

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

APPEAL No. 95 OF 2020

Dated: 30.04.2025

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

IN THE MATTER OF:

Haldia Energy Limited

Through its Managing Director,
Barick Bhawan (6th Floor)
8, Chittaranjan Avenue,
Kolkata- 700072, West Bengal

...Appellant

VERSUS

1. West Bengal Electricity Regulatory Commission

Through its secretary,
Plot No. AH/5,
Premises No. MAR 16-1111,
Action Area- 1A, New Town, Rajarhat,
Kolkata- 700163, West Bengal

...Respondent

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| Counsel for the Appellant(s) | : | Mr. Sanjay Sen, Sr. Advocate Ms. Divya Chaturvedi Ms. Srishti Rai Mr. Snehal Kakrania Mr. Sanjeev K. Kapoor Mr. Saransh Shaw |
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| Counsel for the Respondent(s) | : | Mr. C.K. Rai |
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JUDGEMENT

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

1. The Appeal No. 95 of 2020 has been filed by the Appellant, Haldia Energy Limited (in short "HEL") challenging the order dated 08.01.2020 (in short "Impugned Order") in Case No. OA-267/17-18 passed by the West Bengal Electricity Regulatory Commission i.e. the Respondent (in short "WBERC" or "State Commission").

Parties:

2. The Appellant, Haldia Energy Limited, a company incorporated under the provisions of the Companies Act, 1956, is in the business of generation of electricity and has set up a 2 x 300 MW coal-based thermal power station at Baneswar Chak near Jhikurkali Village, Haldia, Midnapore (East), West Bengal.

3. The Respondent No. 1, WBERC is a statutory regulatory commission having powers to discharge functions enjoined upon it under Section 86 and other provisions of the Electricity Act, 2003 (in short "Act").

Factual Matrix of the Case

4. The Appellant submitted a Petition for investment approval of the Project before the WBERC vide Case No. WBERC/OA-100/10-11 on 17.08.2010, the project relates to the construction of a Transmission evacuation system, which is in the nature of a dedicated transmission line in terms of Section 2(16) of the

Act, consisting of 400 KV double circuit transmission line, to evacuate the power generated at its 2 x 300 MW thermal generation station.

5. As part of the project as it involved construction over and through the river, which is navigable, the Kolkata Port Trust Authority (in short "KoPT"), vide its letter dated 22.03.2011, had stipulated a span of 1500 metres between RC-1 and RC-2, leaving sufficient clearance for the navigable channel.

6. The Appellant vide work order dated 24.09.2011 awarded the project to Simplex Infrastructure Limited (in short "Simplex"), consequently, Simplex confirmed the hiring period of the Jack Up Barge (in short "JUB"), for 5 months commencing from 01.12.2011, accordingly, the JUB left Mundra, Gujarat on 14.12.2011 after initial preparatory works and statutory clearances and finally reached the Project site at Haldia on 11.02.2012.

7. It is important to note that a JUB is **a floating barge** fitted with long support legs that can be raised or lowered, the jack-up is maneuvered (self-propelled or by towing) into location with its legs up and the hull floating on the water, and upon arrival at the work location, the legs are jacked down onto the seafloor.

8. However, the KoPT issued a letter to Simplex on 21.02.2012, mandating that no construction is to commence at the site until KoPT provides clearance concerning the precise latitude and longitude coordinates of the pylon's position, thereafter, the KoPT revised its directives regarding the Project's construction, extending the horizontal clearance between the towers from 1500 meters center-to-center to 1572 meters, specifying the exact latitude and longitude coordinates for the pylons' locations, and thus, modifying the project specifications.

9. Additionally, the Appellant and KEC International Limited (in short "KEC") entered into an overall supply and services agreement dated 22.03.2012 for the supply and installation of 2 (two) nos. of river crossing towers and 2 (two) nos. of anchor towers.

10. The revised Merchant Shipping Notice 6/2012 was issued on 12.04.2012 imposing a seasonal navigation embargo, resulting in a delay in the release of the Jack Up Barge (JUB) due to a seasonal navigation embargo for non-motorized vessels imposed on the East and West coasts by the Directorate General of Shipping (in short "DGS"), however, the piling work and subsequent dismantling of specialized construction equipment were completed by the third week of May 2012.

11. The delay as faced by the Project executors, Simplex due to new stipulations issued by KoPT and the embargo issued by DGS was intimated to the Appellant by Simplex and it also communicated the additional cost on account of the abovementioned reasons which had resulted in overstay of JUB and additional work.

12. The Appellant also entered into a service contract and supply contract with IVRCL Limited (in short "IVRCL") for the provision of services relating to a land-line portion of the Project.

13. In the light of a change in project specifications, the Appellant and Simplex concerning the claim of Simplex for additional expenditure incurred due to a change in construction methodology at RC-1 and additional work executed but not covered in the tender, mutually decided the cost at Rs. 5.65 crores against the claim of Rs. 10.97 crore.

14. Further, the Simplex claimed Rs. 11.69 crores on account of the delay in retention of JUB, however, the Appellant negotiated the claims with Simplex and agreed to pay only Rs.4 crores out of the aforesaid amount.

15. Separately, IVRCL's work was also affected due to prolonged and extensive monsoons during the period of laying of foundation by IVRCL between June 2013 to August 2014, additionally, IVRCL Limited faced severe RoW issues coupled with intense legal litigation in various places.

16. The Appellant vide its letter dated 28.09.2013 submitted the auditor's certificate with respect to capital expenditure incurred and progress of the Project up to 31.03.2013 in terms of Regulation 2.8.5.2 of the WBERC (Terms and Conditions of Tariff) Regulations, 2011 (in short "Tariff Regulations"), as well as Project progress summary report as on 31.03.2013.

17. The Appellant, to ensure that the Project schedule would be on time and that construction was not hampered, placed an additional work order for Rs. 0.70 crores upon IVRCL for head-loading of various erection materials and tools/ equipment.

18. The State Commission, on 29.10.2013, directed the Appellant to provide details of expenditure incurred on the Project till date against the approved project cost and to restrict the overall expenditure to the approved project cost, in compliance, the Appellant informed the Commission about the Project's unique features and the resulting challenges in its execution, these challenges included modifications and alterations imposed by authorities, logistical issues, extended monsoon periods impacting on-site work, and difficulties in obtaining the necessary Right of Way (RoW), further, the Appellant also communicated

that it would provide detailed information on the expenditure incurred for the Project in due course.

19. Thereafter, the Appellant submitted details of expenditure incurred so far on the Project as well as the technological and other challenges faced by it on 11.12.2013, in reply, the State Commission vide letter dated 12.12.2013 directed the Appellant to furnish, *inter-alia*:

- (i) cost centre-wise expenditure incurred;
- (ii) target vs. achieved status for major Project activities; and
- (iii) causes of delay, remedial action taken, and revised dates for Project activities.

20. Accordingly, the Appellant furnished its point-wise reply on 07.02.2014 to the letter dated 12.12.2013 issued by the WBERC *inter-alia* with a revised estimate of project cost and the Appellant submitted a petition bearing Case No. OA-100/10-11 for approval of revision in project cost amounting to Rs. 573.10 crores in terms of Regulation 2.8.2.3 of the Tariff Regulations along with the Auditor's certificate dated 20.02.2014.

21. Thereafter the State Commission vide a letter dated 24.03.2014 sought additional information on the petition for escalation of project cost, to which the Appellant responded vide its letter dated 17.04.2014, subsequently, the State Commission directed the Appellant to publish a gist of its Project cost escalation petition, which was complied with by the Appellant and published the gist of the Project cost escalation petition, as approved by the State Commission in leading newspapers, with the last date for submission of suggestions and objections being 16.06.2014.

22. The Appellant submitted that due to the onset of heavy monsoon between July 2014 and August 2014, the temporary roads and platforms being used by KEC were washed away twice and each time the road had to be remade for taking up stringing immediately upon getting permission from KoPT, further, due to KEC encountering difficulties in constructing the approach road, which was washed away twice, the Appellant issued additional work orders to KEC for the construction of a temporary approach road, inter-alia, the Appellant agreed to cover 50% of the additional cost, amounting to Rs. 0.34 crores.

23. The Appellant submitted the auditors' certificate concerning capital expenditure incurred up to 31.03.2014 as well as the Project progress report as of 31.03.2014 to the State Commission on 29.09.2014.

24. The Project finally achieved commercial operation on 28.01.2015 i.e. it was considered commercially operating on the commercial operational date of 1st unit of the 2 x 300 MW project.

25. The WBERC vide its order dated 29.01.2016 in Case No. OA-100/10-11, in respect of the petition submitted by the Appellant for approval of revised project cost for the amount of Rs. 573.10 crores noted that the Appellant is required to submit the final project cost as per Regulation 2.8.5.1 of the Tariff Regulations.

26. Further, the State Commission vide order dated 29.01.2016, issued a tariff order in Case No. TP-63/14-15 concerning the Appellant's tariff application dated 15.05.2014, for the Project's tariff determination for the years 2014-15, 2015-16, and 2016-17 in accordance with the Tariff Regulations, the State Commission approved the tariff for the Project, subject to an Annual

Performance Review and considering 95% of the project cost of Rs. 573.10 crores, following a preliminary prudence check as per the Tariff Regulations.

27. Subsequently, the Appellant filed its petition before the State Commission as per the order dated 29.01.2016 for taking on record requisite documents in accordance with Regulation 2.8.5.1 of the Tariff Regulations and for approval of final project cost for an amount of Rs. 594.80 crores in respect of the Project, along with Project completion report dated 25.01.2018.

28. Thereafter, the State Commission on 08.01.2020 passed the Impugned Order approving the final project cost for the Project only to the extent of Rs. 540.36 crores and disallowed certain costs and expenditures for the construction of the Project.

29. Being aggrieved by the impugned order in Case No. OA-267/17-18 passed on 08.01.2020 by the State Commission, the Appellant has preferred the present appeal.

30. The Appellant submitted the Technical Details of the project, as under:

- (i) Starting point: Generating station switchyard of 2 x 300 MW thermal generating station at Haldia.
- (ii) Termination point: 400 KV Subhasgram substation of Power Grid Corporation of India Limited (PGCIL).
- (iii) Line length: 89 kilometers (approx.) Landline portion: 86 kilometers (approx.) River-crossing portion: 3 kilometers (approx.) Conductors: ACSR twin moose.
- (iv) Voltage: 400 KV alternating current.
- (v) Configuration: Double circuit transmission line.

31. The Appellant entered into the following contracts through a competitive bidding process to commission the Project:

- (i) a Work Order dated 24.09.2011 with Simplex Infrastructure Ltd. (Simplex) for river crossing and anchor tower foundation work (Simplex WO)
- (ii) an Overall Supply & Services Contract dated 22.03.2012 with KEC International Limited (KEC) for river crossing towers (KEC Contract);
- (iii) Supply and Service Contracts dated 28.07.2012 with IVRCL Limited (IVRCL) for the landline portion of the Project (IVRCL Contract).

32. The Appellant submitted that this Project is unique and the first of its kind in India, involving the crossing of the river Hooghly (which is a wide, navigable river with high tidal variations) in a single span of 1,572 meters, with a clear gap of 100 meters above the river datum at the center of the navigation channel, to allow sufficient clearance above the tallest point of ships, the long crossing is possible because of the two river-crossing towers which measure 236 meters in height and weigh 1,800 tonnes, making these two towers the tallest and heaviest power transmission towers in India.

33. The two river crossing towers are more than 52% taller and with 47% longer span than the previous tallest power transmission tower in India (the Rihand Lake crossing tower with 155 meters height and span of 1070 meters), the unique features of the Project and enormity of dimensions were a consequence of the directives imposed by authorities such as the KoPT.

34. The Project establishes an evacuation line for the 2x300 MW power station of the Appellant by creating an independent and reliable power flow

path between the banks of river Hooghly and also establishes linkage of the power station with the National Grid, despite this, the Project was executed in record time compared to contemporaneous projects of similar size, as per Schedule – 9C to the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2011 (Tariff Regulations), the duration of construction of the first unit of a coal-fired thermal power station below 500 MW is required to be 42 months, thus, the Project was required to be completed within a strict timeline, being a dedicated transmission line for evacuation of power from the generating station of the Appellant, construction of the first unit of the said generating station was completed in around 38 months, with the Project also completed synchronously, within that stringent timeline.

35. The State Commission has noted the considerable importance of the Project in several instances, including in para 6.2 of the Impugned Order as follows:

"The criticality of this project is enhanced because it forms a major path for import of power for the capital city."

36. Since the construction of the Project involved significant technological issues and challenges, the Appellant availed of the expertise of PGCIL, who were appointed as consultants for the Project, and a number of other consultants were also involved in the construction of the Project.

37. The Appellant submitted that it had prepared the budgetary cost estimate for the Project with inputs from PGCIL, and accordingly, submitted a petition for investment approval of the Project to the State Commission on 17.08.2010, in accordance with the prevailing Tariff Regulations, the State Commission approved the investment proposal of Rs. 310.20 crores

(including IDC) for the construction of the Project on 11.03.2011, in Case No. WBERC/OA-100/10-11.

38. The Appellant in the present Appeal has sought setting aside of the Impugned Order to the extent the State Commission has disallowed costs and expenditures for the construction of the Project under the following heads:

- (i) Rs. 4.00 crores in respect of the retention of the jack-up barge (JUB);
- (ii) Rs. 5.65 crores in respect of additional work on river crossing tower foundation;
- (iii) Rs. 0.75 crore in respect of tax variation;
- (iv) Rs. 27.63 crores in respect of right of way (RoW) issues;
- (v) Rs. 0.70 crore in respect of head-loading expenses;
- (vi) Rs. 0.34 crore in respect of the construction of the approach road; and
- (vii) Rs.6.61 crores in interest during construction (IDC) proportionate to the aforesaid disallowed claims.

Submissions

39. The submissions of the Appellant and the State Commission are noted hereafter issue-wise and dealt with accordingly, the State Commission made common submissions for issues (i) and (ii), accordingly, the two are taken together.

Issue (i)- Rs. 4.00 crores in respect of retention of jack-up barge (JUB)

and

Issue (ii)- Rs. 5.65 crores in respect of additional work on river crossing tower foundation

40. The Appellant, in respect to issue (i), submitted that:

i) The Project involved the construction of two river crossing towers (RC-1 and RC-2) and two anchor towers, and in order to construct the Project, the Appellant had to get various clearances from government/ statutory authorities including KoPT regarding the height of the RC towers and the distance between RC-1 and RC-2.

ii) As already noted in the factual matrix, KoPT, vide letter dated 22.03.2011 had stipulated a span of 1500 meters between RC-1 and RC-2 and a vertical clearance of 100 meters from the river datum at the center of the navigable channel, in addition also noted that Appellant will be required to continue taking approval of KoPT during construction.

iii) On 24.09.2011, the Appellant issued Simplex's work order and finalized the steel pile detail in order to procure the steel pile segments, thereafter, Simplex Infrastructure Ltd. hired a JUB for the purpose of driving piles for the river crossing tower, the JUB reached the Project site on 11.02.2012.

iv) However, after the JUB arrived on site, KoPT issued another directive on 21.02.2012 stating that no construction could commence until clearance was obtained for the exact position (latitude and longitude) of the pylon, subsequently, KoPT issued a further directive on 12.03.2012 stating that the horizontal clearance between the towers should be increased from 1500 meters to 1572 meters and that no

permanent structure of RC-1 should protrude inside the river.

v) Due to these directives, the JUB could not be used for pile driving at RC-1 and could only be used for RC-2. The piling work was completed on 25.04.2012 and subsequent dismantling of specialized construction equipment was completed by the third week of May 2012.

vi) While the clearances from KoPT had to be taken throughout the construction process, once a clearance/stipulation had been provided by KoPT, neither the contractors nor the Appellant could predict that such stipulation would later be modified by KoPT, therefore, the directive dated 12.03.2012 which modified the stipulation regarding horizontal clearance and placement of RC-1, was not foreseeable.

vii) Additionally, DGS issued a notice whereby it was directed that non-motorized vessels on the East and West Coast cannot be moved/transported due to seasonal navigation embargo, thus, the JUB was kept idle at the site until August-September 2012, until there was a suitable window for safe towing for the JUB to reach its destination.

viii) As a result of aforesaid events, Simplex was required to pay an extra amount of Rs. 11.69 crores in total for leasing the JUB for an extended period, out of the aforesaid amount, the Appellant only agreed to pay Rs. 4 crores under prudently negotiating with Simplex.

41. The Appellant argued that the State Commission disallowed Rs. 4 crores despite holding that the over-staying of the JUB was due to a change in law in the Impugned Order, the said finding of State Commission has also been

reiterated in the Reply dated 23.09.2021 filed by the State Commission before this Tribunal, the relevant findings are reproduced hereunder:

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*ii) Regarding overstayed charges at Falta & Kukrahati and increase in material price as well as the retention of the jack-up barge, **it is noted that the same is a change in law.** The contract price is a firm price and can be varied only on variation in quantity or tax. **However,** the activities were included in the scope of work and hence additional expenses on this head cannot be considered to be allowed;*

.....”

42. The Appellant contended that the State Commission cannot now seek to improve upon its order or amend the same, by submitting to this Tribunal that the State Commission in the Impugned Order has inadvertently agreed with the Appellant's contention that the aforesaid event is a Change in Law event, when it meant to hold that the aforesaid events are “not” change in law event.

43. It is a settled principle of law that the validity of an order must be judged by the reasons mentioned therein and cannot be supplemented by fresh findings as well as reasons subsequently given by the concerned authority making the order of what it meant, or of what was in its mind, or what it intended to do.

44. The public orders made by public authorities must be construed objectively with reference to the language used therein as are meant to have public effect and affect the conduct of those to whom they are addressed, reliance is placed on the judgment of the Supreme Court in **Mohinder Singh**

Gill vs. Chief Election Commissioner, New Delhi, (1978) 1 SCC 405 (Para 8).

45. The Appellant in this regard has further submitted that the submission of the State Commission is erroneous since:

- (i) The usage of the term “however” in the sentence subsequent to the State Commission’s decision to hold the events as Change in Law establishes that the State Commission, in fact, had agreed that the events referred to by the Appellant are Change in Law;
- (ii) Any modification of the Impugned Order at this belated stage by the State Commission will amount to reviewing its order before this Tribunal in an Appeal filed by the Appellant, which is not permissible; and
- (iii) The State Commission has reiterated the position regarding claimed events being Change in Law in its Reply dated 23.09.2021 filed in the present Appeal as well at Page 13 as well.

46. The Appellant further, submitted that the notifications by KoPT are covered within the definition of Change in Law under the Simplex Work Order and that expenses incurred on account of Change in Law/uncontrollable expenses are to be allowed as pass-through, Clause 1.1 of the General Conditions of Contract (GCC) in the work order includes the enactment of any new directives or modification of an existing directive having a material effect on the Contract/works under the definition of change in law event.

47. The Appellant argued that "Directive" is defined widely under Clause 1.1 of the GCC, further, in terms of Clause 6.3 read with Clause 24 of the GCC, the Appellant was required to pay the additional amount.

48. Further, submitted that expenses incurred on account of Change in Law/uncontrollable expenses are to be allowed as pass-through under the Tariff Regulations, and in this regard, the Appellant relied on the following regulations:

- (i) Regulations 1.2.1 (cxiii) & 1.2.1 (iv) of the Tariff Regulations, which provides for pass-through of costs due to uncontrollable factors, force majeure, and change in law in tariff;
- (ii) Regulations 2.5.5 of the Tariff Regulations, which lays down the provisions regarding controllable and uncontrollable factors;
- (iii) Regulation 5.2.1 of the Tariff Regulations, which provides for pass-through of expenditure on account of Change in law events;
- (iv) Regulation 2.8.5.1 of the Tariff Regulations, in terms of which only on submission of certain reports, would the final project cost of the Project be determined; and
- (v) Regulation 5.2 of the Tariff Regulations, which lays down the provisions regarding the Additional Capital expenditure incurred.

49. The Appellant also submitted that the State Commission failed to consider supporting documents submitted by the Appellant, including KoPT directives, DGS notice, TCE Report, Bill of Quantities (BoQ) reflecting the amount in terms of work done by Simplex, and a letter dated 09.04.2013 issued by the Appellant to Simplex by way of which Appellant only agreed to pay Rs. 4 crores out of the total amount of Rs. 11.69 crores.

50. In response to the State Commission's submission that the Appellant failed to bring on record the letters dated 29.02.2012 and 05.03.2012, which were referred to in the letter dated 12.03.2012 issued by KoPT, the Appellant has submitted that the State Commission neither during the proceedings

leading up to passing of the Impugned Order nor in pleadings filed before this Tribunal in the present Appeal had sought copies of the aforesaid letters and therefore, such letters were not furnished by the Appellant earlier, the Appellant has also submitted that the contents of the aforesaid letter do not have any material bearing on the claims of the Appellant, in any event, the Appellant has brought on record the aforesaid letters dated 29.02.2012 and 05.03.2012 vide its Affidavit dated ---, pursuant to seeking leave of this Tribunal during the hearing held on 23.04.2024.

51. The Appellant has also objected to the State Commission's submission that the Letter dated 22.03.2011 issued by KoPT notes that the Appellant will take permission of KoPT at every stage of construction and the entire work is to be carried out in close coordination with KoPT, therefore, the subsequent letter dated 12.03.2012 issued by the KoPT cannot be treated as a Change in Law event, further, submitted that while the clearances from KoPT had to be taken throughout the construction process and the same had been duly followed, once a clearance/stipulation had been provided by KoPT, neither the contractors nor the Appellant could predict that such stipulation would later be modified by KoPT to such a large extent that it would necessitate significant reengineering, changes in dimension of RC towers and substantial cost implications, hence, any subsequent directive leading to substantial change in the works ought to be allowed as Change in Law in terms of the State Commission's Regulations

52. The Appellant also argued that the State Commission erroneously held that the work was within the scope of work of the contract entered into between the Appellant and Simplex, even though the concerned contract allows for "change in law" relief and the State Commission has held that the events referred to by the Appellant constitute Change in Law.

53. The Appellant, in respect to issue (ii), submitted that:

i) The change of specifications in compliance with the directives of KoPT vide the aforesaid letter dated 12.03.2012, RC-1 was directed to be entirely on land at the Kukrahati bank and the methodology originally envisaged to use the JUB for all 4 legs of RC-1 by dredging to the extent required could not be done anymore, resulting into cost implications of mobilizing additional higher capacity cranes, vibro hammers, and piling rigs for driving the piles on load at RC-1 at Kukrahati end.

ii) The KoPT letter dated 12.03.2012 is covered under Change in Law event and brought on record the Letter dated 26.10.2012 issued by the Appellant to Simplex, regarding approval of a claim of Rs. 5.65 crores against a claim of Rs. 10.97 crores raised by Simplex for compensation of additional expenditure incurred due to change in construction methodology at RC-1 and additional work executed, but not covered in the tender.

iii) A detailed break-up of the costs incurred by Simplex on account of additional work on the river foundation was placed on record before the State Commission, however, the State Commission ignored several components relating to additional work on the river foundation, even though expenses incurred on account of Change in Law / uncontrollable expenses are to be allowed as pass-through under the Tariff Regulations.

iv) In fact, the State Commission has allowed the increase in cost of material required for undertaking the additional scope of work on the

river foundation, but disallowed the expenses towards carrying out such work, it cannot be logical as to how the material costs due to the shifting of RC-1 and increase in foundation size have been allowed, but the cost increase due to change in methodology has been disallowed by the State Commission, reliance has been placed on the judgment dated 07.10.2021 passed by the Supreme Court in **Civil Appeal Nos. 2491-2492 of 2021: Union of India & Ors. vs. N Murugesan** to support the argument that the State Commission cannot blow hot and cold at the same time.

54. Countering the submissions of the Appellant, the State Commission submitted that:

- i. The issue related to Simplex is dealt with by the Commission on pages 89-91 vol-1, the cost and expenses related to Simplex as per LOA was Rs. 107.25 Crs., which was subsequently enhanced and admitted in the impugned order as Rs. 133.45 Crs.
- ii. Contract Price was firm price can be varied only on variation in quantity or tax and the Activities for which the additional claims were made already included in the Scope of work order issued to Simplex.
- iii. The relevant clauses of the Work Order dated 24.09.2011 entered upon by Appellant and the Simplex is reproduced hereunder:-

"4 SCOPE OF WORK:

The Contractor's obligation includes necessary survey, supply and procurement of all materials and equipment including supply of construction materials, transportation to Site, quality control, unloading, storage of all materials in safe custody, handling, supply of labour (skilled and un-skilled), necessary insurance, associated civil works, arranging of all Contractor's Equipment as

may be required for execution of the Works, conducting necessary tests and all activities necessary for construction of foundation for 02 nos. main river crossing towers, 02 nos. onshore anchor towers and protection work to the main offshore tower at Raichak Side as per the Bill of Quantity (BOQ) as detailed in Annexure-1. Works shall be carried out as per the Plot plan released for construction drawings and Tender Documents. The broad scope of work includes but not limited to the following:

- i. Construction of load out jetty including necessary approach road, if required as per construction methodology of the contractor
- ii. -----,
- iii. i-----
- iv. **Complete mobilization and demobilization of necessary equipment including the Jack up barge and cranes in consonance with the Project Schedule.-----xx-----**

“ 5. CONTRACT PRICE

Except as otherwise provided in the WO, the Contract Price for the entire obligations of the Contractor under this WO will be Rs 107,25,00,000.00 (Rupees One Hundred and Seven Crore and Twenty-Five Lakh Only). The Contract Price has been arrived at on the basis of your firm quoted rates for probable items with estimated quantities as detailed in the BOQ. The estimated quantities are subject to vary on the basis of final design by HEL appointed consultant (s) and as approved by HEL and consequently the Contract Price shall stand adjusted accordingly. Prior permission of HEL has to be taken if actual

quantity exceeds the estimated quantities.

The quoted rates shall remain firm during the tenure of this Contract. Quoted rates are Inclusive of all applicable taxes, duties and levies including service tax, prevailing on the date of submission of final offer dated 16th August, 2011. Any change in rate of taxes, duties and levies and/or impact of introduction/withdrawal of taxes, duties and levies subsequent to that date will be to the account of HEL.”

55. The State Commission placed reliance on the judgement of the Supreme Court in **Satyanarayan Construction Company vs. Union of India & Ors. (2011) 15 SCC 101**, wherein the Court has held that once rate has been fixed for work in the contract the contractor is not entitled to claim additional amount merely because he had spent more for carrying out such work, para 11 of the Judgment is reproduced hereunder:-

*“ 11. Thus, as per the contract, the contractor was to be paid for cutting the earth and sectioning to profile, etc. @ Rs 110 per cubic metre. There may be some merit in the contention of Mr Tandale that the contractor was required to spend huge amount on the rock blasting work but, **in our view, once the rate had been fixed in the contract for a particular work, the contractor was not entitled to claim additional amount merely because he had to spend more for carrying out such work.** The whole exercise undertaken by the arbitrator in determining the rate for the work at Serial No. 3 of Schedule A was beyond his competence and authority. It was not open to the arbitrator to rewrite the terms of the contract and award the contractor a higher rate for the work for which rate was already fixed in the contract. The arbitrator having*

exceeded his authority and power, the High Court cannot be said to have committed any error in upsetting the award passed by the arbitrator with regard to Claim 4.”

56. Further, submitted that in the approval letter dated 22.3.2011 vide which KOPT has given the approval for erection of Pylon in the River Hooghly, it was clearly mentioned that the Appellant has to take the approval of KoPT **at every stage of construction and the entire work is to be carried out in close co-ordination with the KoPT**, Appellant would require to submit its daily programme of work in advance to KopT Office for approval, hence it is submitted that the approval of KopT at every stage was a known fact to the Appellant and therefore the letter dated 21.02.2012 and 12.03.2012 cannot be termed as change in law event, also added that in the letter dated 21.2.2012 and 12.3.2012 the KopT only acted as per its earlier directions.

57. The State Commission contended that in the letter dated 12.3.2012 there is a reference of Letter no. HEL 863 dated 29.2.2012 and HEL 870 dated 5.3.2012, the Appellant did not file the said two letters before the Commission and filed before Tribunal only today i.e. 06.05.2024, the perusal of the same would show that it was not the unilateral decision of the KoPT to increase the distance to 1572 metres but out of joint discussion between the Appellant and KoPT the decision was taken.

58. Countering the submission of the Appellant, the State Commission submitted that the Commission has not sought for the copy of the letters dated 29.2.2012 and 5.3.2012, it is a trite law that burden lies on the person to establish his assertion, further, with respect to para 8 of the Supplementary written submission dated 23.4.24 filed by the Appellant that “**not**” should not be read between “**is**” and “**a change in law**”, it is most respectfully submitted that

the “**not**” was missed by way of typographical error, else *the statement para (ii) second line* would raise a *latent ambiguity as per section 95 of the Evidence Act. –A latent ambiguity arises when the words of the instruments are clear but their application to circumstances is doubtful,* the paragraph should be read in totality and as whole and had the commission held the letters as change in law then there was no occasion for the commission to further get in to the scope of work and firm contract price and held that the cost cannot be allowed.

59. Further, submitted that the Tariff proceedings are admittedly *inquisitorial proceeding and not adversarial*, the Appellant failed to make out a case for change in law even before this Tribunal as to how the KoPT letter dated 12.3.12 and DGS Letter dated 12.4.2012 be termed as Change in law when it was known beforehand that they were the ultimate authority and their approvals would be required at every stage of construction/erection, the Letter dated 12.3.12 cannot be interpreted in absence of further two letters mentioned in it, the practice that in the similar circumstances approval of KoPT is mandatory was prevalent since prior to the petitioner’s undertaking the work.

60. The Judgment of the Supreme Court in **Mohinder Singh Gill vs Chief Election Commissioner (1978)1SCC 405 (para 8)** is not applicable to the facts and circumstances of the present case as Commission is not supplementing any fresh reasons or findings but only responding to the submissions raised by the Appellant in the interest of consumers at large, a perusal of the letter dated 26.10.2012 would show that additional claims were made **with respect to overstay charges of cranes and mobilization and de-mobilization of necessary equipments**, it is reiterated that as per Work Order issued to Simplex the agreed tender prices were inclusive of

complete mobilization and de- mobilization of necessary equipments for the erection of Tower hence this cost claimed were already within the scope of work. It is further important to mention here that original Cost as per LOA was 107.25 crores which already got increased to Rs. 133.45 Crs. and appellant is not entitled to further additional charges as claimed in its letter dated 26/10/2012.

Our Observation and Conclusion

61. It cannot be disputed that the directives issued by the KoPT and the DGS have to be complied with mandatorily, in fact, such directives after the awarding of a contract by the Appellant are certainly resulting in a change in the scope and technical specifications of the project and, therefore, have cost implications.

62. The contract awarded to Simplex and other contractors has significantly changed/ modified resulting in a change in financial conditions.

63. The State Commission has rightly acknowledged the directives as a change in law, accordingly, the impact of the change in law should have been determined and made pass through.

64. It is a settled principle of law that the impact of change in law has to be considered and the affected party has to be restituted as if a change in law has not occurred, any Government instrumentality which mandatorily has to be complied with is covered under change in law.

65. The submission of the State Commission that the Contract Price was firm can be varied only on variation in quantity or tax is unjust and

unsatisfactory, the directives issued through Govt. instrumentalities have effected change in the scope of the works, therefore, any cost implication has to account for, the reliance on the judgment of the Supreme Court in ***Satyanarayan Construction Company vs. Union of India & Ors. (2011) 15 SCC 101***, is completely misplaced as the issue herein has resulted in material change in the scope of the project, whereas in the said judgment, there is no material change, in fact, in the present case there is an impact of change in law whereas there was no change in law occurrence in the case covered by the said judgment.

66. We also decline to accept the submission of the State Commission that the Appellant was well aware that it has to obtain approval **at every stage of construction and the entire work is to be carried out in close coordination with the KoPT**, therefore the letter dated 21.02.2012 and 12.03.2012 cannot be termed as a change in law event, such submissions are misconceived as a change in approvals or change in specifications affecting change in financial conditions after the award of contracts are events of change in law, no party can be aware of or can include the risk as part of the contract for such changes in advance, it is only once such conditions are imposed then only impact can be ascertained.

67. Further, an increase in distance to 1572 meters is a change in technical specification and has to be mandatorily complied with, even if it is after joint consultation as the mandate is by KoPT only, the submission of the State Commission on this count is also rejected.

68. The submission of the State Commission that the word “not” was missed due to a typographical error, when asked, the State Commission replied that they decided to get it corrected at the appellate stage instead of reviewing it on

their own. The State Commission has observed ***“Regarding overstayed charges at Falta & Kukrahati and increase in material price as well as the retention of jack-up barge, it is noted that the same is a change in law.”***

69. We find the above argument unsatisfactorily and unacceptable, the Appellant has rightly submitted that the State Commission cannot review its decision at the appellate stage.

70. We are also not agreeing to the submission of the State Commission that the Appellant has failed to make out a case for change in law before this Tribunal, stating that the KoPT letter dated 12.3.12 and DGS Letter dated 12.4.2012 be termed as Change in law.

71. As already observed, such letters are, undisputedly, change in law events, as also observed by the State Commission in the Impugned Order, the failure to consider the change in law event after observing it, deserves to be rejected.

72. The counter to the reliance of the Appellant on the Judgment of the Supreme Court in **Mohinder Singh Gill vs Chief Election Commissioner (1978)1SCC 405 (para 8)** that the same does not apply to the facts and circumstances of the present case as Commission is not supplementing any fresh reasons or findings but only responding to the submissions raised by the Appellant in the interest of consumers at large, is also misplaced, the Commission has certainly changed its reasoning by stating the it has wrongly worded the Impugned Order and “not” should be included as part of the order.

73. On the other side, the fact remains that initially, KoPT, vide letter dated 22.03.2011 had stipulated a span of 1500 meters between RC-1 and RC-2 and a vertical clearance of 100 meters from river datum at the center of the navigable channel, based on which the Work Order was placed, however, after the award of contract, the Appellant received a letter dated 12.03.2012 from KoPT directing the distance to be increased to 1572 meters.

74. In fact, such a change cannot be predicted or considered as part of a contract by either the contractors or the Appellant, such changes are never foreseeable.

75. Also, considering the fact regarding overstaying of JUB, the State Commission has held as under:

*“Regarding overstaya charges at Falta & Kukrahati and increase in material price as well as the retention of jack-up barge, **it is noted that the same is a change in law.** The contract price is a firm price and can be varied only on variation in quantity or tax. **However, the activities were included in the scope of work and hence additional expenses on this head cannot be considered to be allowed;**”*

76. We agree with the contention of the Appellant that the State Commission cannot now seek to improve upon its order or amend the same, by submitting to this Tribunal that the State Commission in the Impugned Order inadvertently agreed with the Appellant’s contention that the said event is a Change in Law event, when it meant to hold that the said events are “not” change in law event, also, the word “However” used therein clarifies that the State Commission has specifically ruled it a change in law, and, there is no typographical error, the

submission of the State Commission that there is typographical error is misleading, and has to be rejected with strong words.

77. Further, it is a settled principle of law that the validity of an order must be judged by the reasons mentioned therein and cannot be supplemented by fresh findings as well as reasons subsequently given by the concerned authority making the order of what it meant, or of what was in its mind, or what it intended to do.

78. The Appellant further, submitted that the notifications by KoPT are covered within the definition of Change in Law under the Simplex Work Order and that expenses incurred on account of Change in Law/uncontrollable expenses are to be allowed as pass-through, Clause 1.1 of the General Conditions of Contract (GCC) in the work order includes the enactment of any new directives or modification of an existing directive having a material effect on the Contract/works under the definition of change in law event.

79. The Appellant also argued that "Directive" is defined widely under Clause 1.1 of the GCC, further, in terms of Clause 6.3 read with Clause 24 of the GCC, the Appellant was required to pay the additional amount.

80. We are satisfied that the Appeal on issue (i) & (ii) has merit and therefore, is concluded in favour of the Appellant.

Issue (iii)- Rs. 0.75 crore in respect of tax variation;

81. The Appellant submitted that at the time of issuance of Simplex Work Order on 24.09.2011, the effective rate in respect of service tax was 10.30%, however, with effect from 01.04.2012, the service tax rate was revised to

12.36%, which led to an increase in the cost of the items and services procured by Simplex, however, the State Commission has erred in not considering its own observation in the Impugned Order, where it had noted that any variation in tax is to be allowed, instead, the State Commission has proceeded on an erroneous footing that the claim of the Appellant relating to expenditure for tax variations under Simplex WO is not supported with required documents and is hence not considered.

82. The Appellant also argued that Regulation 2.8.5.3 of the Tariff Regulations categorically lays down that any deviation or variation in the contracts shall be brought to the State Commission's attention via third-party certification by a reputed engineering firm not involved in the execution of the package from any side, further, in terms of Clause 5 of the Simplex Work Order, any change in rates of taxes, duties, etc. subsequent, to 16.08.2011 is to be on account of the Appellant.

83. The Appellant contended that it had brought several documents on record before the State Commission in support of its claim, which have been ignored by it, these include the Independent Auditors' Report dated 24.01.2018, TCE Project Completion Report dated 25.01.2018, a statement showing completed BOQ, and a No Dues Certificate, the BOQ submitted above clearly establishes that an amount of Rs. 0.75 crore was incurred by Simplex due to tax variation and the No Dues Certificate establishes that such amount was paid by the Appellant to Simplex.

84. Therefore, the Appellant pleaded that the State Commission has failed to adhere to established principles of prudence check while disallowing the expenditure for tax variations in Simplex Work Order, further, argued that such expenditure was due to a change in tax rates and was thus beyond the control

of the Appellant and in terms of the Tariff Regulations, such an expense on account of uncontrollable expenses ought to have been allowed by the State Commission.

85. However, the State Commission argued that the State Commission in the impugned order has held that- -- “iii) *As far as impact on variation of tax and other expenses are concerned, the claims are not supported with required documents and hence not considered-----*”, however, the Appellant during the hearing and also by its written submission stated that all supporting documents related to tax variation has been filed before the Commission, in view of above it is submitted that the Project Completion Report dated 25.01.2018, a report from M/S Tata Consulting Engineers, and the Statement showing completed BOQ as referred at annexure to such report provided total BOQ for which a cost of Rs 153,32,59,031/- has been reported, such BOQ had an item under the head of “Tax Variation” for Rs 75,00,000/-, no information was furnished by HEL as regards the original tax rate and amount, the variation in rates/slabs etc, the Govt notification supporting such tax variation and other supporting documents.

86. The State Commission also argued that the Appellant has tried to justify the payment taking plea of No Dues certificate issued by SIMPLEX wherein SIMPLEX has acknowledged receipt of total amount of Rs 153,32,59,031/- as reported in BOQ, however, No Dues certificate has been placed by the Appellant, also, mere acknowledgement of the BOQ Price amount by M/S SIMPLEX as a whole never completes due diligence of the head of “Tax Variation” towards prudence check of such item before according investment approval and consequent pass through in tariff with fixed cost impact throughout the operating life of the Transmission Asset of the Appellant which is ultimately to be borne by consumers of the concerned distribution utility,

hence the fact remains that the Appellant never submitted the requisite documents to carry out regulatory prudence check essential before according investment approval with long term tariff impact to be borne by consumers.

Our Observation and Conclusion

87. There is no dispute that the Appellant is entitled to get relief against impact on variation of tax and other expenses, however, the State Commission rejected the claim of the Appellant citing that “***the claims are not supported with required documents and hence not considered***”.

88. It is a settled position of law that an appeal is a continuation of the proceedings of the original court, ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact, the first appeal is a valuable right of the Appellant and therein all questions of fact and law decided by the trial court are open for re-consideration, therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons, the court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties.

89. Therefore, it is important to note whether there is a service tax revision as claimed by the Appellant and whether necessary documents/ certificates are placed on record.

90. The Appellant claimed that it has placed on record the Independent Auditors' Report dated 24.01.2018, TCE Project Completion Report dated 25.01.2018, a statement showing completed BOQ, and a No Dues Certificate, wherein the BOQ submitted above clearly establishes that an amount of Rs.

0.75 crore was incurred by Simplex due to tax variation and the No Dues Certificate establishes that such amount was paid by the Appellant to Simplex.

91. On examination of documents, it is seen that Annexure-15 (BoQ) of the Project Completion Report, indicates the tax variation component and is included in the final cost of Rs. 153,32,59,031/- as claimed by SIMPLEX and paid by the Appellant, however, further details as the earlier service tax considered and the revise service tax as notified by the Government have not been placed for examination.

92. There is no reason for us to doubt the submissions made by the Appellant that there is actual tax variation as claimed also, in fact, any variation in tax is carried out only through government notifications, therefore, the matter needs to be re-examined by the State Commission after obtaining the relevant documents from the Appellant.

93. In the light of the above, the matter is remanded to the State Commission to re-examine the claim, the Appeal is allowed to this limited extent on Issue-(iii).

Issue (iv)- Rs. 27.63 crores in respect of right of way (RoW) issues

94. The Appellant submitted that:

(i) The Appellant submitted that the RoW issues in the form of severe resistance from the local community coupled with intense legal litigation were a significant challenge during the construction of the Project through the land portion, which was not envisaged before starting the

job and which resulted in work stoppage on several occasions from June 2013 till August 2014 and to avoid rescheduling of the Project, monetary compensation to land-owners had been provided.

(ii) The Appellant argued that the State Commission has erred in deciding that the claim of the Appellant for the RoW issues faced by it, for completing the project, is clearly mentioned in the scope of work under the agreement dated 28.07.2012 entered into between the Appellant and IVRCL, and also observing that since "arranging right of way / way leaves (ROW)" are within the scope of the contractor, the claim of Appellant cannot be allowed, even after admitting that the issue was beyond the control of the Appellant.

(iii) The Appellant also argued that the State Commission had erred in not taking into consideration the following documents, placed on record by the Appellant:

- a) A detailed table reflecting the timelines of the project completion;
- b) Audited Statement of Final Project Cost; and
- c) A copy of communications between IVRCL, the Appellant, and Police Station along with relevant Court Orders on problems/challenges relating to the aforesaid RoW issues.

(iv) Further, submitted that Clause 56 of GCC in IVRCL Contract includes blockade, embargo & civil commotion as Force Majeure Events, in terms of Clause 56.2 of the GCC, the contractor is entitled to be excused from its performance on account of Force Majeure Events, however, under 56.3 of GCC, reasonable alternate means of

performance can be undertaken, as such, Cost escalations under RoW are thus covered under 56.3 of GCC.

(v) The Appellant also submitted that even as per Regulation 1.2.1 (iv) of the Tariff Regulations, Force Majeure events have been given a wide definition and include any event or circumstance which was not within the reasonable control of the affected party and the same could not have been prevented by the exercise of reasonable care and diligence.

(vi) The Appellant further submitted that the CERC has allowed such expenses, incurred on account of RoW issues in several orders, including the following:

- a) Order dated 16.06.2021 passed in Petition No. 453/MP/2019: Sipat Transmission Limited vs. Maharashtra State Electricity Distribution Company Limited & Ors.;
- b) Order 25.02.2023 passed in Petition No. 164/MP/2021: Kohima-Mariani Transmission Limited vs. Assam Electricity Grid Corporation Limited & Ors.;
- c) Order 04.02.2021 passed in Petition No. 462/TT/2020: Power Grid Corporation of India Limited vs. Bihar State Power (Holding) Company Ltd.;
- d) Order dated 30.04.2022 passed in Petition No.663/TT/2020: Power Grid Corporation of India Limited vs. Tamil Nadu Generation and Distribution Corporation Limited & Ors. and
- e) Order dated 15.05.2023 passed in Petition No.91/TT/2022: Power Grid Corporation of India Limited vs. Tamil Nadu Generation and Distribution Corporation Limited & Ors.

(vii) However, the CERC's orders are not of binding nature for the State Commission or for this Tribunal.

(viii) The Appellant has also submitted that the RoW expenditure of Rs. 27.6 crores as incurred by the Appellant is considerably less than RoW expenditure computed as per Government of India guidelines dated 15.10.2015 (GOI Guidelines), which comes out to Rs. 79.1 crores, also while the aforesaid GOI Guidelines were only notified in 2015 and such Guidelines have not been adopted by the State Commission, the computation as per GOI Guidelines has only been referred to by the Appellant as a benchmark that can be taken into account while checking prudence of the expenditure incurred by the Appellant due to RoW issues.

(ix) The Appellant placed reliance on the Order dated 24.08.2021 passed by the State Commission in the Case No. OA – 323/19-20 in the context of the State Transmission Utility, i.e., West Bengal State Electricity Transmission Company Limited wherein, the State Commission approved the revised project cost of Rs. 310 crores (due to RoW issues being faced by WBSETCL) in terms of Regulation 2.8.2.3 of the Tariff Regulations, while the original project cost was only Rs. 193 crores.

(x) The Appellant submits that the per kilometre cost of the landline portion of the Project, including RoW cost incurred by the Appellant is Rs. 2.1 crores/km, which is much lower than the sum of benchmark cost laid down by the CERC and RoW cost computed as per the GOI Guidelines, i.e., Rs. 2.8 crores/km, in this regard, the Appellant has also provided a comparative computation of the cost.

(xi) The Appellant has also submitted that the State Commission has failed to consider that increase in expenses associated with RoW are covered under Clause 56 read with Clause 56.3 of GCC of IVRCL Contract, the State Commission while determining the tariff for FY 2014-15, FY 2015-16 and FY 2016-17 earlier had in its Order dated 29.01.2016 considered 95% of total claimed project cost through *prima facie* prudence check, which included increase in expenses towards RoW, therefore, it is erroneous to not allow the increase in ROW expenses during the final project cost determination stage.

(xii) The Appellant has also placed emphasis on the fact that the Project of Appellant was completed in a shorter time compared to similar projects commissioned as well as the timeline provided for completion of projects under Schedule-9C of the Tariff Regulations, the Project took around 38 months as against 47 months to 134 months for similar projects and the timeline of 42 months provided under Schedule-9C of the Tariff Regulations as duration of construction of the first unit of a coal-fired thermal power station below 500 MW, a comparison table for timelines for commissioning of other similarly placed projects was placed on record.

(xiii) The Appellant argues that the severe RoW issues faced during the setting-up of the Project were Force Majeure events, and the consequent cost impact ought to have been allowed by the State Commission in terms of the Tariff Regulations and the agreement signed between the parties, the Appellant was constrained to pay the cost towards the aforesaid RoW expenditure to ensure that the 600 MW Generation Project, which was crucial for the supply of power to the

consumers in the State of West Bengal, is not stranded due to non-commissioning of its sole evacuation line.

(xiv) As per the submission of the Appellant, if the generation project was stranded, a total IDC of approximately Rs. 30 crores would have been incurred by the Appellant on a monthly basis for both, its generation and evacuation Project, the generation Project was completed within 38 months against a timeline of 42 months provided in the Regulations of the State Commission, therefore, any delay in setting-up of the Project would have led to much higher cost impact on the consumers of the buying distribution licensee in the State of West Bengal, who are the ultimate beneficiaries of the power being generated by the Appellant.

(xv) Thus, the severe RoW issues faced during the setting-up of the Project were Force Majeure events and the consequent cost impact incurred by the Appellant for ensuring timely completion of Project ought to have been allowed by the State Commission in terms of the Tariff Regulations and the agreement signed between the parties.

95. On the contrary the State Commission submitted that:

(i) The submission of the State Commission is that the Appellant in the Appeal and Written Submission has claimed that it has faced severe RoW issues during the setting up of the Project which were force majeure events and the consequent cost impact ought to have been allowed by the State Commission, further relied upon the Government of India Guidelines dated 15/10/2015 and claimed that RoW expenditure of Rs. 27.6 Crores as incurred by the Appellant is

considerably less than RoW cost as per GOI guidelines which comes out to Rs. 79.1 crores and therefore the claim of Rs. 27.6 cores which considerably much less should have been allowed by the Commission.

(ii) Further, argued that State Commission has given detailed reasons in the impugned order dated 08.01.2020 which clearly shows that claim on the part of the Appellant under this issue is not sustainable in law, the relevant Para of the Impugned Order is reproduced hereunder:-

“RoW Issue:

HEL has also claimed Rs 27.63 crore being the amount reimbursed to IVRC Limited on Row issues. In this regard HEL has submitted with a detailed calculation that the compensation paid on Row issue are well within the purview of Govt. of India (Ministry of Power) guidelines for payment of compensation towards damages in regard to ROW for transmission line dated 15 Oct 2015. Estimated compensation for 86 Km Transmission corridor as per Gol guidelines has been computed by HEL as below:

i) ROW compensation of 15% of land value as per GOI guideline of 66 km transmission line corridor is Rs. 73.30 crore.

*ii) Total compensation required as per GOI Guidelines based on above calculation comes out to Rs. 79.10 crore which is much higher than the actual paid for compensation against ROW ie. Rs 27.60 crore and HEL has prayed for acceptance Rs 27.60 Cr as compensation reimbursed by HEL to IVRC Limited. Regarding the claim of Rs. 27.60 Cr. against the ROW, **it is clearly mentioned in the scope of work under agreement between Haldia Energy Limited and IVRCL dated 28.07.2012 that "arranging right of***

way / way leaves (ROW)" are within the scope of contractor.

The same has also been specifically mentioned under section 1.2 of said agreement as below:

1.2 Specific Responsibilities to ROW

- a. **The Contractor shall be responsible for any ROW which may be required by the Contractor for execution of the Line and is included in the Contract Price.** The detail obligations of the Parties relating to ROW are provided in the Technical Specifications (Attachment 1)
- b. In the event the Contractor is behind the approved L1 Network (Attachment 2) program on ROW, the Purchaser shall have the liberty of obtaining ROW to the extent of shortfall and debit the same from the payable amount against any running bills of the Contractor."

The basis of contract price is further clarified under clause 9.0 of GCC as below:

9.0 BASIS OF CONTRACT PRICE

Contractor to inform itself fully

The Contractor shall be deemed to have inspected the Site and its surroundings and to have satisfied itself as to the condition of an all circumstances affecting the Site and the Works including the nature of the ground and sub-soil, the form and nature of the Site extent of surface and sub-soil water, under all climatic conditions, the extent and nature of the work and materials necessary for the carrying out and completion Line, the means of communication with and transportation and access to the Site, labour supply position at the Site, the accommodation it may require and in general all risks and contingencies influencing or affecting the Works.

The Contractor shall not, except as expressly provided in these Conditions be entitled to any extension to any Guaranteed Completion date or to any adjustment of the Contract Price or grounds of misinterpretation or misunderstanding of any such matter, nor shall it, except as so provided, be released from any of the risks accepted or obligations undertaken by it under the Contract on the ground that it did not or could not reasonably have foreseen any matter which affects the execution of the Works."

(iii) Therefore, it is clear from the contract between Appellant and IVRCL that it is liability of the contractor (i.e. -IVRCL) to inspect the site and its surroundings and to have satisfied itself as to the condition of all circumstances affecting the site. **'Arranging right of way/ way leaves (ROW)' are within the scope of contractor as mentioned in the scope of work** under the agreement between HEL and IVRCL dated 28.07.2012. The relevant extracts of contract dated 28/07/2012 between Appellant and IVRCL Limited are reproduced herein under:

" 1. SCOPE OF WORK

1.1 The scope of work to be carried out by the Contractor pursuant to the terms of this Contract shall include but not be limited to survey soil investigation, benching foundation including excavation, concreting and supply of cement, reinforced steel and other construction materials, arranging right of way / way leaves (ROW), ----- "

(iv) It is denied Force Majeure event occurred in ROW. It is further submitted that Force Majeure clause restrict parties from obligations and liabilities under an agreement when sudden and unexpected

circumstances take place. The relevant clause of the contract dated 28/07/2012 between HEL and IVRCL is reproduced herein below:

“56.1 Force Majeure

*Force Majeure means any of the following event or circumstances, or any combination of such events or circumstances, which are beyond the reasonable control of the affected party, **which could have been prevented by Good Industry Practice or by the exercise of reasonable skill upon the performance by the affected party of its obligations under the Contract.**”*

(v) That Force majeure clause cannot be used as a cause to pass on unnecessary/additional expenditure upon the consumers. As stated in Clause 56.2 of the GCC it is for the purpose of excusing the party from performing its obligation under the contract. Force majeure clause is used for the purpose of adjustment or extension of Guaranteed Completion Date, if either party is prevented from performing any of its obligations under the contract by Force Majeure.

(vi) With respect to the GOI guidelines dated 15/10/2015 it is submitted that the Guidelines are not applicable to the present case. COD of the present project was 28/1/2015 i.e. much before the Guidelines notified. In the present project ROW cost / compensation is governed by Section 67 & 68 of Electricity Act read with Section 10 & 16 of Indian Telegraph Act, 1885. The stipulations provide for compensation towards damages of crops /trees without acquisition of land which are assessed/reviewed by the Revenue Authorities. The relevant extracts from Electricity Act & Telegraph Act are

reproduced hereinunder:

“The Electricity Act, 2003 Section 67 & 68

Section 67 (3 & 4)

*(3) A licensee shall, in exercise of any of the powers conferred by or under this section and the rules made thereunder, cause as little damage, detriment and inconvenience as may be, **and shall make full compensation for any damage, detriment or inconvenience caused by him or by any one employed by him.***

*(4) Where any difference or dispute [including amount of compensation under sub-section (3)] arises under this section, **the matter shall be determined by the Appropriate Commission.***

Section 68 (6) -----xx-----

*(6) When disposing of an application under sub-section (5), an Executive Magistrate or authority specified under that sub-section shall, in the case of any tree in existence before the placing of the overhead line, **award to the person interested in the tree such compensation as he thinks reasonable**, and such person may recover the same from the licensee.*

The Indian Telegraph Act, 1885 Section 10

“Section 10. Power of Telegraph Authority to place and maintain telegraph line and posts - The telegraph authority may, from time to time, place and maintain a telegraph line under, over, along, or across, and posts in or upon any immovable property:-

Provided that –

a.

b. the [Central Government] shall not acquire any right other than that of user only in the property under, over, along, across in or upon which the telegraph authority places any telegraph line or post; and

c.

d. in the exercise of the powers conferred by this section, the telegraph

authority shall do as little damage as possible, and, when it has exercised those powers in respect of any property other than that referred to in clause (c), shall pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers.

(vii) Therefore, it is clear from the above provisions that the licensees pay compensation for the damages caused to crops/trees and structures and not for acquisition of land.

(viii) With respect to submission of Appellant made at para 23 of supplementary written submission with respect to 95 % cost considered while determining tariff for 2014-15, 2015-16 and 2016-17 it is submitted that such cost is considered in case no. TP-63/14-15 order dated 29/01/2016 subject to pending determination of final tariff on the basis of final project cost to be approved by State Commission as per the provisions of the Tariff Regulations and this was recorded in the impugned order.

(ix) The Appellant in the written submission has relied upon the orders of CERC regarding to the issue of Row. It is most respectfully

submitted that the said order of CERC will not apply in the present case because the COD in the present case was before the GOI guidelines but in all CERC orders the COD of the projects was after the GOI guidelines. Admittedly, in all CERC orders the State Government (like Assam, Manipur, Kerala etc.) has adopted the GOI guidelines regarding the issue of Row whereas in the present case of State of West Bengal it is not the same.

(x) The Appellant in the written submission has claimed that the State Commission in its order dated 24/08/2021 in Case no. OA – 323/19-20 has allowed Row compensation to WBSETCL. It is most respectfully submitted that the fact and circumstances of the said case was distinguishable from the present case. The para 6, 7 & 8 of the said order make it clear that the project was earlier a overhead transmission line but later it made entirely through underground cable and due to this reason the cost of the project increased. The State Commission found it reasonable and allowed the same. Therefore, the said order will not apply in the facts and circumstances of the present case.

Our Observation and Conclusion

96. The Appellant submitted that due to severe resistance from the local community coupled with intense legal litigation, it had to face a significant challenge during the construction of the Project through the land portion, which was not envisaged before starting the job and which resulted in a work stoppage on several occasions from June 2013 till August 2014 and to avoid rescheduling of the Project, monetary compensation to land-owners had been provided in addition to the contractual amount.

97. The Appellant also argued that Clause 56 of GCC in the IVRCL Contract includes blockade, embargo & civil commotion as Force Majeure Events.

98. It is important to note the Force Majeure clause which governs the issue, quoted as under:

“56.0 FORCE MAJEURE

56.1 Force Majeure

Force Majeure means any of the following event or circumstances, or any combination of such events or circumstances, which are beyond the reasonable control of the affected party, which could not have been prevented by Good Industry Practice or by the exercise of reasonable skill and care and which or any consequences of which have a material and adverse effect upon the performance by the affected party of it's obligations under the Contract.

56.2 Suspension of Obligations in the Event of Force Majeure

Without prejudice to the operation of Clause 45 and the provisions thereunder for the adjustment of the Guaranteed Completion Date(s) in the event of Force Majeure, if either party is prevented or delayed from or in performing any of its obligations under the Contract by Force Majeure, then it may notify the other party of the circumstances constituting the Force Majeure and of the obligations performance of which is thereby delayed or prevented and the party giving the notice shall thereupon be excused the performance or punctual performance, as the case may be, of such obligations for so

long as the circumstances of prevention or delay may continue. Notwithstanding the foregoing, the Purchaser's obligation to pay money in a timely manner for Work actually performed shall not be excused due to a Force Majeure event and shall not be subject to suspension.

56.3 Performance to Continue

*Upon the occurrence of any circumstances of Force Majeure the Contractor shall use reasonable endeavours to continue to perform its obligations under the Contract and to minimize the adverse effects of such circumstances. **The Contractor shall notify the Purchaser of the steps it proposes to take including any reasonable alternative means of performance.***

99. It is seen from above, that in terms of Clause 56.2 of the GCC, the contractor is entitled to be excused from its performance on account of Force Majeure Events, however, Clause 56.3 provides for reasonable alternate means of performance, which the Contractor shall inform the Purchaser of the steps it proposes to take instead seeking time extension resulting into delay in the execution of the project.

100. On the contrary, the State Commission has rejected the monetary claim made by the Appellant vis-à-vis additional compensation paid to the landowners observing that the claim of the Appellant for the RoW issues faced by it, for completing the project, is mentioned in the scope of work under the agreement dated 28.07.2012 entered into between the Appellant and IVRCL.

101. The State Commission held that since "arranging right of way/ way leaves (ROW)" are within the scope of the contractor, the claim of the Appellant

cannot be allowed, even after admitting that the issue was beyond the control of the Appellant.

102. It cannot be disputed that the public disorder/ blockages are events beyond the control of the executing party, the Appellant placed on record the

- a) A detailed table reflecting the timelines of the project completion;
- b) Audited Statement of Final Project Cost; and
- c) A copy of communications between IVRCL, the Appellant, and Police Station along with relevant Court Orders on problems/challenges relating to the aforesaid RoW issues.

103. The Force Majeure events have been given a wide definition and include any event or circumstance that is not within the reasonable control of the affected party and that could not have been prevented by the exercise of reasonable care and diligence.

104. The State Commission argued that, even if such an event is accepted as a Force Majeure event, it cannot be compensated in monetary terms and only time extension can be granted.

105. On the contrary, the Appellant argued that the Project was completed in a shorter time compared to similar projects commissioned as well as the timeline provided for completion of projects under Schedule-9C of the Tariff Regulations, the Project took around 38 months as against 47 months to 134 months for similar projects and the timeline of 42 months provided under Schedule-9C of the Tariff Regulations as the duration of construction of the first unit of a coal-fired thermal power station below 500 MW, thus saving the amount in terms of IDC/ IEDC which otherwise would have been much

above the cost it had claimed in executing the project in time by paying compensation to land owners.

106. The Appellant claimed that in case the generation project was stranded, a total IDC of approximately Rs. 30 crores would have been incurred by the Appellant every month for both, its generation and evacuation Project, therefore, any delay in setting-up of the Project would have led to the much higher cost impact on the consumers of the buying distribution licensee in the State of West Bengal, who are the ultimate beneficiaries of the power being generated by the Appellant.

107. We find merit in the contention that the Appellant was constrained to pay the cost towards the aforesaid RoW expenditure to ensure that the 600 MW Generation Project, which was crucial for the supply of power to the consumers in the State of West Bengal, as also observed by the State Commission, is not stranded due to non-commissioning of its sole evacuation line.

108. The matter is remanded to the State Commission to re-examine the issue in the light of severe resistance from the local public and compensation paid by the Appellant to resolve the issue amicably to ensure timely completion of the Project, after carrying out prudent check shall allow the same within the bench mark costs if notified by the State Commission or the Central Commission.

Issue (v) - Rs. 0.70 crore in respect of head-loading expenses

and

Issue (vi) - Rs. 0.34 crore in respect of construction of approach road

109. The Appellant submitted that:

(i) The State Commission has wrongly disallowed the expenditure of Rs. 0.70 crores incurred on account of head-loading in the contract with IVRCL, the Appellant argues that the prolonged and extensive monsoons during the period of laying the foundation by IVRCL resulted in waterlogging, washing away of approach roads, and location of sites at a distance from the roads, which necessitated additional costs on carriage of materials.

(ii) The Appellant issued the IVRCL Supplemental Work Order dated 21.10.2013 for material and tools/equipment to be transported through head-loading to minimize the impact of heavy rainfall and ensure that the construction of the Project remained on schedule.

(iii) The State Commission has erroneously held that such expenditure was within the scope of work of the contractor, i.e., IVRCL, and thus not considered for admission, even after admitting that the issue was beyond the control of the Appellant.

(iv) The Appellant also claims that the State Commission has wrongly disallowed the expenditure of Rs. 0.34 crore incurred on account of approach road construction.

(v) The Appellant placed an additional work order dated 08.09.2014 upon KEC for the construction of a temporary approach due to the difficulties faced by KEC in building the approach road for mobilization of heavy-duty tools, etc., and the same being washed away twice due to unprecedented rainfall.

(vi) The State Commission has erroneously held that the expenditure related to construction of approach road is within the scope of work of the contractor, i.e., KEC, and hence not to be allowed.

(vii) The Appellant, further, argued that the heavy rainfall between June to October 2013 was 57% higher than the average rainfall of the same period for the preceding four years, and the increase in rainfall in 2014 over the average of the 2009-2013 period is 24%.

(viii) The Appellant claims that the expenditure incurred on head-loading and approach road construction was on account of "Force Majeure" conditions and was due to factors beyond the Appellant's and contractors' reasonable control.

(ix) Further, claimed that the State Commission has failed to consider the documents and submissions placed on record by the Appellant, including the copy of the rainfall data provided by the India Meteorological Department, TCE Report, and additional work orders placed by the Appellant.

(x) The cost for alternative means of performance in the case of a Force Majeure event is required to be allowed in terms of the Agreements signed between Parties and the relief for cost escalation is covered under the General Conditions of Contract of IVRCL as well as KEC Contracts.

(xi) The Appellant agreed to incur the additional expenditure for

head-loading and construction of approach road in order to ensure that the Generation Project of the Appellant is not stranded in the absence of timely commissioning of the transmission line.

(xii) The Appellant thus submits that in terms of the terms of the IVRCL and KEC Contracts as well as the Tariff Regulations, the Appellant was entitled to the expenditure related to head loading and approach road construction being allowed.

110. Countering the submissions of the Appellant, the State Commission submitted that:

(i) The Appellant is contented that the State Commission has proceeded to ignore the documents and submissions placed on record by the Appellant in support of its claim relating to head-loading and erroneously held that such expenditure is under the scope of the contractor i.e. IVRCL and thus not considered for admission even after admitting that the issue was beyond the control of appellant.

(ii) Submitted that the State Commission has dealt with this issue in the Impugned Order, the State Commission after prudence check observed that the additional expenditure of Rs. 0.94 crore and Rs. 0.70 crore as pile foundation work and head loading under SI No. F(i) and F(ii) respectively were within the scope of the contractor and thus cannot be allowed as an additional cost, the relevant extracts of contract dated 28/07/2012 between Appellant and IVRCL Limited are reproduced herein under:

“ 1. **SCOPE OF WORK**

1.1 The scope of work to be carried out by the Contractor pursuant to the terms of this Contract shall include but not be limited to survey soil investigation, benching foundation including excavation, concreting and supply of cement, reinforced steel and other construction materials, arranging right of way / way leaves (ROW), receiving. Unloading, storing in safe custody, handling at Site of all Plant, equipment and materials including material issued on free issue basis by the Purchaser, supply of labour, necessary insurance, necessary Contractor's Equipment and the entire civil work.-----xx ”

(iii) It is the contention of the Appellant that on account of difficulties faced by KEC in building the approach road for mobilization of heavy duty, tools, etc. and the roads being washed away twice due to unprecedented rainfall the appellant placed an additional work order dated 08/09/2014 upon KEC for construction of temporary approach.

(iv) It is most respectfully submitted that the State Commission has dealt with the issue in the Impugned Order, the said claim of Rs. 0.34 crores were rejected on the ground that the same being within the scope of work, in this the contract between HEL and KEC particularly the portion relating to scope of contract vide clause no. 1 and contract price vide clause no. 3 are referred to where from it can inter-alia be found that excepting the variation in quantity and tax duty etc. contract price was firm, the relevant clauses of Supply Executive Cover made on dated 22/03/2012 between HEL and KEC International Limited are reproduced herein below:

“1.SCOPE OF WORK

*The scope of work of the Contractor shall include but not be limited to: **engineering, manufacture, procurement, shop testing/inspection, supply, packaging and forwarding, dispatch transportation, delivery of all materials at Site, obtaining necessary insurance of equipment & materials are necessary for Installation of 2 Nos. of River Crossing Towers***

3.CONTRACT PRICE:

Except as otherwise provided, the Contract Price for the entire obligations of the Contractor under this Supply Contract will be Rs 43,44,31,395/- (Rupees Forty-Three Crores Four Four Lacs Thirty-One Thousand Three Hundred Ninety-Five Only).-----xx --."

(v) Therefore, there was no scope on the part of the Appellant to seek any further amount of Rs. 0.34 crores under a completely separate head being "Approach Road Construction", it is further to state that the chart at page 91 will also show that wherever there was variance being allowable, such amount was allowed by the State Commission, accordingly, in the similar manner something being within the scope of the contract and not having fallen within the scope of the specific ingredients of varying, the claim towards Rs. 0.34 crores for "Approach Road Construction" were rejected.

Our Observation and Conclusion

111. The Appellant has claimed that the State Commission has wrongly disallowed the expenditure of Rs. 0.70 crores incurred on account of head-

loading in the contract with IVRCL and Rs. 0.34 crores incurred on account of approach road construction.

112. It is, therefore, important to examine the reasons for a claim for such expenditure versus the provisions of the Contracts signed by the Appellant with the respective contractor(s).

113. The Appellant submitted that there were unprecedented rains in the area in and around adjoining the construction site during the construction period. This has resulted in the washing away of approach roads, water logging in the area, etc. Thus, the Appellant claimed that the rainfall between June to October 2013 was 57% higher than the average rainfall of the same period for the preceding four years, and the increase in rainfall in 2014 over the average of the 2009-2013 period is 24%, such claims have not been disputed by the State Commission.

114. Further, from the Contract signed with KEC, the provision contained therein includes - **engineering, manufacture, procurement, shop testing/inspection, supply, packaging and forwarding, dispatch transportation, delivery of all materials at Site, obtaining necessary insurance of equipment & materials are necessary for Installation of 2 Nos. of River Crossing Towers** -----, thus, the Contractor liability is, therefore, to carry out prudent survey and investigation before signing the Contract.

115. The Appellant claims that the event of unprecedented rainfall is an event of Force Majeure under the respective contract, the relevant Article is quoted as under:

“43.1.2 Other Force Majeure

any of the following which are not included in Political Force Majeure above:

*(i) lightning, earthquake, tempest, flooding, fire, cyclone, hurricane, typhoon, tidal waves, whirlwind, drought or lack of water **and other adverse weather or environmental conditions or action of the elements-----**”*

116. Therefore, the Contract is, certainly signed on the premise that the approach road shall continue to exist during the construction period, however, during this period, due to unprecedented rainfall, the same has been washed away and twice laying of such road/ alternate path is not part of the contract, the Contractor was asked to perform the additional task of building such road twice during the period.

117. The Appellant argued that the prolonged and extensive monsoons during the laying of the foundation by IVRCL resulted in waterlogging, washing away of approach roads, and location of sites at a distance from the roads, which necessitated additional costs on the carriage of materials. The Appellant has argued that the expenditure incurred on head-loading and approach road construction was on account of "Force Majeure" conditions and was due to factors beyond the Appellant's and contractors' reasonable control. Such event is squarely covered within the definition of Force Majeure events under the contracts signed with IVRCL and KEC.

118. The Appellant had agreed to incur the additional expenditure for head-loading and construction of the approach road to ensure that the Generation Project of the Appellant is not stranded in the absence of timely commissioning

of the transmission line, it is also seen that the claim made by the Appellant is reasonable.

119. The Appellant has provided sufficient evidence to support its claim, including a copy of the rainfall data provided by the India Meteorological Department, the TCE Report, and additional work orders placed by the Appellant. Therefore, in our considered view, the Appellant is entitled to the relief claimed in the Appeal, and the expenditure related to head loading and approach road construction should be allowed as a pass-through in the tariff.

Issue (vii) - Rs.6.61 crores in interest during construction (IDC) proportionate to the aforesaid disallowed claims.

120. The Appellant has claimed that in the impugned order the State Commission disallowed a total claim of Rs. 6.61 crores raised by the appellant at the time of disallowing the claims under Sl. No. 1 to 6. In terms of regulation 5.6.4.2(iv) and also as per Schedule 9C of the Tariff Regulation, the IDC is to be allowed to the appellant.

121. It cannot be disputed that disallowance of proportionate IDC State Commission has disallowed the same in respect of disallowance items only. If a particular item is disallowed meaning thereby not taken into account because of the disallowance, in the capital cost, obviously the corresponding and/or proportionate interest arising out of the loan, during such construction will also require to be disallowed.

122. It is stated that the Disallowance of Proportionate Interest during Construction' as claimed by the appellant is a consequential disallowance of the other components of capital cost.

123. In light of the aforesaid findings of this Hon'ble Tribunal, as well as Regulation 5.6.4.2(vi) and Schedule 9C of the Tariff Regulations, we are of the view that as a natural corollary, the Appellant is entitled to be paid the IDC of Rs. 6.61 crores upon the claims allowed by this Tribunal as a consequential amount.

124. The quantum of aforesaid claim amounts raised by the Appellant have at no point been disputed by the State Commission and only issue before us in the present Appeal was whether such claims are to be allowed or not to the Appellant. Accordingly, we are of the view that the claims raised by the Appellant in the present Appeal and the amounts claimed by it as such towards IDC, are to be allowed to the Appellant.

ORDER

For the reasons stated above, we are of the considered view that the captioned Appeal No. 95 of 2020 has merit and is allowed to the limited extent as concluded in the foregoing paragraphs.

The State Commission shall pass a consequential order within 3 months from the date of the judgment.

The Captioned Appeal and IAs, if any are disposed of in the above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 30th DAY OF APRIL, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

pr/mkj/kks