IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

LPA Nos.166 and 167 of 2022.
Reserved on :15.07.2024.
Date of Decision:18.07.2024.

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1. LPA No.166 of 2022

The State of Himachal Pradesh through its Secretary (Power), Government of Himachal Pradesh.

.....Appellant.

Versus

M/s Adani Power Limited .....Respondent.

2. LPA No.167 of 2022

M/s Adani Power Limited .....Appellant.

Versus

The State of Himachal Pradesh through its Secretary, Ministry of Power, Government of Himachal Pradesh.

.....Respondent

Coram

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

The Hon'ble Mr. Justice Bipin Chander Negi, Judge.

Whether approved for reporting?[1] YES

For the Appellant(s): Mr. Anup Rattan, Advocate General with Mr. Rakesh Dhaulta, Mr. Pranay Pratap Singh, Additional Advocates General and Mr. Arsh Rattan, Deputy Advocate General, for the appellant in LPA No.166 of 2022.

[1] Whether reporters of Local Papers may be allowed to see the judgment? Yes.

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	Mr. Vikram Nankani and Mr. Neeraj Gupta, Senior Advocates alongwith Mr. Ajeet Pal Singh Jaswal, Mr. Vedhant Ranta, Advocates and Mr. Malav, Advocate (Through Video Conferencing), for the appellant in LPA No.167 of 2022.
For the Respondent(s):	Mr. Vikram Nankani and Mr. Neeraj Gupta, Senior Advocates alongwith Mr. Ajeet Pal Singh Jaswal and Mr. Vedhant Ranta, Advocates, for the respondent in LPA No.166 of 2022. Mr. Anup Rattan, Advocate General with Mr. Rakesh Dhaulta, Mr. Pranay Pratap Singh, Additional Advocates General and Mr. Arsh Rattan, Deputy Advocate General, for the respondent in LPA No.167 of 2022.

Bipin Chander Negi, Judge.

Both these Letter Patents Appeal arise out of one (same) judgment and common questions of law and facts are involved in the same, hence, both the appeals were taken up for hearing together and are being disposed of by this common judgment.

2. The controversy in the case at hand pertains to two hydro-electric projects, namely, Jangi Thopan and Thopan Powari of 480 MW each. The State of Himachal Pradesh had issued an advertisement qua the aforesaid two projects in October, 2005. The advertisement so issued was a global invitation inviting bids for implementation of Hydroelectric projects. The bid documents were issued in November, 2005. The last date for submission of bid document was 16.3.2006.

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3. Shortlisted bids were opened on 5.9.2006. Brakel Corporation was found to be the highest bidder. Reliance Infrastructure limited (***hereinafter referred to as 'RIL'***) the other bidder offered to match the bid of Brakel Corporation.

4. On 1st December, 2006, letter of intent was issued by the State in favor of Brakel Corporation, being the highest bidder. By virtue of the aforesaid letter of intent, Brakel was directed to sign the Pre-Implementation Agreement and deposit the upfront premium. On 9.12.2006, Brakel accepted the letter of intent and informed the Government of Himachal Pradesh that they are going through the draft Pre-implementation Agreement. On 11.12.2006, the State of Himachal Pradesh notified the H.P. Hydro Power Policy.

5. Since Brakel did not deposit the upfront premium, therefore, RIL wrote a letter to the Government of Himachal Pradesh on 20.8.2007 stating therein its categoric willingness to match the bid of Brakel. Further award of projects in question was sought by RIL on account of non-deposit of upfront premium by Brakel. RIL wrote similar letters to the Government on 25.9.2007 and 1.11.2007. Finally, on 17.11.2007, RIL filed a Civil Writ Petition bearing No.2074 of 2007. The same was listed

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before the Court on 13th December, 2007, when notices were issued to the State to file its response.

6. On 7th January, 2008 before the State filed its response to the aforesaid CWP No.2074 of 2007, the Government of Himachal Pradesh issued a show cause notice to Brakel asking it to show cause, why allotment of the two projects in the case at hand be not cancelled on account of non-deposit of up-front premium and for not having taken any steps to implement the projects. On 29.1.2008, Brakel Kinnaur Pvt. Ltd(the Indian subsidiary of Brakel Corporation) on behalf of Brakel Corporation sought to deposit a sum of Rs.173.43 crores. RIL opposed the same by filing an application in CWP No.2074 of 2007 and further moved another application to amend the CWP No.2074 of 2007. Subsequent to the aforesaid, the State of Himachal Pradesh issued another show cause notice to Brakel directing it to pay interest on the delayed payment of upfront premium. Brakel Kinnaur Pvt. Ltd; deposited the interest so demanded.

7. Thereafter, on 03.6.2008, when CWP No.2074 of 2007 was listed before the Court, the Court taking into account the contradictory stand being taken by the State in their pleadings directed the State to explain their stand in the case at hand. Subsequent thereto the State got conducted discreet enquiries

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both by the police as well as the Income Tax Department and on the basis of the aforesaid discreet enquiries conducted gathered material. The same formed basis of a Cabinet Memorandum, which was prepared for the consideration of the Council of Ministers. In the said memorandum prepared for the consideration of the Council of Ministers a specific reference was made to a letter dated 21.5.2008 written by the Brakel in response to the Department of Power wherein Brakel had categorically stated that they had agreed to transfer 49% equity to M/S Adani Power. This in the aforesaid Memorandum, which was prepared for the consideration of the Council of Ministers was stated to be against the terms of allotment and the clause of prescribed PIA.

8. On 7th July, 2008, the Cabinet took a decision to issue a show cause notice to M/s Brakel Corporation, as to why the allotment made in their favor should not be cancelled on account of misrepresentation and wrong facts qua Brakels technical and financial competence. Further, the Cabinet was of the view that show cause notice be also issued for forfeiture of upfront money on account of the loss caused to the State. On the basis of the aforesaid, show cause notices were issued to

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Brakel, on 19th July, 2008. In view of the aforesaid, CWP No.2074 of 2007 filed by RIL became infructuous on 31.7.2008.

9. Brakel filed reply to the show cause notice on 04.8.2008. Besides the aforesaid, Brakel made written submissions to the Principal Secretary (Power) on 04.10.2008 and 09.10.2008. In the meanwhile, RIL filed another Writ Petition bearing CWP No.1803 of 2008, feeling aggrieved by the State action whereby fresh bids had been called qua the projects in issue on 7th July, 2008. CWP No. 1803 of 2008 was disposed of on 30.10.2008.

10. The Court while disposing of the aforesaid matter directed the State Government to take a decision on the reply filed by Brakel to the show cause notice on 19th July, 2008, as expeditiously as possible preferably within a period of eight weeks. The Government of Himachal Pradesh after hearing Brakel and representatives of Adani took a decision not to cancel the allotment made in favour of Brakel Power Corporation. The said decision was assailed by RIL by filing CWP No.2748 of 2008 and the same was decided on 07.10.2009.

11. Certain findings recorded in CWP No.2748 of 2008 decided on 07.10.2009 are relevant for adjudication of the present *lis.* The same are being highlighted herein after:-

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(a) The Court was of the view that the core condition of the tender in the case at hand was that the bidder should have a strong financial and technical base with adequate free investible reserves and surpluses and requisite technical capability necessary for development of Hydro Electric Project. According to the Court change in the consortium member was only permissible with the prior approval of the Government. The aforesaid were basic conditions of the bid document which could not be altered because they were necessary to assess the financial and technical strength of the consortium bidders. (internal page 30-31 of the judgment in CWP No.2748 of 2008 decided on 07.10.2009).

(b) Admittedly for depositing the upfront premium on 29th January, 2008, Brakel Kinnaur Pvt. Ltd; had received a sum of Rs.173.43 crore from Adani Group of Companies. In one letter written Brakel had stated that this loan will be converted into equity participation. The court was of the view that this itself showed that equity participation was

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sought to be got changed by Brakel without taking permission of the State Government.

(c) In the Court's considered view the same could not have been done without the prior approval of the Government. Further in the considered view of the Court in the tendered document as well as Hydro Power Policy it had been made clear that members of the Consortium could not be changed without prior approval, hence it was bound by the aforesaid terms and conditions and could not have given an *ex-post facto* sanction. If the same was done, the Court was of the view that the result would be catastrophic.

(d) Other-wise a Company with no financial basis can bid for huge projects claiming to have the support of reputed banks and technical consultants. Once the project is awarded in its favor then it can go fortune hunting in the open market and there would be no difficulty for it to obtain partners in a project which is already allotted to it. (internal page 53 of the judgment in CWP No.2748 of 2008 decided on 07.10.2009).

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(e) The Court while deciding the matter had categorically held that there was no prior approval of the State Government for change of members of the consortium in the case at hand. In the considered opinion of the court Brakel could not have changed the membership of the consortium without prior approval and later waited for an ex-post facto sanction. (internal page 55 of the judgment in CWP No.2748 of 2008 decided on 07.10.2009).

(f) In view of the attending facts and circumstances of the case, the Court was of the view that since the amount in question was deposited after legal proceedings had been initiated in Court, therefore, investment, if any, made during the pendency of legal proceedings was at their own risk and peril, therefore, Brakel could not claim any equity in its favour. (internal page 62 of the judgment in CWP No.2748 of 2008 decided on 07.10.2009)

(g) Further extension of time given by the government to Brakel to deposit the up-front

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premium was subject to the litigative process as RIL had already initiated litigation in this respect. (internal page 39 of the judgment in CWP No.2748 of 2008 decided on 07.10.2009)

(h) The Court was of the view that Brakel had obtained the award in its favor based on misrepresentation and suppression of material facts.(internal page 51 of the judgment in CWP No.2748 of 2008 decided on 07.10.2009)

(i) The Court was of the view that there is nothing on record to show that the previous Government had consciously over looked the infirmities in the bidding process. When the whole time members and the previous Government took a decision to award projects in favor of Brakel, they had acted under the assumption that the constituent members of the Consortium had committed specific equity participation. They may have misread the documents, but no conscious decision was taken to overlook the infirmities. Most of the infirmities in fact came to light after the award of the contract, when investigation was carried out by

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> the police and the Income Tax Department. In view of the aforesaid, the Court was of the view that in the aforesaid facts and attending circumstances of the case, it cannot be said that the previous Government had taken any conscious decision. (internal page 59-60 of the judgment in CWP No.2748 of 2008 decided on 07.10.2009).

12. Brakel Corporation challenged the aforesaid judgment by preferring ***Special Leave to Appeal (Civil) bearing No.888 of 2010***, the same was withdrawn on 01.04.2014 on account of the fact that a show cause notice was issued to Brakel Corporation on 28.3.2014 calling upon Brakel to show cause as to why the amount stated in the show cause notice be not forfeited and damages recovered from the petitioner. While withdrawing the Special Leave Petition, Brakel Corporation reserved its right to file an appropriate reply to the show cause notice issued on 28.3.2014 and reserved liberty for challenging the decision taken thereupon, if in case the same was contrary to the interest of the Brakel Corporation.

13. Adani Power Corporation Ltd; had filed an independent application in the aforesaid Special Leave Petition, whereby refund of upfront money, so deposited by Adani Power

Ltd; was being sought. While disposing of the aforesaid Special Leave Petition on 01.4.2014, application so filed by Adani Power Ltd; was dismissed as withdrawn. Various representations dated 24th August, 2013, 16th September, 2013, 7th March, 2014, 6th May, 2014, 14th August, 2014, 20th October, 2014, 3rd December, 2014, 25th February, 2015 and 8th June, 2015 were made by Adani Power Limited, for refund of its upfront premium money deposit.

14. On 10.9.2015, the Government of Himachal Pradesh conveyed a decision taken by the Cabinet held on 04.9.2015, whereby the State decided to drop the show cause notice issued on 28.3.2014 to Brakel Corporation and further to refund the upfront premium receipt from Brakel Corporation without interest, but the same was to be paid on receipt of payment of upfront premium from RIL.

15. It was further stated in the aforesaid communication dated 10.9.2015 that the Government of Himachal Pradesh had offered the projects in question, vide letter of intent dated 10.8.2015 to RIL and the latter had conveyed its approval in principle. As per the same RIL had sought an extension of period of letter of intent so that legal formalities with respect to the pending Special Leave Petition

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before the Supreme Court against the judgment dated 7.10.2009, passed in CWP No.2748 of 2008 could be taken by RIL. Special Leave Petition preferred against the aforesaid judgment by RIL was dismissed as withdrawn on 18th July, 2016.

16. In this respect, it would be appropriate to refer letter dated 09.9.2015, addressed by the Additional Chief Secretary (Power) Government of Himachal Pradesh to the Director of Energy, Himachal Pradesh. From a perusal of the same, it is evident that the reason for dropping the show cause notice dated 28.3.2014, issued to Brakel Corporation was that the project in question had been embroiled in litigation since 2007 and the Council of Ministers in its meeting held on 05.8.2015 had decided to offer the projects in question to RIL, who was the second highest bidder on the same terms and conditions as had been awarded to M/s Brakel Corporation.

17. Other than the aforesaid it would be relevant to refer to the opinion of the Law Department when the matter was placed before the Council of Ministers in its meeting held on 4th September, 2015. Keeping in the view the facts and attending circumstances of the case, the Law Department had opined that the State cannot retain upfront premium money from two different parties for the same project.

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18. Subsequent to the aforesaid, RIL vide their letter dated 01.7.2016 and 04.8.2016 conveyed their inability to go ahead with the implementation of the projects. Hence, the upfront premium could not be realized. Consequently, the projects in question were offered to Central/Joint Sectors *viz*. SJVNL, NHPC and NTPC for execution on the terms, conditions of the prevailing Hydro Power Policy of the State Government and by imposing the condition of negotiated upfront premium worked out in the case at hand and recovered from Brakel.

19. A Memorandum prepared in this respect was placed before the Council of Ministers in its meeting held on 04.10.2017 and the same was approved. Vide letter dated 16.10.2017 Adani Power Limited, was informed of the aforesaid decision whereby the Government was now exploring all other possibilities to give effect to its decision taken on 04.9.2015 whereby refund of upfront premium had been proposed in favor of Adani Power Limited.

20. The matter was once again placed before the Cabinet. The Cabinet after looking into the entire matter withdrew the decision taken on 4th September, 2015 in favor of Adani Power. Vide letter dated 7th December, 2017, Adani Power Limited was informed that on account of legal intricacies and

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contractual complications the decision taken on 4th September, 2015 was being withdrawn.

21. Post refusal of RIL to execute the project the project in question stands awarded to Sutlej Jal Vidyut Nigam Limited (SJVN Ltd.). As has already been stated supra when RIL in July/ August 2016 conveyed its inability to execute the project, then the project in question was offered to the Central/Joint Sectors viz SJVN, NHPC and NTPC. Post registration when the project was allotted to SJVN Ltd, the same was allotted without any up-front premium. As the condition of up-front premium was not acceptable to SJVN Ltd.

22. Feeling aggrieved by letter dated 7th December, 2017, whereby Adani Power Limited was informed that on account of legal intricacies and contractual complications the decision taken on 4th September, 2015 was being withdrawn Adani preferred CWP 406 of 2019 seeking the following reliefs;

> *"(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari, or a Writ in the nature of Certiorari or any other appropriate Writ, Order or direction, calling for the records and proceedings leading to the issuance of the impugned letter dated 7th December, 2017 (Annexure-R hereto) and after going into the legality, validity and propriety thereof to quash and set aside the same;*

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(b) that this Hon'ble Court be pleased to issue a Writ of Certiorari, or a Writ in the nature of Certiorari or any other appropriate Writ, Order or direction calling for the records and proceedings leading to the issuance of the impugned letter dated 10th October, 2017 (Annexure-N hereto) and after going into the legality, validity and propriety thereof, to quash and set aside the same;

(c) that this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or direction, directing the respondents by themselves, their servants, agents, officers and subordinates to forthwith refund the sum of Rs. 280.969 crores together with interest thereon @ 18% p.a. from the date of receipt of the payment until refund to the petitioner;

(d) that pending the hearing and final disposal of this petition, this Hon'ble Court be pleased to direct the respondents by themselves, their servants, agents, officers and subordinates to forthwith pay a sum of Rs. 280.969 crores to the petitioner."

23. Taking into consideration noting of the files of the respondent-State, especially those written by the Law department, referring to section 65 (principles of restitution) and referring to Section 70 of the Contract Act (principles of unjust

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enrichment, the CWP 406 of 2019 was allowed vide judgment dated 12.4.2022 passed by learned Single Judge whereby letter dated 7th December, 2017 informing Adani qua the council of ministers decision to review earlier decision taken on 4th September, 2015 was quashed and the state was directed to refund the up-front premium in terms of the earlier decision taken on 4th September, 2015. The refund if not made within two months from the date of decision was to carry a 9% rate of interest from the date of decision till realization. Further communication dated 30.11.2017 was also quashed.

24. Feeling aggrieved by the aforesaid judgment passed in CWP 406 of 2019 dated 12.4.2022 the state has preferred an appeal assailing the impugned judgment in its entirety. Similarly Adani has preferred an appeal assailing the impugned judgment to the extent it does not grant interest to Adani from the date of initial deposit, pendente-lite interest and further an increase in interest from 9% to 12% is being sought.

25. At the very outset attention is drawn to the memorandum prepared for the consideration of the council of ministers dated 3.10.2017 Annexure -L of the CWP file . Relevant extract whereof is being reproduced here-in-below;

> *“4. Consequent upon withdrawal by M/s Reliance Infrastructure Limited, the process to allot the*

project further was initiated but not reached its finality.

5. The matter was placed before CMM in its meeting held on 27.09.2017 and was withdrawn. However, informally the Cabinet advised the Additional Chief Secretary (Power) and Additional Chief Secretary (Finance) to re-examine the whole matter after re-visiting all the records available carefully. Accordingly, a detailed status note as on 03.10.2017 on the allotment of Jangi Thopan Power HEP taking into consideration the earlier decisions of the State Government as a result of the decision of the Hon'ble High Court and the stand taken by the State Government in the Apex Court has been prepared (Annexure A). In view of these facts, it may not be legally and otherwise tenable to consider refund of the upfront premium deposited by the M/s Brakel Corporation NV which is liable to be forfeited."

26. Other than the aforesaid attention is also drawn to the status note appended alongwith the memorandum prepared for the consideration of the council of ministers dated 3.10.2017 Annexure-L of the CWP file and specifically to the implications of refunding upfront premium to Adani contained at Pg. 177-179 of the CWP No. 406 of 2019-A, titled M/s Adani Power Limited vs. State of H.P. and forming part of Annexure-L appended thereto.

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27. The decision dated 4.9.2015 to refund up-front premium without interest was subject to receipt of the same from RIL . RIL backed out in July/August 2016. The implications of refunding upfront premium to Adani which formed the basis of withdrawing the decision taken on 4th September, 2015 in favor of Adani Power have been placed on record (form part of Annexure-L appended with CWP No. 406 of 2019-A, titled M/s Adani Power Limited vs. State of H.P). It is a well settled preposition of law that in the letter dated 7th December, 2017, whereby Adani Power was informed of the decision to withdraw the earlier decision dated 4th September, 2015 in favor of Adani Power no detailed reasons are to be given. However reasons must exist on the record. The detailed reasons existing on the record are being reproduced here-in-below for a ready reference:-

> "Implications of refunding Upfront Premium to M/s Adani Power Limited:
>
> 1. The Hon'ble High Court on 07.10.2009 passed judgment as under:
>
> "We allow the writ petition and quash the decision of the Council of Ministers dated 25th November, 2008 as being arbitrary, illegal and irrational. We also hold that in view of the misrepresentation made by Brakel the allotment of the two projects Jangi Thopan and Thopan Powari of

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480 MW each, which were later combined into one project was illegal and is bound to be cancelled. We further hold that for the reasons stated above the allotment of the above said projects in favour of Brakel is liable to be cancelled and accordingly cancel the same. The State is directed to take fresh decision as to whether it wants to re-advertise the said projects or it wants to act on the basis of the old tender within four weeks from today. The respondents No. 4 and 5 are held liable to pay the costs of the petition, which are assessed at Rs.1 lakh."

The GoHP vide CMM held on 22.10.2009 based upon the judgment of Hon'ble High Court decided to cancel allotment of Jangi Thopan and Thopan Poweri HEP of 480 MW each made in favour of M/s Brakel Corporation NV and the allotment was cancelled on 03.11.2009 and Pre-Implementaion Agreement (PIA) signed on 09.04.2009 with the Company was rescinded.

As the allotment of Jangi Thopan and Thopan Poweri HEPs in favour of M/s Brakel Corporation NV was cancelled by the Govt., the Upfront Premium deposited by M/s Brakel Corporation NV was liable to be forfeited as per the provisions of the Hydro Power Policy of the State.

2. The Pre-Implementation Agreement in respect of Jangi Thopan and Thopan Poweri HEP of 480 MW each was signed between Govt. of HP and M/s Brakel Corporation NV. It is pertinent to mention

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here that no agreement was signed between Govt. of HP and M/s Adani Power Limited for the implementation of Jangi Thopan and Thopan Poweri HEP of 480 MW capacity each. Therefore, the clam of M/s Adani Power Limited to refund the Upfront Premium has no meaning and the amount may not be refunded.

3. That Govt. of HP vide CMM held on 23.07.2013 decided to allot Jangi-Thopan Poweri HEP (960 MW) through International Competent Bidding (ICB) Route on the basis of quoting highest upfront premium over and above the minimum upfront premium. As the decision to invite fresh bids for allotment of Jangi-Thopan Powari HEP (960MW) was taken after the cancellation of allotment made in favour of M/s Brakel Corporation NV who misrepresented the Govt., the Upfront Premium deposited by M/s Brakel Corporation NV was liable to be forfeited as per the provisions of Hydro Power Policy of the State.

4. The Govt. of HP Vide CMM held on 05.08.2015 decided as under:

1) To offer Jangi Thopan Power HEP (960 MW) to M/s Reliance Energy Ltd. who had been found the 2nd Highest Bidder in respect of Jangi Thopan HEP (480 MW) and Thopan Powari HEP (480 MW) in the Bidding process in response to NIP published on 30th/31st October, 2005 for the implementation of 15 HEPs on the similar terms and conditions as awarded to M/s Brakel Corporation NV by Govt. vide

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Letter of Award dated 1.12.2006 subject to following:-

iv. Accept to withdraw pending Special Leave Petition (Civil) No. CC 1480 of 2010 titled M/s Reliance Infrastructures Ltd., Vs M/s Brakel Corporation NV and Others filed in the Hon'ble Supreme Court of India.

v. Accept to deposit the entire amount payable on account of highest quoted Upfront Premium by M/s Brakel Corporation NV for Jangi Thopan HEP (480 MW) and Thopan Powari (480 MW) @ Rs.36.13 Lakh/MW within the stipulated time frame.

vi. Accept the offer within 30 days from the date of conveyance of this offer.

2) If M/s Reliance Infrastructure Ltd., does not accept offer and deposit the amount within the stipulated time, the Project may be advertised afresh for bidding."

The Govt. of HP vide CMM held on 04.09.2015 decided:

"The Show Cause Notice dated 28.03.2014 served upon M/s Brakel Corporation NV be dropped and the amount of upfront premium be refunded to M/s Adani Power Limited without interest and the payment be made on receipt of Upfront Premium from M/s Reliance Energy Limited."

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In this context, it is submitted that M/s Adani Power Limited was never the Party with the Govt. for the implementation of Jangi Thopan Powari HEP (960 MW) and was nowhere in picture. The PIA was signed with M/s Brakel Corporation NV and the allotment was cancelled in view of misrepresentation and supersession of material facts by M/s Brakel Corporation NV as is clear from the judgment of Hon'ble High Court dated 07.10.2009. Therefore, the Upfront Premium was liable to be forfeited as per the provisions of the Hydro Power Policy of the State,

5. Jangi Thopan and Thopan Powari HEP of 480 MW capacity each was allotted in 2006. But due to misrepresentation by M/s Brakel Corporation NV, the Project remained stalled for a long time. The delay in implementation of the Project resulted in loss of revenue to the State exchequer. The State has suffered loss of revenue to the tune of Rs. 2713.73 Crore upto March, 2014 on account of inaction, misrepresentation, misdeed, misconduct and delay on the part of M/s Brakel Corporation NV. Therefore, there is no question of refunding the amount of Upfront Premium deposited by M/s Brakel Corporation NV.

6. Also, the opinion of Law Department that the Govt. cannot retain Upfront Premium from two bidders for the same Project is not valid in this case as M/s Brakel Corporation NV misrepresented Govt.

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based on which the allotment of Jangi Thopan and Thoparı Powari HEP of 480 MW each was cancelled and PIA was terminated. Therefore, the Upfront Premium deposited by M/s Brakel Corporation NV was liable to be forfeited.

7. M/s Reliance Infrastructure Limited (RIL) showed inability to implement Jangi Thopan Powari HEP (960 MW) in view of non acceptance to the terms and conditions mentioned in Letter of Intent (LOI) dated 10.08.2015. As M/s Reliance Infrastructure Limited (RIL) backed off from implementing Jangi Thopan Powari HEP (960 MW), the decision taken by the Govt to refund Upfront Premium to M/s Adani Power Limited without interest, has not reached its finality.

8. It is the obligation of the Second Party i.e. developer to implement Project as per the provisions of the Hydro Power Policy of the State. Since, M/s Brakel Corporation NV was at fault and misled the Govt., therefore, the amount deposited on account of Upfront Premium by M/s Brakel Corporation NV is liable to be forfeited.

9. Also, the implication of Govt's decision to refund Upfront Premium to M/s Adani Power Limited will be that all the Financial Institutions/Banks will also start seeking refund of funds sanctioned to the Project developers in case the developers fail to implement the Project. Consequently, the legal implications may arise.

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> Therefore, the proposal to refund Upfront Premium deposited by M/s Brakel Corporation NV to M/s Adani Power Limited is legally not tenable as the amount stands forfeited as per the provisions of the Hydro Power Policy of the State."

28. From the aforesaid it is evident that post passing of judgment in CWP No.2748 of 2008 on 07.10.2009 the allotment of project in question was cancelled on 3.11.2009 and the pre-implementation agreement signed with Brakel on 9.4.2009 was rescinded. Besides for allotment of project Brakel had mis-represented and suppressed material facts. In view of the aforesaid, in terms of the Hydro policy of the State, the up-front premium deposited by Brakel was liable to be forfeited. On account of in-action in developing the project, mis-representation of Brakel the State had suffered huge financial loss to the tune of Rs 2173.73 Crores hence there was no question of refunding up-front premium deposited by Brakel. The opinion of the Law Department that the State cannot retain up-front premium from two bidders was not valid as in the case at hand the allotment of project in question was cancelled on 3.11.2009 and the pre-implementation agreement signed with Brakel on 9.4.2009 was rescinded due to mis-representation and suppression of material facts by Brakel. Other than the aforesaid, the decision to refund the up-front premium to

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Adani without interest had not attained finality as RIL had backed of from implementing the project in question and up-front premium was not realized from RIL. Moreover since no agreement had been entered into between the state and Adani therefore there was no basis of the claim for refund on behalf of Adani. Last but not the least it was opined that if in this case up-front premium is refunded to Adani than it would set a very bad precedent as in every case where developers fail to implement the project all financial institutions/banks would seek refund from the State of funds sanctioned in favor of the developer.

Reasons exist on record. Relevant material has been examined while questioning the decision dated 4.9.2015. The decision making process cannot be faulted with. A reasonable man applying his mind to the facts of the case at hand would not have arrived at any other conclusion. The conclusion arrived at is not in defiance of logic.

29. Insofar as pleas with respect to (1) Adani being a bona-fide investor, (2) the fact that there was no mis-representation on the part of Adani and (3) the fact that the State had taken a categoric stand in the litigation initiated by RIL both before the High Court and the Apex Court that there was no mis-representation by Brakel are concerned, the same cannot be accepted on account of

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the reasons; (a) deposits with respect to up-front money , interest thereupon were made while the projects in question were entangled in litigation initiated by RIL. Hence deposits made were subject to litigation. A *bonafide* investor who should have done a due diligence is expected to be aware of the ground realities. In the case at hand Adani should have been aware of the litigation in which the project at hand was embroiled. (b) In the tendered document as well as Hydro Power Policy it had been made clear that members of the Consortium could not be changed without prior approval. Despite the same Brakel sought to introduce Adani as a member of the Consortium without prior approval. A *bonafide* investor is expected to be aware of the tender condition and the Hydro policy. Especially the method prescribed therein of becoming a member of the Consortium with Brakel in the case at hand. Most of the infirmities in fact came to light after the award of the contract after 3.6.2008 when the State got conducted discreet enquiries both by the police as well as the Income Tax Department. (c) The judgment in CWP No.2748 of 2008 decided on 07.10.2009 has not been up-set therefore findings returned therein have attained finality. The finding qua mis-representation by Brakel during the bidding process for obtaining the award in question has attained finality and the finding that there exists nothing on record to show that the previous

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Government had consciously over looked the infirmities in the bidding process has also attained finality.

30. Facts substantiating the aforesaid reasons are being detailed here-in-below:

> *"A Division Bench of this Court in a petition filed by M/s DSC Himal Hydro JV bearing CWP No 1184 of 2007 on 24.02.2009 had considered the question of cancellation of project allotted in favor of M/s DSC Himal Hydro JV on account of non-deposit of up-front money. The principle laid therein was that up-front premium needs to be deposited within a reasonable time of the letter of allotment. Further it had been categorically laid therein that the deposit of up-front money had nothing to do with the signing of the Pre-Implementation-Agreement. The afore-stated principles were followed in judgment delivered in CWP No.2748 of 2008 decided on 07.10.2009."*

31. The Court while delivering judgment in CWP No.2748 of 2008 decided on 07.10.2009 was of the view that Brakel should have been dealt in the same manner as M/s DSC Himal Hydro JV. Further extension of time given by the government to Brakel to deposit the up-front premium was subject to the litigative process as RIL had already initiated litigation in this respect. (internal page

39 of the judgment in CWP No.2748 of 2008 decided on 07.10.2009)

32. In the case at hand in October, 2005 global bids for implementation of Hydroelectric projects in question were issued. The bid documents were issued in November, 2005. The last date for submission of bid document was 16.3.2006. Shortlisted bids were opened on 5.9.2006.

33. On 1st December, 2006, letter of intent was issued by the State in favor of Brakel Corporation on 9.12.2006, Brakel accepted the letter of intent and informed the Government of Himachal Pradesh that they are going through the draft Pre-implementation Agreement. On 11.12.2006, the State of Himachal Pradesh notified the H.P. Hydro Power Policy.

34. Since upfront premium was not deposited by Brakel therefore, RIL wrote letters to the Government of Himachal Pradesh on 20.8.2007, 25.9.2007 and 1.11.2007 stating therein its categoric willingness to match the bid of Brakel and further for award of projects in question on account of the afore-stated non-deposit of upfront premium by Brakel. Finally, on 17.11.2007, RIL filed a Civil Writ Petition bearing No.2074 of 2007.

35. First show cause was issued to Brakel On 7th January, 2008 by the Government of Himachal Pradesh before the State filed

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its response to the aforesaid CWP No.2074 of 2007. On 29.1.2008, Brakel Kinnaur Pvt. Ltd(the Indian subsidiary of Brakel Corporation) on behalf of Brakel Corporation sought to deposit a sum of Rs.173.43 crores. RIL opposed the same by filing an application in CWP No.2074 of 2007 and further moved another application to amend the CWP No.2074 of 2007. Subsequent to the aforesaid, the State of Himachal Pradesh issued another show cause notice to Brakel directing it to pay interest on the delayed payment of upfront premium. Brakel Kinnaur Pvt. Ltd; deposited the interest so demanded.

36. From the facts and attending circumstances of the case at hand it is clear that letter of intent was issued in favor of Brakel on 1.12.2006. The same was accepted by Brakel on 9.12.2006. On 29.1.2008, Brakel sought to deposit a sum of Rs.173.43 crores towards up-front premium. The deposit was not therefore made within an acceptable reasonable period. As has already been stated supra a categoric finding was returned in CWP No.2748 of 2008 decided on 07.10.2009 that extension of time given by the government to Brakel to deposit the up-front premium was subject to the litigative process/an on-going litigation (CWP No.2074 of 2007). A bona-fide investor should have been aware of the litigation in which Brakel was involved.

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37. In view of the attending facts and circumstances of the case, the Court while deciding CWP No.2748 of 2008 on 07.10.2009 was of the view that since the amount in question was deposited after legal proceedings had been initiated in Court, therefore, investment, if any, made during the pendency of legal proceedings was at their own risk and peril, therefore, Brakel could not claim any equity in its favor. (internal page 62 of the judgment in CWP No.2748 of 2008 decided on 07.10.2009).

38. Further in the considered view of the Court while deciding CWP No.2748 of 2008 on 07.10.2009 it had been held that in the tendered document (issued in November 2006) as well as Hydro Power Policy dated 11.12.2006 it had been made clear that members of the Consortium could not be changed without prior approval, hence it (state) was bound by the aforesaid terms and conditions and could not have given an *ex-post facto* sanction. (internal page 55 of the judgment in CWP No.2748 of 2008 decided on 07.10.2009). As a bona-fide investor seeking to become a consortium member Adani was expected to be aware of the tendered document as well as the Hydro Power Policy in this respect.

39. On 03.6.2008, when CWP No.2074 of 2007 was listed before the Court, the Court taking into account the contradictory stand being taken by the State in their pleadings directed the State

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to explain their stand in the case at hand. Thereafter, the State got conducted discreet enquiries both by the police as well as the Income Tax Department and on the basis of the aforesaid discreet enquiries conducted gathered material.

40. The same formed basis of a Cabinet Memorandum. On 7th July, 2008, the Cabinet took a decision to issue a show cause notice to M/s Brakel Corporation, as to why the allotment made in their favor should not be cancelled on account of misrepresentation qua Brakels technical and financial competence. Further, the Cabinet was of the view that show cause notice be also issued for forfeiture of upfront money on account of the loss caused to the State.

41. Hence on account of misrepresentation and wrong facts qua Brakels technical, financial competence show cause notices were issued to Brakel, on 19th July, 2008. In view of the aforesaid, CWP No.2074 of 2007 filed by RIL became infructuous on 31.7.2008.

42. Admittedly Adani was not there during the bidding process. Nor did Adani sign the Pre-Implementation Agreement. During the pendency of CWP No.2074 of 2007 after the deposit of up-front premium by Brakel the State had got conducted discreet inquiries by the police and the income tax authorities. Wherefrom it was revealed that the money for deposit of up-front premium by

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Brakel had come from Adani. The infirmities in fact came to light after the award of the contract. Adani was aware of the financial health of Brakel and was also aware of the method whereby in terms thereof (tender documents and State Hydro policy) it could have legally become a member of the consortium made by the Brakel. Adani choose a surreptitious route to becoming a member of the consortium rather than the legally acceptable mode.

43. The State called for fresh bids qua the projects in issue. RIL filed another Writ Petition bearing CWP No.1803 of 2008, feeling aggrieved by the aforesaid state action on 7th July, 2008. The same was disposed of on 30.10.2008 by directing the State Government to take a decision on the reply filed by Brakel to the show cause notice on 19th July, 2008, as expeditiously as possible preferably within a period of eight weeks.

44. The Government of Himachal Pradesh post hearing Brakel and representatives of Adani took a decision not to cancel the allotment made in favor of Brakel Power Corporation. The said decision was assailed by RIL by filing CWP No.2748 of 2008 and the same was decided on 07.10.2009.

45. While deciding CWP No.2748 of 2008 on 07.10.2009 the Court categorically held there is nothing on record to show that the previous Government had consciously over looked the infirmities in

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the bidding process. The court further categorically held that they may have misread the documents, but no conscious decision was taken to overlook the infirmities. Most of the infirmities according to the finding returned by the court in fact came to light after the award of the contract. (internal page 59-60 of the judgment in CWP No.2748 of 2008 decided on 07.10.2009).

46. Brakel Corporation challenged judgment in CWP No.2748 of 2008 decided on 07.10.2009 by preferring ***Special Leave to Appeal (Civil) bearing No.888 of 2010***, the same was withdrawn on 01.04.2014 on account of the fact that a show cause notice was issued to Brakel Corporation on 28.3.2014 calling upon Brakel to show cause as to why the amount stated in the show cause notice be not forfeited and damages recovered from the petitioner. While withdrawing the Special Leave Petition, Brakel Corporation reserved its right to file an appropriate reply to the show cause notice issued on 28.3.2014 and reserved liberty to challenging the decision taken thereupon, if in case the same was contrary to the interest of the Brakel Corporation.

47. In the aforesaid facts and attending circumstances Adani Power Corporation Ltd; had filed an independent application in the Special Leave Petition preferred by Brakel, whereby refund of upfront money, so deposited by Adani Power Ltd; was being sought.

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A fact which cannot be lost sight of is that while disposing of the Special Leave Petition preferred by Brakel on 01.4.2014, application filed by Adani Power Ltd; seeking refund was dismissed as withdrawn. No liberty was reserved in this respect by Adani Power Ltd.

48. Special Leave Petition preferred against the judgment in CWP No.2748 of 2008 decided on 07.10.2009 by RIL was dismissed as withdrawn on 18th July, 2016. Hence findings returned in CWP No.2748 of 2008 decided on 07.10.2009 became final.

49. A case/right is sought to be raised on the basis of section 70 (un-just enrichment) of the contract act by Adani against the State.

Section 70 reads thus:

> *"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."*

50. In this respect it would be appropriate to refer to **AIR 1962 SC 779.** Relevant extract whereof is being reproduced hereinafter:-

> "14. It is plain that three conditions must be satisfied before this section can be invoked. The

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first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. ....
.....When these conditions are satisfied s. 70 imposes upon the latter person, the liability to make compensation to the former in respect of or to restore, the thing so done or delivered.....The person said to be made liable under s. 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under s. 70 arises. ....

.....Section 70 occurs in chapter V which deals with certain relations resembling those created by contract. In other words, this chapter does not deal with the rights or liabilities accruing from the contract. It deals with the rights and liabilities accruing from relations which resemble those created by contract. ....
.....Therefore, in cases falling under s. 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask for damages for the breach of the contract for the simple reason that there is no contract between him and the

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other person for whom he does something or to whom be delivers something.

15…….In this connection it may be relevant to consider illustration (a) to s 70. The said illustration shows that if A a tradesman leaves goods at B's house by mistake, and B treats the goods as his own he is bound to pay A for them. The cause of action for a claim for compensation under s. 70 is based not upon the delivery of the goods or the doing of any work as such but upon the acceptance and enjoyment of the said goods or the said work.

17…….All that the word "lawfully" in the context indicates is that after something is delivered or something is done by one person for another and that thing is accepted and enjoyed by the latter, a lawful relationship is born between the two which under the provisions of s.70 gives rise to a claim for compensation.

18……The thing delivered or done must not be delivered or done fraudulently or dishonestly nor must it be delivered or done gratuitously. Section 70 is not intended to entertain claims for compensation made by persons who officiously interfere with the affairs of another or who impose on others services not desired by them.

21……What s. 70 prevents is unjust enrichment and it applies as much to individuals as to corporations and Government. The very broad argument that

> the State Government is outside the purview of s. 70 was not accepted by the apex Court."

51. In the case at hand Adani delivered money to Brakel hence the first condition of Section 70 is satisfied. The second condition is also satisfied as in delivering the money Adani did not intend to act gratuitously; and in the case at hand Brakel to whom the money was delivered enjoyed the benefit thereof hence the third condition is also satisfied. On account of the aforesaid a lawful relationship is born between the two i.e Brakel and Adani which under the provisions of s.70 gives rise to a claim for compensation.

52. No lawful relationship is born between the State and Adani therefore, no claim for compensation in terms of provisions of s.70 arises against the State by Adani.

53. Even otherwise Section 70 is not intended to entertain claims for compensation made by persons who officiously interfere with the affairs of another or who impose on others services not desired by them. Moreover it is not a case of unjust enrichment of the State but a case where the State has suffered losses.

54. For the reasons stated here-in-above the claim/right sought to be enforced by Adani against the State on the basis of Section 70 of the Contract Act is rejected.

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55. A case/right is also sought to be raised on the basis of section 65 (restitution) of the contract act by Adani against the State.

Section 65 reads as follows:

"*When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it*".

56. In this respect, it would be appropriate to refer to **AIR 1974 SC 1892.** Relevant extract whereof is being reproduced hereinbelow:

> "6.....The section makes a distinction between an agreement and a contract. According to section 2 of the Contract Act an agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of the section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and it, therefore, not a contract. It means that it was void. It may be that the parties or one of the parties to the agreement may not have, when they entered into the agreement, known that the agreement was in law not

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enforceable. They might have come to know later that the agreement was not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was, therefore, a contract, becomes void due to subsequent happenings. In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into both the parties knew that it was not lawful and, therefore, void, there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings. Therefore, section 65 of the Contract Act did not apply.

7. The Privy Council in its decision in ***Harnath Kaur*** v. ***Indeer Bahadur Singh*** (1923, 50 Ind App. 69, 75-76=(AIR 1922 PC 403) observed:

> "The section deals with (a) agreements and (b) contracts. The distinction between them is apparent by s. 2; by clause (c) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (h) an agreement enforceable by law is a contract. Section 65, therefore, deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause(g) an agreement not enforceable by law is said to be void. An

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> agreement is therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void."

8. A Full Bench of five Judges of the Hyderabad High Court in ***Budhulal*** v. ***Deccan Banking Company*** (AIR 1955 Hyd. 69 FB) speaking through our brother, Jaganmohan Reddy J., as he then was, referred with approval to these observations of the Privy Council. They then went on to refer to the observations of Pollock and Mullah in their treatise on Indian Contract and Specific Relief Acts, 7th Edn. to the effect that Section 65, Indian Contract Act does not apply to agreements which are void under Section 24 by reason of an unlawful consideration or object and there being no other provision in the Act under which money paid for an unlawful purpose may be recovered back, an analogy of English law will be the best guide. They then referred to the reasoning of the learned authors that if the view of the Privy Council is right namely that agreements discovered to be void' apply to all agreements which are ab-initio void including agreements based on unlawful consideration, it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section even if the illegal purpose is

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carried into execution and both the transferor and transferee are in pari delicto. The Bench then proceeded to observe:

> "*In our opinion, the view of the learned authors is neither supported by any of the subsequent Privy Council decisions nor is it consistent with the natural meaning to be given to the provisions of Section 65. The section by using the words 'when an agreement is discovered to be void' means nothing more nor less than: when the plaintiff comes to know or finds out that the agreement is void. The word 'discovery' would imply the preexistence of something which is subsequently found out and it may be observed that sec. 66, Hyderabad Contract Act makes the knowledge (IIm) of the agreement being void as one of the pre-requisites for restitution and is used in the sense of an agreement being discovered to be void. If knowledge is an essential requisite even an agreement ab-initio void can be discovered to be void subsequently. There may be cases where parties enter into an agreement honestly thinking that it is a perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be void. There is nothing specific in section 65 Indian Contract Act or its corresponding section of the Hyderabad Contract Act to make it inapplicable to such cases.*

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A person who, however, gives money for an unlawful purpose knowing it to be so, or in such circumstances that knowledge of illegality or unlawfulness can as a finding of fact be imputed to him the agreement under which the payment is made cannot on his part be said to be discovered to be void. The criticism that if the aforesaid view is right then a person who has paid money or transferred property to another for illegal purpose can recover it back from the transferee under this Section even if the illegal purpose is carried into execution, notwithstanding the fact that both the transferor and transferee are in pari delicto, in our view, overlooks the fact that the courts do not assist a person who comes with unclean hands. In such cases, the defendant possesses an advantage ever the plaintiffs- in pari delicto potior est conditio defendentio.

Section 84, Indian Trust Act however has made an exception in a case where the owner of property transfers it to another for illegal purpose and such purposes is not carried it into execution or the transferor is not as guilty as the transferee or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law the transferee must hold the property for the benefit of the transferor".

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"This specific provision made by the legislature cannot be taken advantage of in derogation of the principle that s. 65 Contract Act applicable where the object of the agreement was illegal to the knowledge of both the parties at the time it was made. In such a case the agreement would be void ab-initio and there would be no room for the subsequent discovery of that fact."

We consider that this criticism as well as the view taken by the Bench is justified. It has rightly pointed out that if both the transferor and transferee are in pari delicto the courts do not assist them.

9. A Division Bench of the Andhra Pradesh High Court in its decision in ***Sivaramakrisnaiah v. Narahari Rao*** *(AIR 1960 AP 186) held that:*

> "In order to invoke section 65 invalidity of the contract or agreement should be discovered subsequent to the making of it. This cannot be taken advantage of by parties who knew from the beginning the illegality thereof. It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement, i.e. without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal. The effect of section 65 that in such a situation, it enables a person not in pari delicto to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason

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of the section because the action is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the status quo ante. Section 65 does recognize the distinction between a contract being illegal by reason of its being opposed to public policy or morality or a contract void for other reasons. Even agreement the performance of which is attended with penal consequences, are not outside the scope of section 65. At the same time Courts will not render assistance to persons who induce innocent parties to enter into contracts of that nature by playing fraud on them to retain the benefit which they obtained by their wrong".

They also referred with approval to the earlier decision of the Hyderabad High Court in Budhulal v. Deccan Banking Co. Ltd. (supra).

10. In a recent judgment of this Court in ***Shri Ramagya Prasad Gupta & Ors. v. Shri Murli Prasad & Ors. C.A. Nos.*** *MANU/SC/0018/1974 decided on 11-4-1974 to which one of us was a party, this Court quoted with approval the observations of the Full Bench of the Hyderabad High Court in* ***Budhulal v. Deccan Banking Company*** *(supra). These decisions are in accordance with the view we have taken."*

57. Hence, in adjudicating a claim of restitution under Section 65 of the Indian Contract Act, the court must determine the

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illegality which caused the contract to become void and the role the party claiming restitution has played in it. If the party claiming restitution was equally or more responsible for the illegality (in comparison to the defendant), there shall be no cause for restitution. This has to be determined on the facts of each individual case.

58. In a decision of the Orissa High Court reported in MANU/OR/0017/1974, ***Lakhiram v. Brajal*** replying on the aforesaid decision of Andhra Pradesh High Court and some others, it was held that Section 65 of the Act applies where the contract is void from its inception but the parties or at least the plaintiff enters into it bona fide and the contract is later discovered to be void.

59. **The following can be culled out from the aforesaid;**

> An agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of section 65 speaks of an agreement being discovered to be void it means that the agreement is not enforceable.
>
> S. 65 uses the words 'when an agreement is discovered to be void' means nothing more nor less than: when the plaintiff comes to know or finds out that the agreement is void. The word 'discovery' would imply the preexistence of something which is subsequently found out.
>
> Since knowledge is an essential requisite even an agreement ab-initio void can be discovered to be void subsequently. There may be cases where

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parties enter into an agreement honestly thinking that it is a perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be void.

Where even at the time when the agreement is entered into both the parties knew that it was not lawful and, therefore, void, there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently. **Nor is it a case of the contract becoming void due to subsequent happening**s. Therefore, s. 65 of the Contract Act would not apply.

It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement, i.e. without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal.

Courts do not assist a person/ party who come with unclean hands seeking to be restored to the status quo ante. The effect of section 65 is that, it enables a person not in pari delicto to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason of the section because the action is not founded on dealings which are contaminated by illegality.

In adjudicating a claim of restitution under Section 65 of the Indian Contract Act, the court must determine the illegality which caused the

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> contract to become void and the role the party claiming restitution has played in it.

60. In the present case, Brakel was in pari delicto. The judgment of this Court in CWP No.2748 of 2008 decided on 07.10.2009 makes it amply clear that Brakel had obtained the award in its favor based on misrepresentation and suppression of material facts. In such a situation and following the well-settled principles which have been enunciated above, Brakel nor anyone on its behalf could have claimed a refund. As was sought to be done by Brakel in the case at hand vide communication dated 24.8.2013 addressed to the Government of Himachal Pradesh whereby Brakel had sought release of the up-front premium in the case at hand to Adani. In other words, in the given facts and circumstances, Brakel itself was not entitled for a refund, therefore, it was not competent to transfer any right to Adani to recover from the State.

61. For the reasons stated here-in-above the claim/right sought to be enforced by Adani against the State on the basis of Section 65 of the Contract Act is rejected.

62. From the above discussion, we are of the considered opinion that the learned Single Judge has not considered the Implication of judgment passed in CWP No. 2748 of 2008, decided on 7.10.2009 nor considered the entire record, provisions of

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Sections 65 and 70 of the Contract Act in their right perspective in the given facts and attending circumstances.

63. Other than the aforesaid it is a well settled position of law that a note recorded on a file is merely a noting simpliciter. It merely represents an expression of opinion of a particular individual. It does not have any legal sanctity. The same cannot be relied upon. It cannot be treated as a decision of the Government. In this respect it would be appropriate to refer to case reported as ***Delhi Union of Journalists Coop. House Building Society Ltd. v. Union of India,*** (2013) 15 SCC 614. The relevant extract whereof is as under;

> "**17.** The note recorded by the Minister, Urban Development on 2-12-1999 did not have any legal sanctity and the same could not have been relied upon by the appellants for seeking cancellation of the allotment made in favour of Respondent 4 in 1997 because no order was issued on the basis of that note and no notification was issued withdrawing the amendment made in the Master Plan vide Notification dated 20-9-1995.
>
> **18.** In **Shanti Sports Club** v. **Union of India** a similar question was considered in the context of noting recorded by the then Minister, Urban Development for release of the acquired land in favour of the appellant. While rejecting the

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appellants' prayer, this Court referred to the earlier judgments and held: (SCC pp. 726-27, paras 41-43)

"41. ... All executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the President or the Governor of a State, as the case may be, are required to be authenticated in such manner as may be specified in rules to be made by the President or the Governor, as the case may be [Articles 77(2) and 166(2)]. Article 77(3) lays down that:

'77.(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business. Likewise, Article 166(3) lays down that:

'166.(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.'

42. This means that unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the

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rules,the same cannot be treated as an order on behalf of the Government.

43. A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review." (emphasis supplied)

64. Based on the aforesaid position of law, a claim for refund by Adani on the basis of selective reading of notings on the files and by ignoring other relevant material on record is not sustainable.

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65. In view of above discussion, impugned judgment dated 12.04.2022 passed in CWP No. 406 of 2019 is set aside. CWP No. 406 of 2019 is dismissed.

66. Accordingly, LPA No. 166 of 2022 filed by the State of Himachal Pradesh is allowed and LPA No. 167 of 2022 filed by the M/s Adani Power Limited is dismissed.

All pending miscellaneous application(s), if any, also stand disposed of.

(Vivek Singh Thakur)
Judge

(Bipin Chander Negi)
Judge

18th July, 2024
(vs/cs)