APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 144 OF 2015 &

IA NOs. 220 & 221 of 2019

Dated : 07th January, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

IN THE MATTER OF :

M/s Bhilangana Hydro Power Limited.
Represented by Authorised Representative
B-37, Sector-1,
Noida-201301
Gautam Budh Nagar,
Uttar Pradesh Appellant(s)

VERSUS

1. **Uttarakhand Electricity Regulatory Commission**
Vidyut Niyamak Bhawan
Near ISBT, P.O. Majra
Dehradun- 248171

2. **Power Transmission Corporation Of Uttarakhand Limited,**
Represented by Managing Director
Vidyut Bhawan,
Near ISBT Crossing,
Saharanpur Road, Majra,
Dehradun – 248002 … Respondent(s)

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr.Adv.
Mr. Samyak Mishra
Ms. Shikha Ohri
Ms. Pratiksha Chaturvedi

Counsel for the Respondent(s) : Mr. Buddy A. Ranganathan
Ms. Stuti Krishn for R-1

Mr. Sitesh Mukherjee
Mr. Divyanshu Bhatt for R-2

J U D G M E N T

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

1. The present Appeal has been filed by M/s Bhilangana Hydro Power Limited ("**Bhilangana Power**"/ "**Appellant**") under Section 111 of the Electricity Act, 2003 ("**Electricity Act**"), challenging the legality, validity and propriety of the Uttarakhand Electricity Regulatory Commission's ("**UERC**") Order dated 04.03.2015 in Petition No. 3 of 2015 ("**Impugned Order**").

1.1 P. No. 3 of 2015 ("**Petition**") was filed by Bhilangana Power before the Respondent No. 1 / UERC, for seeking a compensation of Rs. 59.59 crores along with interest @ 15% per annum for loss caused to the Petitioner on account of the default of Respondent No.2 herein, i.e., Power Transmission Corporation of Uttarakhand Ltd. (**"PTCUL**"). The said petition was filed by the Petitioner on the basis that the Respondent No. 2 / PTCUL was in breach of the terms of the Transmission Services Agreement (TSA) dated 25.10.2008.

2. Brief Facts of the Case:-

2.1 Bhilangana Power / Appellant, is a generating company incorporated under the Companies Act, 1956 and has set up a 24 MW hydro electric power project (Bhilangana-III or B-III) on River Bhilangana near Village, Ghuttu, Tehsil Ghansali, District Tehri Garhwal, Uttarakhand. The project was allocated under the competitive bidding process by Government of Uttarakhand in 2003 and was commissioned on 20.12.2011.

2.2 The Respondent No. 1 is the Uttarakhand Electricity Regulatory Commission which has passed the impugned order dated 04.03.2015.

2.3 The Respondent No. 2 is Power Transmission Company of Uttarakhand Limited (PTCUL), which is the State Transmission Utility (STU) which owns and manages the intra-state transmission system in the State of Uttarakhand.

3. Questions of Law :

The Appellant has raised followed questions of law:

3.1 Whether the Respondent No. 1 Commission failed to appreciate that the petition filed by the Appellant was fully maintainable?

3.2 Whether the Respondent No. 1 Commission failed to consider that the jurisdiction of the Commission comes from Section 86(1)(f) of the Electricity Act, 2003, and as such there was no question of the petition not being maintainable when the Appellant demonstrated that it had a claim, which claim was refused by the Respondent No. 2? The Commission failed to appreciate that the jurisdictional factions for invoking statutory jurisdiction under section 86(1)(f) of Electricity Act, 2003 read with the judgment of the Supreme Court in Gujarat Urja Vikas Nigam Ltd vs. Essar Power, reported in *(2008) 4 SCC 755*, were fully pleaded and accepted.

3.3 Whether the Respondent No. 1 Commission failed to appreciate that damages/ compensation for breach of a contract (TSA) in this case is a legal right/ remedy to claim damages under the laws of contract. Such right/ remedy falls from the provisions of Section 73 of the Indian Contract Act 1872 is specific in this regard.It did not matter if the TSA did not contain any provision for claiming compensation. On the contrary, the contract (TSA) could only restrict/ limit the application of the law, which it did not provide for. So section 73 of the Contract Act will be fully available.

3.4 Whether the Respondent No. 1 Commission while passing the impugned order ought to have considered that all the objections of

the Respondent No. 2 recorded in the impugned order were on merits of the case and not on maintainability?

3.5 Whether by passing the impugned order, the Respondent No. 1 Commission failed to discharge its duties as enshrined in Section 86(1)(f) of the Electricity Act, 2003?

3.6 Whether the Respondent No. 1/Commission could not have held the timing of filing of the petition against the Appellant since it is a settled principle of law that for proceedings emanating from the Electricity Act 2003, the Limitation Act 1963 does not apply?

3.7 Whether the Respondent Commission failed to appreciate that on account of the default of the Respondent No. 2 the Appellant could not achieve the COD despite being ready for the same. This also prevented the Appellant to source power to the beneficiaries thereby leading to a loss of business?

3.8 Whether the findings rendered by the Respondent Commission with respect to COD of the Appellant were wrong, since the Appellant was prevented from achieving revised COD due to the default of the Respondent No. 2 in not making available its transmission network despite repeated assurances in terms of the

TSA, various communications including the letter dated 30.04.2011?

3.9 Whether the Respondent Commission failed to appreciate that there was legitimate expectation (based on an express promise made in a contract) by the Appellant that the transmission facility of the Respondent No. 2 would be in place if the COD of the power plant happens by 01.07.2011 and the Appellant proceeded to finish the requisite work at its plant so as to be ready for COD by the said date?

3.10 Whether the Respondent Commission failed to consider that the principles of promissory estoppel applies against the Respondent No. 2, and the said Respondent cannot be allowed to wriggle out of its commitments to provide transmission facility by 01.07.2011 on account of any mis-interpretation of the order dated 14.10.2011 of this Tribunal in Appeal No. 112 of 2011 after the Appellant has changed his position by investing substantial capital?

4. Shri Samyak Mishra, learned counsel appearing for the Appellant has filed the written submissions for our consideration as under:-

4.1 The present appeal is against the order dated 04.03.2015, by which order the State Commission held that the petition filed by the Appellant (M/s. Bhilangana Hydro Power Ltd.), being Petition No. 3

of 2015, "is not maintainable and is accordingly disposed off as dismissed".

4.2 The petition was filed, *inter alia*, for seeking Rs. 59.59 crores along with interest @ 15% per annum for loss caused to the Petitioner on account of the default of Respondent No. 2, i.e., Power Transmission Corporation of Uttarakhand Ltd.

4.3 The Petitioner had filed the said petition on the basis that the Respondent No. 2/ PTCUL was in breach of the terms of the Transmission Services Agreement (TSA) dated 25.10.2008. In support of its case, the Petitioner had filed 50 supporting annexures/ evidences, that disclosed the nature of transaction, conduct of parties and the default/ breach caused by the Respondent No. 2 / PTCUL.

4.4 The State Commission held an admissibility hearing on 19.01.2015 in which hearing the Commission passed the following order:

> *"Heard the Petitioner and the Respondent in the matter. The Commission directs the Petitioner to submit a copy of the Appeal filed by it before the Hon'ble Appellate Tribunal for Electricity against the Order of the Commission dated 08.07.2011 and referred to in this Petition."*

4.5 After the admissibility hearing no further hearing was held. No opportunity was given for hearing on merits of the case. In fact, after the admissibility hearing the parties were asked to file written submissions. The Appellant filed its written submissions on 30.01.2015, which submission was confined only on the issue of admission of the matter.

4.6 Without reference to the scope of the proceeding, the Commission after recording the brief admissibility submissions made by the Petitioner, which is at paras 8 to 17 of the impugned order, proceeded to dispose off the matter by holding as follows:

> *"26. On the issue of commissioning the TSA provides as follows:*
>
> *4.2.1*
>
> *'(e) The Company shall, before commissioning the Project and its Interconnection Facilities, obtain all statutory approvals from the Chief Electrical Inspector/ Electrical Inspector. Company shall issue a 15 days notice to PTCUL before trail operation and commercial operation of the generating sets and charging Interconnection Facilities.*
>
> *Provided that, the company has incorporated all suggestions given by PTCUL in its proposal in the design and drawing of interconnection facilities.'*
>
> *This interalia required the Petitioner to obtain statutory approval both for the project as also for the interconnection facilities of the Chief Electrical Inspector/ Electrical Inspector, before commissioning the project. The contention of the Petitioner that since they obtained Electrical Inspector's Certificate for*

project on 30.06.2011, 01.07.2011 should be treated as revised COD is farfetched and has no support in the TSA. The certificate of Electrical Inspector, merely certifies that the installation are electrically safe as per I.E. Rules, and is just a prerequisite for commissioning of the project. Further, it will be relevant to refer to Regulation 3(22) of the UERC (Terms & Conditions for Determination of Tariff Regulation), 2011 which reads

'22. Date of commercial operation or COD means:

… the date declared by the Generating Company after demonstrating peaking capability corresponding to installed capacity of the generating station through a successful trial run, after notice to the beneficiaries:'

27. In common parlance also, commercial operation date is one on which the generator demonstrates its ability to generate power at rated capacity. The contention of the Petitioner that the date of certification of the project by the Electrical Inspector be treated as COD cannot be sustained. It will also be relevant to have a look on what transpired after the evacuation line was ready. As mentioned by Respondent, the evacuation line was ready on 21.10.2011, was got inspected by Electrical Inspector and after removing deficiencies was energised on 04.11.2011. The metering system at Petitioners' end was not ready even then. As such even after 3 month of contended COD, the Petitioner was not ready to commission the project. In fact project commenced delivering power only from 20.12.2011 about 1 ½ months after energisation of line. It is evident that subsequent events also do not support the contention of the Petitioner that revised COD had occurred on 01.07.2011.

… … … …

29. Based on the above analysis, the Commission concludes that the claims of the Petitioner that evacuation line was not ready before the occurrence of revised COD of the project and consequently a breach of TSA occurred cannot be sustained as Petitioner could not establish occurrence of revised COD. It is

also noted that the Petitioner did not act for more than 3 years after the APTEL had issued Order on 14.10.2011 and now, has filed this petitioner after lapse of more than three years. Filing of the present Petition by the Petitioner appears to be mealy an afterthought.

30. Reverting now to the claim of compensation made by the Petitioner of Rs. 59.59 Crore for contented breach of TSA, the Commission holds that any claims made by the parties in the agreement should flow from that agreement and cannot be independent of it. The said agreement contains no provision for payment of compensation by either party in case of any breach occurs in the performance of their respective obligations.

31. To summarise, the Commission holds that neither a breach of TSA has been established nor the basis for seeking compensation is made out in absence of nay provision in the agreement. As the basis of dispute for which adjudication is sought from the Commission is not established, the Commission holds that the Petitioner is not maintainable and accordingly disposes it off as dismissed."

4.7 The aforesaid findings of the Commission are wrong for the following reasons:

a. Under the terms of the Transmission Services Agreement particularly Clause 4.2.1, the generating Company before commissioning of its project was required to obtain statutory approval from the Chief Electrical Inspector/ Electrical Inspector. Thereafter, the Company had an obligation to issue a 15 days notice to PTCUL before trial operations and commercial operation of the generating sets and charging the interconnection facility.

b. Admittedly, the Appellant had obtained the certificate of the Chief Electrical Inspector on 30.06.2011. There is no dispute on this. After receiving this certificate, on 09.07.2011 the Appellant wrote to the Respondent No. 2/ PTCUL setting out the minutes of the site visit made on 03.07.2011. A bare perusal of this letter will disclose that while the Appellant's project was ready for commissioning, it was awaiting connectivity. Also, the said letter indicates that Respondent No. 2/ PTCUL had to expedite the work for completing the transmission/ evacuation system and had to confirm charging of the Ghansali-Chamba line at its rated voltage of 220 KV.

In the said letter, the Appellant also mentioned about the pending proceedings before the State Commission, in which proceeding the Appellant had, *inter alia*, sought the following reliefs:

> *"a. direct the Respondent No. 1 to immediately file, within a period of one week, a progress report indicating the current progress of the Transmission Facility for evacuation of power from Bhilangana III Project;*
>
> *b. upon taking note of the progress, direct the Respondent No. 1 to complete the Transmission Facility for transmission of power from Bhilangana III project on or before end May 2011;*
>
> *c. to hold that in case any delay in Commissioning the Transmission Facility which results in loss to the Petitioner, the Petitioner will be entitled to recover an amount of Rs. 10.71 Crores per month i.e. Rs. 35.71*

lacs per day and/ or such other amount as may be computed by this Commission;

d. to direct the Respondent No. 1 to provide a Bank Guarantee of Rs. 21.43 Crores as security/ Performance Guarantee for completion of the project, which guarantee/ security can be invoked by the Petitioner in case of default to complete the project within the time period; and

e. pass such other and further orders as the Commission may deem fit and proper in the facts and circumstances of the present case."

From the aforesaid, it is quite clear that the Appellant had already moved the Commission on account of delay in construction of transmission system of Respondent No. 2/ PTCUL for evacuation of power from the Appellant's project. All the facts and circumstances leading to the filing of the said petition, are set out therein.

4.8 The Commission disposed off the aforesaid petition by an order dated 08.07.2011, which order was made available to the Appellant subsequently. In the said order the Commission after recording the submissions disposed off the matter without issuing any directions requiring PTCUL to complete the project on time. In this context, reference may be made to the following paragraphs of the Commission's order:

"14. Coming to the contention raised on behalf of the petitioner that they have on regular intervals written to

PTCUL regarding delay, on their part, in implementation of the evacuation network of Bhilangana-III power project and these communications are nothing but written notice for amicable settlement before filing the Petition cannot be accepted. All these communications, whatever the nature of the same may be, cannot take the place of a notice as envisaged under Article 9.2.1 of TSA which has been specifically incorporated in the TSA for an amicable settlement of the disputes between the parties. Thus, the argument that these communications are nothing but written notice for amicable settlement is without any force. It thus stands established that the petitioner has not given any notice for amicable settlement of the dispute as envisaged in Article 9.2. of TSA.

15. Coming to the legal argument advanced on behalf of the petitioner as laid down in 'Gujarat Urja Vikas Nigam Ltd. versus Essar Power Ltd. (Supra), the said legal petition cannot be disputed. However, the question is whether in view of the said decision of the Hon'ble Supreme Court, Article 9 of the TSA which provides for amicable settlement of the dispute between the parties becomes redundant and the parties are debarred from getting their disputes settled through amicable means and are supposed to rush to the State Commission for adjudication of their disputes. Perhaps this could have never been the intention of the Hon'ble Court to deprive the parties of getting their disputes settled amicably of their own if they so intended. If any intention otherwise is imported, the result would be that the 'Disputes Resolution' clause in the agreement need not be incorporated as it cannot given effect to because of the aforesaid case law of the Hon'ble Supreme Court. Thus if the parties fail to settle their disputes amicably as per Article 9.2 of TSA, all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it and not by anyone else.

> *16. Thus the Commission having considered the submissions advanced on behalf of the parties and also after having gone through the legal position has come to the conclusion that the petitioner should first avail the remedy of amicable resolution of its Dispute in the manner envisaged in Article 9.2 of TSA. In the event of the Dispute still remaining unresolved, the Parties can then approach the Commission for redressal of their Dispute."*

4.9 Since, there was substantive delay in commissioning of the transmission system and the Appellant was likely to lose generation of electricity from its project during the hydro months, the Appellant had no other option but to challenge the aforesaid order dated 08.07.2011 before this Tribunal in Appeal No. 112 of 2011. Before this Tribunal the Respondent No. 2/ PTCUL undertook to complete the line by 30.10.2011. Based on such undertaking and on the statement made by the Appellant, this Tribunal passed the following order:

> *"Accordingly, we direct the second respondent to complete the transmission network on or before 30th October, 2011 for evacuation of power from the Appellant's project as undertaken by them. On that completion the appellant will be allowed to evacuate the power in terms of Transmission Services Agreement.*
>
> *It is open to the Appellant to raise the other issues, if any, before the appropriate forum if circumstances so warrant.*
>
> *With these observations, the appeal is dismissed as withdrawn."*

4.10 The entire sequence has been left out by the Commission in the impugned order. Instead, the Commission had relied upon Regulation 22 of the UERC (Terms and Conditions for Determination of Tariff) Regulation, 2011. The said regulation is not applicable in a situation where commercial operation cannot take place on account of non-availability of transmission system, if the generating plant cannot be connected to a transmission system how does it demonstrate generation capability, leave aside peaking capability. The entire evidence provided in the petition filed before the Commission has been overlooked, no opportunity was given to place the entire material before a forum, which was dealing with an original petition akin to a suit for recovery of loss/ damages. The summary proceedings adopted by the Commission violates the principles of natural justice. In this context, reference may be made to following judgment:

Bachhaj Nahar v. Nilima Mandal, reported in ***(2008) 17 SCC 491***, has held as follows:

> *"11. The Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfilment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation*

should not be a ground to flout the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions.

12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when

> *the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.*
>
> [underline supplied]

4.11 The Commission returns a finding in paragraph 27 of the impugned order regarding the non-availability of the metering system of the Petitioner. This finding is without reference to any document or evidence. There are several correspondences between the parties on this issue, which is provided in the list of dates handed over by the Appellant to this Tribunal, during the hearing of 26.08.2019. Apart from the aforesaid, there is no other assessment/ determination of the factual issues raised in the petition. It is humbly submitted that the metering system had to be sealed by the transmission company. The Appellant duly and in a timely manner installed the meters, however, PTCUL delayed the sealing of the meters in order to cover-up the delay in the readiness of its transmission system. This fact is also acknowledged in the arbitral award dated 06.03.2015 passed by the Ld. Sole Arbitrator in an arbitration proceeding between the parties. PTCUL has now challenged this award before the Hon'ble District Court of Dehradun. However, these facts could not be

placed before the Respondent Commission by the Appellant, as the Petition was dismissed at the admission stage itself. The Commission thereafter proceeds to hold that the Petitioner has not acted for more than 3 years after the order of the Tribunal dated 14.10.2011. The Commission thereafter holds that the petition by the Petitioner is merely an afterthought. Clearly, the Commission has ignored the previous petition that was filed and the numerous correspondences that was exchanged by the parties on the subject. There is no finding on limitation either. The finding is on an alleged delay/ lapse of time from the date of the order of this Tribunal. The starting point and end point of limitation has not been discussed or determined in the impugned order. In any event, limitation is a mixed question of law and fact and as such, the Commission was required to frame an issue and conclusively decide this point. Limitation cannot be decided summarily on the basis of vague conjectures.

4.12 The Commission thereafter in paragraph 30 of the impugned order completely misdirects itself on law. It held that since the agreement contains no provision for payment of compensation by either party in case breach occurs in the performance of their respective obligations, the claim for compensation made by the Petitioner of

Rs. 59.59 crores is not maintainable. The Commission held that any claim made by the parties in an agreement should flow from that agreement and cannot be independent of it. This finding is illegal and contrary to the provisions of section 73 of the Indian Contract Act, 1872. The Commission is of the view that unless there is a provision for liquidated damages, a claim for compensation cannot be made. This is a grave error of law, which also constitutes an error of jurisdiction.

4.13 Further, in paragraph 31 of the order, the Commission reiterates its finding that there is neither breach of TSA nor the basis for seeking compensation in the absence of a provision in the agreement is made out. Thereafter, the Commission proceeds to hold that the petition is not maintainable.

4.14 Clearly, the order is incorrect both on law and facts and requires to be set aside. The Appellant humbly prays that this Tribunal may graciously be pleased to remand the matter to the Commission.

5. Shri Buddy A. Ranganathan, learned counsel appearing for the Respondent No. 1 /UERC has filed the written submissions for our consideration as under:-

5.1 Since the present appeal is directed against the impugned Order of the Commission which arises from an Order passed in a dispute

petition under Section 86(1)(f) of the Electricity Act, it is for the contesting parties to argue on the various factual issues as between them. However, the present submission is being filed for the limited purpose of assisting this Tribunal on one argument of the Appellant. The said argument is that – The Appellant was not heard by the Commission. The said argument of the Appellant is not only factually wrong is not even pleaded in the Appeal. **There is not even a single ground in the Appeal to the effect that the Appellant has not been heard**. It is therefore unfair for the Appellant to argue this contention orally without any foundation in its pleadings and without giving an opportunity to rebut the same.

5.2 Without prejudice to the above it is submitted that the Impugned Order itself records in para 6 of the Appeal paper book that the Commission had "…heard the Petitioner and the Respondent..". The Appellant has not sought to impugne such statement in the Appeal. It is further submitted that a record of the hearing before the Commission which appears in the Order of the Commission ought to be taken as conclusive proof of the same. If the Appellant seeks to challenge the same, the burden of proof would lie very much on the Appellant to plead and prove that it was not heard before the Commission.

5.3 The Appellant also seeks to contend that the petition was heard only for "admission" and not finally heard. Whether the hearing was for "admissibility" or not is only a nomenclature. The only controversy is whether the parties were heard or not. Undisputedly the parties were heard and this stands recorded in the Order. This has not been challenged by the Appellant in the appeal.

5.4 The Appellant has not been able to show or contend that any argument raised by it before the Commission was not considered by it nor was the Appellant not heard on any particular aspect. There is not a single ground on this aspect in the appeal.

5.5 Under Regulation 14 (i) of the Commission's Conduct of Business Regulations 2014, it is for the Commission to "..*determine the stages, manner, the place and time of the hearing of the matter consistent with the Central Act*…". Under Regulation 14(2), The Commission may "..*decide the matter on pleadings of the parties or may call the parties to produce evidence by way of affidavit or lead oral evidence in the matter*…".

5.6 In fact, the Appellant does not have a right in law, to insist that a hearing could only be held when it is captioned as "final hearing". If the parties were heard, as in this case, they undisputedly were, whether the hearing was nomenclated as an "admission" hearing or a "final hearing" is immaterial.

5.7 The appeal may, therefore, be dismissed on this sole ground alone.

6. Shri Divyanshu Bhatt, learned counsel appearing for the Respondent No. 2 /PTCUL has filed the written submissions for our consideration as under:-

6.1 Vide the instant Appeal, the Appellant has prayed for issuance of directions to Power Transmission Corporation of Uttarakhand Limited ("**PTCUL**"/ "**Answering Respondent**"), the Respondent No. 2 herein, to pay the Appellant an amount of Rs. 59.59 Crores along with interest @ 15% per annum for alleged losses suffered by the Appellant on account of alleged default by the Answering Respondent. However, the UERC dismissed the claims raised by the Appellant herein on account of, (a) the claims of the Appellant being barred by Limitation, and (b) there being no default on part of the Answering Respondent.

6.2 The Appellant's primary claim is to recognize 01.07.2011 as the date of commissioning of the Project. The said claim is on the basis of the averment that the Appellant had received the approval from the Electrical Inspectorate, Central Electricity Authority, on 30.06.2011. However, it is submitted that the said claim is devoid of any basis in law or fact. In fact, the Appellant's Project was far

from achieving commissioning. There were multiple shortcomings in the Project which were not rectified until November, 2011.

6.3 The Appellant signed a Transmission Service Agreement dated 25.10.2008 "TSA" with the Answering Respondent. As per the terms of the TSA, the Answering Respondent was required to facilitate and provide transmission capacity to the Appellant for evacuation of its power from its 24MW Hydropower Project at River Bhilangana near Village Ghuttu, Tehsil Ghansali, Distt. Tehri Garhwal ("**Project**") prior to its Scheduled Commercial Operation Date or Revised Scheduled Commercial Operation Date ("**Scheduled COD**") as per the terms of the TSA and as revised thereafter. As per the TSA, the Commercial Operations Date ("**COD**") meant the date of charging the Project, or part thereof, by the Appellant herein and it was Appellant's obligation to ensure that its Project is commissioned not later than the Scheduled COD or Revised Scheduled COD of the Project, as the case may be.

6.4 As per the express terms of the TSA the Scheduled COD was agreed between the parties as 31.03.2009. However, admittedly, the Appellant could neither complete its Project nor was able to commission, generate and transmit the power from its Project on the date of Scheduled COD. As such, the Appellant from time to

time communicated progress of its Project, which is evident from several correspondence letters issued by Appellant in this regard as well as extracts of meetings held before the UERC in this regard, copies of which are annexed to the paper-book of the Appeal. Notably, there is no claim by the Petitioner with respect to the originally decided Scheduled COD, i.e. 31.03.2009, as it is clear that the same was given a go-by by. It is pertinent to mention here that the Appellant, without having commissioned its Project within agreed time and without being certain of commissioning of its Project, unnecessarily pressed upon the Answering Respondent to complete the transmission line within Scheduled COD, in order to shift onus of delay upon the Answering Respondent.

6.5 Further, in terms of the provisions of the TSA, the Appellant was under an obligation to serve notice on the Answering Respondent no later than One Hundred Twenty (120) days prior to COD of the Project stating its intention to connect with the transmission Network of the Answering Respondent. Further, the Appellant agreed to ensure that its Project is commissioned not later than the Scheduled or Revised Scheduled COD of the Project as determined under the TSA. The Appellant was under the obligation

to establish a Letter of Credit in favour of the Answering Respondent not later than one (1) month prior to Scheduled or Revised Scheduled COD. The Appellant was also under the obligation to obtain all statutory approvals and issue 15 days' notice to the Answering Respondent before trial operation and commercial operation of the generating set and charging of Interconnection Facilities. However, the Appellant failed to discharge any of its aforementioned obligations as per the TSA and is trying to take advantage of its own wrong under the garb of present proceedings.

6.6 It is evident from the correspondences between parties that from time to time the Answering Respondent asked the Appellant to comply with prevalent provisions of law and to obtain required approvals, which was also a requirement under the TSA. However, the Appellant did not pay any heed towards the same and failed to discharge its contractual obligations under the TSA or to comply with applicable law and started raising frivolous grounds in order to gain time for completion of its Project under the guise of alleged non-completion of transmission line within time. Pertinently, though the Appellant got CEA approval for energisation of its Project on 30.06.2011, however, during the inspection carried out at the time

of the site visit of the Appellant's Project by the General Manager (Projects) of the Answering Respondent on 10-11.06.2011, as well as on 03.07.2011, it was observed that Appellant's plant had many shortcomings.

6.7 It is further submitted that in the meetings held before UERC in respect of evacuation arrangement for hydro power projects, wherein the Appellant as well as the Answering Respondent were participants, the Appellant, failed to disclose clear date of completion / commissioning of its Project and provided new tentative dates of completion in each and every communication. As such, the Appellant has no case whatsoever, and the present Appeal is liable to be dismissed.

6.8 Without prejudice, it is submitted that the TSA signed between the parties, on its express terms constitute entirety and covers all terms for present arrangement between the parties for providing transmission services. As such, the contention of the Appellant that it is entitled to claim damages on account of alleged breach of the terms of TSA is not tenable. It is pertinent to mention here that the said TSA have no provision for claiming such damages / compensation, if any, on account of generation loss etc., as such, no breach of contract / TSA ever occurred as alleged by the

Appellant. Moreover, the Appellant failed to prove the occurrence of its contended 'CoD' and revised the same and provided new tentative dates several times on its own accord before the evacuation system was ready.

6.9 Further, the Appellant herein had filed a petition before the UERC on 10.05.2011. The UERC heard all the parties and recorded their submissions in great detail and disposed of the said Petition vide its detailed order and judgment dated 08.07.2011.The Appellant challenged the findings of the said order before this Tribunal vide its Appeal No. 112 of 2011 and prayed for issuing directions to the Answering Respondent to commission its transmission line. This Tribunal disposed of the said Appeal vide its order dated 14.10.2011 in Appeal No.112 of 2011, which held as follows:

> "*Accordingly, we direct the second respondent to complete the transmission network on or before 30th October, 2011 for evacuation of Power from the Appellants Project as undertaken by them. On that completion, the Appellant will be allowed to evacuate the Power in terms of Transmission Services Agreement.*"

6.10 The aforesaid Order of APTEL clearly implied that the Revised COD is 30.10.2011 which has not been challenged by the Appellant before any judicial forum as such, has attained finality. It is further submitted that there could not be any such breach of

TSA by the Answering Respondent, as the COD was to be declared by the Appellant and in absence of any declaration made by the Appellant regarding the readiness of the Project for charging, it is the date as fixed by this Tribunal or the actual date on which the Project was charged. It is pertinent to mention here that this Tribunal vide its above-mentioned Order dated 14.10.2011 directed the Answering Respondent that the evacuation facility should be ready on or before 30.10.2011 i.e. the Revised Scheduled COD was set as 30.10.2011 and the Answering Respondent completed the transmission line in issue within the time as directed by this Tribunal and got clearance from the Electrical Inspector on 25.10.2011. Further, the APTEL gave liberty to the Appellant to raise other issues which were not related to 'COD'. The fact that this Tribunal, vide its order dated 14.10.2011, decided and fixed a date for the commissioning of the transmission line means that there was no other date that the Answering Respondent was required to adhere to. However, the Appellant under the garb of its own interpretation of the orders of this Tribunal has filed the present appeal which is not maintainable.

6.11 It has been contended by the Appellant before UERC that since it obtained Electrical Inspectors Certificate for Project on 30.06.2011,

01.07.2011 should be treated as revised COD. However, the UERC held that such contention is farfetched and has no support in the TSA. It has further correctly observed that the certificate of Electrical Inspector merely certifies that the installations are electrically safe as per extant regulatory framework, and is a pre-requisite for commissioning of the Project and does not imply that the project of the Appellant was ready to operate.

6.12 Hence the claim of the Appellant that due to Answering Respondent's failure to comply with the provisions of the TSA it could not achieve Revised COD despite being ready for the same cannot be accepted. Pertinently, in compliance with this Tribunal's order dated 14.10.2011, the said line i.e. BH-III-Ghansali-Chamba, was constructed on 21.10.2011, got clearance certificate from electrical inspector on 25.10.2011 and was energized on 04.11.2011. But due to utter failure on part of the Appellant, the metering system at the Appellant's end was not ready which was to be done by the Appellant, as required in terms of the TSA. Further request for scheduling of power before SLDC was the responsibility of the Appellant as per TSA and not of the Answering Respondent. However, admittedly, the Appellant for the first time applied for scheduling of power only on 18.11.2011 which implies

that the Project of the Appellant was not ready before such date and any alleged claims of the Appellant on the basis of alleged deemed generation are devoid of any merits and liable to be rejected.

6.13 As stated above, the construction work of the transmission network of the Answering Respondent for evacuation of power of the Appellant was completed on 21.10.2011 and got the Electrical Inspector's Certificate on 25.10.2011. The line got energized on 04.11.2011 but the metering system was not ready at the Appellant's end. As soon as the metering system was installed by the Appellant, joint meter sealing was done by the Answering Respondent on 12.11.2011. Further, it was only after this that the Appellant approached SLDC for the scheduling of its power on 18.11.2011 and eventually started transmission of power from its Project only on 20.12.2011. In respect thereof, the Appellant initiated Arbitration proceedings, challenging payment of transmission charges to the Answering Respondent from 04.11.2011 till 20.12.2011 on the grounds that the Appellant's project was not ready, and it did not transmit the electricity. However, on the other hand by way of present proceedings, the Appellant is claiming compensation on account of alleged deemed

generation since 01.07.2011 despite of the admitted fact that its Project was itself not ready. Even after 3 months of the contended COD, the Appellant was not ready to commission the Project which commenced delivering power only from 20.12.2011 and about $1^{1/2}$ months after energisation of line. It is evident that subsequent events also don't support the contention of the Appellant that Revised COD had occurred on 01.07.2011. As such, the present proceedings are merely an abuse of process of law and liable to be dismissed with heavy costs.

6.14 It is evident that even after getting permission from SLDC, the Appellant was not in a position to display its capacity by injecting "Infirm Power" into the grid which clearly shows that its plant was not ready for generation and evacuation of power and finally its first machine was synchronized on 20.12.2011, meaning thereby that the Appellant from 18.11.2011 to 19.12.2011 was incapable to start the generating station.

6.15 Further, even after the line was energized and joint meter sealing done by Answering Respondent, the Appellant neither made any declaration for trial run nor ever injected "Infirm Power" into the grid thus displaying its capacity as mentioned at Regulation 3 (1) (n) of Chapter 1 of UERC (Tariff and other Terms

for Supply of Electricity from Renewable Energy Sources and non- fossil fuel based Co-generating Stations) Regulation, 2010, reiterated as under:

> "*Infirm Power" means electricity generated during trial runs prior to commercial operation of a unit of a generating station;*"

Therefore, there is no doubt that the Appellant did not achieve COD in terms of the provisions of the TSA, as well as the extant regulatory framework. The Appellant failed to commission its Project and neither complied with the technical requirements provided under the TSA for achieving COD nor did it achieve COD by satisfying the requirements under the provisions of the regulations.

6.16 It is also pertinent to mention that the Appellant alleges that it was not provided permission for scheduling by SLDC before 18.11.2011 which is totally wrong as the Appellant never asked for permission of SLDC before 18.11.2011. As and when the Appellant approached SLDC for granting permission, SLDC allowed on the same day i.e. w.e.f. 18.11.2011 only. Even then the Appellant did not comply with Regulation 3(1)(n) of Chapter 1 of UERC (Tariff and other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-

generating Stations) Regulation, 2010 and also did not inject the "infirm power" to the grid before COD as per CERC (Grant of Connectivity, Long-Term Access and Medium Term Open Access in inter-state Transmission and related matters) Regulations, 2009 while the Appellant had executed Long Term PPA dated 27.12.2007 with TPTCL.

6.17 Without prejudice to the arguments hereinabove, it is submitted that the dispute in question as raised by the Appellant is regarding the failure to fulfil an alleged contractual obligation of constructing adequate transmission services and to pay the money. Under Limitation Act, the period of Limitation in respect of the present dispute is 3 years from the date when the cause of action arises under Section 55 of the Limitation Act, 1963.

6.18 The cause of action in the said dispute allegedly arose from the day the Appellant was allegedly ready to start supplying its power, which is claimed as 01.07.2011. However, the Appellant only chose to raise such a dispute for the first time in the year 2014 by way of the Petition filed by the Appellant before the UERC. Since the said Petition was filed in November, 2014, it is clear that the Appellant was sleeping on its rights for the period from 14.10.2011,

which is the date of this Tribunal's Order to November, 2014, which is the date of filing of the instant Petition.

6.19 The present appeal is merely an afterthought as the issue herein claiming alleged compensation for the delayed 'COD' has been raised by the Appellant after three years of the issuance of the aforementioned Order, which cannot be entertained. It has been rightly observed and held by the UERC vide the Impugned Order that

> *" .... the Petitioner did not act for more than 3 years after the APTEL had issued Order on 14.10.2011 and now, has filed this petition after lapse of more than three years. Filing of the present Petition by the Petitioner appears to be merely an afterthought ..... "*

6.20 In view of the provisions of the Limitation Act, only a period of 3 years from when the cause of action arose can be allowed to be considered for the purposes of calculating the damages. Since the Petition was filed in November, 2014, a period of 3 years has lapsed since any cause of action that may have allegedly arisen between July, 2011- 17.11.2011, as claimed by the Appellant. Accordingly, any claims of the Appellant pertaining to the period of 01.07.2011 to 17.11.2011 stand excluded. It is further submitted that once the clock of limitation starts running, the same only stops when a claim is filed in respect of the said cause of action. There is

no scenario in which the period of limitation can be extended. Therefore, the Appellant cannot be allowed to state that since it wrote multiple communications to the Answering Respondent regarding the same claim the period of limitation starts from the day when the last of such letters is written. If such an argument were to be accepted, it would reduce the law of limitation a nullity.

6.21 The question of applicability of limitation to disputes under the Act has been settled by the Hon'ble Supreme Court vide its judgment in ***Lanco Kondapalli Power Limited vs Andhra Pradesh Electricity Regulatory Commission &Ors.*****[(2016) 3 SCC 468].**

6.22 In view of the above, it is clear that the Appellant's claim is clearly barred by limitation as it is trying to agitate a cause of action in respect of which the limitation was over much in advance.

7. We have heard learned counsel appearing for the Appellant, learned counsel for the Respondent Commission and learned counsel for the Respondent PTCUL at considerable length of time and we have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeal for our consideration:-

<u>Issue No.1</u>: Whether the Respondent Commission failed to appreciate that the Appellant could not achieve the

COD on account of the default of the Respondent No. 2/PTCUL which prevented the Appellant to source power to the beneficiaries thereby leading to a loss of business?

Issue No.2: Whether the Respondent Commission failed to appreciate that damages/ compensation for breach of contract (TSA) is a legal right/ remedy to claim damages under the laws of contract.?

OUR FINDINGS AND ANALYSIS: -

8. Issue No.1:-

8.1 Learned counsel for the Appellant submitted that the State Commission erroneously held that the petition filed by it, being Petition No. 3 of 2015, "is not maintainable and is accordingly disposed off as dismissed". Learned counsel further submitted that the said petition was filed on the basis that on account of breach of the terms of the Transmission Services Agreement (TSA) dated 25.10.2008 by the Respondent/PTCUL, the Appellant could not commission its project and has suffered a loss of Rs.59.59 crores. Learned counsel for the Appellant vehemently submitted that after the admissibility hearing on 19.01.2015, no further hearing was held and also no opportunity was given for

hearing the case on merits. Admittedly, the Appellant had obtained the certificate of the Chief Electrical Inspector for its project on 30.06.2011and thereafter on 09.07.2011, the Appellant wrote to the Respondent No. 1/ PTCUL setting out the minutes of the site visit made on 03.07.2011. Learned counsel was quick to submit that the bare perusal of this letter will disclose that while the Appellant's project was ready for commissioning, it was awaiting connectivity for which PTCUL had to expedite the work for completing the transmission/ evacuation system and had to confirm charging of the Ghansali-Chamba line at its rated voltage of 220 KV. In the said letter, the Appellant had also mentioned about the pending proceedings before the Respondent Commission in which the Appellant had, *inter alia*, sought among others the completion of transmission facilities on or before end of May, 2011. Additionally the Appellant had also narrated the losses to the Appellant on account of non-commissioning of evacuation system. However, the State Commission disposed of the aforesaid petition by order dated 08.07.2011 without issuing any direction to PTCUL to complete the transmission project on time. In this context, reference to Para 14, 25 & 16 of the impugned order are quite relevant.

8.2 In view of the substantial delay in commissioning of the transmission system, due to which the Appellant was likely to lose generation of electricity from its project during the hydro months, the Appellant had no other option but to challenge the aforesaid order dated 08.07.2011 before this Tribunal in Appeal No. 112 of 2011. Based on submissions of Respondent/PTCUL, so as to complete the transmission line by 30.10.2011, this Tribunal disposed of the Appeal directing PTCUL to complete the said transmission network on or before 30.10.2011. Learned counsel for the Appellant reiterated that despite having merit in the case, the State Commission without hearing on merits, dismissed the petition which is nothing but grave error of law and also error of jurisdiction.

8.3 ***Per contra,*** learned counsel for the Respondent Commission submitted that the argument of the learned counsel for the Appellant that, the Appellant was not heard is not only factually wrong but also not even pleaded in the Appeal. In fact, there is not one single ground in the Appeal to the effect that the Appellant has not been heard. Learned counsel further contended that a recordal of a hearing before the Commission which appears in the Order of the Commission ought to be taken as conclusive proof of

the same. If the Appellant seeks to challenge the same, the burden of proof would lie very heavily on the Appellant to plead and prove that it was not heard before the Commission. Learned counsel for the Commission while referring to Regulation 14 (i) of the Commission's Conduct of Business Regulations 2014 submitted that the Appellant does not have a right in law, to insist that a hearing could only be held when it is captioned as "final hearing". The Commission may "..*decide the matter on pleadings of the parties or may call the parties to produce evidence by way of affidavit or lead oral evidence in the matter...*"

8.4 Learned counsel appearing for second Respondent/PTCUL submitted that the Appellant's primary claim is to recognize 01.07.2011 as the date of commissioning of the Project. The said claim is based on the averment that it had got the approval of Electrical Inspectorate, Central Electricity Authority, on 30.06.2011. Learned counsel was quick to submit that in fact, the Appellant's Project was far from achieving commissioning on that date as there were multiple shortcomings in the Project which were not rectified until November, 2011. Learned counsel for the second Respondent further submitted that as per Transmission Service Agreement signed on 25.10.2008, PTCUL was required to

facilitate and provide transmission connectivity for evacuation of its power prior to its Scheduled Commercial Operation Date or Revised Scheduled Commercial Operation Date. Learned counsel for the second Respondent vehemently submitted that as per the express terms of the TSA, the scheduled COD was agreed between the parties as on 31.03.2009. However, admittedly, the Appellant could neither complete its Project to be charged nor was able to commission the same and transmit the power on the date of Scheduled COD. Learned counsel contended that without commissioning its project within agreed time and without being certain of commissioning of its Project, the Appellant unnecessarily pressed upon the second Respondent to complete the transmission system within Scheduled COD, in order to shift onus of delay upon the Answering Respondent.

8.5 Learned counsel for the second Respondent further contended that in terms of the provisions of the TSA, the Appellant was under an obligation to serve notice on the second Respondent, not later than 120 days prior to COD stating its intention to connect with the transmission Network. Further, the Appellant was under the obligation to establish a Letter of Credit in favour of the second Respondent not later than one (1) month prior to COD and it was

also the obligation on the Appellant to obtain all statutory approvals and issue 15 days' notice to the second Respondent before trial operation / COD. However, the Appellant failed to discharge any of its aforementioned obligations envisaged under the TSA and is trying to take advantage of its own wrong under the garb of present proceedings. It is also pertinent to note that the Appellant got CEA's approval for energisation of its Project on 30.06.2011, however, during the inspection carried out at the time of the site visit of the Appellant's Project by the General Manager (Projects) of the Answering Respondent on 10-11.06.2011, as well as on 03.07.2011, it was observed that Appellant's plant had many shortcomings and was not in a position to get commissioned.

8.6 Learned counsel further submitted that the Appellant had filed a petition before the UERC on 10.05.2011 which after hearing all the parties in great detail was disposed of vide its detailed order and judgment dated 08.07.2011. The said order of the Commission was challenged by the Appellant before this Tribunal in Appeal No. 112 of 2011 and prayed for issuing directions to the Answering Respondent to commission its transmission line. This Tribunal disposed of the said Appeal vide its order dated 14.10.2011 in Appeal No.112 of 2011, which held as follows:

"*Accordingly, we direct the second respondent to complete the transmission network on or before 30th October, 2011 for evacuation of Power from the Appellants Project ns undertaken by them. On that completion, the Appellant will be allowed to evacuate the Power in terms of Transmission Services Agreement.*"

8.7 Learned counsel further submitted that in view of the aforesaid order of this Tribunal, the Revised COD was 30.10.2011 which has not been challenged by the Appellant before any judicial forum as such, has attained finality. It would thus emerge that in absence of any declaration made by the Appellant regarding the readiness of the Project for charging/ commissioning, the revised COD was fixed by this Tribunal as 30.10.2011 and the Answering Respondent completed the reference transmission line in issue within the time as directed by this Tribunal and got clearance from the Electrical Inspector on 25.10.2011. Learned counsel, accordingly reiterated that as decided by this Tribunal, vide its order dated 14.10.2011, the said line was completed on 21.10.2011, got clearance from the Electrical Inspector on 25.10.2011 and was energised on 04.11.2011 but due to utter failure on part of the Appellant, the metering system at the Appellant's end was not ready and for the first time, the Appellant applied to SLDC for scheduling of power only on 18.11.2011 which implies that the Appellant's Project was not ready before such date

and any claims of the Appellant on the basis of alleged deemed generation is devoid of any merits and liable to be rejected. In fact, the Appellant started transmission of power from its project only on 20.12.2011 whereas the transmission system was duly energized on 04.11.2011. However, on the other hand, by way of present proceedings, the Appellant is claiming compensation on account of alleged deemed generation since 01.07.2011 despite of the admitted fact that its Project was itself not ready.

8.8 While summing up his argument, learned counsel for the second Respondent emphasised that in view of the facts stated supra, the Appellant could not claim that it could achieve the COD of its hydro project due to any delay in commissioning/charging of the transmission line.

Our Findings

8.9 We have carefully considered the rival contentions of the learned counsel for the Appellant and learned counsel for the Respondent Commission/second Respondent. What thus transpires from the submissions of the parties that not only the generation project of the Appellant but also the transmission line to be constructed by the second Respondent got delayed due to one or the other reason. The main dispute in the case has arisen due to the claim

of the Appellant that its generation project could not be commissioned because of not readiness of the transmission line which was to be constructed by the second Respondent/PTCUL. From the record/material placed before us, it is relevant to note that as per terms of the TSA signed between the parties on 25.10.2008, the scheduled COD was agreed as on 31.03.2009. However, admittedly neither the Appellant nor the second Respondent could complete their respective project within the agreed COD. While the Appellant claims its COD as on 01.07.2011 based on the approval from Electrical Inspector, CEA on 30.06.2011, the second Respondent contend that even after the inspection by the Electrical Inspector of CEA, there were multiple shortcomings in the project which were not even rectified till November, 2011 and hence the COD, as claimed from 01.07.2011 appears to be fictitious.

8.10 It is noticed that the case regarding claims and counter claims of COD was heard by the State Commission in the Petition filed before it on 10.05.2011 and after hearing all the parties in detail, the State Commission passed its order on 08.07.2011 which subsequently was challenged by the Appellant before this Tribunal in Appeal No.112 of 2011. The said appeal was disposed of by

this Tribunal vide its order dated 14.10.2011 directing the second Respondent to complete the transmission network on before 30.10.2011 for evacuation of power from the Appellant's project. In pursuance of the said order of this Tribunal, the second Respondent/PTCUL completed its transmission line on 21.10.2011, got clearance from Electrical Inspector on 25.10.2011 and energised the transmission line on 04.11.2011. However, the Appellant's generation project and the metering system was not ready on account of which the request for scheduling of power before SLDC could be made only on 18.11.2011 and permission granted on same date. Eventually, the Appellant started transmission of power from its project only w.e.f. 20.12.2011. In view of the aforementioned facts, the claim of the Appellant that its project was ready on 01.07.2011 appears to be in utter contrast to the factual matrix. It is noticed that even after three months of the contended COD, the Appellant was not ready to commission the project which commenced delivery of power only from 20.12.2011 i.e. after about 1 ½ months since energisation of the transmission line.

8.11 In the light of the above, we are of the opinion that the claim of the Appellant to recognise its project COD as 01.07.2011 appears to

be non-existent and the delay whatsoever in COD/transmission of power has occurred cannot be attributed to the second Respondent. It is a settled practice in construction of generation and transmission projects that the completion of both the schemes i.e. generation as well as transmission has to be achieved matching to each other.

8.12 One more fact that comes to our mind that even after getting permission from SLDC, the Appellant was not in a position to schedule power and display its capacity by injecting "infirm power" into the grid which implies that the power project was not ready for generation and evacuation of power and its machine got synchronised / commissioned only on 20.12.2011. It is thus crystal clear that generation project has delayed due to reasons attributed to the Appellant itself and in, no way, for non-completion of transmission line. Accordingly, we are of the considered opinion that there is no infirmity or ambiguity in the findings of the State Commission in the impugned order and the Commission has passed the said order with cogent reasoning. Hence, interference of this Tribunal on this issue is not called for.

9. Issue No 2:-

9.1 Learned counsel for the Appellant submitted that it had filed petition before the State Commission *inter alia*, for seeking Rs. 59.59 crores along with interest @ 15% per annum for the losses caused to the Petitioner on account of the default of Respondent No. 2/PTCUL. The said claim was primarily on the basis that the Respondent No. 2/ PTCUL was in breach of the terms of the Transmission Services Agreement (TSA) dated 25.10.2008. However, the State Commission disposed off the aforesaid petition by an order dated 08.07.2011. Learned counsel for the Appellant further submitted that under the terms of the Transmission Services Agreement (TSA) particularly clause 4.2., the Appellant before commissioning of its Project was required to obtain all statutory approvals from the Chief Electrical Inspector/ Electrical Inspector and thereafter to issue a 15 days notice to PTCUL before trial operation and commercial operation of the generating sets and charging of Interconnection Facilities. It is the contention of the Appellant that it obtained the certificate of the Chief Electrical Inspector on 30.06.2011 and after receiving this certificate, the Appellant wrote to the Respondent No. 2/ PTCUL setting out the minutes of the site visit made on 03.07.2011.

Learned counsel vehemently submitted that a bare perusal of this letter will disclose that while the Appellant's project was ready for commissioning, it was awaiting connectivity and also, the Respondent No. 2/ PTCUL had to expedite the balance work for completing the transmission/ evacuation system and had to confirm charging of the Ghansali-Chamba line at its rated voltage of 220 KV.

9.2 Learned counsel for the Appellant alleged that despite knowing that the second Respondent has not completed its transmission line, the State Commission disposed off the matter without issuing any directions to PTCUL to complete the project on time. It is pertinent to mention that only during the proceedings before this Tribunal in Appeal No. 112 of 2011, the Respondent No. 2/ PTCUL undertook to complete the line by 30.10.2011 and based on such undertaking and on the statement made by the Parties, this Tribunal disposed off the appeal with the direction to second respondent to complete the transmission network on or before 30th October, 2011. Learned counsel further submitted that the entire sequence has been left out by the State Commission in the impugned order, instead the Commission had relied upon Regulation 22 of the UERC (Terms and Conditions for

Determination of Tariff) Regulation, 2011. In fact, the said regulation is not applicable in a situation where COD cannot take place on account of non-availability of transmission system. Learned counsel was quick to point out that if the generating plant cannot be connected to a transmission system, how does it demonstrate generation capability, leave aside peaking capability. Learned counsel contended that the entire evidence provided in the Petition filed before the Commission has been overlooked and no opportunity was given to place the entire material in an original petition akin to a suit for recovery of loss/ damages. Learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Bachhaj Nahar v. Nilima Mandal***, reported in ***(2008) 17 SCC 491*** to emphasize that the proceedings adopted by the State Commission violates the principle of natural justice.

9.3 Advancing his arguments further, learned counsel for the Appellant contended that the finding of the State Commission in paragraph 27 of the impugned order regarding the non-availability of the metering system of the Appellant is without any reference to document or evidence. Instead, the Appellant in a timely manner had installed the meters but the second Respondent/

PTCUL delayed the sealing of the meters in order to cover-up the delay in the readiness of its transmission system. Learned counsel further submitted that this fact has also been acknowledged in the arbitral award dated 06.03.2015 passed by the Sole Arbitrator which has now been challenged by the second Respondent/PTCUL before the District Court of Dehradun. Learned counsel pointed out that the findings of the State Commission that the Appellant has not acted for more than 3 years after the order of the Tribunal dated 14.10.2011 is erroneous as the Commission has ignored the previous petition that was filed and the numerous correspondences that was exchanged by the parties on the subject were placed on record. Further, the State Commission in paragraph 30 of the impugned order had completely misdirected itself on law by holding that since the agreement contains no provision for payment of compensation by either party in case breach occurs in the performance of their respective obligations, the claim for compensation made by the Petitioner of Rs. 59.59 crores is not maintainable. Learned counsel was quick to submit that such finding is illegal and contrary to the provisions of section 73 of the Indian Contract Act, 1872. Hence, the State Commission has wrongfully held that there is neither breach of TSA nor the basis for seeking compensation in the

absence of a provision in the agreement. Summing up his arguments, learned counsel for the Appellant submitted that the impugned order is wrong - both on law and facts and requires to be set aside. Stating as above, learned counsel requested to remand the matter to the State Commission.

9.4 ***Per contra,*** learned counsel for the Respondent Commission presented his submissions only in case of the maintainability of the petition before the State Commission and merely refers to the Regulations of the State Commission on Conduct of Business Regulations 2014 to highlight that all the parties were heard in detail in this case and there is not a single ground by which it can be alleged that the matter was not heard in detail or how the natural justice has been violated. Learned counsel for the State Commission has not made any argument on the claim of the Appellant for compensation in lieu of the energy loss.

9.5 Learned counsel for the second Respondent/PTCUL making detailed submissions on the COD of generating units and transmission line highlighted that delay in COD of Appellant' plant cannot in any way be attributed to the second Respondent as its transmission line was charged well before the commissioning of the generating units. Learned counsel for the second Respondent

highlighted that under the TSA, the Scheduled COD was agreed between the parties as on 31.03.2009. However, admittedly, the Appellant could neither complete its Project to be charged nor was able to commission, generate and transmit the power from its Project on the date of Scheduled COD. Further, the formalities of serving notice to the second Respondent by the Appellant relating to COD were not completed and instead the Appellant is trying to take advantage of its own wrong under the garb of its present proceedings. Learned counsel was quick to point out that from the records and material placed for consideration of the State Commission and this Tribunal, it is evident that the Appellant failed to disclose clear date of completion/commissioning of its project and rather, provided new tentative dates of completion in each and every communication.

9.6 Learned counsel further submitted that the contentions of the Appellant that it is entitled to claim damages on account of alleged breach of TSA is, therefore, not tenable. Moreover, TSA has no provision for claiming such damages / compensation on account of generation loss etc.. On the other hand, the second Respondent completed its transmission line within the time stipulated by this Tribunal in its order dated 14.10.2011 whereas

the Appellant could not complete its project along with associated metering system and in turn could not transmit power up to 20.12.2011.

9.7 Learned counsel for the second Respondent vehemently submitted that even after charging of transmission system on 04.11.2011, clearance of SLDC for scheduling of power on 18.11.2011, the Appellant could not make use of transmission line admittedly because of non-completion of its generating project. Hence, the claim of any loss or compensation does not arise and that too on the second Respondent. He further submitted that the claim of the Appellant regarding compensation in lieu of energy loss is also barred by limitation which is 3 years from the date when the cause of action arises under Section 55 of the Limitation Act, 1963. In the instant case, the cause of action allegedly arose from the day when the Appellant claims to start supply of power i.e. 01.07.2011 whereas the Appellant chose to raise such a dispute for the first time in November, 2014 by way of the petition filed before the State Commission. It is thus clear that the Appellant was reluctant to claim its right for the period from 14.10.2011 when this Tribunal passed the judgment dated 14.10.2011. Learned counsel pointed out that the present appeal

is merely an afterthought as the issue claiming alleged compensation for the delayed COD has been raised after three years of the issuance of the aforementioned order of this Tribunal and accordingly the State Commission has rightly observed in the impugned order as under:-

> *" .... the Petitioner did not act for more than 3 years after the APTEL had issued Order on 14.10.2011 and now, has filed this petition after lapse of more than three years. Filing of the present Petition by the Petitioner appears to be merely an afterthought ..... "*

9.8 Learned counsel submitted that once the clock of the limitation starts running, the same only stops when a claim is filed in respect of the said cause of action and there is no scenario in which the period of the limitation can be extended. To fortify his contentions, learned counsel placed reliance on the judgment of Hon'ble Supreme Court in ***Lanco Kondapalli Power Limited vs Andhra Pradesh Electricity Regulatory Commission &Ors.*****[(2016) 3 SCC 468].** Learned counsel for the second Respondent accordingly concluded his pleadings that the Appellant's claim is clearly barred by the limitation as it is trying to agitate a cause of action in respect of which the limitation was over much in advance and hence the Appeal ought to be rejected.

Our Findings:-

9.9 We have critically analysed the contentions of the learned counsel for the Appellant and learned counsel for the Respondents and also taken note of various judgments relied upon by the parties. It is not in dispute that a TSA came to be executed by the parties on 25.10.2008 as per which the agreed COD was 31.03.2009. However, admittedly neither the Appellant nor the second Respondent could complete their respective project on or before the agreed COD due to one or the other reason, as stated supra. While looking at factual matrix of dates under the records/material placed before us, it is crystal clear that the transmissions system was completed/charged in all respects on 04.11.2011 and the generating units got commissioned in all respect including its metering system only on 20.12.2011 from which the power flow started. We do not find force in the arguments of the learned counsel for the Appellant that as approval of Electrical Inspector of CEA was given on 30.06.2011, the COD of generating project should be reckoned from 01.07.2011. From various records, it emerges that thought Electrical Inspector gave safety approval on 30.06.2011 but the generating station was not completed to its full requirement so as to generate and transmit power. Besides, it is

noticed that the first notice for scheduling power from the project was given to SLDC on 18.11.2011 and despite clearance of SLDC for transmitting power, the Appellant could not commence evacuation of power until 20.10.2011.

9.10 It thus clearly reflects that the generating plant in true sense so as to generate and transmit power was completed only on 20.12.2011 whereas the transmission line was made fully functional on 04.11.2011. It is beyond doubt that the transmission system was not completed as per the agreed COD i.e.31.03.2009, but, at the same time, generating units were also not completed by that time and as such the claim in question is not justified on account of deemed energy loss and the same cannot be raised alleging that the loss was attributed to non-completion of transmission system.

9.11 It is also relevant to note that this Tribunal in its judgment directed to the second Respondent to complete the transmission line on or before 30.10.2011 to which the second Respondent scrupulously completed the line on 25.10.2011 followed by charging of the same on 04.11.2011. The State Commission has analysed all the documents placed before it and has recorded its findings in its order at Paragraph Nos.26-31. Paragraphs No. 31 is reproduced below:-

31. To summarise, the Commission holds that neither a breach of TSA has been established nor the basis for seeking compensation is made out in absence of any provision in the agreement. As the basis of dispute for which adjudication is sought from the Commission is not established, the Commission holds that the Petitioner is not maintainable and accordingly disposes it off as dismissed."

9.12 Regarding reference to the Indian Contract Act, 1872 & Limitation Act 1963, it is pertinent to note that the Appellant did not take any action regarding its claim for compensation on account of alleged energy loss for more than three years as soon as the occurrence of cause of action. Even reckoning from the judgment of this Tribunal dated 14.10.2011, the period of limitation also crossed three years which is provided under Section 55 of the Limitation Act 1963. In view of the facts in the matter and our analysis thereon, it emerges that the Appellant is not entitled for any claim for compensation in lieu of energy loss etc. due to the fact that the transmission line was ready for use well before the generating units were actually commissioned for generating power. Besides, the claim is also barred by limitation and any violation of the India Contract Act, 1872 is also not noticed in the impugned order. Accordingly, we hold that the State Commission has passed the

impugned order in a judicious manner and intervention of this Tribunal is not called for.

10. SUMMARY OF FINDINGS:-

In view of the findings and analysis on the issues raised in the Appeal in the above paras, we summarise our findings as under:-

10.1 The Appellant has not been able to establish that any argument raised by it before the Commission was not considered by it nor was the Appellant not heard on any particular aspect and hence Issue no.1 decided against the Appellant.

10.2 We hold that delay in commissioning of the generating units are in no way attributed to the delay in transmission line of the second Respondent and hence the question of any compensation for deemed losses of energy does not arise and hence Issue No.2 decided against the Appellant.

ORDER

For the foregoing reasons, we are of the considered view that the instant Appeal being Appeal No.144 of 2015 is devoid of merits and hence dismissed. The Impugned order dated 04.03.2015 in Petition

No.3 of 2015 passed by Uttarakhand Electricity Regulatory Commission is hereby upheld.

In view of the disposal of the Appeal, the relief sought in the IA Nos.220 of 2019 & 221 of 2019 do not survive for consideration and accordingly, stand disposed of.

No order as to costs.

Pronounced in the Open Court on this **07th day of January, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

Pr