

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY**  
(Appellate Jurisdiction)

**APPEAL No. 235 of 2017**

Dated : 20<sup>th</sup> March, 2025

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

**In the matter of:**

**M/s Brahmani Thermal Power Private Limited**

(Formerly known as Navbharat Power Private Limited)

Essar House, 11, K.K. Marg,  
Mahalaxmi, Mumbai – 400034

**...Appellant**

Vs.

- (1) **The Chairman & Managing Director,**  
M/s Power Grid Corporation of India Limited  
'Saudamini', Plot No. 2, Sector 29,  
Gurgaon – 122001
  - (2) **The Director,**  
Central Electricity Authority,  
Sewa Bhawan, Rama Krishna Puram,  
New Delhi-110066
  - (3) **The Chairman,**  
Central Electricity Regulatory Commission  
3rd & 4th Floor, Chanderlok Building,  
36, Janpath, New Delhi- 110001
  - (4) **Central Transmission Utility of India Limited**  
**Authorized Signatory**  
First Floor, Saudamini, Plot No. 2, Sector – 29,  
Near IFFCO Chowk Metro Station,  
Gurgaon, Haryana – 122001
- ...Respondents**

Counsel for the Appellant(s) : Buddy A. Ranganadhan, Sr. Adv.  
Amit Kapur  
Abhishek Ashok Munot  
Kunal Kaul  
Malcolm Dinyar Desai  
Tushar Nagar  
Samikrith Rao Puskuri

Counsel for the Respondent(s) : Suparna Srivastava for R-1  
  
Alok Shankar  
Kumarjeet Ray for R-4

## **J U D G M E N T**

### **PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER**

1. The Appellant M/s. Brahmani Thermal Power Pvt. Ltd. (formerly known as Navbharat Power Private Limited) has, in this appeal, assailed the order dated 12<sup>th</sup> April, 2017 passed by the 3<sup>rd</sup> Respondent Central Electricity Regulatory Commission (hereinafter referred to as "the Commission or CERC") in Petition No. 317/MP/2013 whereby the Commission held that the Appellant has abandoned the power project on account of delay in obtaining clearances, which is not permissible as per Article 9.0 of the Bulk Power Transmission Agreement Ltd. (BPTA) dated 7<sup>th</sup> June, 2010 executed between Appellant and the 1<sup>st</sup> Respondent – Power Grid Corporation of India Limited (PGCIL). It has been observed by the Commission that the Force Majeure clause in the BPTA does not

permit the Appellant to exit the agreement and seek refund of its Bank Guarantee. The Commission has also held that the Appellant has statutory right to relinquish the BPTA/LTA upon payment of relinquishment charges in terms of Regulation 18 of the Connectivity Regulations.

2. The Appellant is a company incorporated under the Companies Act, 1956 and is engaged in the business of generation of electricity. It has been in the process of setting up 1050 MW (2x525 MW) coal based thermal power plant at Kharag Prasad and Meramundali, Dhenkanal District, Odisha.

3. We may note here that initially CTUIL was not party to the appeal and on an application bearing IA No. 502 of 2024 filed by it seeking its impleadment as a party to this appeal, it was impleaded as Respondent No. 4 in this appeal vide order dated 20<sup>th</sup> March, 2024 as it has taken over some of the functions of the 1st Respondent PGCIL which form the subject matter of dispute in this Appeal.

4. A bird's eye view of the facts and circumstances of the case, leading to the filing of this appeal can be had from the below given list of important dates and events :-

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04.01.2006	<p>Navabharat Power Private Limited (“<b>NPPL</b>”) [now BTPPL] executed a Power Purchase Agreement (“<b>PPA</b>”) with PTC India Limited (“<b>PTC</b>”) for sale of contracted capacity and power output from 1050 MW (2 x 525 MW) coal based thermal power plant at Kharag Prasad and Meramundali, Odisha (“<b>Project</b>”) for 946 MW net power, at the delivery point, for a period of 25 years from the date of commercial operation of the Project.</p>
09.06.2006	<p>NPPL executed a Memorandum of Understanding (MoU) with the State of Odisha for setting up of the Project with an estimated investment of about Rs.4,675 Crores. As per the MoU, the State Government, through IDCO was required to procure the land required by NPPL and hand it over, free from all encumbrances. Relevant clauses of the MoU are:</p> <p>(i) <b>Clause 1(iii)</b> – “A nominated agency(s) authorized by Government will have the right to purchase up to 25% of power sent out from the Thermal Power Plant(s) excluding the quantum of power indicated at item (i) &amp; (ii) under terms of a Power Purchase Agreement to be mutually agreed upon on the basis of existing laws and regulations in force and the tariff for such power purchase will be determined by the appropriate Regulatory Commission.”</p> <p>(ii) <b>Clause 1(iv)</b> – “NPPL will have the right to sell the balance power from the Thermal Power Plant(s) to any party outside or inside the State of Orissa subject to applicable laws and regulations, for which NPPL may enter into contractual arrangement(s) with such buyer(s), the terms of</p>

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	<p>which would be mutually agreed between NPPL and such buyer(s).”</p> <p>(iii) <b>Clauses 5(A) – 5(F)</b> – Areas of assistance and co-operation between BTPPL and Government of Odisha which inter alia include:</p> <p>A. Land</p> <p>(i) <b>NPPL will require</b> approximately 1200 acres of land for the purpose of setting up the Thermal Power Plant and associated facilities (colony, coal transportation system, water transportation system, power evacuation system, ash disposal and other infrastructural facilities).</p> <p>(ii) <b>NPPL</b> agrees to fully comply with the stipulations of the Government as per its policy in this regard. For rehabilitation of displaced families, Rehabilitation and Resettlement (R&amp;R) package as notified by the State Government as well as any special stipulation relating to scheduled areas as applicable shall be followed.</p> <p>(iii) <u>The Government agrees to acquire, the required land as per Clause (i) above and hand over the required land free from all encumbrances to <b>NPIL</b> through Orissa Industrial Infrastructure Development Corporation (IDCO) for the project and allied facilities.</u></p> <p>(iv) <b>NPPL</b> agrees to pay the cost of the land to IDCO in case the land is acquired for the purpose and to the Revenue authorities in case the land is Government land alongwith the rehabilitation costs and other related charges. In case the Project is abandoned</p>

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	<p>for some reason or other, all required rehabilitation cost shall be borne by the <b>NPPL</b> in the same manner as if the project has been implemented. All incidental charges paid by the NPPL for such land acquisition paid to various authorities will stand forfeited.”</p> <p><b>B. Coal:</b></p> <p>(i) The Government agree to facilitate allotment of coal blocks for the purpose of mining to be utilized for the project and would provide all assistance for such allocation, in accordance with the provisions of applicable Law and Rules which would include but not be limited to recommendation to the Central Government authorities (like Ministry of Coal, Ministry of Power, Central Electricity Authority and any other entities within or outside the State).</p> <p>(ii) On allocation of coal block and sanction of the mining lease by Government of India (GOI) the Government will execute necessary mining lease and acquire and hand over the required land to <b>NPPL</b> for the captive coal mine and assist NPPL in accordance with the applicable Law and Rules in obtaining electric power for construction of the Thermal Power Plant and operation of such mine, forest and environment clearances and other statutory clearances, inputs like power and water, etc. for construction and operation of such mine.</p> <p>(iii) In case no coal block is allotted for the</p>

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	<p>subject power station, as an alternative to captive mining facility, the Government will assist <b>NPPL</b> to get the allocation of long term coal linkage of suitable quantity and quality to meet its requirement by recommending the proposal to the Ministry of Coal and such other entity, as may be necessary.</p> <p>C. Water  D. Power  E. Environment  F. Statutory permits/clearances  .....</p> <p><b>I. General Clauses:</b>  ....</p> <p>“(iv) <u>The MOU shall remain valid for a period of three years from the date of signing and may be further extended by Government on a request made by NPPL in this regard. However, no such extension shall be considered unless NPPL has made substantial progress on implementation of the project in terms of the project development activities covering land acquisition, statutory approvals of project contracts, etc.</u></p> <p>(v) <u>The MOU may be terminated by either party in the event of failure of the other party to fulfill the terms and conditions of the MOU or inadequate progress of implementation <b>without any obligations to either party</b>, by giving three months notice in writing. Further, during this period, the MOU can be terminated by mutual consent of the Parties if it is jointly agreed that due to certain insurmountable reasons, it is not possible to proceed further with the Project.</u></p>

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	<p>.....</p> <p>(viii) In the event of non-implementation of the project or part thereof, the corresponding support/commitment of the Government indicated in the MOU with regard to the Project and coal blocks/linked coal mines, incentives and concessions of the Government in particular shall be liable to be cancelled.”</p>
02.08.2006	Investment Corporation of Odisha Limited (“ <b>IPICOL</b> ”) vide its letter requested IDCO to consider the acquisition/ alienation of 1,500 acres of land for the purpose of setting up the Project and laid down certain terms and conditions to be followed by NPPL.
17.08.2006	Government of Odisha issued Resolution No. 7947 designating Grid Corporation of Odisha Ltd. (“ <b>GRIDCO</b> ”) as its nominated agency for purchase of 25% power sent out from the Project including infirm power and power generated above 80% PLF.
05.09.2006 [Land]	NPPL provided various details and documents as desired by IDCO in terms of its letter dated 02.08.2006 and requested IDCO to initiate the process of acquisition of land for the Project at the earliest.
28.09.2006 [PPA]	Pursuant to the Government of Odisha’s Resolution dated 17.08.2016, NPPL executed a PPA with GRIDCO. In terms of the said PPA GRIDCO would purchase 25% of the power sent out from the Project including the infirm power and power generated above 80% PLF.
31.10.2006	Department of Water Resources, Odisha, conveyed it’s in-principle approval in favour of NPPL for drawal of 42 cusecs of water for the proposed Project, subject to certain terms and conditions.
02.11.2006	NPPL provided Rights of Record in original for the



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<b>[Land]</b>	identified area of 1200 Acres (to be acquired by IDCO) and furnished a payment of Rs. 1,20,00,000/- (Rs. 1.20 Crores) towards the cost of land acquisition, to IDCO.
04.12.2006	Ministry of Railways conveyed its approval to NPPL regarding Rail Transport Clearance for the construction of private siding from Meramandali railway station of East Coast Railway for movement of coal to the proposed Project.
27.12.2006 <b>[Land]</b>	IDCO issued 9 letters directing the Land Acquisition Officer, Dhenkanal to initiate land acquisition process under the emergent provisions of the Land Acquisition Act, 1894 to make the respective lands identified by IDCO across various villages, for development of infrastructure and establishment of industries, and make them available at the earliest.
24.02.2007	NPPL sought permission from Airports Authority of India for the construction of two chimneys.
15.03.2007	Airports Authority of India issued No Objection Certificate to NPPL for the erection of proposed chimneys, subject to certain conditions, valid for a period of four years from the date of issuance.
26.04.2007 <b>[Land]</b>	Department of Energy, Government of Odisha accorded administrative approval for acquisition of private land measuring 1093.23 acres to Chief General Manager, IDCO, subject to certain terms and conditions.
31.05.2007 <b>[Land]</b>	Divisional Forest Office, Dhenkanal Division communicated to NPPL that as per the verification done by the Range Officer, Dhenkanal/ Revenue Officials no forest land is coming under the DLC Report.
08.06.2007	IDCO requested NPPL to deposit Rs. 1,12,02,900/-

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<b>[Land]</b>	(Rs. 1.12 Crores) for the balance of 10% cost for establishment charges for acquisition of private land of around 1,093 acres and alienation of Government Land admeasuring 89.66 acres.
05.07.2007 <b>[Land]</b>	Pursuant to IDCO's letter dated 08.06.2007, <b>NPPL furnished a payment of Rs.1,12,02,900/- to IDCO towards land acquisition.</b>
13.07.2007 <b>[Land]</b>	Assistant Defense Estates Officer, Bhubaneswar issued NOC communicating that no defense land is situated in the Project area, to NPPL.
13.08.2007	Deputy Chief Operation Manager, East Coast Railways, accorded in-principle approval to the NPPL for undertaking the survey for the proposed railway siding taking off from Meramandall Station and also requested to submit 13 copies of the Detailed Project Report (DPR) for security and comments by railway authority.
06.11.2007 <b>[Land]</b>	<b>Government of Odisha issued Section 4(1) Notifications</b> in the Official Gazette for various patches of land, for the purpose of setting up of the Project.
17.01.2008 <b>[Coal]</b>	<b>Ministry of Coal allotted Rampia and Dip Side of Rampia coal block</b> for captive mining of coal in the command area of Mahanadi Coalfields Limited ("MCL") to NPPL (along with five other companies).
08.02.2008	Ministry of Environment and Forest ("MoEF") accorded Environmental Clearance to 1050 MW thermal power project as Phase-I under the provisions of Environment Impact Assessment Notification, 2006, subject to terms and conditions set out therein.
14.07.2008	The Ministry of Railway, Government of India, granted Rail Transport Clearance to NPPL for movement of

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	liquid fuels like LDO, HFO etc., for its Project, in East Coast Railways.
07.08.2008	State Pollution Control Board, Odisha, conveyed Consent to Establish to NPPL for the Project.
29.11.2008 & 11.12.2008 <b>[Land]</b>	The Government of Odisha <b>issued Notification(s) under Section 6(1)</b> of the Land Acquisition Act for various patches of land. The Government of Odisha <b>issued notification(s) under Section 6(1)</b> of the Land Acquisition Act for a few other patches of land.
15.12.2008	A meeting between Power Grid Corporation of India Limited (“ <b>PGCIL</b> ”) and generation developers was held at PGCIL’s office to discuss the draft Bulk Power Transmission Agreement (“ <b>BPTA</b> ”). During the meeting, a few generation developers sought modifications/reduction of quantum of power for which they would seek the long term open access (“ <b>LTOA</b> ”).
28.01.2009	The Central Ground Water Authority, Ministry of Water Resources, Government of India, issued a NOC to NPPL for the proposed withdrawal of ground water. The NOC was to be valid till the area remains in safe category on ground water resource consideration or for a period of five years from the date of issue of NOC, whichever is earlier.
04.02.2009	Supplemental MoU was executed between BPTTL and Govt. of Odisha.
16.03.2009	The Ministry of Power, Government of India, granted in-principle Mega Power Project status to the proposed Project.
31.03.2009	PGCIL sent the minutes of meetings held at PGCIL office on 08.12.2008 and 15.12.2008, for grant of LTOA for generation projects in Odisha.

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29.04.2009	PGCIL issued intimation letter for providing LTOA and requested respective generation project developers to provide undertakings to sign the requisite BPTA for sharing of transmission charges.
14.05.2009	PGCIL issued an amendment to its letter dated 29.04.2009 and informed that it has considered LTOA for evacuation of power from generation projects in the State of Odisha including the project of the NPPL.
30.07.2009 [Land / Ayacut Land]	The <b>Collector, Dhenkanal informed the Commissioner-cum-Secretary to the Government of Odisha, Revenue cum Disaster Management, that the Project area covers 546.98 hectare of the Ayacut area of Rengali Right Canal System (“RRCS”) and therefore requested the issue to be settled with concurrence of the Water Resources Department.</b>
07.08.2009	CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 were notified. Regulation 18 provides for Relinquishment of access rights and liability to make payment of compensation for stranded capacity.
11.08.2009	Govt. of Orissa, Department of Energy communicated the extension of validity of the MoU for a period of 1 year, i.e., till 08.06.2010.
18.08.2009 [Land]	<b>Department of Water Resources, Govt. of Odisha requested Energy Department, Govt. of Odisha to identify the non-irrigated land for the industrial (power) project avoiding the 546.98 hectares of land coming under RRCS.</b>
29.09.2009 [Land]	IDCO requested NPPL to revise its requirement of land or relocate the project site taking into consideration the instructions contained in

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	aforementioned letters dated 30.07.2009 and 18.08.2009.
31.05.2010	CERC granted regulatory approval for development of High Capacity Power Transmission Corridor (“HCPTC-I”) vide its Order in Petition No. 233/2009 in which NPPL’s Project was also considered.
07.06.2010	<p>NPPL executed the BPTA / Long Term Access (“LTA”) Agreement with PGCIL for availing LTOA for inter-state transmission of 720 MW of power from its proposed Project. Relevant clauses are reproduced below for ease of reference:</p> <p>“5.0 <b>The Long Term transmission customer shall not relinquish or transfer its rights and obligations specified in the Bulk Power Transmission Agreement, without prior approval of POWERGRID and CERC and subject to payment of compensation in accordance with CERC Regulations issued from time to time.</b></p> <p>6.0 (a) <b><u>In case any of the developers fail to construct the generating station/ dedicated transmission system or makes and exit or abandon its project, POWERGRID shall have the right to collect the transmission charges and/ or damages as the case may be in accordance with the notification/ regulation issued by CERC from time to time.</u></b> The developer shall furnish a Bank guarantee from a Nationalised bank for an amount which shall be equivalent to Rs.5 (five) Lakhs/ MW to compensate such damages. The bank guarantee format is enclosed as Annexure-Y. The details and categories of bank would be in accordance with clause 2(h) above. The bank</p>

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	<p>guarantee would be furnished in favour of POWERGRID in the month of June and within 30 days of signing the Agreement.</p> <p>(b) This bank guarantee would be initially valid for a period upto six months after the expected date of commissioning schedule of generating unit(s) mentioned at Annexure-I (however , for existing commissioned units, the validity shall be the same as applicable to the generator in the group mentioned at Annexure I). The bank guarantee would be encashed by POWERGRID in case of adverse progress of individual generating unit(s) assessed during coordination meeting as per para 7 below. However, the validity should be extended by concerned Long Term transmission customer(s) as per the requirement to be indicated during co-ordination meeting.</p> <p>(c) The POWERGRID shall build transmission system included at Annexure-3 keeping view of various commissioning scheduled, however, till the completion of identified transmission elements the transfer of power will be based on the availability of system on short term basis.</p> <p>(d) In the event of delay in commissioning of concerned transmission system from its schedule, as indicated at Annexure-4, POWERGRID shall pay proportionate transmission charges to concerned Long Term Access Customer(s) proportionate to its commissioned capacity (which otherwise would have been paid by the concerned Long Term Access Customer(s) to POWERGRID) provided</p>

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	<p>generation is ready and POWERGRID fails to make alternate arrangement for dispatch of power.</p> <p>7.0 In order to monitor/review the progress of generating units along with its direct evacuation lines and also the common transmission system, Joint co-ordination meeting with the representative of each developers and POWERGRID shall be held at regular interval (preferably quarterly) after signing of this Agreement.</p> <p>8.0 All differences/ disputes between the parties arising out of or in connection with this Agreement shall be resolved in terms of the Redressal Mechanism provided under Regulation 35 of the CERC (open access in Inter-state Transmission) Regulations and under the Electricity Act 2003 (including any amendments thereof).</p> <p>9.0 <b>The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable to any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party.</b> But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice of 30 days to the other party to</p>

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	<p><i>this effect. 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.”</i></p> <p style="text-align: right;"><i>[Emphasis supplied]</i></p>
July, 2010	<p><i>NPPL sold its entire Shareholding in favour of M/s. Essar Power Limited for a consideration of Rs. 231 Crores.</i></p>
19.07.2010	<p><i>Director of Essar Group wrote a letter to the Hon'ble Chief Minister of Odisha, inter alia, informing him about the following:</i></p> <p><i>(i) The Essar Group had taken over the Project by acquiring NPPL.</i></p> <p><i>(ii) NPPL has obtained all the required statutory and non-statutory approvals including coal linkage, coal blocks, Environmental clearance, land acquisition at advance stage, PPAs, Forest clearance, Chimney clearance, Defense clearance, Rail transport clearance, Railway siding clearance etc.</i></p> <p><i>(iii) Certain critical issues like extension of MoU, permission to continue project in same location, etc. needs to be resolved at the earliest so as to start the project construction.</i></p>
21.07.2010	<p><i>BTPPL furnished a Bank Guarantee, bearing BG No. 00080100005091 for an amount of Rs. 36 Crores, in terms of the BPTA.</i></p>
11.08.2010 [Coal]	<p><i>Mahanadi Coal Fields Ltd. (MCL) issued provisional Letter of Assurance in favour of NPPL for the requirement of 4.219 million tonnes per annum of E/F grade coal for the Power Project, subject to the fulfilment of certain conditions.</i></p>
September	<p><i>Investment Approval was accorded by the Board of</i></p>



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2010	Directors of PGCIL for development of transmission projects in Odisha qua those under Part A. Sub-station and transmission packages were awarded by PGCIL between September 2010 and March 2011.
08.12.2010 [Land]	<b>IDCO issued receipt of the cheque of Rs. 65.39 Crores issued by NPPL on 02.08.2010, towards acquisition of land for the Project.</b>
08.12.2010 [MoU]	<b>Govt. of Orissa, Dept. of Energy extended the MoU upto 31.12.2011 and communicated that steps were being taken to execute a supplemental MoU with BTPPL.</b>
04.03.2011	2 <sup>nd</sup> Joint Coordination Committee Meeting (of IPPs that had been granted LTOA in Eastern Region) was held at PGCIL office, <b>wherein NPPL, inter alia, informed that:</b> (i) 1 <sup>st</sup> Unit of the power plant was expected to be commissioned by January 2014. (ii) <u>Out of total land required of 1090 acres, no land is in possession.</u> (iii) <u>The Government of Odisha is acquiring the land and the same will be made available by March 2011.</u> (iv) The financial closure of the Project is expected by April 2011 and advance has been released to the EPC contractor.
29.08.2011	NPPL executed an agreement with PGCIL for obtaining consultancy services for execution of 2 numbers 400 KV bays at PGCIL's Angul pooling station for connectivity of Dedicated Transmission Line from its Power Plant on cost plus basis, for consultancy fee of Rs. 1,50,00,000/- payable to PGCIL.

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20.09.2011	<b>The Ministry of Power issued prior approval required under Section 68(1) of the Electricity Act, 2003, in favour of BTPPL for installation of overhead lines for the associated transmission system of the Project, subject to certain conditions.</b>
31.10.2011	<b>During 4<sup>th</sup> Coordination meeting for High Capacity Transmission Corridors in Eastern Region, PGCIL informed that the transmission system for phase-1 generation projects would be commissioned by November, 2013.</b>
18.11.2011 <b>[Land]</b>	<b>IDCO, upon NPPL's request, issued a certificate on the status of land acquisition for the purpose of getting extension of coal linkage for thermal power project at Dhenkanal, confirming that BTPPL had paid the entire compensation amount of Rs. 61.43 Crores for acquisition of private land of 1002.569 acres.</b>
30.11.2011 <b>[Land]</b>	<b>NPPL in its letter to Commissioner-cum-Energy Secretary, Government of Orissa, inter-alia, <u>expressed its inability to implement the project at any other site than the existing project site due to various reasons (already having received Environmental Clearance &amp; CTO for the existing site; possibility of forest land at another location, etc.)</u>. NPPL also submitted a revised proposal considering the Ayacut issue and requested for early Ayacut clearance for starting the Project construction, considering that all balance statutory clearances were in place.</b>
31.12.2011	<b>The MoU between NPPL and State of Odisha was not extended beyond 31.12.2011.</b>
05.04.2012 <b>[Land]</b>	<b>NPPL by its letter to the Land Officer - IDCO, submitted detailed land records and other related documents after reducing the overall share of Ayacut</b>

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	affected land in the Project and requested IDCO to initiate the process of Land Acquisition for the Project.
21.04.2012	<b>State Pollution Control Board, Odisha, conveyed its Consent in favour of the NPPL to establish the Mega Thermal Power Project, superseding earlier consent to establish consent issued on 07.08.2008.</b>
04.06.2012	<b>NPPL requested PGCIL to revise the Commercial Operation Dates for Unit I to 31.03.2015 and Unit II to 31.06.2015 and accordingly amend Annexure-1 and Annexure-4 in the BPTA for LTOA dated 07.06.2010. <u>NPPL apprised PGCIL, in detail, of the fact that land had not been handed over to it till date and the delay caused was wholly and solely due to reasons extraneous to and beyond its control.</u></b>
10.07.2012 [Land]	<b><u>The Department of Water Resources, Government of Odisha, issued letter agreeing in-principle for establishment of the Project in the irrigation command area of RRCS at Meramundali, Nagari, Suravi, Guada Posi, Taladanga, Bido and Chintapokhari to an extent of 244.72 hectares including 39.92 acres of DoWR land to be relinquished for the proposed Project basis the undertaking given by the NPPL and subject to certain terms and conditions.</u></b>
27.07.2012	NPPL re-applied to Principal Secretary, Department of Water Resources seeking permission for 40 Cusecs of water drawal from Brahmani and informed that the earlier permission for water drawal of 42 Cusecs granted vide letter dated 31.10.2006 had lapsed on 01.11.2009 due to delay in land acquisition by IDCO on account of Ayacut issue.
17.08.2012	NPPL issued a letter to the Commissioner-cum-Secretary, Dept. of Energy Govt. of Odisha informing

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	<p>that DOWR had allowed IDCO to go ahead with land acquisition procedure in the proposed Irrigation Command Area of 244.72 Ha. Failing in the project land. IDCO had already taken action for reissue of Section 4(1) as part of the process for land acquisition. BTPPL also provided various other details and requested the Govt. to:-</p> <p>(i) issue administrative approval for acquisition of new private land requirement of 57.79 acres as mentioned in IDCO's letter dated 08.08.2012; and</p> <p>(ii) Extend the validity of the MoU which had expired on 31.12.2011.</p>
<p>03.09.2012 <b>[CBI Case re. Coal Block]</b></p>	<p>Central Bureau of Investigation ("<b>CBI</b>") filed an FIR (RC No. 219 2012 E 0011) against the following, on the ground that the Accused Directors of NPPL decided to apply for a Coal Block to the Screening Committee, and while doing so, they made false representations (as to its Financial Capacity/Net-worth) in order to tide over other applicants and get favorably recommended.</p> <p>Upon such allocation of Coal Block, the said Directors sold the company [sale of the entire shareholding] for a windfall gain of Rs. 231 Crores, which is alleged to effectively include the value addition which was obtained as a result of such allocation.</p> <p>Y. Harish Chandra Prasad – Accused No.1 Trivikrama Prasad - Accused No.2 Nava Bharal Power Pvt. Ltd. - Accused No.3 H.C. Gupta - Accused No.4 K.S. Kropha – Accused No. 5 K.C. Samaria – Accused No. 6 .</p>
<p>11.09.2012</p>	<p><b>NPPL submitted Project Report to PGCIL whereby</b></p>

<u>DATE</u>	<u>PARTICULARS</u>
	<i>it duly informed PGCIL that land is still being acquired, Section 4(1) Notification is being issued by IDCO, expected date of acquisition is March 13 and the expected date of commissioning of its Units will be 31.03.2015 and 30.06.2015 for Units 1 and 2 respectively.</i>
03.11.2012	<i>NPPL once again requested State of Odisha to extend the validity of the MoU. NPPL clarified that it had made all relevant payments to IDCO for land acquisition. Further MoP had confirmed that Rampia &amp; Dip Side of Rampia coal block was still allocated to Rampia Coal Mine and Energy Pvt. Ltd. a JV company in which NPPL was a partner.</i>
31.12.2012	<i>NPPL vide its letter to the Commissioner-cum-Secretary, Dept. of Energy Govt. of Odisha requested for extension of the validity of the MoU. BTPPL provided a status update and highlighted that critical activities such as reissue of declaration under Section 4(1) for land acquisition and revalidation of water allocation could be initiated only after extension of MoU.</i>  <i>BTPPL also highlighted that there was tremendous pressure from Financial Institutions to get possession of land and to start construction work on war footing, as the project had been delayed due to reasons beyond BTPPL's control.</i>
13.02.2013	<i>PGCIL issued a letter conveying the status of transmission system for Phase-I IPPs in Odisha.</i>
10.03.2014 <b>[CBI Case re. Coal</b>	<i>CBI filed a Charge Sheet (No. 01/2014) under Sections – 420, 409 r/w 120-B IPC; 13(1)(c) &amp; 13(1)(d) P.C. Act, 1988.</i>

<u>DATE</u>	<u>PARTICULARS</u>
<b>Blockj</b>	<i>Accused No. 3 NPPL [now called BTPPL], is arraigned as an accused primarily on the count that the Company was in fact the applicant which had made the false representations to the Screening Committee. Since the change in management of NPPL (now BTTPL) has been occasioned due to a sale of the entire shareholding, the essential legal character of the company remains the same and the company stands as an accused for the acts committed by the erstwhile Directors.</i>
29.04.2013	<i>NPPL once again requested the Govt. of Odisha to extend the validity of the MoU.</i>
06.05.2013	<i>PGCIL issued letters informing Axis Bank Limited that the Bank Guarantee was expiring on 30.06.2013 and unless extension for another year is provided, the same may be treated as a claim against the bank guarantee and the proceeds of which to be remitted to PGCIL by way of demand draft.</i>
	<i>PGCIL reiterated its request for extending the validity of the Bank Guarantee.</i>
	<i>PGCIL issued a letter to NPPL calling for an execution of a Transmission Service Agreement.</i>
25.06.2013 <b>[Force Majeure Notice]</b>	<i>On account of the aforesaid unforeseen (force majeure) events, <b>NPPL issued a letter/ Notice to PGCIL enumerating, in detail, the issues hindering the timely commissioning of the Project.</b> NPPL requested PGCIL for relinquishment of LTOA without any liability on either side, for exemption from payment of any transmission charges and for the return of bank guarantee of Rs. 36 Crores till NPPL is able to confirm the future course of action regarding the Project.</i>
27.06.2013	<i>NPPL once again requested the Govt. of Odisha to</i>

<b><u>DATE</u></b>	<b><u>PARTICULARS</u></b>
	<i>extend the validity of the MoU.</i>
12.08.2013	<i>PGCIL called for a meeting to discuss connectivity and LTOA issues and the request raised by NPPL in its FM Notice. Thereafter, NPPL was advised to approach CERC for directions on the issue of relinquishment.</i>
19.11.2013	<i>NPPL once again requested the Govt. of Odisha to extend the validity of the MoU and highlighted that it had already incurred expenditure of more than Rs. 560 Crores, however, could not start construction as land for the project could not be acquired without extension of the MoU.</i>
03.12.2013	<i>NPPL filed Petition No. 317/MP/2013 before CERC seeking relinquishment of LTOA without any liability, exemption from payment of transmission charges and the return of bank guarantee of Rs. 36 crores.</i>
15.01.2014 <b>[Coal]</b>	<i>The Ministry of Coal issued notice to review the allocation of captive coal blocks to private companies.</i>
24.01.2014	<i>NPPL once again requested the Govt. of Odisha to extend the validity of the MoU.</i>
17.02.2014 <b>[Coal Block De-allocation]</b>	<b><i>Ministry of Coal issued a Notice on the recommendations of Inter-Ministerial Group and <u>de-allocated</u> Rampia and Dip Rampia coal blocks allotted to the NPPL and its other Joint Venture partners.</i></b>
05.03.2015	<i>BTPPL was renamed to “M/s Brahmani Thermal Power Private Limited” from “Navbharat Power Private Ltd.” and a Certificate of Incorporation was accordingly issued.</i>
23.03.2017	<i>BTPPL extended the Bank guarantee till 31.03.2018.</i>
12.04.2017	<i>CERC issued the Impugned Order in Petition No.</i>

<u>DATE</u>	<u>PARTICULARS</u>
[Impugned Order]	<p>317/MP/2013.</p> <p><b><u>Main Findings:</u></b></p> <p>(i) Substantial progress had been made on the transmission line by the time BTPPL had issued its force majeure notice. BTPPL is liable to pay transmission charges or damages.</p> <p>(ii) LTA customer (in this case, BTPPL) have an obligation to pay transmission charges <b><u>and/or</u></b> (used interchangeably in the order) damages in this the power plant does not come up in time.</p> <p>(iii) BTPPL has abandoned the Project for purely commercial reasons and is trying to wriggle out of the BPTA on account of delay in obtaining clearance.</p> <p>(iv) Cl. 9 of the BPTA (force majeure) only give temporary amnesty.</p> <p>(v) BTPPL has a statutory right to relinquish its LTOA only on payment of relinquishment charged.</p> <p><b><u>Directions:</u></b></p> <p>(i) Actual relinquishment charges to be decided in Petition No. 92/MP/2015.</p> <p>No relief re: Bank Guarantee.</p>

5. The Appellant had approached the Commission by way of Petition No. 317/MP/2013 claiming following reliefs :-

*“(a) direct relinquishment of the long term open access under the Bulk Power Transmission Agreement dated 07.06.2010 without any liability on the part of the Petitioner;*



*(b) direct the Respondent No. 1 to return the bank guarantee bearing no. 00080100005091 dated 21.07.2010 for an amount of Rs.36 Crores issued by Axis Bank Limited on behalf of the Petitioner;*

*(c) grant an exemption to the Petitioner from making any transmission charges; and*

*(d) pass such other and further order or orders as this Hon“ble Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.”*

6. Following three issues were framed by the Commission for its consideration

*“(a) Whether the petitioner’s contentions that the circumstances faced it are force majeure events under meaning of Article 9.0 of the LTA Agreement?”*

*(b) Whether the LTA granted to the petitioner under LTA Agreement dated 7.6.2010 should be relinquished without any liability on the part of the petitioner?*

*(c) What should be the treatment of BG submitted by the Petitioner in accordance with LTA Agreement?”*

7. On issue No. (a) the Commission held that the Appellant has abandoned the power project for commercial reasons and Article 9 of BPTA does not permit the defaulting party to abandon the Long-term Access (LTA) as this clause of BPTA only provides temporary amnesty to the party affected by Force Measure in order to make agreement work.

8. On issue No. (b), the Commission held the Appellant entitled to relinquish the LTA upon payment of relinquishment charges but refrained from quantifying the charges saying that decision in that regard would be taken in the light of decision in another petition No. 92/MP/2015 filed by the Appellant in which a Committee was formed by the Commission vide order dated 28<sup>th</sup> August, 2015 for assessment/determination of stranded transmission capacity which regards to relinquishment of LTA right by long-term customers and relinquishment charges in terms of the provisions of Connectivity Regulations. Similarly, the Commission did not give any finding on issue No. (c) also and left it to be decided in the light of decision in the said petition No. 92/HP/2015.

9. The reasoning given by the Commission in deciding the issue (a) against the Appellant can be found in paragraph No. 19 of the impugned order which is extracted herein below:-

*“19. The Petitioner has abandoned the project for the purely commercial reasons and the Petitioner cannot be said to be affected by reasons beyond its control. The Petitioner has relied upon the findings of the Hon“ble Appellate Tribunal for Electricity dated 4.2.2014 in Appeal No. 123 of 2012. In the said case, the Appellate Tribunal held that the approval under the Bombay Tenancy and Agricultural Land (Vidarbha Region and Kutch Area) Act,1958 and for water source under the Environment Protection Act,1986and CRZ Regulations are statutory/ legal approvals under the PPA and accordingly, it fall under force majeure events and the period of delay is required to be suspended or excused and to that extent the period of Commercial Operation Date, Date of construction default and Scheduled Commercial Operation Date were to be extended under the LTA Agreement. In the present case, the Petitioner has abandoned the project on account of delay in obtaining clearances and is seeking to wriggle out of the*

LTA Agreement. From the analysis of Clause 9 of the LTA Agreement, it clearly emerges that the said clause is for providing temporary amnesty to the parties affected by force majeure in order to make their agreement work. The provision of Clause 9 of the LTA Agreement does not permit a defaulting party to abandon the LTA which is evident from the last sentence of the said clause which states that drawal/transmission 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.”

*(Emphasis supplied)*

10. We have heard Learned Counsel for Appellant and the Learned Counsel for Respondent No. 4 Central Transmission Utility of India Limited (CTUIL). We have also perused the record as well as the Written Submissions submitted by the Learned Counsels.

11. We may note here that the Appellant had assailed the impugned order of the Commission, apart from merits, on the grounds that the order was passed by the Commission, after a lapse of more than 2.5 years from the date of final hearing and the same has been signed only by the two members of the Commission

including the Chairperson whereas the petition had been heard by three members of the Commission including the Chairman. However, Learned Counsel for the Appellant did not press these grounds during the course of argument and confined his submissions on the merits of the case only.

12. The main issue which arises for our determination in this appeal is whether BPTA/LTA executed by Appellant with 1<sup>st</sup> Respondent-PGCIL got frustrated on account of the Force Majeure event agitated by the Appellant. In other words, we are called upon to determine whether clause 9 of the said BPTA provides only temporary amnesty to the parties on account of Force Majeure events or it provides the permanent relief also to a party affected by the Force Majeure event to terminate the agreement.

13. In order to understand and analyse the rival submissions made on behalf of the contesting parties, we find it pertinent to extract herein below the relevant clauses of the BPTA/LTA dated 7<sup>th</sup> June, 2010 :-

***“5.0 The Long Term transmission customer shall not relinquish or transfer its rights and obligations specified in the Bulk Power Transmission Agreement, without prior approval of POWERGRID and CERC and***

**subject to payment of compensation in accordance with CERC Regulations issued from time to time.**

6.0 (a) **In case any of the developers fail to construct the generating station/ dedicated transmission system or makes and exit or abandon its project, POWERGRID shall have the right to collect the transmission charges and/ or damages as the case may be in accordance with the notification/ regulation issued by CERC from time to time.** The developer shall furnish a Bank guarantee from a Nationalised bank for an amount which shall be equivalent to Rs.5 (five) Lakhs/ MW to compensate such damages. The bank guarantee format is enclosed as Annexure-Y. The details and categories of bank would be in accordance with clause 2(h) above. The bank guarantee would be furnished in favour of POWERGRID in the month of June and within 30 days of signing the Agreement.

(b) This bank guarantee would be initially valid for a period upto six months after the expected date of commissioning schedule of generating unit(s) mentioned at Annexure-I (however , for existing commissioned units, the validity shall be the same as applicable to the generator in the group mentioned at Annexure I). The bank guarantee would be encashed by POWERGRID in case of adverse progress of individual generating unit(s) assessed during coordination meeting as per para 7 below. However, the validity should be extended by concerned Long Term transmission customer(s) as per the requirement to be indicated during co-ordination meeting.

(c) *The POWERGRID shall build transmission system included at Annexure-3 keeping view of various commissioning scheduled, however, till the completion of identified transmission elements the transfer of power will be based on the availability of system on short term basis.*

(d) *In the event of delay in commissioning of concerned transmission system from its schedule, as indicated at Annexure-4, POWERGRID shall pay proportionate transmission charges to concerned Long Term Access Customer(s) proportionate to its commissioned capacity (which otherwise would have been paid by the concerned Long Term Access Customer(s) to POWERGRID) provided generation is ready and POWERGRID fails to make alternate arrangement for dispatch of power.*

7.0 *In order to monitor/review the progress of generating units along with its direct evacuation lines and also the common transmission system, Joint co-ordination meeting with the representative of each developers and POWERGRID shall be held at regular interval (preferably quarterly) after signing of this Agreement.*

8.0 *All differences/ disputes between the parties arising out of or in connection with this Agreement shall be resolved in terms of the Redressal Mechanism provided under Regulation 35 of the CERC (open access in Inter-state Transmission) Regulations and under the Electricity Act 2003 (including any amendments thereof).*

**9.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable to any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice of 30 days to the other party to this effect. 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.”**

*[Emphasis supplied]*

13. We are unable to accept the observations of the Commission that clause 9 of the BPTA/LTA executed between the Appellant and the 1<sup>st</sup> Respondent only provides temporary relief to the party affected by any Force Majeure event. While observing so, the Commission has referred to last sentence in the said clause 9 of PBTA/LTA which reads as under :-

“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.”



14. The use of word “practicable” in the said sentence merely indicates that the agreement may be continued after the Force Majeure event ceases to exist if the affected party finds it practical so to do. In other words, the affected party cannot be compelled to continue with the agreement after the Force Majeure event comes to an end, if it finds it impracticable so to do or finds it impossible to proceed further with the agreement having regard to the changed circumstances arising due to the Force Majeure event. We do not find anything in the entire clause limiting its scope to the temporary Force Majeure events only and disentitling a party affected by a Force Majeure event to terminate the agreement on account of Force Majeure event. The first part of the clause clearly provides that in case a party fails to carry out the terms of the agreement due to a Force Majeure event or any other cause beyond its control, he would not be held liable for any claim/loss/damage arising out of such failure. The expression “failure to carry out the terms of the agreement” used in the clause clearly convey that ‘failure’ may be either temporary or permanent. To say that the clause applies only in case of “temporary failure to carry out the Terms of the Contract” would tantamount to adding words to the written agreement

executed between the parties which is not permissible. Hence, the said clause certainly is applicable where the affected party seeks termination of contract citing permanent failure to execute the contract in case the failure has been on account of changed circumstances due to Force Majeure event or any other cause beyond the control of affected party rendering the continuation of the agreement impossible or impracticable.

15. This Tribunal has earlier also in judgment dated 19<sup>th</sup> May, 2020 passed in Appeal No. 266 of 2016, PEL Power Limited Vs. Central Electricity Regulatory Commission and Anr. considered the scope of identical clause 9 in the BPTA dated 24<sup>th</sup> December, 2010, which was the subject matter of that appeal and rejected the observations of the Central Commission that the Appellant can be entitled to relief only for temporary Force Majeure event and not for permanent Force Majeure events. We may note that in the appeal filed by PGCIL against the said judgement of this Tribunal, the Apex court has declined to grant any interim relief but has admitted the appeal.

16. The said judgement of this Tribunal in PEL Power Limited has been taken note of with approval in the subsequent judgement

dated 14<sup>th</sup> May, 2024 Himachal Sorang Power Pvt. Ltd. Vs. Central Electricity Regulatory Commission and ors. 2024 SCC online APTEL 13. It is to be noted that appeal filed by CTUIL against the said judgement of this Tribunal has been dismissed by the Supreme Court on 27<sup>th</sup> August, 2024.

17. Hence, we set aside the findings of the Commission on this issue and hold that clause 9 of the BPTA/LTA dated 7<sup>th</sup> June, 2010 applies the permanent Force Majeure events also thereby entitling the party affected by Force Majeure event to terminate the agreement if it finds the continuation of the agreement impracticable or impossible on account of the Force Majeure event.

18. Now, coming to the merits of the case in order to determine whether the Appellant was not affected by reasons beyond its control and has abandoned the project for purely commercial reasons, as held by the Commission in the impugned order.

19. It is argued on behalf of the Appellant that the Appellant had taken timely steps for establishing the power project but same could not be done on account of Force Majeure events that were beyond its control. It is pointed out that as per the MOU dated 9<sup>th</sup> June, 2006, executed by Appellant with the Government of Odisha to set

up the said 1040 MW (2x520 MW) coal based thermal power plant at Kharag Prasad and Meramundali, Dhenkanal District Odisha, the State of Odisha was obliged to :-

(a) Acquire the land required i.e. 1200 acres for the purpose of setting up the Project along with the associated facilities and handover the same free from all encumbrances to the Appellant through Orissa Industrial Infrastructure Development Corporation (“**IDCO**”).

(b) Facilitate allotment of coal blocks for the purpose of mining to be utilized for the Project and provide all assistance for such allocation.

(c) Assist the Appellant in obtaining all clearances/ permits/ approvals from Central Government / State Government departments or agencies, Regulatory Commissions and local bodies.

20. It is submitted that the Appellant made best efforts towards establishment of the project which is evident from the following critical approvals and licensees obtained, many of which were prior to the execution of BPTA dated 7<sup>th</sup> June, 2010:-

<b>Sl. No.</b>	<b>Approval</b>	<b>Date on which obtained</b>
1.	<i>In-principle approval for drawal of 42 cusecs of water for the Project - Department of Water Resources, Odisha.</i>	31.10.2006
2.	<i>Rail Transport Clearance for construction</i>	04.12.2006

<b>Sl. No.</b>	<b>Approval</b>	<b>Date on which obtained</b>
	<i>of Private Siding – Ministry of Railways</i>	
3.	<i>NOC for chimneys – Airport Authority of India</i>	<i>15.03.2007</i>
4.	<i>Administrative approval for acquisition of private land admeasuring 1093.23 acres – Department of Energy, Govt. of Odisha</i>	<i>26.04.2007</i>
5.	<i>Forest Clearnce – Divisional Forest Officer</i>	<i>31.05.2007</i>
6.	<i>Defence NOC – Asstt. Defence Estates Office, Bhubaneshwar, Orissa</i>	<i>13.07.2007</i>
7.	<i>Allocation of Rampia&amp; Dip Side of Rampia Coal Blocks – Ministry of Coal</i>	<i>17.01.2008</i>
8.	<i>Environmental Clearance – Ministry of Environment &amp; Forest</i>	<i>08.02.2008</i>
9.	<i>Rail Transport Clearance for movement of liquid fuels like LDO, HFO etc. – Ministry of Railways</i>	<i>14.07.2008</i>
10.	<i>Consent to Establish – State Pollution Control Board Odisha</i>	<i>07.08.2008</i>
11.	<i>NOC for drawal of ground water - Central Ground Water Authority, Ministry of Water Resources.</i>	<i>28.01.2009</i>
12.	<i>In-principle Mega Power Project Status – Ministry of Power</i>	<i>16.03.2009</i>
13.	<i>Explosives Clearance – Ministry of Commerce &amp; Industry (Petroleum and Explosives Safety Organisation)</i>	<i>28.04.2009</i>
14.	<i>Letter of Assurance from Mahanadi Coalfields Ltd.</i>	<i>11.06.2009 &amp; 11.08.2010</i>
15.	<i>BPTA executed with PGCIL.</i>	<i>07.06.2010</i>
16.	<i>Environmental Clearance for changed configuration of 2x525 MW – Ministry of Environment &amp; Forest</i>	<i>03.06.2011</i>
17.	<i>Section 68 Approval</i>	<i>20.09.2011</i>
18.	<i>New Consent to Establish – State Pollution</i>	<i>21.04.2012</i>

<b>Sl. No.</b>	<b>Approval</b>	<b>Date on which obtained</b>
	<i>Control Board, Odisha</i>	
19.	<i>In-principle Approval for establishment of Project in irrigation command area of RRCS - Department of Water Resources, Government of Odisha</i>	10.07.2012
20.	<i>Section 164 Approval</i>	16.01.2014

21. Learned Counsel further submitted that the Appellant proceeded to incur substantial costs and expenditure upon the project which includes payment to the tune of Rs.67.71 crores made to IDCO towards cost of land acquisition. It is submitted that the Government of Odisha had even issued Section 4(1) notification on 6<sup>th</sup> November, 2007 and Section 6(1) notification on 29<sup>th</sup> November, 2008 and 11<sup>th</sup> December, 2008 under the Land Acquisition Act, 1894 to acquire the identified land for the project, on the basis of which Appellant entered into BPTA with the 1<sup>st</sup> Respondent PGCIL on 7<sup>th</sup> June, 2010 for Long-Term Open Access (LTOA) of 720 MW. The Appellant also furnished a bank guarantee of Rs.36 crores to PGCIL in terms of the BPTA. It is argued that on account of following Force Majeure events, which obviated the progress of the project, the Appellant was prevented from operationalizing the project for reasons beyond its control:-

(a) *Although land acquisition process was initiated by IDCO and all necessary payments were made by the Appellant, no progress could be undertaken due to subsequent overlapping of the Project area under a 'proposed' irrigation command area of the Rengali Right Canal System ("Ayacut area"), which was highlighted only on 30.07.2009 i.e., approx. 3 years after the in-principal approval was already granted and necessary Notifications under the Land Acquisition Act published.*

*Though the Department of Water Resources belatedly accorded Ayacut area clearance to the Appellant on 10.07.2012, the earlier Notifications under the Land Acquisition Act had lapsed due to efflux of time on 29.11.2010 and 11.12.2010. Further, due to the expiry of the MoU on 31.12.2011 and the failure of the State Government to renew the same, the governmental agencies and instrumentalities viz., IDCO and IPICO were denuded of any authority to acquire the required land, issue notifications or make any further effort towards implementation of the Project.*

(b) *The fuel linkage for the Project (Rampia and Dip Side of Rampia Coal Blocks) that had initially been allocated to the Appellant, were de-allocated.*

22. It is argued that in spite of making a total investment of approximately Rs.51.08 Crores till June 2013, in addition to Rs.67.71 Crores paid to IDCO for acquisition of 1,002 acres of private land, the Appellant was compelled to cease work on the

Project on account of the aforesaid Force Majeure events / unforeseen and unavoidable circumstances.

23. Learned Counsel submitted that despite obtaining necessary consents/approvals well in time, the Appellant was unable to implement the project due to :-

- (i) *Department of Water Resources' belated actions – requiring the Appellant / IDCO to revise / reduce land for the project (3 years after granting in-principle approval), resulting in lapse of the Section 4 & 6 Notifications issued by the Govt. and subsequent un-due delay in granting approval for the Project land.*
- (ii) *Non-extension of the MoU by the State of Odisha, resulting in IDCO being unable to re-issue Land Acquisition Notices upon receiving approval from the Department of Water Resources (albeit belatedly).*
- (iii) *De-allocation of coal block by the Government of India.*

24. Thus, according to the Learned Counsel, the Appellant had well founded and cogent reasons for terminating the BPTA/LTA on account of the said Force Majeure events which were totally unforeseen and prevented the operationalization of the power project and, therefore, the impugned order of the Commission cannot be sustained.

25. Per contra, the Learned Counsel for Respondent No. 4, CTUIL vehemently refuted the submissions of the Appellant's counsel. He



argued that the principle that the relief for a force majeure event shall be in accordance with the provision of the underlying contract has consistently been applied across courts and tribunals of the country. Therefore, from the above it is submitted that the Appellant would not be entitled to treat any act as an event of force majeure if there are alternate mode of operation and the performance of obligation of the Appellant has become onerous. It is submitted that the entire case of the Appellant is that land acquisition was the responsibility of the State Government under the MoU entered into by the Appellant and after the said MoU stood terminated the project became impossible to perform. The entire argument is fallacious in terms of the law on the issue of force majeure. Admittedly there was never an embargo on the appellant to acquire the land itself and therefore an alternate modes of performance was always available. It is submitted that as laid down by the Delhi High Court the force majeure clause in a contract is to be interpreted narrowly and risks associated with a contract are required to be borne by a party. In light of the above it is further submitted that termination of MoU by the State Government cannot be an event of force majeure under the BPTA especially when the Appellant chose not to even

challenge such termination as illegal or arbitrary before a court of law. It is submitted that while the force majeure provision of the LTA is exhaustive and should not be given a liberal interpretation even applying the provision in relation to consent and approval from government authority as incorporated in the Model PPA, denial and/or revocation of consent are considered as an event of force majeure in the event the same is declared to be arbitrary by a court of law. It is submitted that CERC has rightly come to the conclusion that the instant case is of abandonment of a project for purely economic reasons.

26. It is further submitted by the Learned Counsel that the fact that various approvals had been obtained by the Appellant and certain monies had been spent cannot be the basis to decide whether or not the termination of MoU with the State Government would qualify as event of force majeure. Without prejudice to the above it is submitted that the MoU specifically provided that the extension would be permitted only if substantial progress has been made. Accordingly, it is evident that the State Government terminated the MoU due to inadequate progress. It is submitted allowing such termination to be treated as an event of force majeure would effectively be rewarding the inefficiency of the Appellant.

27. Referring to Regulation 18 of Connectivity Regulations, 2009, Learned Counsel argued that a liability that is not contractual in nature but arises in terms of applicable law (Act and/ or Regulations) shall not be impacted by an event of force majeure under a contract. It is submitted that even if this Hon'ble Tribunal comes to a conclusion that the Appellant was indeed impacted by an event of force majeure, then also the remedy available to them cannot extend to extinguishing statutory liability that arises under applicable law in this case the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter-State Transmission and Related Matters) Regulations, 2009 ("Connectivity Regulations").

28. It is submitted that reliance by the appellant on the judgment of this Hon'ble Tribunal in PEL Power is erroneous as in the said Judgment there is no discussion on the issue of obligations arising under applicable law. It is submitted that it is no longer res-integra that the liabilities, if any, in terms of applicable law are not discharged only on the ground that an applicant has been impacted by an event of force majeure. It is submitted that since Himanchal Sorang Judgment relies on the judgment of PEL Power and there is

no discussion about contractual liability vis-a-vis liability in terms of applicable law, the Himanchal Sorang Judgment is also of no assistance to the Appellant.

29. On these submissions, Learned Counsel sought dismissal of the Appeal. He cited the judgement of Delhi High Court in M/s Halliburton Offshore Services Inc. V/s. Vendanta Ltd. & Anr. (2020) SCC online Del. 2068 in support of his submissions.

**Our Analysis :**

30. We note that the Commission, in the impugned order, has held that the appellant has abandoned the project for purely Commercial reasons and can not be said to be affected by reasons beyond its control. Regretfully, we find that these findings of the commission are bereft of any reasoning. The commission has, though, noted in paragraph 18 of the impugned order the factors stated by the Appellant which affected the power project seriously and which were beyond its control, yet has not given any reason at all to disbelieve/discard these factors. Thus, what lead the commission to hold the Appellant guilty of abandonment of the project for purely commercial reasons, is not discernible from the entire impugned order. Without mincing any words, we would say

that such a practice of writing unreasoned and cryptic orders having tremendous impact on the rights and obligations of the parties under the Agreement need to be deprecated sternly. Reasons are the lifeline of a judicial order/judgement. Providing reasons in an order/judgement is as necessary as the final order/judgement itself. The final order/judgement would have no legs to stand in case it is not supported by detailed reasoning. Further, reasons in an order/judgement serve two fundamental purposes. Firstly, the losing party comes to know about the weakness of its case and why it has lost the legal battle. Secondly, reasons provide an insight to the Appellant authority into what was going on in the mind of the original forum while writing the order and why did it arrive at a particular finding which has been assailed.

31. Though the impugned order could be set aside on this very score only i.e. lack of reasons, yet since we have heard the Ld. Counsel for the parties in detail and considering the fact that the Appeal has been pending disposal in the Tribunal for more than seven years (having been filed in the month of August, 2017), we find it is in the interests of justice to decide the Appeal on merits.

32. It is not in dispute that the Appellant has incurred substantial expenditure of Rs. 118.79 crores (including cost of land acquisition

of Rs. 67.71 crores) upon project. Further, the Appellant had even concededly taken a host of requisite approvals/clearances before the execution of BPTA/LTA on 07/06/2010. After the execution of BPTA also, the Appellant continued to perform its obligations and obtained fresh Environmental clearance from Ministry of Environmental & Forestry (MoEF) for changed configuration (2x525 MW) on 03/06/2011, fresh consent from state Pollution Control Board, Odisha on 21/04/2012. in principle approval from Department of Water Resources, Govt. of Odisha for establishment of project in irrigation command area of RRCS on 10/07/2012 and approvals under sections 68 & 164 Electricity Act on 20/09/2011 & 16/01/2014 respectively.

33. Under the MoU dated 09/06/2006 executed between the Govt. of Odisha & the Appellant for setting up of the Power Project, the State Govt. through Orrissa Industrial Infrastructure Development Corporation (IDCO) was obliged to acquire the land required (about 1200 acres) for the project along with associated facilities and handover the same free from all encumbrances to the Appellant (clauses 5A to 5F). The piece of land to be acquired was identified and process of acquisition was commenced. On 08/06/2007, IDCO wrote to the Appellant asking it to deposit Rs. 1,12,02,900/- (Rs,

1.12 crores) for the balance 10% cost for establishment charges for acquisition of private land of around 10.93 acres and alienation of 89.66 acres of Govt. land. The Appellant furnished proof of said payment vide letter dt. 05/07/2007. Thereafter, the Govt. of Odisha issued section 4(1) notification under the Land Acquisition Act on 06/11/2007 which was followed by the notifications under section 6(1) on 29/11/2008 & 11/12/2008.

34. Meanwhile, the Ministry of Coal allotted Rampia and Dip Side of Rampia Coal block for captive coal mining in the command area of Mahanadi Coal fields Ltd. (MCL) to the Appellant on 17/01/2008. MoEF accorded Environmental clearance for the project on 08/02/2008 and consent was given by the State Pollution Control Board on 07/08/2008.

35. It was on 30/07/2009 that the Collector, Dhenkamal informed that the project area covers 546.98 hectares of the Ayacut area of Rengali Right Canal System (RRCS) which required the matter to be settled with the concurrence of Water Resources Department. Department of Water Resources, vide its letter dt. 18/08/2009 requested the Energy Department, Govt. of Odisha to identify the non-irrigated land for the power project avoiding 546.98 hectares of

land coming under RRCS. In pursuance to this communication from Water Resources Department, IDCO wrote to the Appellant on 20/09/2009 asking it to revise its requirement of land or relocate the project site. Despite that, IDCO accepted payment of Rs. 65.39 crores from Appellant vide receipt dt. 08/12/2010. MCL too issued provisional letter of assurance dated 11/08/2010 to the Appellant for the requirement of 4.219 million tonnes per annum of E/F grade Coal in the power project.

36. Vide letter dt. 30/11/2011, Appellant expressed its inability to shift the project to any other site.

37. The MoU dt. 09/06/2006 (as also the extensions granted to it) executed between Appellant & Govt. of Odisha expired on 31/12/2011 and the Govt. did not extend it.

38. Vide letter dt. 05/04/2012, the Appellant submitted detailed land records and other related documents after reducing the overall share of Ayacut affected land in the project and requested IDCO to initiate land acquisition process. On 21/04/2012, the State Pollution Control Board conveyed its consent to Appellant for establishing the Mega Thermal Power Project. Thereafter the Appellant, vide letter dt. 04/06/2012, requested the 1<sup>st</sup> respondent PGCIL to revise the



Commercial Operation Dated (CoD) for Unit 1<sup>st</sup> to 31/03/2015 and for Unit 2<sup>nd</sup> to 31/06/2015 and accordingly amend the Annexure 1 & 4 in the BPTA for L to A.

39. On 16/07/2012, the Department of Water Resources issued letter to the Appellant agreeing in-principle for establishment of the project in the irrigation command area of RRCS. Accordingly, the Appellant again wrote to Commissioner-cum-Secretary, Energy Department, Govt. of Odisha on 17/08/2012 to go ahead with the process for land acquisition.

40. Vide letters dt. 03/11/2012 and 29/04/2013, the Appellant again requested the State of Odisha to extend the validity of the MoU but in vain.

41. Finally, the Appellant issued Force Majeure notice dt. 25/06/2013 highlighting the issues hindering the execution of the project and sought to relinquish the LToA without any liability and also return of Bank Guarantee from PGCIL.

42. Even thereafter also, the Appellant wrote to the Govt. of Odisha on 27/06/2013 and 19/11/2013 to extend the validity of the MoU but did not get any response. It appears that a meeting was

held between the representatives of Appellant and PGCIL to discuss the LToA issue raised by Appellant in Force Majeure Notice dt. 25/06/2013 wherein the Appellant was advised to approach the Central Commission for relief in this regard.

43. In these facts and circumstances of the case, we are unable to comprehend as to what lead the commission to hold in the impugned order that the Appellant abandoned the project for commercial reasons. It is very clear that the Appellant was all along ready & willing to complete the project and did everything which it was required to do. The appellant not only incurred total expenditure of Rs. 118.79 crores but also obtained all the requisite clearances/approvals.

44. However, after approximately 3 years of the in principal approval granted to the Appellant for establishing the power project i.e. on 30/07/2009 it was informed about the overlapping of the project area under a “proposed” irrigation command area of the RRCS Ayacut area. This was much after the land acquisition process was initiated by IDCO. All necessary payments were made by the Appellant. Even the notifications u/s 4(1) & 4(11) of the Land Acquisition also had already been issued on 6/11/2007, 29/11/2008

& 11/12/2008. Thus, the process for land acquisition got stalled for no fault attributable to the Appellant.

45. Even though the Water Resources Department accorded clearance to the Appellant on 10/07/2012 for the power project in Ayacut area but meanwhile, the notifications under the Land Acquisition Act had already expired on 29/11/2010 and 11/12/2010 due to efflux of time. To add further to the woes of the Appellant, the Govt. did not come forward to renew/extend the MoU which had expired already on 31/12/2011, thereby denuding the IDCO and IPICO of authority to acquire the land for the project.

46. Thus the main reasons due to which the project could not be executed were (i) failure on the part of the State Govt. to acquire land for project before expiry of the notifications issued under sections 4(1) & 6(1) of the Land Acquisition Act and (ii) failure on the part of the State Govt. to extend/renew the MoU beyond 31/12/2011. Both these factors were undoubtedly beyond the control of the Appellant and therefore, constitute Force Majeure events contemplated and clause 9 of the BPTA/LTA.

47. Manifestly, the project could not take off due to Lack of co-ordination between the Governmental agencies and indifferent

attitude of the State Govt., as noted hereinabove. No inaction or lack of intent is attributable to the Appellant in this regard. The Appellant's impression that the project can not be commenced and completed was bonafide as well as well founded. Appellant was compelled to turn its head off the project on account of these Force Majeure events which were evidently beyond its control even though it had invested Rs. 118.79 crores on it.

48. The argument advanced on behalf of the 4<sup>th</sup> Respondent CTUIL that there was never an embargo on the Appellant to acquire land itself is not only irrational but also unconscionable. When the MOU dated 9<sup>th</sup> June, 2006 clearly made it an obligation upon the State Government to acquire the land required for the project through IDCO and place it at the disposal of the Appellant free from any encumbrances, there was no reason or occasion for the Appellant to itself initiate land acquisition process. It is the State Govt. which has failed to fulfil its obligations under the MOU for which the Appellant cannot be held responsible.

49. We find that the judgement of Delhi High Court in M/s Halliburton Offshore Services Inc. (supra) cited by the Learned Counsel for CTUIL does not advance its case at all. In the said

judgement, the court has referred to judgement of the Apex Court in Energy Watchdog Vs. CERC (2017)/4 SCC 80 in which the Apex Court has laid down the principles related to Force Majeure as under :

*“a) Force Majeure would operate as part of a contract as a contingency under section 32 of the Indian Contract Act 1872 (ICA’).*

*b) Independent of the contract sometimes, the doctrine of frustration could be invoked by a party as per Section 56, ICA.*

*c) The impossibility of performance under Section 56, ICA would include impracticability or uselessness keeping in mind the object of the contract.*

*d) If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement it can be said that the promisor finds it impossible to do the act which he had promised to do.*

*e) Express terms of a contract cannot be ignored on a vague plea of equity.*

*f) Risks associated with a contract would have to be borne by the parties.*

*g) Performance is not discharged simply if it becomes onerous between the parties.*

*h) Alteration of circumstances does not lead to frustration of a contract.*

*i) Courts cannot generally absolve performance of a contract either because it has become onerous or due to an unforeseen turn of events. Doctrine of frustration has to be applied narrowly.*

*j) A mere rise in cost or expense does not lead to frustration.*

*k) If there is an alternative mode of performance, the Force Majeure clause will not apply.*

*l) The terms of the contract, its matrix or context, the knowledge, expectation, assumptions and the nature of the supervening events have to be considered.*

*m) If the Contract inherently has risk associated with it, the doctrine of frustration is not to be likely invoked.*

*n) Unless there was a break in identity between the contract as envisioned originally and its performance in the altered circumstances, doctrine of frustration would not apply.”*

50. We are conscious of the settled position of law that a Force Majeure clause is to be interpreted narrowly and not broadly and the parties ought not to be excused from contractual obligations except in exceptional situations. There should be a ‘real justification’ which the Court would consider for involving the Force Majeure Clause. Where an untoward event or change in circumstances totally upsets the very foundation upon which the parties had entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do, thus creating an exceptional situation in which the Courts would be justified to involve the Force Majeure clause of the contract. [see principle (d) evolved by the Apex Court in the above noted judgement. ]

51. In the instant case also, the failure on the part of the State Govt. to acquire the land for the project before the expiry of the notices issued under Land Acquisition Act coupled with its failure to extend/renew the MOU beyond 31.12.2011 are the circumstances which were beyond the control of the Appellant and which upset the

very foundation of the MOU as the availability of land free from any encumbrances was the basic requirement for the project to take off. Failure on the part of the State Govt. to hand over the requisite chunk of land to the Appellant for the project made it impossible for the Appellant to start work on the project. In such a situation, the Tribunal would be justified in invoking the Force Majeure clause of the MOU.

52. Hence, we hold that the Appellant was constrained to relinquish the project and the LTA due to above noted Force Majeure events which were unforeseen and beyond its control and therefore, is not liable to any claim for any loss or damage whatever arising in pursuance to such relinquishment.

53. Learned Counsel for the CTUIL (Respondent No. 4) referred to Regulation 18 of the connectivity Regulations, 2009 issued by the Central Commission, to argue that even if the Appellant was prevented by any force majeure event from executing the project, it would still be liable to compensate CTUIL for the stranded capacity arising out of the relinquishment of LTA. We have noted the said argument of the Learned Counsel only to be rejected.



54. Regulation 18 of the Connectivity Regulations 2009 reads as follows :

**“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.*

**(b) Long-term customer who has not availed access rights for at least 12 (twelve) years-***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 12 (twelve) years of access rights:*

*Provided that such a customer shall submit 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;*

*Provided further that in case a customer submits an application for relinquishment of long-term access rights at any time at a notice period of less than one year, then such customer shall pay an amount equal to 66% of the estimated transmission charges (net present value) for the period falling short of a notice period of one (1) year, in addition to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of 12 (twelve) years of access rights.*

- (2) The discount rate that shall be applicable for computing the net present value as referred to in sub-clause (a) and (b) of clause (1) above shall be the discount rate to be used for bid evaluation in the Commission's Notification issued from time to time in accordance with the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees issued by the Ministry of Power.*
- (3) The compensation paid by the long-term customer for the stranded transmission capacity shall be used for reducing transmission charges payable by other long-term customers and medium-term customers in the year in which such compensation payment is due in the ratio of transmission charges payable for that year by such long-term customers and medium-term customers.”*

55. Evidently, the said Regulation 18 is applicable when the LTA customer relinquishes the LTA rights voluntarily and out of its wish without being affected by any force majeure events or the events beyond its control. It has no application where the LTA customer is compelled to relinquish its LTA rights due to the reasons which could not be foreseen and which were beyond its control. It is for this reason that clause 9 was put in the BPTA/LTA dated 07.06.2010 executed between the Appellant and PGCIL (predecessor of CTUIL) excusing a party affected by any Force Majeure event from liability to any claim for any loss or damage whatsoever arising out of failure to carry out the obligation under the agreement.

56. Further, we may note that as on 25.06.2013 when the Appellant issued Force Majeure notice, admittedly the work on 765 KV 2XS/C transmission line from Angul pooling station – Jharruguda pooling station, on which the Appellant was granted LTA, was yet to be commissioned and work on 2<sup>nd</sup> Angul – Jharruguda – Dharamjaigarh 765 KV D/C transmission line was yet to be awarded. 765 KV 2XS/C transmission line from Angul Pooling Station – Jharruguda Pooling station was commissioned on

04.04.2015 with a delay of about two years from its SCOD whereas the work on 2<sup>nd</sup> Angul – Jharrguda – Dharamjaigarh 765 KV D/C transmission line was awarded in the month of August, 2013 and was commissioned five years later i.e. on 01.12.2018. Thus, it does not lie in the month of CTUIL to say that as on 25.06.2013, there was any spare stranded capacity in the said transmission line. This fact also rules out the applicability of Regulation 18 of 2009 connectivity Regulations which pre supposes stranded capacity on account of relinquishment of LTA by a customer before expiry of full term of the LTA.

57. It is axiomatic that LTA granted to a generator can be put to use by the generating company only after start of operation of the generating station. Therefore, a generator cannot be made liable to pay transmission charges where the power project remains to be established due to some Force Majeure events. This Tribunal has already held in the PEL case (supra) and Himachal Sorang Case (supra) that in case of a Force Majeure event affecting the establishment and operation of a generating station, the generator cannot be held liable to pay Transmission charges to CTUIL.

58. Therefore, in the instant case also the Appellant is not liable to pay any transmission chargers or standard capacity charges to the CTUIL.

Conclusion :

59. Resultantly, the impugned order of the Commission is set aside. The Appeal is hereby allowed. We hold that the relinquishment of LTA under the BPTA dated 07.06.2010 by the Appellant was occasioned by the Force Majeure events and the reasons beyond its control and thus, without any liability as per clause 9 of the BPTA. The Appellant shall not be liable to pay any transmission charges to the CTUIL. Further CTUIL is directed to return the bank guarantee No. 00080100005091 dated 21.07.2010 for the amount of Rs.36 crores issued by Axis Bank Ltd. to the Appellant within two weeks from today.

Pronounced in the open court on this 20<sup>th</sup> day of March, 2025.

(Virender Bhat)  
Judicial Member

(Sandesh Kumar Sharma)  
Technical Member (Electricity)

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*REPORTABLE / NON-REPORTABLE*  
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