
(2010) 07 SHI CK 0097
In the High Court Of Himachal Pradesh

Cosmos Hydro Power Private Limited and Another	APPELLANT
Vs	
State of H.P. and Others	RESPONDENT

Date of Decision : 08-07-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 21, 226
Electricity Act, 2003 — Section 29

Citation : (2010) 07 SHI CK 0097

Hon'ble Judges : V.K. Ahuja, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Ahuja, J.—The present writ petition has been filed by the petitioners under Article 226 of the Constitution of India. The facts of the case, as alleged by the petitioners, are that the State of H.P. (respondent No. 1) issued "Global Notice Inviting Proposals" (NIP) from eligible bidders for the implementation of hydro power projects mentioned in the said Notice in the State of Himachal Pradesh in private sector on "Build, Own, Operate and Transfer (BOOT)" basis. The said Notice was duly published in various newspapers including the Hindustan Times on 7.1.2006. A copy of the said Notice Inviting Proposal is placed on the record as Annexure P-7. The said Notice Inviting Proposal by respondent No. 1 was in three parts. Part-1 of the Notice pertained to the projects for which Pre Feasibility Reports (PFR for short) were ready. Part-2 of the said Notice pertained to the Projects feasibility whereof was to be ascertained by the Independent Power Purchasers (IPPs for short). Part-3 of the Notice pertained to self identified projects, which were to be of above 5MW capacity. The projects listed under Part-1 and Part-2 were divided into category-I and category-II. Under category-I, those projects were mentioned the tentative installed capacity of which were less than 100MW only. Under category-II, those projects were mentioned the tentative installed capacity of which was more than 100MW.

2. Petitioner No. 2, being eligible to apply for allotment of hydro electric projects

mentioned in the Notice Inviting Proposal, dated 7.1.2006, submitted its proposal for Chanju-I (25MW) hydro electric project in Chamba District of H.P. mentioned at Sl. No. 1 and also for Chanju-II (17MW) hydro electric project in Chamba District of Himachal Pradesh mentioned at Sl. No. 2, under category-I, Part-I of the said Notice. Similarly, respondent No. 3 also applied for Chanju-I (25MW) hydro electric project in Chamba District of H.P. Thus, both petitioner No. 2 as well as respondent No. 3 applied for the projects in category-I of part-I of the NIP, for which PFRs were ready. Copies of the PFRs of Chanju-I (25 MW) and Chanju-II (17MW) have been appended with the petition as Annexures P-8 and P-9, respectively. The PFRs of the above mentioned projects, which were prepared in March, 2004 and May, 2003, respectively, were, in fact, based on preliminary studies carried out after identifying the sites for diversion and power house on Chanju and Bhararu streams and only reflected "reach"/site for harnessing hydro power potential. The detailed survey and investigation were not undertaken at the time of preparation of the said PFRs.

3. On 26th September, 2007, a decision was taken by the State Cabinet to allot the above mentioned projects by way of entering into Memorandum of Understanding (MoU for short) with the eligible parties. Accordingly, petitioner No. 2 was informed by the respondent State that Chanju-II (17 MW) project stood allotted to it vide allotment letter, dated 1.10.2007. The petitioner was called upon to deposit 50% of the upfront premium on or before 15.10.2007. Respondent No. 3 was allotted Chanju-I (25 MW) Project by respondent No. 1 State vide allotment letter, dated 1.10.2007. 50% of the upfront premium amounting to Rs. 8.5 lacs was also paid to respondent No. 1 by the petitioners vide bank draft, dated 5.10.2007.

4. It was further averred that even after the issuance of the allotment letter dated 1.10.2007 and submission of the requisite upfront premium, the respondent State did not enter into any MoU, either with the petitioners or with respondent No. 3. Both the said parties preferred separate writ petitions before this Court with the prayer that the respondent State be directed to enter into MoU on the basis of the letter of allotment issued to them. This Court, in the writ petition filed by respondent No. 3, directed the respondent State to enter into MoU with respondent No. 3 on the basis of the letter of allotment issued to them. During the pendency of the writ petition filed by petitioner No. 2, a communication was received by the petitioner from respondent No. 1 State to sign MoU on 26.12.2007. The writ petition filed by petitioner No. 2 was dismissed as withdrawn vide order, dated 18.12.2007. Petitioner No. 1 confirmed to respondent No. 1 the receipt of the letter, dated 17.12.2007, and informed the State that petitioner No. 1 shall be signing the MoU with the respondent State on 26.12.2007.

5. It was further alleged in the writ petition that though respondent No. 1 entered into MoU with respondent No. 3 on 20.12.2007 with regard to Chanju-I (25 MW) Project, however, when petitioner No. 1, on 26.12.2007, approached

the respondent State for the purpose of signing of the MoU, as per communication of the respondent State, dated 17.12.2007, the MoU was not signed with petitioner No. 1. Petitioner No. 2 filed a contempt petition before this Court and during the pendency of the said Contempt Petition, the respondent State invited petitioner No. 1 to enter into the MoU on 27.2.2008. Thereafter, the MoU was entered in between petitioner No. 1 and respondent No. 1 State of H.P. with regard to Chanju-II (17 MW) Project on 26.2.2008.

6. It was further alleged that after the signing of the MoU, petitioner No. 1 has been following the conditions laid down in the said MoU and achieved the milestones within the period prescribed therein. The time limit prescribed in the MoU, as per milestone at Sl. No. 8, for submission of the Detailed Project Report (DPR for short) qua the project allotted to petitioner No. 1, was 18 months from the date of signing of the MoU. It is further averred that the time limit for submission of the DPR had still not expired and cut off date for the submission of the DPR by petitioner Company is 25.8.2009. The DPR of the said project, as alleged by the petitioner, was being prepared by petitioner No. 1 as per the guidelines for preparation of DPR. The project report is ready and the same is being finalized for submission to obtain the techno economic clearance. Petitioner No. 1 alleged that he will be submitting the DPR before the date i.e. 25.8.2009.

7. It was further alleged that the DPR of Chanju-II Project allotted to the petitioner Company is being prepared by their consultants. According to the assertions made by the petitioners, respondent No. 1 has entered into MoU with respondent No. 3 on 20.12.2007 for the purpose of implementation of Chanju-I (25 MW) project. As per the PFR of the said Project, Chanju Stage-I hydro electric project was a run of the river scheme on Chanju Nallah, a tributary of Baira Nallah and sub tributary of river Ravi. The proposed project had the "reach"/site well defined with the geographical coordinates i.e. longitude and latitude as under:

----- Components		Longitude
Latitud -----	-----	Diversion site/
intake	76°13'55"	32°44'40" site
-----		Power House site 76°11'
28" 32°45'57"	-----	

It was further alleged by the petitioners that the "reach"/site of the said project is also well defined with respect to its physical location on the ground as from the confluence of Chanju Nallah with Bagai Nallah and upstream of Bhaled weir, as shown in the lay out plan given in the pre feasibility report of the said Project.

8. The further averments made in the writ petition are that in July, 2008, it was learnt by petitioner No. 1 that respondent No. 3 had submitted a DPR in respect of Chanju-I Project with enhanced installed capacity of 36 MW instead of 25 MW, as mentioned in the PFR and the MoU signed between respondent No. 3 and respondent No. 1. Petitioner further alleged that as per the information available,

respondent No. 3 submitted two detailed project reports ? one initially in the month of May, 2008 with the enhanced installed capacity of 30MW and another in the month of July, 2008 with an enhanced capacity of 36 MW. It was also alleged that the "reach" allotted to respondent No. 3, as envisaged in the PFR and on the basis of the MoU so signed between respondent No. 1 and 3, also stood arbitrarily and unilaterally enhanced by respondent No. 3. Thus, it was submitted that the reach of the allotted Project cannot be altered arbitrarily. Petitioner No. 1, vide letter, dated 9.7.2008, wrote to the Chairman of respondent No. 2 (Electricity Board) expressing its concern regarding the said change in the installed capacity of the Project allotted to respondent No. 3 and requested it to intimate petitioner No. 1 about the full reservoir level taken in the DPR submitted by respondent No. 3. The main concern of petitioner No. 1 was that since its Project was upstream to the Project of respondent No. 3, any change in the lay out of Chanju-I project of respondent No. 3, especially, near the diversion/intake site, the full reservoir level of Chanju-I Project would affect the tail water level of Chanju-II project allotted to petitioner No. 1. A request was also made for supplying information regarding the full reservoir level and location of diversion weir/barrage kept in the DPR submitted by respondent No. 3 for Chanju-I, so that various alternative lay outs of Chanju-II could be examined by petitioner No. 1 for optimizing the capacity of its project. Petitioner No. 1 also informed about the achievements of milestones envisaged in the MoU achieved by them. The petitioner also sought other details about the Project of Chanju-I as contained in the DPR submitted to respondent No. 1. It was further alleged that when respondent No. 3 submitted its DPR with an enhanced installed capacity of 36MW, the Chief Engineer of respondent No. 2 wrote to respondent No. 1/State regarding the fact that respondent No. 3 has submitted the DPR of the Project with an enhanced capacity of 36 MW against the allotted capacity of 25 MW. According to the terms of the Hydro Power Policy, the Project was to be allotted on the basis of tentative installed capacity as mentioned in the NIP. However, in case the capacity of the Project increases/decreases, the Company shall be required to sign a fresh MoU with the Government and the royalty, upfront premium and other charges were to be levied according to the approved norms by the Government for the revised capacity.

9. It was further alleged that the enhanced installed capacity was based on unilateral enhancement of "reach" of the Project of respondent No. 3 from the "reach" that was mentioned in the PFR and stood allotted to respondent No. 3 as per the MoU. It was also alleged that respondent No. 1 took up the issue with respondent No. 2 to which respondent No. 2 addressed a communication to respondent No. 1, dated 4.9.2008, and it was intimated by respondent No. 2 that the NIP for implementation of Chanju-I was invited for an installed capacity of 25MW and the Project was allotted to respondent No. 3 Company in October, 2007. The Project was being investigated by respondent No. 2 and the DPR of the Project was under preparation at the time of bidding. However, it was finalized by respondent No. 2 during the allotment of the Project for an enhanced

capacity of 30MW. It was further informed that the DPR was supplied to respondent No. 3 on their request against the payment of the cost of the DPR as per the conditions stipulated in the NIP. Thereafter, respondent No. 3 had submitted the DPR by enhancing the capacity from 25 MW to 36 MW. It was also informed that the capacity of the Project has been enhanced by respondent No. 3 by shifting the diversion site from 1380 meter to 1426 meter. The petitioner also challenged that there was no mention in the NIP that the HPSEB was in the process of preparing a DPR or it had prepared a DPR, which would be available on payment of cost or otherwise to the successful IPP. The DPR and the various compendium against milestones No. 1 to 5 and 7 were to be submitted by the IPP with which the MoU has been signed after carrying out the detailed survey and investigation within a period of one year after the signing of the MoU. It was further alleged that the capacity of the Project stood enhanced by respondent No. 3 by shifting the diversion site from 1380 meter to 1426 meter and by substituting the diversion structure i.e. trench weir proposed in the HPSEB DPR with gated weir/barrage structure having full reservoir level at 1440 meter. Both these acts were done by respondent No. 3 unilaterally since there was no MoU in between the State and respondent No. 3, which permitted respondent No. 3 to prepare its DPR on the basis of DPR prepared by respondent No. 2 (HPSEB) or by shifting the diversion site or by substituting the diversion structure. It was further alleged that the Chief Engineer of respondent No. 2 also addressed a communication, dated 7.10.2008, to the Director, HIMURJA regarding Chanju-I Project and it was brought to the notice of HIMURJA that Chanju-I Project has been allotted to respondent No. 3 on the basis of the PFR of the HPSEB. It was further mentioned in the said letter that the PFR, the intake and the power house of the Project were located between 1380 meter 1180 meter, respectively. However, respondent No. 3 had submitted the proposals to enhance the capacity from 25MW to 36 MW and intake and power house had been located between 1426 meter and 1192.65 meter and in this background, the HIMURJA was called upon to confirm as to whether it had allotted any Project between elevations 1426 meter and 1180 meter. The Director HIMURJA confirmed to the Chief Engineer that no Project has been allotted by HIMURJA in the elevation range of revised DPR of 36 MW submitted by respondent No. 3. It was also mentioned that the proposed Chanju-I Project also does not interfere with any other Scheme of the HPSEB. In the upstream of this Project, Chanju-II is located between elevations of 1450 meter and 1600 meter. Thus, it was alleged by the petitioner that every effort was made by respondent No. 2 to justify the DPR submitted by respondent No. 3 with an enhanced capacity of 36 MW. It was further alleged that the period contained in the MoU for submission of the DPR has not yet expired and petitioner No. 1 Company had not submitted its DPR. The comments of petitioner No. 1 were never called in regard to the enhanced capacity of the project of respondent No. 3 and the conclusions were arrived at by respondent No. 2 unilaterally without associating petitioner No. 1.

10. It was further alleged that certain queries were raised by respondent No. 1 to

respondent No. 2 and it was informed that in the PFR, the trench weir of Chanju-I Project was proposed at EL. 1380 meter. However, after geological studies in the DPR prepared by respondent No. 2 HPSEB, it was recorded that the location of the trench weir at 1380 meter was not found suitable from geological, ecological and economic considerations and, therefore, the HPSEB had proposed the trench weir at EL. 1426 meter, which was found suitable on these very grounds. Respondent No. 3 has now proposed gated weir at 1426 meter, which would facilitate storage of water upto 1440 meter full reservoir level. Thus, in the opinion of respondent No. 2, the proposal of respondent No. 3 was considered geologically a better proposal. It was also mentioned in the said communication that no proposal regarding the enhancement of capacity had been received from petitioner No. 1. Moreover, the Project of respondent No. 3 has an added benefit of storage/peaking power due to construction of gated weir. Thus, it was communicated that proposal of optimization of potential by respondent No. 3 will result in higher generation of energy and more royalty to the State. Thus, it was alleged that it was an attempt to justify the proposed gated weir at 1426 meter by respondent No. 3, which was not the "reach" allotted to respondent No. 3 and was not even contemplated in the DPR prepared by the HPSEB. Petitioner No. 1 had, at no stage, been called upon by respondents No. 1 and 2 regarding the enhancement of capacity or to submit its proposal with enhanced capacity or to submit its version or its stand on the proposal of respondent No. 3 of enhancing its "reach" and capacity from 25MW to 36MW. Thus, it was alleged that the "reach" was changed arbitrarily and respondent No. 2 tried to justify the DPR submitted by respondent No. 3 in violation of the PFR and the MoU in between respondent No. 1 and respondent No. 3.

11. It was further alleged that since respondents No. 1 and 2 were not responding to the communications, representative of petitioner No. 1 met the Principal Secretary (Power), to the Government of H.P., and the Chief Engineer of respondent No. 2 HPSEB on December, 30 & 31, 2008 and discussed the issues raised by petitioner No. 1 in its communication with the said respondents. It was revealed for the first time to petitioner No. 1 that the full reservoir level of Chanju-I Project has been kept at elevation of 1440 meters in the DPR submitted by respondent No. 3. Petitioner No. 1 was assured that the entire matter shall be got examined after receiving the proposal for Chanju-II project for which petitioner No. 1 was asked to submit the proposed lay out of Chanju-II Project. Petitioner No. 1 submitted the desired proposal highlighting the likely adverse effects which the proposed modifications of the Scheme envisaged in the DPR submitted by respondent No. 3 with enhanced capacity of 36MW and changed "reach" would have on the project of the petitioner No. 1. It was further alleged that on 7.1.2009, the Chief Engineer (Projects-cum-Arbitrator) wrote a letter to the Chief Engineer (PSP) regarding the technical viability of Chanju-I Hydro Power Project (36MW). It was intimated that the DPR of Chanju-I Project (36 MW) submitted by respondent No. 3 has been broadly examined and the Project is found technically viable for an installed capacity of 36 MW. It was further

submitted that the DPR of Chanju-I is being examined in detail for processing it for techno economic clearance. It was further alleged that though there was no techno economic viability conveyed by respondent No. 1 in favour of respondent No. 3, a notification was issued by respondent No. 1 dated 12.1.2009 that respondent No. 3 proposed to implement Chanju-I Project cost of which was Rs. 304.08 crores and brief description of the main Project components were also contained and notice was given that any licensee or any other person interested may raise objection/make representation on the above Scheme within two months of the publication of the said notice. It was alleged that petitioner No. 1 on 6.3.2009 preferred objections on the modified proposal in respect of Chanju-I Project highlighting its adverse effects on upstream Chanju-II Project allotted to the petitioner. The objections were raised in detail in regard to the raising of full reservoir level at 1440 meter elevation and other points. It was further alleged that the representative of petitioner No. 1 also met the Chief Minister and brought to his notice that respondents No. 1 and 2 had failed to appreciate that respondent No. 3 had submitted a proposal of 36 MW Project by enhancing the "reach" of the Project from initially allotted to it and by totally changing the components of the said Project in violation of the MoU entered into by respondent No. 1. It was also requested that the matter be got examined by way of constitution of an independent expert Committee. Thereafter, the respondent State issued an office order, dated 26.3.2009, that in view of the objections of the proponent of Chanju-II Project with regard to the elevation range notified with respect to Chanju-I Project, it was necessary to have the whole issue technically and transparently examined on the spot through a Committee of technical experts. A 3-member Committee was constituted to conduct a spot inquiry on commission basis comprising of Director of HIMURJA, who was to be the Chairman of the Committee, the Senior Executive Engineer and the Geologist, both of whom were to be the members of the said Committee. It was the job assigned to the said Committee to fix and confirm the site of power house of Chanju-II Project in view of the geological and geographical features of the site and to ensure that with the proposed gated weir/barrage of Chanju-I, there was no risk to the power house of Chanju-II Project getting submerged or being adversely affected. The Committee visited the project site on 24.4.2009 and the representatives of petitioner No. 1 and respondent No. 3 were also present. The proposed site of power house of Chanju-II, the site selected by petitioner No. 1 and the site proposed in the PFR were inspected by the said Committee. The Committee also posed five questions to petitioner No. 1 as well as to respondent No. 3 and called both the parties to submit their response to the said five queries raised by the Committee. The Committee submitted its report to the State on 1.6.2009. It is claimed by the petitioner in the writ petition that the copy of the said report was not made available to petitioner No. 1 either by the Committee or by respondent No. 1. On the basis of the report of the expert Committee, respondent No. 1 issued order, dated 11.6.2009, vide which the objections filed by petitioner No. 1 were rejected by respondent No. 1 and respondent No. 3 had been allowed to construct the gated weir with full reservoir

level at El.1440 meter. Thereafter, the Implementation Agreement was signed in between respondent No. 1 and respondent No. 3 on 12.6.2009 regarding the enhanced capacity of Chanju-I Project for an installed capacity of 36 MW. The petitioners, therefore, were aggrieved by the order, dated 11.6.2009, issued by the respondent State since petitioner No. 1 was not apprised about the report of the expert Committee on the basis of which office order dated 11.6.2009 had been passed. It is alleged that petitioner No. 1 should have been asked to submit its response to the said report of the expert Committee and has thus filed the writ petition mainly on the following grounds:

- i) No objections were called by the respondent State from petitioner No. 1 on the report of the Expert Committee before passing the impugned order;
- ii) The report of the Expert Committee was not a unanimous report and had not been signed by the Chairman of the Committee;
- iii) The Implementation Agreement entered into in between respondent No. 1 and respondent No. 3, dated 12.6.2009, based on the said DPR and the result of order, dated 11.6.2009, is bad in law and is liable to be quashed and set aside.
- iv) The respondent State was bound by the terms and conditions contained in the MoU and, therefore, respondents No. 1 and 2 were required to abide by the conditions of Notice Inviting Proposal and the MoU.
- v) Respondents No. 1 and 2 are State within the meaning of Article 12 of the Constitution and the government largesse cannot be permitted to be granted or distributed to any one in an arbitrary manner.
- vi) The Project capacity has been enhanced by respondents No. 1 and 2 based upon the enlarged "reach" that was never allotted to respondent No. 3.
- vii) There was no techno economic viability certificate issued by the competent authority in favour of respondent No. 3 as on 12.1.2009.
- viii) The order, dated 11.6.2009, is bad in law as the same has been issued by respondent No. 1 without any application of mind.

On the basis of such grounds taken in the writ petition, the petitioners have prayed for quashing of the impugned order, dated 11.6.2009.

12. In the reply filed by respondent No. 3, it was pleaded that the writ petition was not maintainable, there was no impropriety in the order passed by respondents No. 1 and 2 and this Court is not sitting as an appellate authority over the actions of the State Government, though it can correct any error of jurisdiction by the said authorities. The petitioner has not made any grievance against the decision making process. It was also submitted that at the instance of the petitioner making a representation to the Hon"ble Chief Minister of Himachal Pradesh, a technical expert Committee was constituted to consider the representation of the petitioner and the said technical expert Committee, after following proper procedure, making site inspection and hearing both the parties,

had given its reasoned report on the basis of which the impugned order has been passed by the Government. It was averred that apprehension of the petitioner that if the capacity of the Project allotted to respondent No. 3 is enhanced, it is likely to adversely affect the Project of the petitioners is completely unfounded. The petitioners have not alleged any violation of the MoU or the Hydro Power Policy of the respondents No. 1 and 2 and no provision has been pointed out which has been violated. It was also pleaded that the Court cannot interfere in matters of government policy unless it is arbitrary, capricious, irrational, discriminatory or violative of constitutional or statutory provisions. It was also pleaded that the present writ petition, since it aims at challenging the policy decision of the Government in enhancing the capacity of the Project allotted to respondent No. 3, is not maintainable. The larger public interest has to be considered and as per the report submitted by the Technical Expert Committee, larger public interest would be served if the capacity of the Project allotted to respondent No. 3 is enhanced since it would lead to hydro power generation and optimum utilization of the resources without adversely affecting the Project allotted to the petitioners. It was further pleaded that respondent No. 3 has already entered into an Implementation Agreement with respondents No. 1 and 2 and any order passed in terms of the reliefs prayed for cannot be carried out without prejudicing the rights of respondent No. 3. It was also pleaded that there is a provision in the Hydro Power Policy as well as in the MoU that the capacity of the Project can be enhanced or decreased on the basis of the TEC accorded by the competent authority and, therefore, fresh MoU has to be signed with the Government, according to the norms of the Government for the revised capacity. It was also pleaded that the diversion site was shifted by respondent No. 2 and that too on the basis of geological considerations and report of the Geologist and in the interest of the Project on the recommendation of a team comprising of the Engineers accompanied by the Geologist. According to the petitioners' own admission, the "reach" of the allotted project can be altered by following the proper process. It was also pleaded that it was not incumbent upon respondents No. 1 and 2, either in the MoU or in the Hydro Power Policy, to seek the permission of the petitioner to enhance the capacity of the adjacent project, which does not, in any manner, whatsoever, interfere with the said project of the petitioner. It was not obligatory on the part of respondents No. 1 and 2 to have brought this factum of 36MW DPR submitted by respondent No. 3 to the notice of the petitioners and, therefore, the grievance of the petitioners is without any basis. The DPR has been accepted by respondents No. 1 and 2 with an optimized installed capacity of 36 MW which is well within the frame work of MoU and Hydro Power Policy to which the petitioners cannot object. The expansion of Chanju-I Project does not interfere with any Project of petitioner i.e. Chanju-II Project, which is allocated in the upstream between elevations 1450 meter and 1600 meter. The petitioner has not submitted any proposal regarding enhancement to respondent No. 2 and, therefore, the proposal submitted by respondent No. 3 has an added benefit of storage/peaking power due to construction of gated weir.

13. In the reply filed by respondents No. 1 and 2, it was pleaded that the DPR for Chanju-I Project was under preparation at the time of bidding which was finalized by respondent No. 2 for an installed capacity of 36 MW during the allotment of the Projects. The DPR was supplied to respondent No. 3 against the payment of cost of the DPR as per the condition of the Notice Inviting Proposal. Thereafter, respondent No. 3, after carrying out the detailed surveys and investigations on the parameters mentioned in the DPR finalized by the HPSEB (respondent No. 2), submitted a DPR with an enhanced capacity of 36 MW against the allotted capacity of 25 MW. It was also pleaded that so far as the question of "reach" of the project of the petitioner Company is concerned, different projects were advertised for execution through BOOT route and respondent No. 2 cannot stop the work. In case of Chanju-I Project, the same was at an advanced stage and preparation of the DPR was continued by respondent No. 2. After reviewing the PFR, it was found that the diversion site at El.1380 meter, as proposed earlier, was not suitable on geological consideration. On traversing the Chanju Nallah, a site about 50 meter of confluence of Bhararu Nallah and Chanju Nallah was found to be suitable. Hence, the proposal of diversion structure was shifted to El.1426.5 meter and the site for power house was adopted on geological, economical and ecological considerations for preparation of the DPR by respondent No. 2. Thus, the diversion site was shifted by respondents on the basis of geological considerations and not arbitrarily and unilaterally on the recommendation of a team of Engineers accompanied by Geologist. The team had visited the site and in the interest of Project, the change was necessitated. It was also pleaded that the change does not affect the upstream Project, the downstream reach of which is extended only upto 1450 meter. It was further averred that after the allotment of the Project, the MoU was also signed in between respondents No. 1 and 3. The Project scheme was optimized for an installed capacity of 36 MW by respondent No. 3 without changing the location of diversion structure and proposing a barrage in place of a trench weir with full reservoir level at 1440 meter, which was well below the allotted "reach" to the petitioner at El.1450 meter. The "reach" of Chanju-I Project was shifted on the basis of the recommendation of the Expert Committee and it does not affect any other Project except making Chanju-I Project technically and geologically viable. It is nowhere provided in the MoU or Hydro Power Policy that it is binding on respondent No. 1 to seek permission of the petitioner for enhancement/optimization of the adjacent project when it is not interfering with the said Project. It was also pleaded that the project allotted to the Petitioner Company does not fall in the elevation levels on which respondent No. 3 has submitted the DPR. The respondent No. 3 has optimized the Project by changing the diversion structure to a barrage with full reservoir level at El.1440 meter, which has been found best possible option for this Project. The objections raised by the petitioner were duly considered by the Committee, which submitted its detailed report and the said report of the Committee is final.

14. The majority of the members including the Geologist concluded that the site

proposed by the HPSEB for power house at an El.1450 meter was much better site than that proposed by the petitioner, that too, beyond the "reach" allotted to the petitioner, without consideration of keeping the structure above highest flood level. It was found by the Committee that the Power House site of Chanju-II Project at El.1450 meter is beyond doubt the best site which is not going to be affected anyway by the proposed Chanju-I barrage with full reservoir level at El.1440 meter and therefore, the question of shifting the intake site of Chanju-I Project does not arise. The report of the Committee was duly considered and the respondents No. 1 and 2 will get additional free power at the rate of 3% over and above the normal base royalty rates, which will lead to more revenue to the State and will also speed up the progress of the Project. The enhancement of the Project capacity will lead to more income to the State and it is in the interest of the State.

15. Coming to the first contention put forth by the learned Counsel for the petitioners that respondent No. 2 was not competent to sell the DPR to respondent No. 3, it was submitted that the pre feasibility report had been submitted by the petitioners as well as respondent No. 3 and the DPR in question could not have been sold to respondent No. 3. Thus, respondent No. 3 was not competent to purchase the DPR or rely upon the same which action of respondents No. 1 and 2 cannot be termed as proper.

16. On this point, the learned Counsel for respondent No. 3 had submitted that there is a specific provision in the MoU that any DPR prepared by respondent No. 2 could be sold to the party on payment of charges. To this effect, the learned Counsel for the respondent No. 3 relied upon Clauses 16 and 20 of the MoU, which will be referred to in the following discussion.

17. Various contentions put forth by the learned Counsel for the petitioners were that the capacity of Chanju-I Project was enhanced by the respondents from 25 MW to 36 MW arbitrarily and without considering the project of the petitioner. It was submitted that the DPR was to be submitted by the petitioner within 18 months of the date of agreement and the said period was to expire on 25.8.2009. The petitioner was never asked to submit any proposal for consideration to enhance the capacity of Chanju-II Project. It was further submitted by the learned Counsel for the petitioners, that the petitioner, when he learnt about the enhancement of the capacity of Chanju-I Project, he made various representations to respondents No. 1 and 2. The first representation is dated 12.1.2009 (Annexure P-27), in which it was informed by the petitioner that the preparation of DPR of Chanju-II Project on the basis of the layout finalized was under progress and shall be submitted shortly. Petitioner also raised an objection qua Chanju-I project that any post-allotment change in one scheme should not adversely affect the other project.

18. Another letter was written by petitioner to the State Government, dated 6.3.2009, (Annexure P-30) and a reference was made to the representations/objections invited in regard to Chanju-I Project. The petitioner submitted

objections to the project citing reasons therein. The objections raised by the petitioner were never replied to by respondents No. 1 and 2. Thereafter, petitioners made representation to the Chief Minister of Himachal Pradesh, vide letter Annexure P-31A. Thereafter, a notification was issued by the State Government on 26.3.2009 vide which a notice was given to all concerned interested to raise any objection against Chanju-I Project (36 MW) allotted to respondent No. 3 within two months of the publication of the office order.

19. A reference was specifically made in this office order to the objections raised by the petitioner. It was also mentioned that in view of the specific objections raised by the petitioner, it has been decided to have the whole issue technically and transparently examined on the spot through a Committee of Technical Experts. The following were the members of the said Committee constituted to conduct spot inquiry on commission basis vide office order 26.3.2009 (Annexure P-32):

1. Shri K.S. Attri, Director Himurja, (Chairman)
2. Shri D.K. Chaudhary, Senior Executive Engineer (I&P), Member
3. Shri M.L. Sharma, Geologist, Member

It was further mentioned in the said office order that the Committee will try to resolve the matter in consultation with both the parties i.e. the proponents of Chanju-I and Chanju-II, who will be given due prior notice of the visit of the Committee to the site and will be associated with the inquiry. The terms of the inquiry of the said Committee constituted vide the aforesaid office order were fixed as under:

1. To fix and affirm the site of Power House of Chanju-II Project keeping in view the geological and geographical features of the site.
2. To affirm and fix the elevation of Intake site of Chanju-I with a view to ensure that with the proposed Gated Barrage of Chanju-I, there is no risk to the Power House of Chanju-II getting submerged or otherwise being adversely affected.

20. It is not the case of the petitioners that they were not associated at the time of site inspection by the Committee or that their views were not taken, but the main contention put forth by the learned Counsel for the petitioners was that the report of the Committee was not unanimous and the majority report of 2-members has been relied upon by respondents No. 1 and 2 in preference to the report of the Chairman of the Committee, who gave a dissenting view. The Committee had visited the site on 24.4.2009 and submitted its report. It was submitted on behalf of the petitioners that the objection could have been called to the report made by the said Committee, which report was never made available before passing the impugned order. It was also submitted that since the report of the Committee was not unanimous and the Chairman had differed with the view expressed by two other members, it should not have been relied upon.

21. On this point, it was submitted by the learned Counsel for the respondents that the Committee had been constituted in pursuance of the objections raised by the petitioner and the said Committee had submitted its report, which was duly considered by the State Government before passing the impugned order. In between intra departmental correspondence had taken place, as pointed out by the learned Counsel for the respondents, and a reference is being made to the same. A letter was written by the Chief Engineer (PSP), dated 8.7.2008, to the Principal Secretary (Power), in which a reference was made that respondent No. 3 had submitted a DPR of its Project with an enhanced capacity of 36MW against the allotted capacity of 25 MW and they had sought the opinion of the Government in regard to the signing of the fresh MoU and the question of royalty, upfront premium and other charges to be levied according to the approved norms of the Government for the revised capacity. The Principal Secretary (Power) was requested to convey the decision of the Government on the matter. The Chief Engineer, HPSEB also wrote a letter to the Principal Secretary (Power), dated 4.9.2008, (Annexure P-23), in which it was specifically mentioned that the capacity of the Project has been enhanced by the IPP by shifting the diversion site from 1380 meter to 1426 meter and substituting the diversion structure with its trench weir proposed in the DPR of the HPSEB with gated weir having full reservoir level at 1440 meter at the same river bed level i.e. El.1426 meter. Thus, the capacity was increased from 25 MW to 36 MW. In between, a letter was written by the Chief Engineer (PSP), dated 7.10.2008, (Annexure P-24), to the Director, Himurja, regarding Chanju-I Project allotted to respondent No. 3 to confirm that Himurja has no project between El.1426 meter and 1180 meter. The Chief Engineer (PSP), vide letter, dated 3.11.2008, (Annexure P-25), informed the Principal Secretary (Power) that Himurja had confirmed that no Project has been allotted by Himurja in the elevation range of revised DPR submitted by respondent No. 3. The proposed Chanju-I Project also does not interfere with any other Scheme of HPSEB. In the upstream of this Project, Chanju-II Project is located between elevations of 1450 meter and 1600 meter. It was also informed that the crest elevation of trench weir of the allotted Chanju-I HEP, as per the DPR prepared by the HPSEB, is 1426.50 meter and elevation of TWL/power house of Chanju-II is 1450 meter. Thus, there is an elevation difference of 24 meter, which can be utilized by either this Project or the upstream Project i.e. Chanju-II. However, it was clarified that no proposal has been received so far from the developer of Chanju-II Project and the proposal submitted by the developer of Chanju-I Project has an added benefit of storage/peaking power due to construction of gated weir.

22. The learned Counsel for the petitioners, on this point, had submitted that there was no question of submitting of the DPR by the petitioner since the time for submission of such DPR had not expired till 3.11.2008 and was to expire on 25.8.2009. Thus, it was submitted that respondents No. 1 and 2, without waiting for the DPR to be submitted by the petitioner, finalized the MoU with respondent No. 3. On this point, it was submitted by the learned Counsel for the respondents

that once the petitioner had come to know that a proposal has been submitted for enhancement of the capacity of Chanju-I Project from 25 MW to 36 MW, it was required of him to have submitted his DPR before the expiry of the period and he took no steps for submitting the DPR in time praying for enhancement of the capacity of his Project also, but kept on making correspondence with the State Government or raising objections in regard to Chanju-I Project, with which they had no connection.

23. Thereafter, another letter was written by the Chief Engineer (PSP) to the Principal Secretary (Power) in which they opined that the proposal of Chanju-I Project submitted by respondent No. 3 is considered geologically better proposal. It was also mentioned therein that no proposal regarding enhancement of capacity has been received so far from the developers of Chanju-II Project. A letter was written by the petitioner, dated 12.1.2009, (Annexure P-27), to the Chief Engineer (PSP) that the preparation of the DPR of Chanju-II is under progress and they referred to the objections raised by them. A perusal of the letter written by the Chief Engineer (Projects), dated 7.1.2009, (Annexure P-28), to the Chief Engineer (PSP) shows that the DPR of Chanju-I, as submitted by respondent No. 3, has been broadly examined based on hydrological/ technical studies, geological report of the project components and the evacuation system projected in the DPR. It was opined that the project is found to be technically viable for an installed capacity of 36 MW. It was also submitted that the DPR of Chanju-I is being examined in detail for technical/financial aspects and clarifications being sought from the IPP for processing it for Techno Economic Clearance (TEC). The petitioners raised objections vide letter dated 6.3.2009 (Annexure P-30), whereby they wrote to the Principal Secretary (Power) and referred to the objections invited by the Government under the provisions of Section 29 of the Electricity Act. They also raised objections in regard to the Chanju-I Project of respondent No. 3.

24. It is clear from the above discussion that when the State Government learnt about the increase in the capacity of Chanju-I Project from 25MW to 36MW, they sought clarifications from the Chief Engineer, HPSEB and others as to whether the said enhancement is likely to affect any other project or the reasons for such change. In the communications made to the State Government, the State Government was informed that there is no project given by Himurja, which is likely to be affected by change in the capacity. The State Government was informed in regard to the reasons for the said change. Thereafter, after inviting objections, the Government had constituted a 3-Member Committee, as discussed above, to submit the report in regard to the change of site, change of power house and other points and other points raised by the petitioners in the objections. The site was inspected by the Committee and the report of the Committee, which was relied upon by the State Government before passing the impugned order. The report is Annexure P-38, wherein the Committee made reference, in detail, to the two Projects i.e. Chanju-I and Chanju-II, technical details, geographical appraisal etc. and gave its findings accordingly. This report

was signed by only two Members of the Committee and a dissenting note was given by the Chairman.

25. Thus, it was contended on behalf of the State Government and other respondents that the order was passed by the State Government after considering the report of two Members of the Committee, which consisted of the report of the Geologist as well as Senior Executive Engineer of the Department and the Geologist can be said to be the most competent person to opine about the site of the Power House. It was submitted that the State Government had specifically mentioned that the promoters of Chanju-I were required to pay 3% additional free power over and above the royalty rates and there would be increase in the royalty as mentioned above. It was submitted by the learned Counsel for the petitioner that before passing the impugned order, no objections were called from either of the parties. It was also submitted that once the report in question was not unanimous, it was not required to be relied upon by the State Government and the State Government could have appointed another Committee.

26. However, my attention has been drawn to Clause 33 of the MoU that the decision of the State Government shall be final and binding on all the parties, which reads as under:

33. The First Party shall put in place a Committee comprising of experts from the relevant field for determining the impact, if any, on the existing Projects due to allotment of any upstream and/or downstream Project. In the event of a dispute, the decision of First Party in the matter shall be final and binding on all the parties.

27. My attention has also been drawn to Clause 14 of the MoU (Annexure P-17), dated 26.12.2008, which reads as under:

14. The validity of this MOU shall be up to a period of maximum of 36 months from the date of signing of MOU. In the even, the Project is not found viable by the Second Party after the submission of DPR and the First Party is satisfied that the Second Party has sufficient ground to establish that the Project is not techno-economically viable, the Second Party will be permitted to withdraw from the Project without any compensation or liability on the First Party for the expenditure incurred by the Second party. The Security Deposited at the time of signing of MOU shall however be refunded without interest. 50% of the Upfront Premium deposited at the time of signing of MOU shall also be refunded without interest.

28. Thus, it was contended by the learned Counsel for respondent No. 3 as well as on behalf of the State Government that in case the second party was not satisfied after the submission of the DPR that the Project was not found viable by the second party i.e. the petitioners, they were permitted to withdraw from the Project and the security deposit at the time of signing the MoU shall also be refunded without interest and 50% of the upfront premium deposited at the time

of the signing of the MoU shall also be refunded without interest. It is, therefore, clear that a due provision had been made in the agreement in question for the petitioner to withdraw from the Project in case the Project was not found viable after the submission of the DPR.

29. My attention has also been drawn to the Notice Inviting Proposals issued in the newspapers vide which it was specifically provided that the Projects will be allotted on the basis of tentative installed capacity as mentioned therein. However, in case the capacity of the Projects increases/decreases, the Company will be required to sign fresh MoU/IA with the Government, as the case may be. It is, therefore, clear that in the Notice Inviting Proposal, it was made clear to both the parties that the installed capacity can be increased or decreased depending upon the TEC and they were required to sign the fresh agreements. In case there is a specific provision for increase or decrease of the installed capacity, the petitioner cannot have any grievance that the capacity of the Project of respondent No. 3 was enhanced arbitrarily. Both the projects were advertised vide the same Notice Inviting Proposal and it was clear that both the projects were independent and there was nothing mentioned in the Notice Inviting Proposal or the MoU signed with the petitioner that in case the capacity of the Project of respondent No. 3 is enhanced, it shall be subject to his objection or his view shall be taken and once both these projects were independent and the capacity could be enhanced, the petitioner cannot have any grievance.

30. It was submitted by the learned Counsel for the petitioners that the sanctity was attached to the reaches, as per the DPRs, and the validity of the order passed by respondent No. 1 could be challenged only by way of judicial review and in no other manner. It was submitted that the power of judicial review is with this Court and that can be exercised in considering the case of the petitioner. It was also submitted that the report of the Chief Engineer was not supplied to the Committee before the constitution of the Committee or before seeking its report and no objections were invited from the petitioners to the said report, which was not made available to the petitioner. It was further submitted that the impugned order in question was passed at the back of the petitioner and the principles of natural justice were flouted. There was no adjudication of the objections raised by the Chairman of the Committee nor these were discussed in the impugned order. It was further submitted that the issue of submergence of power house of the project of the petitioner Company was not considered by the 2-Members Committee so constituted and since respondent No. 1 had not referred to the opinion of the Chairman or the objections raised by him, the impugned order is bad in the eyes of law.

31. During the course of hearing, my attention has also been drawn to an application filed by the petitioner whereby certain documents have been placed on record by the petitioners to show that one Sh. Swaraj Bhushan Lalit, Vice President of respondent No. 3 at present, was an employee of respondent No. 2 and he was still in the service of respondent No. 2 when he visited the site of

respondent No. 3 on 24.4.2009. According to Annexure A-1 placed on record with the said application, Swaraj Bhushan Lalit was working in the office of the Chief Engineer and had issued a notice for voluntary retirement w.e.f. 5.7.2009. It was sought to be argued that the said officer was present on behalf of respondent No. 3, though he was still in the employment of the HPSEB and there are no specific allegations in regard to any mala fide or favour done by the said Officer to respondent No. 3. A perusal of the report shows that the said Officer was mentioned as a person present on behalf of respondent No. 3 though he had not left the services of the HPSEB at that time. He may be working at the relevant time as Senior Executive Engineer, but it cannot be said nor there are specific allegations in this regard that he had been able to influence the report of inspection submitted by the Committee. The said Swaraj Bhushan Lalit had tried to give an explanation by filing his affidavit and that of one B.S. Mehta to show that Mr.Lalit was a personal friend of the consultant of respondent No. 3 company and because of his personal equations, he was present at the site. The said Swaraj Bhushan Lalit was not made a party nor given any time to offer any comments and no strictures can be passed as against him for this reason. However, once he was on the employment of the HPSEB on the date of the visit of the site, his being present at the spot on behalf of respondent No. 3 cannot be appreciated and his conduct in being present on behalf of respondent No. 3 Company in anticipation of his joining the said Company leads to an inference that he was interested to watch the interests of respondent No. 3 Company. He was an employee of the HPSEB, it cannot be said nor there were any allegations that he had been instrumental in influencing the report of the Committee. We require persons of character, who should have a sense of responsibility towards the Department they are serving and are not supposed to work or appear on behalf Company, which they intend to join after retirement and nothing beyond this can be observed in this regard.

32. To substantiate his submissions that the powers of judicial review can be exercised by this Court, the learned Counsel for the petitioners had placed reliance upon the following decisions.

33. The decision in Union of India and Others Vs. Dinesh Engineering Corporation and Another etc., shows that observations were given in regard to the power of the Government to reject any tender offer without assigning any reasons or to accept or not to accept the lower offer. It was held that such power could be exercised within the scope of the object of the relevant clause and not arbitrarily.

34. The next decision was in Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, It was observed that the decision making process is open to judicial review, though court cannot act as Appellate Authority, but if the process is violative of Article 14 of the Constitution of India, the Court can strike down the decision and action taken pursuant thereto.

35. The next decision was in LIC of India and Another Vs. Consumer Education and Research center and Others, The observations made in paras 27 and 23 are

relevant and are being reproduced below:

In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined in a manner that is fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by public interest. It is the exercise of the public power or action hedged by public element that becomes open to challenge. If it is shown that the exercise of power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their acts are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens simpliciter do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons.

36. Another decision was in *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, wherein it was observed regarding government contracts/tenders that without giving publicity, issuing advertisements or calling tenders, the government can accept a package scheme offered by an individual which serves public interest. It was also observed that the benefit to State is not to be judged by the monetary benefit only but the totality of benefit to the State and the public against the entire set of facts and circumstances.

37. Reliance was also placed upon the decision in *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, a perusal of which shows that the question considered was in eviction proceedings by a Government Trust and in that context the observations were made that any authority covered under Article 12 cannot act arbitrarily even in contractual matters and must act only to further public interest.

38. Another decision relied upon was in *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, which is not attracted to the present facts since it related to a transaction of supply of large quantity of material to a private party and there was a discontinuance of the supply on the ground of change of government policy without informing and taking into confidence the affected party, which was held to be bad.

39. The decision in *Union of India and others Vs. M/s. Graphic Industries Co. and others*, shows that it was observed that where the Government acts unfairly even

in contractual matters, the fairness in action can be examined.

40. The decision in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, shows that it was a decision in regard to grant of insurance contract, which is not applicable to the present facts.

41. The next decision relied was in Food Corporation of India and Another Vs. SEIL Ltd. and Others, which also relates to interference in contractual matters.

42. Another decision relied upon was in Tata Cellular v. Union of India (1994) 6 SCC 651, wherein the following observations were made:

The principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. (para 70)

Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review. (Para 71)

43. The decision in Syndicate Bank Vs. New Look Rubbers (P) Ltd. and Others, was also relied upon, which was in regard to the recovery of sums advanced as loan plus interest, which decision is not attracted to the present facts.

44. The next decision relied upon was in Union of India v. M.S. Mohammed Rawther (2007) 12 SCC 527, which decision is not applicable to the present facts since the question being considered was the application for grant of Swatantrata Sainik Samman Pension. It was observed that the Court has only judicial power to review the executive orders on Wednesbury principles, but it cannot arrogate to itself the power of the executive.

45. On the other hand, to substantiate his submission that the Court should exercise the power not as an Appellate Authority but in case there is any violation of principles of natural justice or there is arbitrariness in the order, it was submitted that the court can interfere. It was also submitted that the Court cannot assume the powers of an expert in substituting its own judgment for the judgment of the State and since the order passed by the State Government was in interest of the State i.e. it would have given more revenue to the State and

the Project was also found technically viable and all the procedure prescribed had been followed by the State Government while awarding the contract to respondent No. 3. Therefore, there was no violation of the principles of natural justice.

46. To substantiate his submissions, the learned Counsel for respondent No. 3 had relied upon the following decisions. The decision in *Tata Cellular (supra)* was relied upon. The observations made in para 77 are relevant and are being reproduced below:

The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) **Illegality** : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) **Irrationality**, namely, *Wednesbury* unreasonableness.

(iii) **Procedural impropriety**.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time....

It was submitted that none of the grounds mentioned above were available to the petitioner.

47. The other decision relied upon was in *Tehri Bandh Virodhi Sangarsh Samiti and Others Vs. State of U.P. and Others*, The observations made in paras 2, 6, 7 and 8 are relevant and are reproduced below:

2. The main grievance of the petitioners is that in preparing the plan for the Tehri Dam project the safety aspect has not been taken into consideration. It is asserted that the dam if allowed to be constructed poses a serious threat to the life, ecology and the environment of the entire northern India as the site of the dam is prone to earthquake. After this petition was filed a number of persons

have intervened and the parties have filed affidavits and counter-affidavits. The matter was head by this Court at various stages. The controversy relating to the project has not only been debated in this Court but has also taken a good deal of Parliament's time.

6. The report submitted by the Environmental Appraisal Committee was considered and discussed in the meeting of the Committee of Secretaries held on March, 20, 1990. The Committee of Secretaries came to the conclusion that the Environmental Appraisal Committee ought to have concerned itself with the environmental parameters within which the opinion of the said Committee was relevant. It was also opined by the Committee of Secretaries that the safety aspect of the design and earthquake engineering could be best looked into by the scientific and specialized organizations such as Geological Survey of India, National Geological Research Institute, Central Water Commission and Earthquake Engineering Department of the Roorkee University. In this context the Committee of Secretaries further observed that the safety aspect relating to the project ought to be resolved and in this regard directed the constitution of a High Level Committee of Experts to examine the issues relating to the safety aspects of Tehri Dam Project.

7. Pursuant to the decision of the Committee of Secretaries the Government of India constituted a High Level Committee consisting of Shri D.P. Dhoundial, Director General, Geological Survey of India as Chairman, Prof. V.K. Gaur, Secretary, Department of Ocean Development, Dr. D. Guptasarma, Director, National Geological Research Institute, Dr. C.D. Thatte, Member, Central Water Commission, Prof. L.S. Srivastava, Head, Department of Earthquake Engineering, University of Roorkee and Shri S.K. Shrone, Director, Geological Survey of India as members of the said Committee. The Committee was directed to examine the safety aspect of the project.

8. The High Level Committee of Experts under the Chairmanship of Shri D.P. Dhoundial, Director General, Geological Survey of India rendered its report on April 6, 1990. The affidavit filed by the Government of India stated as under regarding the said report:

The said Committee considered all safety aspects of the Tehri Dam and opined with reference to all the issues that were to be decided upon. The said Committee assumed the worst scenario of the possible occurrence of a large magnitude earthquake in the area and rendered an opinion to the effect that the design of the Tehri Dam incorporated adequate defensive measures in accordance with the recommendations of the International Congress of Large Dams on seismic design on dams made from time to time and that additional safety measures had been inbuilt to ensure an adequate and well evolved seismic design for this high dam.

In this case also, there was a dissenting opinion given by one of the members. In considering the said opinion, it was observed as under:

14. ...This Court does not possess the requisite expertise to render any final opinion on the rival contentions of the experts. In our opinion the court can only investigate and adjudicate the question as to whether the government was conscious to the inherent danger as pointed out by the petitioners and applied its mind to the safety of the dam. We have already given facts in detail which show that the government has considered the question on several occasions in the light of the opinions expressed by the experts. The government was satisfied with the report of the experts and only thereafter clearance has been given to the project. The petitioners contend that project has not as yet been cleared.

48. The above decision will show that inspite of a dissenting view given and the question was in regard to the various steps required for safety of the dam, but still the report was accepted by the Court and there was no opinion expressed that fresh Committee be formed or fresh report be sought.

49. Reliance was also placed upon the decision in Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others, The observations made Tata Cellular case (supra) were reiterated and it was observed in para 73 as under:

While exercising power of judicial review courts should not proceed where two views are possible and one view has been taken. In such a case, in the absence of mala fide taking one of the views cannot be a ground for judicial review.

A reference was also made to decisions in Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd. and Tata Cellular v. Union of India (supra) and the observations made in para 77 of the said decision, which observations have been quoted, while discussing the submissions made by the learned Counsel for the petitioners.

50. Reliance was also placed upon the decision in Jasbir Singh Chhabra and Others Vs. State of Punjab and Others, The observations made in para 20 are relevant and are being reproduced below:

20. It is trite to say that while exercising power of judicial review, the superior courts should not readily accept the charge of malus animus laid against the State and its functionaries. The burden to prove the charge of malafides is always on the person who moves the Court for invalidation of the action of the State and/or its agencies and instrumentalities on the ground that the same is vitiated due to malafides and the courts should resist the temptation of drawing dubious inferences of malafides or bad faith on the basis of vague and bald allegations or inchoate pleadings. In such cases, wisdom would demand that the Court should insist upon furnishing of some tangible evidence by the petitioner in support of his/her allegations....

Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. Here the petitioner, who was himself

once the Chief Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extraordinary and unusual occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore, the anxiety of the Court should be all the greater to insist on a high degree of proof. In this context it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties. These acts may lend themselves to misconstruction and suspicion as to the bona fides of their author when the full facts and surrounding circumstances are not known. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. Such is the judicial perspective in evaluating charge of unworthy conduct against ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up—these considerations are wholly irrelevant in judicial approach—but because otherwise, functioning effectively would become difficult in a democracy.

51. Next decision relied upon was in *Voltas Ltd. Vs. Union of India (UOI) and Others*, The observations made in para 12 are relevant and are reproduced below:

12. It is not in dispute that the Project in question is a very important National Project and for the aforesaid project, the respondent No. 2 wanted the best available person, who can complete the job satisfactorily and without any difficulty. It is also required to be noted that this Court is not sitting in appeal over the decision of an expert body or an Expert Committee, which is possessed with technical knowledge of the subject. It is also not possible for this Court, therefore, to substitute its own decision on merits for that of the Authority vested with the decision making process. Even otherwise, the Court is not qualified to pronounce upon this technical subject. What is required to be seen is whether the decision making process was in a just and proper manner and whether relevant facts and circumstances of the case were considered by the Committee and whether all the parties were also given equal chance to prove their credentials before the Expert Committee.

52. My attention was also drawn to condition No. 3 under the head "Applicable for Part-I(Category-I) Projects" of the Notice Inviting Proposals, wherein it was mentioned that the developer was to be permitted to withdraw from the Project after the submission of the DPR if the Government was satisfied that the developer has sufficient ground to establish that the Project is not techno economically viable without any liability on the Government of H.P. for the expenditure incurred by the developer.

53. It was also pointed out that there is a specific Clause No. 33 in the MoU that in regard to any dispute, the decision taken by the Government shall be final and

binding on all the parties. According to Clause 8 of the MoU entered with respondent No. 3, the second party was to carry out techno economic studies of the Project and was to submit a detailed Project report, after obtaining the techno economic feasibility of the project and implementation agreement was to be signed between both the parties.

54. In the light of the above discussion, the contentions put forth by the learned Counsel for the parties deserve to be examined. Clause 8 of the Notice Inviting Proposals reads as under:

8. The Projects will be allotted on the basis of tentative installed capacity as mentioned in the NIP. However, in case the capacity of the Projects increases/decreases upon firming up of the potential as per TEC accorded by the competent authority, the Company will be required to sign the fresh/revised MOU/IA with the Govt. as the case may be.

55. According to the pre feasibility report of Chanju-I Project of the respondent No. 3 Company (Annexure P-8), it was contained therein in regard to the vicinity as under:

Diversion barrage on Chanju nallah at El.?1380m near Katwa village, Power house on left of Chanju nallah at El.?1180m near Udwa village.

56. According to the pre feasibility report of Chanju-II Project of the petitioner Company (Annexure P-9), it was contained therein in regard to the vicinity as under:

2. Nos. Barrage at Chanju & Bhararu nallah at El.?1600m. Power house at El.?1450m near Gewa village.

57. Clauses 16 & 20 of the MoU (Annexure R-3/2) entered into between the State Government of H.P. (respondent No. 1) and M/s Indo Arya (respondent No. 3) read as under:

16. The First Party agrees to provide to the Second Party, at its request the copies of all available documents, data, information, reports relating to the Project including copies of all investigations and studies carried out since the inception of the Project to enable them to use this information in the best interest of the implementation of the Project. The First Party further agrees to render all possible assistance to facilitate the Second Party in obtaining necessary statutory clearances from the concerned authorities.

20. The Second Party agrees to reimburse to the HPSEB the amount spent by the HPSEB up to the date of signing of Implementation Agreement on the investigations and infrastructural works of the Project with compound interest @ 10% per annum within three months of the Implementation Agreement.

Thus, it is clear that the Second Party, i.e. respondent No. 3, was to reimburse to the HPSEB the amounts spent by the HPSEB upto the date of signing of the Implementation Agreement on the investigations etc.

58. Clause 33 of the MoU is relevant and reads as under:

33. The First Party shall put in place a Committee comprising of experts from the relevant field for determining the impact, if any, on the existing Projects due to allotment of any upstream and/or downstream Project. In the event of a dispute, the decision of First Party in the matter shall be final and binding on all the parties.

59. It follows from the above discussion that the question of location of the Project, its elevation and site of power house were to be determined after the inspection of the site. It is also clear that the HPSEB respondent No. 2 was competent to sell the DPR to respondent No. 3 on payment, which was, therefore, done by respondent No. 2 within the power given to them. In so far as the question regarding the findings of the Expert Committee constituted by respondent No. 1, according to Clause 33 of the MoU, respondent No. 1 was to appoint a Committee comprising of experts and in the event of dispute, as contained in the said Clause, the decision of the First Party i.e. respondent No. 1, in the matter, shall be final and binding on all the parties. There is no provision in clause 33 or any other Clause for calling for any objections from the other party or appointment of a fresh Committee. Therefore, there is no substance in the objection raised by the petitioners that they were not given time to raise objections and specifically there were no submissions that a fresh Committee should have been appointed. The only objection was that the report of the Committee was not unanimous and in case that is so, still the State Government can act upon the opinion of the majority of members. The difference in the report of the two Members of the Committee and a dissenting note has been mentioned above and it is clear that the decision of the First Party shall be final and binding on all the parties, which clearly precludes the petitioners from challenging the findings of the Committee of the Experts.

60. Apart from the above, both the Projects were independent and there was nothing on record to show that in case the elevation of one Project is raised thereby enhancing the capacity of the said Project, the same shall be subject to the objections raised by the proponents of the other Project. Both the Projects were independent and the only question to be determined was that in case the capacity of one Project is enhanced, whether it is likely to have adverse effect upon the other project and if so, to what extent. In that regard, the correspondence in between respondent No. 1 and respondent No. 2 shows that when the capacity of the Project of respondent No. 3 was enhanced, respondent No. 1 sought the opinion of respondent No. 2 and it was clarified to them as to the necessity and the likely benefits to the State Government in the form of increased income. All these questions were examined by the State Government and thereafter it had concurred for the enhancement of the capacity of the Power Project of respondent No. 3. Moreover, when an objection was raised by the petitioners by way of representation to the State Government, the State Government, as per the provisions contained in the MoU, constituted a

Committee of Experts, sought its report and thereafter it was the subjective satisfaction of the Government to accept the recommendations of the said Committee by due application of mind and the consideration that had weighed with the State Government was increase in income and maximum utilization of the capacity of power generation. It cannot be said that this Court can substitute its own judgment for the judgment of the State Government in determining the question whether by enhancing the capacity of Chanju-I Project of respondent No. 3, there will likely to be more revenue to the State and the question was also considered that it was not likely to have adverse effect upon the upstream Chanju-II Project of the petitioners.

61. In regard to the question of location of the site, the site was to be selected after its inspection by the Geologist and others and till the signing of the Project, the inspection of the site had not been carried out and as such, the site of the power house was amenable to any change depending upon the report of the Geologist and others. That report came subsequently and the DPR had to be considered and after consideration of the DPR and the report qua the selection of the site, the Project was to be finalized which was finalized thereafter. There is also a provision in the MoU, as per Clause 14, that in case there was any objection to the Second Party (i.e. petitioner), after the increase of the capacity of the Project, a liberty had been given to the petitioner to withdraw from the Project and as such it cannot be said that by increase in the capacity of Chanju-I Project, there will be adverse effect upon the project of the petitioner, which question has been considered in enhancing the capacity of Chanju-I Project. As per Clause 8 of the MoU, a liberty is given to the First Party to cancel the MoU after affording due opportunity to the Second Party and the Second Party could grant extension also.

62. In the present case, because of the enhanced capacity rather respondent No. 3 is liable to pay more royalty as provided in the MoU and they can have a grievance, if any, that due to enhancement of the capacity of the Project, they have been liable to pay more royalty than what was originally agreed upon in between the parties.

63. Apart from the above, it is also clear that in case there are some mala fides on behalf of respondents No. 1 and 2, they have to be pleaded and proved also, which is lacking in the present case. Neither the mala fides were pleaded nor even there was a whisper in regard to the mala fides and thus were never substantiated by any assertions made in the petition or affidavit filed in this regard. Respondent No. 3 was nowhere in the picture till 20.12.2007 and it came into picture after the finalization of the Project only in the month of December, 2007 and, therefore, it cannot be said that this all was done to favour respondent No. 3. In regard to the increase in the capacity, it was done after considering the DPR and the State Government had been satisfied of the reasons for the increase in the capacity or the change of Power House site and it was clear that there was no likely adverse effect upon the Project of the petitioners and it was nowhere

provided that before increasing the capacity of Chanju-I Project of respondent No. 3, the objections, if any, of the petitioners will be considered. The objections raised by the petitioners were in regard to the change in the site and change in elevation of the Project or the location of Chanju-II Project. However, this change in elevation was done from 1380 meter to 1440 meter. The increase in the capacity of the Project and the change in the Project site was made after the report of the Geologist and the site selection or the elevation was to be finalized after the DPRs were received and the site had been inspected by the Committee. Therefore, it cannot be said that these things were done with a mala fide intention to favour respondent No. 3. The only consideration that can weigh with the State Government was the likely increase in its income, which question was considered and thereafter a decision was taken.

64. In regard to the objection that one Member of the Committee had given a dissenting view, the report of the Committee, which was considered by respondent No. 1, was of two Members of the Committee, including the Geologist, and only the Director Himurja, who happened to be the Chairman of the committee, had given a dissenting view. However, it cannot be said that the report of the Committee had to be unanimous before it could be implemented by the State Government. There was no provision for calling for objections from the petitioners or for appointment of another Committee, which would have only delayed the setting up of the Project. The decision in Tehri Dam case (*supra*) also shows that, though the objection was in regard to safety of people of the area, but even, inspite of the dissenting view given by one Member of the Committee, the Hon"ble Apex Court did not deem it fit to appoint another Committee or agree to the dissenting view and, therefore, the objections to the said report were also ignored. The said decision and the reasoning given in the said case applied to the present facts also. The Apex Court in two of its decisions, namely, Tata Cellular and Reliance Airport (*supra*) has already laid down the points, which have to be looked into by the Court and as to whether the grounds were made out for calling for an interference or not. This Court is neither an expert nor it is expected to give any such opinion and has to go by the report of the Expert Committee. It cannot substitute its own judgment for the judgment of the State Government in considering the questions raised in this regard.

65. The petitioners had raised objections in regard to Chanju-I Project for enhanced capacity. They made representation to the Chief Engineer (PSP), dated 12.1.2009, (page 342), with a copy to the Principal Secretary (Power), in which they raised objections in detail and I need not reiterate the same since it shall be referred below in the representation made by the petitioners to the Chief Minister. Thereafter, vide letter dated 31.3.2009 (page 355), the Chief Engineer (PSP) submitted para-wise comments in regard to the objections and the enhancement of the capacity of Chanju-I Project, in which details of both the Projects were also given. Finally, it was concluded that the proposal of 36MW does not adversely affect the upstream Chanju-II Project. The objections raised by the petitioners were reiterated by them in the representation made to the

Chief Minister (Annexure P-31A), which may be reproduced below:

1. That both the projects were advertised and thereafter allotted simultaneously as envisaged in the respective Pre-feasibility Reports (PFR"s) to two different IPPs.
2. That the potential sites along with locations nad elevations were defined in the PFR"s for both the projects, namely; Chanju-I (25MW) and Chanju-II (17MW).
3. That the proponent of Chanju-I HEP have modified the project proposal by shifting the diversion site upstream from El.1380 m to 1426 m and have proposed storage up to El.1440 m. whereas the original proposal was purely as "run-of-the river" scheme. The installed capacity has accordingly been enhanced from 25 MW to 36 MW in the DPR submitted by the concerned IPP.
4. That at the location of Power house of Chanju-II shown in the PFR the elevation has been found to be 1429 m in place of 1450 m. as per the detailed topographical survey carried out. As a result, the tail water lever of Chanju-II has been kept at 1429 m.
5. That if the proposal as brought out at (3) above, is accepted, the power house of Chanju-II will get submerged due to FRL of Chanju-I at El.1440 m. As such, it will not be possible to utilize the power potential allotted in respect of Chanju-II HEP and the project will become techno-economically unviable.
6. That we understand the natural tendency of developers to maximize the capacity of power projects, but it should not be at the cost of the adjoining project as in the instant case.

The petitioners had also prayed vide this representation for the constitution of an independent expert Committee to examine the issues raised by them. To meet out the objections raised by the petitioners, the respondent State, vide order dated 26.3.2009, (Annexure P-32), constituted a Committee of Experts. In the said order dated 26.3.2009, it was clearly mentioned as under:

The main objection of proponent of Chanju-II HEP is with regard to the elevation range notified with respect to Chanju-I (36MW) HEP. On the objection of the proponent of Chanju-II HEP dated 6.3.09, Member (Projects), HPSEB has already been asked to examine the matter and furnish his comments to his department, vide this department"s letter of even number dated 19.3.09.

However, in view of the second representation of proponent of Chanju-II HEP aforesaid, it is felt necessary and expedient to have the whole issue technically and transparently examined on the spot through a committee of technical experts.

Thus, it was observed that the whole issue deserves to be examined by a Committee of technical experts. The terms of inquiry of this committee were as under:

1. To fix and affirm the site of Power House of Chanju-II Project keeping in view the geological and geographical features of the site.
2. To affirm and fix the elevation of Intake site of Chanju-I with a view to ensure that with the proposed Gated Barrage of Chanju-I, there is no risk to the Power House of Chanju-II getting submerged or otherwise being adversely affected.

Thereafter, the Committee so constituted by the respondent State visited the site and the main recommendations of the two Members of the Committee (Annexure P-38) were as under:

Keeping in view the geological conditions as observed at confluence, there is no threat to the power house to be located on a natural bench at an El. 1458m, which can further be lowered to develop a bench at an El. 1450m on the right bank of the Chanju Nallah, where competent rock is present to accommodate the various components of the power house of Chanju-II scheme.

In view of the forgoing, as there will be no adverse effect on the Power House (P/H) of Chanju-II scheme, if the TWL is kept at an El. 1450m, as per the stipulations of PFR, hence, there will be no risk of keeping the proposed Gated Barrage of Chanju-I, at an El. 1426.50m with FRL at an El. 1440m.

The dissenting note of the one Member of the Committee Shri K.S. Attri was as under:

The PFR of Chanju Stage-II HEP was prepared by HPSEB during May 2003, based on preliminary studies of Topographical sheets indicating diversion sites at an Elevation of 1600 Meters on Chanju and Bhararu Streams and a Power house on the confluence of Chanju and Bhararu at Elevation 1450 Meters. These elevations were subject to change based on site and geological conditions or optimizations or project features.

However the reach of Chanju Stage-II HEP was fixed downstream of confluence of Chanju & Mehad Nallahs and upstream of confluence of Chanju and Bhararu Nalas. Part of this reach is now proposed to be submerged under the Chanju Stage-I full reservoir level.

The conclusions drawn by the one Member of the Committee giving a dissenting opinion were as under:

1. The site proposed by the proponents of Chanju Stage-II is suitable though it shall need protection to keep it safe from Bhrrarur stream discharges.
2. The Full reservoir level of the Chanju-II may need to be lowered to ensure that the full reservoir level does not affect the power house of Chanju-II. The amount of lowering however shall depend upon the setting of the Chanju Stage-II power house which itself is dependent on the minimum draw down level of Chanju Stage-I reservoir and the parameters of machines selected for Chanju Stage-II. It is proposed to lower this level based on the peaking storage proposed to be provided by the Chanju Stage-II. It is however possible to ensure

that Chanju Stage-II power house is not submerged or adversely affected even if the full reservoir level is maintained in the range 1435-1438 meters by taking suitable protection measures cost of which can be shared by the proponents.

66. Thereafter, the impugned order, dated 11.6.2009, was passed by the State Government after considering the report of the Committee and in regard to Chanju-I Project, it was observed as under:

Since the Chanju-I HEP was allotted for 25 MW capacity and the DPR submitted by the Company is of 36 MW. There is clear cut enhancement of capacity and hence the Policy for enhancement is applicable. Therefore, as per present policy, the promoters of Chanju-I will have to pay 3% additional free power over and above the royalty rates or 12% for first 12 years, 18% for the next 18 years and 30% for the balance agreement period of 10 years. Meaning thereby, the promoters of Chanju-I has to pay royalty at the rates of 15% for the first 12 years, 21% for the next 18 years and 33% for the balance agreement period of 10 years.

67. It is, therefore, clear that the objections were raised by the petitioners before the Principal Secretary (Power), who sought the opinion of the Chief Engineer (PSP), who gave his reply. Thereafter, representation was made to the Chief Minister, in which the petitioners prayed for the constitution and the report was submitted by two Members of the Committee, while one Member of the Committee gave a dissenting view. The learned Counsel for the petitioner was banking upon mainly on the dissenting view given by one of the Members of the Committee. However, the court has to go by the report of the majority of the members, which was examined by the State Government and accordingly the impugned order was passed on 11.6.2009 by the Government.

68. The site had been inspected on 24th and 25th April, 2009 and the spot inquiry was to be conducted by the Committee for resolving issues arising due to the objections raised by the proponents of Chanju-II Projects on the proposal of Chanju-I Project. These objections had been considered in detail and had been answered by the Committee in its report submitted by two Members. The said report had been considered by the State Government and in raising the capacity of the Project from 25 MW to 36 MW, the economic considerations had weighed with the Government which point was also considered by the State Government while passing the impugned order. The facts of the case also show that a revised MoU was signed with the respondent No. 3 which would have given increased economic benefits to the State and, therefore, it cannot be said that the said order was passed without considering the opinion of the experts or was mala fide.

69. My attention has been drawn to the extract from the Project Report prepared by the HPSEB in February, 2008 (Annexure R-3/8), relevant portion of which is as under:

During Nov., 2006 a joint visit of Planning/Design/Field Engineers along with Geologist was held to finalize the layout of the Project. The proposals on both the

banks of Chanju nallah were discussed/studied at site. During traversing of the project area it was observed that the left bank of Chanju nallah where the project was initially proposed is covered with thick rain forest and is not approachable by road. Roads to all the components will have to be constructed in addition to two bridges near the power house and diversion sites. Moreover, on the left bank there is no suitable location to locate surface powerhouse and forebay....

The proposal on the right bank was jointly visited by Planning, Design & Field Engineers along with Geologist. The diversion site proposed at El. 1386.62m was not found suitable on geological considerations. On traversing the Chanju nallah, a site about 50 m downstream of confluence of Bhararu nallah & Chanju nallah appeared to be suitable for locating the diversion site.... The power house site earlier proposed on the right bank at about 80 m upstream of Bhaled weir of Baira-Suil HEP was also not found suitable on geological considerations. Hence, the site was ruled out and was shifted to 300 m u/s of Bhaled weir of Baira Suil HEP.

70. It is clear from the Notice Inviting Proposal i.e. the advertisement in question that it was clearly provided therein in Clause 8 mentioned above that the capacity of the Project could be increased or decreased. The location of Chanju-II Project and Chanju-I Project was specified on the basis of the pre feasibility report and it was subject to TEC clearance after the DPRs were submitted by both the parties. The DPR was submitted by the proponents of Chanju-I Project i.e. respondent No. 3 which was the DPR supplied by the HPSEB praying for enhancement in the capacity of the project. On the other hand, even after learning of this enhanced capacity of Chanju-I Project, the petitioners waited for time to expire and submitted the DPR and took up the plea that they were to submit the DPR within a period of 18 months. However, nothing prevented the petitioners from submitting the DPR before the expiry of the period in case they had learnt about the enhanced capacity of Chanju-I Project. The petitioners took no steps to make submission for increase in the capacity of their Project and rather raised objections to the Project of respondent No. 3 i.e. Chanju-I Project. The TEC was to be given by the State Government on consideration of the DPR as well as site inspection. The elevation of the Project site of the power house etc. were to be finalized by the TEC after the DPR had been submitted by both the parties and the mere fact that after site inspection, there has been some changes in the elevation as well as the site of the power house cannot lead to the inference that the petitioner has a right to challenge the project of respondent No. 3 for enhanced capacity. Before the finalization of the project, the site was to be inspected, DPR was to be considered and thereafter there could have been some change in the elevations as well as location of the Chanju-I Project. The Government had considered the objections of the petitioners, appointed the Expert Committee and accordingly took a conscious decision which does not suffer from any mala fide, for which no allegations or proof is also on the record and the facts of the case show that the revised MoU was signed with respondent

No. 3, which would have given increased income to the respondents, which can be and is a relevant consideration.

71. The reasons for holding that the petitioners are not entitled to the relief can be summed up thus. The location of the Projects, their elevations and capacity can be enhanced or increased for which a revised MoU was required to be signed in between the parties and there was a clause in the Notice Inviting Proposal itself that the capacity of a Project can be increased or decreased after the submission of the DPR and the spot inspection. There was a specific clause that the petitioners, if not satisfied that the project is viable, they could withdraw from the Project to which a reference has already been made above. The DPR was purchased by respondent No. 3 from respondent No. 2, which, as per the provisions referred to above, cannot be termed as an illegality or irregularity. On the receipt of the communication that the capacity of Chanju-I project is being enhanced, the State Government had sought the opinion from the Chief Engineer, who had submitted the reasons for the increase in the capacity of the Project, which was duly considered by the State Government. On objections, a Committee of experts was constituted by the State Government and the decision taken by the Government upon the report of the Committee could not be called in question. The mere fact that a dissenting view was given by one of the members of the said Committee does not lead to the inference that the petitioner had a right to challenge the report of the Committee or file objections, for which there was no provision. The only thing in favor of the petitioner was the opinion of the Chairman of the Committee, who gave a dissenting note, which cannot be said to be the only consideration to hold that the impugned order is liable to be quashed. The State Government had considered the opinion of the Committee and after due application of mind, the impugned order was passed. The benefits accruing to the State Government from the increased capacity of Chanju-I Project have already been reiterated above. Any increase in the capacity of Chanju-I Project was not subject to any objection by the proponents of Chanju-II Project as both the projects were independent and not dependant upon each other or objections could be raised by the proponents of the one project to the other project. The provision for enhancement of the capacity was there in the MoU and as such the State government was competent to enhance the capacity after consideration of the DPR and the site inspection subject to techno economic clearance.

72. In view of the above discussion, I accordingly hold that the petitioners have not been able to make out any case. Therefore, the writ petition filed by the petitioners is dismissed. There is no order as to costs.