

❖ Supreme Court: List of Reportable Judgements as Lead Counsel:

Sl. No.	Case Title	Citation
1.	Gautam Kumar Das Vs. NCT of Delhi & Ors.	<i>2024 SCC OnLine SC 2059</i>
2.	State of West Bengal Vs. Rajpath Contractors Engineers Limited	<i>(2024) 7 SCC 257</i>
3.	PAM Developments Pvt. Ltd. Vs. The State of West Bengal & Anr.	<i>2024 INSC 628</i>
4.	Ali Hossain Mondal & Ors. Vs. West Bengal of Primary Education & Ors.	<i>2024 SCC OnLine SC 1189</i>
5.	Kolkata Municipal Corporation & Anr. Vs. Bimal Kumar Shah & Ors.	<i>2024 SCC OnLine SC 968</i>
6.	All India Judges Association Vs. UOI & Ors.	<i>2024 SCC OnLine SC 27</i>
7.	Damodar Valley Corporation Vs. Venky HI-Tech Ltd. & Ors.	<i>2024 SCC OnLine SC 1418</i>
8.	Anmol Vitthal Abhang Vs. Same Deutz Fahr India Pvt. Ltd.	<i>2024 SCC OnLine SC 1998</i>
9.	Jalal Molla alias Omar alias Babu Bhai Vs. State of West Bengal	<i>2024 SCC OnLine SC 873</i>
10.	Kishan Chand Jain Vs. UOI & Ors.	<i>2023 SCC OnLine SC 1021</i>
11.	K.C. Ninan Vs. Kerala State Electricity Board & Ors.	<i>2023 SCC OnLine SC 663</i>
12.	K.B. Tea Product Pvt. Ltd. & Anr. Vs. Commercial Tax Officer, Siliguri & Ors.	<i>2023 SCC OnLine SC 615</i>
13.	Tarak Nath Keshari Vs. State of West Bengal	<i>2023 SCC OnLine SC 605</i>
14.	Pravasi Legal Cell Vs. UOI & Ors.	<i>2023 SCC OnLine SC 1229</i>
15.	Snehasis Giri & Ors. Vs. Subhasis Mitra	<i>2023 SCC OnLine SC 107</i>
16.	Indrajit Das Vs. State of Tripura	<i>2023 SCC OnLine SC 201</i>
17.	Sushanta Kumar Banik Vs. State of Tripura & Ors.	<i>2022 SCC OnLine SC 1333</i>
18.	Uttam Kumar Shaw Vs. Partha Sarathi Sen & Ors.	<i>(2022) 10 SCC 138</i>
19.	Nemai Chandra Kumar (D) Thr. LRS. & Ors. Vs. Mani Square Ltd. & Ors.	<i>2022 SCC OnLine SC 920</i>
20.	M/s Aravali Power Co Pvt Ltd Vs. Vedprakash & Anr.	<i>2022 SCC OnLine SC 645</i>
21.	Shrachi Burdwan Developers Private Limited Vs. The State of West Bengal & Ors.	<i>(2022) 15 SCC 496</i>

22.	Adani Gas Ltd. Vs. Union of India & Ors.	<i>(2022) 5 SCC 210</i>
23.	The Employees Provident Fund Organization & Anr. Etc. Vs. Sunil Kumar B. & Ors. Etc	<i>2021 SCC OnLine SC 630</i>
24.	PLR Projects Pvt. Ltd. Vs. Mahanadni Coalfields Ltd. & Ors.	<i>(2021) 15 SCC 100</i>
25.	M.C. Mehta Vs. Union of India (UOI) and Ors.	<i>(2021) 11 SCC 529</i>
26.	Skill Lotto Solutions Pvt. Ltd. Vs. Union of India & Ors.	<i>(2020) 15 SCC 667 & (2020) INSC 676</i>
27.	Commercial Tax Officer and Ors. Vs. Jalan Hi-Mech Ltd.	<i>2020 SCC OnLine SC 1415</i>
28.	Star India (P) Ltd. Vs. Society of Catalysts & Anr.	<i>(2020) 13 SCC 401</i>
29.	Nirmal Kumar Parsan Vs. Commissioner of Commercial Taxes & Ors.	<i>(2020) 11 SCC 294</i>
30.	State Bank of India Vs. Manibhadra Polycot	<i>2019 SCC OnLine SC 1843</i>
31.	Satpal & Anr. Vs. Bank of India & Ors.	<i>(2020) 17 SCC 377 & (2020) INSC 50</i>
32.	The Competent Authority Calcutta, under The Land (Ceiling and Regulation) Act, 1976 & Anr. Vs. David Mantosh & Ors.	<i>(2019] 4 S.C.R. 331 & (2019) INSC 268</i>
33.	Anjali Bhardwaj & Ors. Vs. Union of India & Ors.	<i>(2019) 18 SCC 246 & (2019) INSC 210</i>
34.	Naba Prajay Primary Organiser Teachers' Association Vs. State of West Bengal & Ors.	<i>(2018) 17 SCC 555</i>
35.	Commissioner of Service Tax Etc. Vs. M/s. Bhayana Builders (P) Ltd. Etc.	<i>2018 SCC 3 782</i>
36.	Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.	<i>(2019] 4 SCC 17 & (2019) INSC 95</i>
37.	Surender Singh Vs. State of Haryana & Ors.	<i>(2018) 1 S.C.R. 581 & (2018) INSC 65</i>
38.	Rashtriya Colliery Mazdoor Sangh, Dhanbad Vs. Employers in Relation to Management of Kenduadih Colliery of M/s BCCL & Ors.	<i>(2017) 1 SCC 264</i>
39.	Dr. Tapas Kumar Mandal & Ors. & Etc. Vs. State of West Bengal & Ors.	<i>(2015) 10 S.C.R. 447 & (2015) INSC 624</i>

40.	Keshavlal Khemchandand Sons Pvt. Ltd. & Ors. Vs. Union of India & Ors.	<i>(2015) 4 SCC 770 & (2015) INSC 72</i>
41.	Munish Bhasin & Ors. Vs. State (Govt. of N.C.T. of Delhi) & Anr.	<i>(2009) 4 SCC 45</i>

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Civil Appeal No. 21821/2017
(arising out of SLP (C) No. 11616/2017)

BIMLA DEVI & ORS.

Appellants

VERSUS

NARENDER & ORS.

Respondents

O R D E R

When the case was called, learned counsel for the petitioner was not present. As the matter relates to a claim petition and the legal representatives have preferred the special leave petition for enhancement of the claim, and further, the counsel for the insurer on whom liability has been fastened is present, we thought it appropriate to dispose of the matter.

For the aforesaid purpose, we have appointed Ms. Madhumita Bhattacharjee, learned counsel as Amicus Curiae.

Leave granted.

The present appeal calls in question the legal propriety of the order dated 20.10.2016 passed by the High Court of Punjab and Haryana at Chandigarh in F.A.O. No. 1304/2015 (O&M), by which the High Court has enhanced the amount of compensation by Rs.60,000/- (Rupees sixty thousand only). Be it stated, the Tribunal had granted

Rs.5,28,500/- (Rupees five lacs twenty eight thousand five hundred only) and by virtue of enhancement granted by the High Court, the total sum had come to Rs.5,88,500/- (Rupees five lacs eighty eight thousand five hundred only).

It is submitted by Ms. Madhumita Bhattacharjee, learned Amicus Curiae representing the appellants that the deceased was a 21 year old man and was engaged as a Supervisor, and the High Court has erroneously calculated the income as Rs.4,800/- (Rupees four thousand eight hundred only), whereas, there is material on record that he was a skilled labourer and was earning Rs.20,000/- (Rupees twenty thousand only) per month. That apart, it is submitted by her that future prospects at the rate of 40% have not been considered. For the aforesaid purpose, she has placed reliance on a decision rendered by this Court in *National Insurance Company Limited vs. Pranay Sethi & Ors.*, 2017 (13) Scale 12.

Mr. Abhishek Gola, learned counsel appearing for the insurance company would submit that 40% of the income cannot be added, for there is no basis for enhancing the income as no evidence has been brought on record.

Considering the material brought on record and regard being had to the post that the deceased held, we are inclined to come to the conclusion that his monthly income would have been Rs.6,000/- (Rupees six thousand only). If 40% towards future income is added to the monthly income,

it would come to Rs.8,400/- (Rupees eight thousand four hundred only).

Keeping in view the evidence on record, we think it appropriate to deduct 50%, so the amount of contribution would come to Rs.4,200/- (Rupees four thousand two hundred only) and the yearly contribution would be Rs.50,400/- (Rupees fifty thousand four hundred only). If the multiplier of 18 has to be applied, the amount would come to Rs.9,07,200/- (Rupees nine lacs seven thousand two hundred only). To the aforesaid sum, the conventional heads would be applied. As far as the loss of estate is concerned, the amount would be Rs.15,000/- (Rupees fifteen thousand only) and the amount of funeral expenses would also be Rs.15,000/- (Rupees fifteen thousand only). No consortium is granted as the deceased was a bachelor. Thus the total amount come to Rs.9,37,200/- (Rupees nine lacs thirty seven thousand two hundred only). The differential sum shall carry interest at the rate of 9% per annum. The determined amount alongwith interest be deposited before the Tribunal within twelve weeks hence, and the same shall be disbursed by the Tribunal keeping in view the decision of this Court in *General Manager, Kerala State Road Transport Corporation, Trivandrum vs. Susamme Thomas & Ors.*, (1994) 2 SCC 176.

We appreciate the assistance given by Ms. Madhumita Bhattacharjee, learned Amicus Curiae, in the matter.

In view of the aforesaid, the appeal stands allowed to the extent indicated above. The amount that has been paid shall be adjusted. There shall be no order as to costs.

.....CJI.
[Dipak Misra]

.....J.
[A.M. Khanwilkar]

.....J.
[Dr. D.Y. Chandrachud]

New Delhi;
December 12, 2017.

ITEM NO.32

COURT NO.1

SECTION IV-B

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition for Special Leave to Appeal (C) No. 11616/2017

(Arising out of impugned final judgment and order dated 20-10-2016 in FAO No. 1304/2015 passed by the High Court Of Punjab & Haryana At Chandigarh)

BIMLA DEVI & ORS.

Petitioners

VERSUS

NARENDER & ORS.

Respondents

Date : 12-12-2017 This matter was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE A.M. KHANWILKAR
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD

Ms. Madhumita Bhattacharjee, Adv./A.C.
For Petitioners
Mr. Sanjay Kumar Visen, AOR (N/P)
For Respondents

Mr. Abhishek Gola, Adv.
Mr. C.K. Gola, Adv.
Mr. Viresh B. Saharya, AOR
Mr. Akshay Agarwal, Adv.

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.

The appeal is allowed to the extent indicated in the signed order.

Pending interlocutory applications, if any, also stand disposed of.

(Deepak Guglani)
Court Master

(H.S. Parasher)
Assistant Registrar

(Signed order is placed on the file)

❖ High Court: Reportable Judgements

Sl. No.	Cause title	Citation/ Case No.
1.	Damodar Valley Corporation <i>Vs.</i> UOI & Ors.	2023 SCC OnLine Del 465: (2023) 298 DLT 82
2.	Union of India <i>Vs.</i> Arun Mishra & Anr.	2023 SCC OnLine Del 4021
3.	Chief Secretary Govt. of West Bengal <i>Vs.</i> Amritpal Kaur & Ors.	2023 SCC OnLine Del 4026
4.	State of West Bengal <i>Vs.</i> Parul Kush Jain & Ors.	2023 SCC OnLine Del 4935
5.	State of West Bengal <i>Vs.</i> Tushar Singla & Anr.	2022 SCC OnLine Del 3847
6.	Nidhi Malik <i>Vs.</i> Sh. Alapan Bandyopadhyay	2021 SCC OnLine Del 4680: (2022) 286 DLT 60
7.	State of West Bengal <i>Vs.</i> Alankrita Pandey & Ors.	2022 SCC OnLine Del 4924
8.	Hima Paul Hildebrandt Gmbh <i>Vs.</i> Railway Board	2021 SCC OnLine Del 1224
9.	State of West Bengal <i>Vs.</i> Gandharva Rathore & Ors.	2021 SCC OnLine Del 2197
10.	Kritika Sharma <i>Vs.</i> Union of India and Ors.	2021 SCC OnLine Del 2198
11.	Nidhi Malik <i>Vs.</i> Union of India & Anr.	2021 SCC OnLine Del 3447
12.	Hima Paul Hildebrandt Gmbh <i>Vs.</i> Railway Board	2021 SCC OnLine Del 2043
13.	Kritika Sharma <i>Vs.</i> Union of India and Ors.	2021 SCC OnLine Del 3884
14.	State of West Bengal <i>Vs.</i> Reena Joshi & Anr	2021 SCC OnLine Del 4214
15.	Lakshmi Bhavya Tanneeru <i>Vs.</i> UOI & Ors.	2021 SCC OnLine Del 4994
16.	Surinder Singh <i>Vs.</i> Delhi Development Authority	2020 SCC OnLine Del 1239
17.	Surinder Singh <i>Vs.</i> Delhi Development Authority	2020 SCC OnLine Del 1314
18.	Beena Arora <i>Vs.</i> Directorate of Education and Anr.	2018 SCC OnLine Del 9067
19.	Group Capt. Mukesh Paul <i>Vs.</i> Delhi Development	2018 SCC OnLine Del 7128
20.	Bharat Rail Automations Pvt. Ltd. <i>Vs.</i> UOI & Anr.	2018 SCC OnLine Del 12590
21.	Gokul Projects <i>Vs.</i> Cyclone Energy Pvt. Ltd.	2018 SCC OnLine Del 11814
22.	Balraj Parashar <i>Vs.</i> Union Academy Sr. Sec. School and Ors.	2017 SCC OnLine Del 12499
23.	Rupa Sharma <i>Vs.</i> Directorate of Education and Anr.	2017 SCC OnLine Del 11750
24.	Shyamal Kumar Bandyopadhyay <i>Vs.</i> Chairman of National Disaster Management Authority	2017 SCC OnLine Del 11821
25.	South Delhi Municipal Corporation <i>Vs.</i> Ambience Education Society and Ors.	(04.09.2017 – DEL HC): MANU/DE/2810/2017
26.	Midas Touch Investors Association <i>Vs.</i> Union of India & Anr.	2015 SCC OnLine Del 14139
27.	Sant Nirankari Boys Sr. Sec. School <i>Vs.</i> Govt. of NCT of Delhi & Anr.	2015 SCC OnLine Del 13288
28.	Ravinder Kaur <i>Vs.</i> Delhi Development Authority	2013 SCC OnLine Del 1323
29.	Ravinder Kaur <i>Vs.</i> Delhi Development Authority	2013 SCC OnLine Del 1323
30.	AK Bhatt <i>Vs.</i> Lt. Governor	2011 SCC OnLine Del 4038
31.	Roopa Sharma & Ors. <i>Vs.</i> Director, Directorate of Education & Ors.	2011 SCC OnLine Del 3861

32.	Shiva Ditta Juneja <i>Vs.</i> Director of Education and Anr.	2011 SCC OnLine Del 2449
33.	Subodh Kumar <i>Vs.</i> DDA	2011 SCC OnLine Del 3986

BEFORE THE ARBITRAL TRIBUNAL

COMPRISING OF

Justice (Retd.) R.C. Lahoti,

Presiding Arbitrator

Justice (Retd.) Dr Arijit Pasayat

Justice (Retd.) Deepak Verma

Arbitrators

In the matter of arbitration between:

JSC Technoprompexport

v.

M/s NTPC Ltd.

Award dt. 05th August, 2020

Counsel who appeared in the matter:

For the Claimant

Mr. Siddhartha Dave, Sr. Advocate; Mr. Santosh Krishnan, Advocate

For the Respondent

Mr. C.S. Vaidyanathan, Sr. Advocate, Mr. Barunesh Chandra, Ms. Madhumita Bhattacharjee, Ms. Monika Singh, Ms. Priyanka Bakshi, Ms. Archita Kundu, Ms. Shivangi Bajoria, Mr. Jayendra, Mr. Anirudh Gupta
i/b August Legal

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*Every page of the Award is initialled by the Presiding Arbitrator;
last page (operative part) is signed by all Members of the Tribunal.*

R. Lahoti

Justice (Retd.) R.C. Lahoti (Fr. CJI)

Presiding Arbitrator

BEFORE THE ARBITRAL TRIBUNAL

COMPRISING OF

Justice (Retd.) R.C. Lahoti,

Presiding Arbitrator

Justice (Retd.) Dr. Arijit Pasayat

Justice (Retd.) Deepak Verma

Arbitrators

In the matter of arbitration between:

JSC Technoprompexport

AND

M/s NTPC Ltd.

Award dt. 5th August, 2020

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Award	Pages 1 to 51
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Every page is initialled by the Presiding Arbitrator;
last page (operative part) is signed by all Members of the Tribunal


Justice (Retd.) R.C. Lahoti (Fr. CJI)
Presiding Arbitrator

BEFORE THE ARBITRAL TRIBUNAL
COMPRISING OF
Justice (Retd.) R.C. Lahoti, Presiding Arbitrator
Justice (Retd.) Dr Arijit Pasayat, Arbitrator
Justice (Retd.) Deepak Verma, Arbitrator

In the matter of ARBITRATION

Between

The Joint Stock Company 'Foreign Economic Association Technoprompexport'

Having its Principal place of business at

18/1, Ovchinnikovskaya nab, 115324,

Moscow, Russia

...Claimant

And

M/s NTPC Ltd.

Having its principal place of business at NTPC Bhawan,

Core- 7, Scope Complex, 7 Institutiona Area,

Modi Road

New Delhi- 110003

Corpoarte Office At:

Engineering Office Complex, 3rd Floor, AA-8A

Sector 24, Noida- 201301 UP

...Respondent

AWARD

Dt. ^{5th} August, 2020.

PART-1
ABBREVIATIONS

1.1 Abbreviations frequently used in this Award are as under-

A&C Act	Arbitration & Conciliation Act, 1996
BHEL	M/s BHEL
BG	Bank Guarantee
BOIs	Bought Out Items
CPBG	Contract Performance Security/Bank Guarantee
CRM	Contract Review Meeting
CSH	Convective Super Heater
Doosan	M/s Doosan Heavy Industries & Construction Co. Ltd., Korea
DJU	Deed of Joint Undertaking
FOB	Free On Board
GCC	General Conditions of Contract
IDC	Interest During Construction
IEDC	Incidental Expenditure During Construction
LD	Liquidated Damages
LOA	Letter of Award
MoM	Minutes of the Meeting
NETRA	NTPC Energy Technology Research Alliance

NoA	Notification of Award
NTPC	National Thermal Power Corporation Limited
PFD	Points for Determination
PSH	Platen Super Heater
PVC	Price Variation Claim
RCC	Reply to the Counter Claim
RWS	Respondent's Written Submissions
SCC	Special Conditions of Contract
SEM	Scanning Electron Microscopy
SoC	Statement of Claim
SoD	Statement of Defense
TEP	M/s Teploelectroproject
TKZ	M/s KrasnyKotelschik
TPE	Technopromexport
ZEP	M/s Zarubezhenergo Project

PART-2
PARTIES

- 2.1. The Claimant, thus represented by it to NTPC, is, an engineering, procurement and construction company incorporated in Russia.
- 2.2 NTPC having its office at the address mentioned in its pleadings mentioned above in the Memo of Parties is a Public Sector Undertaking incorporated under the Companies Act, 1956 engaged in the business of generation of electricity and has been conferred a 'Maharatna' Status by the Government of India.

PART-3
AN OVERVIEW OF THE DISPUTE

- 3.1. The present dispute is in relation to Barh STPP Stage-I. Barh STPP is a Project of national importance and has been awarded Mega Power Project status by the Government of India. The Project was conceived as an inter-regional Power Project to meet the pre-requisites of Northern Region, Western Region and home state of Bihar, subject to final allocation by the Government of India. The Project has an overall capacity of 3300 MW (5X660 MW) and was divided into two stages: Barh STPP Stage – I (3X660 MW) and Barh STPP Stage – II (2X660 MW). Barh STPP Stage – I was initially planned to be commissioned during the Eleventh Plan period (prior to March 2011) and its timely completion was essential for relief to the immense deficiency in power supply, which was being faced by India in general and Bihar in particular.
- 3.2. Three Notifications dated 14.03.2005 were issued in Claimant's favour qua the Project.
- (i). Notification bearing No.CS-9558-102-2-FC-NOA-4520 (hereafter, "NOA 4520") was broadly in respect of CIF Supply of Main Plant Package Part-A (Steam Generator & Auxiliaries) for Barh Super Thermal Power Project (3 X 660 MW).

- (ii). Notification bearing No.CS-9558-102-2-FC-NOA-4521 (hereafter, "NOA 4521") was broadly in respect of design, engineering, manufacture, inspection, testing at supplier's works, packing, forwarding and despatch from manufacturer's works /place of despatch (both in India) of all Ex-works (India) plant and equipment including mandatory on Ex-works (India) basis for the Main Plant Package.
 - (iii). Notification bearing No.CS-9558-102-2-FC-NOA-4522 (hereafter, "NoA 4522") was broadly in respect of Installation, testing and commissioning of the Main Plant Package.
- 3.3. At the bidding stage, prior to Award of Contracts, following three (3) parties submitted their bids:
- (i) M/s BHEL, New Delhi (hereinafter referred to as "BHEL"),
 - (ii) M/s Doosan Heavy Industries & Construction Co. Ltd., Korea (hereinafter referred to as "Doosan"), and
 - (iii) FGUP "VO "Technopromexport" (which was later renamed as JSC "VO "Technopromexport" and hereinafter interchangeably referred to as the "Claimant", "Contractor" or "TPE").
- 3.4. The Contracts (as defined herein below) were awarded to Technopromexport (TPE) vide Notifications of Award (hereinafter referred to as "NoA"). TPE had to undertake the Barh STPP Stage – I along with its collaborators M/s Krasny Kotelschik (hereinafter referred to as "TKZ"), M/s Teploelectroproject (hereinafter referred to "TEP") and M/s Zarubezhenergo project (hereinafter referred to as "ZEP"), which collaborators had jointly furnished a Deed of Joint Undertaking (hereinafter referred to as "DJU") along with TPE as part of the documents submitted along with TPE's bid. The collaborators i.e. TKZ, TEP and ZEP shall hereinafter be collectively referred to as "DJU Associates".
- 3.5. On March 25th, 2005, NTPC and TPE signed the following three (3) Contracts for the aforesaid package:
- (i) 'First Contract' vide NoA No. CS-9558-102-2-FC-LOA-4520 along with the appendices thereto, for the supply of plant and equipment including mandatory spares (procured from outside India) on CIF basis at a contract price of USD 391,121,452/- amended to USD 388,907,009/- vide Amendment No. 6 dated June 18th, 2009.
 - (ii) 'Second Contract' vide NoA No. CS-9558102-2-SC-LOA-4521 along with the appendices thereto, for the supply of plant and equipment including mandatory spares (procured within India) on ex-works basis at a contract price of INR 686,993,784/- amended to INR 772,570,796/- vide Amendment No. 3 dated September 15th, 2007.
 - (iii) 'Third Contract' vide NoA No. CS-9558-102-2-TC-LOA-4522 along with the appendices thereto, for providing all services i.e. port handling and clearance for

the imported goods, inland transportation and insurance, installation, testing and commissioning at a contract price of USD 2,818,288/- + INR 2,034,351,463/- amended to USD 2,818,288/- + INR 2,034,288,297/- vide Amendment No. 4 dated June 18th, 2009.

[At the time of final hearing submissions, it was pointed out by Parties that the Contract is only one but it has been split into three for the purpose of facilitating requirements of tax, duties etc. The 'First Contract' was mainly about goods to be imported from an outside country; the 'Second Contract' mainly related to goods to be procured from within India; the Third Contract related to installation and commissioning services]

- 3.6. The capitalised term "Contracts" appearing hereinabove or hereinbelow includes the three Contracts mentioned in the foregoing para 3.5. (i.e. First Contract, Second Contract and Third Contract) and various other documents such as Special Conditions of Contract along with amendments and clarifications thereto (hereinafter referred to as "SCC"), General Conditions of Contract along with amendments and clarifications thereto (hereinafter referred to as "GCC"), Technical Specifications and Drawings along with its amendments and clarifications, the Bid and the Price Schedules, Procedures along with amendments and clarifications thereto.
- 3.7. The Contracts consisted of a Cross Fall Breach Provision whereby any breach under any of the three (3) contracts i.e. First Contract, Second Contract or Third Contract shall automatically be deemed as a breach of remaining two (2) Contracts and any such breach shall give NTPC an absolute right to terminate all the Contracts and/or recover damages thereunder.
- 3.8. As per the time schedule prescribed in the Contracts, the completion of work (hereinafter referred to as "Completion of Facilities" for the three (3) units (of 660 Mega Watts each) were to be accomplished by:
- Unit # 1: January, 2009
 - Unit # 2: July, 2009
 - Unit # 3: January, 2010
- 3.9. Ten Bank Guarantees ("BG") were furnished by the Claimant and sub-contractors in favour of the Respondent pursuant to conditions contained in GCC. Guarantees were renewed and enhanced from time to time. Aggregate value of BGs as of 2014 was: USD 123,093,851.42/- and INR 67,08,61,773.24/-.
- 3.10. The SCC had originally prescribed the following timelines for completion of the Facility: (a) Unit I: 46 months, (b) Unit II: 52 months, and (c) Unit III: 58 months, from the date of Notification of Award of Contract (14.03.2005). [Vol. CD- I, pg. 176].
- 3.11. By 2008, it became apparent that the Project could not be completed within the original time schedule. Disputes arose between the parties as to who bore responsibility for the

delay and the consequences thereof. The SCC contemplates that disputes between parties first be considered by an “adjudicator”. Accordingly, parties appointed and approached Mr. Justice Anil Dev Singh, Retired Chief Justice of the Rajasthan High Court, to adjudicate their differences.

3.12. An Award dated 28.11.2008 was given by the Learned Adjudicator which *inter alia* concluded:

“...both the parties have been responsible for infringing the time imperatives. However, it is not possible to quantify the proportion in which the parties have contributed to the delays, but surely delays have taken place on both the sides...when both the parties have contributed to the delays an attempt needs to be made to resolve the problem by an attitude of give and take.”

Thus, the Award did not identify either party as being solely responsible for the delay in completion.

3.13. On 29.10.2010, the Respondent and the Claimant agreed on extended completion dates as under:

- Unit I: 29.10.2013
- Unit II: 29.04.2014.
- Unit III: 29.10.2014.

It was also agreed that: “Respondent and Claimant have no outstanding claim, as on date, on each other. However, claim or issues having financial implication, if any, in the future, would be dealt in line with the provisions of the Contract”.

3.14. The Award dated 28.11.2008 by the Ld. Adjudicator was not challenged by either party. Hence, it became final and binding on both the parties. This would have two consequences. First, whatever disputes existed between the parties stood adjudicated upon, by the Award of the Adjudicator. Second, the Award was virtually a drop-curtain as to the events, faults, liabilities of the parties till the date of initiation of proceedings before the Adjudicator except for the reservations that – “... claims or issues having financial implications if any..... would be dealt in line with the provisions of the Contract.”

3.15. The timelines stipulated as per amendment dated 29.10.2010 could not be achieved on account of various reasons, not particularly attributable to the Claimant above. In its outline of submissions, Claimant has summarized the correspondences during this period which depict Respondent’s contributory faults in delaying execution of the Project.

3.16. At the Meeting dated 25.09.2013, between the parties, following points were noted in the Minutes of the Meeting (MoM)-

- (i). Claimant’s confirmation that commissioning of Unit #1 shall be undertaken by September 2015 “on best effort basis”.

- (ii). Claimant's confirmation that it was suffering financial constraints and seeking assistance from the Russian Government in this regard.
- (iii). That the record made was "*with the intent to expedite the progress of project only without prejudice to the terms & conditions of the contract which shall prevail.*"

3.17. Acting pursuant to the MoM dated 25.09.2013, the Claimant sent a Letter dated 10.10.2013, furnishing the revised schedule of the Bought Out Items ("BOIs") ordering, to meet the agreed date of Unit #1's commissioning September 2015. The Respondent also issued a Letter dated 10.10.2013, indicating measures proposed, pursuant to the Minutes of Meeting dated 25.09.2013 (wherein project extension was contemplated). This shows that Respondent had acquiesced to an extended timeline, in terms of Meeting dated 25.09.2013.

3.18 By its letter dated 14.11.2014, Respondent intimated, the Claimant that the Contract period was "*provisionally extended upto 29.10.2015 without prejudice to the right to levy LD*". Claimant agreed to the terms of this letter by appending its counter-signature. By letter dated 21.11.2014, the Respondent confirmed their letter dated 14.11.2014 for provisional extension of the Contract period and requested that "all bank guarantees" submitted under the Contract be extended by one year.

3.19 On 27.11.2014, the Claimant furnished its countersigned copy of the Letter dated 14.11.2014 whereby the "Contract period" was extended by 1 year, up to, 29.10.2015 and also made proposals regarding the implementation schedule. On 27.11.2014, the Claimant furnished a draft of detailed schedule of completion of Barh STPP Project Unit-I construction for consideration and review from the Respondent.

3.20 There were attempts at holding discussions and meetings but, the Respondent by its letter dated 27.12.2014 (Vol. CD-II, p. 435) asked for a Contract Completion Program and Fund Flow Statement from the Claimant. (In the opinion of the Tribunal this letter is not of much relevance in as much as the extended Contract period had already expired and the Bank Guarantee Agreement also had been invoked and encashed). By letter dated 07.01.2015 (Vol. CD-2, p.439) the Respondent made it clear to the Claimant that the invocation of bank guarantees could not be reversed. The Respondent also invited the attention of the Claimant to the fact that a comprehensive plan of execution, additional financing and firm commitment on various points requiring immediate action was not forthcoming from the Claimant.

3.21. In December 2015, once again, Justice (Retd.) Sadannand Mukherjee was appointed as an Adjudicator, who passed his Order on 20th May, 2016. It is not necessary to take note of the findings given by the Adjudicator in as much as the Claimant, feeling dissatisfied with the Adjudication Order, on 25.05.2016, served a Notice of Intention to commence arbitration in terms of Clause 6.2.1 of GCC. The Order of Adjudication lost all its efficacy in view of its having been put under challenge by way of Arbitration.

PART-4
PLEADINGS OF THE PARTIES

4.1 There are claims and counter claims.

4.2 In the background of the facts stated hereinabove in Part-3 of the Award, the Claimant has in its Statement of Claim ("SoC") dated 26.12.2016 sought for the following reliefs: -

- A. Declare that NTPC's termination of the three Contracts was illegal;
- B. Direct NTPC to compensate the Contractor the principal amounts of USD 162,929,595.28 and INR 103,19,98,690.79 along with interest @18% p.a. from the dates the respective amounts became due till the dates the respective amounts are paid in full;
- C. Direct payment of costs incurred by the Contractor, in the present arbitral proceedings and prior adjudication proceedings;
- D. Pass such further or other orders as may be deemed fit in the facts and circumstances of the case.

4.3 In the Statement of Defense ("SoD"), all the material averments made by the Claimant have been denied. In addition to SoD, the Respondent has also filed a Statement of Counter Claims.

4.4. The pleadings in the Statement of Counter Claim are very detailed and they will be noticed at appropriate places to the extent necessary. Hereat, it would suffice to take note of the summary of quantified counter claims of NTPC forming part of Written Submissions on behalf of Respondent/ NTPC (dated May 20, 2019). It is as under:

3C, Quantified Counter-Claims of NTPC as on date						
S.No	Description	Clause Enabling provision under the Contracts	Amount (INR)	Amount (USD)	Amount (Euro)	Approx. in INR (@ 1 USD= INR 67/1 Euro=INR 76)
i)	Cost of Completion of Facilities by NTPC [including cost of supply, erection and installation of new materials in place of damaged/defective material supplied by TPE as per 6 (d) and 6(e) at page 224-225 CV2].	Clause 42.2.6 of GCC	18,053,172,730	27,597,454	14,830,343	
ii)	Liquidated Damages (LD)	Clause 26.2 of GCC read with Clause 8 of SCC	140,342,955	19,586,264		
iii)	Outstanding payment to be made by TPE	Clause 27.02.00 of ECC [Part D, Section VI A at page 101 Vol. 9 RD) and Clause 3.02.00 of ECC (Part D, Section VI A at page 90 Vol. 9 RD] of Technical Specification for Main Plant Package.	559,859			
iv)	Consequential damages resulting from wilful	Clause 30 of GCC	71,047,453,461		185,149	

misconduct of TPE resulting in inordinate delay in completion of Barh STPP Stage-I.					
Total		89,241,529,005	-8,011,190	15,015,492	89,845,956,643/-
Total in Words – INR Ninety Billion or Nine Thousand Crores (approx and round off for ease of reference.					

4.5. In its reply to the Counter Claims, the Claimant has raised several pleas which can be briefly noticed hereunder:

- (i) That 2 counter claims are of major strength of content of the GCC i.e. Clause 42.2.6 and Clause 30. None of these claims have crystallized (preliminary objections).
- (ii) A claim by reference to clause 42.2.6 of GCC arises only if the facility is completed and the cost incurred have been finally determined. The facility having not been completed as yet, the question of claiming the cost of completing the facilities by the employer under Clause 42.2.6 of GCC does not arise.
- (iii) Under Clause 42.2.6 of GCC, only reasonable costs can be claimed but not hypothetical or speculative demands, as has been raised by the Respondent by way of Counter Claims.
- (iv) The cumulative percentage of completed works as per NTPC's own assessment works out to be 63% (monetary value) as per NTPC's SoD. For the balance 37% of the Facility, the balance basic Contract price payable under the TPE's Contracts was only USD 133,844,902 and INR 184,46,89,605. If the figure was denominated in INR for convenience, it is INR 1081,22,98,039¹. To allegedly complete this 37% balance work, NTPC's Counter-Claim has raised a claim of INR 18,053,172,730 and EURO 14,830,343². If the figure is denominated in INR³ for convenience it is INR 1918,02,78,798. This above figure is a paper figure, without proof of actual expenditure/ payment by Respondent. However, even assuming for the sake of argument that this is the new price for the balance work, the difference between the old price and new price is approximately Rs. 836,79,80,759. This is an escalation of 77.4% which is ex facie unreasonable, considering that the alleged re-award of Contract (for balance works) took place within just one year of termination.
- (v) Under Clause 30 of GCC there is a cap on the liability incurred by the Contractor. Assuming the Claimant incurs any liability, it shall be subject to the cap.
- (vi) The equipment in question were delivered to the Respondent in the year 2007 and 2009. The Respondent incorporated this Claim in its Counter Claim in its amendment Application dated 01.11.2017. Any claim based on the ground that the equipment delivered was defective made on

¹ USD 1= INR 67, going by the exchange rate notionally shown in Respondent's own chart, handed during final hearing on 11.02.2019.

² Please see para Amended Counter Claim at page 229, Respondent's Convenience Compilation, Vol. 2.

³ EURO 1+ INR 76, going by the exchange rate notionally shown in Respondent's own chart, handed during final hearing on 11.02.2019.

01.11.2017 shall be barred by time and hence, would be liable to be rejected.

- 4.6 In Reply to the Counter Claim (RCC), the Claimant denied all the material averments made in the Statement of Counter Claim and sought for dismissal of the Counter Claims.
- 4.7 On the pleadings of the parties, the Tribunal with the assistance of the Ld. Counsel for the parties settled the Points For Determination on 12/13-5-2017 (See Part-5).
- 4.8 A detailed statement of the pleas of facts and law raised in the pleadings is being avoided hereat in the interest of avoiding repetition. The relevant pleadings will be referred to while dealing with the disputes at their appropriate places. Hereat, suffice it to say that an overview of the facts given in Part-3 hereinabove, read with the Points for Determination set out in Part-5 hereunder, projects adequately the picture of the disputes between the parties.

PART 5
POINTS FOR DETERMINATION (PFD)

5.1 The Points for Determination (PFD) settled with the assistance of Ld. Counsel for the parties are reproduced hereunder:

1. *Whether the termination of three contracts by NTPC was illegal?*
- 2(a) *Whether TPE (the Claimant) is entitled to damages on account of termination of the three contracts by NTPC (as elaborated in the SoC)?*
- (b) *Whether the Claimant can be said to have committed 'willful misconduct' rendering inapplicable Clause 30 of the GCC providing for limitation (cap) on liability?*
- 3 *Whether there was persistent failure and / or persistent neglect on the part of the Claimant qua its contractual obligations (as elaborated in the SoD/CC)?*
- 4(a) *Whether the invocation and encashment of Bank Guarantees to the tune of USD 123,093,851.42 and INR 67,08,61,773.24 by Respondent NTPC is illegal / contrary to the contract?*
- (b) *Whether NTPC cannot appropriate and is bound to return the amount to the Claimant?*
- 5(a) *Whether the Claimant is entitled to the claims as prayed for?*
and / or
- (b) *The Respondent / Counter Claimant is entitled to the reliefs as prayed for?*
6. *Whether any party is entitled to payment of interest, and if so, at what rate and for which period?*
- 7 *Relief and Costs?*

PART-6
ARBITRAL PROCEEDINGS

6.1 The arbitration clause having been invoked, the parties appointed their respective arbitrators namely, Justice Deepak Verma (Former Judge, Supreme Court of India) and Dr. Justice Arijit Pasayat (Former Judge, Supreme Court of India) as their respective arbitrators. The two party-nominated arbitrators appointed Justice R.C. Lahoti (Former Chief Justice of India) as the third (Presiding) Arbitrator who accepted the appointment and conveyed the same to the parties on 05.11.2016.

- 6.2 The SoC was filed on 26.12.2016. SoD accompanied by Statement of Counter Claims was filed on 07.02.2017. On 21.03.2017, Reply to Counter Claim (RCC) was filed. Both the parties have filed substantial documentary evidence. On 02.08.2018, the Claimant declared its desire of not adducing any oral evidence. The Respondent expressed its desire of adducing oral evidence of witnesses namely (i) Shri Kameshwar Jha, and, (ii) Shri Rajeev Kumar. It was agreed that Examination-In-Chief, part of the testimony of the witnesses shall be filed by way of affidavits, which shall be available to be read in evidence subject to Cross Examination by the other side. Accordingly, affidavits of the two witnesses have been filed. They have been cross examined on behalf of the Claimant. The witnesses examined on behalf of the Respondent are:-
- (i) Shri Kameshwar Jha- He is additional General Manager (Mechanical), of the Respondent and during the period January, 2008 to April 2018, he was posted in various positions in Barh STPP Project. He is fully conversant with the facts of the case and aware of the veracity and relevance of the documents filed by NTPC including those which have been denied by the Claimant, TPE in the process of admission/denial of documents.
 - (ii) Mr. Rajeev Kumar Saxena- He was posted at various positions in Delhi during the period 1988-2017. He has personal knowledge of certain documents referred to in the affidavit. His affidavit has been filed to establish the veracity and relevance of certain documents filed by NTPC which have been denied by the Claimant in the Memos of Denial dated April 30, 2017, November 22, 2017 and February 21, 2018.
- 6.3. Final hearing submissions were advanced by Mr. Siddharth Dave, Sr. Advocate for the Claimant and Mr. C.S. Vaidyanathan, Sr. Advocate for the Respondent. In addition to the submissions advanced orally, Written Submissions have also been filed.
- 6.4 Voluminous documentary evidence has been filed on behalf of both the parties. For the purpose of convenience and final hearing, on behalf of the Claimant, it was submitted that two volumes of documents, marked as Vol. CD-I and CD-II shall be referred to. In addition thereof, the Claimant has filed another compilation of 6 volumes marked as CCV-III to CCV-VIII wherein, are included such documents as would need to be referred frequently at the time of final hearing but, which are available on record of the Tribunal having been already filed. There is yet another volume of documents filed by the Claimant along with its Reply to Counter Claims (RCC). For convenience of reference, this volume has been marked and is being referred to as CCV-IX.
- 6.5 Out of the several interim proceedings held before the Tribunal, some need to be noted and made part of this Award.
- 6.6. On 31.10.2017, the Respondent moved an Application for Amendment in the Counter Claims. The Application was opposed on very many grounds on behalf of the Claimant including, on the ground of limitation submitting that on the date of seeking amendment, the Counter Claims were barred by limitation. On 15.12.2017, the Tribunal allowed the Application and assigned reasons for allowing the Application on 16.12.2017. All pleas raised by the Claimant while resisting the Respondent's Application for amendment were permitted to be raised in reply to its defense against the Counter Claims.

6.7 The Respondent, in view of subsequent events, again filed an Application to reduce the quantum of Counter Claims. By Order dated 21.02.2018, the Respondent/Counter Claimant's Application was allowed. The following changes/amendments were permitted to be incorporated in the counter claim:

"On page 135 of CC in the column of 'Cost (USD)' the figure of "46,817,230/-" shall be scored out (deleted) and, in its place, figure of "383,844,290/-" shall be mentioned in the column 'Cost(INR)'.

On page 136, the figure of "3,984,207/-" appearing in the column 'Cost (USD)' shall be scored out (deleted). In the column 'Cost (INR)' also the figure of "2,739,510,689/-" shall be scored out and in its place the figure of "1,917,223,509/-" shall be mentioned"

6.8 On 06.02.2018, the Respondent filed an Application seeking the Tribunal's direction to the Claimant to deposit in an Escrow Account, the following amount –

INR	160,753,509,073
USD	42,790,247/-
Euro	15,015,492/-

6.9 The Application was opposed on behalf of the Claimant. After hearing the Ld. Sr. Advocates for the parties, the Tribunal formed an opinion that the Application could not be allowed. By a reasoned Order dated 02.04.2018, the Respondent/Counter Claimant's Application was rejected.

6.10 In the reply filed by the Claimant to the Respondent's Application dated 16.02.2018 under Section 17 of Arbitration & Conciliation Act, 1996 ("A&C, Act") the Claimant stated in para 4.1 – *"TPE has been declared bankrupt by the Arbitration Court of the City of Moscow in Case No. A40-239581/2015 on 31.03.2017"*. On behalf of the Respondent, it was submitted that the Contract between the parties provides (vide Clause 5.1 of GCC forming part of the Contract) that the Contract would be governed by the laws of India. The Tribunal directed Ld. Counsel for the Claimant to obtain instructions if the Receiver appointed by the Moscow Arbitration Tribunal adopts the Contract and the present proceedings between the parties hereat. On 23.03.2018, the Tribunal passed an Order. The following extract from the Order dated 23.03.2018 of this Tribunal is reproduced hereat which speaks for itself:-

"Today on behalf of the Claimant a soft copy of English translation of the relevant Federal Law NO. 127-FZ of October 26, 2002 on Insolvency (Bankruptcy) has been made available. The original runs into about 600 printed pages. The text of the soft copy as made available is not disputed by either side. The bankruptcy proceedings before the Arbitration Court in Moscow are under Article 126 of Federal Bankruptcy Act. A copy of the summary of Final Arbitration Award dated 29.03.2017 has also been made available and placed before the Tribunal.

On behalf of the Claimant it is stated on instructions that the Receiver has 'not discarded the contract' forming subject matter of these proceedings and rather has adopted the same as having participated, and continuing to participate, in the proceedings with the knowledge of all relevant facts. It is also stated that the Receiver

would not only be prosecuting the claim but also defending the Claimant in the Counter Claim preferred by the Respondent.

Although the provision of Article 102 and 126 of the above said Moscow Act are clear, yet the Tribunal expects the Claimant and the Receiver to make a statement in the form of an affidavit to that effect and file the same on the record of the Tribunal. Let it be done on or before the next date of hearing.

In the above fact situation and the stand taken by the parties, more particularly the Claimant, it is agreed by the learned advocates for both the parties that the present arbitral proceedings would continue unaffected by the insolvency proceedings before the Arbitral Court at Moscow. ”

- 6.11. From time to time, by consent of the parties and subsequently, by the orders passed by the Court, the time appointed for pronouncing the Award has been extended. Finally, by Order dt. 17.02.2020, time for pronouncing the Award u/s 29A of A&C Act has been extended upto 17-08-2020.

PART – 7 **DISCUSSION ON MERITS**

- 7.1. The principal issue which goes to the very heart of the matter is the validity/legality of termination of three Contracts by the Respondents.
- 7.2. Works for the Main Plant Package Part-A (Steam Generator and Auxiliaries) of Barh STPP Stage-I were awarded to the Claimant under International Competitive Bidding procedures in March 2005. As is usually done in projects of this nature and scope, for accounting and tax purposes, the works Contract was trifurcated i.e. three separate Contract Agreements were signed between the Claimant and Respondent:
- ‘First Contract’ was for supply of plant and equipment including mandatory spares from abroad.
- ‘Second Contract’ was for supply of plant and equipment including mandatory spares from India.
- ‘Third Contract’ was for providing services i.e. port handling and clearance for the imported goods, inland transportation and insurance, installation, testing and commissioning etc.
- 7.3 Clause 3.6.2 of the GCC [at p. 113, Vol. CD-I] specifically provided a Cross Fall Breach Clause which stated that the award of three separate Contracts shall not dilute the Claimant's responsibility towards the overall Project and that breach of any one of the Contracts by the contractor would be construed as the breach of the other Contracts and shall confer a right on the Respondent to terminate the other Contracts at the risk and cost of the Claimant.
- 7.4. The Respondent terminated the three Contracts with the Claimant in January 2015 on the basis of Clause 42.2.2(c) of the GCC [CCV- 8, p. 127]. The conditions precedent for invocation of the said Clause are either persistent failure or persistent negligence on the part of the Claimant without just cause.

7.5 The dispute centers around Clause 42.2.2 and 26.2 of the Contract, to be more specific, of the GCC which have been incorporated into the Agreement between the parties. These Clauses provide as under-

“42.2.2 If the Contractor

- (a) has abandoned or repudiated the Contract*
- (b) has without valid reason failed to commence work on the Facilities promptly or has suspended (other than pursuant to GCC Sub-Clause 41.2) the progress of Contract performance for more than twenty-eight (28) days after receiving a written instruction from the Employer to proceed*
- (c) persistently fails to execute the Contract in accordance with the Contract or persistently neglects to carry out its obligations under the Contract without just cause*
- (d) refuses or is unable to provide sufficient materials, services or labor to execute and complete the Facilities in the manner specified in the program furnished under GCC Clause 18 (Program of Performance) at rates of progress that give reasonable assurance to the Employer that the Contractor can attain Completion of the Facilities by the Time for Completion as extended.*

then the Employer may, without prejudice to any other rights it may possess under the Contract, give a notice to the Contractor stating the nature of the default and requiring the Contractor to remedy the same. If the Contractor fails to remedy or to take steps to remedy the same within fourteen (14) days of its receipt of such notice, then the Employer may terminate the Contract forthwith by giving a notice of termination to the Contractor that refers to this GCC sub-clause 42.2.

42.2.3 Upon receipt of the notice of termination under GCC Sub-Clauses 42.2.1 or 42.2.2, the Contractor shall, either immediately or upon such date as is specified in the notice of termination,

- (a) cease all further work, except for such work as the Employer may specify in the notice of termination for the sole purpose of protecting that part of the Facilities already executed, or any work required to leave the Site in a clean and safe condition*
- (b) terminate all subcontracts, except those to be assigned to the Employer pursuant to paragraph (d) below*
- (c) deliver to the Employer the parts of the Facilities executed by the Contractor up to the date of termination*
- (d) to the extent legally possible, assign to the Employer all right, title and benefit of the Contractor to the Works and to the Plant and Equipment as at the date of termination, and, as may be required by the Employer, in any subcontracts concluded between the Contractor and its Subcontractors*
- (e) deliver to the Employer all drawings, specifications and other documents prepared by the Contractor or its Subcontractors as at the date of termination in connection with the Facilities.*

XXXXX

XXXXX

XXXXX

“26.2 If the Contractor fails to attain successful Completion of the Facilities or any part thereof within the Time for Completion or any extension thereof under GCC Clause 40 (Extension of Time for Completion), the Contractor shall pay to the

Employer liquidated damages in the amount computed at the rates specified in the SCC: The aggregate amount of such liquidated damages shall in no event exceed the amount specified as "Maximum" in the SCC. Once the "Maximum" is reached, the Employer may consider termination of the Contract, pursuant to GCC Sub-Clause 42.2.2.

Such payment shall completely satisfy the Contractor's obligation to attain Completion of the Facilities or the relevant part thereof within the Time for Completion or any extension thereof under GCC Clause 40 (Extension of Time for Completion). The Contractor shall have no further liability whatsoever to the Employer in respect thereof.

However, the payment of liquidated damages shall not in any way relieve the Contractor from any of its obligations to complete the Facilities or from any other obligations and liabilities of the Contractor under the Contract.

Save for liquidated damages payable under this GCC Sub-Clause 26.2, the failure by the Contractor to attain any milestone or other act, matter or thing by any date specified in Appendix 4 (Time Schedule) to the Contract Agreement and/or other program of work prepared pursuant to GCC Clause 18 (Program of Performance) shall not render the Contractor liable for any loss or damage thereby suffered by the Employer."

7.6 It will also be useful to take note of the following contractual provisions: -

a) **TIME SCHEDULE**

1.0 It is clearly understood and agreed that time is the essence of this Contract and shall be strictly adhered to by the Contractor..... (Volume CD-I, p. 37)

b) **GCC**

26. Completion Time Guarantee

26.1. The Contractor guarantees that it shall attain completion of the facilities (or a part for which a separate time for completion is specified in the SCC) within the time for completion specified in the SCC pursuant to GCC sub-clause 8.2 or within such extended time within which the Contractor shall be entitled under GCC Clause 4.0 (extension of time for completion) hereof.

c) **GCC 8.2 (as amended by SCC No. 5)**

Time for commencement and completion.

GCC Clause 8.2:

Completion of the facilities for Unit-I, Unit-II and Unit-III shall be attained within 46 months, 52 months and 58 months respectively from the date of Notification of Award.

7.7. There are a few significant letters which it is considered appropriate to refer to and, where necessary, to extract the relevant part therefrom and reproduce hereunder:-

A. Respondent's Letter to the Claimant dt. 27.09.2014, [CCV-5, pages 120-122].

"27.09.2014

Ref. No. 01/CS-9558-102-2-POA

JSC "VO "TECHNOPROMEXPORT",

15, bld. 2, Novyi Arbat St.,
119 019 Moscow,
Russia

Fax No. 007 495 953 3373/ 007 495 950 94 48

Kind Attn.

Mr. Alexander V. Tscghegolev,
Regional director of business development department

Mr. Leonid L. Testov,
Director, Power Plant Construction, R&M Department

Dear Sir,

Sub. Main Plant Package Part-A (Steam Generator & Auxiliaries)
for Barh Super Thermal Power Project (3x660 MW)
Contract No.: CS-9553-102-2-FC-COA-4520 dated 25.03.2005,
Contract No.: CS-9558-102-2-SC COA-4521 dated 25.03.2005 and
Contract No.. CS-9558-102-2-TC-COA-4522 dated 25.03.2005

Ref: i) MOM of Apex level review meeting at Barh Site on 25.09.2013
ii) TPE letter ref. 530520/011251 dated 10.10.2013
iii) MOM of CRM held on 01.11.2013 at NTPC Noida
iv) NTPC letters ref. 01/CS-9558-102-2-POA dated 11.11.2013,
29.11.2013, 05.12. 2013, 16.12.2013 and 17.12.2013
v) NTPC letter no. 01/D(Proj)/Barh/JSC dated 20th January, 2014
vi) NTPC Letter No. 01/CS-9558-102-2-POA dated 31.01.2014
vii) NTPC Letter no. 01:CMD:PES:607:22 dated February 14,2014
viii) Contract Review Meeting held on 3rd March-5th March,2014
ix) NTPC letter no. 01/CS-9558-102-2-POA dated 14.03.2014
x) NTPC letter no. 01/CS-9558-102-2-POA dated 28.03.2014

1.0.The Notifications of Award for the subject package were placed on you on 14.03.2005 with schedule Completion of Facilities by Jan, 2009, July' 2009 & Jan. ' 2010 for Unit#1, Unit#2 and Unit # 3 respectively.

2.0.Subsequently, vide amendments dated 29.10.2010 to subject Contracts the schedule for Completion of Facilities were revised as under:

Unit#1 :29.10.2013
Unit #2 :29 04 2014
Unit #3 :29.10.2014

3.0.This has reference to our various requests to Technopromexport to perform its obligations under the Contract such as i) ordering of balance BOIs, ii) completion of balance engineering, iii) supply of balance material and iv) installation, testing and commissioning including completion of facilities including request vide letters referred above.

4.0.We regret to note that Technopromexport have conducted following breaches under the Contract:

i) Technopromexport is not placing order for balance BOIs which was to be completed y Technopromexport by 29.05 2011 as per agreed revised Contract schedule.

- ii) *Technopromexport is not completing balance engineering which was to be completed by Technopromexport by 28.01.2012 as per agreed revised Contract schedule.*
- iii) *Technopromexport is not completing supply of balance material which was to be completed by Technopromexport by April '12, Oct. '12 and April '13 for Unit #1, Unit #2 and Unit# 3 respectively as per agreed revised Contract schedule.*
- iv) *Technopromexport choose to perform selectively i.e. only supplied some of the items which they found beneficial from their point of view and not supplying the balance material despite repeated requests from NTPC. Technopromexport have not shipped even the material for which Material Dispatch Clearance Certificates (MDCCs) have been issued by NTPC viz. Critical Piping, valves, NMEJ, Duct Support structures & Unit#3 pressure parts, etc.*
- v) *TPE has been subjecting the execution of contract to financing by the government of Russian Federation since September 2013 which is not related to the contract.*
- vi) *TPE vide its letter dt. 12 September 2014 has demanded additional compensation of 230 Million USD from NTPC, which is not payable as per the provisions of the contracts.*
- vii) *TPE, vide its letter dated 26 September 2014 has escalated the demand of additional compensation to 248 Million USD from NTPC. Further vide above mentioned letter, TPE has extended the completion period unilaterally to November 2016 for unit I, May 2017 for unit II and November 2017 for unit III, which is violation of agreed revised Contract schedule.*
- viii) *NTPC has released around 363 Million USD and 1200 Million INR to TPE against the supply of materials and services. NTPC has made huge investment of around 92,780 INR for the equipments and services for stage I, which are lying idle and rusting due to non-completion of Boiler by TPE. NTPC is spending heavily on preservation of these assets and machines and establishment cost. Further, as a consequence of completion period extension on 29th October 2010, NTPC has already paid around 60 Million USD as additional price adjustment*
- ix) *Delay in ordering of bought out items, completion of engineering, supply of balance material have seriously affected installation activities at Barh Site resulting into failure of Technopromexport to achieve Completion of the Facilities as per agreed revised Contract Schedule at para 2.0 above.*

5.0. *Technopromexport has therefore failed to perform its obligations under the Contract without any valid reason. We therefore without prejudice to all of our rights and contentions in law, contract or otherwise, hereby call upon you, 'Technopromexport' to take immediate necessary action to perform its obligations under the Contract within fourteen (14) days from the date of receipt of this letter such as i) ordering of balance BOIs, ii) completion of balance engineering, iii) immediate shipment of material for which MDCCs are already issued by NTPC and supply of balance material and iv) installation, testing and commissioning of the plant, etc. as required to complete your obligations under the Contract failing which NTPC may take such action against Technopromexport under the Contract or otherwise including invoking of Joint Deed of Undertaking furnished by*

Technopromexport and boiler manufacturer viz. Krasny Kotelshchik and/or GCC clause 42.2.2(c) of the Contract as the NTPC may in its sole discretion deem appropriate and Technopromexport shall be liable for all of the consequences thereof. Also please note that in the event of termination of Contract, NTPC shall be entitled to proceed with further necessary action as per GCC clause 42.2.4 and 42.2.6 of the Contract to complete the "Facilities" by itself or by employing any third party at Technopromexport cost and expense

Thanking You,

*Yours faithfully,
for & on behalf of NTPC Ltd.*

*(KV Adivarahan)
GGM (Barh)*

B. Respondent's Letter to the Claimant dt. 14.11.2014, Vol. CD-II, p.421.

*"Sub: Main Plant Package Part-A (Steam Generator & Auxiliaries) for Barh STPP Stage-I (3x660 MW)
Reg: Provisional Time Extension*

Dear Sir,

This has reference to our Contract Agreement Nos. CS-9558-102-2-FC-COA-4520, CS-9558-102-2-SC-COA-4521 and CS-9558-102-2-TC-COA-4522 dtd. 25/03/2005 and your letter ref. no 530528/011121 dated 16.08.2014. The contract is hereby provisionally extended as under:-

- 1. The contract period is provisionally extended upto 29.10.2015 without prejudice to the right to levy LD.*
- 2. All the other terms and conditions of our above mentioned Contract Agreement shall remain unaltered.*

You are requested to return us the duplicate copy signed and stamped as a token of unconditional acceptance."

This letter is signed by Mr. Kameshwar Jha, AGM (ME-1) on behalf of the Respondent. As was desired in the letter, a copy of the letter was signed on behalf of the Claimant's General Director, Mr. SA Topor- GILK, by Mr. AV Raskatov, Dy. General Director for Finance and Economy and returned to the Respondent.

C. Claimant's letter to the Respondent dated 27.11.2014 (Vol. CD-II, p.424), with which the signed copy of the letter dated 14.11.2014 (referred to hereinabove) was returned by the Claimant to the Respondent.

"Herewith please find enclosed NTPC letter No. 4400/BARH/ME/9.01/508 of 14.11.2014 regarding provisional extension of the Contract by 1 year, i.e. upto 29.10.2015, duly signed by TPE.

Taking into account that the Parties have not agreed upon a final Contract implementation schedule for Units Nos. 1,2 and 3 till present time (a draft schedule was submitted to Your address along with TPE letter No. 530528/012677 of 27.11.2014), we consider the enclosed document, signed by the Parties, a provisional solution, which would allow both Parties to continue implementation of the Contract.

Further to abovementioned TPE letter we kindly request You to appoint time and place for holding a negotiations with the object of discussion and final approval of Contract implementation schedule.”

- D. By letter dated 27.11.2014 from the Claimant to the Chairman and MD of the Respondent seeking revised schedule for commissioning of the three units and consequent amendment in the Contract to be signed by the parties incorporating extension of time for project completion (Vol.CD-II, p.425 to 427). The letter stated *inter alia*:

“You are kindly requested to give the necessary directions to NTPC’s concerned departments to review the enclosed draft schedule and as it was prescribed by the abovementioned documents we are looking forward you to appoint before 01.12.2014 the date and place for holding mutual negotiations for consideration and approval of the schedule.

We do hope for the constructive dialog with a purpose to sign a respective amendment to the Contract for extension of time for project completion.”

- E. By reply dated 28.11.2014, (Vol. CD-II, p.427) the Respondent clearly stated that the Claimant’s demand for additional 248 Million USD from NTPC was not admissible as per the Contract and that NTPC would pay only as per the terms of the Contract as already informed, vide letters dated 12.09.2014 and 28.10.2014. At the end, the letters stated:

“It is requested that TPE should resubmit revised schedule for commissioning of Unit- 1 by December 2015, Unit- 2 by June 2016 and Unit- 3 by January 2017 with its own funding, for consideration by NTPC.”

The Claimant had suggested longer dates for commissioning but the Respondent was willing to accept only as per the dates stated in the letter as above.

- F. Respondent’s letter to the Claimant dated 24.12.2014 (Vol. CD-II, p.428-431), referring to all the letters exchanged till then between the parties, stated *inter- alia* as under

“4.0. We regret to note that Technopromexport has thereafter conducted the following breaches under the Contract:

i) As per APPENDIX-C (Work Schedule and major milestones to Notifications of Award dated 14.03.2005) Technopromexport was to complete ordering for Bought out items (BOIs) within 12 months for Unit#1 (i.e. by 14.03 2006). within 15 months for Unit#2 (i.e. by 14.06.2006) and within 18 months for Unit#3 (i.e. by 14.09.2006) and as per agreed revised Contract schedule vide amendments dated 29.10.2010 to Contract(s) Technopromexport was to complete ordering for Bought out items (BOIs), by 20.05.2011. However, till date Technopromexport have not placed orders for balance BOIs viz. Control & Instrumentation equipment & instruments, Coal sampling system, Coal piping System, Fuel Oil preparation & firing system, PRDS, Chemical cleaning system and Chemical dosing system, etc.

ii) As per APPENDIX-C (Work Schedule and major milestones to Notifications of Award dated 14.03.2005. Technopromexport was to complete detailed engineering for Main Plant Package Part-A (Steam Generator and

Auxiliaries) for Barh STPP Stage-I within 24 months from date of Notification of Award (i.e. by 14.03.2007) and as per agreed revised Contract schedule vide amendments dated 29.10.2010 to Contract(s) Technopromexport was to complete engineering for Main Plant Package Part-A ((Steam Generator and Auxiliaries) for Barh STPP Stage-I by 28.01.2012. However, Technopromexport have not completed engineering for Main Plant Package Part-A (Steam Generator and Auxiliaries) for Barh STPP Stage-I till date.

- iii) As per APPENDIX-C (Work Schedule and major milestones to Notifications of Award dated 14.03.2005) Technopromexport was to complete supplies within 36 months for Unit#1 (i.e. by 14.03.2008), within 42 months for Unit#2 (i.e. by 14.09.2008) and within 48 months for Unit#3 (i.e. by 14.03.2009) and as per agreed revised Contract schedule vide amendments dated 29.10.2010 to Contract(s). Technopromexport was to complete supplies by April'12, Oct.'12 and April'13 for Unit #1, Unit #2 and Unit # 3 respectively. However, Technopromexport has supplied only 92,000 MI (approx.) material under the subject Contract as against the total material of 1,40,400 ME till date. Hence, 48,400 MT (approx.) material i.e. more than 34% of total material is yet to be supplied by Technopromexport.*
- iv) Technopromexport has not shipped even the material for which Material Dispatch Clearance Certificates (MDCCs) have been issued by NTPC viz. Critical Piping, RC Feeders, NMEJ, valves, Duct, Support structures & Unit #3 pressure parts etc. (include MDCC No. 2005387, 2005382, 2005381, 2005461, 2005485, 2005503, 2005525 issued for Critical Piping, MDCC no. 618618, 619048 issued for Raw Coal Feeders and MDCC no. 2005476 issued for NMEJ).*
- v) Technopromexport has been subjecting the execution of Contract to financing by the Government of Russian federation since September 2013 which is not related to the contract in any manner and TPE itself is responsible for the same.*
- vi) Technopromexport, vide it letter dated 12th September 2014 has demanded additional compensation of 230 Million USD from NTPC beyond the provisions of the Contract(s). In this regard please note that there is no provision in the Contract for additional compensation demanded by Technopromexport.*
- vii) Technopromexport, vide it letter dated 26th September 2014 has further revised the demand of additional compensation to 248 Million USD from NTPC. Further Technopromexport vide said letter dated 26.09.2014, has extended the completion period unilaterally to November 2016 for Unit #1, May 2017 for Unit #2 and November 2017 for Unit #3, which is violation of agreed revised Contract schedule end cannot be accepted. Technopromexport vide their letter dated 27.11.2014 has further extended the completion period unilaterally to Dec' 2016 for Unit #1, June'17 for Unit # 2 and Dec 17 for Unit # 3 in violation of agreed revised Contract schedule.*
- viii) NTPC has already released approx 363 Million USD and 1200 Million INR to TPE against the supply of materials and services under the Contract(s). Please note that NTPC has made huge investment of around 92,780 Million INR for the equipment/ systems and services for Barh Super Thermal Power Project, Stage-I and these equipment/systems are lying idle and rusting due to enormous delays*

by TPE in execution of the subject Contract(s) and for which NTPC is paying huge amount of Interest and loosing generation loss resulting in loss of profit. Please note that due to enormous delays in execution of subject Contract(s) by TPE, NTPC is compelled to incur heavy costs on preservation of these assets and machines and establishment. Further, as a consequence of extension in period for Completion of Facilities vide amendment to Contract(s) dated 29th October 2010, NTPC has already paid around 60 Million USD as additional price adjustment to TPE, however, TPE failed to achieve Completion of Facilities for Unit#1 by 29.10.2013, Unit#2 by 29.04.2014 and Unit # 3 by 29 10.2014 as per said amendments to Contracts. This is resulting in increased cost of the project and cost of generation.

ix) Delays in ordering of Bought Out Items, completion of engineering, supply of balance material have seriously affected installation activities at Barh Site resulting into failure of Technopromexport to achieve Completion of Facilities as per agreed revised Contract Schedule at para 2.0 above.

5.0. *Technopromexport has therefore failed to perform its obligations under the Contract without any valid reason. We, therefore, without prejudice to all of our rights and contentions in law, contract or otherwise, hereby call upon you, Technopromexport to take immediate necessary action to perform your obligations under the Contract within fourteen (14) days from the date of receipt of this letter such as i) ordering of balance BOIs, ii) Completion of balance engineering iii) immediate shipment of material for which MDCCs are already issued by NTPC and supply of balance material and iv) installation, testing and commissioning of the plant, etc. failing which NTPC can take such action against Technopromexport under the Contract or otherwise including invoking of Joint Deed of Undertaking furnished by Technopromexport and boiler manufacturer viz. Krasny Kotelshchik and / or GCC clause 42.2.2(c) of the Contract as the NTPC may in its sole discretion deem appropriate and Technopromexport shall be liable for all of the consequences thereof. Also please note that in the event of termination of Contract, NTPC shall be entitled to proceed with further necessary action as per GCC Clause 42.2.4 and 42.2.6 of the Contract to complete the "Facilities" by itself or by employing any third party at Technopromexport cost and expense."*

G) By Letter dated 26.12.2014 (Vol. CD-II, p.433-434), the Claimant requested the Respondent for a meeting – (i) “in order to disclose to you our concept for ‘completion of BARH STPP construction on conditions of investment from TPE without additional financing from NTPC’ and, (ii) “to give directions to the bank authorized by NTPC to suspend the collection of amounts under the guarantees till 20.01.2015”. In response, by letter dated 27.12.2014 (Vol. CD-II, p.435) the Respondent asked the Claimant that before a meeting could take place on 29.12.2014 at Delhi, the Claimant may forward beforehand, for meaningful discussions, Contract Completion Program and Fund Flow Statement.

H) Letter dated 29.12.2014 (Vol. CD-II, p. 436), by the Respondent to the Chief Manager, Bank of India which mentions the particulars of the 10 BGs with numbers and dates and the amount and acknowledges the following amounts having been received by the Respondent consequent upon the invocation of bank guarantees.

INR-67,08,61,773/-
USD – 123,093,501.42

It is further stated in the letter that in respect of each foreign currency denominated guarantee, the Respondent has received USD 50 less than the guaranteed amount totaling to USD 350, which may forthwith remitted by the Bank to the Respondent.

I) The Respondent's Letter to the Claimant dated 14.01.2015 (Vol. CD-II, p. 441).

"Please refer to NTPC letter no 01/CS-9558-102-2-POA dated 24/12/2014 vide which notice under clause 42.2.2(c) of General Conditions of Contract was issued to JSC "VO" "TECHNOPROMEXPORT". However, there has been no improvement in the performance despite repeated reminders by NTPC and several assurances by you. Therefore, considering your response after our notice dated 24/12/2014 and considering all other aspects, NTPC do not have any option but to terminate subject contract forthwith.

The employer, NTPC, thus in terms of clause 42.2.2 of General Conditions of Contract now hereby terminates the contract of JSC "VO" "TECHNOPROMEXPORT" for the awarded work of Main Plant Package Part-A (Steam Generator & Auxiliaries) for Barh Super Thermal Power Project (3X660 MW) with immediate effect (i.e. from date of issue of this letter) and reserves its right to enter upon the site in terms of clause 42.2.4 of General Conditions of Contract.

The obligations between parties after termination shall be strictly governed as per the provisions of clause 42.2.3 (a) to (e) of General Conditions of Contract and other relevant provisions of the Contract.

This is without prejudice to NTPC's rights under the contract or otherwise."

7.8. As already noted, the validity of the Notice of Termination dated 24.12.2014 given by the Respondent to the Claimant is to be tested in light of Clause 42.2.2 of GCC, let the provision be analyzed.

7.9 Sub-Clause (a)&(b) are not relevant for our purpose. In as much as the Notice of Termination refers to 42.2.2 (c), both the parties have interpreted sub-clause (c) of this Clause and read it in its own way respectively. In addition, Mr. C.S. Vaidyanathan, Ld. Sr. Counsel for the Respondent has also supported the Notice of Termination by reference to sub-clause (d). We will deal with both the sub-clauses.

7.10. The ingredients of sub-clause (c) are:-

- (i) Persistent failure of the Contractor to execute the Contract in accordance with the Contract; or
- (ii) Persistent neglect on the part of the Contractor to carry out its obligations under the Contract;
- (iii) Such failure or neglect, as the case may be, should be 'without just cause'; meaning thereby if the Contractor may have just cause to justify the failure or neglect as the case may be, the Employer would not be entitled to terminate the Contract under sub-clause (c).

7.11. Sub-clause (d) deals with a more specific area. The ingredients of sub-clause (d) are:-

- (i) refusal or inability of the Contractor to provide sufficient materials, services or labor;
- (ii) such sufficient materials services or labor were required to execute and complete the facilities in the manner specified in the program furnished by the Contractor to the Employer under GCC Clause 18;
- (iii) refusal or inability above said results in denting the rates of progress that give reasonable assurance to the employer that the Contractor can attain completion of the facilities by the time for completion (as extended);
- (iv) the reasonable assurance referred to hereinabove should be of the Employer. This obviously introduces an element of subjectivity open to the Employer;
- (v) the refusal or inability, referred to in sub-clause (d) cannot be claimed to be condoned even if there is available 'just cause' to justify the refusal or inability;

Thus, in a way although, what is contemplated by sub-clause (d) would be covered by sub-clause (c) which is wider and more general in its scope than sub-clause (d). However, if the default is covered by sub-clause (d) even if covered sub-clause (c) in its wider sense, may not be available to be condoned even if the Contractor may have a just cause to plead. This is the principal difference between sub-clause (c) and (d).

7.12 The last part of Clause 42.2.2 enumerates the rights of the Employer once the act or neglect of Contractor is covered by any of the sub-clauses (a), (b) (c) and (d). The Employer is then entitled to take a two-step action. First, the Employer shall give a Notice to the Contractor stating the nature of the default and requiring the Contractor to remedy the same. Next, the Employer shall wait for a period of 14 days from the date of receipt of Notice to see if the Contractor has remedied or failed to remedy the default. On failure to remedy, on lapse of 14 days from the date of service of Notice, the Employer is entitled to terminate the Contract forthwith i.e. without giving any further time to terminate the contract. This termination shall not prejudice any other right which the Employer may have under the Contract. It is to be noted that the right of termination is given to the Employer under Clause 42.2.2 generally. Such termination is not necessarily referable to any particular sub-clause. In other words, it would suffice that the Notice of Termination refers to Clause 42.2 of the GCC and it is not necessary that the Notice must also refer to any particular sub-clause of Clause 42.2.2. The consequences of termination are provided by Clause 42.2.3.

7.13 It is also noteworthy that for the purpose of Clause 42.2.2, the period of Contract is irrelevant. To put it in other words, Clause 42.2.2 would operate even during the originally appointed term of the Contract and also during the extended term of the Contract. It cannot be contended that in spite of the applicability of one of the sub-clauses (a)(b)(c) & (d) being attracted, the Contract cannot be terminated by the Employer simply because the term of the Contract or the term for which the Contract has been extended, has not come to an end.

7.14 Termination of the employment of the Contractor under the Contract is different from the Contract coming to an end by expiry of its term.

7.15 Let us first examine if there was a persistent failure/persistent neglect by the Claimant in carrying out its obligations under the Contract.

7.16 It is an admitted case of the Contractor that prior to 14.11.2014, it had not fulfilled all its obligations under the Contract and what was not done or left to be done which would, in other words, amount to default (failure or neglect) on the part of the Contractor was not cured even in the extended period. The Contractor was lacking in its performance has been admitted by the Contractor itself (See para 7.7 of the Award especially the letters dated 27.11.2014 & 26.12.2014 from the Claimant to the Respondent).

7.17 It can also not be disputed that by Notice dated 14.11.2014, the Claimant was allowed the cure period of 14 days and then, the termination followed on 24.12.2014.

7.18 A meeting was held on March 12th, 2010, chaired by Hon'ble Minister of Power and attended by Secretary (Power), Special Secretary (Power) and Director (Thermal) from Ministry of Power/Government of India, CMD, Director(Fin.), ED (CC&M) and GM (CS) from NTPC and Mr. Sergey V. Chemezov, General Director, State Corporation, Russian Technologies, Mr. Alexander A. Lukin, General Director, TPE, Mr. A Schegolev, Director of representation of TPE in India from TPE. It is stated that the following were discussed & agreed upon during the said meeting:

- Revised L2 Schedule shall be worked out jointly and agreed between NTPC and TPE.
- Price variation shall be calculated as per Revised Contract Schedule and Contract formula and as per indices provided in the Contracts since 2005.
- Price variation ceiling of 20% shall be removed from First Contract.
- Erection will start within a month from March 12th, 2010.

Based on the above, both parties were to work out detailed action plan for implementation.

("Record note of discussion held in Ministry of Power between MOP/ NTPC and M/s TPE for Barh Stage 1 on 12.03.2010" is available in Vol. CCV-IV, p. 67)

7.19 Referring to the record of abovementioned discussions held on March 12th, 2010, the Ministry of Power, vide letter dated May 28th, 2010, forwarded the decision of CBI which *inter alia* included as under,

"NTPC may carry on with the Contracts with TPE in Barh STPP Stage I notwithstanding CBI's advisory to NTPC for civil action against TPE as per tender conditions and the Contracts. However, CBI is to continue with the investigation of corruption/criminal part of the case."

7.20 It is clear from the facts stated that issues between NTPC and TPE were discussed during June - August, 2010. On the basis of mutual understanding arrived at between TPE and NTPC, the amendments to the Contracts i.e. Amendment No. 07 to First Contract, Amendment No. 05 to Second Contract and Amendment No. 05 to Third Contract, all dated October 29th, 2010, were agreed to and duly signed by both the parties.

7.20.1. As per aforesaid amendments to the Contracts, the schedule for the Completion of Facilities was revised as under:

Units	Original Schedule for completion of the facilities.	Revised Schedule for the Completion of the facilities.
Unit #1	January, 2009	October, 2013
Unit #2	July, 2009	April, 2014
Unit #3	January, 2010	October, 2014

7.20.2 Further, as per the amendments, 20% ceiling on price adjustment on Free On Board (“FOB”) price for plant and equipment was removed in the First Contract. Further, NTPC and TPE agreed that they had no outstanding claim on each other as on the date of aforesaid amendments i.e., October 29th, 2010. It is pertinent to mention that NTPC paid an additional sum of approx. USD 60,000,000/- (US Dollar Sixty Million only) as additional price adjustment to TPE till termination of the Contracts in January, 2015.

7.21 In view of the aforesaid amendments, TPE was again under contractual obligation to resume works under the Contracts and meet the revised schedules. However, TPE again lagged behind in achieving the interim milestones, even as per the revised schedules as per mutual agreement. The following table clearly shows the delays on the part of TPE even as per the revised schedules.

Activity	Amended Schedule	Status
Mobilization of erection subcontractor	Was to be achieved by December 14 th , 2010.	Actually mobilized on February 10 th , 2011; delay of about two (2) months.
Commencement of boiler erection of Unit # 1	Commencement by December 30 th , 2010	Commencement on March 17 th , 2011; delay of over two and a half (2.5) months. Only 20,946.2 MT out of the 49,172 MT (i.e. 42.6%) was erected till the date of termination i.e. January 14 th , 2015.
Commencement of boiler erection of Unit # 2	Commencement by June 30 th , 2011	Commenced on July 29 th 2011; delay of one (1) month. Only 17474 MT out of 47500 MT (i.e. 38.2%) has been erected till date of termination i.e. January 14 th , 2015.
Commencement of boiler erection of Unit # 3.	Commencement by December 30 th , 2011.	Commencement on January 25 th , 2012; delay of nearly one (1) month. Only 7,979 MT out of the 45563.4 MT (i.e. 17.5%) was erected till the date of termination i.e. January 14 th , 2015.
Completion of ordering of BOIs for all three (3) units (of 660 MW each)	Was to be completed by May 28 th , 2011.	Orders for many major BOIs were yet to be placed as on the date of termination i.e. January 14 th , 2015.
Completion of engineering for all three (3) units (of 660 MW each)	Was to be completed by January 28 th , 2012.	Not completed till date of termination i.e. January 14 th , 2015.
Boiler hydraulic test for Unit # 1.	Was to be carried out by September 27 th , 2012.	Not completed till date of termination i.e. January 14 th , 2015.

Boiler light-up & alkali boiler completion for Unit # 1.	Was to be carried out by January 28 th , 2013.	Not completed till date of termination i.e. January 14 th , 2015.
Steam blowing completion for Unit # 1.	Was to be carried out by April 28 th , 2013.	Not completed till date of termination i.e. January 14 th , 2015.
Synchronisation and coalfiring for Unit # 1.	Was to be carried out by June 29 th , 2013.	Not completed till date of termination i.e. January 14 th , 2015.

7.22 That it is a matter of record that NTPC was regularly following up with TPE regarding the delays, as stated in the tabular chart in the preceding para through various letters dated August 8th, 2011; August 26th, 2011; November 16th, 2011. At the onset of 2012, NTPC continued to vigorously follow up with TPE in respect of delays in procurements of various critical items which were causing inordinate delays in Barh STPP Stage-I. Several letters/communications were sent by NTPC addressed to TPE highlighting various issues relating to delays on the part of TPE, which included letters dated January 5th, 2012; February 2nd, 2012; February 16th, 2012; March 15th, 2012; March 29th, 2012; April 10th, 2012; April 17th, 2012; May 10th, 2012; May 16th, 2012; July 9th, 2012; July 24th, 2012. However, despite the said several letters, communications and reminders from NTPC, TPE failed to check the delays in the execution of the Contracts and the delays in Barh STPP Stage-I continued to pile up. NTPC was constrained to raise the issues pertaining to persistent delays in execution of Contracts by TPE during the meetings held between NTPC and TPE on July 4th, 2012, CRM ("Contract Review Meeting") held on August 30th, 2012 and later during an apex level meeting held on November 23rd & 26th, 2012. NTPC, vide its letter dated December 27th, 2012, amongst others, reminded TPE, again, about various commitments made by TPE during the meeting on July 4th, 2012 and requested for submission of Monthly Progress Reports on a regular basis.

7.23 During the CRM held on January 28th, 2013, NTPC again urged TPE to expedite the execution of the Contracts. NTPC also sent various letters including letters dated February 7th, 2013, May 29th, 2013, June 6th, 2013, June 7th, 2013, June 12th, 2013 and July 3rd, 2013, bringing to the notice of TPE, the inordinate delays in execution of Contracts on the part of TPE and listed various critical issues including, but not limited to the following:

- Engineering issues
- Site issues
- Delay in BOI ordering
- Delay in manufacturing of equipments.
- Delay in supply / shipment of equipments and mandatory spare parts.
- Delay in submission of drawings/documents.
- Delay in erection activities
- Non-submission of monthly progress reports.

7.24 Despite NTPC's best efforts and relentless exhortations as mentioned in the preceding para and despite amendments to the original Contracts on mutually agreed terms, TPE continued to willfully and intentionally neglect its contractual obligations without any justification or cause.

7.25 During CRM held on July 8th- 9th, 2013, TPE, for the first time, cited financial problems being faced by them as the main reason for delay in execution of the Contracts and further stated that it would be able to arrange sufficient funds to execute the Contracts by fourth quarter of 2013 and had accordingly submitted their program for shipment/ordering.

7.26 From the above narration of events, the following inferences necessarily follow:

- (i) That TPE failed to achieve the milestones towards commencement/completion of works as agreed.
- (ii) That the parties mutually agreed to a revised L2 Schedule pursuant to the amendments in the Contracts dt. 29.10.2010 providing fresh timelines;
- (iii) These timelines were also not adhered to by the Claimant to which the attention of the Claimant was invited by letter dated. 04.09.2013 informing the Claimant that the Claimant was again in default in relation to the supply and works.

7.27 In the High- Level Review Meeting held at the site on 25.09.2013, the Claimant committed to commission Unit#1 by September 2015 on 'Best Effort Basis' and subsequent units with the gap of 6 months respectively. The Claimant also confirmed to resolve its financial constraints by October, 2013 with its own resources and additional funding from the Government of Russian Federation. The Claimant also submitted the revised program for ordering of BOIs vide their letter dt. 10.10.2013, reaffirming its commitments in the CRM dt. 01.11.2013. The Respondent acting in good faith on the assurances given by the Claimant allowed it to continue with the implementation of Barh STPP Stage-I.

7.28 A whole chain of correspondences between October, 2013 and February, 2014 goes to show that there was failure on the part of the Claimant in resolving its financial problems and ensuring supply of material and labor as promised.

7.29 Between March 3rd and 5th, 2014, a CRM was held in Moscow wherein it was again indicated by the Claimant that unless it received financial support of USD 570,000,000/- from the Government of Russian Federation, the supply of balance material and ordering of BOIs would not be possible.

7.30 The Respondent was under no obligation to provide additional funding to the Claimant. It appears that the Government of Russian Federation intervened to provide some financial aid to the Claimant and yet, there was a gap between such aid and requirement of the Claimant.

7.31 In the month of June, 2014, it came to the notice of the Respondent that the Claimant was not able to pay wages to the workers. The NTPC by its letter dated 06.06.2014 asked the Claimant to resolve labor issues by writing repeated letters, beginning from the letter dated 07.06.2014 but the disputes were not resolved. Surprisingly, by letter dated 12.09.2014, the Claimant sought for an increase in the Contract price to the tune of USD 230,000,000/- which would be by way of additional finance from NTPC for completion of Barh STPP Stage-I. The Respondent made it clear by letter dated 12.09.2014 that it was not agreeable to increase the Contract price and it was also beyond the terms of the Contract.

7.32 Once again by letter dt. 26.09.2014, the Claimant revised its demand for increase in the Contract price to the tune of USD 248,000,000/-, by way of additional financial assistance

from the Respondent. The Claimant also set out its assessment that Unit#1, #2, #3 would be completed by November 2016, May 2017 and November 2017 respectively. By letter dated 08.10.2014, the Respondent rejected both the demands of the Claimant.

7.33 There were meetings and letters exchanged, but the deadlock was not resolved. In the aforesaid backdrop came the letter dated 11.11.2014 issued by Respondent to the Claimant, which letter and the subsequent events have already been referred to hereinabove.

7.34. The limited issue which would remain to be examined is whether there was a 'just cause' justifying the default of the Claimant.

7.35. On behalf of the Respondent, it has been pointed out that there were persistent defaults made by the Contractor in executing the Contract in accordance with the terms of the Contract and/or the Contractor had persistently neglected and continued to neglect to carry out its obligations under the Contract. Some illustrative activities have been pointed out on behalf of the Respondent, summarized in a tabulated form at pages 21-23 of Respondent's Written Submissions. For convenience, the table is extracted and reproduced hereunder: -

Period between December 2010 to June 2013	Activity	As per Amended L-2 Schedule (E-71 pg. 209~249 at pg. 216 Vol. 11 RD and pg. 111~151 at pg. 118, CV-4	Status
25.02.2011 E-66, (Vol. RD-11, pp. 192-193)	Mobilization of erection sub-contractor	Was to be achieved by December 14 th , 2010.	Actually mobilized on February 10 th , 2011; delay of about two (2) months.
30.06.2012 E-257, (Vol. RD-15, pp. 39-40, CV-4, pp. 198-199)	Commencement of boiler erection of Unit#1	Commencement by December 30 th , 2010.	Commenced on March 17 th , 2011; delay of over two and a half (2.5) months. Only 20,946.2 MT out of the 49,172 MT (i.e. 42.6% was erected till the date of termination i.e. January 14 th , 2015.
07.07.2014 E-264, (Vol. RD-15, pp. 50-52, CV-5, pp. 87-89)			
14.01.2015 E-177, (Vol. RD-12, p. 560)			
E.279, (Vol. RD-17, pp. 59-113, CV-5, pp. 199)			
15.06.2011 E-71, (Vol. RD- 11, pp. 209-249 at p. 210, CV-4, pp. 111-151 at p. 112)	Commencement of boiler erection of Unit#2	Commencement by June 30 th , 2011	Commenced on July 29 th 2011; delay of one (1) month.

<p>29.07.2013 E-73, (Vol. RD-11, p. 258)</p> <p>07.07.2014 E-264, (Vol. RD-15, pp. 50-52, CV-5, pg. 87-89)</p> <p>14.01.2015 E-177, (Vol. RD-12, p. 560)</p> <p>E-279, (Vol. RD-17, pp. 59-113, CV-5, p. 199)</p>			<p>Only 17,474 MT out of 47,500 MT (i.e. 38.2%) has been erected till date of termination i.e. January 14th, 2015.</p>
<p>15.06.2011 E-71, (Vol. RD-11, pp. 209-249, at p. 210. CV-4, pp. 111-151, at p. 112)</p> <p>25.01.2012 E-81, (Vol. RD-11, p. 272)</p> <p>07.07.2014 E-264, (Vol. RD-15, pg.50-52, CV-5, pg. 87-89)</p> <p>14.01.2015 E-177, (Vol. RD-12, p. 560)</p> <p>E-279, (Vol. RD-17, pp. 59-113, CV-5, p. 199)</p>	<p>Commencement of boiler erection of Unit#3</p>	<p>Commencement by December 30th, 2011</p>	<p>Commenced on January 25th, 2012; delay of nearly one (1) month. Only 7,979 MT out of the 45563.4 MT (i.e. 17.5%) was erected till the date of termination i.e. January 14th, 2015.</p>
<p>13.12.2011 E-76, (Vol. RD-11, pg. 264-265, CV-4, pg. 168-169)</p> <p>20.01.2014 E-130, (Vol. RD-12, pp. 418-420, CV-5, pp. 41-43)</p> <p>07.01.2015 E-175, (Vol. RD-12, p. 558, CV-5, p.197)</p>	<p>Completion of ordering of Bought Out items (hereinafter referred to as "BOIs") for all three (3) units (of 660 MW each)</p>	<p>Was to be completed by May 28th, 2011</p>	<p>Orders for many major BOIs were yet to be placed as on the date of termination i.e. January 14th, 2015.</p>

<p>24.02.2014-28.02.2014 E-281, (Vol. RD-17, pp. 120-130, at p. 122. CV-5, pp. 55-65, at p. 57)</p> <p>07.01.2015 E-175, (Vol. RD-12, p. 558 CV-5, p.197)</p>	Completion of engineering for all three (3) units (of 660 MW each)	Was to be completed by January 28 th , 2012	Not completed till date of termination i.e. January 14 th , 2015.
<p>CRM 30.08.2012 E-95, (Vol. RD-11, pg. 308-312, CV-4, pg. 204-208)</p> <p>04.09.2013 E-110, (Vol. RD- 11, pp. 367-368, at p. 368, CV-5, pp. 3-4, at p. 4)</p>	Boiler hydraulic test for Unit#1	Was to be carried out by September 27 th , 2012.	Not completed till date of termination i.e. January 14 th , 2015.
<p>04.09.2013 E-110, (Vol. RD-11, pp. 367-368, at p. 368, CV-5, pp. 3-4, at p. 4)</p>	Boiler light-up & alkali boil out completion for Unit#1	Was to be carried out by January 28 th , 2013	Not completed till date of termination i.e. January 14 th , 2015.
<p>24.02.2014-28.02.2014 E-281, (Vol. RD-17, pp. 120-130, at p. 123 CV-5, pg. 55-65 at pg. 58)</p>	Steam blowing completion for Unit #1	Was to be carried out by April 28 th , 2013.	Not completed till date of termination i.e. January 14 th , 2015.
<p>04.09.2013 E-110, (Vol. RD-11, pp. 367-368, at p. 367, CVS pp. 3-4, at p. 3)</p>	Synchronization and coalfiring for Unit #1	Was to be carried out by June 29 th , 2013	Not completed till date of termination i.e. January 14 th , 2015.

7.36.Mr. C.S. Vaidyanathan, Ld. Sr. Counsel for the Respondent submitted that the inferences to be drawn from several documents illustratively included in the table hereinabove, fully substantiated by also the documents otherwise available on record (*viz* correspondences between the parties, various MoMs, record notes of CRMs etc.) lead to the following defaults/neglect in performance by the Claimant:

- a. Slippage in ordering of Bought Out Items.
- b. Slippage in engineering drawing/design.
- c. Non-sequential supply of materials.
- d. Non-supply of materials for which MDCC's were duly issued by Respondent.
- e. Non-submission of monthly progress reports.
- f. Non-supply of materials.

7.37.On behalf of the Respondent, a table of several documents has been compiled, running into 25 pages filed with the Respondent's Written Submissions at pages 67-81. Therein, the information compiled by the Respondent has been tabulated in the following columns:

(i)	Ex. No.
(ii)	Page No.
(iii)	Slippage in ordering of BOIs.
(iv)	Slippage in engineering drawing/design.
(v)	Non-sequential supply of materials.
(vi)	Non-supply of materials for which MDCC's were issued
(vii)	Non-submission of monthly progress reports
(viii)	Non-supply of materials.

7.38. Although the said table is not being made as part of this Award in the interest of saving its length. However, the Tribunal would like to place on record that during the course of hearing, attention of the Tribunal was invited to the said documents, reading out relevant passages therefrom and the Tribunal has also taken care to check that the contents of the table are factually correct. Let it also be noted that it has not been the case of the Claimant that there is any factual error in the contents of the above two tables. Of course, the inference is to be drawn have been the subject matter of debate between the parties through their Ld. Sr. Counsel.

7.39. The Tribunal having taken into consideration the documents referred to in the above said two tables in the background of the admission of the Claimant itself referred to in para 7.7 of the Award, the Tribunal is convinced that the applicability of sub-clause (c) of Clause 42.2.2 of the GCC is fully attracted to the facts of the case.

7.40. On the other hand, there are good number of letters written by the Claimant pleading that it was in financial difficulty. The Claimant initially persisted in seeking extension of time accompanied by request to the Respondent for financial assistance. The Respondent took a firm stand that no financial assistance could be provided by the Respondent to the Claimant. Subsequently, the Claimant informed the Respondent that it had arranged finance from the bank and requested the Respondent to grant extension of time dispensing with the Claimant's request for extending any financial assistance.

7.41. On behalf of the Respondent, the decision of Supreme Court of India in *Mahanadi Coal Fields Limited & Ors. Vs. Dhansar Engineering Co. Pvt. Ltd. & Ors.*, (2016) 10 SCC 571, 589 has been cited wherein, it has been held that financial difficulty cannot be pleaded in justification of inability to perform the contract nor can it be a consideration for walking out of the contract. Other than the financial difficulty, the Claimant has utterly failed in proving that there was any 'just cause' for default of the Claimant.

7.42. With the Written Submissions, the Claimant has filed a collation of correspondences between the Claimant and the Respondent giving the dates and description thereof marked as 'Table X' to submit that the progress reports justify the Claimant's defense of 'just cause' within the meaning of Clause 42.2.2 (c). The Respondent has submitted that such a collation having been filed at the stage of final hearing submissions is afterthought. The Respondent has also filed a 'Reply to Table X' at pages 82-128 of its Written Submissions wherein, the contents of Table X as filed by the Claimant have been reproduced and against each and every single item, the Respondent has offered its detailed comments as to why none of the documents relied on by the Claimant are available to urge the existence of 'just cause'. We have carefully considered the contents of Table X and the comments of the Respondent thereon. We are satisfied that there is

much substance in the comments made by the Respondent. A perusal of Table X shows that even petty events which are normal in the course of execution of a project of this magnitude and such of the actions which were carried out with the consent of the parties or were agreed upon, have also been listed by the Claimant as 'just cause' which shake the foundation of the Claimant's plea. And again, we also find merit in the submission of the Respondent that none of the issues highlighted as Respondent's alleged default in Table X have been the proximate cause for the huge delay in execution of the Barh STPP Stage -I.

7.43. It was next contended by Mr. Siddharth Dave, Ld. Sr. Counsel for the Claimant that the letter dated 14.11.2014 constitutes waiver on the part of the Respondent in so far as the Claimant's alleged delay/default in completion of facilities as per revised L2 Schedule is concerned, which is as under:-

Unit -I : October 29, 2013

Unit -II : April 29, 2014

Unit -III : October 29, 2014

7.44. On behalf of the Respondent, it was submitted that a provisional extension was granted by the Respondent because it is impractical to carry out a delay analysis especially in the midst of project execution and therefore, time extension is given provisionally only by way of mutually convenient interim arrangement so that the project does not suffer while the delay analysis is being carried out simultaneously, so as to calculate the LD and decide upon final extension of time for completion as per Clause 40 of the GCC.

7.44(a) According to Black's Law Dictionary (Eighth Edition), provisional means (i) temporary; (ii) conditional. In Advanced Law Lexicon (P. Ramnath Iyer, Third Edition, Book- 3) provisional has been defined as 'temporary, preliminary; tentative; taken or done by way of precaution or ad interim; not final, temporary in nature'. Thus, by no stretch of imagination, it can be contended that on 14.11.2014 the extension of Contract period granted to the Claimant upto 29.10.2015 was final. Not only the extension was provisional but it was accompanied by two significant riders; namely, it was without prejudice to the right of the Respondent to levy LD and the operation of all other Terms and Conditions of the Contract were to remain unaltered. Of course, in as much as the Contract was continuing to be executed, applying the commercial and practical wisdom, it shall have to be held that the Claimant was permitted to work the project under the Contract upto 29.10.2015. To extend beyond 29.10.2015 was left to the discretion of the Employer; and so also, the operation of all other obligations of the Contractor whatever they may be under the Contract and all other rights of the Employer, including right to levy LD were expressly saved. The Contractor unconditionally agreed to such provisional extension and in token of such agreement signed the duplicate copy of the letter and returned it to the Employer.

7.45. On behalf of the Respondent, a calculation has been filed to demonstrate that subject to levy of LD consistently with retaining the cap of 5% of Contract Price, the stage for termination had arrived even before 14th November, 2014 and yet, the Respondent not only complied with the provisions of the Contract but gave full opportunity to the Claimant to cure the default and terminated the Contract as the defaults were not cured.

7.46. It is pointed out on behalf of the Respondent that although the Claimant had returned the copy of the letter dated 14.11.2014 duly signed on 27.11.2014, but at the same time, the Claimant had written another letter of the same date (Vol. CCV-V, pg. 157-177)

whereby the Claimant made a proposal for Unit-I completion by December 2016 and sought USD 248 million by way of additional finance from the Respondent. If the letter dated 14.11.2014 from the Claimant and the Respondent's two letters dated 27.11.2014 are read together, it becomes clear that the acceptance of provisional extension of time by the Claimant was not unconditional and was rather accompanied by a counter offer and therefore, the Respondent would be justified in contending that in fact, there was no bilateral extension of time. In any case, the extension of time contained in the letter dated 14.11.2014 by the Respondent cannot be construed as a waiver by the Respondent of the defaults committed by the Claimant. Mr. C.S. Vaidyanathan, Ld. Sr. Counsel for the Respondent has relied on the judgment of the Supreme Court of India in the case of *P. Dasamuni Reddy vs. P. Appa Rao*, 1974 2 SCC 725 wherein, their Lordships have held - 'waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention.....the essential element of waiver is that there must be a voluntary and intentional relinquishment of the right. The voluntary choice is the essence of waiver.' Apart from the express words used by the Respondent in the letter dated 14.11.2014, it is clear that there has been no waiver by the Respondent to satisfy the test of waiver laid down by the Supreme Court of India.

7.47. On behalf of the Respondent, reliance has also been placed on Clause 3.11 of the GCC which reads as under:-

“3.11 Non-Waiver

3.11.1 Subject to GCC Sub-Clause 3.11.2 below, no relaxation, forbearance, delay or indulgence by either party in enforcing any of the terms and conditions of the Contract or the granting of time by either party to the other shall prejudice, affect or restrict the rights of that party under the Contract, nor shall any waiver by either party of any breach of Contract operate as waiver of any subsequent or continuing breach of Contract.

3.11.2 Any waiver of a party's rights, powers or remedies under the Contract must be in writing, must be dated and signed by an authorized representative of the party granting such waiver, and must specify the right and the extent to which it is being waived”

7.48. It needs hardly any reasoning to demonstrate that there has been no waiver by the Respondent.

7.49. It was then contended that levy of LD and Termination of Contract are such actions which are to the prejudice of the Contractor and the Respondent, being a Public Sector Undertaking. It should have exercised its discretion in a just and fair manner and also should have assigned reasons as to why the discretion was being so exercised.

7.50. For two reasons we are not inclined to agree with a submission of Mr. Siddharth Dave, Ld. Sr. Counsel for the Claimant. *First*, this Tribunal is an Arbitral Tribunal which is a creature of the Agreement between the parties; it is not exercising an administrative law jurisdiction. *Secondly*, the Contract between the parties empowers the Respondent to terminate the Contract if the requisites for such action are available. If the discretion exercised has been conferred by the Contract, this Tribunal would not exercise an Appellate Jurisdiction over the exercise of discretion by the Respondent which has

already indicated hereinabove also has some element of subjectivity. It is to be noted that an Arbitral Tribunal is bound by the Contract between the parties.

7.51. While making oral submissions, Mr. C.S. Vaidyanathan, Ld. Sr. Counsel for the Respondent had also submitted that the Termination of Contract can also be justified by reference to Clause 42.2.2 (d) of GCC. He submitted that the overwhelming documentary evidence clearly points out that the Claimant was unable to provide sufficient materials and services to execute and complete the facilities in the manner specified in the program furnished under Clause 18 of the GCC. The Claimant was unable to give the Respondent a reasonable assurance that the Contractor could attain completion of the facilities by the time for completion, *as extended*. This provision of the GCC does not permit the Claimant raising the plea that there was a 'just cause' for the Claimant for its suchinability.

7.52. The submission of Mr. Siddharth Dave has been that in the Notice of Termination dated 24.12.2014, the Respondent has referred to only Clause 42.2.2 (c) of the Contract and therefore, the Respondent cannot and should not be permitted to refer to Clause 42.2.2(d). This contention cannot be accepted for two reasons. *First*, a Notice is not a pleading. If the requisite facts are stated, then the employer who issued the Notice of Termination can always rely on the appropriate clause and the law, the applicability of whereof would be attracted. *Secondly*, the end part of Clause 42.2.2 requires only this much that the Notice of Termination should refer to Clause 42.2. It is not the requirement of the Contract that which item out of (a), (b), (c), or (d) is being relied on should also be referred to in the Notice. This requirement of the Contract that the Notice should refer to Sub-clause 42.2 is intended to expect a clarification in the Notice that the termination was for Contractor's default which is Clause 42.2 in contra distinction with Clause 42.1 which deals with Termination for Employer's convenience.

7.53. For foregoing reasons, it is held that the termination was legal and as per the Contract.

7.54. The encashment of bank guarantees is a consequence of termination and authorized by the Contract. In any case, it is now a *fait accompli*. The amount of 10 bank guarantees has reached the hands of the Respondent. All that remains to be done is to find which party is entitled to how much amount from the other side and while working out the figure finally due and payable by one side to the other, the availability of the amount of bank guarantees with the Respondent shall be kept in view.

7.55. It is held that the termination by the Respondent of the three Contracts was legal. The first and foremost relief sought for by the Claimant – 'declare that NTPC's termination of the three contracts was illegal' fails and is rejected. The subsequent reliefs namely (B) for compensation and (C) for payment of costs are obviously dependent on the Claimant succeeding on Claim (A) and therefore, they also fail and are rejected.

PART -8 **COUNTER CLAIMS**

8.1. The counter claims of the Respondent have been quantified and summarized in a tabulated form in para 4.4 above.

- 8.2. Applying the conversion rate of INR 67=USD 1 and INR 76 = 1 EURO, the amount has been arrived at Rs. 89,845,956,643/- which has been rounded off for ease of reference, also by applying the approximation as INR 90 billion or 9000 crores of rupees.
- 8.3. The Contract with the Claimant having been terminated by the Respondent and this Arbitral Tribunal having been constituted, during the pendency of their arbitral proceedings, the Respondent re-awarded the Contract for the balance work to Doosan. Similarly, some works and contract for supplies were awarded to Bharat Heavy Electricals Ltd., Griffin Power Pvt. Ltd., Gerb Vibration Control System Pvt. Ltd., Mukand Engineers Ltd., Larsen & Tubro Ltd., Oriental Insurance Company Ltd. and so on. All the relevant facts are found pleaded in the Counter Claim. Kameshwar Jha (vide para 3 of the affidavit, sub para a to z and aa to zz, aaa to zzz and aaaa to hhhh) and Rajeev Kumar (vide para 3, sub-para a to z and aa to gg of the Affidavit) have made very detailed statements substantiating the voluminous documents filed on behalf of the Respondent relating to the contracts awarded to different contractors, suppliers, and vendors, payments made to them and correspondences exchanged with them.
- 8.3A. In the process of Admission/Denial of the documents, as to all these documents, the statement made on behalf of the Claimant is only to the effect that all these documents being Third Party documents to which the Claimant is not a party, and do not have knowledge thereof, the documents are denied. In face of such denial, we are of the opinion that the evidence of Kameshwar Jha and Rajeev Kumar is sufficient to prove all these documents, raising a high degree of probability that these documents do exist and are truthful. Even otherwise, we have perused the voluminous documents filed and we are of the opinion that the documents are originating from the official records regularly maintained by the Respondent and there is no reason to suspect or doubt the genuineness or veracity of all these documents. In the cross-examination of the two witnesses also, we did not find the testimony as to these documents having been shaken at all.
- 8.3B. In short, we are of the opinion that on the Termination of the Contract with the Claimant, the Respondent has inducted contractors, suppliers and service providers in place of the Claimant. The cost incurred by the Respondent is capable of being quantified from the available documentary evidence as has been done in the Statement of Counter Claim.
- 8.3C. So far as Doosan is concerned, it was L-2 in the bidding wherein, the Claimant was successful being L-1. Inviting fresh international tenders consequent upon the Termination of Contract with the Claimant would have entailed substantial expenditure and unreasonable delay which would have been much to the detriment of the project which was ongoing. The Respondent took a very reasonable decision in the facts and circumstances of the case in moving on to L-2 bidder i.e. Doosan on Termination of Contract with the Claimant.
- 8.3D. So far as the defects in works and the quality are concerned, the Claimant is not justified in submitting that there has been a gross delay on the part of the Respondent as the Respondent is pleading the detection of such deficiencies long after the date of performance and supply of equipment. In as much as the deficiencies were detected only when Doosan commenced its execution of the balance work and put the equipment to test and found that they were not working and were rather failing.
- 8.4. The Respondent has in its Counter Claim pleaded in very many details, that the facts and events which go to show (i) that there was delay, default and neglect on the part of the Claimant in performing its obligations under the Contract; (ii) also that the material supplied and the work done by the Claimant was defective. First aspect has been

adequately dealt with while dealing with claims, the facts referable to second aspect are briefly noted in the succeeding paragraphs.

- 8.5. Doosan conducted six Hydraulic Pressure Tests of Unit#1 of which the first Four hydraulic pressure tests were conducted in the high pressure area and the subsequent Two hydraulic pressure tests were conducted in the low pressure area. As per Regulation 379 of the Indian Boiler Regulations, 1950 and the Boiler Hydraulic Test & Preservation Procedure of Barh STPP Stage-I dated December 23rd, 2016, the hydraulic pressure tests were to be conducted at One and a Half (1.5) times of the design pressure of the respective parts. Accordingly, the parts in the high pressure areas of the boiler were to be tested at 1.5 X 274.4 ksc i.e. 411.6 ksc pressure and the parts in the low pressure areas of the boiler were to be tested at 1.5 X 53.1 ksc i.e. 79.65 ksc pressure. Doosan conducted the *first* Hydraulic Pressure Test on March 15th, 2017 in the boiler high pressure circuit till the boiler stop valve of Unit#1. The test was conducted upto Eighty Two (82) ksc pressure as against the stipulated Four Hundred Eleven and Point Six (411.6) ksc pressure. Forty Five (45) leakages were found in the Convective Super Heater ("CSH"), Twelve (12) leakages were found the Platen Super Heater ("PSH") Stage-IV and Two (2) leakages were found in the roof water wall.
- 8.6. After various leakages were detected in the *first* hydraulic pressure test, samples of CSH and PSH Stage-IV were sent to NTPC Energy Technology Research Alliance (hereinafter referred to as "NETRA") on March 21st, 2017 to analyze the reason(s) for the leakages. After attending to and rectifying the leakages detected in the *first* hydraulic pressure test, Doosan conducted the *second* hydraulic pressure test on March 23rd, 2017 in boiler high pressure circuit till the boiler stop valve of Unit#1. The test was conducted upto One Hundred and Forty (140) ksc pressure as against the stipulated Four Hundred Eleven and Point Six (411.6) ksc pressure. There were Seventy Five (75) leakages that were found in the CSH and Forty Nine (49) leakages in the PSH Stage-IV.
- 8.7. NETRA submitted its preliminary analysis report on March 24th, 2017 wherein NETRA concluded the following:
- (i) Both CSH and PSH Stage-IV showed transgranular cracks that originated from the internal surface of the tube and propagated through its thickness.
 - (ii) Both CSH and PSH Stage-IV failed due to stress corrosion cracking phenomenon.
 - (iii) Material of both CSH and PSH Stage-IV was confirmed as DI-59 grade.
- 8.8. On March 25th, 2017, a team from NETRA visited the Barh Site and collected samples of CSH and PSH Stage-IV for analyzing the reason(s) for the leakages.
- 8.9. On March 30th, 2017 NETRA submitted its failure analysis report wherein it concluded the following:
- (i) That the superheater tubes showed pinhole leakages on the external surface of the tube. Internal surfaces of the tube showed brown deposit/ corrosion product just below the leakages.
 - (ii) Microstructural observation showed significant corrosion before crack propagation to external surface.

- (iii) Scanning Electron Microscopy (SEM) and Energy Dispersive X-Ray Analysis (EDAX) analysis showed presence of significant amount of chloride in the cracks. Chloride is one of the main species to enhance corrosion in stainless steel.
 - (iv) Superheater tubes failed under corrosion cracking phenomenon. Significant corrosion was observed before crack propagation to the external surface. Presence of chlorides in the crack and traces of manganese chromium oxide confirm corrosion.
 - (v) Chemical composition of all the tubes conform to DI-59 grade material was also recommended to replace the DI-59 material with some other known material in order to ensure reliability of the plant in future.
- 8.10. On April 16th, 2017, Doosan conducted the *third* hydraulic pressure test in the boiler high pressure circuit of Unit#1 but, excluded the PSH (all four stages) and CSH. The test was conducted upto Four Hundred and Twelve (412) ksc pressure wherein Eight (8) leakages were found in roof water wall, Three (3) leakages in furnace water wall, One (1) leakage in horizontal gas duct water wall and Four (4) leakages were found in convection shaft internal water wall.
- 8.11. On May 2nd, 2017 Doosan conducted the *fourth* hydraulic pressure test in the boiler high pressure circuit of Unit #1 and included the PSH (stages I, II and III). The test was conducted upto Two Hundred and Ninety (290) ksc pressure wherein Two (2) leakages were found in the furnace water wall and One (1) leakage in the second pass wall.
- 8.12. On May 4th, 2017, NTPC sent the samples of CSH and PSH Stage-IV to an independent agency i.e. National Test House in order to reconfirm the findings of NETRA.
- 8.13. On June 23rd, 2017, Doosan conducted the *fifth* hydraulic pressure test in the right-hand side of the low pressure section of Unit#1. The test was conducted at zero (0) ksc pressure as against the stipulated pressure of Seventy Nine and Point Six Five (79.65) ksc, wherein Thirty Four (34) leakages were found in the LPR Stage-II.
- 8.14. On June 27th, 2017, Doosan conducted the sixth hydraulic pressure test in the left hand side of the low pressure section of Unit#1. The test was conducted upto Three point Eight (3.8) ksc pressure as against the stipulated pressure of Seventy Nine and Point Six Five (79.65) ksc pressure wherein Four (4) leakages were found in the LPR Stage-I and Forty Three (43) leakages were found in the LPR Stage-II. For Unit#3, TPE was only able to supply the LPR Stage-II and not erect the same. It merits mention that TPE had failed to supply the CSH and PSH Stage-IV for Unit#3.
- 8.15. Between June 30th, 2017 and July 12th, 2017, Doosan conducted the air leak test of Two Hundred and Forty Eight (248) LPR-II tubes for Unit#3 that were lying idle at site. The test was conducted upto Two (2) ksc pressure as against the stipulated pressure of Seventy Nine and Point Six Five (79.65) ksc pressure wherein, One Hundred and Twenty Eight (128) leakages were detected in the LPR Stage-II. In the meantime, Doosan was able to attend to and rectify the leakages at the LPR Stage-I, roof water wall, furnace water wall, horizontal gas duct water wall, convection shaft internal water wall and the second pass water wall. However, the leakages at the PSH

Stage-IV, CSH and LPR Stage-II could not be rectified due to the failure of the parent material, DI-59.

- 8.16. On August 9th, 2017, the National Test House submitted its final report to NTPC which concluded the following: *“Metallographic analysis of the defective portion reveals the cracks emerged from pits produced on the upper surface and propagated along the grain boundaries and bodies... Cracking initiated from the surface by pitting corrosion mechanism... This pitting corrosion lead to ultimate failure of the pipe under hydrostatic pressure.”*
- 8.17. The expert reports are based on the analysis done by NETRA (Volume CD-27, p.83-96 and Hydraulic Test Reports Exhibit E-321 dt. 25.03.2017 at p.37-82 of Volume CD-27, Exhibit E-323 3rd Hydraulic Test Report dt. 16.04.2017 at p.97-105 of Vol. CD-27, Exhibit 322 Final Analysis Report dt. 30.03.2017). It is noteworthy that all these expert reports have been denied by the Claimant submitting that these reports are Third Party documents of which the Claimant does not have knowledge. The two witnesses for the Respondent have deposed in details about these expert reports. We do not find any reason to doubt much less to disbelieve the authenticity of these reports and correctness of their contents. It is to be noted that in the reply to the Counter Claims, the Claimant has not disputed that the tests were carried out and the experts were engaged and gave those reports.
- 8.18. For the foregoing reasons, we are of the opinion that the Respondent/Counter Claimant has incurred the costs forming subject matter of the Counter Claims consequent upon the failure of the Claimant to perform the Contract in spite of persistent delay in execution of the works.

Findings

- 8.19. We sum up our findings as under:-
- (i) The Claimant-Contractor persistently failed to execute the Contract in accordance with the Contract and persistently neglected to carry out its obligations under the Contract without ‘just cause’, attracting applicability of Clause 42.2.2 (c) of the GCC;
 - (ii) The Claimant was unable to provide sufficient materials, services and labor to execute and complete the facilities in the manner specified in the program furnished under Clause 18 of the GCC at rates of progress which could give reasonable assurance to the Employer that the Contractor-Claimant could attain completion of the facilities by the time for completion as extended, attracting applicability of Clause 42.2.2 (d) and herein, the existence or availability of ‘just cause’ is irrelevant and of no consequence.
 - (iii) The Termination of the Claimant’s Contract satisfied the requirement of Clause 42.2.2.
 - (iv) Even otherwise, *de hors* Clause 42.2.6, the employer is entitled to recover the cost of completing the facilities under Section 73 of the Indian Contract Act.
 - (v) The Respondent/Employer has initiated the process of completing the facilities by awarding the Contract for balance work supplies and services to third party and

the cost of completing the facilities by the Employer are capable of being determined within the meaning of Clause 42.2.6.

- (vi) The Respondent is entitled to levy the liquidated damages for delay under the Contracts, but the same shall be subject to a maximum of 5% of the total Contract price for First Contract, Second Contract and Third Contract.
- (vii) The aggregate liability of the Contractor shall not exceed total Contract price in view of Clause 30.1(b) of the GCC; the exception to the cap shall not apply as the present one is not a case of criminal negligence or willful misconduct on the part of the Contractor-Claimant; in working out the aggregate liability of the Contractor Claimant to the Employer Respondent, the amount of liquidated damages shall be over and above the amount of the aggregate liability.
- (viii) So far as the Bank Guarantees are concerned, the amount of Contract performance security/bank guarantee (CPBG) under Clause 13.3 of the GCC, being BG No. 2,3,4,6,9 and 10 cannot be allowed to be adjusted as they were Contract performance bank guarantees and the Contractor failed to perform.
- (ix) So far as the BGs against initial advance are concerned, being BG 1,5,7 and 8, the unadjusted value shall be liable to be returned to the Claimant.

8.20. After due discussions and deliberations with NTPC, Doosan submitted a proposal on October 19th, 2017, requiring an additional sum of monies amounting to INR 2,739,510,689/- and USD 50,801,437/- for dismantling the damaged/defective materials that were erected by TPE, replacing the damaged/defective materials by supplying and installing new materials to ensure the completion of Barh STPP Stage-I.

Reply to Counter Claim (RCC)

8.21. Parawise reply to the Statement of Counter Claims has been filed wherein, all the material averments made in the SCC have been denied. It is not necessary to make a detailed statement of denials. It would suffice to briefly sum up the defenses which are as under:-

- (i) The possibility for Counter Claims would arise only if the claims are denied/rejected by the Tribunal.
- (ii) Clause 42.2.6 of GCC can be applied only where the 'employer completes the facilities'. This is evident from the wordings of the Clause itself which reads – '42.2.6 If the employer completes the Facilities, the cost of completing the Facilities by the Employer shall be determined....' Admittedly, the Facility is not completed and therefore, the claim is premature.
- (iii) The Respondent has not produced on record any evidence of completion of Facility or the payments.
- (iv) Clause 42.2.6 GCC does not permit hypothetical or speculative demands. First, the Facility must be completed for raising the demand and even then, only so much of the cost incurred by the Respondent can be allowed which satisfy the test of being reasonable.

- (v) It is the Respondent's own case (SoD para 60) that the cumulative percentage of the completed works as per NTPC's own assessment works out to about 63% (monetary value). For this balance 37% of Facility, the balance basic Contract price payable under the Contracts was only USD 133, 844,902/- and INR 184,46,89,605/- that is, if converted into INR then INR 1081,22,98,039/- (by applying the conversion rate of USD 1=INR 67) but, the Respondent is raising in its Counter Claim, a Claim of INR 18,053,172,730/- and Euro 14,830,343/- making a total of INR 1918,02,78,798/- (by applying the conversion rate of Euro 1 = INR 76). Thus, the difference between the old price and new price is approximately INR 836,79,80,759/-. This is an escalation of 77.4% which is *ex facie* unreasonable and cannot be said to be reasonable within the meaning of Clause 42.2.6.
- (vi) There is no evidence in support of the Counter Claims raised especially as regards the defective equipment.

8.22. We would deal with the several pleas raised in the Counter Claim in the light of the denial and the several pleas raised in RCC.

Whether the claim for recovery from the Claimant is premature?

- 8.23. On behalf of the Claimant, reliance has been placed on Clause 42.2.6 of the GCC which provides – 'If the employer completes the Facilities, the cost of completing the facilities by the employer shall be determined.' It is submitted by Mr. Siddharth Dave, Ld. Sr. Counsel for the Claimant that the Facilities are admittedly still far from completion and therefore, the cost of completing the facilities can neither be quantified nor recovered from the Claimant; the Respondent should have waited for completing of the Facilities before raising the Claim.
- 8.24. The Claimant's submission though attractive, has to be rejected for the reasons stated hereafter.
- 8.25. The Claimant's Contract has been terminated leading to consequences which would follow the termination as provided by Clause 42.2.3. The facilities have been entrusted to a different set of contractors. So far as the relationship between the Respondent and the Claimant is concerned, it has come to an end. The cost of completing the facilities which the Respondent has incurred, also stand quantified. The payment which the Respondent shall have to make to the contractors and supplier inducted in place of the Claimant is well known. The Respondent has already incurred the liability to make the payment which payment would in no case be less than the one which the Respondent has already committed. The term 'completes' and the expression 'cost of completing' have to be construed and assigned a practical meaning dictated by the commercial wisdom and common sense.
- 8.26. In the opinion of the Tribunal, the words used in Clause 42.2.6 could have been assigned a literal meaning if the Employer would have embarked upon the task of completing the facilities *by itself*, then the cost of completing the facilities could not have been determined till the actual completion of the facilities. In the present case, the Respondent has not taken upon itself the task of completing the works left undone by the Claimant. The works have been contracted out. The cost of completing the facilities have been incurred and the cost are capable of being determined precisely.

- 8.26.1. The word “Incur” is constantly used in the sense of ‘meeting with’, ‘of being exposed to’, of being liable to. [(1887) 14 IA 89]. The phrase “properly incur” means reasonably and suitably incurred (*AIR 1926 Nag. 345*)
- 8.26.2. The word ‘Incur’ came up for the consideration of the Supreme Court of India in the case of *Srimati Indira Nehru Gandhi v. Sri. Raj Narain & Anr, 1975 (SUPPL SCC 1)*, (para. 148). Their Lordships have held- “ *The word “incur” according to the dictionary meaning means to become liable to. The word “incur” means to undertake the liability even if the actual payment may not be made immediately*”.
- 8.26.3. In *Indian Oil Corporation Limited v. SBS Engineering (2011) 3 SCC 507*, Their Lordships have held (vide para 24(iii)):
- (a) Once a risk and cost tender is issued at the risk and cost of a person, then, the amount which is to be claimed from the person who is guilty of breach becomes crystallized at the time when the risk- purchase tender at a higher cost is awarded. This is true as a general proposition;
 - (b) The above said general proposition may not be applied if there is a specific provision in the Contract like Clause 7.0.9.0, which requires that an Employer should claim an extra cost only the difference between the “amounts as would have been payable to the Contractor in respect of the work” and “the amount actually expended by the owner for completion of the entire work”.
- 8.27. In the case at hand, the general proposition would apply in view of the wordings of GCC Clause 42.2.6 forming part of the Contract between the parties. The expression used is “the reasonable costs incurred by the Employer in completing the facilities”. The wording of this provision are different from the wording of the provision before their Lordships in the case of *IOC Ltd. (Supra)* where the emphasis was on the amount ‘actually expended for completion of the entire work’. Proposition (b) which is an exception to the general proposition, as held by their Lordships in the case of *IOC Ltd.* will not apply.
- 8.28. The case of *MSEB Bombay v. Sterilite Industries (NDR) Ltd., AIR 2000 Bom 204*, cited by the Claimant is clearly distinguishable. In that case, interpreting the provisions of Section 73 of the Contract Act and Section 62 of the Sales of Goods Act, the High Court has held that a cause of action under Section 73 of the Contract Act does not arise unless and until damages are actually suffered.
- 8.29. Even otherwise, if the submission of the Claimant was to be accepted then also, *de hors* the Clause 42.2.6, the Respondent would be entitled to recovery u/s 73 of the Contract Act. The Claimant’s submission based on literal interpretation of Clause 42.2.6 is rejected.
- 8.30. The next question which arises is whether there is a limitation on the liability of the Claimant which the Claimant would incur under the Contract. Following provision is relevant.

‘Clause 26.2 as amended by SCC

GCC Clause 26.2

a) *Applicable rate for liquidated damages:*

Liquidated damages for delay in successful completion of Facilities shall be as under:-

If the contractor fails to achieve successful Completion of facilities for Unit-I, Unit-II and Unit-III within 46 months, 52 months and 58 months respectively from the date of Notification of Award, the Contractor shall pay to the Employer as liquidated damages and not as penalty, a sum calculated at the following rates:

<i>A sum of US Dollar 75,846 (US Dollar Seventy five thousand eight hundred forty six only) or equivalent amount in proportionate contract currencies, based on bills selling exchange rate of SBI prevailing as on the date of Notification of Award.</i>	<i>for each day of delay in successful Completion of Facilities for each unit under the package as per the Scope of work of the Contractor under the Contracts.</i>
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If the Contractor fails to deliver at site all the mandatory spares covered under the package within 40 months from the date of Notification of Award, the Contractor shall pay to the Employer as liquidated damages and not as penalty, a sum calculated at the following rates:

One half of the one percent (1/2%) of Ex-works (India) / CIF (Indian port-of-entry) price of the delayed Mandatory Spares, per week or part thereof of delay, subject to maximum of five percent (5%) of the total CIF/Ex-works price of all mandatory spares covered under the package.

Maximum deduction for liquidated damages:

The total amount of liquidated damages for delay under the contracts will be subject to a maximum of five percent (5%) of the total contract price for First Contract, Second Contract & Third Contract.

- 8.31. So far as the calculation of LD is concerned, the Respondent has set out its calculation as under:

USD 75,846 for each day of delay per Unit

Delay of 4 years and 1 Month= 1,490 days

Therefore, Liquidated Damages on account of delay of 1,490 day for all three (3) units=

1,490 X 75,846 X 3 = USD 339,031,620/- (US Dollar Three Hundred Thirty Nine Million Thirty One Thousand Six Hundred and Twenty only)

Separately, there is a provision for additional liquidated damages for TPE's failure to deliver mandatory spares in time which is being overlooked for the present purposes.

In any event, in deference to the provisions of the Contracts, NTPC is compelled to restrict its claim under the aforesaid head to the maximum cap of five percent (5%) of the total contract price.

Total Claim under the aforesaid head:

USD 19,586,264/- + INR 140,342,955/-

Computation of aforesaid claim as per Clause 8 of the SCC is provided hereinbelow:

S.No.	Contract Price	5% of Contract Price
<i>First Contract</i>	<i>USD 388,907,009</i>	<i>USD 19,445,350</i>
<i>Second Contract</i>	<i>INR 772,570,796</i>	<i>INR 38,628,540</i>
<i>Third Contract</i>	<i>USD 2,818,288</i>	<i>USD 140,914</i>
	<i>INR 2,034,288,297</i>	<i>INR 101,714,415</i>
TOTAL		USD 19,586,264/-
	<i>USD 19,445,350+ USD 140,914</i>	INR 140,342,955/-
	<i>INR 38,628,540 + INR 101,714,415</i>	

- 8.32. The Tribunal does not find any error of calculation in the Statement of the Respondent as quoted hereinabove. The Respondent is entitled to levy of LD but subject to the cap of 5% and accordingly, it is held entitled to USD 19,586,264/- and INR 140,342,955/- by way of LD. The figures are subject to cap.
- 8.33. In so far as the submission of the Claimant that the Respondent can claim only a reasonable amount is concerned, it would suffice to state that Doosan was L-II bidder in the same bidding in which the Claimant was L-1 and hence selected. Foregoing the need for inviting international tenders which process would have been costly and would also have substantially delayed the project keeping it hanging, resulting in further loss and damages, the Respondent followed the most reasonable and prudent step of going to Doosan. In view of the inflationary tendencies of the market, fresh bids would have resulted in the Contract being entered into at a much higher price. This is a possibility which cannot be ruled out. In as much as Doosan was L-II in the same bidding process, the specifications remained unaltered. It was stated by Mr. CS Vaidyanathan, Ld. Sr. Counsel for the Respondent that in the Contract with Doosan, the specifications have not been changed at all. There is no material brought on record by the Claimant to show that the various supplies for which orders were placed with new suppliers were not for a reasonable price. In short, there is no reason to hold that the compensation demanded by the Respondent from the Claimant is not reasonable.
- 8.34. As to the cap provided by Clause 30.1 of the GCC, it has been the submission of Mr. C.S. Vaidyanathan, Ld. Sr. Counsel for the Respondent that the facts of the case clearly go to show that the conduct of the Claimant was 'willful misconduct'. In support of his submission, he has referred to several documents available on record to submit that not only the Claimant was aware of its obligations under the Contract ever since beginning but, continued to delay the performance in spite of specific reminders from the Respondent. Mr. Vaidyanathan has relied on the definition of 'willful misconduct'

as given in Black's Law Dictionary. Having known that the Claimant was delaying the performance and then taking shelter behind the plea of financial difficulty, persistently asking the Respondent to make available finance, which it was not obligated to do under the Contract, asking the Respondent to revise the Contract price upwards, all leading to termination of the Contract, are such circumstances which clearly spell out that the conduct of the Claimant was not only misconduct but also 'willful misconduct'; it was committed voluntarily and intentionally.

8.35. Black's Law Dictionary (Eighth Edition, p.1630) defines 'willful' as –

'The word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent. "Rollin M. Perkins & Ronald N. Boyce, Criminal Law 875-76 (3d ed. 1982)."

8.35.1. At p.1020 (*supra*) the phrase 'willful misconduct' has been defined as –

'misconduct committed voluntarily and intentionally.....the term of art (willful misconduct) has defied definition but it is clear that it means something more than negligence.'

8.36. To us, it appears that to amount to 'willful misconduct' there must be *mens rea*, something akin to criminality. In the present case, we have found that the Claimant has been negligent and conducted itself in such a manner that its conduct can be termed as 'misconduct'. Still it falls short of 'willful misconduct'. The letters exchanged between the parties go to show that the Claimant was making repeated attempts to manage the finances, knocking unsuccessfully at the doors of the Respondent, and to some extent the Govt. of Russian Federation. The real reason was the financial difficulty, which the Claimant was feeling and was finding it difficult to wriggle out of it. The Claimant has failed in performing its obligations under the Contract and incurred liability to satisfy the Claims of the Respondent yet, it cannot be said the Claimant has committed 'willful misconduct'.

8.37. For the foregoing reasons, the limitation of liability provided by Clause 30.1(a) would apply. Clause 30.1 of GCC provides as under:

"30. Limitation of Liability

30.1. Except in cases of criminal negligence or willful misconduct,

(a) the Contractor shall not be liable to the Employer, whether in contract, tort, or otherwise, for any indirect or consequential loss or damage, loss or use, loss of production, or loss of profits or interest costs, provided that this exclusion shall not apply to any obligation of the Contractor to pay liquidated damages to the Employer and

(b) the aggregate liability of the Contractor to the Employer, whether under the Contract, in tort or otherwise, shall not exceed the total Contract Price, provided that this limitation shall not apply to any

obligation of the Contractor to indemnify the Employer with respect to patent infringement.”

- 8.38. The case for exception from the limitation is not made out. Clause 30.1 (a) is very wide. The cap on the liability is on all sorts of liabilities incurred by the Contractor i.e. in contract, tort, or otherwise excluding the Contractor’s obligation to pay LD to the Employer. The liability which the Claimant has incurred is direct. The liability so incurred, having been quantified, shall be subject to the cap provided by GCC Clause 30.1(b).
- 8.39. The consideration of such cap shall be kept in view while quantifying the liability of the Claimant.
- 8.40. For the sake of clarity, we state, that in the facts and circumstances of the present case, there are two types of cap, the benefit whereof shall be available to the Claimant. These are:
- (i) The total amount of LD for delay which the Contractor shall be liable to pay to the Respondent shall be subject to the maximum of five percent (5%) of the total Contract price for First Contract, Second Contract and Third Contract;
 - (ii) Other than LD, whatever liability is incurred by the Contractor for breach of Contract including interest shall not exceed the total Contract price.

Is the Claimant entitled to claim return of the amount of BGs realized by the Respondent?

- 8.41. The factum of the bank guarantees having been invoked and the Respondent having received the amount of 10 Bank Guarantees is not in dispute. The details of BGs furnished by the Claimant and encashed by the Respondent are as under:

S. No	Bank Guarantee Details (Provider)	Purpose	Bank Guarantee Amount
1.	NDO/6042/GRF/20/94 (TPE)	Initial Advance	USD 27,755,081.33
2.	NDO/6042/GRF/20/98 (TPE)	Contract Performance	USD 281,829 + INR 203,435,146
3.	NDO/6042/GRF/20/95 (TKZ, DJU Associate)	Contract Performance	USD 19,696,987 + INR 136,067,262
4.	NDO/6042/GRF/20/108 (TEP, DJU Associate)	Contract Performance	USD 196,970 + INR 1,360,673
5.	NDO/6042/GRF/21/40 (TPE)	Initial Advance	INR 115,165,177
6.	NDO/6042/GRF/20/97 (TPE)	Contract Performance	INR 77,257,080
7.	6042FPEBG070037 (TPE)	Initial Advance	USD 248,126.90
8.	6042FPEBG070038 (TPE)	Initial Advance	INR 137,576,435
9.	NDO/6042/GRF/20/96 (TPE)	Contract Performance	USD 38,891,067
10.	6042FPEBG110015 (TPE)	Additional Bank Guarantee (escalation 20% ceiling removal)	USD 36,023,790.19

8.42. The nature of the 10 Bank Guarantees submitted by the Claimant to the Respondent can be classified under the following three heads:-

- I) Advance Payment Security/Bank Guarantee under Clause 13.2 of the GCC.
- II) Contract Performance Security/Bank Guarantee (CPBG) under Clause 13.3 of the GCC.
- III) Bank Guarantee against additional PVC ("Price Variation Claim") paid for already supplied material as per amendment of Contracts dated 29.10.2010.

8.43. On behalf of the Respondent, the following calculation has been submitted:

8.43.1. **Advance Payment Security:** BG's at 1,5,7 and 8 of the Table (in para 8.42) were submitted against initial advance received by the Claimant from Respondent.

8.43.2. The total value of unsupplied material in the 1st Contract (for materials to be procured from outside India) on which advance is unadjusted is USD 119,008,815.00 The total value of unsupplied material in 2nd Contract (for materials to be procured from within India) on which advance is unadjusted is INR 727,493,829. Unadjusted advance is 15% of the advance applicable component of unsupplied material value. Similarly, for the 3rd Contract (for services), the total value of unexecuted work on which advance is unadjusted is USD 1,787,969 and INR 991,271,879 and advance is 10 % of the above value. Total unadjusted value is USD 17,851,322.25 and INR 109,124,074.35/- for 1st and 2nd contract and USD 178,796.9 and INR 99,127,187.9 for 3rd contract against Respondent's unadjusted initial advance of USD 18,061,339.1 and INR 22,55,65,984.90.

S. No	Contracts	Currency	Amount paid by NTPC excluding		Amount Balance (c)= (a-b)
			LOA Value (a)	PVC (b)	
1	1 st Contract	USD	38,89,10,673.00	25,12,72,504.34	13,76,38,168.66
2	2 nd Contract	INR	77,25,70,796.00	14,34,47,993.00	62,91,22,803.00
3	3 rd Contract	USD	28,18,288.00	9,99,937.80	18,18,350.20
4	3 rd Contract	INR	2,03,43,51,463.00	55,45,18,297.00	1,47,98,33,166.00

The unadjusted advance is *not* 15% or 10% of balance amount shown above since in above table Letter of Award ("LOA") value is taken as full LOA value, while advance is only in respect of main supply and installation and not on spares, OFMI, freight or type test charges etc..

8.43.3. **CPBG:** BG at serial no. 2,3,4,6 and 9 in the table in para 8.42 were CPBG's (3 and 4 provided by DJU associates of the Claimant. Total amount is: INR 41,81,20,161 and US Dollar 59,263,823. As per clause 13.3.1 of the GCC, CPBG's are submitted as guarantees for the performance of the Contracts by the Claimant. Since the Claimant

failed to perform the Contract, the Respondent was fully entitled to encash the CPBG's including those from the DJU Associates and retain the full amounts thereof.

- 8.43.4. **BG against PVC:** These BGs have been against the amount paid for already supplied material. As per the Amendment no. 7 dated 29.10.2010 (pg. 185-189, Vol. 11 RD) the Respondent had agreed to release 90 % of price variation to already supplied material against submission of BG of equal value, as a guarantee to achieve successful completion of facilities for Unit #1 by 30.01.2014. The value of the BG is USD 36,023,790.19 mentioned at serial no. 10 of the table in para 8.42 above. Since the Claimant failed to achieve Completion of Facilities of Unit#1, by 30.01.2014, the Respondent was fully entitled to encash and retain the full amount of the BG.
- 8.44. It is to be noted that the Claimant has disputed the entitlement of the Respondent to retain the amount of the encashed BGs or any part thereof; however, so far as the several figures and calculations are concerned, the arithmetical part is not in dispute.
- 8.45. Mr. CS Vaidyanathan, Ld. Sr. Counsel for the Respondent submitted that the bank guarantees were unconditional in nature. It is settled law that the Respondent is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. Further, it has been categorically held by the Courts in India that the terms of the principal Contract cannot be read into the bank guarantee unless the same are specifically incorporated therein by reference or reproduction. He further submitted that none of the contractual clauses have been incorporated in the bank guarantee Agreement by reference or reproduction. Mr. Vaidyanathan, further submitted that the submissions made on behalf of the Claimant that the Respondent cannot be permitted to unjustly enrich itself, cannot be accepted as in the matter of encashment of BGs, it has been held in *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd., (1997) 6 SCC 450, at para 29, page 462*, in the matter of encashment of Bank Guarantees, the principle of Unjust Enrichment has no applicability.
- 8.46. As has been clearly held in the earlier part of this Award that the Respondent was fully justified in terminating the Contracts under Clause 42.2.2 and therefore, the Respondent was also fully justified in encashing the bank guarantees and is entitled to retain the amounts received therefrom. Mr. Vaidyanathan stated on behalf of the Respondent that there are minor amounts of Advance Payment Security BGs which were adjusted during the subsistence of the Contract but still encashed by the Respondent are being held towards the Counter Claims of the Respondent subject to final Award as may be passed by the Arbitral Tribunal and to the extent of adjustments already made, the amount of advance payment BGs shall be either refunded to the Claimant or adjusted against the amount of Counter Claims upheld by the Arbitral Tribunal.

Limitation

- 8.47. The objection as to some of the claims being barred by time and hence liable to be rejected has been taken note of at (vi) of para 4.5 above. This plea has been argued on behalf of the Respondent without citing any particular article of Limitation Act, 1963. Even otherwise, the limitation would begin to run only when the cause of action for filing the suit (Claim) has arisen to the Claimant. The equipment may have been delivered in 2007- 09 but the cause of action for claiming the cost thereof from the Claimant would arise only when the equipment has been found to be defective. In the

present case, the factum of the equipment being defective came to light only when the Contract in favour of the Claimant was terminated and the remaining work was handed over to Doosan, who found the equipment defective and brought it to the notice of the Respondent. The Claims cannot be said to be barred by time.

Part-9
Quanification

9.1. In the light of the discussion as above it is held that the Claimant is not entitled to any of the Claims except for (i) payment of the amount of the work already done by the Claimant. If there are any bills for payment raised by the Claimant and they are outstanding or pending for payment as per Clause 42.2.5 of the Agreement, the Claimant shall be entitled to have such bills processed for payment as per Contract; (ii) return of the unadjusted or surplus amount in the hands of the Respondent from out of the Advance Payment Security/ Bank Guarantees encashed by the Respondent; (iii) the amount of LD levied and deducted or withheld by the Respondent which is in excess of the LD subject to cap under Clause 26.2 of the GCC.

9.2. The undisputed amount of the value of work done by the Claimant and which has remained unpaid and which the Claimant shall be entitled to payment under Clause 42.2.5 of the GCC is as under:

- (i) As per Para 54 a. of the SoC (at p. 30) Commercial Invoice No. 26 for supplied Plant & Equipment (60% of Ex- works value), Commercial Invoices Nos. 21A A-26A for Plant & Equipment supplied at site (15% Ex- works value) amounting to INR 20,92,420.57.
- (ii) As per Para 57 a. of the SoC (at p. 30) in respect of commercial invoices 01.41-01.43,02.37-02.38,03.20-03.21 for executed Installation services (70% of Installation value for payment) for units 1-3 is total amounting to USD 3,115.29 & INR 1,727.679.59.

Therefore, total value of work done by the Claimant which is undisputed and has remained unpaid is USD 3,115.29 and INR 38,20,100.16. As highlighted in NTPC's SoD, the reason for the non- payment of the aforementioned invoices was the freezing of accounts as part of Standard Operating Procedure pursuant to Contract termination.

9.3. The Respondent is held entitled to the following Counter Claims.

Quanified Counter- Claims of NTPC

S.No.	Description	Clause enabling provision under the Contracts	Amount in INR	Amount in USD	Amount in Euro
1.	Cost of Completion of Facilities by NTPC [including cost of supply, erection and installation of new materials in place of damaged/ defective material supplied by TPE as per 6{d}]	Clause 42.2.6 of GCC	18,053,172,730	(-) 27,597,454	14,830,343

	and 6{e} at page 224-225 CV2]				
2.	Liquidated Damages subject to maximum cap of 5% of contract price	Clause 26.2 of GCC r/w Clause 8 of SCC	140,342,955	19,586,264	
3.	Outstanding payment to be made by TPE	Clause 27.02.00 of ECC [Part D, Section VI A at p. 101 Vol. 9 RD] and Clause 3.02.00 of ECC (Part D, Section VI A) at p. 90 Vol. 9 RD] of Technical Specification for Main Plant Package	559,859		
4.	Total claims factoring in cap under limitation of liability Clause	Clause 30 of GCC	18,194,075,544	(-) 8,011,190	14,830,343

9.4. Under Section 31 (7) of A&C Act, the Arbitral Tribunal has been conferred with discretion to award interest on the claims for money at such rate as it deems reasonable. The Tribunal considers a rate of 12% p.a. to be reasonable to be applied on all the claims to which either party is held entitled to recovery.

9.5. In so far as costs of these proceedings are concerned, in view of the fact that the Claims have failed and the Counter Claims have succeeded, we see no reason why the Respondent should not be allowed the costs of these arbitral proceedings.

9.6. Both the parties have filed Statement of Costs incurred by them in these proceedings.

9.7. As per the Statement filed on behalf of the Claimant, the amount of costs incurred has been quantified as under:

S.No.	Particulars	Amount (Rs.)
1.	Consolidated fees of Arbitrators	1,18,00,000
2.	Consolidated fees of Counsel	3,00,00,000
3.	Consolidated expenses incurred towards booking of venue	1,34,490
4.	Travel Expenses	11,70,876
5.	Consolidated other out of pocket expenses related to arbitration	1,57,506
	TOTAL	4,32,62,872

9.7.1. To the above amount would be added an amount of Rs.25,50,000/- remitted by the Claimant by way of fee to the Members of the Tribunal for the time spent on writing the Award.

9.8. According to the Respondent as per certificate dt. 18.07.2019 issued by M/s Gulshan Dhiraj & Associates, CA, the Respondent has incurred the costs as under:

S.No.	Particulars	Paid to Advocate/ Arbitrator (Rs.)	Tax under RCM (Rs.)	Total Expenditure (Rs.)
1.	Fee paid to the Members of the Tribunal	10,695,000	1,897,200	12,592,200
2.	Sh. C.S. Vaidyanathan, Sr. Adv	24,489,999	4,211,401	28,701,400
3.	M/s August Legal	28,520,007	4,811,884	33,331,891
	TOTAL	63,705,006	10,920,485	74,625,491

9.8.1. To the above would be added an amount of Rs. Rs. 25,50,000/- being the Respondent's contribution equivalent to one- half of the amount of fee appointed by the Tribunal on 17.06.2020 for the time spent on writing the Award.

9.8.2. Accordingly, it is held that the Respondent has incurred a cost of Rs. 77,175,491/- on these arbitral proceedings.

9.9. In its Counter Claim the NTPC has submitted that there are following claims of the Respondent against the Claimant which are "currently unspecified". These claims are as follows:

S. No.	Description	Clause Claimed under
1.	Claim in respect of Functional Guarantee/ PG Test	Clause 28 of GCC r/w "Functional Guarantees and Liquidated Damages", Part- A of Section VI of Technical Specification
2.	Claims against damage due to material during removal of TPE's gantry crane	Clause 33.1 of GCC

9.10. As these Claims were unspecified on the date of commencement of these proceedings and have continued to remain so, this arbitral Tribunal has neither adjudicated thereon nor expressed any opinion.

Part-10 *Operative Part*

10.A. As to the Claims preferred by the Claimant

1. The Claimant's prayer for declaration that NTPC's termination for *three* Contracts was illegal, is refused and rejected.
2. The Claimant's prayer for directing the Respondent to compensate the Claimant for payment of the specific amounts of USD 162,929,595.28 and INR 1,031,998,690.79 with interest @ 18% p.a. is refused. In its place it is directed that:

- a) All the amounts due and payable under the Contract-1, Contract- 2 and Contact- 3 for which the bills were passed by the Respondent but the payment was withheld as having been frozen on account of termination of the Contracts of the Claimant shall be released to the Claimant. (See para 9.2 of the Award)
 - b) All the bills for payment submitted by the Claimant to the Respondent shall be verified as per the Contracts and the payment thereunder as found to be due and payable to the Claimant shall also be released.
 - c) From out of the amount of 'Advance Payment BGs' encashed by the Respondent, such amount as is available as surplus or unadjusted lying with the Respondent shall also be released to the Claimant.
 - d) From out of the amount withheld by the Respondent from payment to the Claimant on account of LD, so much of the account as is in excess of the cap on LD in terms of Clause 26.2 of the GCC r/w Clause 8 of the SCC, shall also be released by the Respondent.
 - e) All the above amounts shall carry interest calculated @ 12% p.a. with effect from 14-01-2015, the date on which the Respondent terminated the Contracts of the Claimant till the date of the payment.
3. Claimant's prayer for return of the amount of Contract Performance Security/ Bank Guarantee (CPBG) is refused.
 4. The Claimant's prayer for return of the amount of Bank Guarantee against additional PVC (Price Variation Claim) is also refused.
 5. Claimant's prayer for Award of costs of arbitration is refused. The Claimant shall bear the costs as incurred by it.

10.B. As to the Counter Claims preferred by the Respondent

1. The Respondent NTPC is held entitled for recovery of INR 18,194,075,544/- (*plus*) Euro 14,830,343/- wherefrom shall be be deducted an amount of USD 8,011,190/- (as per details given in para 9.3 of the Award).
2. The above amount shall carry interest calculated @ 12% p.a. w.e.f 14-01-2015, the date of termination of the Contract.
3. The Respondent NTPC is held entitled to recovery of Rs. 77,175,491/- on account of costs incurred by the Respondent on these arbitral proceedings.

10.C. The parties shall work out the final figure in accordance with the directions given in para A & B above and settle and release the payment

as found due and payable, in a period of two months from the date of the pronouncement of Award.

- 10.D. Failing the payment arrived at by calculating the figure in terms of the directions given hereinabove, the amount found due and payable in terms of this Award shall carry its interest calculated @ 18% p.a. from a date falling 60 days after the date of its Award till the date of payment.

Part-11
Miscellaneous

- 11.1. This Award has been drawn up in 5 identical copies.
- 11.2. One copy each is being sent to the parties on the addresses made available by them for the purpose which are as under:

For the Claimant	For the Respondent
Mr. Tejas Karia, Advocate C/o- Shardul Amarchand Mangaldas & Co., Advocates & Solicitors Amarchand Towers, 216, Okhla Industrial Estate, Phase- III P.O. New Delhi- 110 020	Mr. Avnish Srivastava, GM (Dispute Resolution Cell), NTPC- Engg. Office Complex (EOC), Sector 24 P.O. Noida- 201301 (U.P.)

- 11.3. Before parting, the Tribunal records its appreciation of the hard work put in preparing and presenting with precision the respective cases by the Ld. Sr. Counsel for the two parties assisted by the team of their briefing Counsel and for the courtesies extended by both the sides to the Tribunal throughout the proceedings.

- 11.4. In 60 days from the day of the pronouncement of Award either party would deposit non-judicial stamp worth the stamp duty due and payable on the Award in accordance with the provisions of the Indian Stamp Act, 1899 (as amended in its application in Delhi) whereupon only the Award shall become enforceable. One-half of the amount of stamp duty shall be recoverable to the party depositing the non-judicial stamp from the other party.

Signed on this 5th day of August 2020 at New Delhi


Justice (Retd.) Dr. Arijit Pasayat
(Arbitrator)


Justice (Retd.) R.C. Lahoti
(Presiding Arbitrator)


Justice (Retd.) Deepak Verma
(Arbitrator)



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ARB.P. 391/2022

M/S TREASURE VASE VENTURES PRIVATE LIMITED

..... Petitioner

Through: Kshitiz Mahipal, Advocate.

versus

MIS BROWN BIRD ENTERPRISES PRIVATE LIMITED

..... Respondent

Through: Mr. Asish Nischal, Mr. Arun Nischal
and Rinku, Advocates.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

ORDER

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02.09.2022

1. A petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "*the Act*") has been filed on behalf of the petitioner.
2. It is stated in the petition that the petitioner and respondent had entered into a Service Agreement on 14th February, 2020 whereby the petitioner had deployed E-vehicles at the respondent's location for the purpose of providing last mile delivery services. The Agreement was effected from 01st March, 2020 till 28th February, 2021. Since, July, 2020 until October, 2020, the respondent failed to pay service fee to the petitioner, which comes to Rs.26,94,780/-. The respondent is also liable to pay interest @ 12% per annum in terms of Clause 2.8 of the Agreement. A cheque bearing No.000085 dated 25th July, 2020 for Rs.78,95,38/- drawn on Kotak



Mahindra Bank, Janakpuri was issued, but the same got dishonoured. A Demand Notice dated 17th November, 2020 was issued for outstanding payment of Rs.27,16,241/- along with interest of Rs.21,461/-. The respondent acknowledge the deficiency in making the payments despite which the respondent has failed to clear the outstanding dues.

3. The petitioner thus, sent a Notice dated 15th November, 2021 for appointment of Sole Arbitrator in terms of Clause 11.5 of the Service Agreement dated 14th February, 2020 for adjudication of the disputes. The petitioner suggested the name of Sh. Mohit Verma Advocate as Sole Arbitrator, but the respondent has not given the consent to the appointment of the Arbitrator as suggested by the petitioner. Hence, the present petition has been filed.

4. Learned counsel for the respondent submits that after the Agreement dated 14th February, 2020 a fresh Agreement dated 30th June, 2020 was executed between the parties which also contains the Arbitration Clause. There is no objection to the appointment of the Sole Arbitrator, but seeks liberty to raise his defence and contentions before the learned Arbitrator.

6. **Submissions heard.**

7. Since there exists a valid Arbitration Agreement and arbitrable disputes have been agitated, Ms. Madhumita Bhattacharji, Advocate, Mobile No.9811785211) is appointed as the Sole Arbitrator to conduct the arbitration under the aegis of Delhi International Arbitration Centre. The parties are at liberty to raise their claims and objections including limitation before the learned Arbitrator.

8. This is subject to the learned Arbitrator making the necessary disclosure as required under Section 12(1) of the A&C Act, 1996 and not



being ineligible under Section 12(5) of the Arbitration & Conciliation Act, 1996.

9. Accordingly, the petition is allowed in the above terms.

NEENA BANSAL KRISHNA, J

SEPTEMBER 2, 2022

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