

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

APPEAL NO. 127 of 2015

Dated:15th March, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of :-

Power Grid Corporation of India Ltd.
Saudamini, Plot No. 2,
Sector-29, Gurgaon
Haryana- 122001

... Appellant

Versus

- 1. Central Electricity Regulatory Commission**
3rd & 4th Floor, Chanderlok Building
36, Janpath, New Delhi- 110001 **...Respondent No.1**
- 2. Madhya Pradesh Power Trading Co. Ltd.**
Shakti Bhawan, Rampur,
Jabalpur –482008 **...Respondent No.2**
- 3. Maharashtra State Electricity**
Distribution Co. Ltd.
Prakashgar, 4th Floor
Andheri (E), Mumbai- 400051 **...Respondent No.3**
- 4. Gujarat Urja Vikas Nigam Ltd.**
Sardar Patel Vidyut Bhawan
Race Course Road, Vadodara- 390007 **...Respondent No.4**
- 5. Electricity Department, Govt. of Goa**
Vidyut Bhawan, Near Mandvi Hotel
Panaji- 403001 **...Respondent No.5**

6. **Electricity Department, Administration
of Daman & Diu
Power House Building, 2nd Floor
Daman- 396210** **...Respondent No.6**
7. **Electricity Department,
Administration of Dadra Nagar Haveli
Silvasa- 396230** **...Respondent No.7**
8. **Chhattisgarh State Electricity Board
PO Sundar Nagar, Dangania
Raipur- 492013** **...Respondent No.8**
9. **Madhya Pradesh Audyogic Kendra Vikas
Nigam (Indore) Ltd.
3/54 Press Complex
Agra- Mumbai Road
Indore- 452008** **...Respondent No.9**
10. **Bharat Aluminium Co. Ltd.
Core 6, SCOPE Complex,
Lodhi Road, New Delhi- 110003** **...Respondent No.10**
11. **Vandana Vidyut Ltd.
Vandana Bhawan
M G Road, Raipur
Chhattisgarh- 492001** **...Respondent No.11**

Counsel for the Appellant(s): **Mr. M G Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. A K Dubey
Mr. Shubham Arya**

Counsel for the Respondent(s): **Mr. Rishabh Donnel Singh for R-2**

**Mr. Matrugupta Mishra
Mr. Hemant Singh
Ms. Shikha Ohri
Mr. Nimesh Jha
Mr. Saahil Kaul**

Ms. Madhura Aparajita
Mr. Tabrez Malawat for R-10

Mr. Abhishek Birthray
Mr. Abhishek Verma
Mr. Nishant Menon
Mr. Deepesh for R-11

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by Power Grid Corporation of India Ltd. (herein after referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 challenging the Order dated 19.05.2014 (“**Impugned Order**”) passed by the Central Electricity Regulatory Commission (hereinafter referred to as the “**Central Commission**”) passed in Petition No.107/TT/2012, in the matter regarding disallowance of delay of three months in commissioning of Asset IV and four months in commissioning of Asset V and consequential disallowance of Interest During Construction (IDC) and Incidental Expenses During Construction (IEDC) amounting to Rs. 1.3246 Cr related to Western Region Strengthening Scheme – II (WRSS-II).
2. The Appellant, Power Grid Corporation of India Ltd. is the Govt. Company within the meaning of Companies Act, 1956 and functions as the Central Transmission Utility (CTU) under Section 38 to the Electricity Act, 2003. The tariff of the Appellant is determined by the Central Commission.

3. The Respondent No.1 i.e. Central Electricity Regulatory Commission (CERC) is the Central Commission constituted under Section 76 of the Electricity Act, 2003 and exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

4. **Facts of the present Appeal:**

a) The Central Commission has notified the CERC (Terms and Conditions for determination of Tariff) Regulations, 2009 (hereinafter referred as “**Tariff Regulations, 2009**”) applicable for the period from 01.4.2009 to 31.03.2014.

b) Ministry of Power (MoP), Govt. of India (GoI), accorded Investment Approval for execution of WRSS-II on 24.7.2006. This included four sets namely Set A, Set B, Set C and Set D. The instant Appeal is related to Set D i.e. 400 kV Korba- Birsinghpur Double Circuit (D/C) transmission line. The scope of work under Set D is as below:

- (i) Korba- BALCO (Loc 179/2) 400 kV D/C transmission line- First Circuit (Asset I), 7.454 km.
- (ii) BALCO (179/2) - Vandana (Loc 176/0) 400 kV D/C transmission line- First Circuit (Asset II), 7.314 km.
- (iii) Korba- Vandana(Loc 176/0) 400 kV D/C transmission line - Second Circuit (Asset III), 14.768 km.
- (iv) BALCO (179/2)- Birsinghpur 400 kV D/C transmission line - First Circuit (Asset IV), 211.874 km.
- (v) Vandana (176/0)- Birsinghpur 400 kV D/C transmission line - Second Circuit (Asset V), 211.847 km.

- c) According to the Investment Approval, the above Assets were scheduled to be commissioned within 48 months from the date of Investment Approval. The scheduled completion date was 1.8.2010.
- d) Some assets under Set D pass through the forest areas of the States of Madhya Pradesh (M.P.) and Chhattisgarh. The total affected forest area in States of M. P. and Chhattisgarh is 254.326 Ha. Total number of locations affected are 144 (63 in M.P. and 81 in Chhattisgarh). The Appellant applied for forest clearance on 17.05.2006 i.e. even before the Investment Approval. The Ministry of Environment and Forest (**“MoEF”**), Gol granted Stage-II forest clearance for M.P. on 09.11.2009 and for Chhattisgarh on 14.06.2011. The forest clearance was subject to certain terms and conditions like minimum felling of trees under strict supervision of State Forest Department etc.
- e) The Appellant has executed the Transmission Service Agreement dated 15.07.2011 with BALCO Aluminium Co. Ltd. (**“Respondent No.10”**) and M/s. Vandana Vidyut Ltd. (**“Respondent No.11”**). It has been agreed by Respondents No. 10 & 11 to bear the transmission charges for part/section of 400 kV Korba – Birsinghpur transmission line connecting their generating stations with the sub-station at Korba, owned by the Appellant till commissioning of complete transmission line and thereafter the transmission charges are to be shared on regional basis.
- f) The Appellant, on 12.10.2011 filed Tariff Petition No. 107/TT/2012 with the Central Commission for determination of transmission tariff of the transmission assets based on capital expenditure incurred/ to

be incurred upto the anticipated date of commercial operation (DOCO) and estimated additional capital expenditure to be incurred from anticipated DOCO till 31.03.2014 as per Tariff Regulations, 2009 of the Central Commission. There was delay in the actual DOCO of the assets as produced below:

Asset	Scheduled DOCO	Actual DOCO	Delay (in months)
I	1.8.2010	1.10.2011	14
II	1.8.2010	1.12.2011	16
III	1.8.2010	1.12.2011	16
IV	1.8.2010	1.3.2012	19
V	1.8.2010	1.4.2012	20

The Central Commission vide Impugned Order dated 19.5.2014 determined the tariff of the above assets. While doing so the Central Commission has condoned the delay for all the assets till 01.10.2011 (for Asset – I) and 01.12.2011 (for Asset No. II, III, IV and V) based on delay in Stage-II Forest Clearance. The delay for Assets IV (3 months) & V (4 months) beyond 01.12.2011 was not condoned by the Central Commission which led to disallowance of IDC & IEDC of Rs. 1.3246 Cr in respect of these assets.

5. Aggrieved by the Impugned Order passed by the Central Commission, the Appellant has preferred the present appeal on following grounds:
 - i. The Central Commission, in the Impugned Order failed to consider the fact that for consideration of delay, the permissions to be obtained under Stage-II Forest Clearance, from the State Govt. are to be considered instead of the date of Stage-II Forest Clearance by

MoEF.

- ii. The Central Commission failed to consider the submissions of the Appellant regarding delay in issuance of permission from forest department for cutting of trees.
- iii. The Central Commission erred in holding that there was no justification for delay in commissioning of Assets IV & V beyond 01.12.2011.
- iv. The Central Commission erred in holding that the Appellant erroneously waited for completion of construction of works in the State of Chhattisgarh.
- v. The Central Commission failed to appreciate that the delays in issuance of approvals and permissions by Gol/State Govt. were beyond the control of the Appellant.
- vi. The Central Commission failed to appreciate that the Appellant promptly complied with the conditions for obtaining the permission to cut trees.
- vii. The Central Commission after having noted the Appellant's claim for delay due to permission for cutting the trees beyond its control failed to consider the same on merits.
- viii. The Central Commission has not followed the principles laid down by this Tribunal's Judgement dated 18.1.2013 in Appeal No. 57 of 2012 (Maharashtra State Power Generation Company Ltd. Vs. Maharashtra Electricity Regulatory Commission & others).

6. **QUESTIONS OF LAW**

The Appellant has raised the following questions of law in the present appeal:

- a. **Whether in the facts and circumstances of the case, the Central Commission is right in rejecting the claim of the Appellant for time overrun in respect of the Transmission Assets IV & V and consequent claim of IDC and IEDC?**
 - b. **Whether in facts and circumstances of the case the Central Commission is right in holding that there was no justification for delay in commissioning of Assets IV and V beyond 01.12.2011?**
 - c. **Whether Central Commission failed to consider the requirement for permission for cutting trees which was granted only in November/ December 2011 while considering the delay in commissioning of Assets IV and V?**
7. We heard at length the learned counsel for the parties and considered their written submissions and the arguments put forth and gist of the same is discussed hereunder.
 8. The learned counsel for the Appellant has made following arguments/submissions for our consideration:
 - a) The Central Commission has condoned the delay in respect of Asset IV & V only up to 01.12.2011 based on the Stage-II Forest Clearance received on 14.06.2011 in the State of Chhattisgarh. The Central Commission has accepted the fact that the commissioning of the assets could not be done until the Appellant receives final clearance. The work related to the Assets IV and V were completed independently in the State of M. P. but could not be commissioned

until the work related to these assets are completed in the State of Chhattisgarh.

- b) The Central Commission while condoning the delay for Asset IV & V has not considered delay in permissions which were granted after receipt of the Stage – II Forest Clearance in the State of Chhattisgarh. The permissions which State Forest Department is to provide include felling of trees and its supervision. Compensatory Afforestation is also to be raised and maintained by the Forest Department for which cost is to be paid in advance by the Appellant before grant of permission for felling of the trees.
- c) After grant of Stage-II Forest Clearance in State of Chhattisgarh on 14.06.2011, the Appellant vide letter dated 20.06.2011 submitted the compliance, with Forest Department in the State of Chhattisgarh and requested for demand note towards cost of felling of trees within the corridor. The Divisional Forest Officer (DFO) vide letter dated 16.08.2011 raised demand for felling and transportation of trees. The Appellant deposited the requisite amount on 19.08.2011 without any delay. Due to revision in estimated cost of tree plantation, the DFO vide letter dated 02.09.2011 raised further demand. This amount was also deposited by the Appellant on 12.09.2011. The permissions for felling of trees were issued progressively from 19.11.2011 to 30.12.2011 in Pendra, Marwahi, Jatga and Pasan ranges of forest divisions. The felling work of the trees was progressively taken up and was finally completed in mid-February, 2012. This has affected the work of transmission line of 67.5 km part of Assets IV & V which include 81 locations in the

State of Chhattisgarh. The construction activities could not be carried out until all permissions are in place.

- d) The Appellant carried out foundation, tower erection and stringing works in the forest stretch simultaneously with tree felling and the Assets IV and V were commissioned on 01.03.2012 and 01.04.2012 respectively in a compressed schedule of 3 to 4 months. There was no delay attributable to the Appellant as it acted expeditiously towards compliance of various permissions and other terms and conditions in respect of Forest Clearance.
- e) During the proceedings in Petition no. 107/TT/2012, before the Central Commission, the Appellant submitted the reasons for delay in commissioning of these assets. In response to the Central Commission's query, the Appellant vide affidavit dated 5.6.2012 submitted the reason for delay in commissioning of Asset IV & V that the Forest Department issued permission of felling trees progressively from 19.11.2011 to 30.12.2011. The cutting of trees was finally completed in mid- February, 2012. The Appellant also reiterated the same facts in its Rejoinder dated 16.01.2014 in response to Reply by Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) before the Central Commission. The Respondents have also not disputed the facts.
- f) The Central Commission while disallowing the delay of 3 months and 4 months for Asset IV and V respectively has not considered the facts related to permission of felling of trees on merits which was a condition in Stage II Forest Clearance issued by MoEF for State of Chhattisgarh. The Central Commission ignored the fact that the

foundation and tower erection works could not be carried out without the felling of the trees. The Central Commission should have considered the dates of such permissions and not the date of Stage II Forest Clearance for the purpose of condonation of delay. This Tribunal's Judgement dated 18.01.2013 in Appeal No. 57 of 2012 have laid down the principle that if the work is delayed due to reasons beyond the control of the utility and there is no imprudence on part of utility executing the project, the utility cannot be penalised for consequences of the delay.

- g) The Central Commission has erroneously held that Appellant waited for completion of construction of works in state of Chhattisgarh. The Appellant has not delayed any work where approvals and permissions were available to it. Assets IV & V could not be compared to Assets I to III which were completed by 01.12.2011 as Assets IV and V were delayed solely due to tree felling permissions. There was no laxity on part of the Appellant to complete the works expeditiously. Therefore, the delay of three and four months respectively ought to be condoned. The Appellant is entitled to recover reasonable cost. The Central Commission may be directed to allow IDC & IEDC to the tune of Rs. 1.3246 Cr. and re-determine the approved capital cost.
- h) The Respondents No. 2, 10 & 11 have not filed any appeal against the Impugned Order. They have also not filed any objections before the Central Commission in this regard. It is not open to the Respondents to file other unrelated issues against the Impugned Order in the present Appeal. The Respondents are prohibited to file cross objections. The Appellant has submitted that in this regard,

this Tribunal has relied on Hon'ble Supreme Court's Judgement in Dhanraj Singh Chaoudhary v. Nathulal Vishwakarma (2012) 1 SCC 741 in its Judgement in Appeal No. 100 of 2013 regarding Uttar Haryana Bijli Vitran Nigam Ltd. and Anr v. CERC and Ors. Even the contentions raised by the Respondents are time barred as the cross objections are to be filed within 30 days from service of appeal by the opposite party. In the present case the reply from the Respondent No. 11 was filed on 27.11.2015 after 165 days from first service (15.06.2015) and 60 days from second service (28.09.2015). The Respondent no. 2 while filing the additional submissions took 338 days and 228 days from first service and second service respectively.

9. The learned counsel for the Respondent Nos. 2, 10 and 11 have made the following arguments / submissions on the issues raised in the present Appeal for our consideration:
 - a) The delay till final clearance i.e. June, 2011 given by MoEF is not attributable to the Appellant. Asset I, II and III form part of connectivity to the plants of Vandana (Respondent No.11) and BALCO (Respondent No.10) both situated in Chhattisgarh. The Appellant expeditiously completed Assets I, II & III in reasonable time and their delay has been rightly condoned by the Central Commission. The Appellant could have undertaken the works of Asset IV and V independently without waiting for completion of works in the state of Chhattisgarh. The works of Asset IV and V related to assets IV and V could have been completed with that of Assets I to III. The Central Commission has rightly denied time

overrun beyond 01.12.2011 for Assets IV and V. Thus, the Impugned Order does not suffer from any infirmity.

- b) The Appellant's grounds related to delay in Forest Clearance and subsequent permissions are related to Assets IV to V in the State of Chhattisgarh only. The Central Commission on these grounds i.e. delayed clearance of MoEF condoned the entire delay for Assets I to III. If the present Appeal is allowed, it will be contrary to spirit of Section 61 (d) of the Electricity Act, 2003 which provides for safeguarding the interest of the consumers and at the same time recovery of cost of electricity in a reasonable manner.
- c) The Appellant failed to provide any justification or produce even a single document to show the reasons which led to delay in commissioning of Asset IV & V. The delay is due to laxity and carelessness of the Appellant. The Appellant has also not brought on record any document which highlights that it got permission of felling of trees in November and December, 2011. It is the responsibility of the Appellant that all the clearances and approvals are in place so that the commissioning is not delayed due to the same. The Appellant was already granted permission for felling of the trees which has been acknowledged by Appellant itself in its letter dated 20.06.2011 asking for cost of felling of the trees.
- d) In view of the Central Commission's findings in the Impugned Order and the Transmission Service Agreement (dated 15.07.2011) executed with Respondent No. 10 and 11, the liability of payment of transmission charges by Respondent Nos. 10 and 11 in proportion to the long term contracted capacity is only up to 01.12.2011 (i.e.

date up to which the delay in commissioning of assets is condoned by the Central Commission) and not up to 31.03.2012. From 01.04.2012 the transmission charges are to be shared in accordance with CERC (Sharing of Inter State Transmission charges and losses) Regulations, 2010. The Respondent Nos. 10 and 11 would also be aggrieved if the Appeal is allowed.

- e) The contention of the Appellant that *“the permissions for felling of trees were issued progressively from 19.11.2011 to 30.12.2011 in Pendra, Marwahi, Jatga and Pasan ranges of forest divisions in the State of Chhattisgarh. The felling works of the trees was progressively taken up and was completed in mid- February, 2012...”* was never raised by the Appellant before the Central Commission.
- f) The Appellant has suppressed the fact that the actual DOCO of the Assets is from 1.5.2012 and the same has been discussed in the 20th WRPC meeting held on 18.05.2012 to which Appellant was also a party. The Applicant, being a CTU is also obligated to provide economical and efficient transmission services under Section 40 (a) of the Electricity Act, 2003.
10. **After having a careful examination of all the aspects brought before us on the issues raised in Appeal and submissions made by the Appellant and the Respondents for our consideration, our observations are as follows: -**
- a) The present case pertains to decision of the Central Commission on disallowance of condonation of delay of three months in

commissioning of Asset IV and four months in commissioning of Asset V and consequential disallowance of IDC (Rs. 1.1806 Cr.) and IEDC (Rs. 0.144 Cr.) amounting to Rs. 1.3246 Cr related to WRSS-II.

- b) On question at serial no. 6 (c) i.e. **Whether Central Commission failed to consider the requirement for permission for cutting trees which was granted only in November/ December 2011 while considering the delay in commissioning of Assets IV and V?, we decide as follows:**
- i) Let us first examine the impugned findings on this issue. The Central Commission vide Impugned Order has held as below:

“14. From the above details, it is noticed that there has been delay varying from 14 months to 20 months in commissioning of different components of the transmission line. The petitioner has stated that the delay in commissioning of the transmission line which passes through the forest areas in the States of Madhya Pradesh and Chhattisgarh is mainly attributed to delayed receipt of forest clearance from Ministry of Environment and Forests (Govt of India), the proposal for which was submitted as early as on 17.5.2006, that is, before accord of the investment approval. It has been stated that pending receipt of the forest clearance construction activities on the transmission line were blocked for a total length of 106.50 km (39 km in the State of Madhya Pradesh and 67.50 km in the State of Chhattisgarh) involving total #144 locations (#63 in the State of Madhya Pradesh and #81 in the State of Chhattisgarh)

because of the delay. The total affected forest area is stated to be 254.326 Ha (96.844 Ha in MP and 157.482 Ha in Chhattisgarh). The petitioner has explained that despite constant follow up, final Stage-II approval for Madhya Pradesh portion was granted by Ministry of Environment and Forests on 9.11.2009 and for Chhattisgarh portion on 14.6.2011. The petitioner has brought out that even after receipt of clearance from Ministry of Environment and Forests, the Forest Department took considerable time to hand over the forest land and permission for working in the forests for tree marking/cutting activities. The petitioner, vide affidavit filed on 17.7.2012, has submitted copies of certain communications exchanged with Forest Department to establish its efforts of following up the matter to expedite clearance. Accordingly, the petitioner has sought condonation of delay in the commissioning of the assets.

15. *We have considered the petitioner's plea. The transmission line traverses through the forest areas in the States of Madhya Pradesh and Chhattisgarh. It was not possible for the petitioner to complete execution of works till such time forests areas were handed over to it by the Forest Department. The generating stations of Vandana and BALCO are situated in the State of Chhattisgarh and connectivity to the generating stations could be provided only after permission by the Forest Department. Asset I, Assets II & III form part of connectivity arrangement to these generating stations. Accordingly, the delay till the petitioner was given final clearance, that is, up to June 2011 is not to be attributed to the petitioner. The petitioner*

expeditiously completed within the reasonable time and Asset I was commissioned on 1.10.2011 and Assets II & III on 1.12.2011. Therefore, delay in commissioning of Asset I and Assets II & III is to be condoned and time over-run in case of these assets is allowed. As regards Asset IV and Asset V it may be noted that it involved construction of transmission line in the State of Madhya Pradesh, the land for which was available to the petitioner way back since November 2009 and in the State of Chhattisgarh for which forest clearance was given in June 2011, as per the petitioner's own admission. Hence, it was not necessary for the petitioner to wait for completion of construction of works in the State of Chhattisgarh. The work should have been undertaken independently. The works in respect of Asset I, Asset II and Asset III of the transmission line were completed by November 2011, and as such Asset IV and Asset V could be commissioned by 1.12.2011, simultaneously with the commissioning of Assets II & III had the petitioner coordinated implementation of works. There is no justification for the delay in commissioning of Asset IV and Asset V beyond 1.12.2011. Therefore, time over-run from December 2011 in case of Asset IV and Asset V has not been allowed."

From the above, it is clear that the Central Commission has acknowledged the fact that it was not possible for the Appellant to execute works till such time forests areas were handed over to it by the Forest Department. The Central Commission has granted condonation of delay in commissioning of assets I to III based on the delayed MOEF clearance in June, 2011 in the State of

Chhattisgarh. The Central Commission has also acknowledged that the Appellant has submitted the copies of communications with the forest department to expedite the clearances.

- ii) The Appellant had pleaded before the Central Commission that the permissions for felling of trees were issued progressively from 19.11.2011 to 30.12.2011 in Pendra, Marwahi, Jatga and Pasan ranges of forest divisions in the State of Chhattisgarh. The felling works of the trees was progressively taken up and was completed by mid- February, 2012. This has affected the work of transmission line of 67.5 km part of Assets IV & V in the State of Chhattisgarh. The construction activities could not be started until all permissions are in place. The total length of the line from Korba to Birsinghpur is 226.642 km. The Asset I, II & III fall in the State of Chhattisgarh and their length is 7.454 km, 7.314 km and 14.768 km respectively. These lengths are much small as compared to the lengths of Asset IV & V i.e. 67.5 km in the State of Chhattisgarh. The Appellant vide its affidavits dated 05.06.2012, and 16.01.2014 (Rejoinder to MSEDCL reply) before the Central Commission from time to time provided the above & other details and documents as required by the Central Commission in favour of its claim for condonation of delay.
- iii) After careful examination of para 15 of the Impugned Order as reproduced above, it is observed that the Central Commission has not dealt with the communications exchanged between the Appellant and the forest department and submissions of the Appellant for getting clearances for felling of the trees. The Central Commission had simply held that the Assets IV and V could have been

commissioned with the Assets I, II and III, had the Appellant coordinated the implementation of works efficiently. It is also observed that although the Appellant has provided the details on affidavit regarding permission for felling of trees but has not placed on record before the Central Commission any supporting documents regarding permissions for felling of trees that were issued progressively from 19.11.2011 to 30.12.2011 in Pendra, Marwahi, Jatga and Pasan ranges of forest divisions in the State of Chhattisgarh and as a consequence, the felling of the trees was completed in mid-February, 2012.

- iv) Though the Affidavits as well as the rejoinder submissions of the Appellant were before the Central Commission, but the supporting documents were not submitted by the Appellant. If the statements made by the Appellant vide its affidavits on account of progressive permissions of the state department for felling of trees were not acceptable as it is without the supporting documents by the Central Commission, the Commission ought to have called for the requisite documentary evidence in support of the statements made by the Appellant in its affidavit regarding the permissions for cutting trees which was granted only in November/December 2011 while considering the delay in commissioning of Assets IV and V. The Central Commission has not dealt this issue in totality. We are of the view that the works regarding foundation, erection and stringing in this area of 67.5 km for Assets IV and V in the State of Chhattisgarh cannot be executed till all permissions are in place especially in view of the vast spread of trees. We are of the considered view that the Appellant must be given one chance to put up its case before the Central Commission with complete facts and

supporting documents in respect of the permissions granted by the state departments for falling of trees and other related issues to justify its claim for condonation of delay in commissioning of Assets IV and V.

c) On question no. 6 (b) i.e. **Whether in facts and circumstances of the case the Central Commission is right in holding that there was no justification for delay in commissioning of Assets IV and V beyond 01.12.2011?**, we decide as follows:

i) The Appellant in its Petition before the Central Commission, vide affidavit 12.10.2011 at para 6) has made it clear that Stage II approval for M.P. portion was granted on 09.11.2009 and construction work of forest stretch in M.P. was already over. The Appellant had pleaded that the permissions for felling of trees in respect of Asset IV and V were issued progressively from 19.11.2011 to 30.12.2011 in Pendra, Marwahi, Jatga and Pasan ranges of forest divisions in the State of Chhattisgarh. The felling works of the trees was progressively taken up and was completed by mid- February, 2012. This has affected the work of transmission line of 67.5 km part of Assets IV & V in the State of Chhattisgarh. The construction activities in these areas could not be started until all permissions are in place. As submitted by the Appellant, the total length of the line from Korba to Birsinghpur is 226.642 km. The Asset I, II & III fall in the State of Chhattisgarh and their lengths are 7.454 km, 7.314 km and 14.768 km respectively. These lengths are much small as compared to the lengths of Asset IV & V i.e. 67.5 km in the State of Chhattisgarh. The Appellant vide its affidavits dated

05.06.2012, and 16.01.2014 (Rejoinder to MSEDCL reply) before the Central Commission from time to time provided various details and documents as required by the Central Commission in favour of its claim for condonation of delay. These issues were offshoot of the Stage II Forest Clearance granted by MOEF in June, 2011. From the communications exchanged between the Appellant and the State Forest Department, it is clear that the Appellant has expeditiously carried out the pre-requisites for getting clearances for felling of the trees.

- ii) In view of the above, we are of the opinion that the Central Commission had not dealt with the issues raised by the Appellant in respect of Asset IV and V on its merits.

- c) On question no. 6 (a) i.e. **Whether in the facts and circumstances of the case, the Central Commission is right in rejecting the claim of the Appellant for time overrun in respect of the Transmission Assets IV & V and consequent claim of IDC and IEDC?, we decide as follows:**
 - i) The Appellant has raised an issue that the Respondents No. 2, 10 & 11 have not filed any appeal against the Impugned Order and hence they are not entitled to file cross objections. In this regard the Appellant has quoted this Tribunal's Judgement dated 01.08.2014 in DFR No. 1077 of 2014 in Appeal No. 100 of 2013 regarding Uttar Haryana Bijli Vitran Nigam Ltd. and Anr v. CERC and Ors. wherein this Tribunal has relied on Hon'ble Supreme Court's Judgement in

Dhanraj Singh Chaoudhary v. Nathulal Vishwakarma (2012) 1 SCC 741.

- ii) According to this Judgement, the cross objections filed by the Respondents are not maintainable. In present appeal, also the Respondents No. 2, 10 and 11 had not preferred any appeal against the Impugned Order and have filed cross objections in the appeal filed by the Appellant. These Respondents have also not filed any objections before the Central Commission during the course of hearings wherein the Impugned Order was passed.
- iii) Accordingly, the cross objections filed by these Respondents are not maintainable.
- iv) The Appellant has relied on this Tribunal's Judgement dated 18.01.2013 in Appeal No. 57 of 2012. The excerpts from the judgement are reproduced below:

“47. This Tribunal in judgment dated 27th April, 2011 in Appeal No. 72 of 2010 in the matter of Maharashtra State Power Generation Co. Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors. has laid down the principle of risk allocation on account of delay in commissioning of the project developed by the Appellant on cost plus tariff under Section 62 of the Act. The relevant extracts are reproduced as under:

“7.4. The delay in execution of a generating project could occur due to following reasons: i) due to factors entirely attributable to the generating company, e.g.,

imprudence in selecting the contractors/suppliers and in executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in providing inputs like making land available to the contractors, delay in payments to contractors/suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improper co-ordination between the various contractors, etc. ii) due to factors beyond the control of the generating company e.g. delay caused due to force majeure like natural calamity or any other reasons which clearly establish, beyond any doubt, that there has been no imprudence on the part of the generating company in executing the project.

iii) situation not covered by (i) & (ii) above.

In our opinion in the first case the entire cost due to time over run has to be borne by the generating company. However, the Liquidated Damages (LDs) and insurance proceeds on account of delay, if any, received by the generating company could be retained by the generating company. In the second case the generating company could be given benefit of the additional cost incurred due to time over-run. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any, to reduce the capital cost. In the third case the additional cost due to time overrun

including the LDs and insurance proceeds could be shared between the generating company and the consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices".

The above findings of this Tribunal imply that due to factors beyond the control of the generating company/ utility, the generating company/utility could be given benefit of the additional cost incurred due to time over-run.

- v) The above observations are to be read along with the provisions of the regulations under which they fall. Here the Appellant is governed with the CERC Tariff Regulations, 2009. The Regulation 7 of CERC Tariff Regulations, 2009 provides as below:

"Capital Cost

.....
.....

(2) The capital cost admitted by the Commission after prudence check shall form the basis for determination of tariff:

Provided that in case of the thermal generating station and the transmission system, prudence check of capital cost may be carried out based on the benchmark norms to be specified by the Commission from time to time:

Provided further that in cases where benchmark norms have not been specified, prudence check may include scrutiny of the reasonableness of the capital expenditure, financing plan, interest during construction, use of efficient technology, cost over-run and time over-run, and such other matters as may be considered appropriate by the Commission for determination of tariff:

.....
.....

The above provision of Tariff Regulations, 2009 provides for admission of capital cost for determination of tariff, by the Central Commission after prudence check which also includes prudence check on cost over - run and time over - run.

- vi) From the above discussions, it is clear that the Central Commission has not applied prudence check on the submissions made by the Appellant on the delay in commissioning of assets IV & V due to delay in Stage-II Forest Clearance and consequential permissions and clearances from state forest department to the extent required. Also considering the fact that the Appellant has not placed on record any documents regarding permissions for felling of trees that were issued progressively from 19.11.2011 to 30.12.2011 and felling of trees completed by mid-February, 2012, before the Central Commission, we are of the considered view that the Appellant must be given one chance to put up its case before the Central Commission with complete facts and supporting documents for condonation of delay for Assets IV and V.

ORDER

We are of the considered opinion that the Appellant must be given a chance to tender document in support of its claim for condonation of delay in respect of Assets IV and V. We are, therefore, remanding the matter to the Central Commission to enable the Appellant to place complete facts and supporting documents for condonation of delay for Assets IV and V and pass appropriate order after its prudent check. To this extent, the Impugned Order is hereby set aside.

The Appeal is disposed of in the above terms.

No order as to costs.

Pronounced in the Open Court on this **15th day of March, 2017.**

(I.J. Kapoor)
Technical Member

✓

(Mrs. Justice Ranjana P. Desai)
Chairperson

REPORTABLE/NON-REPORTABLE
mk