

(1997) 11 DEL CK 0073

In the Delhi High Court

Case No : Interim Application No. 7314 of 1996 and Suit No. 1905 of 1996

National Thermal Power Corporation Ltd.

APPELLANT

Vs

Spectrum Power Generation Ltd. and Others

RESPONDENT

Date of Decision : 05-11-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1
Foreign Exchange Regulation Act, 1973 — Section 19(1)
Specific Relief Act, 1963 — Section 14

Citation : (1998) 1 AD 141 : (1997) 69 DLT 652

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Shanti Bhushan, P. Bhushan, A.B. Divan, Soli Cooper, P.S. Shroff, A.L. Das, P.C. Sen, M.M. Rao, H.N. Salve, Ramji Srinivasan, R.K.P. Shankar Das, K.M. Panikar, M.N. Krishnamani, P.K. Singh, P.S. Shroff, Ritu Bhalla, Arun Jaitley, J.B. Dadachandji and C.M. Oberoi, for the Appellant;

Judgement

K. Ramamoorthy, J.

(1) The National Thermal Power Corporation Ltd. (hereinafter referred to as the "NTPC") instituted the suit on the 3rd of August, 1996 praying for the following reliefs :

"(A) A decree for specific performance directing the defendant No. 1, 2 and 3 to perform their obligations in the Promoters Agreement dated 29.6.1993. (b) A decree for a mandatory injunction to defendant No. 1. To issue and deliver 77.7 lakhs equity shares to defendant No. 1's Company to plaintiff by accepting the plaintiff's contribution for the same. (c) A decree for mandatory injunction to defendant No. 1 to accept the plaintiff's nominee as a Director on their Board. (d) A decree for declaration that the allotment of shares to any person other than defendants No. 2 and 3 are illegal and void. (e) A decree for an injunction restraining the defendant No. 1 and defendant Nos. 14, 16, 17 and 18 from taking any steps for the execution of the contracts/sub-contract issued to them by

defendant No. 1 in respect of the Godavari Gas Project. (f) Composition of Board of Spgl in terms of the Promoters Agreement. (g) A decree for mandatory injunction to defendant No. 1 to supply to the plaintiff complete copies of the audited accounts of defendant No. 1 since its incorporation till date, copies of the minutes of all meetings of their Board, resolutions passed by their Board and all correspondence entered by them with all outside agencies and in the alternatives. (h) The decree of mandatory injunction to defendant No. 1 to retransfer the land which had been transferred by the plaintiff for this project and to apply to the various authorities for transferring back to the plaintiff the gas allocation in respect of that project and various other clearances transferred by the plaintiff to defendant No. 1 in respect of this project. (i) A decree for the costs of the suit"

In I.A.7314/96 under Order 39, Rules 1 & 2, CPC the Ntpc prayed for the following reliefs:

"(A)appoint a Receiver to take charge of all the shares issued by the defendant No. 1 Company and exercise all the voting rights in respect of such shares and ensure the proper management of the Company in terms of the Promoters Agreement dated 29.6.93, or (b) direct the defendant No. 1 Company to accept the plaintiff's nominee as a Director in the Board of Directors of defendant No. 1 Company and further direct defendant No. 1 not to take any financial and administrative decision without the concurrence or approval of the plaintiff's nominee Director in the defendant No. 1 Company, and (e) restrain defendant No. 4 and defendant Nos. 13 and 15 from exercising any voting right in respect of shares allotted to them in defendant No. 1 Company, and (d) restrain defendant No. 14 and defendant Nos. 16, 17, 18 for taking any further steps to execute and implement the contracts awarded to them by defendant No. 1 Company."

There are 18 defendants in the suit.

(2) The Spectrum Technologies Usa INC. (hereinafter referred to as "ST USA") has filed Suit No. 1251/96 praying the following reliefs :

"(A)a mandatory injunction directing defendant Nos. 2 and 3 to make necessary amendments in the Articles of Association of defendant No. 1 in accordance with the requirement of the promoters agreement dated 29th June, 1993; (b) a declaration that the resolution at item No. 9 passed by the Board of Directors of defendant No. 1 in its 27th meeting held on 14th December, 1995 is illegal and ultra virus the promoters agreement dated 29th June, 1993 and no effect can be given to the said resolution and the parties continue to be bound by the promoters agreement dated 29th June, 1993; (e) a declaration that Dr. A.V. Mohan Rao and Mr. Brij Bharteey are and continue to be Members of the Board of Directors of the defendant No. 1 on behalf of the plaintiff and also Mr. C.P. Jain, Director-Finance of Ntpc be inducted as a Director on the Board of Directors of defendant No. 1 as a nominee of defendant No. 3; (d) an injunction restraining

defendant No. 2 either directly or through its associates, nominees, agents or servants from in any manner increasing the authorised issued share capital of defendant No. 1 or to allot or issue any further shares; (e) a direction directing defendant Nos. 1 and 2 not to take any steps in the management and administration of defendant No. 1 without the affirmative votes of the plaintiff and defendant No. 3."

In I.A.4782/96 the plaintiff prayed for the following reliefs :

"(A) Pass a mandatory injunction directing defendant Nos. 1 and 2 to make the necessary amendments to the Articles of Association of the defendant No. 1 Company as required in the promoter's agreement dated 29.6.93. (b) Not give effect to item 9 of the agenda of the 17th Meeting of the Board of Directors of the Company held 01.11.1995 in any manner whatsoever and to direct defendant Nos. 1 and 2 to act only in terms of the Promoters' Agreement dated 29.6.1993. (c) An injunction restraining defendant Nos. 1 and 2 not to take any steps in the management and administration of the defendant No. 1 Company unless affirmative votes have been taken by the plaintiff and the defendant No. 3 in respect of any matter relating to the management, administration and operation of the defendant No. 1 Company. (d) Direct defendant No. 1 Company to hand over the statutory books, records, accounting books and documents to plaintiff's representative for inspection and inventory thereof to prevent any fabrication or interpolations which can be made by defendant No. 1 Company or defendant No. 2 or its men, servants or agents. (e) Ad-interim injunction in terms of prayers (a) to (d) above. (f) An injunction restraining defendant No. 2 either directly or through its associates, nominees, agents or servants from in any manner increasing the authorised issue share capital of defendant No. 1 or to allot or issue any further shares."

(3) Mr. Shanti Bhushan, the learned Senior Counsel made submissions on behalf of the Ntpc, Mr. R.K.P. Shankardas, the learned Senior Counsel made submissions on behalf of St Usa, defendant No. 3 in Suit No. 1905/96 and plaintiff in Suit No. 1251/96, Mr. Anil Divan, the learned Senior Counsel made submissions on behalf of the Spectrum Power Generation Ltd. (hereinafter referred to as "SPGL"), Mr. Harish Salve, the learned Senior Counsel made submissions on behalf of defendant No. 2, Mr. M.N. Krishnamani, the learned Senior Counsel made submissions on behalf of defendants 4 and 5, Ms. Pellavi Shroff, the learned Counsel made submissions on behalf of defendants 6 to 13, and Mr. C.M. Oberoi, learned Counsel made submissions on behalf of defendant No. 18.

(4) Before I go to the pleadings, it is necessary to make some prefatory remarks just to highlight the questions that have arisen for consideration. The Ntpc thought of putting up a power project in Andhra Pradesh, which is necessary for Industrial purposes and that will definitely bring about a change in the living conditions of the people and this area in which the power project is located is one of the backwards areas in the country. Therefore, a power project is really a boon

to the people of the locality. An establishment of a power project is essentially a matter of great public interest. Having started the project, the Ntpc did not want to take up the same for its own reasons and it had decided that the establishment of a power project could be entrusted to a private sector who is competent and who has got the necessary resources and the technical know-how to establish a project. Dr. A. V. Mohan Rao, the real plaintiff in Suit No. 1251/96 came forward with the offer to take up the project in private sector. He apparently sought the aid and assistance of Mr. Kishan Rao, who according to the plaintiff, in both the cases had hijacked the project, as it were, from Dr. A.V. Mohan Rao and the Ntpc and had inducted his family members in the Company and lie is having overall control of the entire project. Mr. Kishan Rao, who is the force behind the Spgl has been able to garner resources, enter into contracts with very competent persons in the field and has been able to establish the project and the project has started generating power. It is a matter of common knowledge that the first Gas Turbine became very much functional on 11.2.1997 at 16.45 p.m. and the second Gas Turbine was under going testing process and on 12.2.1997 was one of the days when testing was done. The project is almost complete and the power is being supplied to the Andhra Pradesh State Electricity Board, who is the main beneficiary of the project, which is obliged to provide power to the people. It is in this back drop, the case has to be considered in the light of the pleadings. No doubt, the point involved is a very short one but the parties had filed number of documents and arguments went on for a quite number of days and various issues were thrashed out and the parties, in particular, the plaintiff in both the suits and the first defendant were putting the blame on each other. The main thrust of the argument on behalf of the plaintiff in both the cases was that in the light of the conduct of Mr. Kishan Rao, the Managing Director of the first defendant Company, a Receiver should be appointed to take over the entire project and the Receiver should be entrusted with the power to manage the affairs of the Company pending the disposal of the suit According to the learned Senior Counsel Mr. Shanti Bhushan and Mr. R.K.P. Shankardas, learned Senior Counsel for the first defendant had not acted in accordance with the terms of a solemn agreement, the promoters agreement dated 26.9.1993 this Court should interdict and prevent him from proceeding with the project. According to the learned Senior Counsel a person who had not been able to keep up to his promise and who had no qualms of conscience and who had committed with impunity flagrant breach of contract should not be permitted to have the benefit of a project which he had wrenched from the Ntpc and Dr. A.V. Mohan Rao.

(5) I feel it is better to survey the events right from 1989 up to the supply of energy on 11.2.1997. On 7.4.1989 the Ntpc applied to the National Airport Authority for its clearance for the project. On 6.7.1989 the National Airport Authority issued no objection certificate for the construction of the proposed Godavari Gas Based Power Plant up to a height of 51.25 nits. The certificate was for a period of two years and it was subsequently extended and there is no

dispute about it. On 17.2.1990 the District Forest Officer, Kakinanda wrote to the Chief Conservative Forest Officer, Andhra Pradesh that the land selected for the project is a non forest area. On 3.5.1990 the Andhra Pradesh .Pollution Control Board issued no objection certificate to the Ntpc to set up the unit to generate electricity at Uppada village. East Godavari District. On 25.7.1990 the Central Electricity Authority issued Clearance Certificate in the following terms:

"THE techno-economic appraisal of the above scheme was found to be in order in the 87th Meeting of the Cea held on 12.12.1989. The scheme was to be considered for accord of techno-economic clearance of Cea after compliance of Section 29 of the E (5) Act, 1948, by National Thermal Power Corporation Ltd., which has since been done."

On 15.10.1990 the Andhra Pradesh Government issued an order permitting supply of water. On 9.3.1992 the Member Secretary to the Government Energy Foreign Environment of the- Government of Andhra Pradesh wrote to the Secretary, Government of India, Ministry of Power and Non Conventional Energy Sources stating that the Andhra Pradesh Government had selected M/s. Spectrum Technologies for setting up a second 400 Mw gas based project in Andhra Pradesh in private sector and requested for allocation of gas. Therefore, in March, 1992 a firm commitment had been made by the Government of Andhra Pradesh to set up the project in private sector and the Ntpc was not to set up the project. On 26.5.1992 Manager, Strategic Programs of G.A. Industrial Company wrote to the Cabinet Secretary, Government of India, Secretary of Power, Government of India, Secretary (Finance), Government of India, Jt. Secretary (Power), Government of India, Managing Director, Tata Electric Co. and Managing Director, Calentta Electric Supply Co. stating that a Company was ready to assist the Spectrum Technologies in the project. On 19.6.1992 there was a meeting between St Usa, Ntpc and Department of Power in New Delhi. The following are the persons who participated in the meeting ;

"1.Shri S. Rajgopal, Secretary (Power) - In Chair 2. Shri Rajinder Singh, Chairman & Managing Director, Ntpc 3. Dr. A.V. Mohan Rao, Vice President, Spectrum Technologies 4. Shri M. Kishan Rao, Managing Director, Jaya Food Industries Ltd. 5. Shri N. Ramji, Joint Secretary (IPC), Deptt. of Power. 6. Shri R.K. Nair, Joint Secretary (P&T), Deptt. of Power. 7. Shri M. Sarangi, Director (Th.) , Deptt. of Power. 8. Shri P.D. Siwal, Deputy Director (JPC), Deptt. of Power 9. Shri B.P. Gupta, Desk Officer (JPC), Deptt. of Power."

Dr. Mohan Rao, the Vice President of Spectrum Technologies Usa, Inc., New York was requested to put forth his proposal. What he stated is :

"DR. Mohan Rao stated that Spectrum Technologies in association with Cms Generation was capable of fully funding the project. He further pointed out that since Spectrum Technologies had technocrafts at the top management level, and the Company would be joining with Cms Generation, Spectrum Technologies had both the financial and technical capability of putting up and running a power

station utilising .75 Mcmd of gas. If Ntpc could also join, it would further strengthen the capabilities of the Company putting up the project, and would also take care of the expenditure incurred by Ntpc so far on the project."

The Cms Generation could not participate in the Programme. Mr. Rajinder Singh, Cmd, Ntpc stated in the meeting that almost Rs. 5 crores had been spent so far on the project by the NTPC. He urged that the project should be continued to be implemented by the NTPC. It was decided :

"In view of the power supply position in Andhra Pradesh, Government of Andhra Pradesh would be insisting on the project being put up in the private sector so that the State benefits from the entire generation utilising the total 1.5 Mcmd gas that is available. Further, even if Adb loan could be tied up, Ntpc will have to find funding of the order of Rs. 250 crores even for a 200 Mw plant and this amount would be much more for a 400 Mw plant. In view of the fact that Ntpc was finding it difficult to locate resources for the Yamunanagar project - a priority project it will not be prudent for Ntpc to deploy its fund to the extent of Rs. 250 crores for such a small project. Now that the gas allocation has been reduced to 1.5 Mcmd, the State would require the entire generation from this project. 4. On the basis of the discussion, it was decided that Spectrum Technologies could undertake the project. They and Ntpc may work out the modalities of a joint sector venture with Ntpc on the basis of the following ratios: 25:26:49 (of Spectrum Technologies, Ntpc & by public share holding respectively or similar ratio as may be found suitable)."

Therefore, on 19.6.1992 it was decided in the presence of the Ntpc that St Usa could undertake the project and the project should be by a joint venture Company with the NTPC. It may be noticed that Dr. Mohan RuO had taken Mr. Kishan Rao, Managing Director, Jay a Food Industries Ltd. Apparently, Dr. A. V. Mohan Rao and Mr. Kishan Rao had an understanding for taking up the project together. On 22.6.1992 Dr. Mohun Rao wrote to the Ntpc thanking Mr. Rajinder Singh, Cmd for agreeing to make the St Usa and their associates as joint sector partners of the NTPC. On 23.7.1992 there was a Memorandum of Understanding executed between St Usa and the NTPC. It is noticed in the MoU that the Government of India had decided that St Usa would undertake the project. It is on that basis only that St Usa had approached to the Ntpc to participate in this project as a joint venture. In Clause 4.2 it was agreed:

"NTPC and Spectrum Technologies agree in principle to participate in the project subject to such terms and conditions as may be mutually agreed and further subject to the approval of the Ntpc Board of Directors and the Government of India. The extent of participation by the parties will be determined based on mutual consultations and agreement."

It was agreed in Clause 4.3 :

"Based on their expertise, Ntpc can provide the full range of technical and project management services for this project subject to such terms and conditions as

may be mutually agreed to."

The parties had agreed that the role and the extent of the participation could be mutually discussed and agreed keeping in view the overall project requirements. On 19.10.1992 the Ntpc wrote to the General Manager, Gas Authority of India, New Delhi for transfer of the allocation to joint venture Company. On 26.10.1992 the Spectrum Power Generation Ltd. was incorporated under the Companies Act, 1956. It is obvious that the word "Spectrum" must have been suggested by Dr. A.V. Mohan Rao and agreed to by Mr. Kishan Rao. On 9.11.1992 the Ntpc wrote to the Minister of Petroleum to accord approval to the joint venture Company to negotiate with the Gas Authority of India for gas supply contract. The first Meeting of the Board of Directors of Spgl was held on 25.11.1992. In that meeting the Company took notes of the details of the project. In paragraph 3 it is stated :

"To take note of details of project The Chairman informed the Board that Spectrum Technologies Inc., Usa, represented by Dr. A, Mohan Rao was selected by Government of Andhra Pradesh to set up 400 Mw combined cycle Power Project in Andhra Pradesh. Jaya Food Industries Limited page 106 "

In para 13 it was noticed by the Company :

"Transfer of Licences and Approvals to the Company The Chairman informed the Board that a gas based project for 400 Mw capacity was identified for implementation in the central sector by National Thermal Power Corporation (NTPC) and subsequently it was decided that Ntpc together with Spectrum Technologies Inc., Usa would set up the project in India Along with an Indian Company. He stated that finally Ntpc, Spectrum Technologies, Usa and Jay? Food Industries Limited, Hyderabad agreed to be the joint promoters and participate in the equity of the Company."

In November, 1992 the Ntpc gave a feasibility report for Godavari Gas Project by SPGL. The second Meeting of the Board of Directors of the Spgl was held on 4th day of December, 1992. On 5.1.1993 the Spgl wrote to the Cmd, Ntpc that as indicated in the letter by the Spgl to the Secretary, Department of Power 10% of the equity would be reserved for the NTPC. A request for the transfer of the land was made. It is also stated that the Spgl had requested Ntpc to provide the cost and terms of Operational and Maintenance Services. The Spgl had informed the financial institutions that the Ntpc would provide the O & M Services. On 7.1.1993 the Spgl wrote to the Foreign Investments Promotion Board, New Delhi for permission to have foreign participants. On 21.9.1993 the Spgl wrote to the Chairman, Andhra Pradesh State Electricity Board for clearance u/Section 44 of the Electricity Supply Act, 1948. On the same date i.e. 21.9.1993 the Spgl wrote to the Chairman, Central Electricity Authority requesting for techno economic clearance by the Central Electricity Authority. The Spgl had enclosed its letter dated 21.9.1993 to the Andhra Pradesh State Electricity Board. On 28.1.1993 the

Ministry of Energy wrote to the Cmd, Ntpc conveying that the Government of India had granted approval for permission to Ntpc to establish joint sector power project. It is stated that the Ntpc would have the powers to nominate its Directors. The Government of India had decided that the power generated through the project will not be subject to power sharing arrangement applicable to Ntpc project. The idea was that the entire power generated would go to the Andhra Pradesh State Electricity Board. On 2.2.1993 the Ministry of Petroleum and Industrial Gas informed the Department of Power that transfer of gas allocated to Ntpc to Spgl had been approved by the Government of India. On the 5th day of February, 1993 a statutory meeting of the SPC.L was held. On 9.2.1993 the Ministry of Power issued an Office Memorandum in the following terms :

"It has been decided by the Government that Godavari Gas Based Power Project (200 MW) located at Kakinada of East Godavari District in Andhra Pradesh State be implemented by M/s. Spectrum Power General Limited (SPGL). Consequent on the Government's decision to permit the National Thermal Power Corporation (NTPC) to participate in joint venture, the Ntpc is likely to join the Spgl as an equity partner after obtaining the needed approval of its Board of Directors and the Ministry of Power. It is requested that all linkages and clearances for the project, presently in the name of Ntpc may be transferred to M/s. SPGL."

On the 26th day of February, 1993 4th Meeting of the Board of Directors of Spgl was held and the following resolution was passed :

"Resolved that Shri M. Kishan Rao, Shri M. Raghuveer and Shri M. Subramanyam, all Directors of the Company be and are hereby authorised to make necessary applications, submissions, alterations etc., in connection with Power Purchase Agreement with Apseb, fuel Supply Agreement with Gas Authority of India Ltd., Investment Pattern with Foreign Investment Promotion Board and hereby authorised to submit the following estimated figures :

Us \$ Rs. (in Millions) (in Lakhs) 1. Estimated Project Cost 218.28 65485.00 2. Equity-Foreign 39.29 11788.00 60% - Indian 26.19 7857.00 40% 3. Debt - Foreign 78.58 23574.00 51% - Indian 74.22 22266.00 49% 218.28 65485.00"

On 9.3.1993 the Central Electricity Authority wrote to the Spgl seeking certain clarifications. The Central Electricity Authority on 7.4.1993 in principle issued the Clearance Certificate in the following terms :

"This has reference to your letter No. REF/93-5 dated 20.1.93 forwarding a copy of the Project Report for Godavari Gtcc Tps (198 MW) to Cea for techno economic appraisal. Based on the preliminary scrutiny of the Project Report, the installation of the above Gtcc Tps in West Godavari District by M/s. Spectrum Power Generation Ltd. as a Joint Venture Generating Company is found acceptable "in Principle". "

Copy was sent to the NTPC. On 15.4.1993 Ntpc wrote to the Principal Chief

Conservator of Forests for transfer of the clearance issued on 7.2.1990 Ntpc to the SPGL. On the same date, the Ntpc wrote to the Irrigation and Cad Department, Government of Andhra Pradesh and also Andhra Pradesh Pollution Control Board for transfer. On 17.4.1993 the Andhra Pradesh Pollution Control Board issued the Clearance. On 30.4.1993 the Ministry of Industry granted approval to the proposed project by SPGL. On the same date the Ministry of Environment and Forest issued an Office Memorandum granting Environmental Clearance. On 11.5.1993 Spgl wrote to the Central Electricity Authority that a gazette notification u/Section 29(2) of the Electricity Supply Act, 1948 was issued and there was no objection from any quarter, On 24.5.1993 the Government of Andhra Pradesh, Irrigation and Command Area Development permitting transfer of supply of water to Ntpc to SPGL. On 16.6.1993 the Energy Forests Environment Science & Technology Department issued a clearance. The 5th Meeting of the Board of Directors of Spgl on 18.6.1993 and Mr. M. Kishan Rao appointed as the Managing Director. The Board noticed the approval of the Ministry of Industry. On the same day, the 6th Meeting of the Board was held at 5 p.m. and the Managing Director was authorised to sign Power Purchase Agreement with Andhra Pradesh State Electricity Board, On 20.6.1993 the Power Purchase Agreement was entered into between Andhra Pradesh State Electricity Board and the SPGL. On 21.6.1993 the 7th Meeting of the Board of Spgl was held authorising Mr. M. Kishan Rao and Mr. M. Raghuveer to sign agreement with the Gas Authority of India. On 25.6.1993 the Ministry of Petroleum and Industrial Gas wrote to the Spgl stating that the Spgl was free to source its requirement of Naphtha because Naphtha was no longer in a locative regime and its import was not restricted or canalised. On 28.6.1993 Ministry of Petroleum and Industrial Gas extended the time for execution of gas supply contract.

(6) While the Spgl was proceeding with the work, on 29.6.1993 the promoters agreement was executed amongst Ntpc (plaintiff in Suit No. 1905/96), St Usa (plaintiff in Suit No. 1251/96) and Jaya Food Industries (Pvt.) Ltd. Section I of the Agreement deals with the definition. It is relevant to note only the definition of "Affiliate". It defined to mean :

" AFFILIATE" in relation to a party hereto shall mean a person previously approved in writing by the other parties hereto and who subscribes to the issue of equity share capital of Spg 1. referred to in Section 3.2 hereof and who agrees in writing to be bound by the terms of this agreement and has furnished in favor of such party an irrevocable Power of Attorney empowering such party to act on its behalf in all matters relating to this Agreement including exercise of voting rights and transfer of shares. Provided that subject to the provisions of Clause 4.4 of the MoU the aforesaid requirement in respect of consent of parties will not apply to Cms as and when it is decided to associate it with the project.

Section 2 deals with participation in the SPGL. It was agreed that the Articles of Association of Spgl shall be amended so as to be in form and substance as mutually agreed upon by the parties and shall to the extent permissible under

Indian law incorporate the terms of this agreement. Section 3 provides for share capital and subscription. Section 4 deals with the Spgl Representations and Warranties. Section 5 deals with the constitution of the Board of Directors. Section 6 refers to Special Resolution. Section 7 deals with the Management. Section 8 speaks of Project Implementation and Funding. Section 9 states that "the Spgl shall adopt, ratify, consent to and fully agree to be bound by this Agreement". Section 10 states that Memorandum and Articles of Association shall be suitably amended. Section 11 speaks of location of the Registered Office. Section 12 speaks of disinvestment. Section 13 refers to the Expenses to be borne by the SPGL. Section 14 provides that Partial Invalidity would not affect the remuneration provisions. Section 15 speaks of Governing Law and Jurisdiction. Section 16 speaks of Notices. Section 17 provides for Arbitration. Section 18 provides for General Provisions. Section 19 speaks of Duration, Termination and Limitation. On 26.9.1993 a Side Letter was signed by all the three parties wherein the parties had agreed to submit the documents mentioned therein within 120 days to make the provisions of the agreement effective and operative. On 30.6.1993 Ministry of Power wrote to the Ntpc about the participation of Ntpc in the following terms :

"I am directed to refer to your letters No. 01/CP/1.300 dated 25.6.93 and 29.6.93 on the above subject and to convey the approval of the Ministry of Power to the signing of Promoters Agreement by the National Thermal Power Corporation Limited in connection with the setting up of 200 Mw gas based power project at Kakinada envisaging a debt equity ratio of 7:3 on an estimated cost of Rs. 654.85 crores with 10% equity participation by NTPC."

On 25.7.1993 Dr. A.V. Mohan Rao wrote to the Ministry of Power informing the Ministry about the promoters agreement. Dr. A.V. Mohan Rao wrote on 23.8.1993 to Ntpc sending a financial statement of STUSA. The Ntpc wrote back to Dr. A.V. Mohan Rao on 2.9.1993 stating that the letter from Dr. A.V. Mohan Rao had not been signed. On 22.9.1993 the Ntpc wrote to Dr. A.V. Mohan Rao requesting to send financial statement and informed Dr. A.V. Mohan Rao that Ntpc had received the financial statement of Jaya Food Industries and the financial statements of Jaya Food Industries and Spectrum Technologies would be put together to the Board. On 27.9.1993 the Ntpc wrote to the Spgl giving details about the terms and conditions of Technical Services to enable the Ntpc to finalise its offer. Later on, the Ntpc gave its proposal for the services to be provided for Ntpc to SPGL. The scope of the work is mentioned in para 2 in the following terms :

"SCOPEOF Work The scope of works is described in seven parts as follows : Engineering Services - Part A Quality Assurance and Inspection - Part B Contracts & Procurement - Part C Project Management - Part D Site Services - Part E Pre-Commissioning Support - Part F Training - Part G Spgl may select the entire scope as per parts A to G above, or any combination of the same."

It may be noticed that the Ntpc finally entered into an agreement and provided the services to the Spgl in the project and it is still rendering services. It was

submitted by Mr. Anil Divan, learned Senior Counsel for the first defendant Spgl that a few crores of rupees have been paid by the Spgl to Ntpc for the technical services rendered by the NTPC. On 28.9.1993 the Central Electricity Authority wrote to the Spgl seeking a few clarifications. On 2.10.1993 the Spgl wrote to the Ntpc to name one representative from Ntpc to attend the first meeting of the Board of SPGL. It may be noticed here that on 7.12.1993 Ntpc deputed Mr. C.N. Swamy, Executive Director (CP) to represent Ntpc in the Board of SPGL. It was stated by the Ntpc that the official nominee of the Ntpc in terms of the promoters agreement will be nominated after the legal relationship was formally established.

(7) To continue the narration, on 8.10.1993 Spgl wrote to the Andhra Pradesh State Electricity Board requesting for clearance and informed the Electricity Board that the Spgl was proposing to obtain conventional financing for the project along with ANZ Grindlays for raising debt with other foreign Companies. On 8.10.1993 the Spgl sent a status report about the Central and State Government approvals as on 30.9.1993 to the Ministry of Power. On 8.10.1993 Spgl wrote to the Department of Power about the capital cost for the proposed Rolls-Royce/Westinghouse combined cycle power plant with expected 1995 August completion. The Spgl had also acknowledged the work done by Ntpc Engineering Members. On 11.10.1993 Ntpc wrote to Spgl as per the Side letter the copies of documents are sent by the NTPC. On the same date, the Ntpc wrote to Dr. A.V. Mohan Rao in similar terms. On 25.10.1993 Dr. A.V. Mohan Rao wrote to Ntpc enclosing the Certificate of Incorporation of Stusa and the objects of the Company. On 4.11.1993 the 10th meeting of the Board of Directors of Spgl was held resolving to authorise the Managing Director to sign the Engineering Procurement and Construction Contract with RollsRoyce. On 16.11.1993 Engineering Procurement and Construction Agreement was signed. On 6.12.1993 Andhra Pradesh State Electricity Board wrote to the Central Electricity Authority for the clearance of the project. On 17.12.1993 the Spgl wrote to the Central Electricity Authority giving the additional information that was required by the Central Electricity Authority. The Spgl wrote to the Ntpc on 27.12.1993 informing that the Spgl had commenced ground work in the site. The Central Electricity Authority by letter dated 3.1.1994 accorded Techno Clearance on the basis of tentative financial package furnished by Spgl subject to conditions mentioned in the letter. The Ntpc wrote on 17.2.1994 to LIC., Unit Trust of India, GIC" Ifci, Irbi, Icci and Idbi requesting them to consider the application of Ntpc for finalising the project favourably. The Ntpc had written that it had developed technical specification for the project for which procurement tie-up has also attained considerable progress. On 25.2.1994 the Board Meeting of the Spgl was held. The Board had decided:

"RESOLVED that subject to approvals, as may be necessary, as required by Reserve Bank of India it is hereby decided that the Company do accept funds/ remittances from the following categories towards advance against share application pending allotment of equity shares of the Company, in line with the existing Fipb approval.

Amount Percentages Rs. 1. Non-resident Indices 8,84,04,750 4.5 2. Overseas Corporate Bodies 26,52,14,250 13.5 3. Foreign Companies/Foreigners 82,51,11,000 42.0 4. Residents 78,58,20,000 40.0 196,45,50,000 100

The Board of the Spgl met again on 2.3.1994. Mr. C.M. Swamy from Ntpc and Dr. A.V. Mohan Rao of St Usa were appointed as Additional Directors in the Company. The Ntpc on 3.3.1994 wrote to the Spgl, inter-alia, about the contract between Spgl and Rolls Royce WestingHouse in the following terms :

" FURTHER, the price quoted by RR/Westing house is comparable to NTPC's estimate for projects with similar gas turbine rating. Considering the above Ntpc supports the selection of Westinghouse Gas Turbines and components and Rolls Royce as Epc contractor."

The Board of the Spgl met on 29.4.1994 for the purpose of securing Bank guarantee of Rs. 774 lakhs for State Bank of India, Hyderabad Main Branch and in respect of other security documents. The Industrial Development Bank of India issued letter of intent on 3.5.1994 with reference to rupee term loan not exceeding 3000 lakhs of rupees, foreign currency loan not exceeding 31.75 million Us \$ equivalent to 10,000 lakhs of rupees and under writing assistance of equity shares of aggregate face value of Rs. 2500 crores out of the proposed public issue of equity shares of Rs. 7936 lakhs. The Spgl was directed to send two certified copies of the resolutions duly passed by the Board of Directors in the proforma appendix Iii to the letter. The Industrial Reconstruction Bank of India, Hyderabad Branch on 6.5.1994 issued letter of intent offering to give the following facilities :

"(A)Rupee Term Loan not exceeding Rs. 1,000 lakhs (Rupees one thousand lakhs only) (b) Underwriting assistance of equity shares of aggregate face value of Rs. 500 lakhs (Rupees five hundred lakhs only) out of the proposed public issue of equity shares of Rs. 7,963 lakhs proposed to be made by the Company."

The 16th Board Meeting of the Spgl was held on 31.5.1994 in which Mr. C.M. Swamy of the Ntpc and Dr. A.V. Mohan Rao had participated. The letters of intent of Idbi and Irbi were placed before the Board and the Board resolved to accept the offers made by the Idbi and IRBI. The Government of Andhra Pradesh issued GO-123 dated 3.6.1994 agreeing to guarantee payment on behalf of Andhra Pradesh State Electricity Board to Spgl towards the price of power. The Ntpc wrote to the Rbi on 7.6.1994 seeking approval for the retention of the money from foreign remittances as an advance of future issue of shares. The Spgl wrote to the Rbi on 22.6.1994 seeking approval of the receipt of the money from Spectrum Infrastructure Ltd. The Ministry of Industry issued an amendment of his earlier approval regarding foreign equity held by its letter dated 27.6.1994. The amendment is in the following terms :

" Foreign equity : 60% (Sixty percent) amounting holdings to Us \$ 39.29 million to be contributed by the Spectrum Technologies Inc., U.S.A. and others viz. Overseas Corporate Bodies/Individuals/Foreign Companies, (names of these

organisations/individuals would, however, be got incorporated in the approval letter) The remaining 40% (Forty percent) equity holdings amounting to equivalent to Us \$ 26.19 million would be contributed by M/s. Bambino Group (10%), Ntpc (10%) and from Indian Public (20%) in the total equity capital works out to Us \$ 65.48 million."

The Spgl had its 17th Board Meeting on the 4th day of July, 1994. Mr. C.N. Swamy of Ntpc, Mr. Bharat Bhattacharya had also participated. Dr. A.V. Mohan Rao could not participate and leave of absence was granted. The Board considered the letter of intent issued by Industrial Financial Corporation of India. The Board resolved to accept the offer of Ifci for :

(A) Rupee term loan not exceeding Rs. 1,000 lakhs of (Rupees one thousand lakhs only); (b) Foreign currency loan not exceeding Dm 28.60 million equivalent to about Rs. 5,020 lakhs (Rupees five thousand twenty lakhs only); (e) Underwriting of equity shares of aggregate face value of Rs. 1,000 lakhs (Rupees one thousand lakhs only) out of the Public Issue of equity share capital of Rs. 7,936 lakhs proposed to be made by the Company.

It was also resolved to appoint Mr. Brij Bharteey, President of Spectrum Technologies, Usa as an additional Director of the SPGL. The Reserve Bank of India by letter dated 4.7.1994 wrote to the Spgl accepting the proposal of the Spgl to have interest free loan as advance share subscription from Overseas Corporate Bodies under the Foreign Exchange Regulations Act, 1973. This was in response to the letter dated 22.6.1994, already referred to. The Spgl had shown the remittance of Rs. 1,53,780/ (48000 Us \$) from Spectrum Infrastructure Ltd. (Juarsey) and remittance from the same Company of Rs. 59,52,700.00 (1,90,000 Us \$). The Spgl had also shown the remittance from the same Company of Rs. 15,35,170.00 (49,000 Us \$) which was to be kept as an advance as permitted by the Rbi towards future issue of shares. The Spgl wrote to the Rbi on 18.7.1994 to the Controller, Reserve Bank of India, Mumbai seeking approval to receive money from Overseas Corporate Bodies and Non Resident Indians. The Spgl wrote to the Ntpc relating to the payment of cost of land by the Spgl to the Ntpc proposed the following :

"We propose that the payment of compensation for the land be treated in following manner. The compensation will be deemed to have been paid by S.P.G.L. to N.T.P.C. simultaneously, the same amount would be deemed as having been paid by N.T.P.C. and received by S.P.G.L. as share application money received in advance. This can be documented in the transfer of land and further authenticated in sale deed by board resolution of S.P.G.L. This process would obviate the necessity for physical transfer of funds to and fro the Company. The funds so retained by the Company will be converted into fully paid equity shares of Rs. 10.00 each of S.P., G.L. from time to time in accordance with the terms of the promoters agreement dated 29th June, 1993. We would be grateful if you could kindly consider the above methodology which, if adopted, could result in an immediate transfer of land and enable the project to move ahead at a rapid

pace."

On 11.8.1994 the loan agreement between the Spgl and the Idbi was signed. The Idbi wrote to the Spgl on 12.8.1994 that an amount of Rs. 2,567 lakhs is required to be brought by way of equity share capital by Bambino Group and the Idbi asked for details. On 23.8.1994 the Rolls Royce wrote to Dr. A.V. Mohan Rao, Spgl, Secunderabad setting out the information given to it and that is an accurate reflection of the agreement reached and the Rolls Royce wanted confirmation by signing and retaining a copy of the letter. Dr. A.V. Mohan Rao had signed the same signifying his acceptance on behalf of Spgl and had sent a copy, as required. This will show that Dr. A.V. Mchan Rao was aware of the transaction between Spgl and Rolls Royce. The Reserve Bank of India, Exchange Control Department. Central Office, Mumbai wrote to title Spgl that the money received from the NRI/OCBS shall be adjusted against the issue of equity shares to them only after obtaining the requisite permission from the RBI. The State Bank of India, Secunderabad wrote to the Spgl that it was agreeable to furnish deferred payment guarantee (DPG) up to the maximum extent of 27.0 million Us \$ on certain conditions. The Sbi wanted guarantees from Mr. M. Kishan Rao, Mr. M. Raghubeer, Mr. M. Subramaniam, Promoter Directors.

(8) In order to meet the short fall cost over runs the Financial Institutions wanted an undertaking from Jaya Food Industries and St USA. On 22.9.1994 the undertaking was given by Jaya Food Industries signed by Mr. Kishan Rao, representative of the Company and St Usa signed by Dr. A.V. Mohan Rao as Vice President Marketing. The Spgl also signed the undertaking. With reference to non disposal of share holding by Jaya Food Industries and St Usa, undertaking was given to all the Financial Institutions on 22.9.1994 by Jaya Food Industries and St Usa and Dr. A.V. Mohan Rao had signed as Vice President for St USA. The Spgl had also agreed to abide by the same conditions imposed by the Financial Institutions. The Spgl wrote to the Ntfc on 23.9.1994 inviting to subscribe to equity shares and the Ntpc was informed that the following action had been taken by it :

" A. The authorised capital of the Company has been increased to Rs. 50 crores vide Resolution passed at the Extraordinary General Meeting of the Company held on 15th September, 1994. A copy of the Resolution is enclosed. B. Resolution has been passed u/s 81(1-A) of Companies Act, 1956 to allot shares to other than the existing shareholders. A copy of the Resolution is also enclosed."

The Spgl requested the Ntpc to obtain necessary approval from the Board and the Board Meeting of the Spgl would be held after receipt of funds from NTPC. On the same day Mr. Kishan Rao wrote to the Ntpc that as per the funds approved by Industrial Development Bank of India part of the equity might come in the public issue up to 34% of the equity. On 4.10.1994 the Spgl wrote to the Department of Economic Affairs requesting for approval of external borrowings buyers credit through Export Credit Guarantee Department (ECGD). U.K

amounting to 50,31,500 sterling pounds which would enable the Company to get formal sanction from Export Credit Guarantee Department on signing the Engineering Procurement and Construction contract with Rolls Royce of U.K. The Spgl informed the Department of Economic Affairs that the Rolls Royce had approached the Export Credit Guarantee Department, U.K for the credit facility. The Industrial Development Bank of India on the 17th of October, 1994 wrote to the Spgl for the undertaking by Mr. M. Kishan Rao, Ntpc and Rolls Royce with reference to non disposal of share holding in SPGL. The Idbi had acknowledged the receipt of the undertakings given by Jaya Food Industries and STUSA. The Spgl wrote to the Rbi, Mumbai on 25.10.1994 requesting for permission of the receipt of advance share subscription from Overseas Corporate Bodies. It is stated in the letter that the Spectrum Technologies, a Company incorporated in Mauritius, had consented to invest Rs. 13 crores (equivalent to 4 million Us \$). This is only to show how Spgl have been trying to garner resources and Stusa have been getting remittances from abroad. On 4.11.1994 Mr. Brij M. Bharteey on behalf of Stusa wrote to Spgl with a copy to the Ntpc in the following terms:

"It is my pleasure to inform you that our Company, Spectrum Technologies Usa, Inc a New York base Corporation, one of the promoters in the Joint venture Company. Spectrum Power Generation Limited (SPGL) will be making equity investment in Spgl through Spectrum Technologies (Mauritius) Ltd for tax reason hope this investment is in order and meets the approval of Spgl and NTPC. Mr. Brij Bharteey and Dr. A.V. Mohan Rao are officers and Directors of both Spectrum Corporations. Should you have any suggestions regarding the above investment, please let us know as soon as possible."

In reply to the letter dated 17.10.1994 from Idbi the Spgl wrote in the following terms on 7.11.1994:

"We refer to your letter requesting us to provide letters of undertaking for Non disposal of share-holding and cost over-run from Sri M. Kishan Rao, Ntpc, Rrpf & WEC. We confirm that we are arranging the undertaking from Sri M. Kishan Rao shortly. As far as Ntpc is concerned as per our promoters agreement with them, they will not be contributing to any cost over-run. Therefore, cost over-run undertakings will be provided only by oilier two promoters namely M/s. jaya Food Industries Ltd. and Spectrum Technologies, USA. Rrpf and Wec are not co-promoters of this project. They have undertaken to provide equity to this project solely to demonstrate their confidence in the Company and also as a sort of guarantee for their technical know how which they bringing into this Company. Their contribution to equity which will be in Us Dollars, will also enable the Company satisfy the condition imposed by Fipb at 1:2 ratio for foreign equity to foreign debt. In view of all these we request you not to insist on non-disposal and cost over-run undertakings from Rrpf and WEC."

The Spgl apprised the Idbi about the role of the Rolls Royce in the project. The Spgl wrote to Dr. A.V. Mohan Rao on 21.11.1994 requesting him to give letter in writing about the financial commitment of the Spectrum Group in the project to

the extent of 23.2 million Us Dollars. The letter runs as follows :

"DEA requires that foreign debt (ECGD credit) should not exceed twice the foreign equity. They also need firm letters of commitment for the foreign equity. The Ecgd credit will be in the region of Us \$79 Million. Thus the foreign equity has to be at least Us \$ 39.5 Million. Of this, Us \$16.3 Million will be coming from Rolls Royce and Westinghouse. That leaves a gap of Us \$ 23.2 Million. Of this Spectrum Technologies were to bring in Us \$12.6 Million (17% of total equity). However, in order to now obtain Dea permission for Ecgd credit, we require a commitment letter for the balance Us \$ 10.6 Million also. Therefore a letter from Spectrum Technologies is required stating that they would be arranging between themselves and their friends and relatives to bring in foreign equity to the total extent of Us \$ 23.2 Million. I request you to kindly fax a letter addressed to the Ministry of Finance, Department of Economic Affairs, New Delhi stating that your Company, one of the promoters of Spgl would be bringing in foreign equity by itself and friends and relatives to the extent of Us \$ 23.2 Million."

Dr. A.V. Mohan Rao on the same day wrote to Department of Economic Affairs in the following terms:

"I am pleased to confirm and commit that Spectrum (one of the three promoters in the First Joint Venture Power Project) as an Overseas Corporate Body will arrange among ourselves, friends and relatives to bring hi foreign equity investment of \$23.2 million dollars as part of the foreign equity holding in the Spectrum Power Generation Project at Kakinada. This equity commitment along with Rolls Royce Power Ventures equity of \$16.3 Million Dollars will stay within the guidelines of the required 1:2ratioof foreign equity to foreign debt. Your approval for the Ecgd credit at the earliest will help the project to move forward towards the zero date. I will be very happy to answer any questions you may have on this matter. With kind regards."

On 24.11.1994 the Spgl wrote to the Exchange Control Department, Rbi, Hyderabad for approval to receive advance shares subscription from the foreign corroborators and Nri participants to the extent of 28.07-million Us Dollars (equivalent to Rs. 88.42 crores) with repatriation benefits. The Company also requested Rbi to give permission to hold entire foreign equity contribution to keep in Dolar account with the Sbi as the money was meant for import of materials for the project. The Company also clarified few things in this behalf. For the purpose of remittances, the Spectrum Technologies was incorporated as a Company in Mauritius. The Spectrum Technologies had also obtained an Offshore Certificate from The Mauritius Offshore Business Activities Authority under the following conditions :

"1.The Spectrum Technologies Usa Inc shall be an offshore Company. 2. The Company shall conduct such business as is permissible under the Laws of Mauritius and under the Laws where the Spectrum Technologies Usa Inc is effectively carrying out its activities. 3. The Company shall not transact any

business or activity with residents in Mauritius, except with the approval of the Moba Authority."

On 29.11.1994 the Spgl wrote to the Ntpc to bring in its share of equity.

(9) The Ministry of Industry wrote to the Spgl on 29.11.1994 amending the approval already granted for setting up project restricting the foreign equity holding to 53%. The capital cost had been noted as Rs. 778 crores. On 6.12.1994 the Spgl wrote to the Ministry of Industry in reply to letter dated 29.11.1994 that the Ministry might allow repatriation both of dividend and capital account. On 7.12.1994 the Ntpc wrote to Mr. Brij M. Bharteey, Stusa with a copy to SPGL. that Hie Spectrum Technologies Mauritius Ltd. being a separate legal entity can take a part in the equity as a affiliate of Stusa or jaya Food Industries. On 9.12.1994 the Spgl wrote to Dr. A.V. Mohan Rao seeking clarification about how the Rolls Royce is going to invest in SPGL. The letter reads as under :

" Reissue of shares to NRjs & OCBs /Foreign Companies. As you are aware. Reserve Bank of India has bifurcated the procedure for permission for issue of shares to non-residents. In case the non-residents are NRIs or OCBs, the relevant authority is the head office of the Reserve Bank of India, Bombay. In case the non-resident is other than an Nri or Ocb the application has to be made to the regional office of Reserve Bank of India a"i Hyderabad. We have already taken approval to receive approximately Rs. 35.00 crores from NRIs/OCBs. We have also applied to Reserve Bank of India, Hyderabad for permission to receive funds from Foreign Companies. At this stage it is essential for us to know the exact route being taken by Rr for investment in our Company. If Rr is coming though an Ocb, we have to apply to Reserve Bank of India, Bombay to receive tins amount and if Rrs investment is coming through a source other than an Ocb, permission will have to be taken from Reserve Bank of India at Hyderabad. Request your immediate clarification. Kindly courier the Original OAC/OAC 1 Certificates for Spectrum Technologies, Mauritius, Spectrum Technologies, Channel islands, and Spectrum Technologies, Usa, (for the remittances made so far) to Rachana Agarwal in Bombay under advise to us."

The Spgl held its 20th meeting of the Board on 11.12.1994 at New Delhi. Mr. Kishan Rao, Dr. A.V.Mohan Rao, Mr. C.N.Swamy. NTPC were present. The Board recorded the permission granted by Rbi accepting interest free advance share subscription from Non Resident Indian Nationality under the Foreign Exchange Regulation Act, 1973. In the Board Meeting item No. 18 was :

"To consider and approve draft engineering procurement and construction contract to be executed with Rolls Royce and Westinghouse Electric Corporation for implementing the project on a turn key basis."

After considering the proposals from various Companies the Board accepted the offer by the Rolls Royce and Westinghouse combine, it was also noticed that a Memorandum of Understanding was signed with the Rolls Royce and WestingHouse combine on 16.11.1993. The E.P.C. contract was placed before the

meeting and that was approved by the Board. Relating to Operating & Maintenance Plant contract (O & M contract) Mr. Swamy of the Ntpc suggested that the Ntpc was to send the parameters for the same and, Therefore, the decision on awarding O & M contract may await the response from the NTPC. At this stage, it may be noticed while Mr. Anil Divan, the learned senior Counsel was inviting my attention to this Board Meeting Mr. Shanti Bhushan, the learned Senior Counsel for the Ntpc wanted Mr. Anil Divan, the learned senior Counsel for the Spgl to read this portion of the Minutes of the Meeting to show the part played by the NTPC. Here itself it has to be noticed that Mr. Shanti Bhushan, the learned Senior Counsel for the Ntpc submitted that Ntpc had not sent any representation to the Board of the Spgl after consideration by the Board of the Ntpc and Mr. Swamy was not a person whose representation was approved by the Board of the Ntpc and he had misused his position.

(10) Granting the request of the Spgl by its letter dated 6.12.1994 the Ministry of Industry wrote on 12.12.1994 stating that for implementing the project, the foreign investment will have the right of repatriation of both dividend and the capital. This brings to the fore the realisation by the Government of India about the urgency of the project. The Spgl has placed on record the erection contract executed between Spgl and Rolls Royce Industrial Power India Ltd. and Westing House International Services India Ltd. on 12.12.1994. This is found at page 596 Vol. II of the Compilation filed by the SPGL. Dr. A.V. Mohan Rao has signed committing to cooperate in the project and the commitment is in the following terms :

"The success of the Godadvari Project is critical to both Spgl and Rolls-Royce. We have committed our Companies to work as a team to perform the Contract in a way that minimises conflict. The \$ 163m price and the 26 month programme are our commitment, except where varied by agreement. If any of us believe that the project is at risk, we who have signed below will seek personally to eliminate that risk and to achieve the programme."

The Rolls Royce (Parsons Power Generation Systems Limited) wrote to Dr. A.V. Mohan Rao (SPGL) that Spgl shall pay for the following additional scope items by issuing various orders under the terms of E.P.C. Supply and Erection Contracts:

Pds Reference Estimate (Pound K) 1. PDS 4.1.2 Stack Height 12 2. PDS4.1.6 Gas Compressor equipment 2847 3. PDS4.2 Extra 1.0m fill to P.S. site 489 4. PDS4.2 Gas Compressor Civil Works 150 5. PDS4.2 Transfer Bus Civil Works 150 6. PDS4.3 Transfer Bus 146

Dr. A.V. Mohan Rao had signed this letter accepting what was stated by the Rolls-Royce. The Spgl, Rolls-Royce, Parsons Power Generation Systems Ltd. and Westinghouse Electric Corporation had recorded "matters after contract seeking amendment to a few conditions which are mentioned therein". The Spgl had also referred to items where the Epc contract had varied suggestions / recommendations made by Ntpc in the project. This is only to show that Ntpc was

aware of the scope of the Epc contract because Ntpc was the Technical Consultant of SPGL. On 20.12.1994 the Spgl wrote to the Exchange Control Department, Rbi, Mumbai seeking permission for allotment of shares to O.C.B., Spectrum Technologies USA Mauritius and advance shares subscription received by the Spgl was to the extent of Rs. 9,36,74,500.00 . The Rbi wrote to the Spgl on 21.12.1994 conveying the approval of the Government of India, Ministry of Finance for the Company obtaining a buyers credit syndicated Anz Banking Group, London support by Export Credit Guarantee Department, U.K. mentioning the conditions under which the approval is granted. The Rbi, Hyderabad on 21.12.1994 wrote to the Spgl asking the Spgl to inform the place where the Spgl intended to open the collection account.

(11) The Government of India wrote to the Spgl on 21.12.1994 in the following terms:

"In continuation of this Department's letter of even No. dated 20.12.1994, on the subject cited above, I am directed to inform you that the ratio of foreign equity and foreign debt should not exceed 1:2 over the period of pendency of this export credit. 2. The other terms and conditions of the above mentioned sanction letter will remain unchanged."

(12) On 10.1.1995 there was remittance of 83,99,500 Us Dollars from Spectrum Technologies Usa, Mauritius. On 12.1.1995 there was remittance of 3,99,458 Us Dollars (Rs. 1,35,16,019.00) from Spectrum Technologies Usa, Mauritius.

(13) The Idbi on 18.1.1995 wrote to the Spgl about the undertakings. Dr. A.V. Mohan Rao wrote to Mr. Kishan Rao that Ntpc participation is necessary and it will play an invaluable role and the amendments to the Memorandum of Articles of Association to Spgl to incorporate the understanding between the joint venture partners as reflected in the promoters agreement dated 27.6.1993 is over due. Dr. A.V. Mohan Rao stated that amendments have to be made forthwith and should be forwarded to Ntpc without any further delay. On 23.1.1995 the Spgl wrote to Rbi, Hyderabad seeking permission and confirmation that the investment brought in by the Nri promoters i.e. Spectrum Technologies, Usa and associates and Rolls Royce Power Ventures and their associates i.e. Rolls Royce Godavari Power (UK) for repatriation on capital and dividend accounts. On 14.2.1995 there was remittance from Spectrum Technologies, Mauritius. On 15.2.1995 there was remittance from Spectrum Technologies, Mauritius. On 15.2.1995 the Government of India issued letter amending the sanctioned letter dated 22.12.1994 relating to Export Credit Guarantee. Satya Narayana & Company, Chartered Accountant gave a certificate on 2.3.2.1995 stating that the amounts brought in by the promoters on account of equity is in the following terms :

Rs. in Lakhs Amount Received (in U.S.D.) (i) Indian Promoters and their associates 2431.34 - (ii) Foreign Promoters and their associates 2408.83 76,85,318 (iii) Equipment Suppliers 1976.31 63,00,000 TOTAL: 6816.48

The RBI by letter dated 28.2.1995 granted permission for issuing shares to Spectrum Technologies, Mauritius. It is stated :

" THE Reserve Bank's permission u/s 19(I)(d) of the Fera, 1973 for issue of equity shares to the Ocb shall be valid only so long as the following further conditions are complied with : (a) The activity of your Company shall be as permitted by Secretariat for Industrial Approvals (SIA), New Delhi vide its letter No.FC.11.118(93)/ 160(93) dated 30th April, 1993 and you shall abide by all the conditions stipulated therein and in their subsequent amended letters dated 27th June and 29th Nov., 1994 respectively. (b) Your Company shall neither carry on agricultural/plantation activities nor shall it undertake any real estate business. (iii) The non-resident interest of the Ocb, foreign collaborators and NRIs in the paid up capital of your Company, carrying repatriation benefits, shall not, at any stage, exceed 53% of the total paid-up capital of your Company without prior permission of Sia, New Delhi and the Reserve Bank of India. (iv) The permission for issue of shares to the Ocb shall be valid so long as at least 60% (sixty percent) of its ownership is held directly or indirectly but ultimately by non-resident individuals of Indian nationality/origin and in case the ownership held by such persons falls below the level of 60% (sixty percent) the same should be intimated to us immediately. (v) Your Company shall arrange to submit to us on an annual basis a certificate in form OAC/OAC-I from Overseas Auditors/Chartered Accountants/Certified Public Accountants indicating that the ownership interest in the Ocb held directly or indirectly but ultimately by non-resident individuals of Indian nationality/origin continues to be 60% (sixty percent) as long as they hold shares in your Company. The permission granted in paragraph 2 may also be treated as our permission to the Ocb u/s 29(1)(b) of the Foreign Exchange Regulation Act, 1973 for acquiring 93,67,750 fully paid equity shares of your Company on repatriation basis."

The Ministry of Finance issued a letter amending the sanctioned letter dated 22.12.1994 and 15.2.1995. On 6.3.1995 the auditors of the Spgl gave a statement of source and application of funds up to 5.3.1995 as per the books of accounts :

Sources	Amount (Rs. in lakhs)	Authorised Capital	10000.00	Paid up Capital	300.00
Amount received on account of Equity, Pending allotment from Promoters, friends and relatives ..Indian	2310.09	..Foreign	4510.27	6820.36	
Total:	7120.36	Applications Land, Land Development, Equipment etc. including advances made on account.	4651.36	Cash and Bank Balances	1332.70
Preliminary, Preoperative project expenditure pending	819.85	authorisation/ capitalisation Security Deposits and advances	316.45	Total:	7129.36

*After deducting Rs. 252.94 lakhs for which payments are still to be made. The 23rd Meeting of the Board of Spgl was held on 10.3.1995 at Bombay. Mr. Kishan Rao, Mr. Bharat Bhattacharya, Dr. A.V. Mohan Rao, Mr. G. Venkataraman Ntpc were present. Mr. G. Venkataraman, Ntpc was nominated to be co-opted on the Board as an Additional Director. Regarding the raising of funds, the Board

decided to accept the offer of Idbi, Ifci and it is not necessary to elaborate the resolution. In this meeting the Company requested both R.R. WestingHouse and Ntpc to provide O & M proposals and it was decided that the Company might sign O & M contract with R.R. WestingHouse . The Company decided to give guarantee to banks and also created mortgage by deposit of title deeds in favor of the Financial Institutions. Regarding the issue of share capital, the Board decided : Issue of Share Capital: The Board has been apprised that Promoters, Jaya Food Industries Limited, Spectrum Technologies Usa and Rolls Royce have brought in substantial contributions aggregating to about Rs. 71.00 crores. The Board has also been apprised that the Ntpc has been requested to contribute their share of equity. After considering the immediate requirement of funds the Board proposed to issue up to Rs. 100 crores to the Promoters in terms of the Resolutions passed by the Company in its General Meeting. Accordingly the following Resolutions are passed. Resolved that 9,70,00,000 equity shares of Rs. 10 Lach lying un-issued out of the authorised share capital of the Company be and are hereby issued and offered to the following in terms of the Promoters Agreement :

	(1) M/
s. Jaya Food Industries) 8,70,00,000 Equity Limited M/s. Spectrum) of Rs. 10.00 each aggre Technologies, gating to Usa and) Rr Godavari Rs. 87,00,00,000.00 Power Ltd.) and other associates) (2) M/s. National Thermal Power 1,00,00,000 Equity Corpn. Ltd. shares of Rs. 10.00 each aggregating to Rs. 10,00,00,000.00	
	Total: 9,70,00,000 Equity shares of Rs. 10.00 each aggregating to Rs. 97,00,00,000.00

The Idbi on 14.3.1995 wrote to the Spgl relating to conversion of foreign currency loan to rupee term loan and the Idbi sent the format of the resolution to be passed by the Board. R.R. Godavari Power Ltd. wrote to Idbi on 15.3.1995 that investment by it was based on promoters agreement and it was not a promoter. On the same day the Rolls Royce Power Ventures Ltd., London wrote to the Idbi giving the following undertaking:

"Rolls Royce Power Ventures Limited, a Company organized under the laws of England (*RRPV*), does hereby undertake to provide a subordinated debt facility of up to \$20 million to the Borrower on terms and conditions to be mutually agreed upon between the Borrower and us for use by the Borrower if there arc shortfalls in the resources of the Borrower for construction and financing project cost."

The Spgl on 18.3.1995 wrote to Idbi as under :

"With reference to the above and in continuation of submission of our letter dated Ii March 1995, we have pleasure in reporting following further developments on the status of compliance of the terms and conditions of disbursement. 1. O & M Contract: O & M Contract has been signed and a copy of which has been submitted separately. 2. Equity : Further equity of about Rs. 3.5 crores have been brought in by an other Body Corporate making the total

amount brought in towards share capital to Rs. 74.7 crores against the originally stipulated amount of Rs. 73.6 crores (including NTPC). 3. Undertaking from Rolls Royce : (a) We have submitted the original undertakings received from Rolls Royce Group. (b) We wish to report that after lot persuasion Rrpv has also increased their commitment of Subordinated debt to Us \$ 20 million from earlier Us \$ 1.5 million. 4. Promoters Agreement : We have submitted a letter from Rolls Royce Godavari confirming that the Promoters agreement entered into with Ntpc, Stusa and Jaya Foods is binding on them and no further agreement is in force. 5. Ntpc Equity & Undertakings As requested vide our letter we are again request you to grant us time of 30 days for arranging Ntpc equity and undertakings. As the other Promoters have brought in the total requirement of Promoters contribution, we seek your relaxation on this condition. We wish to mention that Rbi permits issued for payment of advance are valid up to 29 March 1995. To enable us to make the payments before this date we request you to kindly release your rupee term loan of Rs 30 crores in full as availing the disbursement from other institutions is likely to take sometime, your disbursement of Rs. 30 crores will go a long way in activating the project work. As we have complied with all other pre-disbursement terms and conditions. we now request you to kindly favor us with the disbursement sought at an early date to facilitate early completion of advance payment to Epc Contractor and to activate the work on the project at an early date."

On the same date Spgl wrote to the Idbi agreeing to the terms suggested Idbi in its letter dated 14.3.1995 and enclosed the copies of resolutions passed by the Board on the 10th of March, 1995. The Spgl on the same date wrote to Idbi, Bombay giving the equity position and also requesting disbursement of some amount. The Spgl on 23.3.1995 wrote to IDBi, Bombay stating that it would obtain 50% of the Ntpc equity contribution amounting to Rs. 11.67 crores and further contribution of Rs. 5.92crores from Rolls Royce within 60 days of the disbursement of Rs. 60 crores by IDBI. Again on 23.3.1995 the Spgl wrote to General Manager, Idbi, Bombay stating that Spgl from its own resources would bring in Rs. 3.16 crores as equity within a period of 3 months from the date of first disbursement of Idbi to SPGL. The Idbi wrote to Sbi on 29.3.1975 stating that it had approved the disbursement of Rs. 6000 lakh as an interim loan and a sum of Rs. 3000 lakh, out of the above, had already been disbursed and Idbi was satisfied with the compliance of pre-disbursement conditions. The following would show the approvals and the other efforts taken by the Spgl towards the progress of the project : Spectrum Power Generation Limited List of State/ Central Government Approvals obtained for the project.

S.No. Item Agency Status 1. Cost Estimates Cea Received 2. Techno-Economic Clearance/concurrence of Cea Cea Received 3. Publication State Government Published 4. Water Availability State Government Received 5. Seb Clearance SEB/ State Government Received 6. Pollution Clearance State/Central Received Water & Air Pollution Control Board 7. Forest Clearance State Government Received Min. of E & F Received 8. Environment & Forest State Government Received

Clearance Min. of E & F Received 9. Civil Aviation National Airport Received Clearance for Chimney Authority Height 10. Registration of Reg. of Companies Received Company 11. Rehabilitation & Min. of E & F Received Resettlement of this State Government Received placed families, by land Acquisition. 12. Hydro-Projects Min. of Water Res. Not (Mini-Micro) Applicable 13. Equipment Procurement DGTD/CCI & E Not Applicable Non Statutory Clearances: 14. Land Availability State Government Completed 15. Fuel Linkage Dept. of Coal, Dept. Completed of Petroleum & Natural Gas 16. Financing Cea Completed Dept. of Power Completed Dept. of Eco. Affairs. Completed Financial Insertions Completed 17. Transportation of Dept. of Coal, Transportation Fuel Min. of Petroleum of Naptha & Natural Gas /gas will be handled Min. of Railways, by Hpcl Shipping, Surface /GAIL as the Transport case may be. Hence not Required.

1. List Of AGREEMENTS: (1) Power Purchase Agreement with Apseb dated 13.7.94. (ii) Gas Supply Agreement with Gail dated 19.8.93 (iii) Naptha Supply Agreement with Hpcl dated 19.7.94. (iv) Supply Contract and Erection Contract dated 12.12.94. (v) Operation & Maintenance Contract dated 14.3.95. (vi) Technical Services Agreement with Ntpc dated 16.4.94. (vii) Promoters Agreement (viii) Ecgd Export Credit Loan Agreement with Anz Grindlays Bank dated 6.02.95. (ix) Dpg by Sbi in favor of Anz Grindlays Bank. (a) Counter Guarantee by Spgl in favor of all Banks. (b) Joint Deed of Hypothecation by Spgl for all Banks. (e) Interest Agreement among Sbl, Sbp, Sbbj, Db, Vb an PNB. (d) Deed of Guarantee by Sarvashri M. Kishan Rao, M. Raghuveer and M. Subramanyam in favor of all Banks. (e) Deed of Guarantee by Sbh, Sbp, Sbbj, Db, and Pnb in favor of State Bank of India. -All dated 9.2.95. (x) Rupee Loan Agreement for Rs. , crores with Idbi -common for all institutions. (a) Deed of Hypothecation. (b) Form-8 and Form-13 filed with Registrar of Companies. (xi) Rupee Loan Agreement with Idbi for Rs. 222.20 crores. (a) Deed of Hypothecation. (b) Form-8 and Form 13. (xii) Transfer of land documents. (xiii) Water Agreement.

II.APPROVALS: (i) Department of Economic Affairs approval letter No. 6(382)/94-ECB dated 21.12.94. (ii) Department of Economic Affairs approval letter No. 6(382)/94-ECB dated 21.12.94. (iii) Department of Economic Affairs approval letter No. 6(382)/94-ECB dated 15.2.95. (iv) Department of Economic Affairs approval letter No. 6(382)/94-ECB dated 01.03.95. (v) Rbi approvals. (a) For Ecgd Credit letter No. HY/EC/IMP/269/94-95 dated 6.1.95 (b) For foreign investment from NRIs. OCBs letter No. ECCO/ FID(11)NRIC/2500/S-27/94-95 dated 4 July, 1994. (e) For foreign investment from other than NRIs. OCBs letter No. ECCO/FID(11)NRIC/2500/S-27/94-95 dated 2.9.94. (d) For foreign investment from NRIs/OCBs letter No. HY/EC/ REM/SNR(M)/5077/94-95 dt 21.12.94. (vi) Funding approvals. (a) From Idbi and other Institutions (1) Letters of Intent from Idbi, Irbi, Ifci, Icici, Scici, Gic, Lic, Nic, Uia, Ull, Nia and UTI. 2. Letters of Intent for conversion of foreign currency loan into additional rupee loans from Idbi, Ifci, Icici and SCICI. (b) From Banks (1) Letters of intent from Sbi and other Banks for guarantee. (2) Letters of offer from Anz Grindlays for

Ecgd credit. (3) Letter of offer from Ecgd for their credit."

On 17.5.1995 a loan agreement was entered into between Spgl and other Financial Institutions. For the purpose of the applications, it is not necessary to deal with the terms in detail except to note the financing plan noticed in the agreement, which is as follows:

(Rs. lakhs) Amount 1. Equity (a) Promoters 12603 (b) Public Issue - Reserved for NRIs/OCBs 1842 - Public 5836 7678 (c) Mutual/Pension Funds 3059 II. Debt (a) Idbi, Ifci, Icity, Irbi, Lic, Gic, Uti Scici, Nic, Nia, Qic, Ull 30620 (b) Export Credit Guarantee Department 23840

The Spgl has given a progress report on implementation of the project as on 31.5.1995 referring to the revised power purchase agreement with Andhra Pradesh State Electricity Board, Epc and O & M contracts, the agreements entered into with Gas Authority of India and Hindustan Petroleum Corporation for the supply of Gas and Naphtha .On 19.6.1995 Spgl gave notice for the 28th Meeting of the Board to be held on 30.6.1995 to all the Directors to transact the following agenda :

- 1.To confirm the Minutes of the previous Board of Directors Meeting held on 10.3.95.
2. To consider the progress made on the implementation of the Project.
3. To approve and authorise the Company for extensions of security favouring Financial Institutions.
4. To authorise the Company for opening Letters of Credit.
5. Any other matter with the permission of the Chair.

The 24th Meeting of the Board was held on 27.6.1995 at New Delhi. Dr. A.V. Mohan Rao, Mr. G. Venkataraman Ntpc, Mr. Brij M. Bharteey and Mr. M. Kishan Rao were present. On 4.7.1995 the Spgl wrote to Ministry of Industry seeking approval for foreign equity holdings to apply to the Rbi for approval to issue export of shares to the foreign Companies who had invested money. On 5.7.1995 the Spgl wrote to Rbi, Bombay seeking permission for the issue and the export of shares to R.R. Godavari Power Ltd. On 18.7.1995 a Chartered Accountant Company of Mauritius had issued an Overseas Accountant Certificate of the holding of persons of Indian Nationality / Origin in the Overseas Corporate Bodies. The Ministry of Industry on 25.7.1995 wrote to the Spgl amending approval for foreign equity holding. On 27.7.1995 an affiliate agreement was entered into between Stusa and Spectrum Technologies, Mauritius (as an affiliate of Spectrum Technologies USA). On 28.7.1995 there was an affiliate agreement between Spectrum Technologies and Spectrum Infrastructure Ltd. The 25th Board Meeting of the Spgl was held on 11.8.1995 at Secunderabad. Mr. Bharat Bhattacharya, Mr. Brij Bharteey and Dr. A.V. Mohan Rao could not attend the meeting. The resignation of Mr. G. Venkataraman of the Ntpc was accepted. On 20.8.1995 Spgl wrote to the Andhra Pradesh State Electricity Board stating that the Company had achieved substantial progress and had programme to commission the first Gas Turbine by November, 1996. The Spgl had given broad details about the project and the participants and the financial arrangements

made by the Company, The Spgl had indicated about the expansion. On the same day the Spgl wrote to Member Secretary, Energy and Forests Dept. requesting that the Electricity Board may provide an Escrow Account in the place of the counter guarantee of the Government of India. The Spgl on 23.8.1995 wrote to Idbi requesting for disbursement of rupee term loan. The Spgl had given compliance chart on pre-disbursement conditions. The Spgl had given statement of source and application of funds up to 24.8.1995. the Spgl had also shown the reimbursement made by it to Ntpc to the tune of Rs. 519.46 lakhs. The Spgl on 24.8.1995 wrote to Idbi that it was hopeful of getting equity contribution within a month's time from Ntpc and in case of any delay by Ntpc, Spgl undertook to bring in own secured loans to the extent of Rs. 10 crores till NTPC's contribution was received. The Idbi on 1.9.1995 wrote to the Spgl stating that the following issues were outstanding to be sorted out :

(i) The promoters were to finance Rs. 316 lakh towards additional land acquired outside project preview .This has not been received so far. (ii) Balance promoters' contribution from Ntpc and RRGP. (iii) Increase of authorised share capital. (iv) Sanction/tie up for subscription from foreign mutual/pension funds/ NRI's and OCB's. (v) Approval from Cea for revision in the means of finance. (vi) Renewal of approval from civil aviation and environment and forest clearance and pollution control clearances. (vii) In-principle sanction from bankers of Apseb for opening of irrevocable revolving L/cs. (viii) Amendments in Naptha supply agreement relating to enhancement in quantum of supply from 82 tpd to 95 tpd and inclusion of penalty clause in case of non-supply of naptha. (ix) Insurance cover to be taken by O & M Contractor in the joint name of financial institutions. (x) Insurance cover for All Erection Risks Insurance covering marine delay risk and advance loss of profit to be taken by Epc Contractor and Spgl respectively in the joint name of financial institutions. (x) Insurance cover for All Erection Risks Insurance covering marine delay risk and advance loss of profit to be taken by Epc Contractor and Spgl respectively in the joint name of financial institutions. (xi) Amendment to State Government Guarantee and obtaining of Goi counter-guarantee. (xii) Appointment of technical, financial and executive personnel for smooth implementation and operation of the project. (xiii) Broad-basing of board of directors. (xiv) Constitution of Project Management Committee and Audit Sub-Committee. (xv) Extension of commencement of drawal of gas from January 1, 1996 to January 1,1997. (xvi) Furnishing of undertaking for non-disposal and for shortfall/ overrun from NIPC. (xvii) Notarisation of non-disposal undertaking given by RRGP. (xviii) Undertaking covering both overrun and shortfall from RRPV. (xix) Arrangements with bankers for working capital requirement. (xx) Finalising procedural arrangements for wheeling of energy before financial closure. (xxi) Copies of Form No. 8 and 13 Along with the original receipt for execution of additional loan agreement and extension of security."

Mr. R.R. Alien had given an Inspection Report on 18.9.1995 on behalf of St Usa after inspecting the project. On 14.10.1995 the Spgl wrote to Rbi, Hyderabad for the issue and export of shares to R.R. Godavari Power Ltd. up to 30.9.1996 the

details of cost as approved by Idbi and the expenditure incurred are as follows :

Rs. in lacs Cost as Expenditure approved incurred up to by Idbi 30.9.96 Land & Site development 1247.00 4215.49 Epc Contract (Incl. Customs duty) 61646.00 31775.95 Non-EPC Contract 605.00 755.24 Technical & Financial 1081.00 503.33 Consultancy fees Preliminary Expenses 720.00 70.72 Pre-Operative Expenses 8851.00 7163.57 74150.00 44484.30 Contingencies 2483.00 - Margin money for Working Capital 1167.00 - _____ 77800.00 44484.30

On 25.11.1995 Spgl wrote to Dr. A.V. Mohan Rao, New York to advise State Bank of India, Hyderabad that all the remittances of Spectrum Technologies, Mauritius made to the account of Spgl was for the purpose of allotment of shares in Spgl and this would enable the Sbi to incorporate the purpose of remittance in the Foreign Inward Remittance Certificates issued by it for submission to Reserve Bank of India for its permission to issue and export the shares.

(14) It is the case of the first defendant that there was a Meeting of the Board of Directors (27th Meeting) on the 14th of December, 1995 at Secunderabad. This was disputed by Spectrum Technologies and the Ntpc and I shall deal with this aspect presently.

(15) On 29.12.1995 the Chartered Accountant in Mauritius had given Overseas Accountant Certificate stating that persons of Indian Nationality/Origin in the Overseas Corporate Body is actually held by such persons. The Reserve Bank of India wrote to the Spgl on 11.1.1996 granting approval u/Section 29(I)(b) of the Foreign Exchange Regulations Act, 1973 for acquisition of shares and granting approval u/ Section 19(I)(a) of the Act to export fully paid-up equity shares to foreign collaborator, if so desired by the foreign collaborator. The Rolls Royce Power Venture wrote to Dr. A.V. Mohan Rao enclosing the draft of the power of attorney and affiliate agreement between R.R. Godavari Power Ltd., incorporated under the Laws of Mauritius and Jaya Food Industries. The Stusa wrote to R.R. Power Ventures, Inc (New Jersey) accepting the draft agreement to be executed by R.R. Godavari Power Ltd. and Jaya Food Industries. Dr. A.V. Mohan Rao states that the draft agreements (dated January 16, 1996) were presented to the Ntpc for review. On 9.2.1996 Dr. A.V. Mohan Rao wrote to Mr. Kishan Rao that he cannot furnish Bank guarantees in favor of Mr. Kishan Rao or the members of his family and such request had been made in utter disregard between the joint venture partners of SPGL. The Spgl wrote to Dr. A.V. Mohan Rao on 22.2.1996 enclosing the Minutes of the Meeting held at Noida from 5th and 6th February, 1996 between Triple ,Pps, Wit and Ntpc relating to Gas Turbine Plant. On 6.3.1996 the Spgl wrote to Andhra Pradesh State Electricity Board requesting permission to implement the balance portion of 208 Mw at the existing premises at the same cost as that of Stage I now under implementation on the same terms and conditions of the present Power Purchase Agreement of Stage 1. The Spgl wrote on 12.3.1996 to Idbi requesting for disbursement of loan to the extent of 100 crores of rupees. The details of the loan availed, the project cost and compliance chart of pre-disbursement conditions are also given by the SPGL.

The Spgl had given a statement of source and application of funds up to 29.2.1996 in the following terms: Amount (Rs. in Lakhs) 1. Paid up Capital 4597.76 2. Share Application Money Amount received on account of Equity, Pending allotment from promoters, friends and relatives - Indian 347.15 - Foreign 2919.36 3266.51 _____ 3266.51 3. Term Loans Indian Financial Institutions 15660.00 Foreign currency Loan (ECGD) 5486.47 _____ 21146.47 _____ 29010.74 Application Of Funds 1. Land & Site development incl. advances made on account to suppliers and contractors and an amount of Rs. 519.46 Lakhs reimbursed to Ntpc towards Project expenditure 3358.73 2. Epc Contract & Customs duty incl. advances made on account to suppliers 14079.83 3. Non-EPC Contract incl. advances made on account to suppliers 638.27 4. Preliminary and preoperative expenses pending capitalisation and amortisation (a) Technical & Financial Consultancy Services 359.27 b. Preliminary Expenses 70.72 c. Pre-Operative Expenses 4316.18 _____ 22823.00 7. Loans & Advances recoverable in cash or kind (Net off current liabilities) 1128.19 8. Security Deposits with Government Depts. & others. 328.46 9. Cash & Bank balances incl. Deposits. 4731.09 _____ 29010.74 _____ On 23.3.1996 the Bambino finance Pvt. Ltd. wrote to Spgl stating that it had placed with the Spgl unsecured loan to the extent of Rs. 5.50 crores towards Ntpc equity. The Bambino Finance Pvt. Ltd. confirmed that this amount could remain with the Spgl till Ntpc put its equity or alternative arrangements were made. The Spgl had also placed on record statement of source and application of funds from 1st March to 25th of March, 1996 and it is as follows :

Amount (Rs. in Lakhs) 1. Cash & Bank balances incl. 4731.09 Deposits as on 29th February 1996 (As per Audit Certificate) 2. Loans & Advances recoverable 1128.91 in cash or kind (Net off current liabilities (As per Audit Certificate 3. Share Application Money Amount received on account of Equity, Pending allotment from promoters, friends and relatives - Indian 300.00 _____ 6159.28 _____ Application Of Funds 1. Land & Site development 367.45 2. Epc Contract & Customs 2754.30 duty 3. Non-EPC Contract 25.18 4. Technical & Financial Consultancy Services -- 5. Preliminary Expenses -- 6. Pre-Operative Expenses 130.26 _____ 3277.19 7. Pre-Operational stage payment 0 &: M. Contract: 620.02 8. Loans & Advances recoverable in cash or kind (Net off current liabilities) 744.14 9. Cash & Bank balances incl. Deposits 1517.93 _____ 6159.28 _____

On 26.3.1996 Mr. R.R. Alien on behalf of St Usa had inspected the Gas Turbines and had given the Inspection Report. The Industrial Development Bank of India wrote to the Industrial Financial Corporation of India on 2.4.1996 stating that it had approved a disbursement of Rs. 9,500 lakhs (R.T.C.) to SPGL. The Idbi requested to Ifci to credit this share of disbursement to the tune of Rs. 2,226 lakhs. The Idbi had recorded that it was generally satisfied with compliance of conditions by SPGL. On 6.4.1996 the Spgl wrote to Dr. A.V. Mohan Rao that the 28th Meeting of the Board would be held on 14.4.1996 at Secunderabad enclosing the agenda for the meeting. On 14.4.1996 the 28th Meeting of the

Board was held at Secunderabad. Dr. A.V. Mohan Rao, Mr. Brij Bharteey and Mr. Bharat Bhattacharya were also present. The Board resolved to accept the offer of ICI of foreign currency loan and public issue may be made sometime in the month of July, 1996. About Ntpc the following discussion was noted :

"N.T.P.C. The Secretary placed before the Board the correspondence exchanged between the Company and its Bankers regarding remittance of Rs. 7.70 crores sent by NTPC. The Vice Chairman & Managing Director placed before the Board the letters received from the Secretary & General Manager (Law), Ntpc bearing No. 01 /SEC /JV5 dated 8.4.1996 and a letter from the Jvc Cell of Ntpc having No. OI/JVC/SPGL dated 9.4.1996 Along with the Company's letter dated 11 April, 1996 addressed to the Secretary & General Manager (Law), Ntpc, a copy of which was sent to the Addl. General Manager, Jvc Cell of Ntpc, in response to the two letters. He drew the attention of the Board to the fact that in its letter of 11th April, 1996 the Company made a request to Ntpc to transfer the funds towards the equity after resolving pending issues and on the finalisation of a restated Promoters Agreement, on mutually acceptable terms. The Vice-Chairman & Managing Director thereafter observed that NTPC's investment in the project even at this stage was welcome on mutually acceptable terms and conditions. At this point, the Chairman observed that the Company was equally eager to remain closely associated with Ntpc as an equity shareholder. However, the Board noted that the matter of NTPC's investment may be jointly discussed and finalised on terms to be mutually agreed upon. At this point, one of the Directors enquired from Dr. A.V. Mohan Rao whether this approach was acceptable to St Usa, Dr. Mohan Rao answered in the affirmative."

On 16.4.1996 the Spgl wrote to Rbi, Hyderabad for approval of issue and export of shares to R.R. Godavari for additional 10.65 million US Dollars (Rs. 36,28,44,90.00). Inspection Report was sent by St Usa on 18.4.1996. The Rbi, Hyderabad granted permission for allotment of further shares to R.R. Godavari. On 29.4.1996 a notice was issued by Counsel for St Usa calling upon Spgl to take corrective actions and appropriate steps in the following matters :

(I) Amendment of the Articles of Association to bring the same in line with the Promoter's Agreement; (II) Constitution of the Board of Directors suitably by inducing NTPC's nominee Director; (III) Obtain affiliate Agreement and Power of Attorney from Rolls Royce Godavari; (IV) Correction of the Minutes of the 25th and 26th Meeting of the Board of Directors. (V) Preparation of audited accounts for the period ended 31.3.1996; (VI) Accept the share money from NTPC. (VII) Produce the Members' Register for inspection. (VIII) Issue shares to St USA."

On 3.5.1996 a reply was sent to the Counsel who had sent the notice on behalf of St USA. On 10.5.1996 on behalf of Spgl its Advocate M/s Amarchand & Mangaldas & Suresh A. Shroff & Co. sent a reply to J.B. Dadachanji & Co., Advocates of St Usa that the Spgl was not bound by the promoters agreement and the Company had rescinded the resolution dated 2.3.1994 and the promoters agreement was no longer effective.

(16) On 18.5.1996 St Usa presented the plaint in Suit No. 1251/96.

(17) It may be noticed that towards Technical Services as on 30.9.1996 the Spgl had paid a sum of Rs. 1,39,50,000.00 to Ntpc and that Ntpc has been rendering the Technical Services to the Spgl is not in dispute.

(18) The means of finances given by the Spgl as analysed by the Idbi could be given as under, as stated by Spgl :

Spectrum Power Generation Limited Means Of Finance Source Plan as originally Plan as revised by Idbi appraised by IDBI* in line with the Mof guidelines regarding foreign debt & Equity** % Amount (Rs. in Lakhs) % Amount (Rs. in Lakhs) A. Equity a. Promoters Group & Associate 11.00% 2567 11.00% 2567 Spectrum Technologies Usa 11.00% 2567 11.00% 2567 National Thermal Power Corpn. 10.00% 2334 10.00% 2334 RRP/WEC 9.00% 2101 22.00% 5135 *** _____ 9569 12603 b. Public Issue of which reserved for PFIs 25.00% 5835 13.00% 3059 for Public 34.00% 7936 33.00%, 7678 _____ 13771 10737 _____ 23340 23340 B. Debt Rupee Loans -AIFIs 8400 30620 Foreign Currency Loan from AIFIsADB22720 - /EMO/CDC/ECGD 23340 23840 _____ 46060 23840 _____ 54460 54460 _____ 77800 77800 _____

As per Loi dated 3ra May, IW4 ana Loan agreement dated 11th Aug., 1994. ** Refer (i) Mof letter reference 6(382)/94 - Ecb dated 21.12.1994 (ii) Idbi Loan agreement dated 17th May, 1995 (in) Idbi Letter by PFD.34.B.18(1969)/9 dated 2nd April, 1996 *** From Rr Godavari Power Limited There was a Board Meeting on 14.10.1996 (29th Meeting of the Board). This is after the suit. Ultimately, as I had noticed earlier, the first Gas Turbine was commissioned on 11.2.1997 at 16.45 p.m. and the testing of the second Gas Turbine was done on 12.2.1997. The fact that electricity is supplied to Andhra Pradesh State Electricity Board from the project is not disputed by any of the parties. The Ntpc is rendering its Technical Services as per the separate contract between the Ntpc and the SPGL. The Spgl had engaged the services of foreign agencies as could be seen from the above narration and the project is almost nearing completion in all respects.

(19) It is in the above backdrop, as it were, the reliefs prayed for in the Interlocutory Applications by St Usa in Suit No. 1251/96 and Ntpc in Suit No. 1905/96 have to be considered.

(20) The fact that Ntpc had received money as per its demand from the Spgl towards the cost of acquisition of land and other expenses incurred by the Ntpc is admitted and, Therefore, I need not deal with this any more.

(21) Regarding the contribution of equity by the Ntpc the case of Spgl is that the Ntpc did not come forward to pay the money but the case of Ntpc is that it was always ready and willing but the Spgl had acted contrary to the terms of the promoters agreement and the Spgl had hijacked, as it were, the project conceived and commenced by Ntpc to its ad vantage by the Spgl and, Therefore,

the Spgl ought not to be permitted to take advantage of its own wrong. The Ntpc was aware of what was going on and did not take action at the appropriate stage though it was very much in the scene rendering Technical Services and now it has come forward with the reliefs having acquiesced what Spgl was doing. I don't think it proper to go into the controversies at the stage and give findings thereon without complete picture and the examination of the witnesses which would show the attitude of the parties at the relevant time. In the applications of the nature filed by the plaintiffs, I have to see only the prima facie case of the plaintiffs and the balance of convenience.

(22) The Spgl had filed affidavit on 21.11.1996 in Suit No. 1905/96 setting out the facts up to that date. Mr. Kishan Rao in the affidavit had stated that the Ntpc was aware of the terms and conditions imposed by the Idbi and the result was that the share holding pattern contemplated under the promoters agreement was to be completely ignored. That was not with intent to completely go against the promoters agreement but that was to satisfy the conditions imposed by IDBI. The Ntpc as such had no financial commitment. It had taken from the Spgl Rs. 5.09 crores for the land and Rs. 5.19 crores for mobile assets. He has also referred the charges claimed by the Ntpc being on the very high side. The Spgl had acted in accordance with the directions issued by the IDBI. The averments by the Ntpc about the remuneration of the Directors and fixing up premises in Bombay and Delhi have been made with a view to prejudicing the Court against the SPGL. The Spgl had not done anything compromising the interest of the shareholders and had acted in accordance with the understanding with the foreign collaborators. On 14.10.1996 Dr. A.V. Mohan Rao filed an affidavit in Suit No. 1905/96 on behalf of the third defendant. He has referred to the circumstances under which he had worked for the project and the investment made by foreign Companies by his efforts. He has stated in paragraph 5 of the affidavit that "I say that the work at the site is going as per schedule, unaffected by the litigation and the first gas turbine should be on line as stated above." Regarding St Usa participation in the project. Dr. Mohan Rao had stated in paragraph 6 as under:

"6. With regard to the contents of paras 6 and 7 of the affidavit of Mr. Kishan Rao, I say that unless the project Company i.e. Defendant No. 1 completes the gas turbine, there is no way the Apseb would be able to evacuate the power from the plant and hence there is no reason to use the pending litigation as an excuse for any alleged delays. It is important to note that the contention regarding Naphtha bogey as it is only a back-up fuel and will be used only in the event of non availability of gas. It is also important to note that the main contractor. Rolls Royce Industrial Power (India) Ltd. has not expressed any concern for the alleged delays at the site and they are moving ahead as per their schedule completion date. I say that a new power plant commissioned by Gvk Industries (at Rajamundhry about 100 Kms. from the Kakinada site) in July is using only gas and to-date they have not used a single ton of naphtha. The gas for the Spgl project is from the same source. Hence, there is no merit in the contentions

raised in the paras under reply. 6.1.1 say that defendant No. 3 has been actively participating in the implementation of the project. Despite the fact that the shares certificates have not been given to defendant No. 3 and its affiliates till date defendant No. 3 has not taken a back seat in participating in the implementation of the project. Inter-alia, Stusa at their own expenses, had sent experienced technical team to M/s. Westinghouse Electric Corporation (defendant No. 18) to witness all factory tests including Naphtha firing so that the equipment is shipped fully tested. I say that defendant No. 3 is fully committed to the success of the project. During the early stages of the project, I along with Mr. R. Glynn, our project management expert (having thirty five years of experience from General Electric leaders in Power generation equipment), made many site and Rolls Royce, pie facilities visits and made sure the project started on a solid foundation. I say that defendant No. 3 is ready and willing to invest more money in the project in accordance with the Promoters Agreement and the undertakings given by defendant No. 3 to Dea (Ministry of Finance) which was the basis for getting the approval for the external commercial borrowings. However, the malafide and dishonest action master minded by Mr. Kishan Rao has made further investment from the defendant No. 3 Company an absolute difficulty. Mr. M. Raghuveer, the whole time director, has even informed the State Bank not to accept any foreign investment funds from defendant No. 3 without their permission."

Dr. Mohan Rao had referred to various aspects of the project where financial commitments had to be made and if the Spgl is permitted to have its own way the St Usa and the Ntpc would be put to great financial loss and the Spgl does not care to consult the St Usa and the NTPC.

(23) I may now notice the case of the plaintiff St Usa in Suit No. 1251 /96. The plaintiff refers to the promoters agreement. The plaintiff through by itself and through its affiliate had contributed Rs. 28,88,04,895.00 (Rupees Twenty Eight Crores Eighty Eight Lakhs Four Thousand Eight Hundred and Ninety Five). The entire project was thought of and conceived by the plaintiff and particularly its Managing Director Dr. A.V. Mohan Rao. Mr. M. Kishan Rao had dishonest desire to appropriate the entire project for the benefit of the second defendant Jaya Food Industries Pvt. Ltd. The Spgl had not issued the share certificates and Spgl was bound to carry out and abide by the promoters agreement. I had already extracted the relief prayed for in this suit. The first defendant Spgl had filed the written statement staling interalia that the suit as framed is not maintainable. The first defendant was never a party either to the Memorandum of Understanding or to the Promoters Agreement dated 26.9.1993. According to the first defendant, the plaintiff had not referred to the side letter. According to the first defendant, the promoters agreement had been abandoned by all parties. The parties have been joined issues on various questions of facts which cannot be decided by referring to the averments in the plaint, written statement and the affidavits and it requires evidence and the consideration of the documents in the light of the oral evidence of the parties. Therefore, it is only for the purpose of

broadly noting the disputes between the parties, I had referred to the pleadings. The second defendant Jaya Food Industries has also filed the written statement. The third defendant Ntpc had also filed the written statement and the parties are accusing each other. I have already noticed the relief claimed in IA.4872/ 96 in S.No. 1251/96 (under Order 39, Rules 1 & 2, CPC).

(24) In Suit No. 1905/96 the relief prayed for in the suit and I.A. by the Ntpc had already been extracted. Mr. Shanti Bhushan, learned Senior Counsel for the plaintiff had formulated his points in the following manner :

1.The Ntpc had rights under the promoters agreement dated 26.9.1993. 2. The Spgl had committed major violations of the promoters agreement. 3. There has been huge cost over run in the project. 4. The Spgl had resorted to taking dishonest pleas. 5. Facts and circumstances warrant in public interest appointment of a Receiver.

Mr. Anil B. Divan, the learned Senior Counsel submitted:

1. That the reliefs prayed for in the I.A. cannot be granted as the suit as framed was not maintainable. 2. The Joint Venture Company is akin to a partnership and subject to all members governing partnership. 3. No specific performance can be granted in respect -of a partnership agreement. 4. No specific performance could be granted in favor of a person who acts in breach of or at variance or at subversion of the collusion to be established by the contract. 5. The readiness and willingness of a party seeking specific performance must be continuous and subsisting. 6. There could be specific averment of readiness and willingness in the plaint. 7. Articles of Association of a Company cannot be altered even by an agreement of all share holders. The Articles of Association of a Company bind Members of that Company. 8. No person can seek relief on the basis of a particular situation which he was responsible. 9. The project is on and appointment of Receiver or any interlocutory orders against the first defendant would affect public interest and the plaintiffs have not made out a, prima facie, strong case for the appointment of a Receiver or injunction and the balance of convenience is in favor of the first defendant.

(25) There are 18 defendants in Suit No. 1905/96 filed by NTPC. Mr. Harish Salve, learned Senior Counsel advanced arguments on behalf of second defendant. Ms. Pellavi Shroff, learned Senior Counsel made submissions on behalf of defendants 6 to 13. Mr. M.N. Krishnamani, learned Senior Counsel made submissions on behalf of defendants 4 and 5. Mr. Arun Jaitley, the learned Senior Counsel submitted on behalf of defendants 14,16 and 17. Mr. C.M. Oberoi made submissions on behalf of defendants 18. Mr. R. K. P. Shankardas, learned Senior Counsel made submissions on behalf of St Usa, who is the plaintiff in other Suit No. 1251/96.

(26) In Suit No. 1905/96 the main thrust of the plaintiff's case is that the first defendant had acted contrary to the promoters agreement and the Ntpc plaintiff had fulfilled all its obligations and acted in accordance with the promoters

agreement. It was the plaintiff who had obtained all clearance from the Government and other authorities. The plaintiff has given salient features of the promoters agreement. The plaintiff had requested the various Government Authorities to transfer clearance and approvals in favor of SPGL. These had already come in the narration above. The plaintiff offered to pay Rs. 7.77 crores towards 10% of the total equity contribution. According to the plaintiff the first defendant had violated the promoters agreement in the following manner :

(A) That defendant Nos. 1 and 2 did not incorporate the features of the promoters agreement entered into in its memorandum and articles of association even till date as provided in Clause 2.2 of the promoters agreement. (b) That defendant Nos. 1 and 2 have brought their affiliates without the consent of plaintiff. Defendant No. 1 had allotted shares to third parties without the approval and consent of plaintiff and in violation of Clause 3.6 of the Promoters Agreement. (c) That the defendant No. 1 took a number of major administrative and financial decisions such as awarding the contracts and sub contracts to defendant Nos. 14, 16, 17 & 18 appointment of key persons in the management of defendant No. 1 including members of its board of directors without informing the plaintiff and in violation of Clauses 7.2 and 7.7 of the promoters agreement. (d) Constituted the Board of Spgl contrary to the provisions of Promoters' Agreement and formed the Board with majority of either family members or friends of Managing Director of defendant No. 2. (e) That defendant No. 1 refused to issue and deliver the 77.7 lac equity shares of Rs. 10 each for an amount of Rs. 7.77 crores (which was 10% of the equity issued at that time) to the plaintiff in contravention of Clause 3.2 (b) of the Promoters Agreement. (f) That defendant No. 1 has refused to take on the Board of Directors the plaintiff's nominee Director in contravention of Clause 5.1(b) of the Promoters Agreement.

It is asserted that but for the participation of the Ntpc assistance would not have given from the Financial Institutions and Ntpc Technical, Engineering and the Management Skills were fully behind the project. It is on these allegations the relief was prayed for by the plaintiff.

(27) The case of the St Usa is that Dr. A. V. Mohan Rao had invested a huge sum of money and Mr. Kishan Rao had not taken steps to recognise the shareholding. The fact that Dr. A.V. Mohan Rao had made arrangements for finance through foreign institutions is not denied by Mr. Kishan Rao. The rights of parties have to be decided at the time of the trial of the case. Mr. Anil B. Divan, the learned Senior Counsel for the first defendant submitted that Mr. Kishan Rao would not do anything compromising the interest of the persons who had invested money in the project. I am of the view that whatever is done by Mr. Kishan Rao would be monitored by the Idbi and Mr. Kishan Rao and the first defendant have to account for all the monies that had come into the coffers of the Company.

(28) Mr. Shanti Bhushan, the learned Senior Counsel relied upon the judgment of the Supreme Court reported in Delhi Development Authority Vs. Skipper

Construction Company (P) Ltd. and another, . He relied upon paragraph 28 in the judgment and that paragraph reads as under :

"The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, Therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejawant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejawant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejawant Singh and/or members of his family and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people."

(29) The argument of the learned Senior Counsel was that Mr. Kishan Rao is trying to allot shares to the members of his family and friends and, Therefore, the Receiver should be appointed for the management of the Company. On the facts and circumstances of this case, I am very clear in my view that no case has been made out for the appointment of a Receiver.

(30) Mr. R.K.P. Shankardas, the learned Senior Counsel did not press for the relief (a) in the Interlocutory Application which is already extracted and prayed for the other reliefs. He said the relief (a) could be considered at the time of the trial of the case. Mr. Shankardas, the learned Senior Counsel also submitted that there should a direction to the first defendant to issue share certificates for the amounts contributed by the St Usa and its associates. This can be done only after the trial of the case. Now the project is to be completed and it should be made to supply electricity by manufacturing to its fully capacity.

(31) Mr. Anil B. Divan, the learned Senior Counsel relied upon the judgment of the Supreme Court reported in New Horizons Limited and Another Vs. Union of India (UOI) and Others, . This case is similar to the one decided by the Supreme Court reported in Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, which related to Yellow Pages in Delhi and Bombay Telephone Directories. This case would relate to Yellow Pages in Telephone Directory in Hyderabad. He relied upon paragraph 24, which reads as under :

"The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share

both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839). According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p.117, Vol.23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, Chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p.342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See Jacques Buhart: Joint Ventures in East Asia - Legal Issues (1991).] There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture. The High Court has taken note of this connotation of the expression "joint venture". But the High Court has held that Nhl is not a joint venture and that there is only a certain amount of equity participation by a foreign Company in it. We are unable to agree with the said view of the High Court."

The learned Senior Counsel referred to passage at page 601 in Lindley on Partnership, 15th Edn. to show that the Ntpc cannot claim the relief of specific performance. According to the learned Senior Counsel entering into a joint venture agreement is just like agreeing into a partnership. If one of the parties does not want to proceed further, the remedy of the other person is to sue for damages. The learned Senior Counsel relied upon the following passage :

"If two persons have agreed to enter into partnership, and one of them refuses to abide by the agreement, the remedy for the other is an action for damages, and not, excepting in the cases to be presently noticed, for specific performance. To compel an unwilling person to become a partner with another would not be conducive to the welfare of the latter, any more than to compel a man to marry a woman he did not like would be for the benefit of the lady."

Elaborating on the question on the scope of the power of this Court to grant injunction, the learned Senior Counsel Mr. Anil B. Divan relied upon the judgment reported in Dalpat Kumar and Another Vs. Prahlad Singh and Others, wherein the Supreme Court had laid down :

"The burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favor which needs adjudication at the trial. The existence of the prima facie right and infringement of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court

further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favor of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

The learned Senior Counsel relied upon the judgment reported in M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, . He brought my attention to paragraphs 42, 43 and 47. I don't think the ratio laid down in this judgment could be relevant to the facts and circumstances of this case.

(32) Mr. Harish Salve, the learned Senior Counsel appearing for second defendant Jaya Food Industries referred to page 817 Vol. III of the Compilation, letter dated 23.3.1995 and also the letter dated 24.8.95 at page 973 from the second defendant to the IDBI. According to the learned Senior Counsel the promoters agreement cannot be implemented. He also referred to page 755 Vol. Iii letter dated 1.3.1995 and also at page 993 Vol III. According to the learned Senior Counsel, the balance of convenience is in favor of the defendants and if injunction or receiver is appointed the project will be seriously affected and that ultimately the people of Andhra Pradesh and other consumers would be put to irreparable damages and suffering.

(33) Mr. Arun Jaitely, the learned Senior Counsel appearing for defendant No. 16 submitted that E.P.C. and O & M contracts had been executed. The third parties are not bound by the promoters agreement. The first defendant itself is not a party to the promoters agreement. According to the learned Senior Counsel the shareholders agreement is not binding on the Company and it is personal to the shareholders. I do not want to give any opinion on this question because it has to be decided at the time of the trial of the case. The learned Senior Counsel referred to Section 14 of the Specific Relief Act, 1963. And having regard to the terms now sought to be enforced by the Ntpc and the St Usa in terms of Section 14 of the Specific Relief Act, the Court cannot supervise the transactions and, therefore ,the Ntpc and the Stusa cannot claim any reliefs in the suits and when such is the position in law they cannot claim any reliefs as an interim measure.

The learned Senior Counsel further submitted that the Ntpc had acquiesced at every stage. He referred to page 424 Vol. Ii the letter dated 3.5.1994, which is the letter of intent given by the IDBI. He referred to page 429 wherein the Idbi had mentioned in the terms and conditions suggesting amending shareholding agreement entered into with the Ntpc to provide for the proposed means of finance, and ensuring that the shareholders agreement with RRPf-WEC entered into to the satisfaction of the IDBI. He also referred to page 437 wherein similar suggestion is made by Industrial Reconstruction Bank of India in its letter dated 6.5.1994. He also referred to page 524 in Vol. Ii, the communication dated 17.10.1994 wherein the Idbi required an undertaking. He had also referred to the Minutes of the 23rd Meeting of the Board dated 10.3.1995 and also pages 771,775 and letter dated 8.5.1995 at page 867Vol. Iii from the Ntpc to the first defendant and he also referred to page 906 of the Minutes of the 24th Meeting of the Board of Directors dated 27.6.1995. He also referred to page 911, which is part of the Minutes of the 24th Meeting of the Board of Directors dated 27.6.1995 wherein allotment of shares to R.R. Godavari Power Ltd. is recorded. The learned senior Counsel brought to my notice page 993 letter dated 19.10.1993 from the Ntpc to the first defendant in which the Ntpc had referred to all the transactions between the first defendant and other Financial Institutions and R.R. Godavari. The learned Senior Counsel submitted that the Ntpc was aware of the award of contract to defendant No. 14 R.R. Godavari. He referred to pages 307,320,323,324,339 Vol. I, page 585 Vol. Ii and page 379 Vol. Ii letter dated 16.4.1994 from the first defendant to the Ntpc and submitted that the Ntpc was aware of all the transactions and yet it did not take any action. The learned senior Counsel referred to Palmer's Company Law 24th Edition page 796 paragraph 50-06 wherein the learned Author has expressed its view in the following terms :

"The Court has jurisdiction to decree specific performance of a contract by a person to take, or by a Company to allot, shares but the matter is one of judicial discretion, and if, before the action is brought, all the shares have been allotted to other persons, the only remedy of a plaintiff claiming an allotment is an action for damages for breach of contract. A Company may, by delay, disentitle itself from obtaining specific performance. The Company cannot, however, compel performance of an agreement to take shares to which it is not a party."

This is again a matter which has to be gone into at the time of the trial of the case and dealing with an interlocutory application I refrain myself from giving any finding thereon.

(34) Mr. M.N. Krishnamani, the learned Senior Counsel appearing for the 4th and 5th defendants submitted that the reliefs as prayed for in the plaint cannot be granted. He referred to Section 177 of the Companies Act, 1956. That section reads as under:

"At any general meeting, a resolution put to the vote of the meeting shall, unless a poll is demanded u/s 179, be decided on a show of hands."

According to the learned Senior Counsel the Ntpc cannot seek to exercise which could be termed as vito power and the Ntpc is claiming relief which is in the nature of mandatory injunction. The learned Senior Counsel relied upon the judgments of this Court in *Mis. Magnum films and Another v. Golcha Properties Pvt. Ltd.*, Air 1983 Del 392 and *M/s. Saral Trading Co. and Others v. M/s. Mahesh Steel Traders*, New Delhi, Air 1987 Del 4. These aspects could be dealt with only at the time of the trial of the case. The learned senior Counsel further submitted that in the internal management of the first defendant and other companies the Court cannot interfere at the instance of the Ntpc or the STUSA. The learned Senior Counsel relied upon the judgment of the Privy Council in *British America Nickel Corporation Limited and Others v. M.j. O'Brien Limited* and the judgment of the Bombay High Court in *Ramkumar Potdar v. Sholapur Spinning & Weaving Co. Ltd.*, Air 1934 Bom 427. In my view, the proposition as contended for by the learned senior Counsel would not apply to the situation and I don't want to dilate any further on this aspect. The learned senior Counsel submitted that the Ntpc and the St Usa have not made out any case for injunction or for the appointment of a Receiver.

(35) Mr. C.M. Oberoi, appearing for defendant No. 18 submitted that the reliefs prayed for in the interlocutory applications are very unusual. The learned Counsel submitted that there is absolutely no averment either in the plaint or in Suit Nos. 1905/96 and 1251/96 that the contracts entered into by the first defendant with others are not properly performed and the project is in any way affected. That is really a crucial point. As I had noticed earlier, it is the case of the Ntpc that it is still rendering Technical Services to the first defendant. The Ntpc and Dr. A.V. Mohan Rao were very cautious and careful in making submissions and in all fairness it must be said, they submitted that nothing should be done by anybody which would affect the progress of the project and according to them appointment of a Receiver would not in any way affect the progress of the project.

(36) The learned Counsel Mr. Oberoi referred to the paragraphs 4 and 5 of the affidavit filed by the Ntpc on 14.10.1996 wherein it is admitted that the project is being implemented. He referred to page 379 Vol. Ii of the Compilation, pages 485 to 594 and 596 to 693 Vol. Ii wherein Epc contract is mentioned. He also referred to pages 759 to 773 Vol. Ii wherein O & M contract is given. The learned Counsel Mr. C.M. Oberoi also referred to affidavit of Dr. A.V. Mohan Rao dated 14.10.1996 paragraph 6 at page 10, which has already been extracted above. The learned Counsel submitted that the equity would demand that the first defendant should be permitted to proceed with the project and the balance of convenience is in favor of the defendants. The learned Counsel also submitted that the Ntpc and the St Usa have not made out any case for the appointment of a Receiver.

(37) Mr. Shanti Bhushan, the learned Senior Counsel for the Ntpc submitted that the first defendant had lent monies to his sister concerns and by that process

monies had been siphoned off. In answer to this, Mr. Anil B. Divan, the learned Senior Counsel on 30.1.1997, while making his submissions, gave details that the first defendant had recovered all the monies and whatever money that is available with the first defendant is utilised only for the project. The details given by Mr. Anil B. Divan, the learned Senior Counsel on 30.9.1997 are as follows :

Spectrum Power Generation Limited Details Of Inter Corporate Deposits

Name	Amount	Rate	Of	Period	Status	In	Rs.	Lacs	Interest	In	Days
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Smifs Capital Markets Ltd.	25.00	24%		21-Apr-95 21-Oct-95	183	Since Recovered					
Smifs Capital Markets Ltd.	250.00	24%		29-Jan-96 28-Apr-96	90	Since Recovered					
Karvy Consultants Pvt. Ltd.	50.00	21%		15-May-95 1-Sep-95	109	Since Recovered					
Karvy Consultants Pvt. Ltd.	51.60	21%		25-Sep-95 2-Nov-95	38	Since Recovered					
K.S. Raju Associates Holdings Pvt.	500.00	24%		9-Jun-95 Ltd. 1-Dec-95	175	Since Recovered					
Visakha Industries Ltd.	50.00	24%		11-Nov-95 9-Feb-96	90	Since Recovered					
Khaitan Hostsombe Spinals Ltd	75.00	25%		24-Sep-95 23-Dec-95	90	Since Recovered					
Premier Irrigation Equipment Ltd	100.00	24%		24-Sep-95 23-Dec-95	90	Since Recovered					
Premier Irrigation Equipment Ltd.	50.00	24%		24-Dec-95 23-Jan-96	30	Since Recovered					
Premier Polyfilm Ltd.	50.00	24%		24-Sep-95 23-Dec-95	90	Since Recovered					
Premier Polyfilm Ltd.	30.00	25%		24-Dec-95 22-Feb-96	60	Since Recovered					
Palace Heights	50.00	24%		27-Jan-96 26-Apr-96	90	Since Recovered					

(38) Mr. Anil B. Divan, the learned Senior Counsel submitted that u/s 16(C) of the Specific Relief Act, 1963 the plaintiff in a suit must plead and prove that he has always been ready and willing and there is no such averment in the plaint. He relied upon the judgment of the Supreme Court in Gomathinayagam again Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, and Jugraj Singh and Another v. Labil Singh and Others, Air 1995 S.C. 945. It has to be noticed that there is an application for amendment of the plaint which has to be dealt with and at this stage I do not want to express any opinion on this aspect of the case.

(39) On a consideration of the materials produced before me, I am very clear in my view that the Ntpc and the St Usa have not made out any case for injunction. I had pondered over the matter and as between the Ntpc, St Usa and the defendants I feel that the risk doing injustice to the defendants is greater if I grant injunction. The Ntpc and the St Usa have also not made out any case for the appointment of a Receiver.

(40) I.A. No. 7314/96 in suit No. 1905/96 and I.A. 4782/96 in suit No. 1251/96 stand dismissed. There shall be no order as to costs. IAs.7371196, 8026196 and 8277/96 in S.No. 1905/96 Post the matter for further proceedings on the 18th of January 1998 before the Regular Bench.