IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 400 OF 2017

Dated: 28.01.2025

Present: Hon'ble Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

IN THE MATTER OF:

Sarda Energy and Minerals Ltd.,
Through its Authorized Signatory,
Shri Arvind Singh,
Regd. Office: 73 A, Central Avenue,
Nagpur, Maharashtra – 440 018 …. Appellant

Versus

1) **Central Electricity Regulatory Commission**,
4th Floor, Chanderlok Bulding,
36, Janpath,
New Delhi - 110 001

2) **Power Grid Corporation of India Ltd**.,
B-9, Qutub Institutional Area,
Katwaria Sarai,
New Delhi – 110 016 …Respondent(s)

Counsel for the Appellant(s) : Mr. Raunak Jain

Counsel for the Respondent(s) : Mr. Sitesh Mukherjee
Mr. Syed Jafar Alam
Mr. Deep Rao Palepu
Mr. Vishal Binod for Res.2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The instant Appeal has been filed by the Appellant i.e., Sarda Energy and Minerals Ltd. (in short "SEML" or "Appellant") challenging the legality of the Order dated 29.09.2017 passed by the Central Electricity Regulatory Commission (in short "Central Commission" or "CERC" or "Respondent No. 1") in Petition No. 188/MP/2015 (in short "Impugned Order), whereby the Commission has rejected the claim of the Appellant seeking discharge from its obligations under the Long Term Access Agreement (in short LTAA) dated 14.03.2012 due to impossibility and frustration, on the grounds that the Appellant had allegedly abandoned the project.

Description of the Parties

2. The Appellant, M/s Sarda Energy and Minerals Ltd. is a public limited company duly incorporated and registered under the Companies Act, 1956, and is engaged in the business of Iron & Steel Production and Captive Power Generation.

3. Respondent No.1 is the Central Electricity Regulatory Commission, which is the Central Commission under the Electricity Act, 2003 for the purpose of regulating the tariff of generating companies, regulating the inter-state transmission of electricity, issuing licenses to persons to function as

transmission licensee and electricity trader with respect to their inter-State operations, etc.

4. Respondent No. 2 is Power Grid Corporation of India Ltd. (in short "PGCIL") is a deemed Inter-State Transmission Licensee and was mandated to undertake functions of Central Transmission Utility (in short "CTU") under Section 38 (1) of the Electricity Act, 2003 for transmission of power, before bifurcating into two entities namely PGCIL and CTUIL.

Factual Matrix of the Case

5. Two Memorandum of Understanding (in short "MoU") dated 07.01.2005 and 16.10.2006 were signed between the Appellant and the State Govt. of Chhattisgarh, whereby the Appellant proposed to invest a total of Rs. 2,730 Cr. (Rs. 2010 Cr. + 720 Cr.) in the State of Chhattisgarh by setting-up sponge iron plant, steel plant, power plant, coal mining, coal washery etc. As per Clause B.1 of the said MoUs –

> *"B. Actions by State Govt. of Chhattisgarh*:
>
> *B.1 The State Government would facilitate through Chhattisgarh State Industrial Development Corporation {CSIDC} all necessary assistance in procuring optimum land* ***free from all encumbrances*** *as required for implementation of the projects mentioned herein above."*.

6. On 14.05.2009, the Appellant applied to PGCIL for a grant of Long-Term Access for the transfer of 315 MW power from the Appellant's proposed 350 MW power plant at Village Kolam, Ghargoda, Dist. Raigarh, Chhattisgarh to PGCIL's nearest EHV 400 kV sub-station at Raigarh for a period of 25 years. Under Sl. No. 9 of the application, the Appellant has stated in respect of the Fuel Supply Agreement, that it would be using its coal mines for power generation in the proposed power plant.

7. Further vide letter dated 12.12.2009, the Appellant applied to the State Industrial Promotion Board, Govt. of Chhattisgarh to allot 67.920 hectares (167.833 acres) of land so that the Appellant may set up the coal-based power plant. At the same time, the Appellant took steps to acquire private land of 41.548 hectares (102.667 acres) from private parties.

8. The Appellant obtained water allocation of 8.91 million sq. m/year from Kelo River vide sanction letter dated 21.12.2009 from Ministry of Water Resources, Govt. of Chhattisgarh for the purpose of running the proposed power plant and deposited required commitment charges of Rs. 2,22,750/- for the same.

9. Dept. of Industries, Govt. of Chhattisgarh wrote to the Collector, District Raigarh regarding the transfer of 3.91 hectares of land for industrial purposes at Kolam and Chiramuda vide its letter dated 15.09.2010 and thereafter this land was allotted to the Appellant.

10. To acquire private land of approx. 67.920 Hec. (167.833 acres) for industrial purposes and under Clause B.4 of the MoUs, the Chhattisgarh State Industrial Development Corporation (in short "CSIDC") issued letters dated 04.03.2011 and

25.08.2011 to the Appellant to deposit about Rs. 13.25 Cr., which amount was deposited by the Appellant vide receipts dated 08.03.2011 and 26.08.2011 respectively.

11. On 05.08.2011, PGCIL granted Long Term Open Access (in short "LTOA") to the Appellant for transferring 156 MW of power from its proposed 350 MW power plant through the Raigarh Pooling Station (400 kV). The Appellant was required to build a 400 kV double-circuit transmission line at its own expense, and also share the costs for transmission system strengthening and the augmentation of transformation capacity at the Raigarh Pooling Station with other generators.

12. Subsequently, on 14.10.2011, the Government of Chhattisgarh issued a notice under Section 4(1) of the Land Acquisition Act, 1894, proposing the acquisition of 122.534 acres of land in Kolam, Tamnar, Raigarh for industrial purposes, inviting objections from affected parties.

13. In 2012, the Appellant, after identifying the land and fuel arrangements for the proposed 350 MW coal-based power plant in Raigarh, Chhattisgarh, entered into a Long-Term Access Agreement (in short "LTAA") with PGCIL to transfer 156 MW of power through PGCIL's 400 kV sub-station for 25 years.

14. The agreement required the Appellant to construct a 400 kV double-circuit line and bay extensions, with shared costs for a transformer at the Raigarh Pooling Station.

15. Subsequently, the State Government, under Sections 68 and 164 of the Electricity Act, 2003, sanctioned the construction of a 9 KM transmission line for the project at an estimated cost of Rs. 14 Crore.

16. Meanwhile, the Ministry of Coal, Govt. of India vide its Notice dated 30.05.2012 identified certain blocks of land as coal-bearing areas, and the entire area named Bhalumuda coal block, stood allotted to National Thermal Power Corporation (in short “NTPC”) for exploration of coal.

17. The above-allotted area to NTPC included the entire land of the Appellant acquired by the State Govt. for the proposed power project.

18. The Appellant and the State Government were unaware of a critical development related to the project, discovered much later.

19. The Appellant attempted to access the Official Gazette notification and local publication, as required under Section 4(1) read with Section 24 of the Coal Bearing Areas (Acquisition and Development) Act, 1957, but could not find any official publication of the notice. The notification, filed before the Central Commission, was an internal communication from the Ministry of Coal to other Central Government departments, with no copies sent to state agencies. The notice contains specific instructions under the section titled "Notes."

20. As per the Long-Term Access Agreement (LTAA), the Appellant was required to furnish performance Bank Guarantees (BGs) calculated at Rs. 5 lakhs/MW to PGCIL.

21. On 11.06.2012, the Appellant submitted two BGs totalling Rs. 7.8 crore to PGCIL. These BGs were extended periodically upon PGCIL's request. The BGs served as performance guarantees, capping the Appellant's liability for transmission charges or damages in case of project failure, delay, or exit.

22. Additionally, the Appellant was awarded compensation for acquiring 122.5 acres of land for industrial use in Raigarh, with no objections raised by NTPC or other central agencies.

23. The Competent Authority was unaware that the same land identified for the Appellant's power project had been previously designated by the Central Government for coal exploration.

24. Under the MoUs, the State Government was responsible for providing the Appellant with land free of encumbrances. On 26.02.2013, the Appellant submitted a revised mining plan to the Ministry of Coal for expanding its captive mine in Raigarh to supply coal for its 350 MW power plant. Despite disclosing the plant's location, no objections were received from the Ministry of Coal regarding a prior allotment to NTPC. The Appellant informed PGCIL of its project progress, having acquired 311 acres of land, tied up fuel from its captive mine, and secured most clearances.

25. On 28.11.2013, the Appellant wrote to PGCIL requesting revision/amendment in the commissioning schedule as per LTAA as under-

Unit #1 – December 2017 {150 MW}

Unit #2 – March 2018 {150 MW}

Unit #3 – March 2018 {50MW}

26. In correspondence with PGCIL, the Appellant detailed its efforts to commission the 350 MW power project, noting delays caused by a legal challenge to the land acquisition by CSIDC in the High Court of Chhattisgarh.

27. The Appellant had also applied to increase coal production from its captive mine but was still awaiting approval. Despite no response from PGCIL, the Appellant continued progress, submitting a site selection report to the Ministry of Environment & Forests, explaining the rationale for choosing the Kolam site over alternatives.

28. On 14.01.2014, the Appellant informed PGCIL of the revised commissioning schedule. Forest clearance for 13.325 hectares of land, which was also part of the Bhalumuda coal block previously identified by the Central Government, was granted on 05.03.2014 by the Ministry of Environment & Forests, unaware of the prior identification.

29. The Appellant, unable to attend the 7th JCC meeting, submitted a project status report to PGCIL on 11.03.2014. The report detailed that out of 208.409 acres of government land (including forest, private, and land owned by the Directorate of Industries), the Appellant had possession of the government-acquired private land and an additional 102.665 acres of privately procured land.

30. The Appellant confirmed that coal would be sourced from its captive mine, with capacity enhancement in progress. However, PGCIL's report on the 7th JCC meeting incorrectly stated that the Appellant only held 102.665 acres, while the

actual total was 278.133 acres. PGCIL accurately noted the fuel tie-up and revised commissioning dates, previously communicated by the Appellant.

31. On 31.05.2014, the District Commerce & Industrial Centre wrote to the Directorate of Industries that 167.833 acres of land had been acquired for industrial purposes pursuant to an Award dated 06.08.2012, and the State Govt. even at this point in time did not express any objection regarding possession granted to the Appellant for setting up the power plant.

32. While the Appellant was actively working to establish its power plant, it unexpectedly received letters from the Central Mine Planning & Design Institute (CMPDI) in mid-2014, informing it that the project land, part of the Bhalumuda Coal Block, had been allocated to NTPC for coal exploration by the government.

33. The Appellant had already obtained environmental clearance from the Ministry of Environment & Forests on 07.08.2014 and did not know the prior identification of the land for coal exploration.

34. Thereafter, the Appellant sought intervention from the Minister of State for Power, Coal & MNRE on 11.08.2014, highlighting its prior possession of the land, as well as significant investments, including Rs. 41.61 crore already spent on the project.

35. The Appellant faced a significant setback when the Hon’ble Supreme Court, in its judgment on 25.08.2014, cancelled 42 coal blocks, including the Appellant's captive coal mine at Gare Palma IV/7, which was meant to supply coal for its power plant.

36. Following the judgment, the Ministry of Coal formally cancelled the Appellant's coal block on 26.09.2014. While the Appellant was still addressing the issue of land allotment to NTPC, NTPC informed on 08.04.2015 that the Ministry of Coal had officially allocated the Bhalumuda coal block, including the Appellant's project land, to NTPC, and requested that exploration work by MECL proceed.

37. That in response to the Special JCC meeting sent by PGCIL, Appellant vide its letter dated 06.07.2015 enclosed the project status report as of 24.06.2015 and pointed out the above two unfortunate acts of the sovereign – i) Allotment of project land by Central Govt. to NTPC, and ii) Cancellation of captive coal block which had fuel supply arrangement with Appellant's power project, beyond the reasonable control of the Appellant, which has led to impossibility and ultimately frustration of the LTAA dated 14.03.2012.

38. The Appellant requested PGCIL to absolve the Appellant without initiating any penal actions.

39. Faced with the threat of PGCIL encashing its bank guarantees (BGs), the Appellant filed Petition No. 188/MP/2015 before the Central Electricity Regulatory Commission, seeking a declaration that the LTAA dated 14.03.2012 was frustrated and non-performable, thus freeing the Appellant from obligations under it.

40. The Appellant also sought an injunction to prevent PGCIL from invoking the BGs. Despite the pending petition, PGCIL encashed the BGs amounting to ₹7.8 crores on 09.09.2015.

41. The Appellant then filed an RTI request to PGCIL to determine whether any infrastructure work related to the LTAA had been initiated in Raigarh, Chhattisgarh. PGCIL's response on 29.12.2015 confirmed that no work had begun in the Tamnar block, and no expenses had been incurred on the Appellant's LTAA. These documents were later submitted to CERC as part of the Appellant's case.

42. Aggrieved due to the encashment of BGs during the pendency of the matter and after the order was reserved, the Appellant filed an application for directions from the Commission to PGCIL to keep the said BG amount in a separate account. Vide its Order dated 02.08.2016, CERC directed Respondent No. 2 PGCIL to maintain the *status quo*.

43. Thereafter, CERC passed the Impugned Order dated 29.09.2017 rejecting the claim of the Appellant seeking the frustration of the LTAA and discharge from any liability, citing that the project has been abandoned by the Appellant.

44. CERC also held that Appellant would be further liable to pay {over and above what has been guaranteed under the BGs}, relinquishment charges for the stranded cost for transmission assets that PGCIL may have constructed for the Appellant which are being considered by CERC in a separate petition being Petition No. 92/MP/2015.

Submissions of the Appellant

45. The Appellant submitted that the acquisition of its project land by the Central Government under the Coal Bearing Areas (Acquisition and Development) Act, 1957 qualifies as a force majeure event, as it was a sovereign act;

a. As per the MoU dated 07.01.2005, the State Government had an obligation to facilitate land procurement for the Appellant, free of encumbrances, through CSIDC, which was fulfilled as shown by the Award dated 06.08.2012 and a letter from the Directorate of Industries on 31.05.2014,
b. However, in March 2015, the land was formally allotted to NTPC by the Ministry of Coal,
c. The notice dated 30.05.2012 under Section 4(1) of the Coal Bearing Areas Act was internal and not public, so the Appellant was unaware.

46. This Tribunal in judgment dated 04.02.2014 in Appeal No. 123 of 2012, Gujarat Urja Vikas Nigam Limited vs. Gujarat Electricity Regulatory Commission & Ors., has upheld the Gujarat Electricity Regulatory Commission's (GERC) decision that delays in obtaining approvals for land and water, essential for project completion, qualify as force majeure events (paras 27 and 35).

47. Further argued that it is in a worse situation, as the Central Government's acquisition of its entire project land and the notification of the Bhalumuda coal block left no alternative land options in Raigarh district. Therefore, it became impossible to establish the power plant on the original site.

48. The counsel then asserted that the cancellation of its captive coal mine qualifies as a force majeure event, as:

a) The Appellant's fuel supply arrangement, as indicated in its LTA Application dated 14.05.2009, LTAA dated 14.03.2012, and various project status reports, relied on its captive Gare IV/7 Coal Block in Raigarh district.

b) The Hon'ble Supreme Court, in its judgment dated 25.08.2014 in W.P. (Cr.) No. 120 of 2012, cancelled this coal block along with others. The Ministry of Coal subsequently cancelled the allocation via a letter dated 26.09.2014,

c) The cancellation is not attributable to the Appellant, and neither PGCIL nor CERC has found it to be the result of any act or omission by the Appellant.

49. This Tribunal in judgment dated 21.12.2018 in the case of ***GMR Kamalanga Energy Ltd. and Anr. vs. Central Electricity Regulatory Commission and Ors., Appeal No. 193 of 2017***, has held that the cancellation of a coal block constitutes a force majeure event and a change in law. It clarified that the de-allocation of coal blocks allocated to the petitioner would be treated as a change in law, leading to force majeure implications. The relevant paragraphs of the judgment are as follows:

> *"68. Meanwhile, on 25-8-2014 by virtue of judgment of the Hon'ble Apex Court in the case of Manohar Lal Sharma vs. The Principal Secretary & Ors, entire allocation of coal block made by Screening Committee from 14-7-1993 onwards in 36 meetings and allocations made through the Govt. dispensation route were held to be illegal. As a consequence, de-allocation order came to be passed on 24-9-2014 which cancelled allocation of 204 coal blocks including Rampia etc. with immediate effect. Therefore, Captive Coal Block came to be cancelled. Prior to this, the delay between October 2013 till date of judgment, it was on account of Go-No-Go policy of MOEF which was beyond the control of Appellant. Additional 40% or 20% of the base price was payable by the purchasers as "add on price" for coals after the normative date of production.* ***On account of reasons mentioned above between the scheduled date of coal block and the judgment in Manohar Lal Sharma, it was a case of force majeure and from the date of judgment, it was on account of change in law (due to NCDP of 2013)****.*

69. According to the Appellants, if Captive Coal Block had not been cancelled and if development of coal block was not delayed because of Go-No-Go policy, GKEL would not have to pay add on premium. ***For the reasons stated above, since the delay in development of Captive Coal Block and subsequent cancellation of the Block by virtue of judgment of Hon'ble Apex Court, the consequential financial impact on account thereof in respect of add on premium is also covered as change in law****.*

70. Apparently, add on premium was not part of LOA and tapering linkage policy. Therefore, we are of the opinion, Appellant GKEL is entitled for compensation for increase in cost due to continued use of tapering linkage coal on account of delay in development of coal block as well as eventual cancellation of blocks by judgment."

50. The Hon'ble Supreme Court, in its judgment dated 20.04.2023 in the GMR Warora case (Civil Appeal No. 11095 of 2018), reaffirmed the position that the cancellation of coal mines constitutes a force majeure event.

51. Considering, the following two key events, it is evident that the fundamental purpose of setting up the plant and fulfilling obligations under the LTAA dated 14.03.2012 became impracticable:

i) The Central Government's acquisition of the Appellant's project land and its allotment to NTPC, and

ii) The cancellation of coal mines by the government, which served as the fuel source for the Appellant's power plant.

52. The Appellant further contended that changing the project site or sourcing fuel from alternative sources would require a fresh connectivity application under the fourth proviso to Regulation 12(1) of the CERC Regulations, 2009.

53. In para 15 of the Impugned Order, the Central Commission criticized the Appellant, stating that it could have re-planned its dedicated transmission line by identifying an alternative project site and could have sourced coal from other options, such as block auctions, e-auctions, or coal imports.

54. Regulation 12 of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open access in inter-state Transmission and related matters) Regulations, 2009 is as follows:

"Regulation 12. - Application for long-term access

(1) The application for grant of long-term access shall contain details such as name of the entity or entities to whom electricity is proposed to be supplied or from whom electricity is proposed to be procured along with the quantum of power and such other details as may be laid down by the Central Transmission Utility in the detailed procedure:

Provided that in the case where augmentation of transmission system is required for granting open access, if the quantum of power has not been firmed up in respect of the person to whom electricity is to be supplied or the source from which electricity is to be procured, the applicant shall indicate the quantum of power along with name of the region(s) in which this electricity is proposed to be interchanged using the inter-State transmission system;

Provided further that in case augmentation of transmission system is required, the applicant shall have to bear the transmission charges for

the same as per these regulations, even if the source of supply or off-take is not identified;

Provided also that the exact source of supply or destination of off-take, as the case may be, shall have to be firmed up and accordingly notified to the nodal agency at least 3 years prior to the intended date of availing long-term access, or such time period estimated by Central Transmission Utility for augmentation of the transmission system, whichever is lesser, to facilitate such augmentation;

Provided also that in cases where there is any material change in location of the applicant or change by more than 100 MW in the quantum of power to be interchanged using the inter-State transmission system or change in the region from which electricity is to be procured or to which supplied, a fresh application shall be made, which shall be considered in accordance with these regulations.

(2) The applicant shall submit any other information sought by the nodal agency including the basis for assessment of power to be interchanged using the inter-State transmission system and power to be transmitted to or from various entities or regions to enable the nodal agency to plan the inter-State transmission system in a holistic manner.

(3) The application shall be accompanied by a bank guarantee of Rs 10,000/- (ten thousand) per MW of the total power to be transmitted.

The bank guarantee shall be in favour of the nodal agency, in the manner laid down under the detailed procedure.

(4) The bank guarantee of Rs. 10,000 /- (ten thousand) per MW shall be kept valid and subsisting till the execution of the long-term access agreement, in the case when augmentation of transmission system is required, and till operationalization of long-term access when augmentation of transmission system is not required."

55. Under the fourth proviso to Regulation 12(1), a fresh application must be made to PGCIL in case of a material change in location. The LTAA dated 14.03.2012 was based on the Appellant's application dated 14.05.2009.

56. Since the Central Government acquired all of the Appellant's project land, any change in plant location or power capacity would have required a new application. Consequently, the LTAA would have lapsed if the Appellant had relocated the plant. Therefore, CERC's finding that the Appellant could have re-planned its transmission line for an alternative site is irrelevant, as the original LTAA would no longer be valid.

57. The Appellant also argued that the CERC overlooked the fact that it had followed the "Criteria for Site Selection" and evaluated "Alternative Sites" before selecting the project site. Given the size of the proposed 350 MW power plant, there was no other suitable large, contiguous land available in the vicinity except for the site chosen by the Appellant.

58. The Appellant asserted that the Central Commission incorrectly imposed relinquishment charges. In para 21 of the impugned order, the Commission held that the Appellant is liable for stranded costs and relinquishment charges, as considered in Petition No. 92/MP/2015, in addition to the bank guarantees already encashed by PGCIL.

59. Regulation 18 (1) (a) (i) of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 governing relinquishment of access rights by long term access customer provides as under-

"18. Relinquishment of access rights –

(1) A long-term customer may relinquish the long-term access rights fully or partly before the expiry of the full term of long-term access, by making payment of compensation for stranded capacity as follows:-

(a) Long-term customer who has availed access rights for at least 12 years
(i) Notice of one (1) year – If such a customer submits an application to the Central Transmission Utility at least 1 (one) year prior to the date from which such customer desires to relinquish the access rights, there shall be no charges.

(ii) Notice of less than one (1) year – If such a customer submits an application to the Central Transmission Utility at any time lesser than a period of 1 (one) year prior to the date from which such customer

desires to relinquish the access rights, such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of a notice period of one (1) year……"

60. The Appellant's first unit was set to commence LTA from December 2017 for 25 years. On 06.07.2015, the Appellant informed PGCIL of its inability to fulfill the obligations under the LTAA dated 14.03.2012 and requested to be absolved without penalties. The CERC interpreted this letter as a relinquishment of the entire transmission capacity. However, since the Appellant submitted the letter more than a year before the scheduled start of access rights in December 2017, no relinquishment charges should apply for any stranded capacity.

61. The Appellant filed an RTI on 30.11.2015, and PGCIL responded on 29.12.2015, confirming that no infrastructure or construction work had been initiated or completed by PGCIL in Raigarh District, Chhattisgarh, related to the Appellant's LTAA. PGCIL also stated that while expenses were incurred for eight other generating companies, no expenses were incurred for the Appellant's LTAA at the Raigarh Pooling Station (near Tamnar). Since PGCIL has already recovered costs for the pooling station from these other companies, it did not suffer any loss, and thus, no relinquishment charges should be imposed on the Appellant.

62. Finally, the counsel submitted that the CERC exceeded its jurisdiction by ruling that the Appellant is liable for relinquishment charges for stranded capacity, as per Petition No. 92/MP/2015. This includes adjusting the charges from the Appellant's bank guarantee (BG) amounts, which are held separately by PGCIL.

Submissions of Respondent No. 2 (Based on Brief Written Submissions filed by R2 on 22.05.2019)

63. The submissions of R2 mention that in the Appeal paper book, the Appellant asserted two intervening events (i) the Central Government's acquisition of its project land, which was subsequently allotted to NTPC, and (ii) the cancellation of its captive coal block, rendered the performance of the Long-Term Access Agreement (LTAA) impracticable, thereby making it void. However, this contention is erroneous since the intervening circumstances may have made the performance of the LTAA more commercially onerous, but not impossible. The Commission noted that the Appellant could have requested the State Government for an alternative site near the original location for its generating station. Since the Appellant has not provided any evidence of such a request or any mitigative steps taken, it cannot now claim that the reallocation of the project land made the LTAA impracticable.

64. Regarding the cancellation of coal blocks, it is submitted that the Appellant could have sourced coal from alternative options, such as coal auctions, e-auctions, or imports.

65. The Appellant incorrectly equates commercial difficulty with the impossibility of performance under the LTAA. Frustration with the LTAA can only be claimed if its performance becomes impracticable or useless in light of the parties' original intent, and the supervening events must strike at the core of the agreement. Since the Appellant could still procure coal from other sources, the cancellation of the coal mine does not make the LTAA impracticable.

66. PGCIL invested in constructing transmission infrastructure based on the scheduled COD of December 2014 for the Appellant's first generating unit. The pooling station at Raigarh (Tanmar) was built before PGCIL received a notice of frustration from the Appellant, meaning the Appellant cannot now avoid its obligation to pay transmission charges, which are necessary to recover PGCIL's investment in the LTA.

67. Additionally, the Appellant's obligation to pay transmission charges is independent of whether its generating units are constructed. The responsibility for land acquisition and sourcing coal lies solely with the Appellant. The Appeal, in effect, seeks to unfairly transfer the liability of the Appellant's commercial risks to PGCIL.

68. While the Appellant claims it would be impractical to secure an alternative project site due to logistical challenges, these difficulties do not exempt it from its obligation under the LTAA. Until it becomes genuinely impossible to comply, the LTAA remains enforceable.

69. The Appellant argued that its LTAA was location-specific, requiring the power plant to be near the Raigarh substation and fueled by its captive coal mine. It claims that the acquisition of its project land and cancellation of the coal blocks frustrated the LTAA. However, it is contended that these arguments are an attempt by the Appellant to avoid its contractual obligations.

70. Even if land and coal were central to the LTAA, the Appellant had the responsibility to find alternative means to meet its obligations. The Appellant also claims that no suitable contiguous land is available in Raigarh for a 350 MW

project, but it is argued that the Appellant, not the Respondent, bears the burden of identifying an appropriate location.

71. The Appellant should have foreseen potential land acquisition issues and made necessary alternative arrangements, and its failure to do so does not absolve it from its responsibilities under the LTAA.

72. The Appellant referred to the Hon'ble Supreme Court judgment in China Cotton Exporters v. Beharilal Ramcharan Cotton Mills Ltd. (AIR 1961 SC 1295), where the court analyzed the requirements for claiming relief due to events beyond a party's control. In that case, the Hon'ble Supreme Court considered a force majeure claim to exempt a party from paying damages for breach of a cotton supply contract, emphasizing the necessity of meeting specific conditions when invoking force majeure as a defense.

73. The relevant paragraph of this Tribunal's Judgment in Himachal Sorang Power Ltd. v. Central Electricity Regulatory Commission & Ors. (Appeal No. 54 of 2014 dated 30.04.2015), is as follows:

> *"22. The Hon'ble Supreme Court in Dhanraj Gobindram's case (supra) observed that force majeure includes any event over which the performing party has no control. In the case in hand, no legal notice fulfilling the requirements of clause 13 had been given by the appellant to the respondent no.2 in order to get the benefit of such force majeure and it failed to satisfy the respondent no.2 about the existence of such force majeure event. If the wounds leading to the delay in commissioning of the appellant's power plant are to be considered, no*

material to substantiate the said grounds has been placed by the appellant on record either before the Central Commission or before this Appellate Tribunal, The only ground pressed during arguments in the Appeal by the appellant is regarding sufficient geological surprises affecting major works, for which no notice fulfilling the requirements provided under clause 13 of the BPTA had been given. The learned Central Commission, in the impugned order, has given detailed and cogent reasons for not agreeing to the report prepared by Lahmeyer International Private Limited (Expert). We have quoted the said reasons in para 15.1 of this judgment. We find no force in the appellant's contention that the learned Central Commission did not cite sufficient or material reasons for disagreeing with the expert's report. We are further unable to agree to the contention of the appellant that the learned Central Commission failed to consider that the effects of the force majeure events, that occurred before 01.04.2012, had not ceased to operate. We agree to the finding recorded by the Central Commission in the impugned order because clause 13 dealing with force majeure clearly provides that the transmission/ drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist. The said clause does not provide that the effect of force majeure to continue till the appellant is restored to its original position if there was no force majeure. If the appellant fails to restore or recover from the alleged force majeure for unreasonably long time, it cannot be held entitled to any benefit on that score."

74. The above-quoted judgments establish that for a valid force majeure or frustration claim, the claimant must prove two key points:

(a) they made every effort to prevent the force majeure event, and
(b) they acted promptly to recover from the event.

75. If a claimant fails to act diligently or delays recovery, they are not entitled to relief. In this case, the Appellant failed to show that it took necessary steps to ensure the project land was free from encumbrances. The responsibility to procure land and coal lies with the Appellant, not PGCIL. The Commission noted that the notice regarding the land acquisition was a public document, and the Appellant should have been aware of it. Hence, the Appellant cannot later claim frustration or impracticability of the LTAA due to its own oversight.

76. The Appellant has claimed that under clause B.1 of the Memoranda of Understanding (MoUs) dated 07.01.2005 and 16.10.2005, the Government of Chhattisgarh was responsible for ensuring the procurement of land free from encumbrances. Following a public notification on 14.10.2011 for acquiring 122.534 acres of land, with no objections raised, the Appellant formed a bona fide belief that the land was suitable for constructing its generating station.

77. However, it is submitted that this dispute between the Appellant and the Government of Chhattisgarh does not involve the Answering Respondent. The Respondent should not be denied its right to recover transmission charges under the LTAA due to this internal conflict.

78. The Appellant contended that under the 4th proviso to Regulation 12(1) of the Connectivity Regulations, 2009, the Long-Term Access Agreement (LTAA) would have lapsed, necessitating a fresh application. However, it is argued that this reliance is misplaced. The Appellant did not secure an alternative site for its project, which undermines its claim regarding the lapse of the LTAA.

79. The Appellant argued there was no change in the project location, and thus the conditions for applying the 4th proviso to Regulation 12(1) of the Connectivity Regulation were not met. The provision does not relieve the Appellant of its obligation to pay transmission charges under the existing LTAA. Since no fresh LTAA application has been made, the current LTAA remains in force, and the Appellant cannot claim the benefit of this provision.

80. The Appellant contended that, as per project reports dated 25.9.2013 (6th JCC) and 11.3.2014 (7th JCC), it had acquired 278.133 acres of land, invested Rs. 41.61 crores, and obtained significant clearances for the project. It argued that it did everything necessary for the project setup. However, the Respondent submits that the Appellant, if aggrieved by the land acquisition by the Central Government, should address this with the Appropriate Government, as the Respondent is not concerned with the Appellant's efforts.

81. The Respondent further argues that the Appellant failed to conduct proper due diligence, acquiring land that was later subject to acquisition, and relying on the Government of Chhattisgarh for a portion of the land. Therefore, the Respondent asserts its right to claim transmission charges under the LTAA, attributing the land issues to the Appellant's lapses.

82. The Appellant has argued that it cannot be blamed for notifying the Respondent of the LTAA's alleged frustration on 06.07.2015, as it only learned of the land re-allocation to NTPC Limited on 08.04.2015. The delay in notification, it claims, was due to efforts to prevent the land re-allocation. The Respondent counters that it proceeded with building the transmission infrastructure, assuming the Appellant would meet its LTAA obligations. By the time the Appellant notified the Respondent, the pooling station at Raigarh (Tanmar) was complete. The Respondent asserts that the Appellant's claim of frustration is an afterthought to evade its contractual duties.

83. The Appellant also argued that both parties acted under the belief that the Bhalumuda coal block land would be used for the power project, and since the Central Government’s planned acquisition of the land was evident as of 30.5.2012, both were under a mutual mistake of fact. It claims this makes the contract void under Section 20 of the Contract Act. The Respondent counters this by stating that the LTAA was not dependent on the specific land for the power project but on the Appellant paying transmission charges for the infrastructure made available. Even if there was a mutual mistake about the land, it does not affect the LTAA’s operation. The Respondent argues that the Appellant is attempting to shift responsibility for its failure to secure the necessary land, which was solely the Appellant’s obligation, onto the Respondent.

84. The Appellant argued that the Answering Respondent wrongly encashed the Bank Guarantees (BGs) dated 19.5.2012 and 02.6.2012, amounting to Rs. 7.8 crore, due to alleged poor progress under the LTAA. The Appellant contends that the BGs should have been returned once the LTAA was frustrated and claims that no expenditure was incurred by the Respondent for the Raigarh Pooling Station

or Tamnar block, as indicated in a letter dated 29.12.2015. Since actual loss must be proven to claim damages, the Appellant asserts that the encashment was legally unjustified. However, the Respondent maintains that the encashment was in line with the LTAA and BG terms. Relevant provisions of the LTAA and BG are quoted below:

> *"LTAA*
>
> *d) The bank guarantee shall be encashed by CTU in case of adverse progress of work under the scope of LTC, assessed during Joint Co-ordination Meeting...*
>
> *BG dated 02.06.2012*
>
> *WHEREAS it has been agreed, by the LTOA customer in the said Agreement that in case of failure / delay to construct the generating station / dedicated transmission system or makes and exit or abandon its project by LTOA CUSTOMER. POWERGRID shall have the right to collect the transmission charges and or damages."*
>
> *BG dated 19.05.2012*
>
> *WHEREAS it has been agreed by the LTOA customer in the said Agreement that in case of failure / delay to construct the generating station / dedicated transmission system or makes and exit, or abandon its project, by LTOA CUSTOMER, POWERGRI0 shall have the right to collect the transmission charges and or damages."*

85. The Respondent asserts that the LTAA and BG in this case follow the formats outlined in the Detailed Procedure under the Connectivity Regulations, approved by the Commission. These formats specify when the Respondent, as the Nodal Agency, can encash BGs, and the Appellant's argument would

undermine the rights granted to the Respondent by these regulations. Additionally, it is well-established, including by this Tribunal, that force majeure or similar events cannot prevent BG encashment, as the Connectivity Regulations do not recognize force majeure as a valid reason to stop such action. The Respondent argues that the BG encashment does not result in unjust enrichment, as the damages collected will be adjusted against transmission charges claimed from other developers. The relevant extract of the Detailed Procedure reads as follows:

> *"Annexure-4: Transmission Charges for the transmission system of respective Generation Projects*
> *In the event of default by any developer under Clause 5 and 6 of this Agreement, the transmission charges for the system mentioned at Annexure-3 would be shared by balance developers. However, the damages collected (if any) from the defaulting developer(s) under clause 5 & 6 of this agreement shall be adjusted for the purpose of claiming transmission charges from the balance (remaining) developers. "*

86. The Appellant's claim that the invocation of the Bank Guarantee (BG) would lead to unjust enrichment of PGCIL is incorrect and is hereby denied.

87. The Respondent argues that the encashment of the BGs can only be stopped in cases of fraud or where irretrievable injustice would occur. Since the Appellant has not alleged any such conditions in this case, the Respondent's decision to encash the BGs is justified. The Respondent further states that PGCIL initiated the BG encashment due to the Appellant's non-compliance with the Connectivity Regulations and breach of obligations under the LTAA.

88. The Appellant contended that the Commission erred in holding it liable for relinquishment charges due to non-compliance with the LTAA and the stranding of transmission infrastructure. The Appellant asserted it notified PGCIL on 06.07.2015, well before its access rights began, and that its generating station was not expected to be ready until December 2017. It argued that imposing relinquishment charges violates contractual principles regarding damages. In response, the Respondent argues that the Appellant's claim is legally flawed. The Respondent's costs for constructing the transmission infrastructure are independent of the generating station's commissioning date, as it must adhere to its own timelines for completing the transmission infrastructure. As per Annexure C of the LTAA, the completion schedule for the Tamner pooling station was as follows:

> *"Schedule would be 9 months plus the time as specified by CERC in tariff regulation from date of signing of LTA Agreement / BPTA or submission of BG or Regulatory Approval whichever is later."*

89. The Respondent asserts that it had to commission its transmission infrastructure, including the Tamnar pooling station, according to the agreed timeline, and cannot undo the investment already made. Relinquishment charges are necessary to compensate for this investment and the stranded capacity due to relinquishment. The imposition of relinquishment charges is strictly governed by the Connectivity Regulations, and the Appellant’s attempt to apply contract law principles to avoid these charges is unfounded. The key requirement is that the conditions in the Connectivity Regulations are met, making the Appellant’s argument without merit.

Analysis and Conclusion

90. We find the following question to be answered through this Appeal:

Whether the LTA Agreement dated 14.03.2012 became frustrated and impossible to perform due to the acquisition of the Appellant's project land and its subsequent allotment to NTPC, and the cancellation of coal mines by the Central Government, which served as the fuel source for the Appellant's power plant?

91. The Appellant has prayed for the following reliefs:

(i) Set aside the Impugned Order dated 29.09.2017 passed by the Central Electricity Regulatory Commission in Petition No. 188/MP/2015;

(ii) Discharge the Appellant from its obligations under the LTAA dated 14.03.2012 on the grounds of impracticability and ultimately frustration of the LTAA in view of the project land of the Appellant acquired by the Central Govt. and cancellation of coal mine by Hon'ble Apex Court;

(iii) Direct Respondent No. 2 PGCIL to refund and return the amount under the BGs kept under a separate account, amounting to Rs. 7.8 cr. along with interest;

(iv) Hold and declare that in any event, the Appellant is not at all liable to pay any relinquishment charges for the alleged stranded costs.

92. This Tribunal vide daily order dated 27.08.2024 has held as under:

"Despite the following observation of this Court on 01.08.2024, none for the respondents have appeared even today:-

> *"There is no representation on behalf of the 2nd Respondent. It is observed that Respondent No.2 is not appearing for last many hearings in the matter. Accordingly, we find it appropriate to give last opportunity to the Respondents to appear and argue on the next date of hearing, otherwise the matter will be heard and decided exparte."*

In such circumstances, we find it appropriate to conclude the matter as ex-parte. Heard Mr. Raunak Jain, learned counsel for the appellant and he has concluded his arguments. Judgment is reserved. Written submissions have already been filed by the Appellant"

93. Undisputedly, the acquisition of the Appellant's entire project land by the Central Government under the Coal Bearing Areas (Acquisition and Development) Act, 1957 constitutes a sovereign act and qualifies as a 'force majeure' event.

94. Under the MoU dated 07.01.2005, the State Government was obligated to facilitate the procurement of land for the Appellant, which it did, as confirmed by the Award dated 06.08.2012 and letter dated 31.05.2014 from the Directorate of Industries, Govt. of Chhattisgarh, without knowing the fact that the acquired land has already been allotted to NTPC by the Central Government through internal

communication and no Gazette notification was available at that time, as informed by the Appellant.

95. In fact, in March 2015, the project land was formally allotted to NTPC by the Ministry of Coal, Govt. of India. The Ministry's Notice dated 30.05.2012 under Section 4(1) of the Coal Bearing Areas Act was not a public notice but an internal communication, and the Appellant had no means of knowing about it.

96. The Central Commission has erred in finding that the Appellant should have been aware of the notice.

97. We find the above finding totally baseless and perverse, as intimated by the Appellant that such allotment was through an internal letter, there were no means to ascertain such allotment to NTPC.

98. We strongly reject such findings which are passed without going into the merit.

99. The acquisition of land is an event covered under Force Majeure Event, this Tribunal vide judgment dated 04.02.2014 in ***Gujarat Urja Vikas Nigam Ltd. vs. Gujarat Electricity Regulatory Commission & Ors., Appeal No. 123 of 2012*** has held that the delay caused due to obtaining the permission/approval for land and water which are pre-requisites for the project, would undoubtedly fall under the category of *Force Majeure.*

100. However, in the instant case the Appellant is in an even worse position as the entire land acquired for the Appellant’s project was allotted to another company

without the information of even the State Government, making the commissioning of the proposed power plant impossible.

101. Additionally, the Appellant suffered another setback as the cancellation of the Appellant's captive coal mine, which also qualifies as a 'force majeure' event:

(i) The LTA Application (14.05.2009), LTAA (14.03.2012), and various project status reports confirm that the Appellant's fuel supply was dependent on its captive coal mine (Gare IV/7 Coal Block) in Raigarh, allotted to the Appellant.

(ii) The Hon'ble Supreme Court, in its judgment dated 25.08.2014 (W.P. (Cr.) No. 120 of 2012), canceled the Appellant's coal block along with others. Following this, the Ministry of Coal, Govt. of India, canceled the block through its Letter dated 26.09.2014.

(iii) The cancellation is not attributable to the Appellant, and neither PGCIL nor CERC found any fault or omission on its part.

(iv) In ***GMR Kamalanga Energy Ltd. vs. Central Electricity Regulatory Commission & Ors. (Judgment dated 21.12.2018, Appeal No. 193 of 2017),*** this Tribunal held that the cancellation of coal blocks amounts to 'force majeure' and a 'change in law'. The judgment recognized that the cancellation of coal blocks, including delays caused by government policies such as the Go-No-Go policy, falls under force majeure.

(v) The Hon'ble Supreme Court, in its judgment dated 20.04.2023 (GMR Warora case), reaffirmed this position.

102. Therefore, considering the two intervening events, quoted as under, the underlying purpose of the LTAA dated 14.03.2012 became frustrated, rendering the performance of the Appellant's obligations impracticable:

(i) acquisition of the Appellant's project land by the Central Government and allotment to NTPC, and
(ii) cancellation of coal mines by the Supreme Court.

103. Any change in the project site or sourcing fuel from alternative sources would necessitate a fresh connectivity application under the fourth proviso to Regulation 12(1) of the CERC (Grant of Connectivity, Long-term Access, and Medium-term Open Access) Regulations, 2009.

104. The Central Commission's finding in para 15 of the impugned order, that the Appellant could have re-planned its transmission line or sourced coal from alternate sources, overlooks the fact that such changes would trigger a fresh application to PGCIL under the regulatory framework.

105. As per Regulation 12, a fresh application is mandatory if there is a material change in location or a variation of more than 100 MW in the quantum of power. The Appellant's LTAA dated 14.03.2012 was based on the Application dated 14.05.2009 and would have lapsed if the project site changed, due to the Central Government's acquisition of the Appellant's land. Therefore, the CERC's assertion that the Appellant could have re-planned its transmission line is irrelevant, as a new application would have been required.

106. Furthermore, the Appellant had chosen the project site after following the "Criteria for Site Selection" and determining that no other contiguous land in the vicinity was suitable for the proposed 350 MW Power Plant. The CERC's findings ignored these practical limitations.

107. The Appellant challenged the imposition of relinquishment charges by the Central Commission, asserting that:

I. The Central Commission, in para 21 of the impugned order, wrongly held that the Appellant is liable for stranded costs and relinquishment charges, as considered in Petition No. 92/MP/2015, beyond the encashed bank guarantees by PGCIL.

II. Under Regulation 18(1)(a)(i) of the CERC (Grant of Connectivity, Long-term Access, and Medium-term Open Access) Regulations, 2009, a long-term access customer providing at least one year's notice prior to the commencement of access rights is exempt from relinquishment charges. Since the Appellant, through its letter dated 06.07.2015, informed PGCIL of its inability to perform under the LTAA, and this notice was more than one year before the commencement of LTA in December 2017, no relinquishment charges should apply for stranded capacity.

III. The Appellant’s RTI application dated 30.11.2015 and PGCIL's response dated 29.12.2015 revealed that no infrastructure or expenses had been incurred by PGCIL in relation to the Appellant's project. PGCIL confirmed that costs for the Raigarh Pooling Station had been recovered from eight other generating companies, and no loss was suffered in relation to the Appellant’s LTAA.

IV. Given these facts, the CERC exceeded its jurisdiction by imposing relinquishment charges, as PGCIL did not suffer any loss and the Appellant complied with the required notice period under the regulations.

108. Further, this Tribunal vide order dated 14.05.2024 in M/s. Himachal Sorang Power Pvt. Ltd. vs. Central Electricity Regulatory Commission, Appeal No. 169 of 2018 has been held as follows:

> *"65. We are satisfied the event under consideration is a force majeure event, the Appellant cannot be held responsible for any delay occurred because of the directions of the State Government.*
>
> *66. It is, therefore, important to note the relevant clauses of BPTA/TSA in respect of force majeure and consequential effect, the relevant clauses provide as under:*
>
> *a) TSA- 'Force Majeure' means any given or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.*
>
> *b) BPTA- "no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as fire, rebellion, mutiny, civil commotion, riot, strike, lock-out, forces of nature, accident, act of God and any other reason beyond the control of concerned party.*

……..

68. We find the above submission of the CTUIL totally irrational, the same deserves to be rejected, the force majeure event covers the operation of the power plant and as such eventuality of it happening in respect of the power plant impacting injection of power shall be duly covered by the said Article, inter-alia because of the non-operation of plant has resulted into failure of the Appellant in utilising the LTA and as such any loss/ claim on such an account cannot be claimed by the either party.

…….

70. It cannot be disputed that LTA granted to a generator can only be put to use by the generating company only after the start of operation of the generating station, thus force majeure event as included under the agreement in respect of LTA duly covers the occurrence of force majeure events affecting the operation of the generating station."

109. The above-referred judgment has been upheld by the Hon'ble Supreme Court vide order dated 27.08.2024 in Central Transmission Utility of India Ltd vs. CERC and Ors. (CIVIL APPEAL NO 8494 OF 2024).

110. We therefore, find it appropriate to state that the acquisition of the Appellant's project land by the Central Government and allotment to NTPC, and cancellation of coal mines by the Central Government; the underlying purpose of the LTAA dated 14.03.2012 was frustrated, rendering the performance of the Appellant's obligations impossible.

ORDER

For the reasons stated above, we are of the view that Appeal No. 400 of 2017 has merit and is allowed. The Impugned Order dated 29.09.2017 passed by the Central Electricity Regulatory Commission in Petition No. 188/MP/2015 is set aside. The Appellant is released from its obligations under the Long-Term Access Agreement (LTAA) dated 14.03.2012. PGCIL is directed to refund the bank guarantee amount of Rs. 7.8 crore, held in a separate account, along with interest. The Appellant is not liable for any relinquishment charges related to the alleged stranded assets.

The Appeal in terms of the above along with pending IAs, if any, shall stand disposed of.

PRONOUNCED IN THE OPEN COURT ON THIS 28th DAY OF JANUARY, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

pr/mkj