

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

Appeal No. 229 of 2013

Dated: 16th January, 2014

Present:- Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Justice Surendra Kumar, Judicial Member

IN THE MATTER OF:

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

.....

Appellant/Petitioner

Versus

1. Central Electricity Regulatory Commission
3rd and 4th Floor, Chanderlok Building
36, Janpath, New Delhi-110 001.
2. Rajasthan Power Procurement Centre,
Vidyut Bhawan, Janpath,
Jaipur-302 005.
3. Ajmer Vidyut Vitran Nigam Ltd.,
400 kV GSS Building (Ground Floor)
Ajmer Road, Heerapura, Jaipur-302 005.
4. Jaipur Vidyut Vitran Nigam Ltd.,
400kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur-302005.
5. Jodhpur Vidyut Vitran Nigam Ltd.
400kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur-302005.
6. Himachal Pradesh State Electricity Board Ltd.
Vidyut Bhawan, Kumar House Complex Building II,
Shimla-171004.

7. Punjab State Power Corporation Ltd.,
Thermal Shed, T-1A, Patiala – 147001.
8. Haryana Power Purchase Centre,
Shakti Bhawan, Sector 6,
Panchkula (Haryana) 134109.
9. Power Development Department,
Janipura Grid Station,
Jammu (Tavi)-180007.
10. Uttar Pradesh Power Corporation Ltd.,
Power Purchase Agreement Directorate (10th Floor),
Shakti Bhawan Extension, 14, Ashok Marg,
Lucknow-226001.
11. Delhi Transco Ltd.,
Shakti Sadan, Kotla Road,
New Delhi-110002.
12. BSES Yamuna Power Ltd.,
Shakti Kiran Building,
Karkardooma, Delhi-110092.
13. BSES Rajdhani Power Ltd.,
BSES Bhawan, Building No. 20, Nehru Place,
New Delhi-110019.
14. Tata Power Distribution Ltd.,
33kV Substation Building,
Hudson Lane, Kingsway Camp,
New Delhi-110009.
15. Chandigarh Administration,
Sector 9, Chandigarh-160 002.
16. Uttrakhand Power Corporation Ltd.,
Urja Bhawan, Kanwali Road,
Delhradun-248001.
17. North Central Railway,
DRM Office, Nawab Yusuf Road,

Allahabad-211001.

18. New Delhi Municipal Council,
Palika Kendra, Sansad Marg,
New Delhi-110002.

..... Respondents

APPEAL UNDER SECTION 111 OF THE ELECTRICITY ACT, 2003

Counsel for the Appellant : Mr. M.G. Ramachandran
Ms. Swagatika Sahoo

Counsel for the Respondent(s) : Mr. Alok Shankar, Advocate
for Respondent No. 13.
Mr. Hari Mohan, Advocate
for Respondent No. 18.

J U D G M E N T

JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant appeal has been preferred under Section 111 of the Electricity Act, 2003 against the order dated 8th July, 2013 passed by the learned Central Electricity Regulatory Commission (hereinafter called 'the Central Commission') wherein the learned Central Commission disallowed 50% of the Interest During Construction (IDC) and Incidental Expenditure During Construction (IEDC) while determining transmission tariff in Petition No. 75/TT/2012 for a Spare Converter Transformer at Rihand for Rihand- Dadri HVDC Bipole Terminal from the date of commercial operation, namely, 01.12.2011 to 31.03.2014 in Northern Region for Tariff Block 2009-14 period.

2. The matter in issue in the instant appeal is dis-allowance of 50% of the Interest During Construction (IDC) and Incidental Expense During Construction (IEDC) by the Central Commission. The appellant-petitioner is aggrieved by the impugned order dated 08.07.2013 passed by the Central Electricity Regulatory Commission (in short, 'CERC').

3. The relevant facts given in the present appeal are:-

(a) That the appellant Power Grid Corporation of India Ltd., is a Government Company within the meaning of Companies Act, 1956 and discharges the functions of the Central Transmission Utility (CTU) and is engaged in the transmission of electricity and other functions provided under the Electricity Act, 2003.

(b) That the appellant-petitioner was entrusted with implementation of transmission system for the Rihand-Dadri HVDC Bipole Terminal; sub-station – one no. 315 MVA Spare Converter Transformer for Rihand-Dadri HVDC System in Northern Region at Rihand is the asset under the transmission system.

(c) That on 11.07.2006, the Board of Directors of the appellant approved an investment of Rs. 7230/- lakhs including Interest During Construction of Rs. 148 lakhs based on 4th quarter 2005 price levels, for the above transmission system for a spare converter transformer at Rihand-Dadri HVDC System in Northern Region to be commissioned within 18 months.

(d) That the appellant in the instant case had placed order for transformer of ABB make on BHEL Limited for the project which was required to be completed by July, 2008. The transformer could not be commissioned as per the time schedule and was finally commissioned in November, 2011. The appellant has stated that:-

(i) The work on the transformers was completed in December, 2008 and after testing in January, 2009 it was dispatched to site.

(ii) When the transformer was received at site in March, 2009, the OLTC was damaged beyond repair and the same had to be procured from ABB, Sweden.

(iii) The transformer was received on site in November, 2009, but was commissioned only in November, 2011 due to problems in OLTC imported from ABB, Sweden.

4. According to the appellant, the appellant made complete efforts between July, 2008 - December 2011 to have transmission asset commissioned on time.

5. The appellant filed the impugned Petition No. 75/TT/2012 on 22.02.2012 for approval of transmission tariff for spare converter transformer on Rihand-Dadri HVDC Bipole Terminal from the date of commercial operation, namely, 01.12.2011 based on capital expenditure incurred upto the date of commercial operation and estimated additional capital expenditure projected to be incurred from the date of commercial operation to 31.03.2014 in Northern Region for the tariff block 2009-14.

6. No comments or suggestions were received from the general public in response to the notices published by the petitioner under Section 64 of the Electricity Act, 2003. Respondent no.4 i.e. Punjab State Power Corporation Ltd. (PSPCL), respondent no. 9 Uttar Pradesh Power Corporation Ltd. (UPPCL) and respondent no.12 BSES Rajdhani Power Ltd (BRPL) filed their replies before the Central Commission raising objections regarding time over run, petition filing fees, licence fee, declaration of date of commercial operation etc. The appellant petitioner, thereafter filed rejoinder to the replies of PSPCL, UPPCL and BRPL giving clarifications on the said objections.

7. After hearing the matter at length, the learned Central Commission considered the issues of capital cost, time over run, cost over run, projected additional capital expenditure, debt equity ratio, return on equity, interest on loan, depreciation, interest on working capital, filing fee, publication expenses, licence fee, service tax and sharing of transmission charges. The findings of the Commission on these issues are, in short, as follows:

- (i) **Capital Cost**:- The petitioner has claimed capital cost of Rs. 2456.43 lakh, as on the date of commercial operation, for the transmission asset vide Auditor's certificate dated 02.01.2012. The capital cost amounting to Rs. 2243.77 lakh (excluding disallowed IDC and IEDC) has been considered for the purpose of determination of transmission tariff.
- (ii) **Time Over-run**:- The learned Central Commission while deciding this issue of time over-run in para nos. 23 and 24 of the impugned order has recorded the findings, which are reproduced below:-

“23. In the light of the above principles, the issue of time over-run in respect of the subject asset has been considered. The petitioner selected BHEL to execute the project out of the two bidders who submitted the bids through a process of international competitive bidding. BHEL is a Central Public Sector Undertaking executing the electrical works in the country. Therefore, it cannot be said that the petitioner has committed any imprudence in selecting the contractor/suppliers. In the present case, it is noted that the commissioning of Spare Transformer got delayed due to transportation problem. The new set of OLTC was procured by the BHEL from ABB, Sweden and after erection, the problem in OLTC was rectified by the BHEL through ABB Engineer from Sweden which caused inordinate delay. In our view, the delay in execution of the project cannot be **entirely** attributed to the petitioner. Clause 10.0 of the LoA dated 30.12.2006 deals with liquidated damages for delay under which BHEL is required to pay a sum equivalent to half per cent (0.5%) of contract price as liquidated damages subject to the limit of 5% of contract price. The representative of the petitioner during the hearing on 12.02.2013 has submitted that the maximum liquidated damages of 5% of contract price would be imposed on BHEL and it would be adjusted in the capital cost. In our view, the petitioner cannot totally absolve itself of the responsibility for the delay. Accordingly, we are of the view that the petitioner should be equally held liable for the delay in execution of the project. As regards liquidated damages, the petitioner has submitted that the amount of liquidated damages is yet to be finalized as contract of this package is not yet closed.”

- (iii) **Project Additional Capital Expenditure**:- Total anticipated estimated completion cost of Spare Transformers at Rihand HVDC Terminal is 2931.60 lakh against the approved cost of 3615.00 lakh. Estimated completion cost is lower than the apportioned approved cost in spite of time over-run. The cost estimates of the petitioner in this petition, besides a few other petitions, are not realistic. In our view, the petitioner should adopt a prudent procedure to make cost estimates of different elements of the transmission projects more realistic.

- (iv) **Projected Additional Capital Expenditure:-** The finding of the learned Central Commission as per para 32 of the impugned order is as under:

“The petitioner has claimed additional capital expenditure of Rs. 475.17 lakh pertaining to Sub-station for the year 2011-12 (date of commercial operation to 31.3.2012). The additional capital expenditure claimed falls within the cut-off and hence same has been considered for the purpose of tariff.”

- (v) **Interest on loan:-** On this issue in para no.42 of the impugned order, the learned Central Commission has recorded the following finding:

Accordingly, the interest on loan has been calculated on the basis of prevailing rate available as on the date of commercial operation. Any change in rate of interest subsequent to date of commercial operation will be considered at the time of truing up.

- (vi) **Return on Equity:-** This issue has been decided by the impugned order by giving the following findings in Para no. 38 of the impugned order:

“The petitioner's prayer to allow grossing up the base rate of return with the applicable tax rate as per the Finance Act for the relevant year and direct settlement of tax liability between the transmission licensee and the beneficiaries, shall be settled in accordance with the provisions of Regulation 15 of 2009 Tariff Regulations.”

8. According to the learned counsel for the appellant-petitioner in the instant petition, the amount of LD levied would be known after the closing of contract. In Petition No. 33/TT/2011, where the contract was not closed and LD was not quantifiable, the amount of LD was not considered. The learned counsel for the Commission has taken the same stand in dealing with the issue of LD in this petition also. Accordingly, 50% of IDC and IEDC has been disallowed without considering LD which will be adjusted on actual realization during truing-up. The details of disallowed IDC and IEDC are as follows:-

Details of IDC and IEDC as per Management Certificate dated 2.1.2012

(Rs. In

lakh)			
	<i>IEDC</i>	<i>IDC</i>	<i>Total</i>
<i>Total IDC and IEDC claimed from FY 2008-09 to FY 2011-12 (till November, 2011)</i>	<i>0.56</i>	<i>424.76</i>	<i>425.32</i>
<i>Details of LD, IDC and IEDC disallowed</i>			
<i>Allowed 50% of (IDC+IEDC)</i>	<i>0.28</i>	<i>212.38</i>	<i>212.66</i>

9. The following submissions have been made by the learned counsel for the appellant highlighting the impugned order that :

- (i) There is a clear finding on the reasons for the delay, namely, “transportation problem” “new set up by OLTC was procured by BHEL from ABB Sweden, and “Problem in OLTC was got rectified by BHEL from ABB Engineers from Sweden”.
- (ii) The Central Commission has also held that the appellant has not committed any imprudence in selecting the contractor/supplier.
- (iii) The Central Commission has also held that the liquidated damages that may be recovered by the Appellant shall be adjusted.
- (iv) Having held so, the Central Commission concluded that the delay in execution of the project cannot be entirely attributed to the appellant.

- (v) On the face of the above conclusion, the Central Commission ought not to have mechanically recorded that the Appellant cannot be totally absolved from its responsibility for the delay.
- (vi) The two sets of findings, namely, recording the causes for delay and finding no fault with the Appellant in placing the order on BHEL and recording clearly that the delay is not entirely attributable to the appellant, there was no basis for holding on the other hand that the appellant cannot totally absolve itself of the responsibility for the delay in execution of the project.
- (vii) The reasons recorded clearly lead to the only possible conclusion that the appellant was not responsible for the delay.
- (viii) That the findings recorded by the Central Commission, being patently erroneous, should be set aside by upholding the principle laid down by this Tribunal in Maharashtra State Power Generation Corporation Ltd. Vs. Maharashtra Electricity Regulatory Commission decided on 27.04.2011 in Appeal No. 72 of 2010 in which this Tribunal has observed in the same circumstances that the delay was due to the factors beyond the control of the appellant.
- (ix) That the said delay was on account of force majeure conditions and supervening circumstances. The damage caused to OLTC while in transit cannot in any way be attributable to the appellant as the same could not have been contemplated in the light of first transformer being received at site intact and undamaged.
- (x) That, without any valid reason, it was not justified for the Central Commission to hold the appellant to be equally liable for the delay in execution of the project

particularly when the appellant did not commit any imprudence in selecting the contractor/supplier.

- (xi) That the appellant would suffer substantial loss if 50% IDC and IEDC is dis-allowed as per the impugned order because the appellant had already been dis-allowed to capitalize the cost of one converter transformer in the earlier order of the Central Commission dated 21.06.05 and to some extent upheld by this Tribunal in judgment dated 05.04.06 in Appeal No. 128 of 2005.

10. The rival contentions/submissions made by Mr. Alok Shankar, learned counsel for the respondent are as follows:-

- (i) That the basic tenet of regulatory tariff determination process is that inefficiency of the operator (generating company, transmission licensee or distribution licensee) cannot be passed on to their beneficiaries/consumers. Any act of the operator or its agent or contractors which is not in line with prudent utility practices and results in loss, would have to be borne by operator and losses as a result of imprudent practices cannot be passed on to the beneficiary or procurers.
- (ii) That the appellant had placed order for transformer of ABB make on BHEL Ltd for the project which was required to be completed by July, 2008. The transformer could not be commissioned as per the time schedule and was finally commissioned in November, 2011 because of imprudence and negligence of the appellant. The work on transformer was completed in December, 2008 and after testing in January, 2009 it was dispatched to site. When transformer was received at site in March, 2009, the OLTC was found damaged beyond repair and the same had to be procured from ABB,

Sweden. The transformer was received on site in November, 2009 but was commissioned after a gap of two years only in November, 2011 due to the alleged problems in OLTC imported from ABB Sweden.

(iii) Under the Draft Standard Transmission Service Agreement (TSA), the contractor is defined as under:-

“Contractors” shall mean the engineering, procurement, construction, operation & maintenance contractors, surveyors, advisors, consultants, designers, suppliers to the TSP and each of their respective sub-contractors (and each of their respective successors and permitted assigns) in their respective capacities as such;”

BHEL Limited, being one of the suppliers to the transmission service provider in the present case would thus be covered within the definition of Contractor.

(iv) That Clause 11.4 of the draft TSA provides the force majeure exclusions. Delay in performance by the contractor of transmission service provider and late delivery of equipments have been expressly excluded as an event of force majeure. The relevant part of Clause 11.4 of the draft TSA is extracted hereunder:

11.4 Force Majeure Exclusions:-

“11.4.1. Force majeure shall not include (i) any event or circumstance which is within the reasonable control of the parties and (ii) the following conditions, except to the extent that they are consequences of an event of force majeure:

- a. Unavailability, late delivery, or changes in the cost of the machinery, equipment, materials, spare parts etc., for the project;
- b. Delay in the performance of any Contractors or their agents;”

Since the draft TSA reflects the broad agreed principles on which transmission projects are undertaken in the country, it cannot be stated that late delivery by BHEL can be an event of force majeure and all losses as a result of delay would have to be borne by the appellant.

- (v) That the appellant prayed for IDC and IEDC to be allowed in the light of the fact that delay was for reasons beyond its control such as bad roads. This Tribunal in Appeal No. 180 of 2011 in the matter of *Power Grid Corporation of India Ltd. Vs. Central Electricity Regulatory Commission and others* vide judgment dated 10.05.2012 rejected the very contention of the same appellant- Power Grid Corporation of India Ltd.
- (vi) That the learned Central Commission after taking into account the reasons for delay allowed 50% of IDC and IEDC for the period of delay to be capitalized. The impugned order has already conferred the benefit on the appellant to which it was not otherwise entitled to. There is no merit in the appeal and the appeal is liable to be dismissed.
- (vii) That BHEL was appointed as supplier of the transformer by the appellant and any delay in supply by BHEL which is not on account of any event of force majeure cannot absolve BHEL of its obligations under the supply contract and consequently, the appellant cannot be absolved of its

obligations of commissioning the project as per the timelines agreed. The Central Commission has been liberal in allowing 50% cost to be capitalized so as to not penalize the appellant in the facts of the present case.

- (viii) That the transformer was admittedly not damaged during the transportation on the second attempt because the appellant supervised the delivery. Accordingly, it is not correct to state that the appellant took all reasonable steps and precautions to ensure timely commissioning. The damage during transportation cannot be stated to be an uncontrollable event and responsibility for the same vis-à-vis the procurers at all times rests with the developer.
- (ix) That in the event the principle of prudence check as laid down by this Tribunal is strictly applied to the facts of the present case then not even 50% cost would be allowed to be capitalized as the facts clearly place the situation within control of the appellant if reasonable care and precaution, as an ordinary and prudent person had been taken by the appellant.
- (x) That in the present case the appellant failed as a prudent operator while entering into the contract for supply of the transformer. In the event the contract terms are agreed to as a prudent operator, the developer would take steps to insulating itself against any increased cost such as IDC and IEDC in the event of delay in supply of the transformer. This has clearly not been done and additional cost is proposed to be recovered from the beneficiaries. The additional IDC and IEDC is an evidence to establish that the appellant has failed to act as a prudent operator and the entire cost should have been to the account of the developer. The appellant had the entire responsibility for

implementing the project and the delay in supply and non-performance by the contractors of the appellant is not a solid and cogent ground to absolve the appellant from liability to implement the project within the mandated time frame. The entire additional cost is a result of failure of the appellant to act in accordance with prudent utility practices. Further, the 5% of contract price to be levied as liquidated damages should be applied towards IDC and IEDC and not towards capital cost, as liquidated damages are to offset the loss incurred and the loss that would be incurred as the higher IDC and IEDC incurred by the appellant. The appellant cannot be allowed to take advantage of recovery of the liquidated damages and at the same time pass on the IDC and IEDC burden to the beneficiaries.

11. We have heard the arguments addressed by Shri M.G. Ramachandran, learned counsel for the appellant, Mr. Alok Shankar, learned counsel for the respondent no.13, Mr. Hari Mohan, learned for counsel for the respondent no. 18 and have also gone through the written submissions filed by the rival parties.

After considering the written and oral submissions made by the rival parties, the following points arise for our consideration:-

- (i) Whether the appellant/petitioner is entitled to the effect of force majeure when spare converter transformer (OLTC) was allegedly damaged in the course of journey due to bad road condition?
- (ii) Whether the learned Central Commission was justified in dis-allowing 50% of the Interest During Construction (IDC) and Incidental Expenditure During Construction (IEDC) of the appellant's claim?

Since both these points are inter-woven, they are being considered simultaneously.

12. In the instant case, the appellant/petitioner selected BHEL to execute the project out of the two bidders who submitted the bids through a process of international competitive bidding. BHEL is a Central Public Sector Undertaking (CPSU) executing the electrical works in the country. The appellant had placed order for transformer of ABB, Sweden made on BHEL for the project which was required to be completed by July, 2008. The transformer could not be commissioned as per the time schedule and was finally commissioned in November, 2011. The appellant has stated the following reasons for this delay in final commissioning of the transformer:

- a) That the work on transformer was completed in December, 2008 and after testing in January, 2009, it was dispatched to site.
- b) That when the transformer was received at site in March, 2009, its OLTC was found damaged beyond repairs and the same had to be procured from ABB, Sweden.
- c) That the transformer was received at site in November, 2009, but it was commissioned only in November, 2011 due to the problems in OLTC which was imported from ABB, Sweden.

13. According to the learned counsel for the appellant/petitioner, the commissioning of the spare transformer got delayed due to the transportation problem. The new set of OLTC was procured by the BHEL from ABB, Sweden and after erection, the problem in OLTC was rectified by the BHEL through ABB engineers from Sweden which caused inordinate delay allegedly due to the reasons beyond the control of the petitioner. According to the appellant, the problem encountered during OLTC erection further took another 2 ½ years to rectify the problem and made the transformer ready for commissioning by the engineers from ABB, Sweden.

14. The main thrust of the argument of the learned counsel for the appellant/petitioner is that the learned Central Commission was not right in dis-allowing 50% of the IDC and IEDC after recording a finding that delay in execution of the project was not attributable to the appellant. The petitioner selected BHEL to execute the project which is a Public Sector Undertaking executing electrical works in the country. Therefore, it cannot be said that the petitioner committed any imprudence in selecting the contractor/supplier. The commissioning of the spare transformer got delayed only due to transportation problem.

15. After going through the material on record and hearing submissions of the rival parties, the learned Central Commission in the impugned order recorded a finding that the delay in execution of the project cannot be entirely attributed to the petitioner. The learned Central Commission observed that the commissioning of the spare transformer got delayed due to the transportation problem. The finding of the learned Central Commission is that it cannot be said that the petitioner has committed any imprudence in selecting the contractor/supplier. On this finding, no fault can be found merely by saying that the petitioner has committed no imprudence in selecting the contractor/supplier. BHEL was rightly selected by the petitioner. After selecting the BHEL, the standard of care and caution, as is required from an ordinary and prudent person, should have been adopted. If the petitioner had taken due care and caution after selecting BHEL as supplier of the said spare transformer, the said OLTC could have been saved from major damage during transit to the site. So, the finding of the learned Commission that delay in execution of the project cannot be entirely attributed to the petitioner can, by any stretch of imagination, be said to be illegal or perverse or based upon improper appreciation of the material on record.

16. During hearing before the learned Central Commission, the representative of the petitioner clearly submitted that the maximum liquidated damages of 5% of contract price would be imposed on BHEL and it would be adjusted in the capital cost. The said damage to the OLTC is alleged to have been caused due to bad road condition. The bad road condition is being pleaded by the learned counsel for the appellant as an event of the force majeure. Learned counsel for the petitioner contended that the said delay was caused on account of the force majeure conditions and supervening circumstances. According to the respondents who made all efforts to justify the impugned order of the learned Central Commission by contending that the transformer could not be commissioned as per the time schedule because of imprudence and negligence of the appellant. The basic tenet of regulatory tariff determination process is that inefficiency of the operator (generating Company, transmission licensee or distribution licensee) cannot be passed on to their beneficiaries /consumers. Any act of the operator, its agent or contractor which is not in line with prudent utility practices and results in loss, would have to be borne by operator and losses as a result of imprudent practices cannot be passed on to the beneficiary or procurers.

17. The appellant has prayed for IDC and IEDC to be allowed in the light of the fact that delay was for reasons beyond its control such as bad roads. After considering the material and the circumstances of the matter, this prayer of the appellant cannot be accepted. This Tribunal in Appeal No. 180 of 2011 in the matter of Power Grid Corporation of India Ltd. Vs. Central Electricity Regulatory Commission and others vide judgment dated 10.05.2012 reported in 2012 Energy Law Reporter (ELR) Page 1110 has already rejected this very contention of this appellant- Power Grid Corporation of India Ltd. This Tribunal in Appeal No. 180 of 2011 decided on 10.05.2012 was dealing with the case based on identical facts and circumstances. The contention of the appellant- Power Grid Corporation of India Ltd. in the reported case was that the delay in commissioning of the project was beyond the control of the appellant, namely, bad road

conditions amounting to force majeure saying that the transporter is expected to take due care and caution while transporting the equipments even when he confronts bad road conditions. The appellant's contention that the event was of the nature of force majeure, was mis-conceived as bad road condition is a very common feature in the infrastructure sector of economy and invoking of force majeure doctrine was not found acceptable by this Tribunal. The contention of Shri M.G. Ramachandran, who also represented the same appellant- Power Grid Corporation of India Ltd., in that case that the delay could not be attributed to the appellant as the machine developed defects in course of journey through rough road and when the defect was detected it was sent to Mumbai for repairs and on account of this, there occurred delay of 9 months in commissioning of the project was not accepted. The appellant in the reported case was not found entitled to the effect of force majeure when machine developed defects in the course of journey through rough road observing that force majeure means a superior force, an event or effect that can neither be anticipated nor controlled. The term includes both acts of nature and acts of people like riots, strikes, and wars. The force majeure clause ordinarily occurs as a contractual provision allocating the risk of loss if performance becomes impossible or impracticable especially as a result of an event or effect that the parties could not have anticipated or controlled. In the reported judgment in Appeal No. 180 of 2011, it was held that the learned Central Commission has not unjustifiably held that the damages in the form of IDC and IEDC should not be passed on to the beneficiaries as the manufacturer of machine (ICT) and its transportation is essentially a matter between the appellant and its vendor. The same is a matter of contractual obligation between them alone. It was further observed by this Tribunal in the said judgment that a number of factors whether there were manufacturing defects or whether adequate precautionary measures were taken for transportation of the machine or, whether machine/ICT was sent back with utmost dispatch or whether there was any delay in effecting repairs, whether there was agreement between the appellant and the manufacturer and what were the terms and conditions thereof, if any, so agreed to between the manufacturer and the appellant,

are all unknown and in the circumstances it cannot be said in a broad sweep that the delay cannot be attributed to appellant and/or the manufacturer. The responsibility is upon both the manufacturer and appellant to ensure that the machine is transported and journeyed safely and it cannot be said that the parties must not take into account the condition of road for transportation. It is not a case of breakdown, while working without any human fault on machinery, all of a sudden over which the party could not have any prior control.

18. We have also gone through the judgment of this Tribunal dated 27.04.2011 in Appeal No. 72 of 2010 in the matter of Maharashtra State Power Generation Corporation Ltd. Vs. Maharashtra Electricity Regulatory Commission reported in 2011 Energy Law Reporter (ELR) Page 0594 cited by the learned counsel for the appellant. In this judgment, the Tribunal has laid down the principle regarding prudence check for cost of time overrun due to factors, i) entirely attributable to the generating Company, ii) beyond the control of generating Company and, iii) situation not covered by i) and ii) above and found that the case pertained to the third situation and accordingly apportioned the additional capital cost due to time over run equally between the generating Company and the Consumer. The Central Commission in the present case held that the appellant could not totally absolve itself of the delay in commissioning of the converter transformer and accordingly allowed only 50% of the additional cost due to time over run to the appellant. Thus, the Central Commission has not acted in contradiction of the principles laid down by this Tribunal in Appeal No. 72 of 2010. The entire delay could not be attributable to the appellant but this ruling cannot be of any help to the appellant.

19. After the aforesaid analysis of the matter in hand and after considering various aspects of the matter, the delay as alleged above cannot be said to be due to force majeure. The case in hand is not covered by any imagination under any event of force majeure. Merely the ground that due to the transportation problem, the said delay was

caused in commissioning of the spare transformer cannot be accepted. The learned Central Commission in the impugned order has rightly held that the appellant cannot be absolved of its liability for the said delay caused in the commissioning of the spare transformer. All the findings recorded by the learned Central Commission are just and proper as they are based on correct and proper appreciation of the material available on record and we also agree to them. We do not find any cogent reason to deviate from the findings recorded in the impugned order. The appeal is devoid of merits and is liable to be dismissed. There appears to be no illegality, perversity or material irregularity in any of the findings recorded in the impugned order. The impugned order of the learned Central Commission is hereby upheld. Consequently, this appeal is dismissed with no order as to costs.

Announced in open Court
on 16th day of January, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

Reportable/Non- reportable

rkt