

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

% **Judgment reserved on: 3rd February, 2016**
Judgment pronounced on: 9th May, 2016

+ **O.M.P. 1159/2012, I.A. Nos.22242/2012 & 16035/2013**

JAMMU & KASHMIR STATE POWER DEVELOPMENT
CORPORATION

..... Petitioner

Through Mr.Shashank Garg, Adv. with
Mr.Tariq Khan, Adv.

versus

K.J.M.C.GLOBAL MARKET (INDIA) LTD Respondent

Through Mr.Bishwajit Bhattacharya, Sr.
Adv. with Mr.B.R.Mittal,
Mr.Aneesh Mittal &
Mr.Chandrachur Bhattacharya,
Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has challenged the Award dated 3rd July, 2012 by filing of objection under Section 34 of the Arbitration & Conciliation Act, 1996 published by sole Arbitrator Mr. Justice Arun B.Saharya (Retired).
2. Brief facts as per pleadings and contentions of the parties are that on 21st May, 1999, after correspondence, discussions and negotiations, the petitioner Jammu and Kashmir State Power Development Corporation (JKSPDC) issued the Mandate Letter in favour of the respondent (KJMC), which was accepted by the respondent with some Amendment, vide its

letter dated 22nd May, 1999 and 25th May 1999. Subsequently, on 28th October, 1999, formal agreement (hereinafter collectively referred to as the “Mandate”) was approved by the J & K Government and was entered into between the JKSPDC and respondent.

- 2.1 As per the said Mandate, the respondent was supposed to arrange funds for the project from the financial institutions and banks upto 70% to 80% of the project cost of the 450 MW Baglihar Power Project (hereinafter referred to as “the Project”) and for that purpose, the respondent was authorized by the petitioner to represent the petitioner in dealing with the financial institutions and the banks.
- 2.2 The cost of project was initially estimated to be Rs.3810 crores to be financed by way of “equity” contribution of Rs.1143 crores to be brought in by the sponsor J & K Government, Rupee Terms Loan of Rs.1905 crores and Foreign Currency Loans of Rs.762 crores. However, the cost of project subsequently got reduced substantially by about Rs.430 crores and brought down to Rs.3381.60 crores and the quantum of term loan and foreign currency loan was also consequently reduced to Rs.1690.80 crores and Foreign Currency Loans of Rs.676.30 crores respectively. This was due to substantial fall in interest rates leading to the reduction of interest cost of project during construction period. Consequently, the aggregate loan requirement came down to Rs.2367.10 crores, though the learned Arbitrator has taken the aggregate loan requirement to be Rs.3056 crores as per the IDBI Appraisal.

3. Thus, as per undisputed fact that the respondent was to arrange finances within a period of nine months subject to prompt and timely furnishing by the petitioner of information, documents and data required by prospective lenders for processing and progress of the loan proposal, entering into Power Purchase Agreements ("PPA") and taking of other steps required to be taken by the petitioner.

4. The case of the respondent from the day one was since the petitioner delayed furnishing of essential information, data and documents, finalizing the PPA and taking steps for providing security for the loans as approved by its Board of Directors and the State Government, the said period was formally extended by the petitioner from time to time on 20th March, 2001, 16th October, 2001, 11th May, 2002 and 22nd July, 2002 up to 31st December, 2002 as per terms of the mandate. The petitioner never made any protest or grievance or pointed out any deficiency on part of the respondent till the dispute arose between the parties. The respondent states that as a matter of fact, the petitioner has withheld the material fact that it had issued bonds of more than Rs.200 crores during the period 2000-03 with first charge on the Consolidated Fund of the State as security in favour of Bond Subscribers (the ground taken by the petitioner before the arbitral tribunal that the security by way of charge on the Consolidated Fund stipulated by IDBI was un-accomplishable), but the same was rejected by the arbitral tribunal. In the present objection, the petitioner has taken the same ground who failed to disclose that in the estimated cost of project submitted by it to IDBI it had 'included the cost of the dam which was actually covered in second phase, as found out by a special committee appointed for the purpose and after detailed deliberations the petitioner

accepted the said non-disclosure. The said process caused considerable period of delay in appraisal of the loan proposal.

5. It is submitted by the respondent that as per the prevalent practice of consortium financing of projects of this size, the respondent with full knowledge and consent of the petitioner and top level functionaries of J & K Government, approached IDBI for funding of the project by a consortium of financial institutions and banks and taking the lead role. The initial application for financial assistance was submitted to IDBI through the Principal Secretary, Power Development Department of the J & K Government on or about 11th June, 1999. The IDBI carried out appraisal estimating the cost of project as Rs.3810 crores. The respondent through the consortium mechanism got the initial funding arranged as confirmed by IDBI at the Heads of Institutions Meeting (IIM) held on 18th September, 2001 as under:

Sl. No.	Name of Institution	Rupee Term Loan (Rs. Million)	Guarantee Assistance for ECBs including interest (Amount equivalent rupees)	Aggregate amount of Assistance (Rs. Million)
i)	IDBI	2000	1000	3000
ii)	ICICI	2000	1000	3000
iii)	LIC	3000	-	3000
iv)	GIC	1000	-	1000
v)	PFC	6000	2000	8000
vi)	SBI	1000	1000	2000
vii)	J&K Bank	1400	-	1400
viii)	Others	2650	6517	9167
	Total	19050 (say 1905 crores)	11517 (say 1151 crores)	30567 (say 3056 crores)

It is stated by the respondent that for the 'others', names of Central Bank of India, PNB, Bank of Baroda, Canara Bank and associates of State Bank of India were indicated. The respondent arranged facility to the

extent of Rs.450 Crores from Canara Bank Rs.25 Crores, PNB Rs.25Crores, Bank of Baroda Rs.25 Crores, Central Bank Rs 25 Crores and HUDCO Rs.300 Crores, and additional Rs.50 Crores from SBI. However, financial closure was prevented by the petitioner's defaults primarily in taking steps towards compliance of security condition and subsequent back tracking on security (though both the J&K Government and the petitioner had initially themselves proposed and later unequivocally accepted the security conditions stipulated by IDBI as the leader of consortium) and also in keeping the respondent informed of developments which had bearing on financing arrangement.

6. It is also submitted by the counsel for the respondent that on one hand, the respondent was rendering services as above and on the other hand, the petitioner and the State Government convened a meeting of the institutions and banks on 13th January, 2003 and without informing the respondent, conveyed to the lenders that the petitioner was no longer willing to furnish the security and availing finance. No other reason whatsoever was given, rather the petitioner subsequently pursued loan proposals with a consortium of financial institutions and banks without the knowledge of and even without involving the respondent. The same was in fact not denied by the petitioner that five of the said institutions and banks were the same as had been pursued by the respondent and arrangements made despite of the fact that mandate admittedly provided that the respondent would be entitled to his fees in the event the petitioner pursued the same sources during or after the Mandate as had been pursued by the respondent.

7. As the dispute arose between the parties, the respondent invoked the arbitration clause of the Mandate and sole arbitrator who is the retired Chief Justice of Punjab and Haryana High Court was appointed to adjudicate the disputes between the parties.

8. After completing the pleadings and admission/denial of documents, the matter was put up for framing of issues.

9. The following issues were framed by the Learned Arbitral Tribunal on 3rd March, 2006:-

I.(a) Whether the Claimant supplied to the Respondent an indicative and/or final list of essential project information/documents required by it for arranging the loan facility? If not, what is its effect?

(b) If the answer to (a) above is in the affirmative, whether there was any delay by the Respondent in providing essential information/documents to the Claimant? If so, what is its effect?

II.(a) Whether the Claimant provided the Respondent with the final draft of the Power Purchase Agreement?

(b) If the answer to (a) above is in the affirmative, whether there was any delay by the Respondent in finalizing the Power Purchase Agreement? If so, what is its effect?

III.(a) Whether the Claimant was entitled to extension of the period of the mandate?

(b) Whether the mandate period for the Claimant expired on 31st December, 2002; and if so, to what effect?

IV. Whether the Respondent had accepted all the terms and conditions stipulated by the Lending Institutions? If not, what is its effect? (subsequently dropped)

- V. Whether the respondent accepted the condition that it would create security for the loan including, inter-alia, a first charge over the consolidated fund of the State and mortgage over the project land? If so, whether the Respondent, failed and neglected to take steps for creation of such security? If so, what is its effect as between the Claimant and the respondent?
- VI. Whether the condition of creation of charge over the Consolidated Fund of the State or any of the other conditions imposed by IDBI and other prospective lenders were un-accomplishable? If so, what is its effect?
- VII.(a) What was the total debt facility to be arranged by the Claimant?
OPC
- (b) What was the total debt facility the Claimant could arrange and get sanctioned / approved from the financial institutions/banks?
- VIII What was the project requirement schedule and whether Claimant had arranged the required facility in accordance with such schedule? If not, what is its effect? OPC / OPR
- IX.(a) Whether a consortium of banks and financial institutions was formed and the consortium allocated among themselves the total debt of Rs. 2090 crores for the Respondent in their meeting held on 18.9.2001 or thereafter?
- (b) If (a) above is answered in the affirmative, what were the terms and conditions for granting the loan?
- (c) Whether the terms and conditions stipulated by any member of the Consortium were different from those stipulated by the Lender of the Consortium? If so, what is its effect?
- X Whether financial closure got delayed on account of default on the part of the Respondent? If so, what is its effect?

- XI Whether the Claimant's efforts brought about a stage where financial closure would have followed had the Respondent taken the necessary steps and complied with the pre-conditions of the prospective lenders? If so, what is its effect as between the Claimant and the Respondent?
- XII Whether the interest rate proposed by IDBI was within the limits of the Agreement between the Claimant and the Respondent? (was not pressed)
- XIII(a) Whether the interest rate proposed by IDBI was within the limits of the Agreement between the Claimant and the Respondent?
- (b) If the answer to (a) above is in the affirmative, did the respondent decide not to avail the loan after financial closure was achieved with the lending institutions? If so, what is its effect?
- XIV Whether the Respondents, having accepted the terms and conditions contained in IDBI's letter dated 1.7.2002, was estopped from taking the stand that some term(s)/condition(s) thereof were unaccomplishable?
- XV Whether the Respondent, after having accepted the terms and conditions imposed by IDBI, was under the obligation to inform the Claimant that the Respondent had decided not to take steps to comply with the same, but failed to inform the Claimant of such decision? If so, what is its effect?
- XVI Whether the Respondent directly pursued the financial offer which the Claimant was pursuing? If so, what is its effect?
- XVII Whether the Claimant is entitled to payment of interest? if so, on what amount, at what rate, and for which period?
- XVIII(a) Whether the Claimant did not fulfill its contractual obligation of arranging finances? If so, whether it did so willfully?

- (b) If the answer to (a) above is in the affirmative, whether the respondent suffered loss or damage on account of such breach by the Claimant?
- (c) If the answer to (b) above is in the affirmative, whether the respondent is entitled to payment of compensation? If so, what amount?

XIX. Whether the Respondent is entitled to refund of Rs. 1 Crore advance payment made to the Claimant under the Agreement dated 28.10.99 and any supplementary Agreement thereto?

XX Whether the Respondent is entitled to reimbursement from the Claimant of the sum of Rs.1,43,50,000/- paid to the lending banks towards upfront/application/processing fee under the Agreement dated 28.10.99 and any supplementary Agreement thereto?

XXI Whether the Respondent is entitled to payment of interest? If, so, on what amount, at what rate and for which period?

XXII Whether the Claimant (KJMC) or the Respondent (JKSPDC) is entitled to cost of Arbitration? If so, what amount?

10. The respondent who was the claimant before the Arbitral Tribunal had filed the affidavit of Mr. I.C. Jain on 1st April, 2006 as CW-1 by way of evidence. On 24th November, 2006 the petitioner cross examined CW-1 and it was continued on 25th November, 2006 and concluded on 26th November, 2006. Mr. Inderpal S. Kalra who had been summoned to appear as a witness was examined as CW-2. His cross-examination was recorded on 28th February, 2007.

11. On 30th April, 2007, respondent submitted the affidavit by way of evidence of RW-1 Mr. M.H. Teli. His Cross-examination was recorded on 4th May, 2007, 5th May, 2007, 20th July, 2007; and his cross-examination was concluded on 21st July, 2007. On 21st July, 2007, respondent's counsel

made a statement that he “does not wish to produce any other witness and his case is closed”. Thus, trial of the case was concluded.

The learned sole Arbitrator discussed the terms and conditions of the contract in detail as appeared from the award. Even all relevant clauses of the contract were reproduced in the award.

The respondent submitted written response in respect of the first six issues on 19th May, 2010, who also filed the consolidated written submissions in respect of Issue No. VII to Issue No.XXII on 15th June, 2010 and on Issue No.VII to Issue No.XXII on 17th July, 2010. After discussion of pleadings, documents and evidence adduced by both parties published the award covering 273 pages in favour of the respondent. The petitioner also filed the counterclaim before the Arbitral Tribunal and the same was dismissed.

12. The arbitration proceedings commenced on 7th December, 2004 and were concluded on 3rd July, 2012 when Award dated 3rd July, 2012 was made granting the following reliefs to the respondent:-

A. Cash compensation (Para X.2 of the Agreement) and pre-Award interest in terms of determination under Issue Nos. VII, VIII and IX read with Issue No. XIII and Issue No.XVII

(a)	Principal sum :	Rs.68,12,500/-
(b)	Pendente-lite interest : Simple interest @ 12% per annum for the period from 01.12.2003 up to 30.06.2012 (8 years 7 months)	Rs.70,16,875/-
(c)	Total (a+b)	Rs.1,38,29,375/-

B. Due fees (para X.3 of the Agreement) and pre-Award interest in terms of the Award under Issue No.XVI and Issue No.XVII

(a)	Principal sum :	Rs.2,02,50,000/-
(b)	Pendente-lite interest : Simple interest @ 12% per annum for the period from 01.02.2005 up to 30.06.2012 (7 years 5 months)	Rs.1,80,22,500/-
(c)	Total (a+b)	Rs.3,82,72,500/-

The award of A and B above will operate in the alternative.

C. Costs in terms of the Award under issue No. XXII: Total Rs.62,65,279.00.

D. Future Interest: The total sum of money to be paid under A or B, whichever is higher in terms of value of money, plus costs, shall carry simple interest at the rate of 12% per annum from the date of the Award to the date of realization.

E. If the Claimant has to incur any other or further expenses to take up the Award, the respondent shall reimburse it to the claimant; and the same shall be deemed to be costs under the Award.

13. Initially, both parties had filed the objections under Section 34 of the Act. The respondent herein filed the objections on limited point being O.M.P. No.1088 of 2012 for setting aside part of the reliefs in the award stating “the Award of ‘A’ and ‘B’ would operate in the alternative” but the respondent later on chose to withdraw its objections.

14. The petitioner’s main challenge to the Award dated 3rd July, 2012 was on the basis of grounds for the following reasons:

a) As per Issue I, despite of the finding of the Arbitrator that the respondent/claimant failed to provide the Indicative and Finalised

list of materials required as per Clause V.1, its mandate was still extended.

- b) As per Issue II, despite the respondent/claimant furnishing incomplete Power Purchase Agreements under Clause V.2, the Arbitrator holds that its mandate still extended.
- c) As per Issue IV and V, the petitioners arguments as to the conditions for financing purportedly arranged by the respondent/claimant were unaccomplishable due to the following reasons:
 - i. The mortgages as desired by the lenders required amendments by to the Transfer of Property Act by the State Legislature
 - ii. Similarly for the creation of a charge over the Consolidated Fund of the State required the passage of an appropriations bill in the State Legislature.
- d) As per Issue VI, the Ld. Arbitrator erroneously held that the petitioner and the State Government were one and the same entity and hence, could compel the passage of legislation to ensure the conditions for securing the purported financing.
- e) As to Issue Nos. VII, VIII, IX, it is submitted that:
 - i. Ld. Arbitrator erred in holding that the loan was sanctioned on 18.09.2001 as all correspondence was only indicative and no financial closure had been achieved.
 - ii. Financial closure was a pre-requisite for the Award of any money to the claimant as cash compensation and the

Arbitrator proceeds to award the Award beyond the terms of the Agreement.

iii. Despite admission by CW-1, that offer of loan only if LOI/Sanction letter issued, despite claim awarded on 18.09.2001 minutes.

f) As to Issue No. III on the extension of mandate:

i. The Mandate was extended on three occasions, lastly on 22nd February, 2003 which came after expiry of third extension on 31st December, 2002. However, the respondent/claimant failed to secure financing despite it.

ii. There were clear delays attributable to the respondent/claimant as was held in Issue No. 1. Even despite this the Ld. Arbitrator extended the mandate of the respondent/claimant indefinitely.

iii. The extension of mandate under Clause V. 1 could only be claimed after a formal notice by the respondent/claimant which has not even determined in the impugned Award.

iv. Since the respondent failed to secure debt despite three extensions compensation under Clauses X.1 and X.2 is inapplicable.

g) As to Issue Nos. X, XI, XII the Ld. Arbitrator has erred in holding that the respondent/claimant is entitled to Cash Compensation for arranging Rs. 2690 Crores for financing:

i. This money was only an indicative offer by a IDBI led consortium and based on the minutes of 18th September,

2001 which were not final. Even the total amount of funding was not mentioned.

ii. At best this was a negotiation which failed due to the onerous conditions which were impossible to comply with.

iii. The Ld. Arbitration failed to appreciate that the Sanction Process and the actual sanction of loan are different.

h) As to Issue No. XVI it is submitted that the subsequent loan from, Power finance corporation loan dated 19th January, 2005 was distinct from the loan proposals secured by the claimant and hence it was not entitled to any due fees under Clause V.3.

15. The respondent in its reply has raised the following main points by stating that the objections are untenable; no interference is required under the scope of Section 34 of the Act; the award is well reasoned; the learned Arbitrator by taking the plausible view stroke the balance between the parties under the situation and facts of the present case:-

a. The respondent submits that the petitioner has suppressed the following basic facts which go to the core of the issues in the present petition:

(i) During the course of the Mandate and thereafter till the time respondent filed the petition for reference of the dispute to the Arbitrator, there was not a single communication by the petitioner even obliquely referring to any delay or deficiency on the part of the respondent; instead, there are numerous letters/reminders from the respondent to the petitioner referring to delay on part of the petitioner;

- (ii) There were persistent delays on the part of the petitioner in furnishing necessary information, data and documents required by the lenders both at the initial and further stages of arranging of the finance;
- (iii) The financial institutions observed that the cost of the project envisaged by the petitioner was much higher as compared to other similar projects in the nearby areas. This resulted in deliberations, queries and correspondence to and fro between and amongst the petitioner, respondent and the financial institutions causing corresponding delay;
- (iv) The petitioner failed and neglected to take steps towards complying with the conditions including the condition for creation of security stipulated by the consortium of lenders led by IDBI which had been unconditionally accepted by the petitioner and in fact in the first instance, was offered by the petitioner and the J & K Government themselves as the proposed security package for the Loans.
- (v) The J&K Government was included in the list of defaulters and continued to be shown in the list of defaulters just before the time the letter of intent was issued by IDBI on 1st July, 2002 because it had defaulted on financial guarantees given by it for the loans granted by the institutions and banks in the past to certain J&K State undertakings thereby raising issues about its credibility and capability for honouring its fresh guarantee obligations;
- (vi) The petitioner concealed from the respondent and the lenders the fact that the cost of the project also included

substantial cost of dam covered by Phase II and not under Phase I of the project for which the petitioner applied for financial assistance, as discovered in deliberations of the Special Expert Committee constituted by IDBI;

(vii) The petitioner inordinately delayed acquiring of the required lands for the project and failed to get the J&K Transfer of Property Act amended to permit creation of mortgage in view of the restrictions imposed on creation of such mortgage in favour of persons or entities residing or based outside the State.

(viii) J&K Government being sponsor of the project, had itself offered to support its guarantee obligation for the loan facilities by creating a charge on the State's Consolidated Fund as the final security package but later on back tracked, dithered and developed cold feet due to impending elections in the State and political expediency;

(ix) The petitioner unduly delayed finalizing and entering into Power Purchase arrangements with State Electricity Boards and eventually executed Power Purchase Agreement only with J & K Power Development Department of the Government of J&K and that too only on 13th December, 2000;

(x) The petitioner's contention that the conditions stipulated by given financial institutions and banks were at variance with each other is not correct as most terms, though some were differently worded, were in substance the same and if at

all without admitting, there was any difference in the terms, that would have been got finally harmonized while finalizing the loan documentation in line with the terms and conditions stipulated by IDBI as the Lead institution as per RBI guidelines and established consortium practice of lenders.

(xi) The contention of the petitioner that giving first charge on the State's Consolidated Fund was unaccomplishable is incorrect and misleading. State Government guarantees are known and generally accepted as part of security for Government or Government Undertaking (PSU) projects with direct or indirect implication of charge over and/or resorting to the Consolidated Fund. The petitioner itself had created such a charge in respect of its bond issue for working capital arranged by this respondent and is barred from taking this ground. The petitioner had fully satisfied itself by obtaining legal opinions of experts including of its own Advocate General as also a former Judge of the Bombay High Court as to the feasibility and manner of creation of charge over Consolidated Fund of the State. At no time prior to the invocation of arbitration clause by the respondent did the respondent, raise any issue or take any objection to the said security condition.

(xii) The petitioner is not at all justified in saying that no security for loans was contemplated under the mandate given to the respondent. The petitioner was fully aware of the institutional/normal banking practices of insisting on security

for any loan. The said stipulation was necessarily implied and inherent and indeed, formed part of pre- commitment conditions. The petitioner and important J&K Government representatives were all along party to discussions and deliberations with the financial institutions and banks and at no point of time was it contemplated or could be expected by anyone that loans would be provided without any security or charge on assets being first in place. In case, the security was not to be provided, the petitioner at the initial stage itself would not have agreed to provide security. On the contrary, it had specifically passed the Board Resolution dated 29th July, 2002, accepting the terms and conditions including the condition as to security. The petitioner was fully aware that the furnishing of security was not only implied but was an obvious requirement under the Mandate.”

16. It is pertinent to mention here that the impugned award passed by the learned Sole Arbitrator is detailed one. The learned Arbitrator has dealt with each and every aspect of the matter who has also assigned his reasons. All the grounds taken in the present objections by the petitioner have been discussed and detailed findings have arrived. Thus, it is not necessary to repeat the evidence and arguments advanced by the parties before the Arbitral Tribunal. However, the discussion of evidence and the conclusion arrived at by the Arbitrator in para 32 to 73 are reproduced here as under :

“32. The next question for consideration is whether the financing offers pursued by JKSPDC were the offers being

pursued by KJMC or were different from those that were being pursued by KJMC for financing the project.

33. Power Finance Corporation, HUDCO, Central Bank of India, Canara Bank and Jammu and Kashmir Bank were included in the thirteen institutions banks who were participating in the consortium arrangement made by KJMC. They were five out of nine lenders named in the Common Loan Agreement. Power Finance Corporation was the largest lender in both the arrangements earlier when IDBI was the Lead Institution and later when PFC played the lead role in the consortium arrangement. The break-up of the commitment made by these five common lenders in the earlier arrangement and under the common loan agreement is given below :

Sl. No.	Particulars	Commitment in earlier arrangement discussed under Issue No.VII (supra) (Rupees in crores)	Commitment in later arrangement (Common Loan Agreement) (Rupees in crores)
1.	PFC	800	600
2.	HUDCO	300	300
3.	Central Bank of India	25	37
4.	Canara Bank	25	73
5.	J & K Bank	140	200
	Total	1290	1210

34. In the Common Loan Agreement, the share of loan sanctioned by PFC was lowered from 800 crores to 600 crores; that of HUDCO remained the same at 300 crores; but, the commitment sanctioned by the other three of the erstwhile members was enhanced in the case of J&K Bank from 140 crores to 200 crores, CBI from 25 crores to 37 crores and Canara Bank from 25 crores to 73 crores. The aggregate amount of the loan arranged by five of the common lenders comes to Rs.1210 crores.

35. In the Common Loan Agreement, there is nothing pointed out to show that Power Finance Corporation or any of the other lenders had carried out any independent appraisal of the proposal to finance the project. The Respondent has not adduced

any evidence at all to show that Power Finance Corporation or any of the other lenders had carried out independent appraisal of the proposal to finance the project. RW-1 has said nothing about it in his affidavit by way of evidence. He has been cross-examined extensively on various aspects of appraisal and he has failed to show that Power Finance Corporation or any other lender had carried out appraisal for financing the project under the Common Loan Agreement.

36. RW-I Mr.M.H.Teli on the other hand has admitted that Tata Consulting Engineers was engaged by KJMC and the detailed project report which had earlier been prepared for the project was got evaluated by Tata Consulting Services and Tata Engineering Services; and that JKSPDC was given a copy of the report on the technical and financial aspects of the project. He also admitted as correct that CARE prepared credit rating reports for the project. He was specifically asked about detailed appraisal reports prepared by IDBI and SBI; and. copies of the same supplied JKSPDC. He avoided giving direct answers on the pretext that he did not remember whether documents were officially supplied by IDBI or some documents were sent by KJMC to JKSPDC.

37. He was specifically asked whether the entire process of evaluation was redone. A suggestion was given that the evaluations by Tata Consulting Services and Tata Engineering Services credit rating reports and appraisal notes were utilized to carry the process of financing forward through the PFC led consortium. He tried to wriggle out of these pinpointed questions and suggestions by saying that the Common loan Agreement was a separate arrangement "not based on the services carried out by KJMC and "the documents referred contained information provided by the JKSPDC and the State Government. The information which was sought by PFC for the project appraisal was furnished by JKSPDC and the State Government".

38. It is apparent from the material on record, some of which was specifically put to RW-I Mr. Teli in his cross-examination, that JKSPDC and the State Government furnished to PFC

information that was gathered by KJMC and that the same was utilised to carry the process of financing of the project under the Common Loan Agreement.

39. Security of the State Government Guarantee and Mortgage of land involving amendment of the State Transfer of Property Act; and comparison of the same stipulated by IDBI with that under the Common Loan Agreement are pertinent.

40. The security conditions stipulated by the IDBI are the subject matter of discussion in detail under Issue No.V (supra). Suffice it to say, IDBI's conditions were laid out in far more elaborate and explicit terms and incorporated the entire mechanism also in the Security Package; whereas the Common Loan Agreement stipulates similar conditions in subtle and nebulous terms using different expressions in a different pattern and structure in more concise formal as discussed below.

41. In view of the ambiguous position taken by the parties at the time of oral hearing and in their written submissions on this issue parties were asked to clarify their position on this aspect of the case in the following terms :

"If the earlier financial model was different from the latter, what were the salient features of difference in the two financial models, especially regarding the Security Package and the mechanism for mortgage of the project land involving amendment of the Transfer of Property Act and the mechanism for furnishing State Government Guarantee involving a charge on the Consolidated Fund of the State"

42. The respondent's response is reproduced below:

"The main differences between two models are explained by the Respondent in its written submission filed on 03.09.2009 (56D). In the IDBI lead offer the conditions were that State Government should guarantee charge on the consolidated fund of the state and also allow lien on the

central plan allocation to the State of J & K. These conditions were absent in the common loan agreement. Regarding the security package and mechanism for mortgage of the project land involving amendment of the Transfer of Property Act, IDBI lead institutions insisted for Amendment of Transfer of Property Act, where as in the common loan agreement, it was subject to existing Act, and no amendment of T.P Act was insisted.

It is submitted that in the common loan agreement no such security was demanded or provided for the loan,"

43. Respondent has misrepresented the contents and the tenor of the Security Package Item (h) contained in IDBI's Revised LOI dated 01.07.2002 Exh R-18. The Security is the State Government Guarantee. The other stipulations are a part of the mechanism for operation of the State Government Guarantee, which involve a charge on the Consolidated Fund of the State and also a Tripartite Agreement with the lenders and J&K Bank to provide lien on all the amounts of the State Government lying with Jammu and Kashmir Bank Ltd. including amount received-as Central Plan Allocation, as discussed in detail under Issue No.V (supra). This is different from the Respondent's assertion that State Government should guarantee charge on the consolidated fund of the state and also allow lien on the central plan allocation to the State of J & K".

44. Common Loan Agreement Article III Para 3.1 stipulates "Security for Loans" including Clause (e) State Government Guarantee, in the following terms:

"(e) An unconditional and irrevocable guarantee to be furnished by the Government or State of Jammu and Kashmir in the form prescribed by the Lenders."

45. The mechanism for furnishing and operation of the State Government Guarantee is not given in the Common Loan Agreement.

46. The series of discussions with the lenders in the consortium arrangement made by the Claimant explain the mechanism for furnishing and operation of the State Government Guarantee involving a charge on the Consolidated Fund of the State for the enforcement of the State Government Guarantee. The manner in which such security had to be furnished was explained in the opinion of Mr. Justice (Retired) Dhanuka Exh CW 1/19, and the same is also recorded as the step by step process envisaged for enforcement of such a guarantee in various documents on record, which have also been discussed in greater detail under Issue No.V (supra).

47. Butterworth's "Law Relating to Infrastructure Project" explains the operation and mechanism of "State Guarantees". It is stated: "a guarantee given by the state can be effectively realised only by drawing upon the consolidated fund of a state In order to be secure while obtaining proceeds from the encashment of the state guarantee, a provision will have to be made for its contingency each year in the concerned state's Appropriation Act. In the absence of such a contingency being specified, upon the enforcement of the state guarantee by the IPP, no proceeds can be given unless is from the Contingency Fund of the state or a law is passed by the legislature of the concerned state authorising the money to be paid under the guarantee from the Consolidated Fund of the state".

48. IDBI's Security Package Item (h) required the State Government Guarantee for due repayment of the RTL etc. Provision was made in express terms for a charge on the Consolidated Fund of the State by passing necessary legislative bill to this effect under Article 79 (3) (f) of the Constitution of Jammu & Kashmir and also for passing of the Appropriation/Money Bill.

49. In the Common Loan Agreement, Security of Government Guarantee was required. Provision for the executive and legislative acts necessary for the creation, operation and the mechanism for enforcement of the State Government Guarantee were not made in express terms; but all such executive and

legislative acts and measures were inherent in the requirement of the State Government Guarantee and its enforcement by a law passed by the legislature authorising the money to be paid from the Consolidated Fund of the State in accordance with the relevant provisions made under the Constitution of Jammu & Kashmir.

50. The absence of express stipulation of such a mechanism in the Common Loan Agreement would not justify the comment: "These conditions were absent in the common loan agreement".

51. In respect of the security of mortgage involving amendment of the State Transfer of Property Act also the Respondent has unjustifiably made the comment that such a condition is absent and that no amendment of the Transfer of Property Act was required. The correct position is borne out on a proper analysis and reading of the relevant stipulations made in the Common Loan Agreement.

52. The Common Loan Agreement Article III Para 3.1 stipulates "SECURITY FOR LOANS" in Part (A), Part (B) and Part (C). Mortgage, subject to the State Transfer of Property Act, of immovable properties is regulated by the stipulations made in Part (A) (a) and also Part (B). For the present discussion, it is also necessary to read Article V Para 5.1 (ii) of the "CONDITIONS PRECEDENT TO EFFECTIVENESS" and Para 5.2 "CONDITIONS PRECEDENT TO INITIAL DISBURSEMENT". Relevant portions of the stipulations made in Article III and Article V have been extracted and the same are reproduced below:

Article III: Security

3.1 SECURITY FOR LOANS:

(A) The Loans together with all interest..... shall be secured by:

"(a) a first mortgage and charge in favour of the Lenders, subject to the Transfer of Property Act of the State Government. of all the Borrower's immovable properties pertaining to the Project both present and future."

XXX

XXX

XXX

(b) The Borrower shall make out a good and marketable title to the Project's properties to the satisfaction of the Lenders and comply with all such formalities as may be necessary or required for the said purpose.

XXX

XXX

XXX

ARTICLE V: EFFECTIVENESS OF THE AGREEMENT AND CONDITIONS PRECEDENT

5.1 CONDITIONS PRECEDENT TO EFFECTIVENESS

"The obligations of the Lenders' to make available the loan under this Agreement shall be effective upon the Borrower complied with the conditions set forth below in a manner satisfactory to the Lenders:"

XXX

XXX

XXX

"(ii) The Borrower has provided the evidence that all the amendments; as suggested by the Lenders/Lenders' Counsel in J&K Transfer of Property Act other relevant Acts/Laws of J&K and notifications affecting the right of the Lenders as mortgages, has been incorporated in such Acts laws and notifications by the State Government"

XXX

XXX

XXX

CONDITIONS PRECEDENT TO INITIAL DISBURSEMENT

The obligation of the Lenders to make any disbursement shall be subject to the Borrower establishing that the

conditions set forth below have been fulfilled in a manner satisfactory to the Lenders except those, the fulfilment of which has been waived or deferred by the Lenders.

XXX

XXX

XXX

b) Project Site

The Borrower has acquired and obtained possession of the required land as may be necessary for the Project on terms satisfactory to the Lenders.

53. Respondent has suppressed the above-mentioned stipulations made in the Common Loan Agreement and has picked up in isolation only Article III Part (A) Clause (a). Respondent has also twisted Out of proper context the expression "subject to the Transfer of Property Act of the State Government" to develop the proposition and advance the misleading interpretation: "it was subject to existing Act, and no amendment of T.P. Act was insisted".

54. The above-mentioned stipulations in Article III Part (A) read in conjunction with Part (B) stipulated that the Borrower shall make out a good and marketable title to the Project's properties and comply with all such formalities as may be necessary or required for the said purpose, which allude to the inherent requirement of acquisition, mutation and transfer of the title of land etc., without expressly providing for compliance with the mechanism, by using the nebulous expression "formalities", necessary and required by law for the said purpose of furnishing security by mortgage of "immovable properties pertaining to the Project both present and future".

55. Common Loan Agreement Article V Para 5.1 uses the nomenclature "CONDITIONS PRECEDENT TO EFFECTIVENESS" of the Agreement, which is similar to the expression "Pre-commitment Conditions"; and Para 5.2 uses the nomenclature "CONDITIONS PRECEDENT TO INITIAL

DISBURSEMENT", which is similar to the other expression "Pre-disbursement Conditions" used in the Agreement Exh C-3.

56. Article V Para 5.1 stipulated that the obligations of the lenders to make available the loan shall be effective upon the Borrower complying with the conditions set forth in Clause (ii) requiring "the evidence that all the amendmentsin J&K Transfer of Property Act affecting the right of the Lenders as mortgages" had been "incorporated in such Acts/laws and notifications by the State Government". This was a condition precedent that required in clear terms amendment of the Transfer of Property Act for effectiveness of the agreement. It is just the opposite or the proposition that the mechanism for mortgage under the Common Loan Agreement was subject to existing Act, and no amendment of T.P. Act was insisted".

57. Acquisition mutation, transfer of title and possession of the land and amendment of the Transfer of Property Act were inherent conditions, without laying down in express terms the mechanism required by the law for mortgage of all the immovable properties pertaining to the Project Stipulated as secularity conditions under the Common Loan Agreement.

58. In respect of security by mortgage of all the immovable properties pertaining to the project involving amendment of the Transfer of Property Act, it is misleading and wrong to say: "These conditions were absent in the common loan agreement" or "that in the common loan agreement no such security was demanded or provided for the loan".

59. On this basis, it cannot be said that the financing offers directly pursued or revived by JKSPDC were different and distinct from those that were being pursued from the sources finalised by KJMC.

60. Liberalisation of the policy for financing infrastructure projects in the power sector is evident from series of circulars and guidelines issued by the Reserve Bank of India (RBI) to banks for participation of banks together with financial

institutions for financing such projects, which are the subject matter of discussion under various issues including Issue No.VI and Issue No.XIV (supra).

61. CW-2 Mr. Inderpal S. Kalra has stated in his unchallenged deposition mentioned above inter-alia, that various banks also besides financial institutions were forthcoming to lend to power projects in pursuance of a substantial change in the power sector scenario. He has explained, more particularly, that enactment of the Electricity Act, 2003 had opened up many new opportunities whereby power could be transmitted by any State to other State or from one generator to other distributing company. The Power Grid Corporation was taking up large projects. It made it easier for transfer of power to other States. This is the reason "why all these factors have actually helped in more investment coming into the power sector which speaks of the fact that the risk profiling of the power projects have also undergone change".

62. RW-I Mr. M.H. Teli was specifically asked in his cross-examination about the substantial reform in the power sector. Questions and a suggestion put to him and his answers depict his evasive response on this aspect of the case also.

63. CW-2 has deposed about the Minimum Term Lending Rate (MTLR) also. He has stated: "In 1999 it was 12.5% then it came down to 10.25% around 2004 and has gradually increased to 12% presently". The gradual increase of MTLR to 12% "presently" is relatable to the date when his deposition was recorded i.e. 10.02.2007. This aspect also has been left without any challenge in his cross-examination. This is proof of the fact that interest rate also had come down during the period under discussion.

64. In any event, difference in the rate of interest for repayment of the loan would not in any way disprove the facts which have been proved by preponderance of the evidence discussed above that the Respondent had further pursued or

revived the financing offers that were being pursued by KJMC from the sources finalised by KJMC .

65. There is no substance in the argument developed by Mr. Thomas that KJMC is not entitled to any compensation under Para X.3 of the Agreement as the period of mandate of the Claimant had expired on 31.12.2002 and the Common Loan Agreement was signed almost two years after expiry of the contract with the Claimant.

66. JKSPDC had taken steps for getting financial support from the Central Government. KJMC had assisted JKSPDC in meetings with the concerned officers of the State Government and the Central Government and in making a presentation to the Central Government in May 2003. After obtaining additional Central Assistance, JKSPDC further pursued or revived the financing offers that were being pursued from the sources finalised by KJMC, without keeping KJMC in close confidence, JKSPDC executed the Common Loan Agreement dated 19.01.2005.

67. Para X.3 stipulates operation "any time during or after this mandate". It would apply to the envisaged contingency arising in a situation even after expiry of the period of the mandate. Further it stipulates "In such a case, all obligations of JKSPDC with corresponding obligations of JKSPDC under the terms and conditions of this Agreement shall be deemed to have come in force". Therefore, the argument developed to exclude application of the provisions made in Para X of the Agreement because the Common Loan Agreement was signed almost two years after expiry of the extended period of the mandate, described as "end of the contract", cannot be accepted.

68. There is no substance in the plea raised on behalf of the Respondent that no case has been made out by the Claimant for grant of compensation as no notice of breach was given under Para X.I and Para X.2; and, consequentially, the Claimant is not entitled to payment of fees under Para X.3 of the Agreement.

69. JKSPDC had failed to furnish information to KJMC about security; it had also failed to extend the period of the mandate; and thereby committed breach of its obligations and responsibilities discussed under Issue No.III and Issue No.V (supra). Subsequent to such breach having occurred after the submission of the complete application to the lead institution, namely IDBI, the contingency had arisen which is the subject matter of the present discussion and the same is actionable under Para X.3 of the Agreement.

70. The requirement of notice of the breach under Para X.I and Para X.2, if at all, would operate if the contingency envisaged under Para X.3 also had arisen at any time during the period of mandate. That requirement is not applicable in the present situation where the contingency has arisen after expiry of the period of mandate.

71. In terms of Para X.3 of the Agreement Exh C-3, on successful completion of the financing arrangement under the Common Loan Agreement, KJMC is entitled to its due fees less the fees already paid by JKSPDC being a maximum of 0.25% of the amount arranged. (Exh C-20 Supplemental Agreement had reduced the quantum of fees from the maximum of 2.5% to 0.25% with a cap of Rs.700 lacs).

72. On conservational view, it will be appropriate to calculate the quantum of "due fees" on the basis of the aggregate amount of Rs.1210 crores arranged by five of the common sources under the Common Loan Agreement.

73. Claimant is entitled to due fees amount of Rs.3,02,50,000/- (0.25% of the amount of Rs.1210 crores); less Rs.1,00,00,000/- already received by it. Claimant will be paid "due fees" balance amount of Rs.2,02,50,000/- (Rupees Two Crores Two Lacs Fifty Thousand Only)."

17. Similarly, on issue of interest in paras 1 to 12, the following conclusion is arrived. The same read as under:-

“Issue No.XVII: Interest

1. Grant of interest is regulated by Section 31 Sub-section 7 of the Arbitration and Conciliation Act, 1996. It is reproduced below:

Section 31 (7):

“(a) Unless otherwise agreed by the parties where and in so far as an arbitral award is for the payment of money the arbitral tribunal may include in the sum for which the award is made interest at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.”

2. Claimant has prayed for grant of interest at the rate of fifteen per centum per annum; whereas Respondent has claimed in its counter-claim interest at the rate of eighteen per centum per annum.

3. The agreement is silent as to payment of interest. Claimant made a demand for release of fees by notice dated 14.11.2003 Exh C-47.

4. Claimant has been found entitled to payment, less the fee amount of Rs.1 crore already paid by the respondent, balance amount of cash compensation Rs.68,12,500/- (Rupees Sixty Eight Lacs Twelve Thousand and Five Hundred Only) under Issue No XIII (c); and for the payment of balance amount of due fees Rs.2,02,50,000/- (Rupees Two Crores Two Lacs Fifty Thousand Only) under Issue No. XVI (supra).

5. The tribunal considers it appropriate, in the facts and circumstances of the case, to grant and include in the aforesaid sums of money interest at the rate and for the period given below.

6. CW-2 Mr. Inderpal S. Kalra has stated in his unchallenged deposition about the Minimum Term Lending Rate (MTLR) in 1999 and a part of the pendente lite period from 2004 to 10.02.2007 when his statement was recorded: "In 1999 it was 12.5% then it came down to 10.25% around 2004 and has gradually increased to 12% presently".

7. The Common Loan Agreement Para 2.3 (i) (a) stipulated that the borrower shall pay interest to each of the lenders the principal amount of the Loan disbursement indicated in Schedule IV. Schedule IV stipulated applicable rate of interest on the outstanding amount payable to power finance corporation and HUDCO as per their policy notified from time to time "presently" 8.75% per annum. J&K Bank 9.75% per annum (fixed) Central Bank of India 10.5% per annum (fixed), Canara Bank 10.5% per annum (floating). Provision was also made in Para 2.3 (ii) for payment of penal interest in case of default in payment of interest and principal to Power Finance Corporation, Central Bank of India, Canara Bank, Jammu and Kashmir Bank at rate of 2.0 % per annum and to HUDCO at the rate of 3.0% per annum over and above the applicable rate indicated in Schedule IV. These provisions indicate fluctuating rate of interest from time to time and stipulation of interest by the above-mentioned lenders at variable rate in a broadband from 8.75% to 10.5%, with penal interest in case of default in payment also at the rate of 2 or 3% over and above the applicable rate in January 2005.

8. Mr. Kalra's deposition in respect of a part of the pendente lite period around 2004 is corroborated by the stipulation made for payment of interest in the Common Loan Agreement dated 19.01.2005. There is nothing pointed out to discount his deposition in respect of the later part of the pendente lite period around 2007.

9. In view of the nature of the transaction, the rate of interest claimed by the rival parties and, the evidence showing variable rate of interest from time to time, award of simple interest at the uniform rate of twelve per centum per annum appears reasonable. The same rate of interest would be applicable for the pre-award period and the post-award period.

10. In respect of the aforesaid sum of money for payment of compensation under Issue No.XIII(c), simple interest shall be paid for the period from 01.12.2003, that being the first day of the month after the date of the demand notice Exh C-47, up to 30.06.2012.

11. In respect of the “aforesaid Sum of money payable under Issue No. XVI, the cause of action for payment of due fees arose on 19.01.2005 "on successful completion of the financing arrangement under the Common Loan Agreement". Simple interest shall be paid for the period from 01.02.2005, that being the first day of the month after execution or the Common Loan Agreement, up to 30.06.2012.

12. Further, the total sum of money directed to be paid by the award shall carry future interest at the uniform rate of simple interest of twelve per centum per annum from the date of the award to the date of payment by the Respondent to the Claimant, under Section 31 of the Arbitration and Conciliation Act, 1996.”

18. While rejecting the counter-claim of the petitioner, the learned Arbitral Tribunal in paras 31 to 45 has arrived at the following conclusions. The same are read as under:-

“31. Refundable advance of Rs.100.00 lacs was paid by JKSPDC to KJMC against a bank guarantee; and, it was stipulated that the balance of the total fees, after setting off the advance paid, will be paid on receipt of the 1st tranche of the loan disbursement, in terms of Para VII of the Agreement Exh C-3. Later, efforts made by KJMC had reached the final stage of the financial arrangement for the requisite loan to be sanctioned; and, at that stage, parties had agreed to release the bank guarantee furnished by KJMC against Rs.100.00 lacs already paid to KJMC as advance by virtue of the 1st Supplementary Agreement dated 20.03.2001 Exh C-20.

32. JKSPDC has failed to establish the allegation that KJMC had failed in complying with its contractual obligations of arranging the required facilities for financing the project.

33. This is not a case where the agreement was discovered to be void or the control became void.

34. In the present case, JKSPDC did not even terminate the agreement; and, it failed to prove even the dispatch. much less delivery of the notice dated 09.08.2004 alleged to have been sent by ordinary post for making the demand for refund of the advance (Mark: A') which cannot be read in evidence.

35. It is unnecessary to go into the intricacies of the other arguments advanced by Mr. Sawhney on behalf of KJMC as the bank guarantee furnished by KJMC had been released. It may however be noted that KJMC did not even plead in its Reply, and it did not raise the issue for trial, that the claim for refund was barred by time.

36. JKSPDC has failed to establish its claim for the refund of Rs.100 lacs paid to KJMC under Para VII of the Agreement Exh C-3.

37. In any event, after setting off the advance of Rs.100 lacs paid by JKSPDC to KJMC; under Issue No.XIII(c) (supra), KJMC has been found entitled to cash compensation" balance payment of the principal sum of Rs.68,12,500/- in terms of Para X.2 of the Agreement Exh C-3. Likewise, are setting of the advance of Rs.100 lacs paid by JKSPDC to KJMC; under Issue No.XVI (supra). KJMC has been found entitled to "due fees" balance payment of the principal Sum of Rs.2,02,50,000/- in terms of Para X.3 of the Agreement Exh C-3.

38. Issue No. XX has been cast on JKSPDC's claim for reimbursement of the payment made by it to IDBI (Rs.60 lacs), SBI (Rs.62.50 lacs), PNB (Rs.10 lacs), Canara Bank (Rs.10 lacs), HUDCO (Rs.1 lacs) aggregating to the total sum of Rs.143.50 lacs towards upfront/application/processing fee. JKSPDC has pleaded that it had paid these charges to the lenders on the understanding that KJ MC would arrange the required loan facility. JKSPDC could not avail any loan which was to be arranged by KJMC JKSPDC is entitled to recover the same from KJMC as it failed in its contractual obligation to arrange the required loan facility.

39. Agreement Para IV.4 stipulated that the appraisal charges, also described as processing charges, "will be borne by JKSPDC". Processing charges have also been described at several places in the material on record as upfront /application /processing fee. JKSPDC itself was bound by the agreement to pay these charges for processing its application for financing the project. JKSPDC was bound in terms of the agreement and the usages of the trade applicable to the transaction to pay these charges to the financing institutions and banks upfront.

40. JKSPDC was bound in terms of the agreement and the usages of the trade applicable to the transaction to pay these charges to the financing institutions and banks upfront. KJMC was not the person to pay the same.

41. The material proceed on record show that the financing institutions and banks named above besides several other participating institutions and banks had actually processed JKSPDC's application and had also issued approval/sanction letters/Lols corresponding to their respective commitments in pursuance of the consortium arrangement made by KJMC. JKSPDC had failed to pay to various other financing institutions and banks processing charges upfront fee. This was one of the various defaults on the part of JKSPDC due to which the arrangement for financing the project got delayed. KJMC had duly discharged its obligations under the agreement; but financial closure got delayed and could not be achieved due to the delay and failure on the part of JKSPDC to fulfil the pre-commitment conditions for furnishing security. JKSPDC itself was responsible for not availing the loan arrangement made by KJMC during the stipulated period of the mandate. All this is evident from the earlier discussion on various issues including Issue No.V, Issue No.VII, Issue No.IX, Issue No.X, Issue No.XI, which was transposed and merged with certain modifications into Issue X III and Issue No.XV (Supra).

42. It is also pertinent to note, ultimately, Canara Bank had made the commitment to lend Rs. 73 crores and HUDA had agreed to contribute Rs 300 crores; and, these two were among the five common lenders out of the total nine lenders in the

Common Loan Agreement Exh R W 111, which is the subject manner of discussion under Issue NO.XVI (Supra).

43. JKSPDC is not entitled to reimbursement of the sum of Rs. 143.50 lacs or any other sum of money from KJMC on account of payment made by it some of the financial institutions and banks towards upfront application Processing fee.

44. Issue No.XXI pertains to interest on the total amount of Counter-claims made by JKSPDC. JKSPDC has claimed payment of interest from KJMC @ 18% per annum on the refund amount of @ Rs.100 lacs from 01.01.2000 and for payment of all the other claims from 06.01.2005 till payment.

45. JKSPDC is not entitled to payment of money on account of any the Counter claims as discussed under Issue No.XVIII, Issue No.XIX and Issue No.XX. JKSPDC is not entitled to the award of interest on the Counter-claim under Issue No.XXI.”

19. Now, the question before this Court is whether any interference in the impugned Award is called for under the scope of Section 34 of the Act. The respondent has provided the chart in order to depict the case of the parties before the Arbitral Tribunal and the findings arrived by the Arbitral Tribunal thereon. The same speaks for itself. The details are given as under:-

Issue No.	Case of Claimant (Respondent herein) before the Arbitral Tribunal	Reply of petitioner herein	Finding of the Arbitral Tribunal
I.	Delays in financing had taken place for the reason that the information with regard to the financial data and documents was not supplied by the petitioner on time. The respondent had handed over the indicative list of initial information, data and documents to be supplied at the time of negotiations for its appointment. Final list was to be prepared as mutually agreed. IDBI also had	The respondent failed to supply the indicative list or the final list of the required information or documents.	It was the obligation and responsibility of the petitioner to provide on a timely basis all project information and documents. It was not established that indicative list was supplied. The indicative list was relevant to the initial stage of appraisal. At the later stages, the requirement of essential information necessarily depended upon the subsequent developments which may not be envisaged at the initial stage of

	furnished the list of information/documents to be given by the petitioner vide its letter dtd. 15.07.1999		arrangement. The evidence on record shows delay on the part of the petitioner in supplying information and documents that were required by IDBI for appraisal of the project. As a result of delay at the initial stage, the period of mandate was extended upto 30.09.2001 and such delay will have no further effect.
II	The respondent had complied with its mandate to draft the PPA and to assist the petitioner in negotiations with power purchasers. The petitioner was responsible for the delay in finalization of the PPA. Delay in getting the PPA finalized hindered the process of appraisal and delay the sanction of loans by financial institutions and banks.	The draft PPA was not complete. Schedule Defendants thereof was to be got completed from TCE and four other Schedules A, C, F and G were yet to be completed.	The respondent had proved that it had taken the required steps for the preparation of the draft PPA ; it had given the draft PPA to the petitioner which was approved by the board of the petitioner forwarded to the potential power purchasers. Financial appraisal was delayed for want of finalization of the PPA by the petitioner and the PP A was finally signed by the Petitioner with JKSPDD only on 13.12.2000. As a result of the Respondent was entitled to extension of the Mandate and the same was extended upto 30.09.2001. Under Issue III, obligation to promptly supply information and documents as per Clause V was not restricted to the Indicative or final List or initial stage but extended also to later stages of arrangement to "information without which the progress of the assignment will be held up" and "information and documents as will become available during of the assignment" and "all developments". This was breached by the Petitioner and it was bound to grant suitable extension. Respondent was entitled to further extension. Assistance of Respondent for representation was sought 4 months after 31.12.2002
IV, V & VI	The respondent had accepted the mandate on the basis of assurance that a lien would be given on the State	Mandate did not include any security condition for the loans to be arranged. Furthermore,	The terms of the mandate, the scope of work and the stipulated modes and terms of financing clearly indicated that

	Consolidated Fund as security for the loans. Mr. Justice Dhanuka, Rtd. Judge of Bombay High Court had opined that a lien on the State Consolidated Fund is Constitutionally valid provided the Procedures laid down as indicated by him were followed. Though the Petitioner and the J & K Govt. had unequivocally given their consent thereto, they later backtracked. This resulted in non-compliance of the loan condition for the financial closure delay in financing also took place because of the noncompliance with the conditions regarding transfer of Project land for creation of mortgage as security for the loans. The Petitioner had earlier provided first charge on consolidated fund of State for its Bond Issue during 1999 to 2003	it was beyond its power to give the first charge on the consolidated fund for which legislative approval was required. The condition, therefore, was unaccomplishable.	security for the loan was tacitly understood as a part of the agreement. It was an inherent and intrinsic part. Compliance was necessary to complete the pre-requisite formalities for arrangement of the loans. Failure on the part of the petitioner to furnish security rendered it impossible for the respondent to perform remaining obligations. Progress of the assignment was held up due to breach on part of the petitioner of its obligations under the mandate. The petitioner failed to prove that creation of charge over the consolidated fund was unaccomplishable. Legal opinion also established that the condition for creation of lien on the state's consolidated fund was not unaccomplishable. Petitioner failed and neglected to take necessary steps for fulfilment of pre-commitment conditions for creation of security namely, mortgage over the project land involving amendment of the Transfer of Property Act and security by way of Govt. guarantee involving a charge over the Consolidated Fund of the State. This hindered the process of financing arrangement and entitled the Respondent to further extension of time. Failure to extend Mandate would also be actionable under Para X.1 & Para X.2 of the Agreement.
VII, VIII & IX	Respondent performed its part of obligations under the Agreement; it had tied-up sources/raised funds with the consortium of financial institutions and banks. In the consortium meeting (i.e. HIM) held on 18-9-2001 the loans were duly tied-up as	As against the estimated debt requirement of Rs.2800 crores claimant could arrange loan sanction letters for Rs.350 crores only from HUDCO Rs.300 crores; Central Bank Rs.25 crores; and PNB Rs.25	The respondent had arranged and got sanctioned reasonable facility of the total amount of Rs.2690 crores. Arrangement, allocation, commitment, approval and sanction are various steps taken in process of sanction. After fulfilment of pre-commitment conditions,

	follows: IDBI (Rs. 300 Crores), ICICI (300 Crores), PFC (Rs. 800 Crores), SBI (Rs.150 Crores subsequently increased to Rs. 200 LIC (Rs. 300 Crores), GIC (Rs. 100 Crores) and J&K Bank (Rs. 140 Crores) = total Rs. 2140 Crores. Further loans to the extent of Rs. 500 Crores were also arranged by the Claimant from: Canara Bank Rs. 25 Crores, PNB Rs. 25 Crores, Bank of Baroda Rs. 25 Crores, Central Bank Rs. 25 Crores, HUDCO Rs. 300 Crores and HDFC Rs.100 Crores, and additional Rs.50 crores from SBI. Cost of Project appraised at Rs.3810 crores fell to Rs.3441.6 crores due to fall in interest rates and total debt requirement to Rs.2592.6 crores.	crores. The sanction letters issued by IDBI, SBI and Canara Bank were only in-principle approvals. Power Finance Corporation only short listed the proposal of assistance upto Rs. 615 Crores subject to detailed appraisal and did not reach the sanction stage. As per appraisal the total debt requirement Rs.3056 crores,	process of tie-up of total debt facility requirement will follow paving the way for final offer for financial closure in terms of the Agreement. Project cost or total debt requirement are not specified in Agreement. Petitioner has not raised dispute re steps in arranging and focused on failed to get total facility sanctioned. On review of documentary and oral evidence, total debt facility required to be arranged was Rs.3056 Crores, a consortium was formed, Claimant made arrangement for reasonable facility of Rs.2690 crores. Project requirement schedule was not laid down.
X, XI, XIII	Financial closure got delayed and could not take place as the Petitioner backed out of its obligation to fulfill the conditions regarding the security, package and also delayed furnishing of requisite information and documents and paying upfront processing fee to lenders. Had the Petitioner complied with the terms of security package, got the land transferred in its name for creation of mortgage and provided charge on the consolidated fund, the lenders would have disbursed the loan without hesitation.	Respondent could not comply with its contractual obligations and, thus Petitioner did not renew the Mandate which had already been extended from time to time.	Petitioner failed to establish on material on record any deficiency or demur at any stage in the service for arrangement rendered by the Respondent or any breach of obligations on part of the Respondent. Facts and circumstances and evidence noted under the various issues, from the beginning of the assignment running through the entire period till the end of December 2002 show that the respondent's efforts brought about a stage where financial closure would have followed had the petitioner taken the necessary steps and complied with pre-commitment conditions laid down in IDBI's revised LOI dated 1.7.2002 (Exh.R-18). Financial closure delayed and was not achieved

			on account of above mentioned defaults on the part of the Petitioner and breach of obligation under Para V of the Agreement.
XIV & XV	Petitioner itself proposed and then unconditionally accepted the condition that it would furnish security, inter alia by creating a first charge on the consolidated fund of the State and mortgage over the project land. Respondent worked assiduously on this premise. Petitioner was estopped from taking the stand that terms and conditions so accepted were un-accomplishable. Petitioner accepted IDBI's revised letter of intent dated 1.7.2002 (Exh. R-18) by resolution of its Board of Directors 29.7.2002 (Exh. C-37) & communicated the same to IDBI by letter dated 28.8.2002 (Exh.CW-1/14). Terms and conditions stipulated by IDBI included State Government guarantee and security involving the obligation of the State Government to create a charge on the Consolidated Fund of the State. The Respondent sent various communications to the petitioner who did not respond to any of them and failed to keep the Respondent posted with developments related to or having a bearing on the financing arrangement.	I Stipulation of charge on Consolidated Fund violated the prohibition of RBI against sanction of term finance on security of budgetary allocation In RBI circular dated 22.12.95 which, had the force of law. Estoppel cannot operate against the law.	Petitioner had not raised any objection regarding accomplishability of conditions of security at any time before commencement of the arbitral proceedings. The argument advanced on basis of RBI Circular dated 22.12.95 is rejected for the reason that collateral security stipulation for State Government Guarantee involving charge on Consolidated Fund of the State was not hit by the prohibition envisaged in para 3(a) of RBI circular dated 22.12.95. The backtracking on assurance by conveying to the lenders unwillingness to furnish the charge on the Consolidated Fund of the State discouraged the lenders. This was a significant development and the Petitioner was under obligation to keep the Claimant posted with it at the earliest without losing any time. Petitioner failed to perform its obligation and committed breach of para V.3 of the Agreement which disabled the Claimant in proceeding further with the matter. The breach entitled the Respondent to payment of compensation under para X.1 and para X.2 of the Agreement.
XVI	The Petitioner pursued offers which were being pursued by the Respondent without knowledge of the Respondent and without involving it. The Petitioner entered into a common loan	The financing arrangements made by the Respondent had lapsed and it was open to the Petitioner to adopt any financial model it liked once the offers had	The Petitioner has misrepresented the contents and tenor of the security package under the second consortium. The second consortium did stipulate a State Government guarantee

	agreement dated 19.1.2005 with lenders, five of whom namely, PFC, HUDCO, Central Bank, Canara Bank, J&K Bank were the same with whom the Respondent had pursued financial offers under the consortium led by IDBI. This was in breach of para X.3 of the Agreement (Exh. C-3) and Respondent was entitled to due fees in terms thereof at 0.25% of the amount so arranged.	lapsed. The Respondent was not entitled to any fees under the said para X.3 once the Mandate had lapsed. Loans sanctioned under the latter consortium were different and more favourable.	the enforcement of which has like consequence as that of a charge on the Consolidated Fund of the State. The security package was not materially different. Five of the institutions and banks pursued by the Respondent were part of the second consortium. Appraisal report prepared by IDBI for the first consortium was utilised by the Petitioner in the second consortium. It is established that the Petitioner pursued offers of sources as were pursued up by the Respondent to the extent of Rs.1210 Crores. The Respondent was therefore entitled to due fees of Rs.3,02,50,000 (@ 0.25% of Rs.1210 Crores) being the amount raised by the Petitioner from sources pursued by the Respondent in terms of para X.3 of the Agreement (Exh. C-3).
XVII	Respondent claimed interest @ 15% per annum on Amount awarded	Respondent is not entitled to any amount and question of interest does not arise.	Respondent is entitled to simple interest at 12% p.a. for the period from 1.12.2003 upto 30.06.2012. The counter claim made by the Petitioner for refund of advance (Rs.1 Crore), reimbursement of expenses (Rs.1,43,50,000), damages Rs.200 Crores Total amount of Rs.202,43,50,000/- together with interest at the rate of 18% p.a. stands rejected as discussed under Issue Nos.XVIII, XIX, XX & XXI (consolidated below).
XVIII, XIX, XX & XXI	Respondents denied the counter claims on the ground that the alleged delays or losses are due to non fulfilment of commitments regarding security package and non compliance of conditions stipulated by financial institutions and banks for disbursing the loans. Respondent performed its obligations by arranging	Respondent could not reach even the stage of getting requisite sanction letters issued following which signing of loan agreement and other formalities could have been fulfilled leading to stage of disbursement. Petitioner prefers counter claim for damages	The petitioner has failed to prove allegations against the Respondent and is not entitled to the payment of Rs.200 Crore or any other sum. Petitioner also not entitled to refund of Rs.1 Crore as it failed to establish that the Respondent had failed in complying with its contractual obligations. Counter claims were also otherwise time

	loans with various financial institutions and banks which could not be disbursed exclusively due to the failure of the Petitioner is not complying with the pre-commitment conditions stipulated by the lenders and unconditionally accepted by the Petitioner. It also stopped communications with the lenders and the Respondent and pursued financial offers from lenders five of whom were those with whom the Respondent had pursued loan offers.	caused on account of delay/failure of the Respondent in arranging finance, refund of advance and reimbursement of expenses and payment of interest on the aforesaid amounts. The aggregate counter claim amounted to Rs.202,43,50,000/- with interest @ 18% p.a.	barred. Counter claim relating to payments made by the petitioner to various institutions and banks towards upfront/ application/processing fee, are rejected as the Respondent itself was bound to make those payments.
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20. From the above, it is clear that all the grounds raised in the present petition have already been dealt with by the Arbitral Tribunal and the same are covered. Most of the grounds relate to and seek to challenge findings of fact arrived at by the learned Arbitral Tribunal after a detailed and thorough review and consideration of the documentary and oral evidence on record.

21. With regard to the findings of fact that the petitioner accepted the security condition of lien/charge on the consolidated fund of the state and other terms and conditions and the same were not unaccomplishable pertaining to findings as to norms and practices of consortium lending for projects as reflected, *inter alia*, in RBI Circulars and factual sequence of events, in particular, sequential developments in consortium meetings and sequence in which letters of sanction/letters of intent came to be issued by the various banks/institutions.

22. The findings of fact in light of consortium norms, procedures and practices and, in particular to the paramount import and effect of decision

taken at a Head of Institutions Meeting ("HIM") to go ahead and finance a project and on that basis and in furtherance thereof, allocate quantum of funds/ facilities to be provided *inter se* the financial institutions/banks. The findings are not contrary to "plain reading of the Agreement" or to intention of parties nor to the claim or pleadings of the respondent.

23. With regard to the finding of fact that the petitioner committed breach of Clause V.3 by failing to keep the respondent posted of developments having a bearing on the financing arrangement at the earliest without losing time, the same is based on consideration of evidence on record and sequence of events.

24. The petitioner had, in fact, further pursued financing offers from sources which were being pursued by the respondent and availed the loans from them. The findings are based on evidence on record and on fair and reasonable examination and assessment of terms and conditions of the financing arrangement and are perfectly justified.

25. The petitioner has challenged the interpretation placed by the arbitral tribunal on the provisions of the agreement. It is settled law that interpretation is a matter which falls within the purview of the arbitral tribunal and the court will not interfere therewith except where the interpretation rendered is so perverse or absurd that it was not possible for any person with a rational mind to have taken the view taken by the Arbitral Tribunal. The interpretation and effect of clause V be read as a whole along with Clause XV of the Agreement.

26. The petitioner has wrongly stated by stating in Ground B that the Arbitrator held that the respondent had delayed finalization of the PPA. In

fact, the finding is quite contrary and is to effect that the petitioner had delayed finalisation of PPA and the respondent was entitled to extension. The interpretation of Clause V and XV, which are the provisions of the Mandate Agreement, considering that the same relate to arranging loans from financial institutions and banks for a mega infrastructure project, has been reasonably construed by the Arbitral Tribunal.

27. With regard to consortium norms and practices and interpretation of the Mandate Agreement in the context of its being one relating to arranging of finance, the Arbitral Tribunal upon consideration of the entire oral and documentary evidence on record found as a fact that the process was obstructed and the loan agreement could not be signed due to defaults of the petitioner itself.

28. In relation to interpretation of clauses of the Agreement providing for extension of time and the effect thereof, the Arbitrator rightly found that prolonged delays on the part of the petitioner entitled the respondent to extension of time as a matter of right and defaults on part of the petitioner eventually prevented financial closure. The respondent sent numerous reminders and pointed out delays from time to time.

29. The petitioner has submitted that the Arbitral Tribunal made out a new case for the respondent by granting compensation under Clause X. The said argument has no force as it is the case of the respondent that the petitioner unduly delayed steps required to be taken by it and thereafter eventually defaulted in doing so and thereby prevented financial closure. The respondent claimed full fee. The Arbitral Tribunal, however, found

that the respondent would on account thereof be entitled only to compensation under Clause X and not to full fee.

30. With respect to award of costs which have been rightly awarded on basis of actual expense reasonably incurred during 8 years of proceedings, the Arbitrator had on several occasions during the prolonged proceedings cautioned both the parties that costs would be assessed on realistic terms in light of expenditure incurred. The costs were established by the respondent. All the contentions of the petitioner in this regard are baseless and without any force as the learned Arbitrator Tribunal has already dealt with the said submissions which do not require any interference within the scope of Section 34 of the Act.

31. From reading of Clause X.2. and X.3. of the Agreement it is clear that the same are not intended to operate in the alternative. The line “The award of A and B above will operate in the alternative” stands out in isolation on its own without there being any reason assigned there for.

The same is clearly severable and liable to be deleted as prayed for in the limited objection filed by the respondent herein vide its separate petition under Section 34 of the Act.

32. The arbitrator in the present case has taken the rationale view after hearing both the parties, after considering the evidence and by assigning the cogent and clear reasons which are apparently reasonable, logical and in unbiased manner while striking the balance on merit. None of the finding is unreasonable nor is there any infirmity in the award published. Thus, no ground is made out for interference.

33. In view of the foregoing, the objections are dismissed. All pending applications also stand disposed of.

34. No costs.

(MANMOHAN SINGH)
JUDGE

MAY 09, 2016

