IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

Appeal No. 85 of 2015

Dated: 15th February, 2018

Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

In the Matter of:

NTPC Limited
NTPC Bhavan, Scope Complex,
Core-7, Institutional Area, Lodhi Road
New Delhi-110003 **……Appellant**

VERSUS

1. West Bengal State Electricity Distribution Company Limited
Vidyut Bhawan, Block `DJ'
Sector-11, Salt Lake City,
Calcutta – 700 091

2. Bihar State Power Holding Company Ltd
(erstwhile Bihar State Electricity Board)
Vidyut Bhawan, Bailey Road,
Patna – 800 021

3. Jharkhand Urja Vikas Nigam Limited
(erstwhile Jharkhand State Electricity Board)
Engineering Bhawan, HEC,
Dhurwa, Ranchi – 834 004

4. GRIDCO Ltd.
Vidyut Bhawan, Janpath
Bhubaneshwar-751 007

5. Damodar Valley Corporation
DVC Towers, VIP Road,
Calcutta – 700 054

6. Power Department,
Govt. of Sikkim,
Gangtok– 737 101

7. Central Electricity Regulatory Commission,
3rd& 4th Floor Chandralok Building,
36, Janapath
New Delhi – 110 001

…..Respondents

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

Counsel for the Respondent(s) : Mr. Saurabh Mishra for R-1
Mr. R.B. Sharma for R-2 & R-4

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed against the Order dated 21.01.2014 read with the Order dated 17.12.2014 passed by the Central Electricity Regulatory Commission (hereinafter referred to as '**Central Commission**') in Petition No. 204/GT/2011 and Review Petition No. 9 of 2014, respectively relating to the generation tariff for the period from the actual date of commercial operation of Farakka Super Thermal Power Station, Stage-III (1 x 500 MW) (hereinafter referred to as '**Farakka Station**') of the Appellant - NTPC Limited (hereinafter referred to as **'NTPC'**) i.e. 04.04.2012 to 31.03.2014. The Appellant has prayed for setting aside the Order dated 21.01.2014 passed by the Central Electricity Regulatory Commission.

2. NTPC is aggrieved on the following aspects of the Impugned Order -

(i) The costs over run for the delay of 14 months has to be shared equally between NTPC and the beneficiaries on the ground that NTPC cannot be absolved of its responsibility for the delay even though the delay was for reasons not attributable to NTPC and was due to the failure on the part of contractors/sub-contractors;

(ii) Disallowance of Rs. 2132 lakhs on pro rata basis as increase in contract cost expenditure due to escalation of cost for the period of delay of 14 months for the main plant turnkey package and the main plant civil work package;

(iii) The non-consideration of the delay of 2 months due to the damaged sluice gate at Farakka Barrage as a force majeure event;

(iv) Disallowance of Rs 7920.52 lakhs (50% of 15841.04 lakhs to be shared equally between NTPC and the beneficiaries) as cost overrun towards Interest During Construction & Financing Charges;

(v) Disallowance of Rs 760.18 lakhs (50% of Rs 1520.36 to be shared equally between NTPC and the beneficiaries) as cost overrun due to time overrun for Incidental Expenditure During Construction; and

(vi) Calculation of the weighted average rate of coal as Rs 3494.27 per MT instead of the recomputed Rs. 3544.99 per MT.

3. **FACTS OF THE CASE**

3.1 The Appellant, NTPC is a Central Government Enterprise and a Company incorporated under the Companies Act, 1956 with registered office at NTPC Bhawan, SCOPE Complex, 7, Institutional Area, Lodhi Road, New Delhi – 110003.

3.2 NTPC is engaged in the business of generation and sale of electricity to various purchasers/beneficiaries in India. NTPC being a generating

company owned and controlled by the Central Government, is therefore covered by Clause (a) of sub-section (1) of Section 79 of the Electricity Act, 2003 for sale of electricity to distribution licensees in India. The generation and sale of energy by NTPC to the Respondents No. 1 to 6 is regulated under the provisions of the Act by the Central Electricity Regulatory Commission (hereinafter referred to as the '**Central Commission**'), the Seventh Respondent herein.

3.3 One of the generating stations of NTPC is the Farakka Super Thermal Power Station, located in West Bengal with an installed capacity of 2100 MW.

3.4 The generating station that is the subject matter of the present Appeal is **the Farakka** Super Thermal Power Station, Stage III (1 x 500 MW) (hereinafter referred to as '**Farakka Station**'), an expansion project of NTPC in the existing Farakka Stage-I (600 MW) and Stage-II (1000 MW). The electricity generated from Farakka Station is being supplied to Respondents No. 1 to 6 herein.

3.5 The Central Commission notified the Central Electricity Regulatory Commissions (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter referred to as '**Tariff Regulations, 2009'**) which came into effect from 1.04.2009.

3.6 On 30.10.2006, the NTPC Board approved an investment of an estimated project cost of Rs 2570.44 Crore, at 2nd Quarter, 2006 price levels for the Farakka Station. As per the Board resolution, the 'zero date' was to be reckoned as the date of receipt of environmental clearance from the Ministry of Environment and Forests, Government of India and as per the Investment Approval, the commercial operation date of the Unit was envisaged as 45 months from the date of the main plant award. The Ministry of Environment and Forests granted its clearance on 07.02.2007

and the West Bengal Pollution Control Board consent letter was received on 29.3.2007 Accordingly, the scheduled commercial operation date, of the Farakka Station was 06.11.2010.

3.7 The Farakka Station could not however be completed for commercial operation by the Scheduled Date on account of various reasons. The commercial operation was declared on 04.04.2012.

3.8 On 26.08.2011 NTPC filed a Petition being No. 204/GT/2011 before the Central Commission for approval of tariff of the Farakka Station from the anticipated date of commercial operation, i.e. 01.10.2011 to 31.03.2014.

3.9 After the Farakka Station was declared under commercial operation on 04.04.2012, NTPC by its affidavit dated 20.07.2012, provided the requisite justifications and reasons for the delay and the consequences of the time and cost overrun to the Central Commission.

3.10 NTPC, by its subsequent affidavit dated 07.09.2012 submitted the amended forms for tariff calculation on the basis of the actual date of commercial operation of the Farakka Station, i.e. 04.04.2012 and submitted the additional details as regards the time overrun and the cost overrun from the scheduled date of commercial operation to the actual date of commercial operation.

3.11 In the proceedings, from time to time, the Central Commission sought additional information from NTPC. In response to the same, NTPC filed its additional submissions along with the documentary evidence as regards the justification for the time overrun, the actual capital cost as on commercial operation date etc.

3.12 The Central Commission decided Petition No. 204/GT/2011 vide its Order dated 21.01.2014.

3.13 Presuming errors & anomalies in the Order dated 21.01.2014, NTPC, on 12.03.2014 filed a petition for review, being Petition No. 9 of 2014, before the Central Commission.

3.14 Vide order dated 17.12.2014, the Central Commission decided the Review Petition No. 9 of 2014, partly allowing the review petition, and rejecting the review on other aspects.

3.15 Aggrieved by the decision of the Central Commission in disallowing the claim of the Appellant on certain aspects (which were not allowed in the Review Order) as contained in the order dated 21.01.2014 read with the order dated 17.12.2014, the Appellant is filing the present Appeal.

4. **The following are the gist of submissions made by Shri M.G. Ramachandran, the Ld. Counsel of the Appellant:**

(i) Issue A; Costs Over Run for the Delay of 14 Months has to be Shared Equally Between NTPC and the Beneficiaries.

4.1 In the Impugned Order, the Central Commission, after having concluded that the delay was not attributable to NTPC and that NTPC took all possible measures to mitigate the delay, concluded that the impact of cost overrun and time overrun for the delay of 14 months has to be shared equally by NTPC and the respondent beneficiaries, even though the delay was for reasons beyond the control of NTPC. The Central Commission, after analyzing the detailed justification and submissions filed by NTPC, concluded on factual aspects, inter alia as under**:**

"It is evident from the above that there has been no imprudence on the part of the petitioner in the selection of M/s BHEL as the principal contractor or in the execution of contractual agreements or any delay in awarding of contracts or any slackness in project monitoring. However, there has been delay in the completion of project due to various reasons like the non participation of qualified vendors in bidding process, the non mobilisation of resources at site, technical flaws in bottom Ash system and Instrumentation Air system etc. It is observed that the petitioner was

constantly monitoring and co-ordinating the activities of the principal contractor/sub-contractors and had initiated various steps to mitigate the delay in the completion of the project as narrated above. Despite reasonable efforts on the part of the petitioner, there has been delay in the completion of the project. This in our view cannot be fully attributable to the petitioner."

Despite such a conclusion, the Central Commission has held that NTPC cannot be fully absolved of its responsibility and shall have to bear 50% of the total costs due to time overrun. The operative order is therefore, contrary to the factual aspects decided by the Central Commission.

4.2 The Central Commission, having come to the conclusion that NTPC was not imprudent in selecting M/s BHEL to execute the project and the delay cannot be entirely attributable to NTPC, erred in holding that NTPC cannot be absolved of its responsibility. If the delay in the execution of the project was not attributable to NTPC, then it follows as a natural corollary that there is no delay attributable to NTPC.

4.3 The Central Commission has not considered the salient aspects of cost overrun/time overrun as per the principles laid down by the Tribunal in the judgment dated 27.04.2011 passed in Appeal No. 72 of 2010 in the case of Maharashtra Power Generation Corporation Limited v. Maharashtra Electricity Regulatory Commission. It has been laid down 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."

4.4 In the above, there are two circumstances mentioned, namely, Force Majeure like Natural Calamities or any other reason which clearly establish beyond any doubt that there has been no imprudence on the part of the generating company executing the project.

4.5 Accordingly, the Central Commission ought to have held that the case squarely falls under sub-category (ii) of the three categories dealt by the Appellate Tribunal in Appeal No. 72 of 2010. However, the Central Commission has wrongly categorised the above in sub-category (iii) simply on the ground that the Respondents cannot be asked to carry the entire burden on account of the delay.

(II) Issue B; Disallowance of Rs. 2132 Lakhs Claimed as Increase in the Contract Price Due to Escalation of Cost for the Period of Delay of 14 Months for the Main Plant Turnkey Package and the Main Plant Civil Work Package.

4.6 The Central Commission has wrongly disallowed Rs. 2132 lakhs from the actual expenditure claimed in respect of the main plant turnkey package and the main plant civil work package on account of sharing of costs by NTPC for delay as per the 50:50 methodology applied above.

4.7 The Central Commission has concluded that the actual expenditure value of the package awarded to the Turnkey Contractor of the Main Plant Civil Package exceeded the awarded value of Rs 9200 Lakhs.

4.8 In reaching the above conclusion the Central Commission has ignored the basic fact that NTPC would be supplying steel and cement free of cost to the contractor as per the terms of the Contract Agreement. This was for the reason that NTPC procures steel and cement in bulk in a competitive manner at the reduced price as compared to allowing the contractor to purchase steel and cement. The Central Commission has not taken into consideration the justification provided by NTPC as regards the supply of the owner issued material in its Affidavit dated 07.09.2012.

In Form 5D of the Amended Petition filed vide its Affidavit dated 07.09.2012, NTPC submitted as under:

> ***"In civil packages actual expenditure includes owner issued materials where ever applicable."***

In terms of the above, it would be clear that the actual expenditure incurred on the Main Plant Civil Package was inclusive of the Owner Issued Materials such as Steel and Cement supplied by NTPC to the Contractor.

4.9 The awarded price of the Main Plant Civil Package, Rs. 9200 lakhs **excludes** the cost of materials (steel and cement) supplied by NTPC to the contractor free of cost (as submitted by the Appellant in Form – 5D in the amended tariff petition filed vide affidavit dated 07.09.2012). The value of the steel and cement of Rs 12169.19 lakhs provided by NTPC needs to be added to the value of the awarded contract of Rs 9200 lakhs to arrive at the total capital expenditure claimed for the work. The actual capital expenditure, as on the commercial operation date of Rs. 18756.36 lakhs was however inclusive of the costs of the said materials. The details of cash expenditure in Main Plant Civil Package are as follows:

	MAIN PLANT CIVIL PACKAGE	
A	Awarded Value	Rs. 9200 Lakhs
B	Expenditure as on Commercial Operation Date - 04.04.2012	Rs. 18756.36 Lakhs
C	Owner Issued Materials(Steel & Cement) up to Commercial Operation Date	Rs. 12169.19 Lakhs
D	Works Cost (Including Taxes & Duties) (B-C)	Rs. 6587.17 Lakhs (D < A)

As is evident from the above, the actual expenditure on the Main Plant Civil Package, as on the Commercial Operation Date paid to the Contractor is well within the awarded cost when the cost of the materials supplied free to the contractor is excluded.

4.10 Similarly, the Central Commission has not considered that the price awarded towards the Main Plant Package, namely Rs. 114386 lakhs excludes the pre- commissioning expenses amounting to Rs.

13471.35 lakhs. The actual capital expenditure, as on the commercial operation date of Rs. 124311.45 lakhs was however inclusive of the pre- commissioning expenses (as provided in Form -5D of the Tariff Petition).The pre commissioning expenses were capitalized/ booked to the Main Plant package as per the accounting guidelines and these expenses do not form part of the contracted award value. The details of the expenditure of the Main Plant Package, as on Commercial Operation Date are as under:

	MAIN PLANT PACKAGE	
A	Awarded Value	Rs. 114386 Lakhs
B	Expenditure as on Commercial Operation Date - 04.04.2012	Rs. 124311.45 Lakhs
C	Less: Pre Commissioning Expenses capitalized, as on commercial operation date	Rs. 13471.35 Lakhs
D	Erection & Supply Cost(Including Taxes & Duties and freight) (B-C)	Rs. 110840.10 Lakhs (D < A)

As is evident from the above, if the pre-commissioning expenses were to be excluded from the actual expenditure, as on the Commercial Operation Date, the actual costs fall well within the awarded value.

4.11 The Central Commission has not considered that the pre-commissioning expenses which form part of the actual expenditure on the Main Plant Package, as on the commercial operation date, was allowed to be capitalized by the Central Commission in the Order

dated 21.01.2014 itself. The relevant extracts of the Order dated 21.01.2014 read as under:

> ***"26. Taking into consideration the above submissions of the petitioner, we are of the considered view that the net construction and pre-commissioning expenses amounting to`134.71 crore, after deducting the revenue earned from the sale electricity, excluding fuel cost, shall be capitalised as on COD of the generating station."***

4.12 In the Tariff proceedings or during the technical validation no information/details regarding the difference in the actual expenditure in various contract packages as on actual date of commercial operation and the awarded value was sought. By letter dated 28.05.2012, the Central Commission only directed NTPC to submit details of escalation paid during the period from the schedule date of commercial operation to actual date of commercial operation. NTPC responded as under**:**

> ***"Para 7 -Generally Letters of Awards (LOAs) for various packages envisage price escalation payable by NTPC to contractors/ vendors as per the scheduled dates of supplies/ erection. If any delay on the part of the contractor leads to delay in supply/ erection, additional escalation if any is generally borne by the contractors……"***

4.13 The Central Commission did not consider that any cost escalation on account of the delay on behalf of the Contractor was to be borne by the Contractor itself. The Agreements entered into between NTPC and the Contractor (BHEL) provided for a price variation clause which stipulated that the contract price shall be subject to price adjustment during the performance of the contract to reflect the changes in the cost of labour and material components etc. The price variation clause envisages price escalation payable by NTPC to the contractor, as up to the date provided for completion (scheduled date) or the actual date, whichever is earlier. Therefore, NTPC is liable only for the escalation up to the scheduled date and

the additional escalation for the delay on the part of the contractor is to be borne by the contractor itself. This aspect has been ignored by the Central Commission.

(III) Issue C; Non-consideration of the Delay of 2 Months Due to the Damaged Sluice Gate as a Force Majeure Event

4.14 The Central Commission has disallowed the delay in the commercial operation of the Farakka Station on account of the disruption in the water supply to the existing generating station (Farakka, Stage I and II) as the two sluice gates of the Farakka barrage (maintained by the Central Water Commission) were damaged in February, 2012.

4.15 The damaged sluice gates prevented the supply of cooling water from Farakka barrage to the Farakka Station and the same affected the commencement of the operation of the Farakka Station, Stage III for which the Tariff was being determined in the present case and not merely the existing stations (Farakka, Stage I and II).

4.16 The damaged Sluice gates was aforce majeure event affecting the declaration of Commercial Operation of the Farakka Station as NTPC could not have proceeded to declare commercial operation without the supply of cooling water from the Farakka barrage. The Central commission ought to have considered the justification provided by NTPC on the said delay. Instead the Central Commission proceeded on the presumptive basis that had the original schedule been adhered to, NTPC would have declared commercial operation without the supply of cooling water from the Farakka barrage.

4.17 The above delay on account of force majeure falls under category (ii) of the principles, as laid down by the Tribunal in its judgment

dated 27.04.2011 passed in Appeal No. 72 of 2010 in the case of Maharashtra State Power Generation Co. Ltd. vs. Maharashtra Electricity Regulatory Commission &Ors. {quoted above}

(IV) Issue D; Disallowance of Rs 7920.52 Lakhs (50% of 15841.04 Lakhs) and Rs 760.18 Lakhs (50% of Rs 1520.36) as Cost Overrun Towards Interest During Construction & Financing Charges and Incidental Expenditure During Construction Respectively

4.18 The Central Commission is wrong in holding that the cost overrun, namely the Interest During Construction, the Financing Charges and the Incidental Expenditure During Construction, due to time overrun for the period 05.02.2011 to 03.04.2012 (not attributable to NTPC, as mentioned hereinabove) be shared equally between NTPC and the Respondents.

4.19 The delay of 14 months, as mentioned hereinabove, was for reasons beyond the control of NTPC and NTPC cannot be held liable to bear the costs for the same.

4.20 NTPC vide affidavit dated 07.09.2012 had clearly stated that the deployment of loan got deferred on account of delay that took place for reasons beyond the reasonable control of NTPC. The relevant extracts of the Affidavit dated 7.09.2012 read as under**:**

"…it is submitted that in the event of shifting of various activities related to project construction/execution/commissioning to a later date, the corresponding expenditure on deferred activities through loan and equity deployment also get shifted. It is submitted that loans are drawn at Corporate (Central) level, common to all stations/projects and these loans are allocated to various projects/stations as per their running/current activities/expenditure. These factors, in fact, help in reducing the actual IDC and FC."

4.21 Further certain expenditure for carrying out critical works got deferred due to time overrun for reasons not attributable to NTPC

and that the same had been allowed as a part of the admitted capital cost. Disallowing the Interest During Construction, Financial Charges and the Incidental Expenditure During Construction for the debt deployed during the time overrun would lead to an anomalous situation wherein the debt deployed is allowed as a part of the capital cost but the corresponding Interest During Construction, Financing Charges and Incidental Expenditure During Construction are disallowed.

4.22 The Central Commission has not considered that in Form 8 and Form 14 of the amended Tariff Petition, NTPC had provided the details of the debt deployed during the period of construction. The details of the various loans drawn during the period 05.02.2011 (Scheduled Commercial Operation Date of 6.11.2010 plus the 3 months condoned) to 04.04.2012 (actual Commercial Operation Date of unit) are as under:

Sl. No	**Bank Name**	**Amount (RsCrs)**	**Date of Drawl**
1.	Punjab & Sind Bank	20.00	02.06.2011
2.	SBI-VI	25.00	21.02.2011
3.	Bond XXXVIII	1.00	22.03.2011
4.	Bond XLII	70.00	25.01.2012
5.	PFC-V D-29	90.00	30.03.2011
6.	PFC-V D-31	48.00	24.09.2011
7.	PFC-V D-32	42.00	15.12.2011
8.	PFC-V D-33	131.00	31.12.2011
9.	PFC-V D-34	23.00	21.02.2012
10.	PFC-V D-38	45.00	29.03.2012
TOTAL 495.00 Crores			

4.23 As per the above that around 27% of the debt is deployed during the said period of time overrun, i.e. 05.02.2011 to 04.04.2012, and it forms a part of the admitted capital cost. Therefore, disallowing the Interest During Construction for the debt deployed during the time overrun would lead to an anomalous situation wherein the debt deployed is allowed but the corresponding Interest During Construction and Financing Charges are disallowed. The same is contrary to the objectives of Regulations framed by the Central Commission itself which mandate appropriate servicing of the actual capital cost deployed by the generator.

4.24 The correct methodology for computing the disallowed Interest During Construction and the Financing Charges, the Central Commission ought to have considered the details of deployment of loans after 05.02.2011 and not disallowed them without going into the details of actual debt deployment position.

4.25 The Central Commission did not consider the principle laid down in the judgment dated 27.04.2011 passed by the Tribunal in Appeal No 72 of 2010 as regards the Interest During Construction on account of cost over-run due to time over run. The Central Commission had relied upon the said judgment in the Impugned Order while allocating risk on account of time overrun and the consequent additional cost incurred in commissioning of the project developed under cost plus regime. The relevant extracts of the judgment passed by the Tribunal in Appeal No. 72 of 2010 reads as under:

> ***"13.2ii) As regards IDC, we agree with the State Commission that infusion of <u>equity and debt has to be more or less on paripassu basis as per normative debt equity ratio</u>. However, increase in IDC due to time overrun has to be allowed only according to the principles laid down by us in para 7.4. Accordingly, the State Commission is directed to re-determine the IDC for the actual period of commissioning of the***

project on the principles of paripasu deployment of equity and debt and then work out <u>the excess IDC for the period of time overrun on a pro rata basis and limit disallowance to 50% of the same from the total IDC.</u>"

4.26 If the above principle were to be applied to the present case then the Interest During Construction works out as under:

Sl. No.	**Particulars**	**Amount in Lakhs**	**Remarks**
A	Interest During Construction (including Notional Interest During Construction), as allowed by the Central Commission	31799.07	64 months as debt was deployed from the month of Nov 2006
B	Interest During Construction Disallowed	7920.52	
C	Total Interest During Construction for construction period up to Commercial Operation Date as per order (A+B)	39719.59	
D	Interest During Construction per month on pro rata basis (C/ 64)	620.618	
E	Interest During Construction for time overrun of 14 months (D X 14)	8688.66	
F	Interest During Construction to be shared 50:50	4344.33	
G	Interest During Construction to be disallowed	4344.33	

4.27 The above computation is based on the IDC details contained in the Central Commission's Order dated 21.01.2014. The Appellant had inspected the records of the Central Commission after submitting the requisite fees but the calculation of IDC allowed/ disallowed was not available on the records. The same was informed to the Central Commission vide letter dated 25.02.2014 and the details are awaited.

The Appellant seeks liberty to add to this Ground after the analysis of IDC computation details on receipt of the same.

4.28 The Central Commission in its Order dated 19.05.2014 in Petition No. 112/TT/2012 relating to Powergrid Corporation of India, had duly considered the time over run/cost over run on a proportionate basis, as is evident from Para 16 of the said Order**.** The same methodology should have been applied in the present case**.**

(VI) Issue E; Calculation of the Weighted Average Rate of Coal as Rs. 3494.27 Per Mt Instead of the Recomputed Rs. 3544.99 Per Mt:

4.29 The Central Commission has considered the weighted average price of coal as Rs. 3494.27 per MT instead of the recomputed Rs. 3544.99 per MT, as per the affidavit dated 26.09.2013 wherein NTPC had revised Form 15, segregating the domestic coal received through Merry Go Round (MGR) system and the railways separately and considering a transit loss of 0.2% for the domestic coal received through MGR and 0.8% for the domestic coal received through the railways.

5. **Per Contra, the following are gist of the submissions/views made by Shri R.B. Sharma, the Learned Counsel for the Respondent No. 2, BSPHC Ltd. and the Respondent No. 4, GRIDCO Limited:**

5.1 **<u>Costs Over run for Delay of 14 months:</u>**

(i) At the very outset, it is submitted that there are no specific regulations to deal with the issue related to the time and cost overruns in the completion of the projects under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter referred to as the 'Tariff Regulations, 2009). As such the Tribunal for Electricity in its judgment dated

27.4.2011 in Appeal No. 72 of 2010 (MSPGCL Vs MERC & others) has laid down the certain principles for prudence check of time and cost overruns of a project under Paras 7.4 & 7.5 of the judgment which has already been reproduced by the Appellant.

The Commission has gone strictly in accordance with the principles laid down in the above judgment of the Tribunal while considering the time and cost overruns in the impugned order.

(ii) Appellant has alleged that the case in the present Appeal is covered by the principles laid down at Sl. No. (ii) in the above judgment whereas the Commission has held that the case is covered by the principles laid down at Sl. No. (iii). Basis for such a claim by the Appellant is that the delay has been beyond its control.

The Appellant had filed a Review Petition before the Commission wherein the Appellant had taken all the objections which has taken in the present Appeal. The Commission while rejecting the claim of the Appellant on this issue also clarified the decision in the impugned order by quoting relevant portion of Para 16 of the impugned order which is reproduced below:

"16.....Even though the petitioner cannot absolve itself of its responsibility for the delay due to non performance of the contractors, it is necessary to consider as to whether there was slackness on the part of the petitioner to coordinate with the contractor or to take prudent steps to prevent the delay in completion of the project. It is evident from the above submissions that the delay of 14 months (excluding 3 months due to rainfall) in the completion of the project is due to the non-mobilisation of resources on the part of

M/s BHEL, delay due to technical flaws in Bottom Ash hopper, failure of the instrument air and service air compressor motors, etc., It is noticed that Boiler Erection activities came to a standstill after four months from start of work due to non mobilization of Heavy lift crawler crane by M/s BHEL and the petitioner had continuously followed up with M/s BHEL for mobilization of high capacity crawler crane. This issue was finally resolved in a meeting between the petitioner and BHEL on 2.9.2008 wherein it was decided that the petitioner would hire High Capacity Crane as per technical specifications of BHEL and provide the same to BHEL on rental basis as a unique and special initiative. The petitioner had placed LOI on 27.10.2008 on the agency for mobilisation of High capacity crane at site and with all efforts and initiative, the high capacity crane was made available to BHEL at the earliest possible time at site by 4.12.2008 after load test. Thus, with all efforts taken by the petitioner, and optimum use of resources, drum lifting could be completed during February, 2009 i.e with a delay of 12 months. Also, BHEL was finding it difficult to finalise qualified sub-vendor for boiler erection due to non-participation of qualified vendors in the bidding process and ultimately, one bidder qualified with its financial offer being too high. BHEL could not award the contract and on persistent follow up by the petitioner, short term contract, to start boiler erection was resorted to avoid further delay and M/s Golden Edge Engineering was engaged by BHEL as makeshift agency to compete the work upto drum lifting which took one and half months to mobilise its resources at site. Similarly, in the course of commissioning, bottom ash handling system consistent operation could not be established due to major and critical technical flaws in the various associated components as mentioned earlier. It is observed that these problems were resolved only after several meetings between M/s Indure and NTPC on various dates i.e on 25.9.2011, 25.11.2011 and 30.12.2011 respectively. Pursuant to this, the operation of Bottom ash handling system could be established in January, 2012 after carrying out various modifications. It is evident from the above that there has been no imprudence on the part of the petitioner in the selection of M/s BHEL as the principal contractor or in the execution of contractual agreements or any delay in awarding of contracts or any slackness in project monitoring. However, there has been delay in the completion of project due to various reasons like the non participation of qualified vendors in bidding process, the non mobilisation of resources at site, technical flaws in bottom Ash system and Instrumentation Air system etc. It is observed that the petitioner was constantly monitoring and co-ordinating the activities of the principal contractor/sub-contractors and had initiated various steps to mitigate the delay in the completion of the project as narrated above. Despite reasonable efforts on the part of the petitioner, there has been delay in the completion of the project. This in our view cannot be fully attributable to the petitioner. Accordingly, we are of the considered

view, that the principle to be applied in terms of the situation (i) and (ii) as laid down in the judgment of the Tribunal referred to in Para 12 above, is not attracted in the instant case. However, the delay in the completion of the project had occurred due to the failure on the part of contactor/sub-contractors to carry out the works as per schedule, despite reasonable efforts taken by the petitioner. This, in our view, cannot fully absolve the petitioner and the respondents cannot also be asked to carry the entire burden on account of the said delay. Keeping in view that time is the essence of the contract in respect of the project work, and considering the fact that delay in the completion of the project is not fully attributable to the petitioner, we conclude that the principle laid down in situation (iii) of the judgment of the Tribunal as referred to in Para 12 above is applicable in the instant case. Accordingly, we direct that the impact of time and cost overrun of 14 months should be borne equally in the ratio of 50:50 by the petitioner and the respondents. Moreover, the additional cost due to time overruns including the Liquidated damages and insurance proceeds, if any, received from the contractor should be shared between the generating company and the respondents /consumers".

(iii) The delay as explained by the Appellant before the Commission as contained in Affidavit dated 6th February, 2013 has been attributed to failure on the part of the contractors/sub-contractors to carry out the works as per schedule. Keeping in view that time is an essence of the contract, the Commission, by a conscious decision, concluded that the petitioner could not be fully absolved of its responsibility for the delay, and the impact of such delay could not be passed on to the respondents who had no role to play during the execution. The Commission in order dated 17.12.2014 in Review Petition No. 9/RP/2014 in Petition No. 204/GT/2011 has re-iterated as under:

"9. ……..The submission of the petitioner that the Commission having found that delay was not fully attributable to the petitioner should have applied the principle laid down in situation (ii)-(Force

Majeure) of the judgment dated 27.4.2011 is not tenable as the petitioner is ultimately responsible for ensuring timely completion of the project. Even if no imprudence could be attributed to the petitioner in the selection of M/s BHEL for execution of the works, the delay due to failure of the contractor /sub-contractors to carry out the works as per schedule, would not fully absolve the petitioner of its responsibility to ensure the completion of the said works, as time is the essence of contract. Considering the totality of the facts and circumstances of the case, the Commission had correctly applied the principle (ii) laid down in the said judgment of the Tribunal by directing the sharing of the cost and time overrun in the ratio of 50:50 by the parties. Accordingly, we find no error apparent on the face of record and review on this count is therefore rejected."

(iv) The Commission has thus clearly stated that the Appellant is ultimately responsible for ensuring the timely completion of the project and failure to control the contractor /sub-contractors to carry out the works as per schedule, would not fully absolve the Appellant of its responsibility to ensure the completion of the said works, as time is the essence of contract. In fact, the penalization of the Respondent-beneficiaries for the delay of 14 months through tariff who have no role in the delay is baffling. The Commission, however, has examined the issue strictly in accordance with the principles laid down for prudence check of time and cost overruns by this Tribunal for Electricity in its judgment dated 27.4.2011 in Appeal No. 72 of 2010 (MSPGCL Vs MERC & others) and thus the allegation of the Appellant is without any substance.

(v) The disallowance of Rs. 2132 lakhs on pro rata basis owing to the increase in contract cost expenditure due to escalation of cost

during the delayed period is, consequence to the decision of the Commission not to permit the delay of 14 months. As the time overrun of 14 months has not been fully attributable to the Appellant the entire amount of Rs. 4262 lakhs has been shared between the Appellant and the beneficiaries in the ratio of 50:50. Thus, the disallowance works out Rs. 2132 lakhs which is also in accordance with the principles laid down for prudence check of time and cost overruns by this Tribunal in its judgment dated 27.4.2011 in Appeal No. 72 of 2010 (MSPGCL Vs MERC & others).

5.2 **Non consideration of Time Overrun of 2 months due to damage of sluice gates:**

The Appellant has alleged non-consideration of the delay of 2 months due to the damaged sluice gate at Farakka Barrage in February, 2012 as a force majeure event and reasons not attributable to the Appellant. The Commission has examined the issue and the views of the Commission are reproduced below:

> ***18. The petitioner has further submitted that the commercial operation of the new unit could not be planned as water supply to the existing generating station was affected as two sluice gates of Farakka barrage maintained by CWC got damaged in February, 2012. In addition, agreed quantity of water had to be released to Bangladesh as per Indo-Bangla treaty. In our view, had the work of bottom ash handling system and instrument air system been completed in time i.e. as per the original schedule or even by the time of actual synchronisation on 23.3.2011, the petitioner could have declared COD without the supply of cooling water from Farakka barrage during that point of time. As such, the petitioner cannot be given the benefit of its***

own fault and accordingly, the contention of the petitioner is not accepted.

From the above, it is evident that the Appellant, if completed the project in time, could not have faced the problem of cooling water supply from Farakka Barrage at that point of time and accordingly the Appellant cannot be allowed to take advantage of its own fault. Moreover, this is a very convenient excuse available with the Appellant. In fact, the Appellant was allowed by the Commission to install lift water pumps by way of additional capitalization so that the cooling water supply to Farakka STPS does not affect either in the lean season during February-May or because of the higher flows to Bangladesh. This facility was commissioned during 2011-12. In spite of mitigating the problem of the Appellant by the Commission, this excuse is still continuing, The Appellant also gave the same excuse in Petition No. 189/2010 before the Commission while requesting for revision of Normative Annual plant Availability Factor in respect of NTPC's Power Stations in Eastern Region. The request of the Appellant was rejected by the Commission and this Tribunal as the same was wholly unjustified.

5.3 **Disallowance of Rs. 7920.52 lakhs towards IDC & FC:**

The Appellant has alleged that the Commission has disallowed an amount of Rs. 7920.52 lakhs (50% of 15841.04 lakhs to be shared equally between NTPC and the beneficiaries) owing to cost overrun towards IDC (Interest during Construction) and FC (Financing Charges). The increase

in IDC and FC due to time overrun of 14 months is consequence of the decision of the Commission not to permit the delay of 14 months. As the time overrun of 14 months has not been fully attributable to the Appellant the entire amount of Rs. 15481.04 lakhs has been shared between the Appellant and the beneficiary in the ratio of 50:50. Thus the disallowance works out Rs. 7920.52 lakhs which is also in accordance with the principles laid down for prudence check of time and cost overruns by this Tribunal.

5.4 **Disallowance of Rs. 760.18 lakhs towards IEDC:**

The Appellant has also alleged that the Commission has disallowed an amount of Rs. 760.18 lakhs (50% of 1520.36 lakhs to be shared equally between NTPC and the beneficiaries) owing to cost overrun towards IEDC (Incidental Expenditure during Construction). The increase in IEDC due to time overrun of 14 months is consequence of the decision of the Commission not to permit the delay of 14 months. As the time overrun of 14 months has not been fully attributable to the Appellant the entire amount of Rs. 1520.36 lakhs has been shared between the Appellant and the beneficiary in the ratio of 50:50. Thus the disallowance works out Rs. 7920.52 which is also in accordance with the principles laid down for prudence check of time and cost overruns by this Tribunal.

5.5 **Calculation of Weighted Average Rate of Coal:**

The Appellant has also alleged that the calculation of the weighted average rate of coal has been considered as Rs. 3494.27 per MT instead of the recomputed Rs. 3544.99 per MT by NTPC. The Appellant filed a review petition on this issue claiming the calculation error. The operating portion of the order under the Review Petition is reproduced below:

> ***"29. We have examined the matter. Admittedly, the petitioner vide affidavit dated 26.9.2013 had submitted revised Form-15 in the present case. On scrutiny, the following observations were noticed in the 'Foot Note' of the Form-15as under:***
>
> > ***"The weighted average rate of imported coal for the month of March, 2012 is Rs. 5024/MT. The deviation w.r.t. the weighted average rate in Jan., 2012 (Rs. 9423.88/MT) and Feb., 2012 (Rs. 9245.15/MT) is on account of contractual adjustments."***

The above order in the review petition would clearly show that the calculation for weighted average price of coal as Rs. 3494.27 per MT was furnished to the Commission by the Appellant himself after taking into account the contractual adjustments of imported coal in March, 2012 and thus, Appellant should have no grievance on this issue.

In the aforesaid circumstances, it is respectfully submitted that the Appeal as filed is absolutely devoid of merits and the same is liable to be dismissed with costs.

6. **We have heard at length the learned counsels for the rival parties and considered carefully their written submissions, arguments put forth during the hearings, etc. The following main issues arise in the present appeal:**

(i) **a)** Whether the project was delayed due to factors beyond the control of Appellant?

b) Whether the cost over-run due to the delay of 14 months should be shared equally by NTPC and the beneficiaries or not?

(ii) Whether the time and cost overrun on account of the damaged sluice gate should be treated as a Force Majeure event or not?

(iii) Whether the disallowance of various claims of cost overrun on account of time over-run is justified or not?

(iv) Whether the weighted average cost of coal has been considered correctly or not?

7. **Our Findings and Analysis on the various issues involved in the instant case are dealt as under:**

7.1 The Appellant has contested that after having concluded that there was no imprudence on the part of the NTPC in the selection of the contractor or in the execution of contractual agreements or any delay in awarding of contracts or any slackness in project monitoring and the delay was for reasons not attributable to NTPC, the Central Commission has disallowed Rs. 2132 lakhs claimed as an increase in the expenditure due to escalation of costs for the period of delay of 14 months for the main plant turnkey package and the main plant civil work package. Further, NTPC claims to have clarified that the price escalation on account of the delay beyond the schedule date on the part of the contractor is borne by the contractor themselves and does not result in cost overrun of the works cost. Accordingly, NTPC have claimed that the case, therefore, should be considered under Sl. (ii) of the principles laid down in the Tribunal Judgment dated 27.04.2011 in the Appeal No. 72 of 2010.

It is noted from the details & documents submitted by the Appellant that the problems cited by the appellant leading to delay in CoD are of the general & routine nature which are often faced by the Contractors engaged by the project proponents/generating companies including the Appellant during the execution of the projects. Nothing specific or extra-ordinary has been explained as to how the reasons which have contributed for delay in this case do not constitute imprudence on the part of Appellant. The Commission has very clearly stated that though the delay in the completion of the project occurred due to the failure on the part of contractor/sub-contractor to carry out the works as per schedule for which the Appellant bearing the overall responsibility for the completion of the project, cannot absolve himself.

It is an acknowledged fact that the problems in the construction of the projects occur in numbers from their concept to completion and require constant vigil and remedial measures by the project owner in unison with associated suppliers/contractors/sub-contractors. The problems related to the failure on the part of contractor/sub-contractor to carry out the works, non participation of qualified vendors in bidding process, non mobilization of resources at site in time, removal of technical flaws etc. which have been confronted in this case are the problems of, by & large, of general nature and cannot be termed as force majeure or otherwise, impossible to accomplish. Hence, these are covered by the principles laid down at S. No. (iii) of the cited principles of the Tribunal. Therefore, the impact of the time and cost overrun for the delay of 14 months has to be borne equally by the Appellant and the respondent-beneficiaries.

We note that the Appellant had filed a Review Petition before the Commission wherein the Appellant has taken all the objections which he

has taken in the instant Appeal. The Commission while rejecting the claim of the Appellant on this issue also clarified the decision in the impugned order of review petition by quoting relevant portion of Para 16 of earlier impugned order in main petition.

The delay as explained before the Commission as contained in Affidavit dated 6th February, 2013 has been attributed to failure on the part of the contractors/sub-contractors to carry out the works as per schedule and keeping in view that time is an essence of the contract, the Commission, by a conscious decision, concluded that the petitioner could not be fully absolved of its responsibility for the delay, and the impact of such delay could not be passed on to the respondents who had no role to play during the execution of the project. The Commission in order dated 17.12.2014 in Review Petition No. 9/RP/2014 in Petition No. 204/GT/2011 has re-iterated the same findings.

The Commission has thus clearly stated that the Appellant is ultimately responsible for ensuring the timely completion of the project and failure to control the contractor /sub-contractors to carry out the works as per schedule, would not fully absolve the Appellant of its responsibility to ensure the completion of the project. In fact, the penalization of the Respondent-beneficiaries and, in turn, consumers, for the delay of 14 months through tariff who have no role in the delay, cannot be justified. The Commission has examined the issue strictly in accordance with the principles laid down for prudence check of time and cost overruns by this Tribunal in its judgment dated 27.4.2011 in Appeal No. 72 of 2010 (MSPGCL Vs MERC & others).

We, therefore, conclude that cost over-runs arising out of 14 months delay would need to be shared equally by the Appellant & Respondent beneficiaries.

The disallowance of Rs. 2132 lakhs on pro rata basis owing to the increase in contract cost expenditure due to escalation of cost during the delayed period is, consequence to the decision of the Commission not to permit the delay of 14 months. As the time overrun of 14 months has not been fully attributable to the Appellant the entire amount of Rs. 4262 lakhs has been shared between the Appellant and the beneficiaries in the ratio of 50:50. **Thus, the disallowance works out Rs. 2132 which is in accordance with the principles laid down for prudence check of time and cost overruns by this Tribunal.**

7.2 The Appellant has alleged non-consideration of the delay of 2 months due to the damaged sluice gate in February, 2012 as a force majeure event and reasons not attributable to the Appellant. We note that the Commission has examined the issue and the views of the Commission are reproduced below:

> ***"18. The petitioner has further submitted that the commercial operation of the new unit could not be planned as water supply to the existing generating station was affected as two sluice gates of Farakka barrage maintained by CWC got damaged in February, 2012. In addition, agreed quantity of water had to be released to Bangladesh as per Indo-Bangla treaty. In our view, had the work of bottom ash handling system and instrument air system been completed in time i.e as per the original schedule or even by the time of actual synchronisation on 23.3.2011, the petitioner could have declared COD without the supply of cooling water from Farakka barrage during that point of time. As such, the petitioner cannot be given the benefit of its own fault and accordingly, the contention of the petitioner is not accepted".***

We also agree that the Appellant, if completed the project in time, could not have faced the problem of cooling water supply from Farakka Barrage at that point of time and accordingly the Appellant cannot be allowed to take advantage of its own fault. It is noted that the Appellant was allowed by the Commission to install lift water pumps by way of additional capitalization so that the cooling water supply to Farakka STPS does not affect either in the lean season during February-May or because

of the higher flows to Bangladesh. This facility was commissioned during 2011-12 but perhaps, not functioning. In spite of mitigating the problem of the Appellant by the Commission, the water supply crisis is still continuing, **As such, the contention of the Appellant to allow 2 months period of sluice gates failure at Farakka Barrage as force majeure event is not justified and hence, not accepted.**

7.3 The Appellant has alleged that the Commission has disallowed many claims towards cost over-runs arising out of time over-runs such as (i) Rs. 2132 lakhs claimed as increase in the contract price due to escalation of cost for the period of delay of 14 months for the main plant turnkey package and the main plant civil work package, (ii) Rs 7920.52 lakhs (50% of 15841.04 lakhs), and (iii) Rs 760.18 lakhs (50% of Rs 1520.36) as cost overrun towards Interest During Construction (IDC) & Financing Charges (FC) and Incidental Expenditure During Construction (IEDC), respectively.

Considering all the facts and documents submitted before this Tribunal, though it is evident that there was delay on the part of BHEL and other contractors/sub-contractors in the execution of the project, it is however, not established beyond doubt that the entire delay was due to the reasons beyond the control of the Appellant.

In view of above, we reiterate that this case falls under category (iii) described in Para 7.4 of the Tribunal's judgment dated 27.04.2011. Accordingly, following the principles of prudence check laid down by us, the cost of time over run has to be shared equally between the Appellant and the consumers. Admittedly, there is no enhancement in cost of the contract price of the equipment and works as no price variation escalation was permissible to them beyond the schedule date of completion of the Project according to the terms of the agreement. The impact of time over

run beyond the contractual schedule is only on IDC, IEDC & FC etc. Accordingly, the same have to be shared equally between the Appellant and the beneficiaries/consumers. As such, 50% of the excess IDC and other costs will have to be disallowed. **The issue of disallowance of 50% towards IDC, IEDC & FC etc. for the time over-run is therefore answered accordingly.**

7.4 The Commission in its order dated 21.01.2014 had considered the weighted average price of coal as Rs. 3494.27/MT. However, the Appellant felt that there was apparently, some error in adopting the coal price by the Commission and filed a review petition. The order dated 17.12.2014 in the review Petition no. 9/RP/2014 would clearly show that the calculation for weighted average price of coal as Rs. 3494.27 per MT was furnished to the Commission by the Appellant himself after taking into account the contractual adjustments of imported coal in March, 2012. The Commission has considered the same while working out the energy charges for the generating station as brought out in the Impugned Order(s). **Thus, we also hold the decision of the Central Commission on this issue.**

8. **Summary of Findings**

8.1 After detailed examination and analysis, we come to conclusion that though there was delay on the part of the supplies/contractors/sub-contractors in the execution of the project, but it is not established beyond doubt that the entire delay was for reasons beyond the control of the Appellant. Accordingly, it is held that the case of the Appellant falls under Sl. no. (iii) of Para 7.4 of the Tribunal's judgment dated 27.04.2011 passed in Appeal No.72/2010. Thus, in the interest of justice & equity, the burden of cost over-runs arising out of time over-run of 14 months would need to be equally shared by NTPC and beneficiaries and

therefore, the 50% of the cost over-runs resulting due to time overrun, in IDC, IEDC & FC, etc. has to be disallowed to the Appellant. In view of our findings, we sum-up that the Central Commission has rightly and justly declined various claims of the Appellant in its Impugned Order(s).

ORDER

We are of the considered opinion that issues raised in the instant Appeal are devoid of merit. Consequently, the Appeal fails and is hereby dismissed. The Impugned Order(s) dated 21.01.2014 and 17.12.2014 passed by the learned Central Commission are hereby confirmed. No order as to costs.

Pronounced in the open Court on this **15th day of February, 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~