from 675m to 780m on the right bank, (c) the increase in the top level of excavation is 120m on the left bank and 105m on the right bank as compared to the original levels as per the tender, (d) due to the adverse geological features met with the excavated

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slopes executed as per the drawings were unstable and resulted in slips and mass slides of the rock / bouldery strata, (e) this required revision in drawings and executing slope protection works as per further drawings and the directions at site. All these entailed considerable time and also risk. Further the Claimant submits that the delay is caused from Nov-2005 to Dec-2007 i.e., for a period of 24months and out of this 24months period the period of delay from Nov-2005 to Nov-2006 is an overlapping delay with the delay in giving possession and hence the net effective delay beyond Nov-2006 up to Dec 2007 is 13 months for which he is not responsible.

63. *Per-contra*, the Respondent refutes the contentions of the Claimant and submits that the Respondent had in the instructions and information's to bidders which forms a part of the contract under Clause-10 page-234 Volume-1 of the contract that the Respondent had made it clear *"that the tenderers in their own interest are also advise(d) to inspect and examine the site and its surroundings and satisfy themselves before submitting their tenders in respect of the site condition including but not restricting to the following which may influence or effect the work or cost thereof under the contract"*. Further the Respondent contended that he had specifically provided in para-(v) under the said Clause-10 *"Geological, meteorological, topographical and other general features of the site and its surroundings as are pertaining to and needed for the performance of the work"* which the Claimant was to inspect. Accordingly the Respondent contends that the Claimant had the responsibility of examining the site before tendering itself and hence he cannot raise this as an issue. Further the Respondent also relied on para-12 of the instructions to bidders at page-236 Volume-1 of the contract wherein it is specified that *"The tenderers should note and bear in mind that the Corporation shall bear no responsibility for the lack of acquaintance of the site and other conditions or any information relating thereto, on their part. The consequences of the lack of any knowledge as aforesaid, on the part of the tenderers shall be at their risk and cost and no charges or claims whatsoever consequent upon the lack of any information, knowledge or understanding shall be entertained or payable by the Corporation"*. Accordingly the Respondent contends that the Claimant

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being a qualified firm having adequate experience of executing hydro projects in such geological conditions cannot raise any liability on the Respondent on geological surprises. The Claimant submitted that based on the facts and circumstances of the site situation even the Respondent had not anticipated such geological variations even after conducting geological investigations over a few decades and that the Claimant as a bidder cannot be expected to cover all the geological risks and surprises in a short period of 34 days available for bidding and further more that the Clause-10 & Clause-12 of the instructions to bidder cannot be pressed into action against the Claimant since site situation was all together different which resulted in failure of excavated slopes as per the design drawing and also that the failure of these excavated slopes, slippage of boulders and rock mass resulting in the Respondent redesigning the slopes and ordering adoption of slope stabilization methods involving extra items would amply substantiate the Claimant's contention that there were geological surprises which resulted in delays that were not contemplated by him at the time of bidding leading to the formation of the contract. The Claimant relied on the extracts from the book on tunneling contract and site investigations by P.B. Attewell, E & FN SPON Publications, first edition-1995 to advance his arguments that claims on account of changed circumstances from what was prevalent at the time of tendering are permitted due to actual changes in the geological and geotechnical conditions. Further the Claimant stated that the investigations were made over decades by the Respondent and the designs made on that basis changed radically during the execution, as in this case, due to change in geological conditions coupled with non handing over of the area and restricting the working in bits and pieces, the claimant is entitled to his claims.

64. We have examined the various documents relied on by the parties and after hearing the rival contentions of the parties we find that the actual conditions at site leading to the failure of the slopes and the slope stabilization methods adopted to the excavated slopes involving flattening of slopes resulting in increased quantity of excavation, additional item of installation of geo-grid and geo-textiles, providing dry stone and boulder pitching that were executed

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based on the design drawings issued would lead us to a conclusion that there were delays not attributable to the Claimant due to the changed conditions at site due to the geological features. The total delay is claimed from Nov-2005 to Dec-2007 accounting for 24 months. As the delay from Sep-2002 to Nov-2006 is an over lapping delay which period is already covered in the delay in handing over of possession of land and borrow areas and the right bank, the net delay on account of the delay due to geological reasons is from Nov-2006 till Dec-2007 which accounts for a net delay of 13 months.

65. From the above we find that a net delay of 63 months from September-2002 to December-2007 on the grounds of delays in handing over of land on right bank around Pendaras village, delay in giving possession of borrow areas B1 & B2 and delay due to adverse geological reasons is not attributable to the Claimant. The Claimant has putforth additional grounds of delay as per page-349 of C-1-2 and C-1:

(a) Delay in giving decision for concrete placement methodology from Nov-2004 to March-2006 accounting to 17 months.

(b) Delay due to treatment of cracks in the foundation blocks of the Dam from Oct-2006 to Mar-2007 accounting to 6 months.

(c) Change in specification of cement & FM of sand from Oct-2006 to Oct-2007 accounting to 12 months.

(d) Stoppage of work by local public - the delay continued through out the execution of works however these are claimed as overlapping delays.

(e) Delay in release of construction drawings - the delay continued through out the execution of works however these are claimed as overlapping delays.

66. The Claimant submits regarding delay in giving decision and changes in concrete placement methodology that under the contract volume-1 pages 95 to 155 the construction methodology proposed for the placement of concrete in dam, power house and associated works at page-122 was through a twin cable way of 20 ton capacity and a span of ±360m across the river keeping in view the limits of excavation as per the tender drawing for the length of the dam which

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was 253m at the top level of elevation 618.5m. The Claimant further submits that letter dated 11.03.2002 at page-159 of Volume-1 of the contract addressed to the Respondent informed alternate methodologies for concrete placement viz; (i) concrete placement by cable way & (ii) concrete placement by erecting trestle bridges over which moving cranes would carry the concrete. Further as per the enclosure to the said letter based on the discussions held with the Respondent the Claimant submits that it was decided that both alternatives (i) & (ii) would be kept open and a final decision to use either of these alternatives shall be taken after the award of work and consultations with Respondent of THDC and that as desired by THDC at the pre-award stage, the Claimant had submitted the methodology of concreting with both the alternatives which was also reiterated by him in their letter dated 20.07.2002 under para-3 at page 169 of volume-1 of the contract stating that the methodology will be finalized jointly with project authorities on award of work. The Claimant's contention is that owing to the site conditions and the adverse geological conditions met with at site concreting by cable way was not possible as the excavations were to be made much beyond the original limits and heights as contemplated in the tender. There is a separate claim by the Claimant on this account under CLAIM-7 for having purchased the cable way equipment but not capable of being utilized at the site. The Respondent refutes the contentions of the Claimant that there was any delay by the Respondent as it was the Claimant who was responsible for the delay in not mobilizing the required equipment and not obtaining the approval from the Respondent, not making the presence of the Joint venture partners to obtain their technical advise and expertise on which basis the Claimant JV was qualified. At this juncture for determining the delay we find that it suffices to say that the delay on account of this decision even if agreed to is an overlapping delay as the delay claimed is from Nov-2005 to Mar-2006 and therefore it does not affect the net cumulative delay of 63 months not attributable to the Claimant.

67. Similarly regarding the delay due to treatment of cracks in the foundation blocks of the dam, the delay from Oct-2006 to Mar-2007 and the delay in the

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change in specification of cement and FM of sand from Oct-2006 to Oct-2007 stated by the Claimant as not attributable to him but is refuted by the Respondent, both parties relying on various documents. The fact is that this is an overlapping delay which is covered with in the 63 months of net delay. Hence, we find that insofar as these delays are concerned the net delay comprising all the delays and ignoring the over lapping delays is 63 months which is not attributable to the Claimant. The Claimant had sought for extension of the contract up to September-2009 i.e., for a period of 40 months in his letter for seeking the second extension while the Respondent has granted an extension EOT2 up to June-2009 i.e., for a period of 37 months from the original period of the contract ending on 31.05.2006. It is submitted by the Claimant that for the present, in this Arbitration before this Tribunal the subject of delays placed is to the tune of 40 months as per the claim statement. Hence, we are limiting our jurisdiction only up to September-2009 while we were informed by both the parties that the work is in progress and is in the final stage of completion at the end of the proceedings in 2010.

68. **In the light of the above observations and findings relying on the pleadings, arguments putforth by the parties and the facts and circumstances of the case our answer to Question-2 is the affirmative. We hold that the Respondent is responsible for delay and committed breach of the obligations under the contract as established by the Claimant.**

Question-3: Whether the Claimant is liable for the breaches and delays alleged by the Respondent as per statement of defense briefly stated in para-9 above at Sl. No. i to v?

Regarding Joint Venture partner not being present:

69. The Respondent contends that the Claimant is a joint venture between (1) M/s. Progressive Construction Limited (PCL) having its office in India & (2) M/s. Intertech Service (Intertech) & M/s. Institute Lenhydro Project (Len Hydro). The Co-ventures Intertech & Len Hydro having their offices in Russia have together formed a consortium called Intertech Len Hydro Consortium. The Joint

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304

venture is in the style and name of PCL-Intertech Len Hydro Consortium which participated in the bid, was the successful bidder and the contract for execution of this work is awarded to this joint venture. The Respondent submits that the prequalification requirements were jointly satisfied with PCL satisfying the requirements 1 & 3 of the prequalification and M/s. Intertech Lenhydro Consortium satisfying the requirements 2 & 4 of the prequalification. The Respondent further submits that as per the joint venture agreement between M/s. PCL & M/s. Intertech Lenhydro Consortium page-67 of Volume-1 of the contract the specific duties and responsibilities are agreed as follows:

"INTERTECH LENHYDRO CONSORTIUM:

a. *Coordinate in obtaining necessary designs, technical know-how for execution of the project.*
b. *Coordinate all activities concerning import of material and equipment needed by Joint Venture for speedy completion.*
c. *Formulate and implement quality assurance plan.*
d. *Arrange periodical services of exports during execution of the contract.*
e. *Any other responsibilities assigned by the Management Board.*

PCL:

a. *Coordinating the activities of the Joint Venture in timely preparation & submission of tender.*
b. *Conducting the commercial & Technical negotiations with the Employer.*
c. *Arranging major plant and machinery.*
d. *Arrange and provide performance and bid securities".*

Based on this, the Respondent contends that the entire responsibility for the execution of the contract was upon the Intertech Lenhydro Consortium and the PCL had more of a role of a coordinator and a facilitator and to arrange for the men and equipment and provide performance / bid security. The Respondent submits that none of the joint venture partners including the lead partner M/s. Intertech Lenhydro Consortium was available at site from the very beginning and also no management board was formed as per the joint venture agreement.

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305

This non availability coupled with lack of mobilization of men and machinery was the cause for non adherence to the agreed time schedule for completion of 45 months i.e., by 31.05.2006 as stated by the Respondent. Further, the Respondent relies on page-157 of the contract volume-1 letter dated 08.03.2002 where the JV partners gave an undertaking confirming that 'Intertech Len Hydro Consortium shall be fully involved in construction and implementation of Koteshwar dam and other allied works by way of providing adequate experienced key personnel and other inputs as required enclosing revised organization chart'. The Respondent states that this undertaking given before the contract was awarded and the responsibilities of the joint venture partners as under the JV agreement were not adhered to by the JV partner after the contract was signed and during the construction period as no responsible person from the joint venture was available at site.

70. The Respondent relies on his letter dated 23.06.2003 which is in response to the letters dated 18.01.2003, 26.04.2003 of the Claimant giving the brief status of the work and the impediments at the site causing delays and confirming the presence of Engineer R.K. Mahapatra and other senior engineers at the site. The Respondent in his letter dated 23.06.2003 has refuted reasons given by the Claimant and stating that the work is not progressing on the left bank which is free from all hindrances whereas on the right bank some restricted area which was made available was sufficient for full deployment of the machinery available at that point of time and the Respondent further contends that the delay in progress is only because of the non availability of machinery. With regard to the borrow areas B1 & B2 quarry sites the Respondent has stated in this letter dated 23.06.2003 that *"You have been well informed by THDC officers during the project familiarization visit by your representative before tendering process, that quarry sites are reserved for use of Koteshwara dam project and all land below elevation ±615m along the upstream course of river is under submergence and are being acquired by THDC"*. We find this acquisition was admittedly not completed on 23.06.2003. We find that with regard to the borrow areas what is stated in the letter dated 23.06.2003 is an expression of intention to acquire the land while the actual acquisition and

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handing over of borrow areas B1 & B2 were fully evacuated admittedly in August-2005 & March-2007 respectively as already observed by us in para supra.

71. The Claimant has replied the letter of the Respondent dated 23.06.2003 in his letter dated 12.07.2003 at page-289 Volume-C-1-2 highlighting the failure of the Respondent with regard to the non availability area on the right bank due to non evacuation of the village Pendaras, not making available obstruction free site for camps, stores & workshops, due to changed conditions the methodology of excavation was to be made bottom upwards, B1 & B2 quarries were not handed over and requesting for expediting the vacation of the villages and making available construction drawings well in advance. And hence the Claimant refutes the contentions of the Respondent that the delay was caused due to JV partners not being present, no expertise available and there were lack of men and machinery. The Claimant refutes the contention of the Respondent that the PCL in the JV agreement of the Claimant was only a facilitator relying upon the letters at pages-996 dated 06.11.2002 & 998 dated 08.11.2002 of C-2 Rejoinder that the list of personnel already at site at page-1004 show that the persons nominated as technical and administrative staff were all Indians and that the Respondent did not have any objection to this. The Claimant further contends inviting reference to the JV agreement at page-65 of Volume-1 of the contract that a management board was constituted and the day to day site management is looked after by the project director and further that the Russians partners should be at site is not a requirement. Accordingly the Claimant submits that the JV has acted in accordance with the terms of the JV agreement and also have complied with the requirements of the contract between the Claimant and the Respondent. With regard to the undertaking dated 08.03.2002 at page-157 volume-1 of the contract the Claimant submits that the site organization chart at page-158 is replacement to the site organization chart at page-90 of the contract and drew our attention to the difference that the technical advisors in page-90 were designated for PCL and Len Hydro in page-158 and these adjustments in site organizational chart are based on the agreement of the JV according to the requirement. The Claimant further submitted that the contract defines the word 'Contractor' as

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M/s. PCL-Intertech Len Hydro Consortium JV and there is no distinction or differentiation between the foreign partner or the Indian partner and the contract recognizes the party as only the Contractor that is the Claimant.

72. The Respondent further submits that as the Russian partners did not heed to the several requests to attend the meetings and be present at the site, finally the matter was reviewed by the Secretary (Power), Government of India on 09.08.2005 at pages-26 & 27 of Book-II wherein the Secretary (Power) also expressed concern over the unsatisfactory performance and the CMD of the Respondent mentioned that as informed to the Secretary (Power) that despite repeated requests, the Joint Venture partner of PCL (Intertech Services Institute / Len Hydro Projects) have not visited the project site nor approached THDC for any technical discussions and further submitted that this meeting was also attended by the representatives of PCL, CWC, THDC & Ministry of Power as at page-28 Book-II. In this meeting the president operation of PCL assured that a senior man at the rank of GM shall be posted immediately to the project site and also assured that the joint venture partner shall be visiting the project site shortly. Further, it was brought out by the Respondent that in this meeting the Secretary (Power) directed that *"a PERT chart should be immediately prepared for each package showing weekly targets. It was agreed (if) there is no improvements and corrective actions are not taken with in a reasonable time the contract may have to be short closed"*. Further, on 16.11.2005 a meeting was taken by the CMD of the Respondent at Rishikesh vide page-35 & 36 of Book-II, wherein the representatives of M/s. PCL-Intertech Len Hydro Consortium JV including the Russian partners were present who informed that they visited the site for about a week analyzed the progress of work and gave the suggestions for speeding up the work and further stated that the volume of work is very big and to achieve the desired progress additional resources and man power needs to be deployed and it was also informed that they will be frequently visiting the site and will ensure the completion of the project in time.

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308

73. We have heard the rival contentions of the parties and perused the documents relied upon by them in the proceedings. The main issue to be addressed under this question, according to us, is whether the non presence of the JV partners even at the repeated requests of the Respondent was a breach of contract or a cause for delay attributable to the Claimant. We have already traversed on the various delays caused due to non handing over of site, non handing over of borrow area, varying adverse geological conditions, delays in drawings, delays in decisions etc., and have held that a delay of 63 months from September-2002 to December-2007 is not attributable to the Claimant. We do not find much force in the proposition that the presence of Russian JV partners could have shifted a part of delay of 63 months held as not attributable to the Claimant as being made attributable to the Claimant. Since, we find that the delay of 63 months as not attributable to the Claimant all other factors causing delay are only the overlapping delays which would have no effect on the basic causes of delays of not handing over the site, not handing over the borrow areas for the development of quarry and production of aggregates, adverse geological conditions that resulted in increased quantities due to flattening of slopes, additional items of work done such as use of geo-grids & geo-textiles etc., could not have compensated these delays by the presence of the Russian partners. We accordingly hold that there has been no breach on the part of the Claimant as alleged by the Respondent that was responsible for the delay attributable to the Claimant.

Regarding unauthorized subletting of the work to Rithwik-Swathi JV by the Claimant:

74. The Respondent submits that the Claimant has sublet the work under a contract to M/s. Rithwik-Swathi JV (RSJV) which is a joint venture company and that RSJV was executing the work since the beginning as a sub-Contractor of the Claimant. The Respondent states that this sub-Contractor had stopped the work since the Claimant had not made payments to RSJV and the salaries and dues were not paid since February-2006 as per the letter dated 27.04.2006 at page-47 Book-II from a group of persons purporting to be employees of RSJV. The Respondent also relies on the letter at page-48 of Book-II from RSJV workers

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309

union stating that no payments to the workers were made and a letter dated 28.04.2006 written by Rithwik-Swathi JV to the Engineer-in-Charge of the Respondent, copy of which was filed on 05.04.2009 before the Tribunal, wherein RSJV had brought to the notice of the Respondent that they (RSJV) are carrying out the construction work as sub Contractor of M/s. PCL-Intertech Len Hydro Consortium JV with their men and machineries and had expressed that the Claimant JV had unnecessarily retained heavy amounts due to them and the Claimants are not caring for them. Therefore RSJV had requested the Respondent to intervene in the matter and to resolve the situation in the interest of the project. Based on these letters the Respondent sent a fax message to the CMD of the Claimant on 28.06.2006 stating that such subletting of the total work to M/s. Rithwik-Swathi JV is without prior information and consent of the Respondent. It was notified that this is a breach of the contract under Clause-56 which states that the Contractor shall not, with out prior written consent of Engineer-in-charge, sublet any portion of the contract and further had sought clarifications on the matter from the Claimant. On 29.04.2006 the Respondent notified to the Claimant inviting reference to the unauthorized subletting of the work and requested the Claimant to attend a meeting on 02.05.2006 at their Noida office to resolve the issues. The meeting took place on 02.05.2006 wherein the representatives of M/s. PCL and their sub Contractor working at site viz; Ritwik-Swathi JV (RSJV) were present. While great concern was expressed by the Respondent the ultimate outcome of this meeting was that THDC noted that RSJV had been working at the Koteshwara Project along with M/s. PCL since beginning. It was agreed in the meeting that *"keeping in view the association (of) sub Contractor, THDC expressed that since the engagement has already been made and the matter being fait accompli THDC has no objection to regularize the engagement"*. In the said meeting the parties agreed that *"M/s. PCL and their sub-Contractor M/s. Rithwik-Swathi JV will immediately resume the work at site so that the valuable working season is not further lost"*.

75. Both the parties acted upon this minutes of meeting and it was signed by the Claimant PCL-Intertech Len Hydro Consortium JV, the Respondent THDC & the

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390

Joint Venture partners of M/s. Ritwik-Swathi JV on 02.05.2006. Further, the Respondent in his letter dated 22.05.2006, inviting reference to this meeting dated 02.05.2006, notified the Claimant at page-67 of Book-II, giving approval for the engagement of sub-Contractor of RSJV as per agreement Clause-56 of GCC and stated that *"as per agreement Clause-56 of GCC regularizing of engagement of Sub-Contractor RSJV i.e., Rithwik-Swathi JV is agreed"*.

76. The facts being as above we refer to Clause-56 which reads as below:

"56.0 SUB-LETTING:

The Contractor shall not without the prior written consent of the Engineer-in-charge sublet any portion of the contract. Any subletting shall in no way absolve the Contractor of any of his responsibilities under this contract. The provision of labour on a piece work basis shall not be deemed to be a subletting under this Clause".

We find that this Clause specifies that the contract shall not be sublet without prior written consent of the Engineer-in-charge in any part of the contract. Further the Clause also specifies that any subletting shall in no way absolve the Contractor of his responsibilities under this contract. It is also a term of this Clause that the provision of labour on a piece work basis shall not be deemed to be subletting of the work. In this case the Respondent produced in Book-III pages-2 to 9 a copy of the agreement dated 16.11.2002 for subletting between M/s. PCL & M/s. Rithwik-Swathi JV. The agreement between the Claimant and the Respondent is entered on 14.11.2002. Further we find that the meeting held on 02.05.2006 the Claimant and the Respondent along with the authorized representatives of RSJV have noted that RSJV has been working at the Koteshwara Dam project along with M/s. PCL since beginning and have agreed that *"keeping in view the association of M/s. PCL sub-Contractor THDC expressed that since the engagement has already been made and the matter being fait accompli THDC has no objection to regularize the engagement"*. This has been signed by the authorized representatives of the Claimant, the Respondent as well as the RSJV. It is only after the parties came to consensus regarding this matter the official communication reiterating and regularizing

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the same was made on 22.05.2006 by the Respondent addressed to the Claimant inviting reference to Clause-56 of GCC. We further notice that as per the Contract between the Claimant and the Respondent dated 14.11.2002 page-6 Vol-1 of the contract under Article-1.0 para-1.3 it is agreed that *"Any modifications / Amendments to the contract shall be affected only by a written instrument signed by the authorized representatives of both the parties"*. While we find that under Clause-56 there is no provision for regularizing a sub-contract but the parties have the authority to exercise their powers as per Article-1 para-1.3. Hence according to us we find that such exercise of the authority is Permissible under the provisions of the contract under Article-1.3. Therefore, we find that the Respondent along with the Claimant have exercised this authority to modify Clause-56 of the contract and agreeing for regularizing the engagement of the sub-Contractor RSJV being fully aware of the fact that the RSJV was working on the site from the beginning. Further the Respondent has agreed to this engagement as a fait accompli which as per Law Lexicon 3rd edition-2005 means *"Fact or deed accomplished, presumably irreversible"*. Hence, we find that objection by the Respondent on this issue is not sustainable. Thus the Respondent having effectively modified the Clause-56 as per Article-1.3 would have no case to plead that this sub-contracting is against the provision under Clause-56 of the contract and this contention of the Respondent deserves to be rejected and accordingly we reject this contention. From the materials placed before us, we are of the considered opinion that RSJV was executing the work as Sub-Contractor right from the beginning and the Respondent never objected and finally regularized the Sub-Contract. Once having regularized it is not open for the Respondent to resist the claim on that ground.

77. Various other issues regarding the no claim certificate and the extension of time have been dealt in detail in the earlier paras while addressing the preliminary issues and we have held that the no claim certificates issued by the Claimant are no bar for adjudicating the claims for reasons already recorded in the earlier paras and it would suffice to record that the same are applicable even in this context.

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78. In the light of the above observations and findings relying on pleadings, arguments and documents putforth by the parties and based on the facts and circumstances of the case our answer to Question-3 is in the negative.

Question-4: Whether the Claimant is entitled to the claims made by him before the Tribunal?

79. The Claimant has preferred the first set of claims from Caim-1 to CLAIM-7 and further claims from CLAIM-8 to CLAIM-13 as briefly stated earlier. Having answered the Question-1 in the negative and Question-2 in the affirmative and Question-3 in the negative we proceed to discuss each claim of the Claimant in the following paragraphs:

CLAIM-1: Compensation for losses suffered due to non-handing over of land on right bank of village Pendaras:

80. The Claimant submits that in order to complete the work within 45 months ending May-2006 the Respondent had the obligation to handover the entire land free from encumbrances on September-2002 for completing the work and further states that the village Pendaras had inhabitation in the upper reaches on the right bank near about elevation 610m with houses built along hill slopes and agriculture lands on the banks slopes. We have already dealt with this aspect regarding the delays in handing over of the land and the borrow areas and it is an admitted fact on contemporaneous documents that the right bank area was fully made available for execution by effecting the evacuation of the inhabitants only by April-2005. Until such time the working conditions were altogether different from what was envisaged since it was necessary for the Claimant to adopt controlled blasting methods to limit the shock wave intensity and throw off of blasted materials by adopting unconventional method i.e., from bottom upwards in bits and pieces with frequent intermittent stoppages. The Claimant submits that this delay in handing over of the land and non clearance of the hindrances and having necessitated to adopt controlled

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313

blasting on both banks requiring bottom upwards excavation to be carried out resulted in additional cost and time and relies on various letters dated 18.01.2003, 26.04.2003, 28.11.2005 & 11.04.2007 in Vol-C-1-2 and letters dated 08.09.2006, 01.11.2006, 16.12.2006 & 29.01.2007 in Vol-C-1-3. Further, the Claimant submits that since the upper reaches on the right bank was not acquired wholly it became necessary to adopt controlled blasting methods and work from bottom upwards instead of the normal engineering practice of excavating top downwards due to the restraint imposed on account of not evacuating the Pendaras Village. The Claimant substantiates the fact that he had to adopt bottom upwards method of excavation relying upon letter of the Respondent dated 12.04.2007 at page-120 of Vol-C-1-2 ANNEXURE-17. It is found from this letter that the initial excavation was up to a top bench at EL 670m the right bank and at EL 610m on the left bank. These benches were revised in the beginning of 2003 as per drawing KWR-520-C-3016. on the left bank the bench at EL 610m was revised to 640m with the top edge reaching a level of EL 675m and on the right bank the bench at EL 640m was raised to 675m with top edge of excavation fixed at EL 690m. Again in July-2005 & November-2005 the slopes were flattened and the top edge of excavation was made up to EL 720m on left bank and EL 735m on right bank. Subsequently it was further revised and the actual top level of excavation was further increased to elevation 750m on the left bank and elevation 780m on the right bank. Thus in reality for various reasons as stated by the Claimant the top level of excavation on the right bank was increased from 675mtr to 780mtr i.e., 105mtr and on the left bank from 630mtr to 750mtr i.e., 120mtr. Compared to the respective levels of 675m and 630m on the right and left banks as per the contract this resulted in increase of 105mtr & 120mtr height on the right & left bank respectively. The issue before us is on the right bank excavation where the height was increased from 675m to 780m where the excavation could not be carried on unhindered and in a methodical way from top downwards and the Claimant had to resort to controlled blasting due to various hindrances stated above. The Claimant submits that he has claimed rate of 50% above the quoted rate of Rs. 162/- per cum which works out to Rs. 243/- per cum and has borrowed the nearest available rate in the contract under item 2.4 which is

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also Rs. 243/- per cum. Claimant asserts that the work is neither the perimeter blasting under item 2.4 nor the rock blasting under item 2.3 and it is the item for controlled blasting.

81. Further the Claimant submits that the fact of excavation in rock being done by controlled / restricted blasting is borne out by his letters (i) dated 21.03.2003 at page-280 & 281 Vol-C-1-2 for excavation in the left bank, (ii) dated 12.01.2004 at Page-293 Vol. C-1-2 regarding perpetuating hindrances as the houses in the right bank were still not evacuated. (iii) letter dated 30.10.2004 Page-305 Vol. C-1-2 regarding delay due to with holding of drawings and the fact that due to the protest of the villages at Pendaras on right bank the excavation is done with mild and controlled blasting, (iv) letter dated 01.12.2004 page-309 Vol. C-1-2 regarding the Pendaras village is not evacuated as the village Pendaras is fully occupied with the oustees of the project (v) letter dated 28.11.2005 page-319 Vol. C-1-2 regarding the borrow areas and also regarding excavation in the reverse direction from bottom upwards although it is technically unsound resulting in additional time & cost. In this letter the Claimant states that he had adopted mild and controlled blasting on both banks keeping in view of safety of the villagers and had sought for extension of time up to 30.06.2008. Further, it is asserted that hindrances till evacuation of Pendaras village in April-2005 were persisting.

82. The Respondent denies all the contentions of the Claimant and his liability under this claim and submits that the haphazard way of excavation by the Claimant was only on account of the lack of mobilization of men and machinery by the Claimant and further submits that there is no provision under the contract to give the entire land by the start of work i.e., September-2002 and refutes the contention of the Claimant as unacceptable. The Respondent submits that the land was to be handed over in 'As Is Where Basis' in phased manner depencing upon the construction schedule / activity and their requirement of site relying upon Clause-10(ii), the instructions to bidder at page-235 Vol-1 of the contract. We have traversed on this Clause in earlier paras. This Clause-10(ii) regarding handing over of land in 'As is where basis'

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according to us does not relate to nor relevant to the land required for the execution of the work site nor the borrow areas, since this Clause-10(ii) relates to only land and other facilities for enabling work of the contract like colonies, stores etc. Also there is no term used in the contract that the land for work site and borrow areas will be given in phased manner as contended by the Respondent. Accordingly we have held earlier that the provisions of this Clause-10(ii) relied upon by the Respondent is not of applicable for the land required for handing over of the work site and the borrow areas. Further one of the conditions to which the construction schedule at page-221 Vol-1 of the contract was subject to is that *"the land and areas for various constructions fronts including land for approaches and other miscellaneous works are made available by THDC in time"*. We also find, as observed earlier, that the Pendaras village on the right bank was admittedly evacuated in April-2005 and the borrow areas B1 & B2 were made available without any hindrances on August-2005 & March-2007 respectively. Hence, we find that the Respondent's reliance on Clause-10(ii) of Instructions to Bidders and to contend that the Responcent can give the land in Phases at his will and yet the Claimant should complete the work within the contract period as not reasonable and sustainable under the contract.

83. The Respondent denies the contentions of the Claimant that (a) villagers were staying on the right bank which effected the progress of work, (b) on account of obstruction by the villagers and piece meal handing over of land required the Claimant to adopt controlled blasting carrying out excavation using unconventional method i.e., from bottom upwards and (c) resulted in idling of plant and machinery and the consequential financial compensation sought for by the Claimant. In so far as the delay is concerned we have dealt with the delays and various correspondences & letters relied on by both the parties and have held that the delays are not attributable to the Claimant in the earlier paras. Suffice it to say that those findings apply here also.

84. This claim is for the compensation for carrying out the work on the right bank due to non handing over of the sites and the various hindrances stated earlier

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including land not being handed over, inhabitation of villagers requiring resorting to controlled blasting, adopting unconventional method of excavation by excavating bottom upwards, etc. In the schedule of quantities for the civil works of dam, spill way and power house in section-2 dam, spill way and power intake at page-15 of Vol-1 of the contract there are three items as reproduced below:

Sl. No.	T.S Ref	Description of items	Unit	Quantity	Rates in Rs.
2.2	2.10.3	Common excavation including disposal up to 1.5 KM	Cum	2285240	72.00
2.3	2.10.4	Rock excavation by blasting including disposal up to 1.5 KM	Cum	2649960	162.00
2.4	2.10.5	Control perimeter blasting including disposal up to 1.5 KM	Cum	51600	243.00

Items at Sl. 2.2 & 2.3 are the ones which are under dispute between the parties, Item at Sl. 2.2 relates to common excavation including disposal up to 1.5 KM covered under the technical specification in section-B2 surface excavation at 2.10.3 at page-T-61 Vol-2 of the contract and detailed in para 2.5.3 of the technical specification at page-T-52. Item at Sl. 2.3 is rock excavation by blasting also described in section-B2 of the technical specifications under para 2.5.4. Item at Sl. 2.4 is for control perimeter blasting covered under the technical specifications in section-B2 at para 2.5.4.2. The contention of the Claimant is that up to April-2005 in respect of rock excavation he has executed on the right bank 16,75,870.683 cum and on the left bank 3,66,934.747 cum. In so far as common excavation is concerned the Claimant submits that he has executed up to April 2005 on right bank 19,55,045.632 cum & on the left bank 38,546 cum. The Claimant claims that he be paid 50% extra for this quantity of rock excavated on the right bank & 25% extra for common excavation, since he had to resort to controlled blasting and unconventional excavation from bottom upwards for the reason that on the right bank the village Pendaras was not fully evacuated till April-2005 and conventional blasting as contemplated under item-2.2 using full charge was not possible due to the inhabitation of the villagers in the village Pendaras within the vicinity of the excavation reach and there were occurrence of slips and that the excavation had to be made in bits and pieces as the whole area was not

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evacuated until April-2005. The Respondent refutes this claim on the grounds that:

(a) as per Clause-4.8.1 of Technical specifications part-A page-T-23 Vol-2 of the contract and Clause-6.7(I) of SCC page-346 Vol-1 of the contract and submits that whatever be the blasting the Claimant has to take adequate care and precautions to minimize shock and vibrations as stated in 4.8.1 of technical specifications and 6.7(i) of SCC.

(b) The Claimant made the excavations only from top downwards from elevation 630m on the right bank initially, later on when the upper slopes were located village Pendaras the excavation was again taken up from ±675m downwards.

(c) For the item at Sl. 2.3 the Schedule-B rate is Rs. 162/- per cum and the rate claimed is Rs. 243/- per cum which is the rate for item at Sl. 2.4 namely controlled perimeter blasting. Similarly for item at Sl. 2.2 i.e., the common excavation is 25% over and above the contract rate of Rs. 72/- per cum.

(d) Increasing the Schedule-B rates is not permissible under the contract.

85. We have heard the rival contentions of the parties and perused the documents and pleadings. The technical specification on which reliance was placed by the Respondent with regard to the care and safety to be taken in blasting is a matter that is to be followed as per the norms & standards for blasting. In this case we find that there was no possibility of following the standard blasting on the right bank keeping in view that the village Pendaras was not evacuated admittedly till April-2005. Hence, the type of blasting, the charges, the drill holes spacing etc., cannot be unhindered on account of the presence of the habitation in villages. Further, due to the hindrances and non evacuation on the right bank area till April-2005 the blasting operation by the Claimant cannot be free and unhindered. The Claimant has made his representations regarding non evacuation of the village Pendaras, non handing over of the land in the upper reaches, adopting controlled blasting methods to prevent damage to the people and the houses in the village within the excavated area and adopting unconventional method of excavation by bottom upwards method all of which

resulted in extra cost. Further, we also find from the methodology of excavation of right bank at page-106 in Vol-1 of the contract para-(b) the work of excavation on the right bank was proposed to be executed at a time using two access roads one from the road at 680m and another the lower level from the existing service level. We see from the letters dated 14.11.2002 at page-3 Book-II from the Respondent to the Claimant the Respondent has written *"the left bank area for earth work excavation is fully free from any encumbrances"* while no mention of the right bank is made. Further, in the letter dated 23.06.2003 at page-9 Book-II the Respondent writes stating that the blasting operation was started in the month of January-2003 after obtaining the explosives license on 01.01.2003 and arrival of the explosives on 09.01.2003. In this letter dated 23.06.2003 the Respondent writes *"you have been provided left bank area free from all hindrances, where as at right bank some restricted area was made available but sufficient for deployment of your then available machinery and man power"*. From this what can be understood is that there was no hindrance on the left bank but the area on the right bank was not given fully. We further see from the progress report of the Respondent for the month of April-2008 at pages-1024 of C-2 regarding rehabilitation under para-5, it is recorded that the villages Pendaras & Mulani have been evacuated completely in April-2005 & January-2006 respectively. Further, as observed earlier, as per page-1027 while the award in respect of acquisition for the Pendaras village was dated 16.04.2003 it was fully evacuated only in April-2005. Therefore, the statements in the letters dated 14.11.2002 & 23.06.2003 of the Respondent stated above read along with the contemporaneous document at pages-1024 & 1027 leads to a conclusion that the right bank was not handed over fully till April-2005 & the excavations could not have been done unhindered and in a methodical way.

86. The Respondent contends that the rate asked is for perimeter blasting which is an item covered under perimeter blasting item under Sl. 2.4, the technical specifications of controlled perimeter blasting. This perimeter blasting as per the contract is *"bench or open-cut excavation in last 3m depth of permanent rock slopes and dam abutment slopes shall be carried out using the cushion*

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blasting or pre-splitting techniques. However, depending upon the detailed geometry of rock slopes, other techniques, such as line-drilling, may be used with written approval of Engineer-in-Charge. Production holes within 3m of the perimeter row of holes shall be drilled in such a manner to meet the following tolerances with respect to length, collar, locations and alignment". The Claimant's contention is that the excavation in the right bank is a separate item involving controlled blasting for various reasons stated above and that the methodology of excavation has changed involving additional cost.

87. In the facts and circumstances as seen above we find that due to various unfulfilled obligations Viz; site not been handed over, the village Pendaras not being evacuated before April-2005, the excavation on the right bank was done by controlled blasting and in restricted way and not in an open excavation without any hindrance that is covered under item at Sl. 2.3. Also this quantity of excavation done in the right bank and claimed is not covered under the perimeter blasting under item at Sl. 2.4. Further, the common excavation on the right bank that required change of methodology for reasons recorded above also does not fall under item at Sl. 2.2. Such being the case this excavation is to be treated as an additional, altered or substituted item as per Clause-35(i) of the contract which provides that *"If the rate of any additional, altered or substituted item of work is not specified in Bill of Quantities or Schedule of Items, the rate for such items shall be derived from the rate of nearest similar item specified therein"*. In so far as the controlled blasting is concerned for rock excavation we find the nearest item is the rate for item at Sl. 2.4 at Rs. 243/- per cum which is the rate that is borrowed for this item of controlled blasting of rock on the right bank. The item at Sl. 2.4 is for perimeter blasting at three meters above the final foundation grade of the permanent structure. But this item of controlled blasting under this claim is for the controlled blasting of rock executed at various heights due to the increase height of 105m on the right bank and further the area was not unhindered as the village Pendaras was not evacuated and the local inhabitants were living in the village until April-2005 as per the documents resulting in excavating in areas in bits and pieces adopting unconventional bottom upwards excavation. Keeping all

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320

these in view relative to items at Sl. 2.3 & 2.4 we consider that the item at Sl. 2.4 is the nearest similar item for this item of controlled blasting under this claim. Therefore, we consider the rate of Rs. 225.50 per cum being 7.2% less than the rate of Rs. 243/- as per the discount allowed under the contract is reasonable.

88. According to Claimant on account of various reasons discussed earlier, excavation could not be made by normal blasting for which he had quoted the rate and on the other hand by several precautionary measures the blasting could be done at a much lower pace and it is for this reason he claimed that he would be entitled to rate provided for controlled blasting. It may be noted at the outset that contract does not provide for any rate for controlled blasting, but only provides for normal blasting and controlled perimeter blasting. In view of the definition of controlled perimeter blasting in the contract item at serial No. 2.4, the similar item for the claim could be at the rate provided for perimeter blasting. It cannot be disputed that the Contractor could not proceed with normal blasting and blasting had to be done at a much lower pace and the contract does not provide any rate for controlled blasting the Tribunal finds it justifiable to allow higher rate on equitable basis. Clause-35.1 of the contract provides that if rate of any additional, altered and substituted items of work is not substituted in bill of quantity and schedule of rate then the rate for such item shall be derived from the rate nearest to similar items specified therein. It is true that the aforesaid Clause refers to any additional altered or substituted item and therefore it may not applicable to the item of excavation as provided in the contract. But if the entire evidence on record is considered, it is possible for a Tribunal to view that this tantamount to a substituted item in place of normal blasting and applying provisions contained in Clause-35.1 a Tribunal can derive a rate for controlled blasting on the basis of rate provided at serial No. 2.4 for perimeter blasting, which appears to us to be the rate nearest to the one which is under consideration. The Learned Counsel for the Claimant strongly relied upon the decisions of the Karnataka High Court in AIR 1991 Karnataka page-96 wherein the Learned Judge has held that an Arbitrator can grant equitable rate and excavation charges for delay in handing over the

possession. He also relied upon the decision of Delhi High Court reported in 2003(1) Raj page-477 (Krishna Construction Vs. D.D.A., wherein it has been held that if there has been a breach then the provisions of Sec. 73 of the Contract Act would come into play and the law does not prohibit Arbitrator to grant amount depending upon the circumstances as compensation. Reliance was also placed on the decision of Supreme Court in Harcharan Singh Vs. Union of India (1994) 4 SCC 647, where the Supreme Court allowed revised rate for variation beyond 20% to the schedule of work. It is contended by the Learned Counsel for the claimant that if the Tribunal is satisfied on the material on record that the Claimant could not continue the blasting operation in a normal way on account of non discharge of obligation of the Respondent then the Tribunal has to find out a rate which would be equitable for the work in question. Mr. Taneja, Sr. learned counsel for the Respondent on the other hand submitted that the claim is essentially for a higher rate for the work done during the contract period and if the Claimant's contention is accepted it would tantamount to granting a higher rate for the quantity of work for which the Contractor has given a lower rate. According to him Clause-35 of the contract does not envisage such a case. He also contended that assuming the Contractor faced huge cost on account of so called controlled blasting, he would be duty bound to give notice to the Engineer, as required in Clause-36(iv) of the contract, but no such notice having been given the entire claim must be held to be after thought. According to the learned counsel at no point of time prior to September-2006, the Contractor has raised any claim of higher rate on the ground of controlled blasting and the same is claimed before this Tribunal without any basis. It is in this connection he also urged that when enough land was available at least up to 630feet and yet the Contractor did not start execution of the work, he is not entitled to any claim even on equitable basis. According to Mr. Taneja allowing prayer of the Claimant in CLAIM-1 would tantamount to re-write of the contract and the Tribunal does not have jurisdiction to re-write the contract entered into between the parties. In support of the contention that the Arbitrator has no jurisdiction to revise the rate provided for in the contract, he relies upon the decision of the Supreme Court (2001) 4 SCC 241.

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322

89. Bearing in mind the rival contention of the parties and the accepted legal premise, in view of our conclusion that the Respondent has failed to discharged his obligation under the contract in handing over the possession and that in view of continued existence of human habitation the Contractor was compelled to adopt a method of blasting ensuring safety of the inhabitants and was prevented from executing the work of excavation with ordinary blasting, it would be open for the Tribunal to find out equitable basis for the work done by taking recourse to nearest possible rate provided in the contract and that is why precisely we have followed to arrive at the rate of Rs. 225.50 per cum for the rock excavation at right bank, which was executed by way of controlled blasting.

90. **Under the above circumstances we award the rate of Rs. 225.50/- per cum for the rock excavation on the right bank with controlled blasting, the quantity executed up to April-2005 is 16,75,870.683 cum on the right bank. Admittedly the rate of Rs. 150.34/- per cum after effecting the rebate of 7.2% has been paid. Hence the amount payable is Rs. 225.50 - 150.34 = 75.16/- per cum and the claim amount works out to (16,75,870.683cum x Rs.75.16/-) = Rs. 12,59,58,440/-.**

91. Further, insofar as the common excavation on the right bank is concerned the quantity is 19,55,045.632 cum for which the payment is admittedly made at Rs. 72/- per cum with a discount of 7.2% which works out to Rs. 66.82/- per cum for the excavation done till April-2005 the claim of the Claimant is 25% above this rate i.e., 66.82/- x 25% = Rs. 83.52/-. This item is also a different item executed under similar conditions as per the execution of the rock excavation with controlled blasting for the reasons of changed methodology and sequence of excavation. The Claimant contends that due to adoption of unconventional methods, facing of hindrances and availability of lands in bits and pieces, he had suffered extra costs on account of (i) Execution of excavations in pieces in an unconventional manner with repeated deployment / withdrawal of machinery and other resources - extra 10%. (ii) Frequent adjustment of haul roads to changed work spots - extra 5%. (iii) Operation of machinery of such

roads under steeper gradients with extra wear & tear - extra 10% totaling to 25%. The nearly similar item for this item is at Sl. 2.2 for which the rate is Rs. 66.82/- per cum as stated above which is already paid as per the contract. Considering that item at Sl. 2.2 is a nearly similar item we consider that for this excavation on the right bank even for common excavation the Claimant has been paid admittedly at the rate of Rs. 66.82 per cum. Sufferance of extra costs over and above the rate for the nearly similar item at Sl. 2.2 under the contract is not considered payable. Accordingly we reject this claim towards the extra rate for the common excavation.

92. In the light of the above we award an amount of Rs. 12,59,58,440/- toward this CLAIM-1 against the claim of the Contractor is Rs. 19,72,92,182/- along with applicable escalation as per the contract since the rates are based on the contracted rates.

CLAIM-2: Right and left bank excavation and slope stabilization - extra rates and payments for working in hazardous conditions outside the project area:

93. This CLAIM-2 is for extra rates for the right and left bank excavation for the slope stabilization on the ground that the extra rates and payments for working in hazardous conditions outside the project area are required to be paid. The Claimant submits that as per the tender the levels of excavation had the top edge at EL. 630m & EL. 675m on the left & right banks respectively relying upon the tender drawing at page-88 of the claim statement and submits further that the actual excavations as per page-89 of claim statement were made to greater heights and were respectively EL. 750m on the left bank and EL. 780m on the right bank. Thus, the Claimant contends that this excavation made on the left and right banks were beyond the original agreed levels and beyond the original chainages extending for about 70m on the left bank and 180m on the right bank. Due to encountering poor geological conditions the slopes had to be flattened and revised construction drawings were issued accordingly the top levels of the excavation were raised to EL. 750m & 780m on the left & right bank respectively as in plate-3 at page-88 of the claim statement as contended by the Claimant. It is further contended that the slope stabilization work

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required extensive scaffolding works, new and special items such as geo-textiles, geo-grids, dry boulder pitching etc., which were introduced as extra items modifying the original nature of works increasing the quantities from the Schedule-B and causing further delays. The Claimant submits that this claim is purely for the work executed under totally changed conditions viz; (a) increase in cutting heights from 95m / 140m to 210m / 240m which is a gross change due to bad geology not contemplated at the agreement stage (b) Increase lead and lift, (c) construction of additional stretches of road to man over of the heights working under changed / hazardous conditions & (d) substantially increased scaffolding work for slope stabilization work. The Claimant further submits that he has furnished the rates for the particular extra items in respect of the works executed up to March-2007 letter dated 11.04.2007 ANNEXURE-3 at page-102 of C-1-2 which is further modified in ANNEXURE-141 at page-484 of C-1-3. Accordingly the claim is under CLAIM-2 is for Rs. 4,94,78,982/- comprising the following:

Description	In Rupees
→ Extra claim for common excavation: 436956 x 29.77	1,30,08,180
→ Extra claim for rock excavation: 695700x48.01	3,34,00,557
Sub total for excavation	**4,64,08,737**
→ Slope stabilization works, shot-crete, chain links, rock bolts & boulder stone pitching.	
→ Shot-crete: 300cum x 3340.80	10,02,240
→ Extra for shotcrete and chain links due to undulation @ 25%	2,50,560
Total for shot-crete	**12,52,800**
→ Chain links: 300sqm x 58.46	1,75,380
→ Extra due to undulation @ 25%	43,845
Sub-total for chain links	**2,19,225**
→ 25mm dia 5.2m long rock bolts installation @ 3m c/c (i.e., Number of rock anchors / sqm @ 0.3 No.; (0.3 x 3000) x 5.2m x 225.50	10,55,340
→ Boulder stone pitching (Wet): Quantity=1000 cum 1000x542.88	5,42,880
Total of all the claims for excavation/slope stabilization works under CLAIM-2	**4,94,78,982**

94. *Per-contra*, the Respondent refutes the CLAIM-2 and each one of the items on the grounds that:

a. That under Clause-12(i) of the GCC relating to drawings and specifications page-266 of the contract along with the amendments that the detail drawings will prevail over the tender drawings and the

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Respondent has the authority to modify the drawings and specifications as per requirement of work.

b. That the Contractor shall be required to perform all additional works as per Clause-12(i) page-267 in accordance with the additional, general, revised and detailed drawings at the applicable unit prices tendered in Schedule of quantities and the rates for such work(s) as per Clause-34 & 35 as determined by the Engineer-in-Charge.

c. As per Clause-12(ii) of GCC the modifications in drawings & specifications shall be deemed to form an integral part of the contract and Contractor is bound to carry out the work accordingly.

d. As per Clause-34(i)(a) & (d) in respect of alterations, addition & omissions the Engineer-in-Charge has the powers to increase or decrease the quantity of any work, change the levels, lines, positions of any part of the work.

e. As per Clause-10 & 12 of information and instructions to tenderers which specifies that the tenderers are advice to inspect the site and the consequences of the lack of any knowledge on the part of the tenderers shall be at their risk & cost.

The Respondent further submits that the Engineer-in-Charge having acted as per the provisions of the contract and payments are made as per the items under the contract and the extra item rates having been regulated as per Clause-35 of GCC the claim is not tenable. Also the increase in lead and lift as claimed by the Claimant are included in the unit prices quoted relying upon Clause-2.10.1(2)(b) of technical specifications page-59 Vol-2 of the contract wherein it is specified that the unit price quoted is deemed to include all lifts and lead with in permanent work area and a distance of 1.5Km measured along the main road from dam axis. The Claimant submits that on account of increase in heights there was increase in the lead to negotiate these increase heights to an extent of 0.5km on right bank and 1.5km on left bank resulting in an average increase of 1km lead and has claimed the same.

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95. The Claimant refutes the reliance of the Respondent on Clause-12(i) & 12(ii) of GCC for this extraordinary change that occurred during execution as it was not even foreseen by the Respondent who had investigated the site for decades and at best this Clause may apply for marginal variations and not the gross variations of increased heights by more than 100mtr on both the banks and occurrence of slips in the soil mass to the extent actually encountered at site. Variations in drawings, it is further contended by the Claimant, would mean only reasonable variations and not such abnormal variations as encountered at the site and submits that such variations to the extent of increase in height by 105m as stated above cannot be considered as a normal variation within the contemplation of the contract.

96. The Claimant before this Tribunal has submitted analysis of rates in respect CLAIM-2, but having examined the same we are of the opinion that the said analysis cannot be accepted. In fact the learned counsel for the Claimant also agreed that the Tribunal may arrive at some equitable basis for the extra cost incurred by the Contractor having worked under severe hazardous conditions. The Respondent however submitted that for the increased height a higher rate in accordance with Clause-35 has been calculated and paid to the Contractor as per Annexure-141, which the Contractor has accepted. Consequently, the claim of the Contractor in CLAIM-2 has no basis to stand. According to the Respondent the Engineer having power to revise the level and that power having been exercised, the Contractor cannot make any grievance. It is the contention of the Respondent that in respect of this claim the Claimant first approached the Engineer on 08.07.2006 as per Annexure-71 page-363 of Vol. C-II. Since no case was made out until July-2006 alleging the continuance of work under nay hazardous conditions, this claim must be held to be a after thought. Mr. Taneja also contended that a claim of extra unit rate on this score was made out only on 14.10.2006 vide Annexure-138 page-477 of Vol. C-III. So far as the extra cost on account of scaffolding is concerned, the Respondent contends that this is a part of installation and consequently the Contractor is required to do the same at unit rate and no higher rate can be claimed. He also contended that in any event the rate analysis submitted by the Contractor has no basis at all and has

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been arbitrarily made. Reliance was placed on the decision of the Supreme Court in (1999) 9 SCC 614 para-15 in support of the contention that this claim is liable to be rejected.

97. Having examined the rival contention of the parties and also the materials on record, we are persuaded to come to a conclusion that the Claimant was compelled to execute excavation under certain hazardous condition not contemplated within the contract and therefore would be entitled to some higher rate on equitable basis and that is why we are examining the same in the subsequent paragraph.

98. Based on the submissions made by the parties and the documents each item on which the claim is made is dealt in the following paras:

a. **Extra claim for common excavation: 436956cum x Rs. 29.77:** The common excavation is covered under item 2.2 as observed earlier for which the quoted rate is Rs. 72/- per cum which has been admittedly paid and received. The additionalities are detailed in ANNEXURE-141 page-484 of C-1-3 which amounts to Rs. 29.77 per cum on account of (i) extra for formation of additional two kilometers of road to negotiate the increased heights on either banks - Rs. 10.93 (ii) extra lead charge for one kilometer Rs. 9/- (iii) extra rates for working on higher elevations, longer cycles Rs. 3/- per cum (iv) Interest on bank guarantee cost insurance, works tax etc., @ 9.77% - Rs. 2.25. (v) Unforeseen contingency and over head profits Rs. 4.59 altogether totaling to Rs. 29.77 per cum. The circumstances under which the work is executed is not the same as was contemplated due to abnormal increase in the heights of working which are 120m on the left bank & 105m on the right bank. On account of this abnormal increase in the heights of excavation additional length of 2km road costing Rs. 10.93 per cum of the excavated quantity of 4,36,956 cum is claimed. The contract provides for the common excavation at Sl. 2.2 the lead as 1.5km. The increase in the average lead beyond this 1.5km is an extra lead of one kilometer. Item at Sl. 2.8 of the schedule of quantities at page-15 it is agreed that *"extra for lead for disposal beyond 1.5km up to 6km (common & rock excavation for surface &*

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under ground) Rs. 9/- per kilometer and the quantity specified under the BOQ is 27,88,850 cum". We find that the facts and circumstances brought out that there is an increased average lead of one kilometer for the quantity excavated and claimed under this head. Hence, we find that as per the contract the rate of Rs. 9/- per kilometer is permissible to be paid. In so far as the cost of excavation for formation of the additional 2km of road is concerned the additional cost of Rs. 10.93 per cum claim is based on a weighted average rate considering (2/3) as rock and (1/3) as soil. We find from the items at Sl. 2.2 & 2.3 for common excavation & Rock excavation by blasting the quantities provided respectively in the Schedule-B are 22,85,240cum & 26,49,960cum totaling to 49,35,200cum. Therefore the provision of common excavation & rock excavation is in the proportion of 46% & 54% even as per the contract. Hence, we find that this proportion could be a basis in view of the quantities provided under the contract. The weighted average rate is therefore reasonable to be based on this proportion at the quoted rates for rock and common excavation is = (0.54 x 150.34) + (0.46 x 66.82) = Rs. 111.92 per cum. The quantity for the road excavation is 2000m length x 5m width x (6/2 avg height) x Rs. 111.92 = Rs. 33,57,600/- and adding 30% towards grading, leveling, watering, rolling etc., total cost equals to Rs. 43,64,880/-. Thus the extra cost per cum of excavation towards the formation of additional length of 2Km road is Rs. 43,64,880/- ÷ 4,36,956 cum = Rs. 9.99 per cum. We find that (i) cost towards the additional lead amounting to Rs. 9/- per cum for disposal & (ii) Rs. 9.99 towards the cost incurred in excavation & formation of the additional length of 2 km road (totaling to Rs. 18.99) both of which are caused due to changed circumstances of increased heights involving extra leads is reasonable to be compensated against the claim of Rs. 29.77 per cum for reasons stated above. We do not consider it appropriate to add for extra rate for working in higher elevations, additional interest on BG Costs, unforeseen circumstances over head & Profits. Therefore under this head we award an amount of (4,36,956 cum x Rs. 18.99) Rs. 82,97,680/- towards this item of the claim.

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b. **Extra claim for rock excavation: 695700x48.01:** The extra claim for rock excavation as claimed under ANNEXURE-141 at page-484 of C-1-3 we reject this head of the claim as this claim is not payable under the contract.

c. Other costs claimed against slope Stabilization work towards shot-crete, chain link, rock bolts, boulder stone pitching claim are rejected as they are covered under the extra items or under the respective BOQ items.

99. In the light of the above we award an amount of Rs. 82,97,680/- toward this CLAIM-2 as against the claim of the Contractor is Rs. 4,94,78,982/-.

CLAIM-3: Payment for construction of approach road on right bank from Baily bridge to permanent road:

100. This CLAIM-3 as per the documents is the cost towards an approach road for a length of 200m and width of 8m from the Junction of permanent road to power house and dam axis which was constructed between March to June-2006. It is submitted by the Claimant that the road was partly in cutting and partly in filling and launching the gabions. The Claimant relies on ANNEXURE-142 dated: 22.02.2006 page-486 of C-1-3 wherein the Respondent stated as follows: *"The existing bailey bridge is to be shifted near the d/s cofferdam very soon. The site on the left bank side needs to be cleared for launching of the bridge. You are therefore requested to shift your transformer, tin shades etc., from the left bank near cofferdam axis immediately so that site can be handed over to the agency, shifting the bridge"*. The Claimant made a claim based on this letter for an amount of Rs. 14,39,800/- in his letter dated 25.11.2006 ANNEXURE-5 page-105 of C-1-2 and this claim was rejected by the Respondent in Respondent's letter dated: 22.12.2006 ANNEXURE-145 page-489 of C-1-3. On 01.02.2007 at page-490 the Claimant in his letter addressed to the Respondent stated that he has given full justification for his claims and it was based on the directions of THDC to construct the approach road which was basically for shifting the electro mechanical equipments of BHEL and other agencies.

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101. The Respondent denies that he had instructed to construct this approach road in his letter dated 22.02.2006 reproduced above and resists this claim on the grounds that this claim is arising out of misinterpretation of the letter dated 22.02.2006 as the letter was only to shift the transformer of the Claimant, tin shades from the left bank near the cofferdam axis so that the site can be handed over to other agency for shifting the Baily Bridge. The Respondent also submits that he has got the Baily Bridge shifted in 2006 by another agency / Contractor and submitted that the Claimant had to make a haul road in this portion and hence cannot claim for this.

102. In the light of the above circumstances as there is no instructions to construct this road from the Respondent and the instruction was only to shift the transformer of the Claimant. We consider that this CLAIM-3 does not have any merit and accordingly we reject this claim.

CLAIM-4: Payment for construction of diversion structure: Upstream dyke:

103. The Claimant submits that this work of construction of upstream dyke is located just downstream of the tunnel entrance and upstream of the upstream coffer dam to enable diversion of water through the diversion tunnel and facilitate the construction of the coffer dam. The cross section of the dyke is shown at plate-6, page-91 of the claim statement in the drawing showing the details of the upstream and downstream coffer dam. As per this drawing the upstream dyke has a top width of 6m at an EL. 545.00m. The typical section of the upstream dyke as per this drawing specifies use of rock muck for the construction of the dyke with the slope of 1.5 horizontal to 1.00 vertical both on upstream and downstream with the deepest bed level at EL. ±530m. Undisputedly this upstream dyke was constructed in the year 2003 to allow the non monsoon flow in the river to be diverted through the diversion tunnel. The Claimant submits that this upstream dyke was washed out and it was reconstructed by him and further in 2006 considering the previous flooding events the upstream coffer dam level was raised from the top level of EL. 559m to EL. 564m. The Claim of the Claimant is for the quantity of the random fill

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work placed in the dyke due to such increase in the height for a quantity of 25,473.42cum and the applicable rate of Rs. 324/- per cum as per item-13.4 of the Schedule of quantities which is for rock muck zone-4 in the coffer dam and the claimed amount is Rs. 76,59,141/- after effecting the tender rebate of 7.2%.

104. The Respondent denies this claim and submits that the upstream dyke which was constructed in the year 2003 got washed out in the subsequent monsoon of 2005 as per letter dated 05.07.2005 ANNEXURE-151, page-495 of C-1-3 and the coffer dam built during the year 2006 as per the typical section of the upstream coffer dam in plate-6, page-91 downstream of the upstream dyke, in question, was asked to be raised to EL. 564m. The Respondent submits that it is this upstream coffer dam with a typical section shown in plate-6 which had a top level of EL. 559m that was ordered to be raised to EL. 564m and that the cofferdam design is not related to the dyke construction and raising this cofferdam EL. 564m was notified to the Claimant and a drawing was furnished on 03.06.2006 ANNEXURE-152, page-496 of C-1-3. It is submitted by the Respondent that for the dyke that was constructed in 2003 quantity of 4,909.67cum amounting to Rs. 3,75,590.29 has been paid in the bill for the month of March 2004 at the rate of Rs. 76.50 per cum as per item at Sl. 3.1 Random backfill (un-graded earth and rock) under the Schedule of quantities at page-24 Vol-1 of the contract provided for the item of backfill. The Respondent denies the claim of the Claimant for this upstream dyke, as the claim made is as per item at Sl. 13.4 in the schedule of quantities for the cofferdam at page-14 Vol-1 of the contract for which the rate as per contract is Rs. 324/- per cum. The Respondent drew our attention to the technical specifications under para-6.7 for the backfill and affirm that the payment has been made for this dyke for a quantity of 4,909.67cum at Rs. 76.50 per cum. While the Claimant is making a claim for a quantity of 25,473.42cum being the quantity involved in raising the dyke up to EL. 564m and the applicable rate of Rs. 324/- per cum as per item at Sl. 13.4.

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105. From the documents and submissions made by the parties we find that the typical section of the upstream dyke and the typical section of the upstream cofferdam are both shown in plate-6. The upstream dyke is admittedly constructed up to the design top EL. 545m involving a quantity of 4,909.67 cum for which the payment is made at Rs. 76.50per cum treating this dyke as a backfill. Backfill is defined at page-117 Vol-2 of the contract in the technical specifications wherein it is specified in 6.7.1(1) that *"the Contractor shall place the compact backfill of the specified type to the line grades and dimensions in the locations shown on the construction drawings, behind structures, in over brake, over excavation, or where directed by the Engineer-in-Charge"*. The backfill specification as per the Clause-6.7 according to us is applicable and relevant for backfilling excavated reaches after construction of structures to refill the gap between the structure and the excavated faces. Further, the work backfill as defined under the Webster's dictionary has different connotations in the administration domain it is defined as material used in refilling excavation, or the process of such refilling, material used to fill an excavated trench. In buildings it means the gravel or earth replaced in the space around a building wall, after foundations are in place. In environment it is defined as (1) The general fill that is placed in the excavated areas of an underground facility. (2) Filling a previous excavation. (3) Material used to replace soil and earth removed during mining. In geology it means Soil, overburden, mine waste or imported material used to replace material removed during mining. We find from the above definitions that dyke as per plate-6 cannot be treated as backfill as this dyke is an embankment constructed out of rock muck, above the river bed level up to the top level of EL. 545m with a top width of 6m, for purpose of diverting the non monsoon flow through the diversion tunnel. We also find that the tender drawing No. DA24 dated 07.11.2000 also does not show any upstream dyke and accordingly there is no item of dyke provided under the contract. The upstream dyke shown in the revised drawing of 2003 is independent of the cofferdam. The cofferdam typical cross section in plate-6 we find rock muck being designated as zone-4.

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106. The Claimant refutes the contention of the Respondent that the dyke is not to be treated as a backfill and refutes the payment for the dyke as backfill under item at Sl. 3.1 of the schedule of quantity and asserts that it is to be paid as per item at Sl. 13.4 under the cofferdam. As the dyke is not a backfill for the reasons recorded by us in pre-para, we are of the opinion that the quantity executed for the construction of dyke as per plate-6 does not deserve to be treated as backfill. In the items of the specification either in Sl.13 for the cofferdam at page-14 or Sl. 3 of backfill at page-24 of Vol-1 of the contract there is no mention of dyke. Therefore for the work of execution of dyke as per plate-6, the payment for the executed quantity is to be regulated as per Clause-35(i) under GCC of the contract, where it is agreed that the rate for such any additional or altered item of work the rate shall have to be derived from the nearest bill of quantity. Both the dyke as well as the cofferdam, has zone designated as rock muck. Accordingly we find that for this item of dyke the nearest applicable item is at Sl. 13.4 at the contracted rate of Rs. 324/- per cum and we do not consider that the construction of dyke at plate-6 is covered under item at Sl. 3.1 under backfill. The Respondent states in his letter dated 18.12.2006 at page-78 of Book-II written to the Claimant saying that the upstream dyke was raised with the excavated muck for commuting the Claimant vehicles and no construction activity was their as per the drawings or agreement so cannot be paid. In letter dated 22.12.2006 at page-85 of Book-II the Respondent refutes the contention of the Claimant that no instructions were given to raise the dyke up to EL. 564m. The contention of the Claimant that he raised the dyke to El. 559m and then to EL. 564m when the cofferdam itself was raised to EL. 564m has no basis. Further, as per the claim statement the Claimant submits that "*this work was first executed in December-2003 and is being upgraded and maintained even now but the payment has not been released so far*". The quantity of the random rock fill work placed in dyke is 25,473.42cum at the Rs. 324/- per cum. However, the Respondent submitted a copy of the bill on 25.09.2009 showing that in the bill for March-2004 at page-164 & 165 under item at Sl. 3.1 under the technical specification no. 6.8.3 random backfill paid for a quantity of 4,909.67cum is paid at the rate of Rs. 76.50 per cum less the rebate of 7.2% is towards this dyke. The Claimant has

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refuted the payment of the backfill rate for this dyke which was reiterated during the arguments. Hence, we find that the quantity admittedly by the Respondent towards the dyke is 4,909.67cum which is paid at the rate of backfill quantity item at Sl. 3.1. The item of dyke envisages rock muck corresponding to the item at Sl. 13.4 of the schedule of quantity towards the cofferdam works and it cannot be treated as backfill as contended by the Respondent.

107. In the light of the above findings & observations for the admitted quantity of the dyke of 4,909.67cum the applicable rate as per the contract is not the backfill rate of Rs. 76.50 per cum under item at Sl. 3.1 but it is the rock muck rate of Rs. 324/- per cum under item at Sl. 13.4. The amount payable after considering the admitted payment at Rs. 76.50/- per cum works out to 4909.67cum x Rs. (324.00 - 76.50) x 0.928 (7.2% rebate) = Rs. 11,27,653/-.

108. In the light of the above we award an amount of Rs. 11,27,653/- toward this CLAIM-4 as against the claim of the Contractor is Rs. 76,59,144/-.

CLAIM-5: Payment for construction of approach (haul road) for development of B-1 & B-2 quarries:

109. This CLAIM-5 of the Claimant is towards the cost incurred by him in the construction of approach road for the development of the borrow areas B1 & B2 quarries which are approachable from the Tehri Koteshwar road as per drawing in plate-5 at page-90 of the Claim Statement C-1. The distance of these B1 & B2 quarries was around 6.0km from the dam site. The contention of the Claimant is that as per Clause-2 of SCC page-338 Vol-1 of the contract specifies as follows: *"Possible borrow areas and quarry site for coarse and fine aggregates are located along the Tehri-Koteshwar road as shown in drawing no.-TH-KOT-TD-GE-06. The distance of identified borrow area from dam axis is approx 6.0km and haul road from main road to borrow pit has to be developed by Contractor"*. And that the Claimant submitted his proposal for development of access road to the borrow areas B1 & B2 from the existing Tehri-Koteshwar

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335

road and this length of access road was about 300m from Tehri-Koteshwar road. It is further submitted that this short stretch of 300m length of the road leading to the borrow areas B1 & B2 could not be constructed due to non handing over of the requisite land from the Respondent and protest from local public and that similar problems were also faced in respect of the haul road along the alternative alignment suggested by the Respondents from the substation point. Subsequently during April-2003 a road alignment to Mulani along the lowest right bank bench below EL. 615m for a length of 4.5km was finalized and developed as per the oral instructions of the Respondent's officers. Therefore, the Claimant submitted that the development of 4.5km length of the road was not envisaged at the tendering stage and this was notified to the Respondent in their letters dated 26.04.2003 ANNEXURE-50 at page 284 and letter dated 12.07.2003 ANNEXURE-51 at page-289 of C-1-2, wherein it was reiterated by the Claimant that the specified borrow area shown was only at 400m from the existing Tehri-Koteshwar main road while now being advised to construct the road below EL. 615m, which is a breach of contract and results in cost and time overrun. In the back ground of these, the claim made is for formation of 2.6km length and 5m width road. The total quantity of excavation in the road cutting is 1,13,750cum out of which 2/3 of the quantity is in rock and 1/3 of the quantity is in common excavation. The Claimant submits that the applicable rates for the items at Sl. 2.2 & 2.3 in Schedule of quantities are only considered and the cost of road formation works out to Rs. 1,39,33,976/- in addition to an amount of Rs. 30,00,000/- towards clearing of debris due to slides that occurred and adding the maintenance cost for 4 years as on April-2007 total claim made at the rate of 5% per annum i.e., Rs. 2,03,20,771/- as per letter dated 11.04.2007 ANNEXURE-7 at page-108 & letter dated 01.11.2006 ANNEXURE-8 at page-110 of C-1-2.

110. The Respondent refutes this claim on the grounds that the claim is beyond the terms of contract and that the Claimant is asking for payment for the construction of the approach road / haul road to which he is not entitled to as per Clause-5.3 of SCC page-343 Vol-1 of the contract and states that all the haul roads, approach roads within the site are to be constructed and

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336

maintained by Contractor at his own cost. Further, the Respondent also relies on the provisions under Clause-2 of SCC page-338 reproduced earlier and submits that haul roads have to be developed and constructed by the Contractor. The Respondent refutes the Claimant's contention that he was to construct only a short length of 300m of the haul roads from Tehri-Koteshwar main road on the ground that the Tehri-Koteshwar road was at a level of EL. 695m and the borrow areas B1 & B2 were at EL. 615m and for this difference of 80m with a gradient of 1:5 the length would be about 1.2km and not 300m. Further it is contended by the Respondent that the new road constructed by the Claimant has reduced the lead by 2.6km from the earlier 6.0km and there was huge savings on account of transportation of material & time. The Respondent submits that as per revised construction methodology submitted by the Claimant in para-5.2(i)(a) at page-201 Vol-1 of the contract, it is agreed that access and haul roads at various levels will be developed for connecting the quarry with Tehri-Koteshwar road near Baily Bridge location. Therefore, it is submitted by the Respondent that the claim formulated on the alleged extra length of 2.6km with a width of 5m is not maintainable denying the quantity of excavation in the road cutting and proportionate quantity of rock and common excavation as arbitrary.

111. The Claimant reiterated the claim stating that factually the borrow areas B1 & B2 could not be connected from the Tehri-Koteshwar main road due to non availability of land, since the same was not acquired as submitted in pages-949 to 954 of C-2. The Claimant refutes and places reliance on Clause-5.3 of SCC states that the Clause relates only to the roads inside the work area and camp of the Contractor which shall be constructed and maintained by him at his own cost. We find that it is not correct to say that the haul roads within the work area would include the road from borrow area to the work area. Hence, we find that the reliance of Clause-5.3 of SCC is ill founded. The Claimant refuting the contentions of the Respondent, relies on Clause-2.0 of SCC at page-338 Vol-1 of the contract submits that this Clause also specifies that haul road from main road to borrow pit has to be developed by the Contractor. We find that in this Clause-2.0 of SCC the borrow areas as referred to in the drawing showing the

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337

area located along the Tehri-Koteshwar road at an approx distance of 6.0km from the dam axis. The Clause says *"haul road from main road to borrow pit has to be developed by the Contractor"*. Therefore, according to us both under Clause-5.2 quarries and borrow areas or Clause-5.3 roads in work area, the haul roads are meant to be only the roads within the work area or the camp area and hence any road beyond these reaches are indeed an additional work which is not included in these Clauses and requires to be treated accordingly as per the contract. The other rival contentions made by the parties are of not any consequence on this issue.

112. The claim essentially is for construction of Haul Road for approaching B1 & B2 quarry. Haul Road was required to be maintained by the Contractor. Under the contract Haul Road from Borrow area up to the work site has to be maintained by the Contractor at his own cost and Clause-5 gives the information regarding location and site. The map at page-90 Vol. C indicates the exact situation. The claim of the Contractor on this Haul Road is in respect of 2.6 Km total length of a new road. Though the total length of new road is 4.5 Km, but the claim is restricted to 2.6 Km. According to the Claimant, the authorities of THDC at site instructed orally for such construction and the Contractor having discharged the obligation is entitled to the claim in question. The Respondent does not deny the fact of construction of new road with new alignment, as is apparent from their reply at page-73 of Book-I. In-fact in the reply of the Respondent, there has been no denial to the assertion of the Claimant at page-285 Vol. C-1-2, thereby accepting the stand of the Claimant that the new road was constructed under the suggestion of the Respondent. The Claimant's letter dated 12.07.2003 at page-289 Vol. C-1-2 substantiate the stand of the Claimant. There has been no reply of Respondent to the aforesaid letter of the Claimant on record. The further letter of the claimant dated 10.08.2006 at page-516 Vol. C-1-3 and subsequent letter dated 01.11.2006 at page-110 Vol. C-1-3 has important bearing. In fact the Respondent's reply dated 29.12.2006 / 06.01.2007, which is at page-519 of C-1-3, contains admission on the part of the Respondent regarding the change of the Haul Road, but the emphasis had been made contending that it would be advantageous to the Claimant. In the

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338

aforesaid state of affairs and on examining the materials, we arrive at the conclusion that the Claimant is entitled to the compensation for construction of the so called Haul Road or approach road for approaching quarry at B1 & B2, which was constructed on the instructions of the Respondent, but the Respondent is denying payment for such construction. We accordingly examine the materials for equitable entitlement of the claim of the Contractor on this score in the subsequent paragraph.

113. Based on the above observations and findings, we find it is appropriate to consider this road as an additional item for the length of 2.6km with a width of 5m. The Claimant submitted the actual plan for the road from the borrow area B1 to dam axis on 31.01.2010. The length of 2.6km for which the claim is made is from point-F to point-E as per the plan. The Point-F is located inside the borrow area B2 & a stretch about 500m of this 2.6km passes through the borrow areas B2 & B1. Hence this stretch of about 500m cannot be treated as an additional length as it is a stretch of road within the borrow area that should be classified as a haul road within the borrow areas. Hence, out of this 2.6km length we consider a length of 2.1km is the additional length. The total quantity in this 2.1km length proportionate to the quantity claimed for 2.6km length is 2.1 x (113750 ÷ 2.6) = 91,875cum. In so far as the proportion of rock excavation and common excavation in this total quantity we rely upon our earlier finding that it is reasonable to consider the rock & Common excavation in the proportion of 46% & 54% respectively based on the same proportion of the two items in the schedule-B for item at Sl. 2.2 & 2.3. Accordingly the quantity of rock would be 91,875 x (46/100) = 42,262.50cum & the quantity of common excavation would be 91,875 x (54/100) = 49,612.50cum. The cost of common excavation as per item at Sl. 2.2 is 49,612.50 x 66.82 (7.2% rebate over Rs. 76/-) = Rs. 33,15,107/-. The cost of rock excavation as per item at Sl. 2.3 would be 42,262.50 x 150.33 (7.2% rebate over Rs. 162/-) = Rs. 63,53,321/-. Hence the total cost of excavation as per the rates under the contract is Rs. 96,68,428/-. It is our considered opinion that towards the maintenance of this road for 4 years till April-2007 at 5% per annum over this cost should also cover any clearance of debris, land slides etc., and there fore the total amount under

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339

this claim is Rs. 96,68,428/- + 5% x 96,68,428/- x 4(Years) - Rs, 1,16,02,113/-. As the maintenance cost is included we do not consider that the additional payment towards debris removal amounting to Rs. 30 lakhs is not payable.

114. In the light of the above we award an amount of Rs. 1,16,02,113/- toward this CLAIM-5 as against the claim of the Contractor is Rs. 2,03,20,771/-.

CLAIM-6: Payment for purchase of sand and coarse aggregates for tunnel lining, inlet and outlet works:

115. This CLAIM-6 as per Claimant is towards the additional cost incurred by him for procurement of fine & coarse aggregates from the market on account of the facts that the borrow areas B1 & B2 are not handed over to the Claimant for production of aggregate for undertaking the construction of concrete lining works of the diversion tunnel and its inlet and outlet works as the borrow area B1 & B2 were not handed over till November-2006. The Claimant relies on the letter of the Respondent dated 04.08.2003 ANNEXURE-171 page-522 of C-1-3 and submits that this letter accepts the non availability of the designated borrow areas resulting in the said requirement not being catered to for the progress of concrete works of Koteshwar dam project. This letter addressed to the Executive Director by the AGM (D & PH) requested the Executive Director project to allow take sand from M/s. JPIL on payment basis. It is also stated in this letter that the payment shall be made directly by M/s. PCL Len Hydro Consortium JV to M/s. JPIL and the royalty of sand shall be deducted from the work bill of M/s. PCL Len Hydro Consortium JV and deposited with the revenue department. From this letter we find that in the interest of work and due to non availability of sand the Respondent has authorized the Claimant to bring sand from M/s. JPIL with a condition that the Claimant shall pay for the same. Referring to letter dated 10.08.2006 ANNEXURE 178 at page-529 the Claimant states that he purchased 6750cum of sand and 5680cum of coarse aggregate and the extra expenditure involved is Rs. 250/- per cum of sand and Rs. 500/- per cum of coarse aggregate and the total extra expenditure involved is Rs. 45,31,500/-. The Claimant relies on his letters dated 19.02.2007 ANNEXURE-181

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at page-536 & ANNEXURE-182 at page-539 of C-1-3 documents for purchase and payment of sand and aggregate as produced at pages from 541 to 548.

116. The Respondent refutes this claim on the ground that the tunnel was handed over to the Claimant on 28.10.2002 for construction work and the 50ton per hour crushing plant erection by the Claimant could be completed only on 04.03.2003 whereas the concreting work of inlet structure has started on 21.02.2003 and submits that it is only because of the Claimant's delay in establishing the crusher plant and this crusher plant not capable of producing the aggregates he opted to purchase from outside. Also non-handing of the borrow area did not affect the production as suitable boulders and materials from the excavation were allowed to be used for production of construction material. The Claimant points out that this statement runs counter to the admitted position in letter dated 04.08.2003 ANNEXURE-171. Further, as per Clause-15.0(1) of GCC page-269 Vol-1 of the contract, the Contractor shall at his own expense was to provide and arrange all materials including cement & steel for the bona-fide use in the work under the contract. The letter of the AGM dated 04.08.2003 at ANNEXURE-171 page-522, the Respondent contends, is only a letter of the AGM of the Respondent to its own Executive Director seeking permission to obtain sand on payment basis from M/s. JPIL another Contractor working in Tehri Dam site. Hence, it is contended that this permission to purchase is only a formal request instruction to JPIL to allow the Claimant to obtain the sand and this cannot entitle the Contractor for this claim. Further, the Respondent submits that in this letter there is no permission for procurement of aggregates, therefore the Claimant at best can claim for cost of sand for the months of August-2003 & November-2003 and not for anything else while reiterating that nothing is payable to the Claimant.

117. The Claimant relies on his letter dated 26.04.2003 ANNEXURE-50 at page-284 wherein he has stated that for completion of the diversion tunnel, despite several constraints they have commenced the concrete lining of the diversion tunnel by purchasing sand and coarse aggregate from far away places with a distance of 25km as against 6.0km specified in the contract for the borrow

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areas B1 & B2 and had claimed reimbursement of the resultant financial loss on this account. Also it is stated in this letter that although the crushing units are ready and established to its full capacity, it could not develop the planned production due to vehement protest by the local people who are affected as the land acquisition has not been over. Further, Claimant submits that he had used the boulders available and had been exhausted and relies on letter dated 01.06.2003 ANNEXURE-123 at page-450, letter dated 29.09.2003 ANNEXURE-172 at page-523, Dated 17.12.2003 ANNEXURE-174 at page-528 of C-1-3.

118. We have perused the various documents relied on by the parties and their submissions. The documents show that the Claimant has brought sand from M/s. JPIL at Dobatta. The Respondent had permitted such purchase of sand and not of aggregates and argued that at the most, the Claimant is entitled only for sand although he has denied the whole claim before this Tribunal. The quantity of concreting for the diversion tunnel lining in items at Sl. 8.4.1 & 8.4.2 for invert and overt are respectively 4300cum & 6500 cum totaling to 10,800cum and other concreting works as per the contract covered in items at Sl. 8.1 to 8.3 totaling to 22,650cum. For the tunnel lining quantity and other concrete works the total concrete as per the BOQ is 33,450cum. The aggregate and sand requirement for this quantity of concrete as per norms is around 32,000cum & about 15,000cum respectively. The quantity of sand claimed under this head which is purchased and brought from longer lead is 6750cum as against the total requirement of 15,000cum for the tunnel concrete work. Hence, we find that the claim is made for 6750cum is only for a part of the concrete for the tunnel work which was to be purchased from M/s. JPIL involving an extra lead of 25Km at a cost Rs. 600/- per cum as against the production cost of Rs. 350/- per cum including transportation thus and incurring an additional cost of Rs. 250/- per cum. This is a deviation from the contract as the additional lead became necessity on account of the non-handing over of the borrow areas. Under the circumstances and for the reasons recorded above we find that it is appropriate to allow this additional cost of Rs. 250/- per cum only for 6750cum of sand and reject the claim towards the extra cost incurred on aggregates as it was not approved to be purchased by the Respondent.

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119. In the light of the above observations we award an amount of Rs. 16,87,500/- toward this CLAIM-6 as against the claim of the Contractor is Rs. 45,31,500/-.

CLAIM-7: Compensation for losses suffered due to abandonment of cable-way / cable crane system for Koteshwar dam and power house and extra payment for placement of concrete by Rotec:

120. This CLAIM-7, according to the Claimant, is arising out of the changed methodology of concreting. The Claimant submits that he had initially submitted in the original construction methodology of concreting that the arrangement of concreting was by two sets of cable ways or by tower crane and trestle bridge and both the options were kept open and a final decision was to be taken after the award of the work. The Claimant states that he had proceeded with the procurement of the cable way and had purchased it from National Hydroelectric Power Corporation (NHPC) from Chemera Hydroelectric Projects as per the letter of award of NHPC dated 22.12.2003 ANNEXURE-183 page-549 of C-1-3 addressed to M/s. Ritwik-Swathi JV and submits that the cost of the cable ways was Rs. 2,00,00,000/-. The Claimant had kept the Respondent apprised of this fact from time to time in his various letters from 1-19 as stated in page-59 of the claim statement. The contention of the Claimant is that he could not use this cable ways and had to abandon this for the reason that the excavation profiles provided in the tender drawings were wholly altered due to the flattening of the slopes both on right and left banks and increasing the heights of excavation by 105m on the right bank and 120m on the left banks as observed by us and recorded earlier. On account of this the span of the cable way could not be adopted for this increase and the cable way had to be abandoned and hence this claim of Rs. 2.00 Cr is made.

121. The Respondent refutes this claim on the grounds that the Claimant unilaterally chose to purchase the cable ways without the approval of the Respondent as was necessary under the contract relying upon the enclosure to letter dated 11.03.2002 of the Claimant at pages-159 to 164 of the contract, wherein at

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page-161 both alternatives of placement of concrete in the dam by cable way or by erecting trestle bridges over which the tower crane mover were kept open and a final decision to use either of these alternatives shall be taken after the award of work and in consultations with THDC. Since no consultation was made nor an approval was given, it is contended by the Respondent that this claim cannot be allowed. Further, the Respondent submits that the letter of intent of NHPC at page 549 of C-1-3 dated 22.12.2003 is addressed to M/s. Ritwik Swathi JV and not to the Claimant. It is also submitted that this cable way has not been brought to the work site which was also admitted by the Claimant.

122. We have heard elaborate arguments of both parties and perused the documents relied upon. The fact is that the Claimant on the name of RSJV, his subcontractor has admittedly purchased this from NHPC on sale without any approval from the Respondent, when the contract provided for keeping the options for either the cable way or the trestle bridge with tower crane open and to be decided after the award of work in consultation with the Respondent. The sale consideration having been paid by the Claimant the cable way has not been brought into the possession of or the site of the Respondent and it is further submitted by the Claimant that this cable way has now become a scrap and being dismantled at Chemera Project under the possession of NHPC. In view of these circumstances we find that the Respondent is not even put in possession of the cable way and such cable way cannot be brought to the possession of the Respondent. Thus, the claim of the Claimant is not sustainable as he would have the cable way with him and also the claim under this contract, which is not permissible under the law. Accordingly, for the reasons recorded above we consider that this claim deserves to be rejected.

123. Essentially this claim has been made on the premise that the Claimant was compelled to change the construction methodology on account of change in topographical condition of the site and had to abandon the Cable Crane System and switch over to Rotec System. The Respondent has taken a definite stand that the change in construction methodology was done by the Claimant on its

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own and not upon any direction or instructions of the Respondent. The Respondent also had urged that when the Claimant switched over to Rotec System he never submitted that the change became necessary on account of so called topographical condition. Under the contract the placement of concrete has been planned though cableway / crane or alternatively by trestle bridges. During post bid discussions alternative proposals had been submitted by the Claimant as is apparent from Claimant's letter dated 11.03.2002 (Book-I page-151 of the Respondent). After discusssions it was decided that the job could be done either by cableway or trestle bridges, but it was further held that a final decision to be used to either by alternative of can be in consultation with the Respondent, T.H.D.C. Even before the award of the work, the Claimant on its own decided to do concreting with tower cranes / cable crane vide Claimant's letter dated 08.08.2002. Even under the revised construction methodology submitted by the Claimant on 20.08.2002, it had been proposed to place concrete by cable crane or cableway. Consequently, no choice was left with the Respondent to decide which method of concreting would be adopted. Even on the allegation change of geological condition Claimant has not been able to place on record establishing such change of topography thereby necessitating Rotec system. It is only in the meeting on 02.05.2006 M/s. PCL for the first time informed about the placement of order with American firm M/s. Rotec Industries, USA. The MOU dated 31.03.2006 unequivocally establishes that the Claimant had already placed order for supply of Rotec Machinery, which establishes the fact that the Claimant decided to change the construction methodology on its own without even informing the Respondent and without obtaining approval from the Respondent. On the aforesaid premises, we see no reason why the Claimant's claim on this score can at all be entertained by this Tribunal.

124. In the light of the above circumstances and the reasons recorded therein we reject this CLAIM-7.

CLAIM-8: Compensation for losses suffered due to idling of plant and machinery:

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345

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CLAIM-9: Compensation for losses suffered due to idling; Man power resources:

125. The total set of claims from CLAIM-8 to CLAIM-14 was referred to the Respondent and the Respondent rejected these claims on 21.11.2007 at page-259 of C-1-2. Thereafter, these claims were referred in appeal to the Chairman & Managing Director of the Respondent under letter dated 23.11.2007 at page-260 of C-1-2 and this appeal was dismissed by the CMD of the Respondent in his letter dated 30.11.2007 at page-264 of C-1-2. As we have observed earlier that both parties agreed to refer adjudication of these claims to this Tribunal. The both parties are preferred to argue on the CLAIM-8 & CLAIM-9 together and have made their submissions accordingly. Hence, we also deal with these CLAIM-8 & CLAIM-9 together.

126. This claim under CLAIM-8 is essentially a claim of right to damages arising out of a breach of an obligation of the Respondent created by the contract. To get this damage, breach of contract has to be proved and then an enquiry can be continued with regard to the quantum of damages. We have already indicated how the Respondent has failed to discharge the obligation under the contract by not handing over the possession of the land in time; by not sending approved drawings in time; and by changing several drawings in course of execution of the contract. We are therefore required to hold an enquiry with regard to the quantum of damages that can be awarded under this claim. While holding an enquiry on this aspect two considerations arise: (i) whether the damages naturally arose in the usual course of things from the breach and (ii) whether the Claimant have means of remedying the inconvenience and have neglected to avail himself of it. This is the law which imposes or implies the term that upon a breach of contract, damages must be paid. Every contracting party contemplates the performance and not breach of contract. Damages are recoverable for breach of a term of a contract. It is of course the Claimant's taking reasonable steps to mitigate does not arise. It is in fact that in quantification of loss suffered by the Claimant on account of in-action or non availability of land etc. in time. We have already come to the conclusion that

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346

the Respondent is liable having caused a breach of the contract and therefore we proceed to assess what that liability would be on the particular head of claim. If a contract is broken and in the case in hand which has been broken by the Respondent as already held by us, the Claimant being the sufferer is entitled to receive compensation for loss caused to him. When the contract itself was for a stipulated time, but it could not be completed on account of delay on the part of the Respondent for which the Respondent granted extension is *ipso facto* established. The expression damages means peculiarly compensation for a wrong on account of a breach of contract. While assessing the quantum of damages, a Tribunal would consider as to what fairly and reasonably be considered arising naturally from the breach committed by the Respondent and that is what will have to be arrived at. Quantum of damages is a question of fact but law lays down certain general principles, certain broad principles, which are well settled. The fundamental basis of compensation is the pecuniary loss naturally flowing from the breach, but this is qualified by a principle which imposes duty on the part of the Claimant of not taking reasonable steps to mitigate the loss. In order to entitle the damages by reasons of a breach of contract, the injury being which compensation is asked for should be one that may be fairly taken to have been contemplated by the party is the possible result of the breach of contract. With these principles in mind, we should examine the CLAIM-8 in as much as the claim is based for loss suffered due to idling of plant and machinery on account of delay on the part of Respondent.

127. This CLAIM-8 is towards compensation for losses suffered due to idling of plant & machinery in the 40 months of delay period up to May-2007 and the Claimant submits that he has furnished the details in his letter dated 19.11.2007 ANNEXURE-38 page- 159 to 258 of C-1-2 and has made a claim of Rs. 22.745 Cr therein. The Claimant submits that he has further revised these claims as per ANNEXURE-198 at pages 587 to 656 of C-1-3 wherein he has made the claim in two parts (A) Losses suffered due to idling of plant & machinery during 45 months i.e., up to May-2006 amounting to Rs. 19.47Cr. & (B) Losses suffered due to idling of plant & machinery during next 12 months i.e., from June-2006

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to May-2007 claiming an amount of Rs. 8.495Cr. Thus the total claimed amount for the two periods (A) & (B) is Rs. 27.96Cr and has furnished various details of a machinery and the monthly idling costs as per the details between pages 588 to 656 of C-1-3 along with vouchers and invoices from the manufacturers. CLAIM-9 is towards compensation for losses suffered due to idling of man power resources due to the same reasons as in CLAIM-8 for an effective period of 40 months delay caused by the Respondent and for reasons not attributable to the Claimant. The Claimant submits that he could not disband the labour adjusting with available work load as & when called upon, the quantification of this Claim at ANNEXURE-38 at pages-159 to 258 of C-1-2 are modified and submitted in ANNEXURE-199 at pages - 657 to 665 of C-1-3 and submits that the compensation towards idling of man power up to May-2006 is Rs. 10,78,92,361/- and from June-2006 to May-2007 Rs. 6,49,72,259/- totaling to Rs. 17,28,64,620/- and submits that he is entitled for this claim up to 30.05.2007.

128. The Respondent denies these CLAIM-8 & CLAIM-9 on the common grounds that;

i. The delay is caused by the Claimant due to the non-availability of technical experts in executing this project from the beginning.

ii. The technical know how and expertise and financial capacity of the joint venture partners was not made available to the Respondent resulting in a breach of the contract which would disentitled the Claimant to raise any claim.

iii. The Claimant accepted the time extension without LD and with price adjustment and had issued a no claim certificate NCC1 at the time of giving Extension of Time EOT1 and is barred from raising these claims.

iv. the delay in execution of work was not caused due to the non handing over of the sites for works, borrow areas or any other infrastructure works in time and free from encumbrances.

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348

v. there was any idling of the Claimant's plant & machinery and labour and other resources and that as a matter of fact that the Claimant is guilty of poor mobilization of men, material & machinery which was pointed out to him from the beginning.

vi. the work was unauthorizedly subcontracted even though the sub Contractor was not satisfying any of the requirements stipulated under the contract for the award of the work.

vii. the Claimant is alleging a total delay of 40 months as of May 2007 and is claiming compensation for idling of men, plant & machinery for a period of 57 months as if the entire delay is upon the Respondent and no work was done during the contract period of 45 months & 12 months there after till May-2007.

viii. the CLAIM-1 of the Claimant is on the same grounds and the Claimant is making CLAIM-8 & CLAIM-9 again. The claim as per ANNEXURE-198 & ANNEXURE-199 is without any basis.

129. The Claimant refuted these contentions of the Respondent and submits that;

i. the claim towards CLAIM-8 under ANNEXURE-198 at pages-587 to 650 of C-1-3 for idling of plant & machinery and at ANNEXURE-199 at Page-657 of C-1-3 for idling of man power resources are just and it does not amount to doubling of the claim under CLAIM-1.

ii. He has furnished the details and particulars of the plant and machinery deployed in pages-588 to 591 of C-1-3 and invoices for these in pages-625 to 656 at ANNEXURE-198B of C-1-3 as evidence.

iii. Regarding the particulars of all the equipments including the arrival date and costs are tabulated in Pages-588 to 591 of C-1-3.

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iv. That it is prudent to work out at first monthly idling cost of these resources considering applicable items and facts as per ANNEXURE-198A at pages-592 to 624 of C-1-3 for the machinery and then consider the average period of deployment at the site and finally to consider these along with the turn over loss factor.

v. Regarding the objection with respect to the contract being done on back to back basis it is submitted that the subcontracting has been ratified from the beginning by the Respondent.

vi. Regarding no claim certificate it is stated that the extension of time is given under Clause-58 of the contract which is specifically due to the delays attributable to the Respondent.

vii. Regarding the claim for the idling the Claimant submits that only the period of deployment of resources has been considered and based on the percentage loss of turnover which is 76% of the contract value 40 months delay considered is appropriate and there is no fallacy.

viii. The CLAIM-8 & CLAIM-9 are not overlapping with CLAIM-1 & CLAIM-2 and submits that no idling is considered in CLAIM-1 & CLAIM-2. Inviting reference to ANNEXURE-141 at page-484 of C-1-3 relating to CLAIM-2, ANNEXURE-196 at page-588 of C-1-3. ANNEXURE-196 & 198 of C-1-3 showing the particulars relating to CLAIM-8 & CLAIM-9 respectively.

130. We have heard the parties based on the documents and the submissions made. We find that the Claimant has produced the documents, details and the invoices in ANNEXURE-198 & ANNEXURE-199 with regard to CLAIM-8 & CLAIM-9. We have examined the delays on various counts as claimed by the Claimant and after detail examination of all the delays considering the over lapping delays we have held in earlier paras that there is a net delay of 63 months not attributable to the Claimant which includes the period from the beginning of contract from September-2002 to December-2007. All other delays are only

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overlapping delays. The claim made under CLAIM-8 by the Claimant is for the delay of idling of plant & machinery for two stretches viz;

(A) 26.177 months in the original 45 months period of the contract. Hence, the Respondent's contention that the entire contract period is taken as idling is not acceptable. This 26.177 months idling period is determined based on the weighted average period by considering the product of the sum of the cost of plant & machinery and the deployment months divided by the sum of the cost of plant & machinery to obtain weighted average period of machinery. This is worked out from the fundamentals and hence the weighted average delay for the equipment deployed for 26.177 months up to May-2006 is reasonable. The loss claimed is for this 26.177 months idling which amounts to Rs. 19.47Cr as per ANNEXURE-198 at page 587 of C-1-3 which we consider as reasonable.

(B) 11.012 months in the period beyond the original contract period from June-2006 to May-2007 i.e., for a period of 12 months beyond the original contract period and adopting the same procedure as in (A) above the claim is Rs. 8.495Cr. As the period from September-2002 to December-2007 amounting to 63 months is a delay that is not attributable to the Claimant, the losses suffered due to the idling of plant and machinery from June-2006 to May-2007 falls within this period. However, it is not justifiable that 11 months of idling of plant & machinery would occur in the period of 12 months from June-2006 to May-2007. However, considering the proportion of the delay with respect to the total period as in (A) above i.e., 26 months to 45 months is 58% of the total period is the idling period under (A) above the period of delay in the 12 months accounts to 6.35 months as against 11 months. Correspondingly the claim amount works out to 8.495 x (6.35/11.012) = Rs. 4.89Cr.

131. Thus the total amount allowable under CLAIM-8 is Rs. (19.47 + 4.89) = Rs. 24.36Cr.

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351

132. In the light of the above circumstances and the reasons recorded therein we award an amount of Rs. 24.36Cr towards this CLAIM-8 as against the claim of Rs. 27,96,41,427/-.

CLAIM-9:

133. Regarding CLAIM-9 the total claim is split into two stretches of period (I) & (II) at ANNEXURE-199 page-657 & 658 of C-1-3.

(1) The period (I) is covering the original contract period of 45 months from September-2002 to May-2006 wherein as per the details submitted in page-657 by the Claimant the cost towards labour up to May-2006 is Rs. 9.31Cr which is increased by 1.8 time towards skilled & semi skilled labours & 1.55 times for unskilled & daily wages, thus totaling to Rs. 14,12,49,814/-. The actual turnover achieved in 45 months is Rs. 79.00Cr as against the contract amount of Rs. 334.52Cr, thus the shortfall in turnover is Rs. 255.52Cr. We find from the Clause-36 of the contract relating to Price adjustment at page-288 of Vol-1 of the contract Sub-Clause-36(ii) relating to labour it specifies that the labour component is 25% of the total value of the work done be it for purpose of price variation. Accordingly during the contract period of 45 months for the actual turnover of Rs. 79.00Cr the labour component at 25% accounts for Rs. 19.75Cr. As against this the claim of the Claimant is that he has incurred the cost of labour for this period of 45 months amounting to Rs. 9.31Cr which is further modified to Rs. 14.12Cr as observed above. We find that either Rs. 9.31Cr or Rs. 14.12Cr incurred towards the labour as stated by the Claimant is less than Rs. 19.75Cr which is the amount involved as per the agreed percentage of labour according to the contract. Under these circumstances the claim of Rs. 10.78Cr as a loss claimed by the Claimant fails to reasoning and accordingly we reject this claim for this period.

(2) For the period two from June-2006 to May-2007 we find the total cost of labour claimed in page-657 incurred is Rs. 5.35Cr and the total

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expenditure by considering a factor of 1.8 for skilled & semi skilled worker & 1.55 for unskilled and daily wages the total expenditure towards labour in this period is Rs. 9.93Cr. The value of work done actually in this period is Rs. 58.31Cr. For the reasons stated in pre-para 25% of this works out to Rs. 14.57Cr. We find in this period from June-2006 to May-2007 the actual work done is Rs. 58.31Cr as against the planned work of Rs. 89.20Cr. Hence, compared to the actual turn over of 52.31Cr in the period from June-2006 to May-2007 the Claimant has claimed, on the basis of the actual labour cost of Rs. 9.93Cr, a loss of Rs. 6.49Cr. Therefore, we find that either the actual cost of Rs. 9.93Cr or the loss of Rs. 6.49Cr is far less than Rs. 14.57Cr which he would have incurred at 25% of the work executed. Under these circumstances we find that there is no justifications for this claim towards loss suffered due to idling of labour between June-2006 to May-2007.

134. In the light of the above circumstances and the reasons recorded therein we reject this CLAIM-9.

CLAIM-10(A): Compensation for losses suffered due to overheads:

135. This claim is towards the loss suffered by the Claimant due to the loss of overheads in the original contract period of 45 months from September-2002 to May-2006. The Claimant submits that as per the contract the period of contract was 45 months and the contract amount was Rs. 334.52Cr. Due to various delays not attributable to the Claimant such as non handing over of the work site, non-handing over of the borrow areas, increase in the heights of excavation on both the left and right banks due to poor geological conditions as noted earlier the net delay as observed and held by us is 63 months from September-2002 to December-2007. On account of these delays not attributable to the Claimant, the Claimant submits that the actual turnover that was possible to be achieved in the contract period of 45 months was only Rs. 79.00Cr and the shortfall in turnover amounts to Rs. 255.52Cr. The Claimant submits that the over heads component in the rates is 6.67% as per the norms

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and accordingly claimed the loss in overheads for the unexecuted work amounting to Rs. 255.52Cr as he could not recover the overheads to the extent of Rs. 17.043Cr being 6.67% of Rs.255.52Cr. The Claimant relies on 2006 SCALE 220: Mc Dermott International Inc Vs Burns Std Co. to substantiate his claim that when the breach has occurred the manner of determination of the damages is with in the jurisdiction of the Arbitral Tribunal and the method of determination by the Arbitral Tribunal by any accepted formula like Hudson or Emden or Eichely formulas is accepted under law.

136. The Respondent refutes this CLAIM-10(A) on the grounds that the Claimant failed to bring in the expertise as per the JV agreement, the JV partners were not available at the site from the beginning, the work was subcontracted on back to back basis without approval, he has accepted the time extension without LD and with price adjustment and issued a no claim certificate and resists this claim and further states that there is no basis for the alleged claim and it does not fall under Sec. 73 of the Indian Contract Act. Further, the Respondent submits that the Claimant had claimed 15% towards over heads and 10% towards loss of profit vide his letter dated 19.11.2007 at page-159 of C-1-2 and in all claim 25% amounting to Rs. 126Cr but before this arbitral tribunal he has claimed 6.67% towards overheads and 10% towards loss of profit which is totally 16.67% and submits that the Claimant is not entitled to this claim. The Respondent refutes the reliance of the Claimant on the Mc Dermott case & relies on 2009(4) Arb.L.R.506 (Del): Prominent Electric Works Vs DDA.

137. We have heard the parties and perused the documents. It is a fact that there was a delay of 63 months not attributable to the Claimant as held by us in the earlier paras for the reasons stated there under. The original contract period was 45 months. In so far as the percentage of overhead is concerned the Claimant submits that 6.67% overheads in the rate is indeed a provision made in the rates. In the rates for working out the costs as per the report of the committee on cost control of river valley projects, Government of India Ministry of Irrigation, January-1981 the Claimant submitted that the provision towards Contractors overheads and profits as stated in the report is 20% of the prime

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cost in the analysis of the rates. While, the Claimant submits that his claim is only for 6.67%.

138. We refer to Hudson's Building and Engineering contract Volume-1 Eleventh Edition, by applying this formula and for the overheads at 6.67% the loss of overheads is:

$$= \frac{6.67 \text{ (Overheads)}}{100} \times \frac{334.52 \text{ (Contract Sum)}}{45 \text{ (Contract period)}} \times 57 \text{ (delay up to 31.05.2007)}$$

$$= 28.26\text{Cr.}$$

In the Mc Dermott case the Apex court held in para-116 that *"we do not intend to delve deep into the matter as it is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall with in the domain of the Arbitrator"*. Further, in para-119 of the said judgment the Apex court held *"Sections 55 & 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian Law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India"*. Based on these above decisions of the apex court we find that application of Hudson formula for the determination of loss of overheads is acceptable. According to this the loss of overheads is Rs. 28.26Cr for the period from September-2002 to May-2007 as against which the claim of the Claimant is Rs. 20.932Cr. We find that the reliance of the Respondent in the case of Prominent Electric Works Vs DDA is misplaced with regard to the facts and circumstances of the case before us as the main issue was regarding limitation and the court held in para-8 that *"Accordingly, though the objection petition is allowed for the purpose of record in that it is held that the arbitrator was not justified in holding the claims to be beyond limitation, however, having examined the merits of the matter with respect to the claims which were*

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355

made before the arbitrator, and the other details including the evidence. I am of the opinion that objection petition is liable to be dismissed and it is not required that the matter should be remitted to the arbitrator for fresh consideration. Accordingly, the objection petition is dismissed and the award is made the rule of the court".

139. The Claimant has made this claim for two periods up to 31.05.2006 as Rs. 17.043Cr and for the period from 01.06.2006 to 31.05.2007 as Rs. 3.889Cr totaling to Rs. 20.932Cr. We find that in the facts and circumstances of the present case before us and the delays not being attributable to the Claimant the loss of overheads claimed at Rs. 20.932 Cr for the period up to 31.05.2007 as against the amount of Rs. 28.26Cr as per Hudson formula. Hence, we find it reasonable to award this claim of Rs. 20.932Cr.

140. In the light of the above circumstances and the reasons recorded therein we award an amount of Rs. 20,93,20,000/- towards this CLAIM-10(A) as claimed.

CLAIM-10(B): Compensation for losses suffered due to non-realization of profit:

141. This CLAIM-10(B) is towards non realization of the expected profit which the Claimant would have earned under the contract. The Claimant submits that the profit element is 10% and relies on the report of the rates and costs committee of CWC where the profits and overheads totally are specified at 20% of the prime cost. The claim is in two parts.

A) The first part is for the period from September-2002 to May-2006 i.e., the original contract period. In this period the Claimant submits that for various delays not attributable to him, he was able to execute the work amounting to Rs. 79.00Cr as against the contract amount of Rs. 334.52Cr. The loss in turnover being therefore Rs. 255.52Cr and the loss of profit at 10% is claimed at Rs. 25.552Cr.

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B) The Second part of this claim is for the period from 01.06.2006 to 31.05.2007 i.e., for 12 months period beyond the original contracted period. The turnover planned according to the Claimant is Rs. 89.20Cr being the average turn over for 12 months for the original contract cost of Rs. 334.52Cr and the contract period of 45 months. The Claimant submits that for various delays not attributable to him he could achieve only an actual turn over of Rs. 30.89Cr the difference between the planned turn over and the actual turnover accordingly is stated as Rs. 58.31Cr and the loss of profit is claimed at Rs. 5.831Cr.

142. Hence the total claim towards loss of profit under CLAIM 10(B) for the period from September-2002 to May-2007 is claimed at Rs. 31.443Cr.

143. The Respondent contends that the Claimant has failed to appreciate that the said contract has not been terminated or reduced in value to say that the said profit will never be earned by the Claimant and in-fact the same is earned in the later years by the Claimant and resists this claim.

144. We have heard the parties and we agree with the contention of the Respondent that the loss of profit would arise only when the contract is terminated or when the value of the work is reduced, both of which are not the grounds on which this claim is made. Factually as admitted by the parties, the contract is still in currency and the work is under progress. The total value of the contract at the completion stage is still not known and the parties during the proceedings submitted that the actual cost has been more than the contract value. Therefore, we find that this is not a case where there is a loss of profit as compared to the contract value. In the light of these facts and circumstances we find that this claim towards the loss of profit amounting to Rs. 31.443Cr is liable to be rejected and accordingly we reject this claim.

145. In the light of the above circumstances and the reasons recorded therein we reject this CLAIM-10(B).

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357

CLAIM-11: Compensation for losses suffered due to undue increase in cost of input materials, during the 45 months original stipulated completion time in the contract:

AND

CLAIM-12: Compensation for losses suffered due to undue increase in cost of input materials: by way of revision of rates for works executed after the expiration of original stipulated completion time of 45 months in the contract (i.e., after May. 2006):

146. Both parties during the arguments dealt with the CLAIM-11 & CLAIM-12 together and accordingly we also are dealing with the CLAIM-11 & CLAIM-12 together.

147. This CLAIM-11 is towards compensation for losses suffered due to undue increase in cost of input materials. The Claimant submits that the cost of the materials of construction viz; cement, reinforcement steel, structural steel & Diesel were abnormally increased from the prevalent rates as on January-2002 at the time when the rates were bid under the contract. The increase in percentage of these commodities viz; cement, reinforcement steel, structural steel & diesel were respectively at 86.14%, 117.24%, 130.13% & 94.63% in May-2006 i.e., at the end of the contract period and the claimant makes a claim of Rs. 4,51,33,232/- as at ANNEXURE-3C to ANNEXURE-3B for the works executed up to June-2007.

148. The CLAIM-12 made by the Claimant is towards revision of rates for works executed after the expiration of the original contract period of 45 months which ended on 31.05.2006. This claim is for the revision of rates for the work done beyond the contract period due to increase in the cost of materials, labour which form the basic inputs for the rates. The Claimant submits that the price variation Clause under the contract has lost its relevance and has become infructuous as the quoted rates that were valid up to the end of contract period are no more valid due to undue increase in the prices of commodities and inputs to the works as well as the delays not attributable to the Claimant. Accordingly the Claimant submits that he is entitled to revised rates for the

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work done beyond 31.05 2006 along with price variation as per the formula under the contract with the shifted base date being taken as 31.05.2006 for the work done from 01.06.2006 onwards. The Claimant submits that the rate analysis for the major items applicable for the period beyond the contract and submits that the rate analysis made is as per the Central Water Commission (CWC) guidelines and taking into account the actual site conditions and the rates prevailing as on 31.05.2006. The detailed rate analysis for 95 items of the contract are produced at ANNEXURE-201 at pages-671 to 838 of C-1-3 and prays that the rates as per ANNEXURE-201 for the various items for which the rate analysis has been worked out be awarded. For other minor items Claimant has sought for in enhancement in the quoted rates as per BOQ by 100%. Both the revised rates as per ANNEXURE-201 and the enhancement of 100% over the BOQ rates for items not covered in ANNEXURE-201 is sought for in respect of the works actually executed from 01.06.2006 i.e., beyond the contract period.

149. The Claimant relies on 2006 (12) SCALE 654: Satyapalan Vs State of Kerala & AIR 1991 KAR 96: State of Karnataka Vs R. N. Shetty & Co. to advance his proposition that the arbitral tribunal has the jurisdiction and authority to revise the rates as claimed by him and allow the claims.

150. The Respondent refutes and denies these claims on the grounds that:

i. Under CLAIM-11 the Claimant is seeking to change the escalation formula and is asking for additional costs towards cement, steel, labour against the agreed formula provided in Clause-36 of GCC for the works executed in the original stipulated period of 45 months which is not permissible.

ii. Under CLAIM-12 the revision and enhancement of rates after May-2006 as sought by the Claimant is for both revision of the rates and enhancement of the rates and has further sought for changing the agreed formula by shifting the original base date of January-2002 to 31.05.2006 and this amounts to rewriting the contract which is beyond the scope of arbitration.

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iii. Relying upon Clause-36 of GCC under the contract the increase in the cost towards escalation of items, be it within the contract period or for the extended period, is beyond the provision of the contract and liable to be rejected.

iv. At the time of accepting the extension of time EOT1 the Claimant has given a no claim certificate where he has categorically mentioned that he would not ask for any compensation and hence the claims are not tenable.

v. The Arbitral Tribunal being a creation of the contract cannot travel beyond the contract and rewrite the contract.

vi. Relying upon Clause-34 page-286 para-2 of Vol-1 of the contract, there is no addition, deviation or alteration to the works beyond 100% of the contract value and the Claimant is not entitled to seek revision of rates.

151. The Respondent relies on (2001) 4 SCC 241: Ramachandra Reddy & Co. Vs State of AP & Ors, (1999) 9 SCC 610: Ch. Ramalinga Reddy Vs Superintending Engineer & Ors, 2002 (2) RAJ 528 (Del): UOI Vs Mohan Lal Harbanslal Bhyana & Co., (2002) 4 SCC 45: G.M. Northern Railways Vs. Sarvesh Chopra & 2002 (4) RAJ 650: Kailash Nath & Associates Vs New Delhi Municipal.

152. After having heard the parties and perusing the documents and pleadings we find that CLAIM-11 is towards enhancement of rates within the contract period due to the abnormal increase in the cost of cement, steel & diesel as stated therein. The contract provides for the price variation under Clause-36 of GCC price adjustment wherein it is specified that *"the contract price as awarded shall be adjusted for increase or decrease in rates and prices for labour, materials, fuel and lubricants in accordance with the following principles and procedures"*. Under this Clause there are formulae for increase in the cost of labour at Clause-36(ii) page-288, Clause-36(iii) construction materials with separate formulae for (a) cement, (b) steel & (c) other materials, Clause-36(iv) for increase in cost of petrol, diesel, oil & lubricants. In the formulae for the

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initial base index or the base price is specified as that which is prevailing as on 30 days prior to the closing date of submission of the tender. As per the agreement at page-4 of the contract the proposal of the Claimant was submitted on 30.01.2002 and therefore the 30 days prior to the submission of bid puts the initial base date for prices and indices as on 01.01.2002. The price adjustment Clause formulae provide for:

1) increase in the labour based on increase in All India Consumer Price Index the base date being 30 days prior to the date of closing date for submission of tender as published in the Indian Labour Journal of Labour Bureau page-289 Vol-1 of the contract,
2) for cement it is the average index number of whole sale price in India and for steel it is the average index number of whole sale price in India as on 30 days prior to the closing date of submission of tender published by the office of the economic advisor, ministry of commerce & Industry, Government of India as per page-386 Vol-1 of the contract,
3) For Petrol, Diesel, Oil & Lubricant the retail price of diesel at the existing consumer retail outlet at Rishikesh 30 days prior to the closing date of submission of tender.

153. Based on the above provisions the base indices of price adjustment shall be applicable for the work determined at each component as per Clause-36(i)(d) for each quarter ending March, June, September & December. Admittedly the price adjustment as per Clause-36 has been made by the Respondent within the contract period. Essentially the Claimant's claim on this head is for escalated rate on the ground that there has been unusual escalation of price of cement, steel, labour, etc. There is no dispute with the proposition that an Arbitrator can grant extra amount or extra rate, if there has been unusual increase in the cost of prime input commodity like cement, steel & POL, which has caused the Contractor to bear the extra cost, but in the case in had in such contingency the contract under Clause-36 of GCC (Page-287 of Vol. I) provides a formula for escalation in respect of work executed within the original stipulated period of 45 months. The Contractor has been paid in accordance with the said formula by invoking the said Clause-36 of GCC. Before this Tribunal, in respect of the

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work executed during the continuance of the contractual period of 45 months, the Claimant has raised CLAIM-11 invoking a formula of his own. We are of the considered opinion that when for such escalation on basic materials, formula is provided in Clause-36 of GCC and the Contractor has been paid in accordance with the said formula, the Tribunal will have no jurisdiction to accept the innovated formula of the Claimant whatever may be the extent of escalation. As is often said, an Arbitral Tribunal being a creature of the agreement is duty bound to enforce terms of the agreement and would not be entitled to create fresh agreement for determination of claim for which the contract itself provided a Clause and the Contractor has been paid in accordance with that clause. While the claim of the Claimant is for compensation on account of abnormal increase in the cost of materials like cement and steel, labour, Diesel and petrol which increase is not compensated by the Price Variation formulae under the contract. In the light of the provisions under the contract we find that further escalation of price within the contract period as sought for by the Claimant under CLAIM-11 as is not allowable for the work done within the contract period and accordingly we reject CLAIM-11.

154. CLAIM-12 however is on a different footing where the Contractor has claimed for a revision of rates. At the outset it must be noted that this claim is in respect of executed work beyond the contractual period of 45 months. The Tribunal has already given a finding that the delay in execution was squarely attributable to the Respondent and the delay has been more than 63 months. In a written contract, the contract itself aims at sharing the contractual risk equitably between the contracting parties. When the Employer provides information at the time of tender on ground conditions and the Contractor is asked to quote a rate, the Contractor is not asked to price of a risk, that he could not have foreseen. A contract usually includes the Clause whereby the Contractor is deemed to have inspected and examined the site and its surrounding and information available in connection therewith for being satisfied as far as practicable and reasonable before submitting his tender and when the tender is furnished all the information made available by the Employer as well as the Contractor's own inspection and examination then the

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362

sufficiency of the rates and prices quoted by the Contractor normally would cover all his obligations under the contract. But if during the course of execution of the contract the Contractor encounters physical conditions or artificial obstructions which conditions or obstructions could not in his opinion reasonably have been foreseen by an experienced Contractor, then the Contractor will be entitled to compensation on that score. The expression 'foreseen' has been the subject matter of wide discussions several literatures and Case Laws and reasonable view appears to be that the word 'foreseen' means what can properly be provided for with the information available and not what can be imagined as occurring. In an arbitration proceeding if the Arbitrator comes to a conclusion that the Contractor claims compensation for any unforeseeable circumstances then the Arbitrator will be entitled to consider and find out the basis on which the Contractor can be compensated. In our considered opinion all conditions and hindrances which could not reasonably have been foreseen by the Contractor experienced in the particular type of work which has affected the progress towards execution and completion of the work would tantamount to unforeseen condition and on such an event the Contractor cannot be bound to the terms of the contract providing a rate for the execution of the work.

155. In order to succeed in a claim for compensation as in the instant case the Claimant has claimed under CLAIM-12, the Contractor has to demonstrate unforceability, consequential delay, quantifiable delay and additional cost incurred. In other words, he has to demonstrate his entitlement, causality and the amount. Necessarily, therefore, he would be required to establish reasonableness of the unforeseen event. In the famous book by Powell-Smith and Stephenson dealing with claims and records, it has been stated that claims for breach of contract do not lynch parties. Courts may breathe another and other terms such as implied terms into contract to render it commercially effective. Thus, commercial effectiveness has to be borne in mind by Arbitral Tribunal while considering the claim of the Contractor in the light of the terms of the contract. The author has quoted the Australian case of Morrison-Kunudsen International Company Vs. Common Wealth of Australia, wherein it

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was observed that misinformation given to a Contractor on behalf of the Employer could also give rise to a claim for breach of an implied warranty. In that very case the Court of Appeal had held that the Contractors were entitled to recover some compensation for breach of implied warranty by the Employer that the ground conditions should accord hypothesis upon which they have been instructed to desire. This principle would apply to the case in hand where the Contractor has been able to establish the adverse conditions as well as unusual delay even in handing over the possession by the Employer and also the requirement of excavation at a very high altitude than that was originally intended. This principle will have to be borne in mind while examining the reasonableness of claim under CLAIM-12.

156. In so far as CLAIM-12 is concerned the claim is for revision of rates beyond the contract period for reasons of delays not attributable to the Claimant as observed by us in the earlier paras while delays were discussed and we have held that a delay of 63 months is not attributable to the Claimant for the reasons recorded there under. The EOT1 & EOT2 given by the Respondent are under Clause-58 of the contract where the Respondent is empowered to give the extension only for the delays that are not attributable to the Claimant. The contention of the Respondent that the no claim certificate NCC1 given by the Claimant at the time for according the EOT1 by the Respondent has been held us in the earlier paras that such NCC will not disentitle the Claimant for the reasons recorded therein regarding the Extension of Time EOT2 also the No Claim Certificate NCC2 is held by us that it will not disentitle the Claimant to his claims. Further, we see from Clause-36(c) at page-288 that *"price adjustment shall apply only for work carried out with in the stipulated time or Extension granted by the corporation and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the Contractor"*. Hence, we find from this Clause conjointly read with Clause-58 of the contract when the extension of time is given under Clause 58 for reasons not attributable to the Contractor withholding of or freezing the indices is against the provision of the contract and the Respondent has committed a breach in freezing the indices while according EOT2.

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157. The rates quoted by the Claimant are admittedly for completion of the work with in 45 months which could not be completed for several reasons and delays not attributable to the Claimant as held by us earlier for non-fulfillment of several obligations, under the contract by the Respondent. In a contract of this nature when the obligation of the Respondent are not fulfilled and because of this if the contract is extended, even though at the request of the Claimant, admittedly for reasons not attributable to the Claimant, to hold that the rates quoted at the time of bidding should remain valid for any length of time is an unfair proposition and is not acceptable under the facts and circumstances of this case where the extension is much more than the original period of 45 months contract for reasons not attributable to the Claimant.

158. The Claimant relies on 2006 (12) SCALE 654: Satyapalan Vs State of Kerala, where the Apex court under para-26 held that *"ORDINARILY, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfill its obligations under the contract which has a direct bearing on the work to be executed by the other party, the Arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and M/s. Alopi Parshad's case (supra) and also Patel Engg.'s case (supra). As was pointed out by Mr. Dave, the said principle was recognized by this court in P.M. Paul's (supra), where a reference was made to a retired Judge, this court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation Clause. The said principle was reiterated by this court in T.P. George's case (supra)"*. We rely on this judgment. Further, in the case of AIR 1991 KAR 96: State of Karnataka Vs R. N. Shetty & Co., relied by the Claimant, we find that the Arbitrators in that case had considered revised rates in respect of quantities of work that were executed beyond the contract period and awarded revised rates in respect of the works executed after the contract

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365

period rates which are just and fair towards payment of compensation to the Contractor which the Court upheld. Further in that case the arbitrators have added the price escalation that has taken place there after by revising the base date to the date of the revised rates being made applicable after the contract period. In challenging to the award the court held *"in the circumstances it cannot be stated that the arbitrators had committed any illegality"* by approving the principle adopted by the Arbitrator in revising the rates after the contract period and also adding the price variation by shifting the Base date for price variation as just and fair. Even in the present case before us the CLAIM-12 is for a just and fair compensation based on the cost of materials, labour, etc., worked out on an accepted principle of rate analysis considering the input rates that were prevalent on 31.05.2006 which is the end of contract period in respect of works carried out beyond the original contract period. We have examined these rates and the various invoices, rate analysis based on which the rates for the BOQ items executed beyond 31.05.2006 are shown at pages-686 to 689 of C-1-3 for the 95 items. We find that the rate analysis for these items submitted in pages-724 to 801 of C-1-3 is in conformity with the accepted principles of deriving the rate and also as per CWC guidelines. However, we find that in the rate analysis of each item an additional amount of 9.77% of the prime cost is added towards the interest burden on account of Bank Guarantee cost, margin money cost, insurance cost, etc., and we find that this addition is not allowable accordingly we award the rates for these items by deleting appropriately this 9.77% and the rates awarded for these items are shown in the following table. These rates shall be applicable for the actual quantities executed beyond the contract period ending 31.05.2006:

SL. NO.	ITEM NUMBER	DESCRIPTION OF ITEM	UNIT	RATES AWARDED
1	1/ 8.5	Concrete in Plug in diversion tunnel M20	Cum	4208.83
2	1/13.1	Impervious Clay -Zone I	Cum	268.35
3	1/ 13.2	Fine Filter -Zone II	Cum	1150.46
4	1/ 13.3	Coarse Filter -Zone III	Cum	975.16
5	1/ 13.4	Rock Muck in Coffer Dam- Zone IV	Cum	199.33
6	1/ 13.5	Stone Rip-Rap or pitching-ZoneV	Cum	827.30
7	1/ 14.2	Concrete Lining in Sain nala Diversion M15	Cum	2968.15

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8	2/ 1.1	Dewatering by electric pump.	KWH	28.34
9	2/ 2.1	Removal of material from accepted over breakage including disposal upto K.M 1.5	Cum	178.62
10	2/ 2.2	Common excavation	Cum	168.33
11	2/ 2.3	Rock Excavation	Cum	454.30
12	2/ 2.4	Control perimeter blasting including disposal upto K.M 1.50	Cum	475.94
13	2/ 2.5	Line Drilling	Rm	874.84
14	2/ 2.6	Dental Excavation including Disposal upto K.M1.5	Cum	519.21
15	2/ 2.7	Minor Excavation including Disposal upto K.M1.5	Cum	432.67
16	2/ 2.8	Extra lead per K.M disposal beyond K.M 1.5 to K.M 6.00	Cum	15.56
17	2/ 3.1	Under ground excavation for drainage Galleries (Excavation in class IV including disposal upto KM 1.5)	Cum	2017.03
18	2/ 3.2	Under ground excavation for penstok Shaf:	Cum	1387.07
19	2/ 4.2.1	Furnishing and installing cement grouted Rock bolts upto 3M depth (25mm dia)	Rm	609.37
20	2/ 4.2.2	Furnishing and installing cement grouted Rock bolts beyond 3M depth upto 6M (25mm dia)	Rm	618.58
21	2/ 4.2.3	Furnishing and installing cement grouted Rock bolts upto 3M depth (36mm dia)	Rm	850.35
22	2/ 4.2.4	Furnishing and installing cement grouted Rock bolts beyond 3M depth upto 6M (36mm dia)	Rm	837.77
23	2/ 4.3.1	Furnishing and installing Rock Anchors upto 3M depth (25mm dia)	Rm	572.65
24	2/ 4.3.2	Furnishing and installing Rock Anchors beyond 3M upto 6M depth (25mm dia)	Rm	580.68
25	2/ 4.4.1	Furnishing and installing grouted Rock bolts with end Resin Anchorage upto 3M depth (25mm dia)	Rm	696.71
26	2/ 4.4.2	Furnishing and installing grouted Rock bolts with end Resin Anchorage beyond 3M upto 6M depth (25mm dia)	Rm	642.77
27	2/ 4.5.1	Furnishing and installing Grouted Anchor bars upto 3M depth (25mm dia)	Rm	526.76
28	2/ 4.5.2	Furnishing and installing Grouted Anchor bars beyond 3M depth (25mm dia)	Rm	555.06
29	2/ 4.6	Supply and installation of miscellaneous steel beams, steel plates, steel cables, and all accessories	MT	69141.63
30	2/ 4.8	Furnishing and placing chain link fabric(3mm dia , mesh size 50 mmx50mm)	Sqm	257.54
31	2/ 4.9	Furnishing and placing welded wire mesh (4mm dia wire, mesh size 100 mmx100mm)	Sqm	160.77
32	2/ 4.10	Fabrication and installation of steel supports in underground works	MT	69141.63
33	2/ 4.11	Precast Concrete Lagging	Cum	8682.56
34	2/ 5.1	Providing & laying Shotcreting	Cum	8161.25
35	2/ 6.1.1	Drilling of grout holes by percussion drilling (upto 6M-38mm dia to 50mm dia)	Rm	1749.93

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36	2/ 6.1.2	Drilling of grout holes by percussion drilling (beyond 6M-38mm dia to 50mm dia)	Rm	1759.41
37	2/ 6.2.1	Drilling holes by Rotary drilling (upto 10m depth-38mm dia to 50mm dia)	Rm	6991.11
38	2/ 6.2.2	Drilling holes by Rotary drilling (above 10m upto 20m)	Rm	7330.15
39	2/ 6.2.3	Drilling holes by Rotary drilling (above 20m upto 30m)	Rm	7682.64
40	2/ 6.2.4	Drilling of holes by Rotary drilling depth upto 30 m	Rm	8421.51
41	2/ 6.3.1	Drilling holes for Drainage upto 10m depth-75mm dia	Rm	7350.15
42	2/ 6.3.2	Supply and installation of PVC perforated pipe	Rm	198.00
43	2/ 6.4.1	Drilling of exploratory holes 45mm Dia	Rm	4901.40
44	2/ 6.4.2	Drilling of exploratory holes 76mm Dia	Rm	6535.19
45	2/ 6.4.3	Drilling of exploratory holes 98mm Dia	Rm	9802.79
46	2/ 6.4.4	Extra for core recovery	Rm	1770.00
47	2/ 6.4.5	Extra for Drilling at 15 to 45 degrees inclination from vertical	Rm	1415.96
48	2/ 6.4.6	Extra for Drilling with Triple tube core barrel	Rm	2123.94
49	2/ 6.5	Water pressure Testing of Grout / Exploratory holes	Nos	1226.16
50	2/ 6.6	Supply and installation of mild steel pipes & required fittings for grout holes	Kg	55.87
51	2/ 7.1/2	Consolidation Grouting @ Fill Grouting	MT	12588.80
52	2/ 7.3	Curtain Grouting	MT	13627.68
53	2/ 7.4	Grouting Admixture	KG	21.07
54	2/ 8.1	Mass concrete in Dam (M30)	Cum	4511.61
55	2/ 8.2	Mass concrete in Dam (M25)	Cum	4171.80
56	2/ 8.3	Mass concrete in Dam (M20)	Cum	3967.92
57	2/ 8.4	Mass concrete in Dam (M15)	Cum	3424.22
58	2/ 8.5	Mass concrete in Dam (HPC)	Cum	4430.71
59	2/ 8.6	Silica Fume	MT	38102.40
60	2/ 8.7	Steel fiber	MT	110237.40
61	2/ 8.9	Concrete (including shuttering) lining in shaft & penstok	Cum	7235.47
62	2/ 8.10	Second Stage concreting	Cum	4879.35
63	2/ 8.12	Precast concrete	Cum	5006.16
64	2/ 8.13	Prestressed Concrete	Cum	5214.76
65	2/ 8.14.1 / 2	Air entraining admixture / water reducing / Set controlling admixture	KG	67.43
66	2/ 9.1.1	Shuttering Class F1 & F1C	Sqm	525.24
67	2/ 9.1.2	Shuttering Class F2	Sqm	630.28
68	2/ 9.1.3 / 4	Shuttering Class F2C & F3	Sqm	787.86
69	2/ 9.1.5	Shuttering Class F3C	Sqm	984.83

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70	2/ 10.1	Steel Reinforcement	MT	48488.22
71	3/ 2.1/2.2	Under ground excavation for Access Tunnel Class I & II	Cum	1200.60
72	3/ 2.3	Under ground excavation for Access Tunnel Class III	Cum	1285.39
73	3/ 2.4	Under ground excavation for Access Tunnel Class IV	Cum	1370.19
74	3/ 3.1.1	Furnishing and installing grouted Rock bolts with end Resin Anchorage upto 3M depth (36mm dia)	Rm	766.66
75	3/ 3.3.2	Furnishing and installing grouted Rock bolts with end Resin Anchorage beyond 3M upto 6M depth (36mm dia)	Rm	497.04
76	3/ 3.9.1	Supply and installation of steel Lagging.	MT	69141.63
77	3/ 5.3.1/2	Drilling of grout holes for contact grouting	Rm	470.97
78	3/ 7.1.1	Concreting in power House M25	Cum	4588.98
79	3/ 7.1.2	Concreting in power House M20	Cum	4364.71
80	3/ 7.1.3	Concreting in power House M15	Cum	3766.64
81	3/ 7.1.4	Concreting in power House M10	Cum	3152.37
82	3/ 7.1.6	Back fill Concrete (including shuttering) lining in shaft & penstok	Cum	4272.70
83	3/ 9.1	Steel Reinforcement in power house	MT	53337.04
84	4/ 3.1	Random back fill (ungraded earth and Rock fill)	Cum	149.50
85	4/ 3.2	Compacted back fill (well graded Sandy gravel and cobbles)	Cum	1052.79
86	4/ 3.3	Free draining back fill	Cum	1035.02
87	4/ 4.1	Boulder paving (1:3 cement Mortar)	Cum	2170.34
88	4/ 4.2.1	Supply and Placing of Gabions (wire crates)	Sqm	155.51
89	4/ 4.2.2	Filling of wire crates (Gabions) with boulders	Cum	738.75
90	4/ 4.3	Stone Masonary	Cum	2080.68
91	4/ 6.1	Furnishing and installing of 300mm wide PVC water stopper	Rm	817.35
92	4/ 6.4	Bituminous Coating	Sqm	27.78
93	4/ 7.1.1/2	Mild steel / C.I. pipes	Kg	51.66
94	4/ 7.2.7	Furnishing and installing miscellaneous metal works etc	Kg	63.76
95	4/ 7.9	Metal works supplied by other agency	Kg	7.85

159. The Respondent advanced another contention that the contract envisages revision of rate only in case of addition, deviation or alteration to the work as per Clause-34 of the contract page-286 Vol-1 of the contract and argued that this claim for revision is not based on alteration, deviation or addition and hence the Claimant is not entitled to this claim. We find that this contention is

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unsustainable in view of the fact that the claim is arising due to the breach of the obligations by the Respondent under the contract causing a delay of 63 months beyond the original period of 45 months of the contract and this delay is not attributable to the Claimant as already held by us in earlier paras. Further, we find from Annexure-38 pages-159 to 258 of C-1-2 dated 19.11.2007 when the CLAIM-8 to CLAIM-14 were referred to the Engineer including the CLAIM-12 the Claimant had furnished the rate analysis for some of the items in Annexure-4 of the said letter from pages-190 to 258 enclosing the rate analysis and the cost of various materials. The major items for which the rate analysis was given in support of the claim is at page-190 of C-1-2. The percentage increase in the rate over the BOQ rates for these items varied from 185.99% to 40.84% and in so far as the concrete items are concerned the increase is from 101.74% to 74.56% of the BOQ rates. The Engineer of the Respondent replied this letter on 21.11.2007 at Annexure-39 page-259 of C-1-2 rejecting these claims. The grounds for rejection informed by the Engineer are that *"The various contents contained in your above referred letter, appeared to be due to extended period of work. In this context please be informed that the time extension which have been granted to you is exclusively on your request for consideration of the same and on the basis that no financial claims etc. what so ever shall be entertained by THDC Ltd., on account of grant of such Time Extension. It is apparent also from the 'No Claim Certificate' attached by you with the request made for the time extension"*. Thus, we find that the rejection of this CLAIM-12 along with other claims CLAIM-8 to CLAIM-14 by the Engineer are on the grounds that (a) the time extension has been given as requested by the Claimant and no financial claims shall be entertained by THDC due to such time extension granted by the Respondent. (b) the no claim certificate attached by the Respondent with the request made for time extension would disentitle him and accordingly the Engineer rejected the claims although the rate analysis for some of the items were furnished by the Claimant as per Clause-34(iv) of the contract. Consequent upon such rejection by the Engineer the Claimant had appealed to the Chairman & Managing Director of the Respondent in his letter dated 23.11.2007 Annexure-40 page-260 of C-1-2 and this appeal was also dismissed by the Chairman & Managing

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Director of the Respondent referring to Clause-60 of the contract wherein it is provided that the failure of the Engineer-in-Charge to give decisions in writing the matter will be appealed to the CMD and the CMD has to furnish the reply within 30 days from the date of receipt of the Claimant's appeal. The ground for rejection of the claims by CMD is that the claims are beyond the provisions of contract. It is only after this rejection by the CMD this CLAIM-12 along with CLAIM-8 to CLAIM-14 has been brought for adjudication before this Arbitral Tribunal. Hence, we hold that the Tribunal has jurisdiction to adjudicate on these claims based on the widely worded Arbitration Clause reproduced earlier which engulfs all claims and disputes arising out of the contract with in the ambit of Arbitration.

160. Another contention advanced by the Respondent is that taking particular example in Annexure-201 stating that for the Sl. No. 1 under rock excavation a new rate which is analyzed is Rs. 491.29. In fact we find that for the same item the Claimant while making this claim on 19.11.2007 at page-190 of C-1-2 had sought for a rate of Rs. 429.96 as against the BOQ rate of Rs. 150.34 which the Engineer failed to examine as is required under Clause-34(iv) of the contract while rejecting the claim. Even while asking these revised rates the Claimant had asked only the rates as is now claimed before the Tribunal. Therefore, the claim is not different from what was claimed earlier at the time of rejection. We do not think that claiming for a rate based on the rate analysis by the Claimant for the item and after the same having been rejected referring the matter for adjudication before the Arbitral Tribunal as per the provision of the contract cannot be held to be wrong. Further, the Respondent contends that some of the items for which no rate analysis is furnished in Annexure-201 the Claimant have increased the rates simply by doubling and this cannot be agreed to.

161. These rates are based on the price indices prevailing as on 31.05.2006 and the execution of the works will be subject to the price variations. As the price variation Clause in the contract considers the base index and prices as on 30 days prior to the date of submission of the bid allowing the same base date for

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371

price variation Clause would not be appropriate as the relevant base dates would be only those prevailing on 31.05.2006 for the revised rates awarded. Hence, we find that the same price variation formula would apply even in the extended period with the necessary change in the base date for the revised rates beyond the contract period for reasons explained above. The base prices and indices shall be as on 31.05.2006 and not prior to the date of submission of bid i.e., 01.01.2002. We consider that this as reasonable just and appropriate in view of the facts and circumstances of the case and accordingly award the rates as given in the table above for the items executed beyond the contract period with the base price and indices for price adjustment as per Clause-36 being considered as 31.05.2006.

162. In respect of other minor items not listed above for which the rate analysis has not been submitted but only an increase of 100% is asked above the BOQ rates we reject this claim as it is not substantiated and allow only the BOQ rates with price adjustment as per Clause-36 with the BOQ rate and base indices as on 01.01.2002.

163. The Supreme Court in Satyapalan's case (2007) 13 SCC 43, relying upon the earlier decision in P.M. Paul's case and P.P. George case accepted the contention of the Contractor that even in the absence of any price escalation Clause and with a specific prohibition to the contrary the Contractor would be entitled to claim on account of escalation costs and it would not be beyond the jurisdiction of the Arbitrators to allow such case. On the materials on record, we are of the considered opinion that the Contractor was unable to fulfill his obligation under the contract and could not execute the project in time and did incur extra cost and as such the Arbitral Tribunal was entitled to compensate the Contractor for the extra costs incurred as a result of failure of the Employer to live up to its obligation. We have no doubt in our mind that the Claimant was prevented by unforeseen circumstances from completing the work within the stipulated period and this delay could have been prevented by THDC and therefore the Tribunal was duty bound to find out the reasonable basis for

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372

compensation in respect of the CLAIM-12 and that is what we have arrived at in preceding paragraphs.

164. In the light of the above we award the revised rates as per pre paras.

CLAIM-13(A): Compensation towards extra costs / losses suffered on mobilization advance towards interests and BG's:

AND

CLAIM-13(B): Compensation towards extra costs / losses suffered on performance B.G. due to 40 months delay:

AND

CLAIM-13(C): Compensation for losses suffered due to 40 months delay on insurances:

AND

CLAIM-13(D): Compensation for losses suffered due to the Interest levy on Risk and cost advance:

165. The Claimant submits that the four claims under this Claim are due to the financial losses suffered by him for delays not attributable to him. The CLAIM-13(A) is towards compensation of losses suffered on the mobilization advance towards interests on BG's. The Claimant referring to GCC Clause-9 & Clause-10 states that he has taken mobilization advance of Rs. 16,72,58,304/- which is 5% of the contract amount as per Clause-9(i) of GCC at page-262 of Vol-I of the contract. As per the contract simple interest at 16% per annum is chargeable to the Claimant from the date the amount is paid. This mobilization advance of Rs. 16.726Cr is taken by the Claimant by providing a Bank Guarantee (BG) for an equivalent amount. The contention of the Claimant is that this amount was recoverable as per Clause-10 at page-264 Vol-I of the contract according to which the recovery of sums advanced shall be deducted from the Contractors interim bills including the bills for the payment of price adjustment and that no recovery shall be made till the work equivalent to 10% of the contract is completed. Further, it is contended that the entire advance along with the interest thereon shall be recovered on pro-rata basis of the billed amount by the time work equal to 80% of the contract value is completed. The Claimant

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contends that for several delays not attributable to him the work prolonged beyond the original contract period due to the defaults of the Respondent in not fulfilling its obligations including handing over of site free from all encumbrances, hindrances and interferences during the execution of work and the delay is for a period of 40 months beyond the original period of 45 months of contract. The contention of the Claimant is that the recovery of interest on the mobilization advance for this delay period of 40 months which is not attributable to the Claimant should be deferred. Towards this the claim amount is the interest at 16% per annum for the period of 40 months delay on mobilization advance of Rs. 16,72,58,304/-. Accordingly the claim preferred is Rs. 8,92,04,429/-. In addition to this, the Claimant submits, that for this mobilization advance of Rs. 16.726Cr he had produced the BG and claimed the extra cost suffered by him towards keeping the BG alive for this delay period of 40 months on two counts (a) Bank Guarantee commission at 2% per annum for 40 months which amounts to Rs. 1,11,50,553/- & (b) loss of interest on the margin money of 10% of the BG value kept with the bank and has claimed the differential interest between 16% & 10% i.e., 6% on 10% of the mobilization advance deposited as margin money. Thus under CLAIM-13(A) the claim is:

i. Refund/relief against interest burden on mobilization advance of Rs. 16,72,58,304 for 40 months delay period at 16% per annum, i.e., Rs. 8,92,04,429/-.

ii. Reimbursement of extra expenditure on BG commission charges suffered for 40 months delay period against furnishing of BG's for mobilization advances, @ the rate of 2% per annum on the BG amount, which claim works out as Rs. 1,11,50,553/-.

iii. Reimbursement of losses suffered due to reduced interest income on Margin Money (at 10% of BG Value) to be kept with the bank, (i.e., the differential interest impact between the deposit interest received rate at 6% and the interest rate at 16% per annum levied by THDC) for 40 months delay. Which claim works out as Rs. 55,75,277/-.

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374

Sub-total of CLAIM-13(A) works out as Rs. 10,59,30,259/-.

The Claimant submits that he had requested the Respondent for immediately stopping the recovery of interest and waving of the interest for the delayed period in his letter dated 19.06.2007 at Annexure-202 page-840 of C-1-3 and subsequently this claim has been raised while preferring Claims 8 to 14 on 19.11.2007 at Annexure-38 page-159 of C-1-2.

166. The Respondent denies these claims on the grounds that the Respondent is not liable for the delay but on the contrary it is the Claimant who is responsible for the delay in not deploying the proclaimed expertise and not discharging his responsibilities under the contract. It is contended that the Claimant having issued the 'No Claim Certificate (NCC)' in acceptance of the time extension granted by the Respondent is barred from all or any claims arising out of the delay or on account of extension of time and accordingly it is contended that the present claim is liable to be rejected. Relying upon Clause-9 of the contract regarding the mobilization advance of 5% of the total contract value paid to the Claimant, the Respondent contends that this mobilization advance as per the contract shall bear simple interest at 16% and the interest is chargeable from the date the amount is paid. As this interest has accrued in favour of the Respondent any relief for refund of the said interest is beyond the provisions of contract which amounts to traveling beyond the contract. Further, the Respondent submits that as regards the extension of BG for performance is concerned as per Clause-6 of GCC the Claimant is contractually bound to furnish the security deposit for performance and if the same is in the form of the Bank Guarantee the Claimant is bound to keep the BG alive to cover the period of extension also and submits that the Claimant is contractually bound to keep the BG at his own cost be it for mobilization or performance. And hence, the Claimant cannot claim for the consequent loss due to reimbursement of reduced income and margin money and therefore this claim is for compensation of indirect losses and is beyond the provisions of Sec. 73 of Indian Contract Act.

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375

167. We have heard the parties and perused the documents and pleadings. Clause-9(i) of the GCC at page-262 Vol-1 of the contract provides for mobilization advance for an amount not exceeding 5% of the contract value. This mobilization advance will be released against submission of BG of an equivalent amount from Nationalized Bank. Also it is agreed therein that the advance will be released in 2 installments. The first installment of 2% will be paid with in one month of signing of the agreement and the second installment of 3% will be payable on satisfactory utilization of earlier advance as certified by a practicing chartered accountant and on certification by the Engineer about mobilization at site. It is also an agreed term under Clause-9(i) that the advances shall bear simple interest at 16% per annum and the interest on the amount paid is chargeable from the date the amount is paid. Accordingly it is an admitted fact by the parties that the mobilization advance of Rs. 16,72,58,304/- is paid by the Respondent and received by the Claimant by producing a BG for the equivalent amount.

168. Clause-10 of the contract at page-264 specifies the mode of recovery of advances relating to the advances paid under Clause-9(i) & 9(ii) reproduced below:

"i) Recovery of sums advanced as per Clause-9(i) & (ii) shall be made by deduction from the Contractor's interim bills including the bills for the payments for price adjustment. No recovery would be made till the work equal to 10% (ten percent) of the contract value is completed. The entire advance with interest thereon shall be recovered on prorata basis of the billed amount, by the time work equal to eighty percent of the contract value is completed".

Accordingly we find that the mobilization advance is a recoverable advance to be recovered from the work bills of the Claimant in respect of the works executed under the contract. We also note the conditions of recovery for this mobilization advance are that (i) no recovery shall be made till the work equal to 10% of the contract value is completed & (ii) the entire mobilization advance

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along with interest shall be recovered on prorata basis of the billed amount by the time the work equal to 80% of the contract value is completed. Thus according to us the contract provides for the recovery of the mobilization advance within the period of 45 months of the contract and this recovery shall be made along with interest from the bills for the work that are executed between 10% and 80% of the executed value in this period. The contention of the Claimant is that he could not execute the work as per the contract for reasons not attributable to him thereby the mobilization advance could not be recovered along with interest within the contract period. We have recorded our findings while dealing with the delays that the Claimant is not responsible for 63 months of delay for reasons recorded there under in the earlier paras. The claim of the Claimant is for refund/relief of interest burden on the mobilization advance for 40 months delay period beyond the original contract period. While dealing with the no claim certificate (NCC) and extension of time we have recorded our findings that the NCC1 & NCC2 corresponding to the extensions of time EOT1 & EOT2 will not disentitle the Claimant for his claims for reasons recorded earlier. Also the extension of time for 37 months is granted by the Respondent under Clause-58 of the contract and we have held that the extension of time granted under provisions of Clause-58 is and can only be due to delays not attributable to the Claimant as can be inferred from Clause-58. In view of these findings the mobilization advance that should have been recovered as per the contract according to Clause-9 & 10 was wholly prevented from being recovered on account of various delays attributable to the Respondent by preventing the performance of the Claimant. The Claimant produced copy of the report of committee on cost control of river valley projects Vol. 2 January-1981 Government of India wherein it is stated that Para-6.18 page-9 that *"The interest of all types and bank guarantee charges are considered direct charges and rightly debitable to works"*. Therefore the rates would include the known cost of these Bank Guarantee charges and interest recoverable from the work bills as per the contract. In a situation when the work is extended beyond the contract period for no fault of the Contractor and breaches of the Employer and the mobilization advance is not possible to be recovered within contract period we do not find it correct to by order the

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Claimant with interest and as well as BG charges for such extended period. Therefore, we find that the works having been hindered and delays having been held to be not attributable to the Claimant the recovery of mobilization advance as per the contract was prevented for reasons not attributable to the Claimant. Therefore the expenditure towards the extension of bank guarantee for 40 months period is directly debitable to the works beyond the original contract period and deserves to be compensated and we find that this expenditure is remote to the contract and therefore we find that there is force to support the contention of the Respondent.

169. The Respondent invited our attention to Clause-6 of the GCC at page-256 Vol-1 of the contract and submitted that the Claimant is bound to keep the bank guarantee towards mobilization advance alive at his cost and cannot claim any charges towards extension of these BG's. We find that Clause-6 of the contract relates to security deposit for performance. Clause 6.(i), 6.(ii) & 6(iii) read as follows:

"Clause-6.0 Security Deposit for Performance

i. The Contractor for due performance of contract, within thirty days from the date of issue of Letter of Award but not later than the date of signing of contract shall furnish an initial security deposit of 5% (Five Percent) of the contract value in any one of the following forms:-

a) Demand Draft on any Nationalized Bank in favour of Tehri Hydro Development Corporation Limited payable at Tehri/Rishikesh.

b) Fixed Deposit Receipt with any Schedule or Nationalized Bank pledged to Tehri Hydro Development Corporation Limited. Or

c) Bank Guarantee of any Nationalized Bank or Scheduled Bank and in the form as acceptable to Corporation.

ii. The earnest money deposited by the Contractor along with the tender shall be adjusted / refunded if the total (i.e., 5%) initial security is furnished in any of the above mentioned forms.

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In case the Contractor fails to furnish the security as aforesaid within the specified time or any extension thereof as granted by THDC, the Corporation shall have the right to withdraw the Letter of Award and forfeit the earnest money.

iii. In addition to initial security deposit under Clause no. 6.0(i), the Engineer-in-Charge will deduct the security deposit at the time of making any payments to him for work done under the contract @ 6% of the total value of each bill of work done (excluding those of price variation) till the balance security deposit equivalent to 5% of the contract value, which shall be adjusted in the last deduction.

The total security will be 10% of contract value as awarded".

Based on the above provisions under Clause-6 on which reliance was placed by the Respondent, we find that this Clause-6 is for the security deposit for performance of the contract and is not applicable to the mobilization advance. Also we find that the mobilization advance as per Clause-9(i) at 5% of the contract value paid by the Respondent to the Claimant against a Bank Guarantee is a recoverable advance paid to the Claimant to be recovered in the bills of the Claimant as provided under Clause-10 of the contract and is distinctly different from the performance security which is to be valid till the end of defect liability period. Therefore we find that the Clause-6, the reference to which was invited by the Respondent, would have no application for the recovery or extension of the BG's at the cost of the Claimant even for the BG given towards mobilization advance. We also find that for delays and non-fulfillment of obligations by the Respondent under the contract which are not attributable to the Claimant the said mobilization advance could not be recovered as per the provisions of the contract. An extension of time has also been granted by the Respondent. Under these circumstances we find that it is unjust and unfair to burden the interest on the mobilization advance for the delay of 40 months on the Claimant after having held by us that the delay of 63 months is not attributable to the Claimant for reasons recorded earlier.

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170. It is also pertinent for us to see from the records that the interest on mobilization advance was an issue placed before the Board of the Respondent and the copy of the resolution of the Board in the meeting held on 12.03.2008 at page-523 of Book-VI of the Respondent records the following resolution

"RESOLVED TO APPROVE to defer all deductions in Agreement No THDC/RKSH/CD-197/AG dated 14.11.2002 on account of Mobilization Advance along with Interest thereon, Equipment Advance and Security Deposit. Further, in case of any additional cash deficit arising during construction, essential material inputs such as steel etc. shall be provided by THDC and issued to Contractor subject to his commitment for its adjustment from all his dues/claims, what-so-ever. Board may be apprised of the progress of works subsequently".

This resolution of the Board dated 12.03.2008, according to us, clearly approves *"to defer all deductions in agreement No THDC/RKSH/CD-197/AG dated 14.11.2002 on account of mobilization advance along with interest thereon, equipment advance & security deposit"*. When once the Board having approved such deferment of the interest, the claim of the Claimant is for waiving the levy of such interest. Deferment of interest is indeed different from the waival of interest as claimed by the Claimant. The claim for waival of interest by the Claimant is on the grounds that the work was prevented from performance due to non fulfillment of the obligations by the Respondent for several reasons already traversed by us. The deferment of mobilization advance along with interest is admittedly accepted by the Board of Respondent. As these reasons for delay of 40 months beyond the original contract period of 45 months is not attributable to the Claimant as held by us, we find that the Claimant cannot be burdened with interest for the delay period of 40 months beyond the original contract period of 45 months and charging of interest for this period of 40 months is unjust and unfair. Accordingly, we hold that the claim of the Claimant for waival of interest for the period of 40 months delay not attributable to the Claimant entitles the Claimant for this claim.

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171. Hence, we find that CLAIM-13(A) of the Claimant is allowed and we allow and award the claim towards waival of interest and the additional cost incurred for extending the BG towards mobilization advance for the above reasons.

172. In so far as the third part of the CLAIM-13(A) relating to reimbursement of losses suffered due to reduced interest on the margin money at 10% to be kept with the bank amounting to Rs. 55,75,277/- is concerned, we find that this claim does not deserve consideration as it is not a cost directly chargeable to the work and we reject this part of the claim.

173. Accordingly for the reasons recorded above we award the following under CLAIM-13(A):

i. Refund/relief against interest burden on mobilization advance of Rs. 16,72,58,304 for 40 months delay period at 16% per annum, amounting to Rs. 8,92,04,429/-.

ii. An amount of Rs. 1,11,50,553/- towards the charges for keeping the BG towards mobilization advance alive for a period of 40 months.

174. **In the light of the above we award an amount of Rs. 10,03,54,982/- toward this CLAIM-13(A) against the claim of the Contractor is Rs. 10,59,30,259/-.**

175. The CLAIM-13(B) is towards compensation and extra costs / losses suffered on account of extending the Bank Guarantee towards performance security for a delay period of 40 months. The Claimant contends that this delay is not attributable to him. The Claimant submits that he has furnished a performance guarantee in the form of bank guarantee for an amount of Rs. 16,72,58,304/- in terms of the agreement at 5% of the contract amount viz; Rs. 334,51,66,092/-. The contention of the Claimant is that, as originally envisaged under the contract, the bank guarantee towards the security deposit for performance was to be for a period of 45 months of the contract period and 12 months thereafter

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to cover the defect liability period totaling to 57 months and further contends that due to a delay of 40 months beyond the contract period not attributable to him for the reasons stated in the letter dated 19.11.2007 Annexure-38 page-159 of C-1-2 and reiterated in the Claim statement that the BG was forced to be extended beyond 57 months of the original period contemplated for an additional 40 months period. The Claimant has preferred two heads of claims under this CLAIM-13(B) viz;

i. Reimbursement of extra expenditure on Bank Guarantee (B.G) commission charges suffered for 40 months delay period against furnishing of performance B.G @ the rate of 2% per annum on the B.G. Amount for 5% of contract value, which claim works out as Rs. 1,11,50,553/-.

ii. Reimbursement of losses suffered due to reduced Interest Income on Margin Money (at 10% of B.G Value) to be kept with the Bank, (i.e., the differential interest impact between deposit rate at 6% and the respondents interest rate at 16% per annum by THDC) for 40 months delay, which claim works out as Rs. 55,75,277/-.

176. The Respondent refutes these claims on the same grounds as recorded under CLAIM-13(A) and submits that this CLAIM-13(B) is liable to be rejected on those grounds.

177. From the submissions made by the parties and the documents relied upon we find that this security deposit for performance in the form of BG for an amount of 5% of the contract value is as per Clause-6 of GCC of the contract which has been reproduced in para supra. Accordingly the total security deposit towards performance is 10% of the contract value as noted below:

i. 5% of the contract value in form of a bank guarantee as per Clause-6(i) as an initial security deposit.

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382

ii. 6% Deduction towards the security deposit at the time of making payments for the work done under the contract excluding price variations till the balance security deposit equivalent to 5% of the contract value which shall be adjusted in the last deduction. Thus we find the provision is for a total security deposit of 10% of the contract value. The Claimant's contention is that the bank guarantee equivalent to 5% of the contract value towards the initial security deposit was originally considered to be for 57 months up to the end of the defect liability period. We find under Clause-19 of GCC regarding maintenance and defect liability, *"the agreed period of maintenance shall mean the period of 12 months calculated from the final date of completion of the works as certified by the Engineer-in-charge in accordance with certification of completion of works Clause-18----"*. In this case the work is still under progress as admitted by both parties. The delay in the execution of works as per our earlier findings is not attributable to the Claimant. The claim is for the cost incurred in the extension of the Bank Guarantee during the extended period of the contract. The original contract period as per the contract under article 3.1 at page-7 Vol-1 of the contract is 45 months for completion and handing over as per the agreed construction program / bar chart. Accordingly the agreed date of completion is 30.05.2006. While dealing with the no claim certificates (NCC) and extension of time we have recorded our finding that the NCC1 & NCC2 corresponding to the extensions of time EOT1 & EOT2 will not disentitle the Claimant for his claims for reasons recorded earlier. Also the extension of time for 37 months is granted by the Respondent under Clause-58 of the contract and we have held that the extension of time granted under provisions of Clause-58 is and can only be due to delays not attributable to the Claimant. In view of these we find that the extension of time for a period of 40 months as claimed is on account of delays not attributable to the Claimant. As per the contract the BG furnished under Clause-6(I) towards initial security deposit for performance is indeed required to be provided till the date of expiry of defect liability period under the contract which is 57 months at the time of entering into contract. Beyond this original period of 57 months this BG towards security deposit for performance at 5% of the contract value is concerned the Respondent submits, relying on Clause-6 of GCC, that the Claimant has to keep

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383

alive the BG to cover the period of time extension also at his cost as the BG is an instrument issued by the bank on behalf of the Contractor and any expenditure for such extension is to be borne by the Contractor as per Clause-6(iv) of GCC where the Claimant has undertaken to renew or to furnish fresh BG to cover the period of time extension, if any.

178. Thus, we find in so far as the BG towards security deposit for performance is concerned the Claimant has undertaken under Clause-6(iv) of GCC page-257 Vol-1 of the contract *to renew or furnish fresh BG to cover the period of time extension, if any*. The Respondent contends that as per this Clause the Claimant should renew and keep alive the BG **at its own cost.** By a reading of Clause-6(iv) of GCC read with Clause-6(viii) which states that *"Bank guarantee, Bank Drafts, Government securities, fixed deposit receipts as aforesaid shall be valid till the date of expiry of defect liability period under the contract"* we find that (i) the Claimant should keep alive the BG till the end of defect liability period, (ii) there is no agreed term under the contract that such extension of the BG shall be at the cost of Claimant only. In the present case we have already dealt with the delays caused and held that, for reasons recorded earlier, the delays are not attributable to the Claimant. Under such circumstances in the absence of a specific agreement that the expenditure & cost involved in BG extension in the contract we are unable to agree with the contention of the Respondent that the BG's so extended must be at the cost of the Claimant because: (a) the time extension given under Clause-58 of the contract is admittedly for the delays not attributable to the Claimant as discussed earlier, (b) there is no Clause under the contract as to the contention that the cost of extension of BG shall be to the Claimant for any extension of time, (c) in this case the extension of time granted is 37 months while the extension sought for by the Claimant is 40 months and the work is still admittedly under continuance, (d) period of extension of 37 months is beyond the original period of contract of 45 months. In view of the above we find that the Claimant is to be compensated for such long extensions which were not under the contemplation nor is the delay attributable to the Claimant. Also the interpretation of Clause-6(iv) of GCC that it would include the cost of BG's for

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any length of the extended period, as contended by the Respondent, cannot be held to be just as such the extension in this case is not attributable to delay on the part of the Claimant.

179. In so far as reimbursement of losses suffered due to reduced interest income on margin money at 10% of the BG value to be kept with the bank as claimed by the Claimant for the differential interest of 6% does not deserve to be considered as it is not a cost directly chargeable to the works and hence we reject the same.

180. **In the light of the above we award an amount of Rs. 1,11,50,553/- toward this CLAIM-13(B) against the claim of the Contractor is Rs. 1,67,25,830/-.**

181. The CLAIM-13(C) is towards Compensation towards losses suffered due to 40 months delay on the insurances to be kept in force for additional period. The Claimant's contention is that the delay of 40 months is not attributable to him and he has to incur additional costs towards insuring (i) plant & machinery (ii) work men compensation & (iii) insurance towards materials. The total of the premiums paid towards these is to Rs. 57,82,777/- per year and the total cost incurred for 40 months is claimed at Rs. 1,92,75,923/-. The Claimant refers to Clause-27 of the contract at page-278 of GCC wherein it is specified that the Contractor (Claimant) will, at his own cost insure the construction plant and other service facilities erected for construction of works under the contract brought to the site. The Claimant brought to our notice that even as per the C.W.C guide lines the cost of insurance is not included in the overheads and therefore is to be recovered from the works.

182. The Respondent resists this claim relying upon Clause-27 of GCC and submits that the Claimant is required to insure all the construction plant and other service facilities at his own cost and hence the claim is liable to be rejected.

183. After hearing the parties and perusing the documents we find that under Clause-27 of GCC of the contract at page-278 it is specifically an agreed term

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that the insurance shall be at the cost of the Claimant and the insurance cover should be adequately available at all times in accordance with the provisions of this Clause. Further, we find that under Clause-29.1 at page-281 of GCC of the contract it is agreed that if the Claimant fails to keep in force the insurance referred to in Clauses-27 & 29, the Respondent has the remedy to affect and keep in force such insurance and pay such premium or premiums as may be necessary for that purpose and deduct the amount so paid by the Respondent from the amounts due the Claimant or recover the same as a debt due from the Claimant. From the conjoint reading of Clause-27 & 29 we find that the Claimant has the obligation to keep the insurance policies for the equipment, men & materials as per the contract at his cost and upon the failure of the Claimant to keep the insurance cover valid the Respondent has the right to pay for the insurance cover and deduct it from the payments due to the Claimant. Accordingly we find that this claim does not deserve to be considered and hence we reject this claim.

184. In the light of the above circumstances and the reasons recorded therein we reject this CLAIM-13(C).

185. The CLAIM-13(D) is towards Compensation by grant of relief from the burden of interest levy on Risk and Cost Advance extended by THDC as per actuals. The Claimant submits that on account of the reasons for delay not attributable to him and the undue increase in cost of major critical inputs such as cement, steel & POL and the extra expenditure incurred by the Claimant the Respondent decided to extend an adjustable risk and cost advance to the tune of Rs. 30,49,54,472/-. The Claimant submits that an interest at 16% per annum on this advance is charged by the Respondent and this imposes a burden on the Claimant keeping in view that the delays are solely attributable to the Respondent. The Claimant further submits that the Respondent in his own interest has come to rescue of the Claimant and therefore charging this interest on bridge finance is not fair, reasonable & just in the circumstances and prays claim for relief from the burden of interest on the risk and cost advance and the relief claimed is Rs. 15,25,82,662/-.

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386

186. The Respondent submits that the interest at the agreed rate of 16% is being levied on the risk and cost advances in terms of the contract and any claim for the refund of the same is beyond the provisions of the contract and further submits that it was only on the repeated request of the Claimant to release the money directly infavour of different suppliers/service providers it was decided by the Respondent as a special case in furtherance of the work to advance money to the Claimant at his risk and cost to improve the cash flow of the Claimant and the Respondent has charged 16% per annum simple interest on the said advance on the basis of contractual rate of interest being charged for the mobilization advance. Accordingly it is contended that interest at the agreed rate being levied on the risk and cost advances is in terms of the contract and any claim for the refund of the same is beyond provisions of the contract and thus liable to be rejected. Also the Respondent submitted that there is a counter claim made by him towards this interest on risk and cost advance also and has submitted that all the documents and the counter claim with respect to this may be treated as arguments as addressed in detail in the arguments on counter claim although no such plea is made in the pleadings in Book-I. While we deal with the counter claims separately we find that this CLAIM-13(D) is inter connected with COUNTER CLAIM-1 and as such we deal the issues and documents submitted in respect of COUNTER CLAIM-1 along with the CLAIM-13(D) subject to our findings on the counter claim independently to be dealt with separately. The admitted position of the parties is that the Claimant is admitting to pay the principal amount of the risk and cost advance and the dispute is only regarding the payment of interest as an agreed term.

187. We have heard the parties based on their submissions. We find that the 'risk and cost advance' given by the Respondent is not covered by any terms of the contract at Vol-1 as there is no such term agreed under the contract contrary to the Respondent's contention. This is a subsequent matter which came to be discussed in a meeting held on 17.03.2007 at pages-1 to 5 of Respondents Book-V. This meeting was held under the Chairmanship of CMD of the Respondent along with officers of the Respondent and the representatives of the Claimant.

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387

The record of notes of this discussion elaborates on the circumstances as prevailing on 17.03.2007 also recording the Claimant's submission regarding his various claims. It is also seen from this record that after recording the changed construction methodology of adopting the ROTEC Tower belt system and the additional costs involved in the cost of machinery the reason for giving the risk and cost advance as recorded at page-4 of Book-V of the Respondent is:

- *"The Contractor informed that due to steep hike in cost of cement, steel and other inputs etc., he is facing financial crunch and not able to arrange the requisite material in time and requested for supply of material by THDC or assistance by making direct payment including advance payment to the manufacturers/suppliers/repair agencies/PRWs etc, against the orders placed by them on prevailing costs, for timely arrangement of material such as supply of cement, steel, POL, shuttering and other misc. materials, spare parts of machines, repair & maintenance of machines, deployment of additional specialized technical manpower at any level etc., to expedite the progress of works.*

- *It was apprised by the project that material is required to be arranged by the Contractor. Regarding direct payment to the manufacturers/suppliers/ repair agencies/PRWs etc, against the orders placed by them, it may not be possible to cover the entire amount so paid from the next immediate bill, resulting every time some amount left uncovered from the Contractor, for which Contractor shall be required to bear the interest.*

- *CMD directed to ensure timely availability of material such as supply of Cement, Steel, POL, shuttering & other misc. materials, spare parts of machines, repair & maintenance of machines, deployment of additional specialized technical manpower at any level etc. to complete the targeted schedule of project and if the same is not being arranged by the Contractor as per requirement of work, the same may be arranged by THDC at the risk and cost of the Contractor, by making the payment directly to the manufacturers/suppliers/repair agencies/PRWs etc., against the orders*

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placed by the Contractor. Further, a task force is also being constituted to take immediate decisions to expedite the progress of work".

188. From the minutes of the above meeting we find that this so called risk and costs advance is a special advance which the parties have agreed to under the circumstances explained in the minutes of the meeting. The project authorities apprised the CMD in the above para at page-4 of Book-V and it was also apprised there under that it may not be possible to recover the entire amount so paid from the next immediate bill resulting every time some amount would be left un-recovered from the Contractor for which the Contractor shall bear the interest. The directions of the CMD contained in para(iii) above is that in order to ensure timely availability of material and the same not being arranged by the Contractor the same may be arranged by THDC at the risk and cost to the Contractor, by making the payment direct to the manufactures / suppliers / repair agencies / PRWs etc., against the orders placed by the Contractor. Further, in the letter dated 20.03.2007 at page-6 & 7 of Book-V this special arrangement for execution of Koteshwar dam was ordered by the CMD and authorized the CPO to indent and procure any construction material such as Cement, Steel or source sub Contractor piece rate workers etc., as per requirement of the works at the risk and cost of the Contractor and release payments directly. We find from the above two correspondences neither in the meeting where the Claimant was present on 17.03.2007 nor in the letter dated 20.03.2007 authorizing the CPO by the CMD there is any mention of payment of any interest at 16% on the risk and cost amount advanced or any amount uncovered (un-recovered) from the Contractor for which the Contractor shall bear the said interest or at the said rate. Such risk and cost advances were being paid by the Respondent to the respective vendors based on invoices furnished by the Claimant as seen by several documents produced before us in Book-V & Book-VI. The Respondent in his letter dated 09.07.2007 at page-843 of C-1-3 notified the Claimant as follows:

"As decided and agreed by you in the meeting held on 17.03.2007 at Rishikesh chaired by the 'Chairman & Managing Director THDC'. Keeping in view the

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difficulty in cash flow and for smooth running of various activities, THDC is making payment directly to the related manufactures, suppliers and other service providers, on your request and against your purchase orders.

The total amount up to June-07, due in your 'risk and cost' account including simple interest (@ 16%) is Rs. 9.342 Crores. It is for your information".

189. In response to this letter, the Claimant immediately thereafter in his letter dated 14.07.2007 at page-513 of Book-VI denied the contents of the above letter and stated that *"we had concurred for the above procedure for smooth running of various activities. The issue of the interest @ 16% was never discussed or highlighted in the meeting nor the minutes of the above meeting have been circulated to us"*. It is further stated in this letter at Page-514 that *"the interest at 16% proposed to charged from us is not justified keeping the spirit of the proceedings of the above meeting. It is also against the agreement condition that interest free advances were given for plant and equipment and secured advance against materials"*. The Claimant relies on this letter and contends that the interest proposed to be charged at 16% in the circumstances is not agreed in the meeting and hence this cannot be charged. In response to this letter dated 14.07.2007 of the Claimant, the Respondent in his letter dated 17.08.2007 page-844 of C-1-3 states that there is a very categorical provision for providing interest free advance against new machinery and non perishable material and also mobilization advance with 16% interest and that they are following these provisions up to its full limit and in the spirit of the agreement. It is not in dispute that this is a special arrangement discussed in the meeting held on 17.03.2007 at Rishikesh and finally a decision was taken in this regard as notified by the Respondent in the above letter. And accordingly the Respondent has denied the request for not charging the interest on the advances made to the Claimant under this special arrangement.

190. We note from the Board resolution dated 12.03.2008 reproduced earlier that the mechanism is approved for risk and cost advance, although this name risk and cost advance is not coined in the said board resolution, in the resolution

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"further in case of any additional cash deficit arising during construction, the essential material inputs such as steel etc., shall be provided by THDC and issued to Contractor subject to his commitment for its adjustment from all his dues / claims, what-so-ever"[Emphasis supplied by the Tribunal]. Thus, the letter dated 09.07.2007 of the Respondent at page-843 of C-1-3 and the reply dated 14.07.2007 of the Claimant at page-513 of Book-VI refuting the payment of interest for this special advance on the ground that this was not discussed in the meeting held on 17.03.2007 leads us to the logical finding that after discussing all the matters the board in its meeting held subsequently on 12.03.2008 did not impose any such interest. The only condition for such risk and cost advance imposed by the Board of THDC is the commitment of the Contractor for its adjustment from all his dues/claims, what-so-ever. In view of this we find that neither the interest was discussed in the meeting on 17.03.2007 nor was it communicated to the Claimant and further the subsequent conduct of the Board of the Respondent in authorizing payment of such special advance only with the commitment of the Contractor (Claimant) for adjustment of such advance from all his dues/claims, what-so-ever clearly leads us to the conclusion that the interest is not chargeable as per the resolution of the Board of THDC. Therefore, we find that this special advance is authorized by the Board is as per the resolution and no interest is chargeable on this.

191. We find from the above facts & observations that charging interest on the risk and cost advance @ 16% or at any other percentage was not an agreed term either under the contract or subsequently in the minutes of the meeting held on 17.03.2007 or in the letter of the CMD dated 20.03.2007. It is only in the letter dated 09.07.2007 the Respondent said about the interest of 16% and notified an amount of Rs. 9.342Cr for the information of the Claimant which was refuted by the Claimant in his letter dated 14.07.2007. Accordingly we find that the issue of interest had never surfaced or agreed in the meeting held on 17.03.2007 or in the letter of CMD on 20.03.2007 or at the time of payment made towards several invoices raised in the interregnum period up to 09.07.2007. There are 195 invoices from 28.03.2007 to 09.04.2008 as per

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Annexure-R4 Book-V pages-9 to 13 showing the consolidated statement of invoices. The details of the invoices made by the Claimant from 29.03.2007 to 22.11.2007 are furnished by the Respondent at pages from 16 to 269 of Book-V. Even prior to 09.07.2007, when the Respondent notified the matter of interest of 16% over the invoices paid, the Respondent has not notified any interest payable on such risk and cost advance although 84 invoices were already paid by that time.

192. We refer to Clause-9 Loans & Advances of the Contract at page-262 to 264 Vol-1 of the contract. Clause-9(i) is a provision towards mobilization advance which we have already dealt with and this bears a simple interest of 16%. The Respondent contends that this risk and cost advance should have the same interest rate of 16% applicable as for the mobilization advance under the contract. Clause-9(ii) is towards Plant and equipment advance and is to the extent of 90% of the cost of new construction plant and equipment and this is an interest free advance. Further, Clause-9(iii) provides for secured advance against the materials which specifies that 75% of the cost of construction materials brought to site as per approval of Engineer-in-Charge shall be paid as interest free advance. It is also agreed that secured advance shall not be admissible against procurement of cement and the total advance under this Clause shall not exceed 2% of the contract value as awarded. Thus, under the contract except the mobilization advance which would carry 16% interest all other advances towards plants & machinery and secured advances are interest free. We find from the minutes of the meeting at page-4 of Book-V which is reproduced earlier that this risk and cost advance is towards purchase of materials such as supply of cement, steel, POL and other misc. materials, spare parts of machines, repair and maintenance of machines, deployment of additional manpower, etc.

193. In the facts and circumstances and in the light of our above observations and the various invoices produced by the Respondent himself, we find that (i) this risk and cost advance is given towards the materials (ii) the payment of the cost towards the materials is made directly by the Respondent to the

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respective vendors, (iii) the Claimant is not in receipt of this amount, (iv) the provision under the contract @ 16% is only towards mobilization advance, (v) while the material advance is an interest free advance as per the contract, (vi) this is a special arrangement towards procuring materials as per the minutes of the meeting held on 17.03.2007 where no mention of interest is made, (vii) the interest of 16% is not agreed in the minutes of meeting held on 17.03.2007, (viii) nor this is communicated to the Claimant and agreed, (ix) till 09.07.2007 by which time nearly 84 invoices have been paid and no issue of interest has been raised while making payment towards the cost, (x) When the issue of interest was raised by the Respondent on 09.07.2007 the Claimant has protested against this interest as the interest at 16% was never discussed or highlighted in the meeting nor the minutes of the meeting was communicated to the Claimant, (xi) as per the contract Clause-9(ii) & 9(iii) advances towards equipment or secured advance towards materials is interest free, (xii) the board of the Respondent in its resolution dated 12.03.2008 resolved that in case of any additional cash deficit arising during construction, essential material inputs such as steel etc., shall be provided by THDC and issued to Contractor, as reproduced earlier, with a commitment of the Contractor for its adjustment from all his dues/claims, what-so-ever, (xiii) even the Board resolution which is subsequent to the letter dated 09.07.2007 also does not specify any interest to be charged on this special advance. In the light of the above we are of the opinion that the risk and cost advance which is a special advance provided towards materials and machinery is intended to be interest free advance and cannot be considered on the same footing as mobilization advance keeping in view the purchased materials were already used on the works. In so far as interest is concerned and further this risk and cost advance is to be recovered on the same criteria as that of the secured advance for materials as per Clause-9(iii).

194. In light of the above observations, recordings & findings we allow this CLAIM-13(D) of the Claimant and award the relief of interest on the risk and cost advance paid till December-2007.

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CLAIM-14: Interest on Claims:

195. On the question of award of interest, the case in hand is governed by the provisions contained in Sec. 31(7)(a) of the Arbitration & Conciliation Act, 1996. That provision empowers the Arbitral Tribunal to grant interest at such a rate as it deems reasonable on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. The Arbitrator's power to award interest for different periods came up for consideration before the Supreme Court in several cases and there were divergent views on the same. But the matter no longer remains rest integra in view of Constitution Bench decision in the case of Executive Engineer Dhenkanal Minor Irrigation Division Vs. M.C. Budharaj reported in (2001) 2 SCC 721. That was case under 1940 Act, but the majority view was to the effect that Arbitrator whether appointed with or without intervention of court has the power to grant interest in respect of pre-reference period, provided there is no stipulation or prohibition in the Arbitral agreement excluding the jurisdiction. It was also held that the forum of arbitration created by consent of parties with or without intervention of court being only a substitute for conventional civil court, it is a unavoidable necessity that the parties deemed to have agreed by implication that the Arbitrator would have the power to award interest in the same way and same manner as a court. The earlier decision of the Supreme Court with regard to the Arbitrator's power for awarding pre-reference interest in the case of Jena was over ruled and the observation of the Constitution Bench in Roy's case was approved though Roy's case was only relating to power of Arbitrator for pendent-elite interest. In other words, the Bench by majority held that interest under 1940 Act the Arbitrator has the power to award both interest for pre-reference period as well as pendent-elite.

196. Having regard to the aforesaid authoritative pronouncement of the Supreme Court by Constitution Bench we need not delve into large number of cases cited by the parties on this issue, as in our view the aforesaid Constitution Bench's decision and the provision of Sec. 31(7) of 1996 Act squarely empowers Arbitral

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394

Tribunal to award interest at such rate as found reasonable for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made, thereby covering pre-reference period and the pendent-elite period. In fact the law on the subject has been simplified under Sec. 31(7)(a) and the case laws under 1940 Act could have practically of no importance. The reliance placed by the Respondent on the decision of the Supreme Court in the case of Syeed Ahmed & Co. Vs. State of U.P. (2009) (3) Arbitration Laws Report page-29, in our opinion will be of no assistance in as much as in the case in hand there has been no agreement between the parties barring payment of interest. The Respondent strongly relied upon the Clauses-50 & 51 of the contract in support of their contention that the contract prohibits grant of interest by Arbitral Tribunal and in view of Syeed Ahmed Case the Claimant would not be entitled to any interest. But having examined the two clauses, namely, Clause-50 & 51, we are of the considered opinion that those clauses cannot be interpreted to hold that the parties agreed that Arbitral Tribunal is devoid of any power to grant interest. In fact the Supreme Court considered this question in the case of State of U.P Vs. Harish Chandra & Co. (1991) 1 SCC 63. Clause-1.9 of that case which came up for consideration is similar to Clause-51 of the present case on which the Respondent relied upon. The Supreme Court in Harish Chandra's case ultimately held that on express language of the Clause, there is no prohibition which could be culled out against the Contractor that he could not raise the claim for interest by way of damages before the Arbitrator on the relevant item placed for adjudication. In fact Clauses-50 & 51 can be construed to hold that it did not bar award of interest on claim for damages or claim for payment for work done and which was not paid, but bars award of interest only on amount which may be lying with the Government by way of Security Deposit or retention money or any other amount refund of which was withheld by the Government. This being the position in law, we have no hesitation to hold that on the award of damages and compensation made by this Tribunal, the Tribunal retains the jurisdiction to award interest in terms of Sec. 31(7)(a) of the Arbitration & Conciliation Act, 1996, there being no contrary provision in the agreement as held by us. We therefore award simple interest @ 12% from the date the Claimant has given

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notice till the date of this award. The tribunal also awards further interest @ 18% from the date of the award till the same is recovered or paid by the Respondent.

197. In so far as the commencement date for the period of interest is concerned the first set of claims from CLAIM-1 to CLAIM-7 was made by the Claimant on 11.04.2007 vide Annexures 2 to 10 of C-1-2 and these were rejected by the Respondent on 12.04.2007 vide Annexures 11 to 17 of C-1-2. Consequent upon this rejection Arbitration was invoked as per Clause-62 of GCC on 16.06.2007 and this Tribunal was constituted and the first sitting was held on 06.12.2007. The second set of claims was referred to the Respondent on 19.11.2007 for CLAIM-8 to CLAIM-14 in Annexure 38 of page-159 of C-1-2. The parties having agreed for referring the second set of claims also to this Tribunal, the Tribunal was duly constituted as per the agreement. The second set of claims also was referred to this Arbitral Tribunal on 19.12.2007. The CLAIM-14 is the interest on all the claims as per pages-80 & 81 of the claim statement. Thus, we find the commencement date for reckoning interest in respect of CLAIM-1 to CLAIM-7 would be 11.04.2007 which is the date of notice of claiming interest by the Claimant. In respect of CLAIM-8 to CLAIM-13 the date of reference and notice to claim interest is on 19.11.2007. Hence, we find that in respect of CLAIM-1 to CLAIM-7 the liability of interest would commence from 11.04.2007 whereas in the case of CLAIM-8 to CLAIM-13 the liability of interest would commence from 19.11.2007.

198. Accordingly in the light of above we award the following towards the claim on interest under CLAIM-14:

i. The rate of interest awarded is simple interest at 12% for the pre-award period.

ii. In respect of claims CLAIM-1 to CLAIM-7 as per the award made and the period reckoned for interest is from 11.04.2007 till the date of award.

iii. In respect of claims CLAIM-8 to CLAIM-13 as per the award made and the period reckoned for interest is from 19.11.2007 till the date of award.

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iv. For the post award period simple interest at 18% from the date of award for the claims from CLAIM-1 to CLAIM-13 as per the award made till the date of payment.

Table Showing the interest awarded on the claims awarded are shown below:

Claims	Description	Claim as per the Award	Interest awarded till date of award
Claim-1	Compensation for losses suffered due to non-handing over of land on right bank of village Pendaras.	Rs. 12,59,58,440/-	Rs. 5,56,55,996/-
Claim-2	Right and left bank excavation and slope stabilization - extra rates and payments for working in hazardous conditions outside the project area.	Rs. 82,97,680/-	Rs. 36,66,412/-
Claim-3	Payment for construction of approach road on right bank from Bailey bridge to permanent road.	Claim Rejected	Nil
Claim-4	Payment for construction of diversion structure: Upstream dyke.	Rs. 11,27,653/-	Rs. 4,98,265/-
Claim-5	Payment for construction of approach (haul road) for development of B-1 & B-2 quarries.	Rs. 1,16,02,113/-	Rs. 51,26,510/-
Claim-6	Payment for purchase of sand and coarse aggregates for tunnel lining, inlet and outlet works.	Rs. 16,87,500/-	Rs. 7,45,638/-
Claim-7	Compensation for losses suffered due to abandonment of cable-way / cable crane system for Koteshwar dam anc power house and extra payment for placement of concrete by Rotec.	Claim Rejected	Nil
Claim-8	Compensation for losses suffered due to idling of plant and machinery.	Rs. 24,36,00,000/-	Rs. 8,99,37,120/-
Claim-9	Compensation for losses suffered due to idling; Man power resources.	Claim Rejected	Nil
Claim-10(A)	Compensation for losses suffered due to overheads.	Rs. 20,93,20,000/-	Rs. 7,72,80,944/-
Claim-10(B)	Compensation for losses suffered due to non-realization of profit.	Claim Rejected	Nil
Claim-11	Compensation for losses suffered due to undue increase in cost of input materials, during the 45 months original stipulated completion time in the contract.	Claim Rejected	Nil
Claim-12	Compensation for losses suffered due to undue increase in cost of input materials: by way of revision of rates for works executed after the expiration of original stipulated completion time of 45 months in the contract (i.e., after May, 2006).	Claim awarded	The interest on this claim awarded is at 12% simple interest on the balance amount of each bill after setting of the amount of risk & cost advance applicable towards

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397

			each bill and it shall be computed based on the actual quantities and the bills.
Claim-13(A)	Compensation towards extra costs / losses suffered on mobilization advance towerds interests and BG's.	Rs. 10,03,54,982/	Rs. 3,70,51,059/-
Claim-13(B)	Compensation towards extra costs / losses suffered on performance B.G. due to 40 months delay.	Rs. 1,11,50,553/-	Rs. 41,16,784/-
Claim-13(C)	Compensation for losses suffered due to 40 months delay on insurances.	Claim rejected	Nil
Claim-13(D)	Compensation for losses suffered due to the interest levy on Risk and cost advance.	Relief granted by set-off of the claim under Claim-12	

CLAIM-15: Compensation on account of the cost incurred towards this Arbitral proceedings:

199. This claim is rejected and the parties shall bear the cost of arbitration equally.

200. **In the light of the above observations and findings the Answer to Question-4 is in the positive and the award of claims individually is as per the above paras.**

COUNTER CLAIMS:

Question-5: Whether the Respondent is entitled to the Counter claims made by him before the Tribunal?

201. The Respondent contends in his statement of Counter Claims dated 07.11.2008 in Book-IV along with other documents in Book-V & Book-VI that the Claimant failed to fulfill his obligations regarding bringing the technical know-how and technical persons as per Annexure-A of the contract document at page-65 of Vol-1 of the contract. It is further contended that the joint venture of the Claimant was pre-qualified based on the combined experience of the two co-ventures M/s. PCL & M/s. Intertech-Len Hydro specifically in respect of pre-qualification requirements particularly satisfying Sl. No. 1 & 3 by M/s. PCL & Sl.

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No. 2 & 4 by M/s. Intertech Len Hydro. It is contended that the respective responsibilities of the Joint venture partners as agreed to in the joint venture agreement at page-67 of Vol-1 of the contract were not met with during the execution and further contended that the entire responsibility for the execution of the contract was upon the Intertech Len Hydro Consortium / lead partner and the role of PCL was more of a coordinator and a facilitator. The Russian partner, M/s. Intertech Len Hydro Consortium, was not available at the site from the beginning as contended by the Respondent and the non availability of any official of the joint venture partners affected the progress of work due to incompetence and mismanagement of the Claimant in addition to lack of mobilization of men and machinery. It is contended that for this default of the Claimant that the work could not be completed with in 45 months from the letter of award i.e., by 31.05.2006. The Respondent further contends that the technical know-how, expertise & financial capacity of the Claimant in executing the Hydro Power Projects was never made available to the Respondent which amounts to the fundamental breach of the contract.

202. Another contention strongly advanced by the Respondent is that the Claimant sublet the work without approval right from the beginning in breach of the contract condition Clause-56 of GCC at page-328 of Vol-1 of the contract. It is stated by the Respondent that the progress of the work was closely being monitored by the Ministry of power, Government of India in view of the importance of the project. Keeping in view that the work was being hampered and having noticed that actually at the site M/s. RSJV was working at the project since beginning as a sub-Contractor, the Respondent agreed to regularize the engagement of the sub-Contractor from the very beginning as a *fait accompli* in their letter dated 03.05.2006 at page-58 of Book-II.

203. In view of these breaches, as alleged by the Respondent, the Respondent contends that based on the repeated request by the Claimant to release advance in favour of its different suppliers, service providers directly the Respondent decided in the meeting held on 17.03.2007, at pages 1 to 5 of Book-V, that as a special case to advance money to the Claimant at Risk & Cost

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to improve the cash flow of Claimant and the Respondent shall be charging interest on the said advance.

204. The Claimant refutes the Counter Claims and the contentions taken by the Respondent on the preliminary ground that:

(1) There is a delay in filing the counter claims as the counter claims are filed on 07.11.2008 while the defense statement was filed on 12.04.2008 and the counter claims are filed only when the arguments were to commence before this Tribunal on 10.11.2008 and contended that the counter claims are liable to be rejected on this ground alone.

(2) Secondly the counter claim is objected to by the Claimant that these counter claims have to undergo the same procedure as provided under the contract before they are referred to the tribunal.

(3) The alleged claims have to be converted into a dispute before it can be referred to the Arbitral Tribunal.

(4) The so stated counter claim in its present form is neither maintainable nor Arbitrable.

(5) This is so called counter claim neither was contemplated to be filed earlier, nor it is true to the circumstance, as well as these were not brought to the notice of claimants and devoid of the procedures to be followed as per contractual requirements.

(6) The Clause-60.0 'Settlement of Disputes' under the GCC, provides for the disputes raised by the Contractor. As such, the counter claims preferred by the Respondent are beyond the scope of contract, hence are liable to be rejected/dismissed on this ground alone.

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400

205. We have heard the parties. Regarding various rival contentions raised by the Respondent and Claimant. With regard to the issue of delays contended by the Respondent as attributable to the Claimant we have traversed on these contentions elaborately while dealing with the delays under questions 1, 2 & 3 above and we do not find it necessary to traverse on these contentions again as we have recorded our answers to these questions in earlier paragraphs holding that the delays of 63 months is not attributable to the Claimant for the reasons recorded earlier. However regarding preliminary objections raised by the Claimant that the delay in submission of the counter claims by the Respondent and that the counter claims have not become a dispute as the counter claims have not been referred to the Claimant prior to bringing it before the Tribunal, we find from the facts and circumstances and the documents placed before us that the COUNTER CLAIM-1 to COUNTER CLAIM-4 are more as a setoff to the claims of the Claimant since the Respondent has given some special advance termed as risk and cost advance which is to be set off against the dues/claims. The Claimant also is making claims for relief of interest component on this risk and cost advance while the Claimant is admitting that he is liable to pay the principal amount through adjustments. Therefore, we find that in order to adjudicate the claims of the Claimant by this tribunal it is necessary that the counter claims are also adjudicated. Hence, we consider that it is appropriate to adjudicate on the counter claims in the facts and circumstances of the claims and reject the contentions of the Claimant regarding the delay in filing of the counter claims and the contention that this counter claim should have followed the same procedure of referring this to the Engineer and come before the Tribunal after it was rejected keeping in view that the Respondent has sought this as a setoff for the advances made and accepted by the Claimant.

COUNTER CLAIM-1: Claim for Rs. 33.19 Cr towards advances made under the Risk and Cost Account:

206. This COUNTER CLAIM-1 is for an amount of Rs. 28.06Cr paid under risk and cost account and the accrued interest there on amounting to Rs. 5.13Cr. The Claimant submits that he is liable to pay the principal amount of Rs. 28.06Cr

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while the dispute is only regarding the payment of interest. The Respondent submits that he has brought to the notice of this tribunal that this is an admitted advance paid by the respondent and received by the Claimant which is liable to be recovered by way of counter claim / set off to the claims. As there is no dispute regarding the principal amount of Rs. 28.06Cr admittedly by the parties we allow the principal amount of Rs. 28.06Cr of the COUNTER CLAIM-1 as a set off to the claims awarded by us in favour of the Claimant.

207. As regards the interest on this risk and cost advance is concerned amounting to Rs. 5.13Cr claimed at 16% per annum we have dealt with the special advance of risk and cost account under CLAIM-13 and in particular CLAIM 13(D) of the Claimant while dealing with the claims of the Claimant in the earlier paras. At the cost of repetition, after having gone through all the submissions, we reiterate our findings on this issue that (i) this risk and cost advance is given towards the materials (ii) the payment of the cost towards the materials is made directly by the Respondent to the respective vendors, (iii) the Claimant is not in receipt of this amount, (iv) the provision under the contract @ 16% is only towards mobilization advance, (v) while the material advance is an interest free advance as per the contract, (vi) this is a special arrangement towards procuring materials as per the minutes of the meeting held on 17.03.2007 where no mention of interest is made, (vii) the interest of 16% is not agreed in the minutes of meeting held on 17.03.2007, (viii) nor this is communicated to the Claimant and agreed, (ix) till 09.07.2007 by which time nearly 84 invoices have been paid and no issue of interest has been raised while making payment towards the cost, (x) When the issue of interest was raised by the Respondent on 09.07.2007 the Claimant has protested against this interest as the interest at 16% was never discussed or highlighted in the meeting nor the minutes of the meeting was communicated to the Claimant, (xi) as per the contract Clause-9(ii) & 9(iii) advances towards equipment or secured advance towards materials is interest free, (xii) the board of the Respondent in its resolution dated 12.03.2008 resolved that in case of any additional cash deficit arising during construction, essential material inputs such as steel etc., shall be provided by THDC and issued to Contractor, as reproduced earlier, with a

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commitment of the Contractor for its adjustment from all his dues/claims, what-so-ever, (xiii) even the Board resolution which is subsequent to the letter dated 09.07.2007 also does not specify any interest to be charged on this special advance. In the light of the above we are of the opinion that the risk and cost advance which is a special advance provided towards materials and machinery is to be interest free advance and cannot be considered on the same footing as mobilization advance in so far as interest is concerned and further this risk and cost advance is to be recovered on the same criteria as that of the secured advance for materials as per Clause-9(iii). While awarding the interest on revised rates under CLAIM-12 we have allowed for the interest to be calculated after a setoff is made towards the amount of risk & cost advance.

208. In view of the above the interest of Rs. 5.13Cr does not deserve to be considered and therefore it is rejected.

209. In the light of the above we allow the principal amount of Rs. 28.06Cr advanced by the Respondent towards risk and cost account as a set off against the claims, awarded to the Claimant.

COUNTER CLAIM-2: Claim for Rs. 12.30 Cr towards Deferred recovery of Mobilization Advance:

210. The Respondent has claimed a balance un-recovered principal amount of Rs. 6.35Cr towards the mobilization advance given by the Respondent after production of a bank guarantee as per Clause-9 of the contract. The Claimant admits that this amount of Rs. 6.35Cr is to be recovered from his bills. The admitted position of the parties therefore being that the Respondent is preferring a counter claim for the principal un-recovered mobilization advance of Rs. 6.35Cr and the Claimant admitting that he is liable to pay this advance which is to be recovered on prorata basis. We have exhaustively dealt with this matter while dealing with CLAIM-13(A) of the Claimant in the earlier paras. For reasons recorded therein and keeping in view that the delays are not attributable to the Claimant and further that the Board of the Respondent in its

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meeting held on 12.03.2008 at page-523 of Book-VI has resolved *"RESOLVED TO APPROVE to defer all deductions in Agreement No THDC/RKSH/CD-197/AG dated 14.11.2002 on account of Mobilization Advance along with interest thereon, Equipment Advance and Security Deposit"*. We have elaborately dealt with the delays and the responsibility of the parties with respect to the delays under Questions 1, 2 & 3 in the earlier paras and have held that the Claimant is not responsible for 40 months delay and accordingly the repayment and recovery of the mobilization advance was prevented as per Clause 10 of the contract and therefore we came to a finding that the Claimant cannot be burdened with this additional interest. In view of this the interest on the un-recovered amount of the mobilization advance for this period of 40 months is not justifiable. The Claimant admits the balance principal amount as his liability which is to be recovered as per the contract. Accordingly, we award this un-recovered principal amount of Rs. 6.35Cr towards mobilization advance as per Annexure-R11 at page-516 of Book-VI. In so far as the interest on this amount claimed at 16% amounting to Rs. 5.95Cr is rejected as it is established that the delay of 40 months is not attributable to the Claimant. Accordingly, we reject the claim of interest on this amount.

211. In the light of the above we allow the principal amount of Rs. 6.35Cr advanced by the Respondent towards recovery of mobilization advance as a set off against the claims, awarded to the Claimant.

COUNTER CLAIM-3: Claim for Rs. 10.45 Cr towards Deferred recovery of Equipment Advance:

212. The Respondent contends that as per Clause-9(ii) of the contract an amount of 5% of the contract price is permitted under the contract against hypothecation of the machinery in the favour of Respondent. The material and equipment advance as per Clause-9(II) is interest free and recoverable as per the provision under the contract under Clause-10(ii). Here again the Claimant is accepting the liability to pay the principal amount of Rs. 10.45Cr and as the claim of the

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Respondent is also for Rs. 10.45Cr as per Annexure-R11 at page-516 of Book-VI we find it just and reasonable to award this counter claim.

213. In the light of the above we award an amount of Rs. 10.45Cr advanced by the Respondent towards the un-recovered amount of equipment advance as a setoff against the claims, awarded to the Claimant.

COUNTER CLAIM-4: Claim for Rs. 11.73 Cr towards Departmentally issued steel at the request of the Claimant on Deferred cost recovery:

214. This Counter Claim-4 is towards the steel issued departmentally by the Respondent to the Claimant amounting to Rs. 11.53Cr as per Annexure-R15 page-534 of Book-VI. The Claimant admits that he is liable to pay the principal amount of Rs. 11.53Cr. The dispute is regarding the interest claimed at 16% by the Respondent and this interest is amounting to Rs. 20.00 lakhs as per Annexure-R15 at page-534 of Book-VI. The Respondent contended relying upon the board decision dated 12.03.2008 at Annexure-R13 at Page-523 of Book-VI that upon request of the Claimant the Respondent has provided steel on deferred recovery basis carrying 16% per annum interest similar to mobilization advance under the agreement. The Claimant refuted the claim of interest under this claim on the ground that the Respondent evolved the mechanism of departmentally procurement of steel and issued to the Claimant as the claims of the Claimant are not settled and due to various omissions and commissions by the Respondent that delayed and slowed down the execution of the work.

215. On the basis of the pleadings and the arguments and the documents relied upon we find that this claim is towards the cost of steel procured by the Respondent and issued to the Claimant for bonafide use under the works. The Respondent submits under Annexure-R12 the letter of the Claimant dated 24.01.2008, 28.03.2008, 22.08.2008 & 01.10.2008 and relies on these letters. We find from these letters that the steel is requested to be issued on returnable basis or deduct the payment from the dues/claims of Claimant. We find that there is no mention of interest at 16% or any other percent. Similarly in the Board

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405

resolution of the Respondent dated 12.03.2008 we find that the Board has resolved that *"Further, in case of any additional cash deficit arising during construction, essential material inputs such as steel etc. shall be provided by THDC and issued to Contractor subject to his commitment for its adjustment from all his dues/claims, what-so-ever"*. From this resolution we find that there is no mention of levying 16% interest per annum as contended by the Respondent subjection to the condition that the Claimant must give his commitment for its adjustment from all his dues/claims what-so-ever. The Claimant admits that the amount under this claim can be set off against his dues/claims. Even under the contract we find under Clause-9(iii) secured advance against materials, the advance is paid as interest free advance. What the Board resolution according to us implies is that this is special arrangement made. Under these circumstances we find that levying of interest on this claim is not just and reasonable and also not as per contract.

216. In the light of the above we are of the opinion that this recovery towards steel supplied is a special mechanism provided towards supply of steel by the Respondent to the Claimant and is not to bear interest in view of the reasons stated above. And further we also find it appropriate to consider this special mechanism towards supply of steel as similar to that provided under Clause-9(iii) and cannot be considered on the same footing as mobilization advance as per Clause-9(i) in so far as interest is concerned. And accordingly we reject the claim on interest.

217. In light of the above we find it just and reasonable to allow this claim amount of Rs. 11.53Cr to be set off against the claims, awarded to the Claimant.

COUNTER CLAIM-5: Interest for the amount claimed against the claim 1 to 4:

218. As the Respondent submitted that these counter claims are to be treated as setoff against claims/dues and further for the reasons recorded in each of this counter claims above a setoff against each of these counter claims is awarded against the principal amount. In so far as award of the interest, we find for the

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406

reasons recorded in each of these counter claims the interest claimed for the pre-reference and the pendente-lite period as per Clause-31(7)(a) of the Act the interest claimed is not liable to be paid keeping in view the provisions of the contract and also the fact that with regard to the interest on risk and cost advance under COUNTER CLAIM-1 we have setoff this amount uncer the CLAIM-12 of the Claimant while awarding the interest and as such no interest is liable to be paid against COUNTER CLAIM. Similarly for reasons recorded while awarding COUNTER CLAIM-2 & COUNTER CLAIM-4 the interest for the pre-reference and the pendente-lite period is not liable to be paid. In the COUNTER CLAIM-3 there is no claim made for interest for the pre-reference and pendente-lite period and hence the question of award of interest for this period does not arise. Consequently the interest on counter claims 1 to 4 as per the award deserves to be awarded as per Clause-31(7)(b) only. Accordingly, we award a simple interest at the rate of 18% on the COUNTER CLAIMS awarded from the date of this award.

COUNTER CLAIM-6: Cost of Arbitration:

219. This claim is rejected and the parties shall bear the cost of arbitration equally.

220. In the light of the above findings the award of the counter claims is summarized and made as follows:

Counter Claims	Description	Counter Claim as per the Award	Interest awarded for the post award period only
Counter Claim-1	Claim for Rs. 33.19 Cr towards advances made under the Risk and Cost Account	Rs. 28.06Cr	18%
Counter Claim-2	Claim for Rs. 12.30 Cr towards Deferred recovery of Mobilization Advance.	Rs. 6.35Cr	18%
Counter Claim-3	Claim for Rs. 10.45 Cr towards Deferred recovery of Equipment Advance.	Rs. 10.45Cr	18%
Counter Claim-4	Claim for Rs. 11.73 Cr towards Departmentally issued steel at the request of the Claimant on Deferred cost recovery.	Rs. 11.53Cr	18%
Counter Claim-5	Interest for the amount claimed against the claim 1 to 4	Nil	18%

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221. Future interest on the counter claims awarded shall bare a simple interest at 18% per annum till the date of setting of these counter claims against the claims of the Claimant as per Sec. 31(7)(b) of the Act.

222. This award is made on a stamp paper of Rs. 1000/- with the direction that the parties shall make good the appropriate stamp fee as per the prevailing law and the stamp act.

Patnaik 17/12/10

Shri. G.B. PATNAIK
Presiding Arbitrator

Shri. B.K. MITTAL
Arbitrator

L.V. Sreerangaraju

Shri. L.V. Sreerangaraju
Arbitrator

आर.के.वर्मा

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408