APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 266 OF 2016 & IA NO. 561 of 2019

Dated : 19th May, 2020

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

IN THE MATTER OF :

PEL Power Limited,
8-2-293/82/A/76, Road No.9 A,
Jubilee Hills,Hyderabad-500033 ....Appellant

VERSUS

1. Central Electricity Regulatory Commission
   3rd and 4th Floor, Chanderlok Building,
   36, Janpath, New Delhi – 110001

2. Power Grid Corporation of India Limited
   B-9, Qutab Institutional Area,
   Katwaria Sarai, New Delhi – 110016 ....Respondent(s)

Counsel for the Appellant (s) : Mr. Anand K. Ganesan
Ms. SwapnaSeshadri

Counsel for the Respondent(s) : Mr. SethuRamalingam for R-1

Mr. S.B. Upadhay, Sr. Adv.
Ms. Suparna Srivastava
Ms. SanjanaDua
Mr. TusharMathur 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 the PEL Power Limited ("Appellant") under Section 111 of the Electricity Act, 2003 against the Order dated 12/07/2016 passed by the Central Electricity Regulatory Commission (hereinafter called the '**Central Commission**') in Petition No. **315/MP/2013** whereby the Central Commission has disposed off the petition of the Appellant herein rendering erroneous findings. The said petition was filed by the Appellant seeking a declaration of force majeure under the Bulk Power Transmission Agreement entered into with the Respondent No. 2, Powergrid Corporation of India Limited **(Powergrid)** and consequent non-levy of any charges/damages and return on bank guarantee. By the impugned order, the Central Commission after finding that the Appellant had acted bona fide, the Appellant was affected by force majeure, Powergrid not acting in a prudent manner and in fact not suffering any losses at the time when the Appellant claimed force majeure, has however held that the issue whether any charges are liable to be paid by the Appellant would be decided based on the decision in other proceedings relating to relinquishment of open access capacity and levy of relinquishment charges if any.

1.1 It is the grievance of the Appellant that the Central Commission erred in interpreting the Force Majeure Clause of the Bulk Power Transmission Agreement (hereinafter "**BPTA**") by holding that the Appellant can be entitled to relief only for temporary force majeure events and not permanent force majeure events. Further, the Central Commission erred by not allowing the refund of Bank

Guarantee (hereinafter **"BG"**) even after upholding the ignorance of Respondent No. 2 Powergrid Corporation of India Ltd in fulfilling its responsibility and duty envisaged under the Electricity Act, 2003.

1.2 The Appellant- PEL Power Limited is a company incorporated under the provisions of the Companies Act, 1956. The Appellant has been incorporated with the primary objective of establishing generating stations and to be engaged in business of generation and supply of electricity.

1.3 The Respondent No. 2- Power Grid Corporation of India (hereinafter called Powergrid) is a company incorporated under the provision of the Companies Act, 1956 and is the Central Transmission Utility (hereinafter "**CTU")** and the interstate transmission licensee. The activities of transmission of electricity by the Powergrid are regulated by the Central Commission under the provisions of Electricity Act, 2003.

1.4 The Respondent No. 1, Central Commission is a Regulatory Commission under the provisions of the Electricity Act, 2003. The Central Commission discharges functions and exercises powers under Section 79 and other applicable provisions of the Electricity Act, 2003.

2. FACTS OF THE CASE:-

2.1 In the year 2007, the Appellant had proposed the establishment of a 1050 MW thermal generating station in the Nagapattinam district in the state of Tamil Nadu. For this purpose of establishing the

generating station, the Appellant had applied for and obtained the requisite approvals and permissions. The Appellant had also proceeded to incur substantial cost and expenditure towards the implementation of the project and had mobilized the required infrastructure including land, water, fuel etc and also obtained the requisite statutory clearances for establishment of the generating station.

2.2 The following Table would indicate the approvals and licenses obtained by the Appellant for establishment of the generating station at the project site.

S. No	Approval	Date on which obtained
1	Environmental Clearance from MoEF	26.03.2010
2	CZR clearance from MoEF	19.05.2011
3	NOC for stack height from Airport Authority of India	21.12.2009
4	Indigenous Coal Linkage From MoC	27.08.2010
5	Permission for drawal of seal water from TNMB	06.07.2008
6	forest & wild life	11.06.2010
7	Department of Archaeology	05.01.2011
8	Jetty/port	11.02.2009
9	Power trading-MOA with PTC	07.01.2010
10	Power evacuation- BPTA with PGCIL	24.12.2010
11	Financial closing- sanction of the term loan by axis bank	04.01.2011

2.3 The project site was located along the seacoast of Bay of Bengal in the State of Tamil Nadu and in the vicinity of the Kaveri delta region. As is evident from the above table, the approvals which are required to be taken by the Appellant included the approval from the Ministry of environment and forests, CRZ approval from the marine time authorities etc. all these aspects were duly complied with and the said permissions were obtained by the Appellant.

2.4 For the evacuation of electricity from the generating station of the Appellant, the Appellant approached Powergrid for the long term open access. The long term open access was applied for by the Appellant on 20.10.2008 for the capacity of 987 MW (after deducting auxiliary consumption), in the prescribed form and following the procedure as specified. The required fees for application for the open access as well as for the system studies to be undertaken by Powergrid of Rs. 19,67,752/- was also duty remitted by the Appellant. Pursuant to the above, the long term access was granted by Powergrid to the Appellant on 10.12.2010.

2.5 Thereafter, a Bulk Power Transmission Agreement dated 24.12.2010 (hereinafter called the **BPTA**) was executed by the Appellant with Powergrid. The BTPA was executed by Powergrid with the Appellant and one other company, M/s IL&FS Tamil Nadu Power Company Limited which had also proposed the establishment of a 1200 MW generating station in the vicinity of the Appellant near Cuddalore in the State of Tamil Nadu.

2.6 In terms of the BPTA, the Appellant was required to furnish a bank guarantee for an amount of Rs 49.35 crores calculated at the rate

of Rs. 5 lacs per MW of the open access capacity of the Appellant. The said bank guarantee was duly furnished by the Appellant. The bank guarantee was for the purpose of securing the payment of damages payable to Powergrid to compensate for the loss suffered by the Powergrid in case of any default on the part of Appellant to abide by the terms of the open access arrangement.

2.7 One of the statutory clearances required for the generating station to be established by the Appellant is the no objection/ clearance certificate viz Consent for Establishment to be issued by the Tamil Nadu Pollution Control Board (hereinafter "**TNPCB**"). The application for the same was made by the Appellant to the TNPCB on 15.06.2010.

2.8 There were various correspondences exchanged between the Appellant and the TNPCB in regard to the grant of the Consent for Establishment. However, the Consent for Establishment has not been forthcoming which is evident from the following:

(a) The Appellant's generating station is situated in the coastal region and the most comprehensive and detailed examination is at the time of grant of the Environmental Clearance and the CRZ clearance, both of which were obtained by the Appellant.

(b) The G.O. dated 08/05/1998 which placed restrictions on development in the Cauvery delta region was primarily for textiles and tannaries which were polluting industries with effluents in the river Cauvery. The power projects being covered by the said GO was not even envisaged.

(c) The generating station of the Appellant was more than 5 KM away from the Tailend Regulatory of the river, which is also confirmed by the expert team from Anna University. The Public Works Department has also certified that the water body ends at the Tail End Regulator and downstream is only a drain carrier. These are independent and expert certifications to establish that the Appellant's project was not even governed by the said GO.

(d) The Appellant has already spent in excess of Rs. 300 crores on the project including procuring land, obtaining various clearances and coal linkages etc. It is not the case that the Appellant did not act in a bona fide manner or show its commitment to the project.

(e) The Central Electricity Authority had also recommended the case of the Appellant, however no positive action was taken.

(f) The PWD had also certified the factual position.

2.9 However, the matter has been pending consideration of the State Government. There has been no decision taken by the State Government of the CFE to be granted to the generating station of the Appellant as yet. The Appellant has been continuously following up with Government of Tamil Nadu. In fact, there are other generators in the region who are also affected by the same. There are also writ petitions pending in the Hon'ble Madras High Court on the issue of CFE, but no favourable orders have been passed till date.

2.10 In the circumstances, the non-grant of the CFE due to which the project of the Appellant could not be established is clearly a force majeure event, beyond the reasonable control of the Appellant. The Agreement, in clause 9 also clearly provides for the force majeure clause in an expansive manner as to include any event or circumstances beyond the control of the parties. Article 9, inter-alia, reads as under:

> *"9.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and given written notice of 30 days to the other party to this effect. Transmission/drawal of power shall be stated as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist."*

2.11 The non-availability of CFE was clearly an event beyond the control of the Appellant, on account of which the Appellant had claimed force majeure. It is relevant to mention that the fact of non-availability of CFE was made known by the Appellant to Powergrid as far back as in April, 2011 in the 3rd Co-ordination Committee Meeting held on 01.04.2011. It was further reiteratedin the subsequent meetings held on 09.09.2011 and 02.12.2011.

2.12 The Appellant had also sent various communications to the Respondent No. 2 wherein the Appellant had stated that due to force majeure, the Appellant is not in a position to establish the generating station and use the transmission open access to be

established by the Respondent No. 2. In this regard, the communications were sent by the Appellant to Powergrid dated 16.12.2011, 24.01.2012, 25.02.2012, 18.06.2012, 11.12.2012, 27.04.2013, 06.07.2013, 26.07.2013 and 02.09.2013.

2.13 The force majeure condition was intimated to Powergrid within a few months of the execution of BPTA and at this stage, no activity wasundertaken by Powergrid to construct evacuation transmission facilities in terms of the BPTA. Powergridhad not even acquired land to establish the substation for providing the evacuation facility to the proposed generatingstation of the Appellant.Even for the establishment of 400/765 Kv pooling sub-station, the acquisition and possession of land was not completed by then. The possession of about half of the landwas given to Powergrid only in June 2013 and a substantial portion ofthe land is still to be acquired. The contract for the onward transmissionlines had also not been awarded and no development work had begun.

2.14 However, Powergrid took the position that once theBPTA is executed and the bank guarantee has been provided by theAppellant, the Appellant has to necessarily relinquish the entire bankguarantee whether or not the generating station is established and it isentitled to invoke the bank guarantee. In this regard the communications dated 17.01.2012, 02.07.2013, 14.08.2013 and 25.09.2013 of the Respondent No. 2 are quite relevant.

2.15 The non-development of the generating station by the Appellant is purelyon account of force majeure conditions and is not in any mannerattributable to any act of commission or omission on the

part of theAppellant. In the circumstances, the Appellant could not be expected orrequired to perform its obligations under the provision of the BPTA with thePowergrid. The question of open access being operational does not arise when the generating station itself is not being established.

2.16 Further, the action ofPowergrid in the present case was not bona fide and that of a prudent utility. The Appellant had as far back as in April, 2011 intimated Powergrid of the non-availability of the CFE. By letter dated 16/12/2011, the Appellant claimed force majeure and also intimated that the Appellant would not be using the pooling station and as and when the second pooling station is planned, the Appellant can utilize the same if the generating station comes up.

2.17 The action for establishing the transmission system, including the investment approval itself was taken by Powergrid only in the year 2013, fully aware of the fact that the generating station was not coming up. In the circumstances, it is not open to Powergrid to claim any right against the Appellant for such transmission system. The information sourced from the website of the Respondent No. 2 itself revealed that as in December 2013 the Respondent No. 2 had invested the cumulative amount of Rs. 4.86 crores on the transmission lines and system in question. This is after 2 years when the Appellant had claimed force majeure events. As against the cumulative investment of Rs. 4.86 crores after 2 years of the Appellant claiming force majeure event, the Respondent No. 2 sought to recover the security amount furnished by way of a bank

guarantee of Rs. 49.35 crores from the Appellant. This is clearly not sustainable in law and is extremely unfair and unjust.

2.18 Despite the above, Powergrid threatened invocation of the bank guarantee and appropriation of the said amounts. In the circumstances, the Appellant was constrained to file Petition 315/MP of 2013 before the Central Commission seeking the declaration of frustration of the BPTA on account of force majeure condition and consequent return of the bank guarantee.

2.19 On 03/04/2014, Powergrid filed a reply to the above petition. The Appellant filed its rejoinder and also an Additional Affidavit placing on record facts that had come to the knowledge of the Appellant during the course of the proceedings.

2.20 Vide Order dated 12/07/2016, the Central Commission has disposed off the Petition No. 315/MP/2013 filed by the Appellant. By the impugned order, the Central Commission after finding that the Appellant had acted bona fide, the Appellant was affected by force majeure, Powergrid not acting in a prudent manner and in fact not suffering any losses at the time when the Appellant claimed force majeure, has however held that the issue whether any charges are liable to be paid by the Appellant would be decided based on the decision in other proceedings relating to relinquishment of open access capacity and levy of relinquishment charges if any.

2.21 The Central Commission erred in interpreting the Force Majeure Clause of the Bulk Power Transmission Agreement by holding that the Appellant can be entitled to relief only for temporary force

majeure events and not permanent force majeure events. Further, the Central Commission erred by not allowing the refund of Bank Guarantee even after holding that the Respondent No. 2 did not act correctly and discharge its obligations under the Electricity Act, 2003.

2.22 In the circumstances, aggrieved by the Order dated 12/07/2016 passed by the Central Commission, the Appellant has preferred the present appeal before this Tribunal.

3. **QUESTIONS OF LAW**

The Appellant has raised following questions of law in the present appeal:

(i) Whether the Central Commission has correctly interpreted Article 9 of the BPTA to hold that it includes only temporary force majeure events?

(ii) Whether the Central Commission is justified in holding that the non-availability of CFE though being a force majeure event would not get covered under Article 9 of the BPTA?

(iii) Whether the Central Commission is justified in holding that the Appellant is liable to pay relinquishment charges as may be decided in a separate petition?

4. Shri Anand K. Ganesan learned counsel appearing for the Appellant has filed the written submissions for our consideration as under:-

4.1 By the impugned order, the Central Commission after finding that the Appellant had acted bona fide, the Appellant was affected by

force majeure, Powergrid not acting in a prudent manner and in fact not suffering any losses at the time when the Appellant claimed force majeure, has however held that the issue whether any charges are liable to be paid by the Appellant would be decided based on the decision in other proceedings relating to relinquishment of open access capacity and levy of relinquishment charges if any.

4.2 The petition was filed by the Appellant Limited seeking adjudication of disputes that have arisen between the Appellant and Powergrid in relation to the long term open access which was granted to the Appellant and the subsequent force majeure events that had arisen leading to the frustration of the contract entered into between the Appellant and Powergrid.

4.3 The issue had arisen on account of the Powergrid not accepting the non-availability of the Consent For Establishment (CFE) to be issued by the Tamil Nadu Pollution Control Board as a force majeure event beyond the control of the Appellant and also the demand by Powergrid for encashment of the Bank Guarantee of Rs. 49.35 crores furnished by the Appellant.

4.4 In the year 2007, the Appellant had proposed the establishment of a 1050 MW thermal generating station in the Nagapattinam district in the State of Tamil Nadu. For the purpose of establishing the generating station, the Appellant had applied for and obtained the requisite approvals and permissions. The Appellant has also proceeded to incur substantial cost and expenditure towards the implementation of the project and had mobilized the required infrastructure including land, water, fuel etc. and also obtained the

requisite statutory clearances for establishment of the generating station.

4.5 The Appellant had acquired the entire land, attained financial closure, completed the bidding process for award of the EPC contract, obtained coal linkage and obtained various other permissions and approvals required for the project.

4.6 The project site was located along the sea coast of Bay of Bengal in the state of Tamil Nadu and in the vicinity of the Kaveri delta region. For the said purpose, Consent For Establishment (CFE) was required from the Tamil Nadu Pollution Control Board, which is also a statutory approval required for the project. The non-availability of the CFE is the issue in the present proceedings and the consequent force majeure event that has arisen resulting in the project not being established.

4.7 For the evacuation of electricity from the generating station of the Appellant, the Appellant approached the Powergrid for long-term open access. The long-term open access was applied for by the Appellant on 20.10.2008 for a capacity of 987 MW (after deducting auxiliary consumption), in the prescribed form and following the procedure as specified. The full payment for the open access application as well as for the system studies to be undertaken by the Powergrid of Rs. 19,67,752/- was also duly remitted by the Appellant.

4.8 The long-term open access was granted by the Powergrid to the Appellant on 10.12.2010. Pursuant to the above, the Powergrid executed a Bulk Power Transmission Agreement (BPTA) dated

24/12/2010. The BPTA was executed by the Powergrid with the Appellant and one other Company, M/s IL&FS Tamil Nadu Power Company Limited, which had also proposed the establishment of a 1200 MW generating station in the vicinity of the Appellant near Cuddalore in the State of Tamil Nadu.

4.9 Apart from the above, there was another generating station with a capacity of 1320 MW proposed to be established by M/s NSL Power Pvt. Ltd and in the vicinity of the Appellant's plant site who was also granted the LTOA in the Powergrid letter dated 10.12.2010. However, to the best of knowledge of the Appellant, the said generating station is also under jeopardy for the same reasons as that of the Appellant, namely, force majeure conditions on account of restrictions placed by the Government Authorities on development of generating stations in the said area, as more fully set out herein below.

4.10 In terms of the BPTA, the Appellant was required to furnish a bank guarantee for an amount of Rs. 49.35 crores calculated at the rate of Rs. 5 Lacs per MW of the open access capacity of the Appellant. The above bank guarantee was for the purposes of securing the payment of damages payable to the Powergrid to compensate for the loss suffered by the Powergrid in case of any default on the part of the Appellant to abide by the terms of the open access arrangement. Annexure 4 to the BPTA also lists out the transmission system to be created for the capacity of the generating station, which were to match the power flow requirement.

4.11 The bank guarantee for the amount of Rs. 49.35 crores was furnished by the Appellant to the Powergrid and the same has been valid and effective since 11.03.2011. The bank guarantee is presently valid and subsisting.

4.12 However, the CFE for the generating station was not granted by the Tamil Nadu Pollution Control Board despite the best efforts and repeated follow up by the Appellant. The Appellant had placed on record the various communications exchanged and actions taken in regard to the CFE. The bona fide of the Appellant is seeking to obtain the CFE has not been disputed by the Respondents.

4.13 However, the CFE is as yet not available to the Appellant. In the circumstances, it is submitted that the same would amount to a force majeure event under the terms of the BPTA entered into between the parties. In any event, it is submitted that as in the year 2011 when the fact that the Appellant would not be in a position to establish the project on account of the non-availability of CFE was made known to the Powergrid, there was no activity of the Powergrid undertaken and there can be no question of loss to the Powergrid to claim damages. The Powergrid can only claim subject to proof the actual damages suffered in December, 2011 on account of the actions of the Appellant.

4.14 However by the impugned order, the Central Commission has, inter-alia, held the following:

(a) Though the circumstance was beyond the control of the Appellant, the benefit of force majeure clause under the

Agreement would be available only in case of temporary force majeure and not of a permanent nature;

(b) Powergrid has not discharged its obligations under the Electricity Act in the planning and execution of the transmission system, when the system was established knowing fully well that it would not be used by the Appellant.

(c) The Appellant shall be subject to the decision of the Central Commission on the quantification and conditions for payment of relinquishment charges for the open access capacity relinquished by the Appellant on account of the generating station not being established and the transmission system being left stranded.

4.15 The primary two issues which arise for consideration in the submission of the Appellant in the present Appeal are as under:

(i) The non-availability of CFE is a force majeure condition under the BPTA entered into between the parties. The decision of the Central Commission on temporary force majeure or permanent force majeure is erroneous.

(ii) Even assuming the Appellant was in breach of the agreement, there was no damages caused to the Powergrid. The transmission capacity was built with full knowledge that it would not be used by the Appellant, the system was evidently built for others and therefore there is no question of any relinquishment charges being claimed from the Appellant for any stranded capacity.

(a) The non-availability of CFE is a force majeure condition under the BPTA entered into between the parties. The decision of the Central Commission on temporary force majeure or permanent force majeure is erroneous.

4.16 The BPTA entered into between the parties, inter-alia, provide as under:

> *"9.0 The parties shall ensure due compliance with the terms of this Agreement. However,* ***no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such failure is due to force majeure events*** *such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and* ***any other causes beyond the control of the defaulting party****. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and given written notice of 30 days to the other party to this effect. Transmission/drawal of power shall be stated as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist."*

4.17 The definition of force majeure is clear and includes any event or circumstance not within the reasonable control of the parties. The test to be applied is whether the event or circumstances was within the reasonable control and whether the party has acted in a prudent and reasonable manner in over-coming the event or circumstance or in taking action to mitigate the loss.

4.18 The Hon'ble Supreme Court has, in the case of M/s DhanrajamalGobindram v. M/s ShamjiKalidas& Co., (1961) 3 SCR 1020 held that force majeure includes any event or circumstance beyond the reasonable control of the parties and is to have a wide meaning and to mean anything that is beyond the control of the parties, the Hon'ble Supreme Court has held as under:

> *"McCardie J. in Lebeaupin v. Crispin has given an account of what is meant by "force majeure" with reference to its history. The expression "force majeure" is not a mere French version of the Latin expression "vis major".* ***It is undoubtedly a term of wider import.*** *Difficulties have arisen in the past as to what could legitimately be included in "force majeure". Judges have agreed that strikes, break-down of machinery, which, though normally not included in "vis major" are included in "force majeure".* ***An analysis of rulings on the subject nito which it is not necessary in this case to go, shows that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure", and even if this be the meaning it is obvious that the condition about "force majeure" in the agreement was not vague.*** *The use of the word "usual" makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties."*

4.19 In the present case, the CFE was to be granted by the TNPCB for the generating station of the Appellant, for the generating station to be established. The non-grant of the CFE is clearly an event beyond the control of the Appellant and thus squarely falls within the force majeure clause in the Agreement. The non-grant of CFE by no stretch can be attributed to the Appellant or said to be within the control of the Appellant.

4.20 The Appellant's generating station is situated in the coastal region and the most comprehensive and detailed examination is at the time of grant of the Environmental Clearance and the CRZ clearance, both of which were obtained by the Appellant.

4.21 The G.O. dated 08/05/1998 was primarily for textiles and tanneries which were polluting industries with effluents in the river Cauvery. The power projects being covered by the said GO was not even envisaged.

4.22 The generating station was more than 5 KM away from the Tailend Regulatory of the river, which is also confirmed by the expert teamfrom Anna University. The Public Works Department has also certified that the water body ends at the Tail End Regulator and downstream is only a drain carrier. These are independent and expert certifications to establish that the Appellant's project was not even governed by the said GO.

4.23 The Appellant has already spent in excess of Rs. 300 crores on the project including procuring land, obtaining various clearances and coal linkages etc. It is not the case that the Appellant did not act in a bona fide manner or show its commitment to the project.

4.24 The Central Electricity Authority had also recommended the case of the Appellant, however no positive action was taken. The PWD had also certified the factual position. However, the CFE was not granted to the Appellant despite best efforts.

4.25 In the circumstances, the non-grant of the CFE due to which the project of the Appellant could not be established is clearly a force majeure event, beyond the reasonable control of the Appellant. In the circumstances, clause 9 of the BPTA clearly applies and the threat by the Powergrid for invocation of the bank guarantee provided by the Appellant is incorrect and is liable to be held as such.

4.26 The Central Commission has proceeded on an erroneous assumption that the force majeure clause applies only if the force majeure is of a temporary nature and for a limited period of time.

This is clearly erroneous. There is no such limitation is the force majeure clause, nor can such a limitation be read into.

4.27 When the Central Commission has accepted the fact that the non-grant of the CFE and the consequent inability to establish the generating station is for reasons beyond the control of the Appellant, the relief of force majeure under the BPTA would automatically follow without any limitation of time period for which the force majeure is in subsistence.

4.28 Once it is accepted there were circumstances beyond the control of the Appellant, the consequences of the force majeure clause automatically follow. There cannot be any artificial differentiation between a temporary force majeure or permanent force majeure, when there is no such distinction in the PPA, Section 56 of the Contract Act does not provide for any such distinction and there is also no purpose or rationale in such distinction being made.

(b) ***Even assuming the Appellant was in breach of the agreement, there was no damage caused to the Powergrid. The transmission capacity was built with full knowledge that it would not be used by the Appellant, the system was evidently built for others and therefore there is no question of any relinquishment chargesbeing claimed from the Appellant for any stranded capacity.***

4.29 In the alternate and without prejudice to the submissions on behalf of the Appellant that the non-availability of CFE due to which the project of the Appellant could not be established is a force majeure condition, even if the non-grant of CFE is treated as not a force majeure condition, the Powergrid is not entitled to invoke and appropriate the bank guarantee amount of Rs. 49.35 crores as

sought to be done by the Powergrid or for payment of any relinquishment charges.

4.30 The position of law is clear, that the party claiming compensation or damages is liable to plead and prove the actual loss or damages suffered on account of breach by the other party. In the present case, even assuming the Appellant to be in breach of its obligations under the BPTA and the claim made by the Appellant in December 2011 of their being a force majeure conditions being incorrect, the Powergrid can only be entitled to the actual loss or damages suffered by the Powergrid in December 2011 on account of such breach by the Appellant.

4.31 The basic premise on which the Powergrid proceeded for invocation of the bank guarantee amount of Rs. 49.35 crores and attempted to appropriate in full is misconceived. The bank guarantee is only a security provided and not a measure of liquidated damages under the BPTA. There is no provision in the BPTA or otherwise in the Regulations framed that the entire amount of bank guarantee provided is to be treated as liquidated damages and shall be invoked in case there is a breach by a party.

4.32 Further, even assuming that there is a clause for liquidated damages, the quantum of liquidated damages is only the upper limit of the compensation that the party claiming compensation is entitled to. The Powergrid in the present case has not proven the actual damages suffered on account of breach by the Appellant and if the same is less that the liquidated damages, the actual damages is only payable and not the quantum of liquidated

damages. This is settled by the Hon'ble Supreme Court in its constitutional bench decision in the case of Fateh Chand v. BalkishanDass, (1964) 1 SCR 515, AIR 1963 SC 1405:

> ***"10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty.*** *We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class.* ***The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles.*** *The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."*

4.33 In the case of ***Kailash Nath Associates v. DDA*****, (2015) 4 SCC 136, it has been held as under:**

> ***43.*** *On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:*
>
> > ***43.1.*** *Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to*

be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. *Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.*

43.3. *Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.*

43.4. *The section applies whether a person is a plaintiff or a defendant in a suit.*

43.5. *The sum spoken of may already be paid or be payable in future.*

43.6. *The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*

43.7. *Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.*

4.34 It is not the case that the actual damages cannot be proved or is impossible of proof. On the other hand, the Powergrid has not given any details whatsoever (despite the Appellant calling upon the Powergrid to provide the information) of the amounts incurred by the Powergrid on account of the actions of the Appellant. The Appellant had also filed a Memo dated 06.08.2014, which has not been replied to by the Powergrid.

4.35 It is a settled principle of law on damages that the party should plead and prove the damages and also take action for mitigation of such damages. In the failure of the same, no damages can be granted. In this regard, the decision of the Hon'ble Supreme Court in the case of MurlidharChiranjilal v. HarishchandraDwarkadas, (1962) 1 SCR 653:AIR 1962 SC 366 is relevant:

> ***9. The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps****: (British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London [(1912) AC 673, 689]). These two principles also follow from the law as laid down in Section 73 read with the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be re-imbursed for the loss.* ***Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things."***

4.36 On the other hand, the Appellant had pleaded and also provided evidence of the fact that there was no expenditure incurred by the Powergrid in setting up of the transmission system till December 2011 when the Appellant had claimed force majeure event. In fact,

the investment approval by the Board of Directors of the Powergrid for the transmission system itself was taken only in January 2013, which was 14 months after when the Appellant had claimed force majeure event and stated that the particular transmission system will not be used by the Appellant.

4.37 Thus, when the decision to invest amounts and the approval for investment (which is the starting point for taking up a transmission system) itself was taken only January 2013, the question of the Powergrid claiming damages for breach of contract in December 2011 does not arise. Further, the Appellant has placed on record the details of the investments made by the Powergrid on the transmission system in question supported by an Affidavit filed on 03/07/2014. The information has been sourced from the website of the Powergrid itself. In terms of the above, as in December 2013 the Powergrid had invested the cumulative amount of Rs. 4.86 crores on the transmission lines and system in question. This is after 2 years when the Appellant had claimed force majeure events.

4.38 As against the cumulative investment of Rs. 4.86 crores after 2 years of the Appellant claiming force majeure event, the Powergrid is seeking to recover charges for the system established by Powergrid after full knowledge that the Appellant is not in a position to establish the generating station.

4.39 Considering the above, the Central Commission has also in the impugned order observed that the Powergrid has failed to fulfill its obligations under the Electricity Act for planning and execution of

the transmission system. It is not open to Powergrid to establish a system knowing fully well that the system would not be used as the generator is not in a position to come up and thereafter claim that the transmission system is stranded and the generator needs to pay compensation. This is clearly not sustainable in law and is extremely unfair and unjust.

4.40 The well-settled position in law is that party complaining of breach is entitled to, subject to proof of damages and the duty to mitigate, recover the damages suffered as of the date of the breach of the contract. This is settled by the constitutional bench decision of the Hon'ble Supreme Court in the case of Fateh Chand v. BalkishanDass, (1964) 1 SCR 515, AIR 1963 SC 1405 is relevant:

> ***"15. S****ection 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract.* ***The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.****"*

4.41 In the present case, the Powergrid has not even sought to plead or prove its damages suffered. Further the Powergrid is not entitled to rely on subsequent actions taken as a measure of the damages suffered to be claimed from the Appellant, when as on the date of the breach (assuming such breach) there was no loss whatsoever suffered by the Powergrid.

4.42 It is further relevant to mention that the entire capacity of the pooling station in question is to be used by a generator M/s IL & FS Tamil Nadu Power Company Limited. In the circumstances, even assuming the case of the Powergrid that the Appellant is in breach, there is no loss to Powergrid as the entire capacity is being utilized by another generator and Powergrid will recover its entire cost.

4.43 In the facts and circumstances mentioned above, it is respectfully submitted that the impugned order is erroneous and is liable to be set aside. The Appellant is entitled to the return of its bank guarantee amount which is lying with Powergrid.

5. **Shri S.B. Upadhyay, learned senior counsel appearing for the Respondent No.2 has filed the written submissions for our consideration as under:-**

5.1 The present appeal is not a case of force majeure under clause 9 of the BPTA (Bulk Power Transmission Agreement) but is a case of abandonment of project. Abandonment could lead to relinquishment of LTA and the appellant shall be subject to Rule 18 of the Connectivity Regulations. The said Rule reads thus :

"***18. Relinquishment of access rights***

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

…….

(2) The compensation paid by the long-term customer for the stranded transmission capacity shall be used for reducing transmission charges payable by other long-term customers and medium-term customers in the year in which such compensation payment is due in the ratio of transmission charges payable for that year by such long-term customers and medium-term customers."

5.2 Unlike frustration of contract, where parties are discharged from its respective contractual obligations, the clause 9being a temporary force majeure does not discharge a party from its obligation under the contract. Clause 9 BPTA relied upon by the appellant itself provides for suspension of project till force majeure event continues to operate.

"9.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and given written notice of 30 days to the other party to this effect. Transmission / drawal of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist".

5.3 There is no letter of refusal of grant of CFE(Consent for establishment) by Tamil Nadu Pollution Control Board on record, the grant of CFE was being delayed which does not amount to force majeure event.

5.4 Tribunal is not a Equity court unlike constitutional court. Tribunal is a creation of statues and is bound by the provisions of Electricity Act, 2003 and the Statutory Regulations framed there under.

5.5 Once a common transmission system is created on request of generating company and that system become part of ISTS, irrespective of the fact that whether a generating company has commissioned its plant or not. The said company is liable to share the transmission charges as per Sharing of Transmission Charges and Losses Regulations framed by CERC.

5.6 As evident from sequence of events, the appellant has been throughout assuring the CTU that they are fully geared upto execute the project. Such assurances were made in various letters indicated in sequence of events and in JCC meetings, the Appellant has been rather seeking extension of time for signing TSA etc. The positive representation made by the Appellant evidently demonstrates that non execution of project was not in the mind of the Appellant. The appellant was facing temporary problem in grant of CFE by TNPCB which was being delayed. But there was no refusal at any point of time by TNPCB declining to grant CFE. Such event does not fall within the ambit of clause 9 of BPTA providing for force majeure.

5.7 While discussing the nuances in **Energy Watchdog Vs. CERC 2017 14 SCC 80** of force majeure and frustration of contract held in para 37 as under:

> *37. In M/s Alopi Parshad & Sons Ltd. v. Union of India, 1960 (2) SCR 793, this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express*

> *covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.*

5.8 In any case clause 9 of BPTA itself provides that it is of temporary nature. It states that the transmission/drawl of power shall be started as soon as practicable by the parties concerned after such eventuality come to an end and cease to exist.

5.9 The appellant never constructed the project and ultimately abandoned and therefore the Appellant's LTA was considered to be relinquished and it become liable for payment of relinquishment charged under Regulation 18 of Connectivity Regulations.

5.10 This Hon'ble Tribunal in **Appeal 54 of 2014, Himachal Sorang Power Ltd.** Vs. CERC held in para 22 as under:

> *22. "As mentioned above, the appellant did not give the required notice under clause 13 regarding force majeure event fulfilling the requirements of the said clause, within a reasonable time and the appellant did not satisfy the respondent no.2-Power Grid about the existence of the alleged force majeure event. The notice/ communication dated 07.07.2011 sent by the appellant to the respondent no.2- Power Grid simply states that the open access is to commence from the date when KarchamWangtoo-Abdullapur Line (KWA) is ready and commissioned. The said communication cannot be said to be a notice in sufficient compliance of the provisions of clause 13 dealing with force majeure provided under the BPTA. When there are specific provisions to be complied with for the applicability of force majeure events, the said requirements cannot be legally ignored or*

exempted on the strength of some case law. The Hon'ble Supreme Court in DhanrajGobindram's case (supra) observed that force majeure includes any event over which the performing party has no control. In the case in hand, no legal notice fulfilling the requirements of clause 13 had been given by the appellant to the respondent no.2 in order to get the benefit of such force majeure and it failed to satisfy the respondent no.2 about the existence of such force majeure event. If the grounds leading to the delay in commissioning of the appellant's power plant are to be considered, no material to substantiate the said grounds has been placed by the appellant on record either before the Central Commission or before this Appellate Tribunal. The only ground pressed during arguments in the Appeal by the appellant is regarding sufficient geological surprises affecting major works, for which no notice fulfilling the requirements provided under clause 13 of the BPTA had been given. The learned Central Commission, in the impugned order, has given detailed and cogent reasons for not agreeing to the report prepared by Lahmeyer International Private Limited (Expert). We have quoted the said reasons in para 15.1 of this judgment. We find no force in the appellant's contention that the learned Central Commission did not cite sufficient or material reasons for disagreeing with the expert's report. We are further unable to agree to the contention of the appellant that the learned Central Commission failed to consider that the effects of the force majeure events, that occurred before 01.04.2012, had not ceased to operate. We agree to the finding recorded by the Central Commission in the impugned order because clause 13 dealing with force majeure clearly provides that the transmission/ drawl of power shall bestarted as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist. The said clause does not provide that the effect of force majeure to continue till the appellant is restored to its original position if there was no force majeure. If the appellant fails to restore or recover from the alleged force majeure for unreasonably long time, it cannot be held entitled to any benefit on that score.

5.11 The said findings was further affirmed by this Hon'ble Tribunal in Appeal 212 of 2016 in matter of Maruti Clean Coal and Power Ltd. where similar clause 9 of BPTA was involved vide para 13,14 and 22 of the said Judgement. This Tribunal is inclined to take a different view and may consider referring the matter to a larger bench as per principle enunciated in **State of Tripura Vs. Tripura Bar Association 1998 5 SCC 637**, where it was held:-

"The division bench of the High Court which delivered the impugned Judgement being a coordinate Bench could not have taken a view

> *different from that taken by the earlier Division Bench of the High Court. If the latter Bench wanted to take a view different than that taken by the earlier Bench, the proper course would have been to refer the matter to a larger Bench."*

5.12 Vide order dated 3.12.2018 passed in petition No. 242/MP/2017, the Commission devised a methodology for adjustment of the amount of relinquishment charges payable by a generating company in cases where there was a subsisting bank guarantee furnished by a generator available with Respondent No 2 under the terms of LTA granted to it and held as under:

> *"22. Since, the Petitioner has relinquished the LTA granted and the liability of the Petitioner for payment of relinquishment charges shall be decided in the light of the decision in Petition No. 92/MP/2015, we are of the view that there is no requirement todirect PGCIL to refund the encashed BG at this stage. However, if any amount becomes due and payable after adjustment of the relinquishment charges, the same shall be refunded by PGCIL to the Petitioner with 9% interest from the date of encashment till the date of payment."*

The above appeal being a similar case, can be disposed-off with a direction to PGCIL to adjust the amount of relinquishment charges payable by the appellant against the bank guarantee of Rs 49.35 crores furnished by it under the subject LTA and a direction to the appellant to pay the difference to PGCIL.

5.13 During the pendency of the Appeal, the commission passed order dated 9/03.2019 in petition No 92/MP/2015 and held as under:-

> "*153. Petition No 319/MP/2013, 315/MP/2013 and 69/MP/2013 were filed by project developers who had abandoned their projects and had sought relief from payment of relinquishment charges in the said petitions on the ground of being affected by force majeure. The commission has rejected the plea of force majeure in these cases and decided that in the light of the provisions of Regulations 18 of the Connectivity Regulations, the LTC in case of abandoned projects are liable to pay the transmission charges as may be decided in the present petition.*

…….

155. Thus, the stranded transmission capacity resulting on account of the abandoned projects shall also attract the relinquishment charges liability, as per methodology detailed in this order.

In View of the above Order dated 9.3.2019, the instant appeal has been rendered infructuous. Thereafter, second Respondent calculated the relinquishment charges of the appellant amounting to Rs 90.14 crore and uploaded the same on its website.

5.14 The Tribunal is created by statue and can exercise its powers only within provision of statue. Unlike Constitutional Court established under 226 of Constitution of India, Tribunal is not a equity court. The Tribunal is therefore to decide the matter as per provision of Electricity Act 2003 and statutory provisions framed thereunder. Vide para 11-13 of the judgement in the case of**Export Credit Guarantee Corporation of India Ltd. Vs. M/S.Garg Sons International 2014 (1) SCC 686,** the Hon'ble Apex Court held as under:

"11. The insured cannot claim anything more than what is covered by the insurance policy. "…the terms of the contract have to be construed strictly, without altering the nature of the contract as the same may affect the interests of the parties adversely." The clauses of an insurance policy have to be read as they are…Consequently, the terms of the insurance policy, that fix the responsibility of the Insurance Company must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonize the terms thereof, keeping in mind that the rule of contra proferentem does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon. (Vide : Oriental Insurance Co. Ltd. v. Sony Cheriyan AIR 1999 SC 3252; Polymat India P. Ltd. v. National Insurance Co. Ltd., AIR 2005 SC 286; M/s. Sumitomo Heavy Industries Ltd. v. Oil & Natural Gas Company, AIR 2010 SC 3400; and RashtriyaIspat Nigam Ltd. v. M/s. Dewan Chand Ram Saran AIR 2012 SC 2829).

12. In VikramGreentech (I) Ltd. &Anr. v. New India Assurance Co. Ltd. AIR 2009 SC 2493, it was held :

> *"16.An insurance contract, is a species of commercial transactions and must be construed like any other contract to its own terms and by itself….*
>
> *18. The endeavour of the court must always be to interpret the words in which the contract is expressed by the parties. The court while construing the terms of policy is not expected to venture into extra liberalism that may result in re-writing the contract or substituting the terms which were not intended by the parties."*
> *(See also :Sikka Papers Limited v. National Insurance Company Ltd &Ors. AIR 2009 SC 2834).*
>
> *13. Thus, it is not permissible for the court to substitute the terms of the contract itself, under the garb of construing terms incorporated in the agreement of insurance. No exceptions can be made on the ground of equity. The liberal attitude adopted by the court, by way of which it interferes in the terms of an insurance agreement, is not permitted. The same must certainly not be extended to the extent of substituting words that were never intended to form a part of the agreement."*

5.15 Clause 6 (a) provides that in case any of the developers fail to construct the generating station /dedicated transmission system or makes an exit or abandon its project, POWERGRID shall have the right to collect the transmission charges and/ or damages as the case may be in accordance with the notification/regulation issued by CERC from time to time.

5.16 The Appellant is bound by the terms of BPTA . Therefore once a common transmission system is created on request of generating company and that system become part of ISTS, irrespective of the fact that whether a generating company has commissioned its plant or not. The said company is liable to share the transmission charges as per Sharing of Transmission Charges and Losses Regulations framed by CERC.

6. We have heard learned counsel appearing for the Appellant and learned counsel for the Respondent No.2 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 issues emerge in the instant Appeal for our consideration:-

Issue No.1 :- Whether in the facts and circumstances of the case, the Central Commission is justified in holding that non-availability of Consent For Establishment (CFE) though being a force majeure event would not get covered under Article 9 of the BPTA?

Issue No.2:- Whether in the facts and circumstances of the case, the Central Commission is justified in holding that the Appellant is liable to pay relinquishment charges as maybe decided in a separate petition?

OUR FINDINGS AND ANALYSIS: -

7. **Issue No.1**:-

7.1 Learned counsel for the Appellant submitted that it had proposed during the year 2007 the establishment of 1050 MW thermal project in the Nagapattinam district in the State of Tamil Nadu and in the process, it obtained all the requisite approvals and permissions. However, despite obtaining all the requisite approvals and clearances from various Govt. instrumentalities, the project

could not be provided with Consent For Establishment (CFE) which was to be issued by the Tamil Nadu Pollution Control Board for which the application was made by the Appellant as early as on 15.06.2010. Learned counsel further submitted that the main issue in the case has arisen on account of not accepting the non-availability of CFE as a force majeure by the Powergrid which was an event beyond the control of the Appellant and also, the demand of Powergrid for encashment of the bank guarantee of Rs. 49.35 crores furnished by the Appellant.

7.2 The bare perusal of the list indicating various approvals and licenses obtained by the Appellant regarding setting up of the generating stations would evidence that the Appellant has acted in most bonafide manner and it was quite serious to construct and operate the thermal power project. For the evacuation of the electricity from its generating station, the Appellant approached CTU/Powergrid for LTA on 20.10.2008 for a capacity of 987 MW and also deposited the fee along with application for the Open Access as well as for the system studies to be undertaken by the Powergrid. The LTA was granted to the Appellant on 10.12.2010 and the Bulk Power Transmission Agreement (BPTA) was executed by the Appellant on 24/12/2010. The BPTA was executed by the Powergrid with the Appellant and one other Company namely M/s IL&FS Tamil Nadu Power Company Limited, which had also proposed the establishment of a 1200 MW generating station in the vicinity of the Appellant near Cuddalore in the State of Tamil Nadu. As required under the BPTA, the Appellant furnished a bank guarantee for an amount of Rs. 49.35 crores for the LTA capacity.

7.3 Learned counsel for the Appellant vehemently submitted that despite lapse of considerable time, the State Govt./TNPCB could not grant CFE to the generating station of the Appellant inspite of continuous follow up with the concerned authorities. In fact, there were other generators in the region who were also affected by the same. There are also writ petitions pending in the Hon'ble Madras High Court on the issue of CFE but no favourable orders could be passed till date. Learned counsel was quick to submit that in such a scenario, the non-grant of CFE due to which the project could not be established was clearly a force majeure event beyond the reasonable control of the Appellant. The Clause 9 of the agreement clearly provides for the force majeure event in an expansive manner so as to include in any event or circumstances beyond the control of the parties. Article 9, inter-alia, reads as under:

> *"9.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and given written notice of 30 days to the other party to this effect. Transmission/drawal of power shall be stated as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist."*

7.4 Learned counsel for the Appellant further contended that non-availability of CFE was made known to the CTU/Powergrid as far back as in April, 2011 in the 3rd Co-ordination Committee Meeting

held on 01.04.2011 and also subsequently reiterated in meetings held on 09.09.2011 and 02.12.2011. Further, vide its various communications to second Respondent (Powergrid), the Appellant categorically informed that due to such a force majeure beyond the control of the Appellant, it is not in a position to establish the generating station and use the open access to be established by the second Respondent. In this regard, besides informing in the coordination meeting mentioned above the letters were also sent by the Appellant to Powergrid dated 16.12.2011, 24.01.2012, 25.02.2012, 18.06.2012, 11.12.2012, 27.04.2013, 06.07.2013, 26.07.2013 and 02.09.2013 which are quite note worthy.

7.5 Learned counsel further submitted that the force majeure condition was duly informed to Powergrid within a few months of the execution of BPTA and at this stage, no activity wasundertaken by Powergrid to construct evacuation/ transmission facilities in terms of the BPTA. In fact, Powergrid had not even acquired land to establish the substation and the first patch of about half of the landwas given to Powergrid only in June 2013 and a substantial portion ofthe land is still to be acquired. By that time, neither any contract for the onward transmissionlines was awarded nor any development work started. However, Powergrid took the position that once theBPTA is executed and the bank guarantee has been provided, there is no option for the Appellant but to necessarily relinquish the entire bankguarantee whether or not the generating station is established. Learned counsel for the Appellant contended that the action ofPowergrid in the present case was not bona fide and also not of a prudent utility practice notwithstanding the Appellant had as far back as in April, 2011 intimated Powergrid

of the non-grant of the CFE and by letter dated 16/12/2011, the Appellant claimed force majeure event and also intimated that the Appellant would not be using the said pooling station and as and when the second pooling station is planned, the Appellant may claim the use of the same if the generating station comes up after grant of CFE.

7.6 Learned counsel pointed out that the action for establishing the transmission system, including the investment approval itself was taken by the second Respondent/Powergrid only in the year 2013, fully aware of the fact that the generating station was not coming up. It clearly radiates the non-prudent action of the Powergrid, thus, it is not open to Powergrid to claim any right against the Appellant for such transmission system. Further, the information sourced from the website of the Respondent No. 2 itself revealed that as in December 2013,Powergrid had invested the total amount of Rs. 4.86 crores on the transmission lines and system in question. On the other hand, Powergrid sought to recover the security amount furnished by the Appellant by way of a bank guarantee of Rs. 49.35 crores which is clearly not sustainable in law besides being extremely unfair and unjust. Learned counsel was quick to submit that on account of repeated threatening by Powergrid for invocation of the bank guarantee and appropriation of the said amount, the Appellant was constrained to file Petition 315/MP of 2013 before the Central Commission seeking the declaration of frustration of the BPTA on account of force majeure condition and consequent return of the bank guarantee deposited by the Appellant. The Central Commission disposed off the said petition on 12/07/2016, after holding that the Appellant had acted

bona fide and was affected by force majeure, Powergrid not acting in a prudent manner and in fact not suffering any losses at the time when the Appellant claimed force majeure,. However, the Central Commission held that the issue whether any charges are liable to be paid by the Appellant would be decided based on the decision in other proceedings relating to relinquishment of open access capacity.

7.7 Learned counsel for the Appellant to emphasize its stand on force majeure conditions placed reliance on the judgment of Hon'ble Supreme Court, in the case of M/s DhanrajamalGobindram v. M/s ShamjiKalidas& Co., (1961) 3 SCR 1020 and also ***Kailash Nath Associates v. DDA*****, (2015) 4 SCC 136,** which held that force majeure includes any event or circumstance beyond the reasonable control of the parties and is to have a wide meaning and to mean anything that is beyond the control of the parties. The said judgment squarely covers the case in hand and by no stretch, the non-grant of CFE can be attributed to the Appellant or said to be within the control of the Appellant. Learned counsel further contended that even assuming the Appellant was in breach of the agreement, there was no damage caused to the Powergrid. By the time the force majeure was made known to Powergrid even if the transmission capacity was built, it was with full knowledge that the same would not be used by the Appellant and, therefore, there is no question of any relinquishment charges being claimed from the Appellant for any stranded capacity. Learned counsel emphasized that position of law is very clear that the party claiming compensation or damages is liable to prove the actual loss of damages suffered by it on account of breach by the other party.

To support his arguments, learned counsel placed reliance on the judgment of the Apex Court in case of Fateh Chand v. BalkishanDass, (1964) 1 SCR 515, AIR 1963 SC 1405. Learned counsel further submitted that the actual damages are not impossible to prove but in spite of several requests, such details have not been provided by the Powergrid. Learned counsel further brought out that it is a settled principle of law on damages that the party should plead and prove the damages and also take action for mitigation of such damages and in the failure of the same, no damages can be granted. To substantiate the same, learned counsel placed reliance on the judgment of Hon'ble Supreme Court in the case of MurlidharChiranjilal v. HarishchandraDwarkadas, (1962) 1 SCR 653:AIR 1962 SC 366 .

7.8 Learned counsel for the Appellant summing up his arguments reiterated that the impugned order passed by the Central Commission is erroneous and is liable to be set aside. Accordingly, the Appellant is entitled for the return of its bank guarantee amounting to Rs.49.35 crores lying with the second Respondent/Powergrid.

7.9 ***Per contra***, learned counsel for the second Respondent/Powergrid submitted that the present Appeal is not covered under the force majeure under clause 9 of the BPTA but is a case of abandonment of project which leads to relinquishment of LTA in terms of Rule 18 of the Connectivity Regulations. Learned counsel further submitted that unlike frustration of contract, where parties are discharged from its respective contractual obligations, the clause 9 being a temporary force majeure does not discharge a party from

its obligation under the contract and provides for suspension of project till force majeure event continues to operate. In the instant case, there is no refusal of grant ofCFE (Consentfor establishment) and any delay in granting CFE does not amount to force majeure event. Learned counsel for the second Respondent vehemently submitted that once a common transmission system is created on request of generating company and that system become part of ISTS, irrespective of the fact that whether a generating company has commissioned its plant or not, the said company is liable to share the transmission charges as per Sharing of Transmission Charges and Losses Regulations framed by CERC.

7.10 To substantiate his arguments, learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in**Energy Watchdog Vs. CERC 2017 14 SCC 80** on force majeure and frustration of contract held in para 37. Relying on the above judgment, learned counsel for the second Respondent emphasized that the purpose of a contract is never discharged merely because it may become onerous to one of the parties.

7.11 Learned counsel for the second Respondent further submitted that the Appellant never constructed his project and ultimately abandoned the same and therefore the LTA taken by the appellant was considered to be relinquished and it becomes liable for payment of relinquishment charges under Regulation 18 of Connectivity Regulations. Learned counsel also placed reliance on the judgment of this Tribunal in **Appeal 54 of 2014, Himachal Sorang Power Ltd. Vs. CERC** held in para 22. The findings of

this Tribunal in the above judgment were further affirmed by the Tribunal in Appeal 212 of 2016 in matter of Maruti Clean Coal and Power Ltd.. Learned counsel was quick to submit vide order dated 3.12.2018 passed in petition No. 242/MP/2017, the Central Commission has devised a methodology for adjustment of the amount of relinquishment charges payable by a generating company in cases where there was a subsisting bank guarantee furnished by a generator available with Respondent No 2 under the terms of LTA. Learned counsel pointed out that during the pendency of the Appeal, the Central Commission passed an order dated 09.03.2019 in Petition No.92/MP/2015 and in view of the same, the Appeal has been rendered infructuous. Accordingly, the Appeal being a similar case can be disposed off and with a direction to Powergrid to adjust the amount of relinquishment charges payable by the Appellant against the bank guarantee of 49.35 crores furnished by it under the subject LTA.

Our Findings:-

7.12 We have carefully considered the submissions of learned counsel for the Appellant as well as learned counsel for the second Respondent/Powergrid and also taken note of the various judgments relied upon by the parties. It is not in dispute that the Appellant herein with an intention of setting up its 1050 MW Thermal Project in the year 2007applied and obtained various statutory clearances / approvals from the concerned Govt. instrumentalities and also applied for grant of LTA for 987 MW. It is noticed that clearances / approvals (11 nos.) were duly obtained by the Appellant during the period 06.07.2008 to 05.01.2011 and

also a Bulk Power Transmission Agreement (BPTA) came to be executed by the Appellant on 24.12.2010 with the CTU/Powergrid. As required under the BPTA, the Appellant also deposited a bank guarantee for an amount of Rs.49.35 crores. However, in spite of receiving the requisite clearances / approvals and LTA, the Appellant, despite concerted efforts, could not get the Consent For Establishment (CFE) to be issued by the Tamil Nadu Pollution Control Board (TNPCB) for which the application was made by the Appellant as early as on 15.06.2010. It is the contention of the Appellant that having received many critical clearances such as environmental clearance, CRZ clearance, Forest & Wild Life clearance etc., it was quite optimistic that the CFE would be granted by TNPCB subsequently.

7.13 Learned counsel for the Appellant submitted that with a view to establish its thermal project at its earliest, the Appellant commenced basic activities in the process at its full pace and spent in excess of 300 crores on the project including land acquisition, obtaining various statutory clearances, coal linkages etc.. However, TNPCB did not grant CFE for the project despite rigorous follow up by the Appellant and also recommendations of Central Electrify Authority, PWD of Tamilnaduetc.. It is relevant to note from the records placed before us that the fact of non-availability of CFE was made known to all concerned including CTU and Powergrid as far back as on 01.04.2011 during the Third Joint Coordination Committee Meeting. The said situation was affirmed by the Appellant through its numerous communications to Powergrid/CTU and at that stage, no any activity was undertaken by Powergrid for construction of evacuation facility in terms of the

BPTA. It is noticed that even land required for sub-station was not acquired by Powergrid which started land acquisition only from June, 2013 onwards. Besides, no any contract was awarded by that time and no development work had been initiated by the Powergrid. The Appellant contends that contrary to the factual matrix, Powergrid took the position that once BPTA is executed, the Appellant has to necessarily relinquish the entire bank guarantee whether its generating station comes up or not. In this regard, letters dated 17.01.2012, 02.07.2013, 14.08.2013 & 25.09.2013 issued by the second Respondent/Powergrid are quite relevant.

7.14 Learned counsel for the Appellant repeatedly emphasized that non-grant of CFE leading to non-establishment of its generating station is purely on account of force majeure conditions and is not in any manner attributable to any act of Commission or omission on the part of the Appellant. On account of the aforesaid force majeure, the Appellant could not be expected to perform its obligations under the provisions of BPTA with the Powergrid and the question of open access being operational / relinquished does not arise when the generating station itself could not be established. The other contention of the Appellant duly conveyed to Powergrid had been that though it may not use the reference pooling station because of non-grant of CFE/force majeure, it is still intending to use the second pooling station being planned by Powergrid as and when the generating project gets commissioned.

7.15 Learned counsel for the Appellant has also submitted that the investment approval for the reference transmission system was taken by Powergrid only in the year 2013 even being fully aware of the fact that the generating station of the Appellant was not coming up. In the circumstances, it is, therefore, not open to Powergrid to claim any right against the Appellant for such transmission system. Further, the information sourced from the website of the second Respondent/Powergrid revealed that upto December, 2013, Powergrid had invested the cumulative amount of only Rs.4.86 crores on the subject transmission system. Learned counsel further contended that having spent only such a meager amount and that too after two years of the Appellant claiming force majeure, how Powergrid could seek to recover the entire security amount furnished by way of a bank guarantee of Rs.49.35 crores by the Appellant.

7.16 On the other hand, learned senior counsel appearing for the second Respondent/ Powergrid was quick to submit that the present case is not a case of force majeure but is a case of abandonment of the project leading to relinquishment of LTA which is subject to the Clause 18 of Connectivity Regulations. Learned counsel further submitted that unlike the frustration of a contract where parties are discharged from its contractual obligations, the Clause 9 of BPTA being a temporary force majeure does not discharge a party from its obligation under the contract. Moreover, there is no letter of refusal for grant of CFE by TNPCB on record and hence the case cannot be considered to be of permanent force majeure. Learned counsel for the Respondent/Powergrid vehemently submitted that once a common transmission system is

created on request of the generating companies and the system becomes part of ISTS, such generating company is liable to share the transmission charges as per sharing of transmission and Losses Regulations framed by Central Commission irrespective of the fact whether the generating station is commissioned or not? Moreover, as evidenced from sequence of events, the Appellant has been throughout assuring the CTU that they are fully geared up to execute the project and such assurances were made in various JCC meetings. As such, there was no refusal at any point of time by TNPCB declining the grant of CFE and therefore the event does not fall within the ambit of Clause 9 of BPTA providing force measure for the Respondent No. 2/ Powergrid. In order to emphasize his arguments on applicability of force measure and other issues, he placed reliance on various judgements of the Hon'ble Supreme court as well this Tribunal indicated as under: –

(i) Energy Watchdog Vs. CERC 2017 14 SCC 80;
(ii) Himachal Sorang Power Ltd. Vs. CERC; Appeal 54 of 2014;
(iii) State of Tripura Vs. Tripura Bar Association 1998 5 SCC 637;
(iv) Export Credit Guarantee Corporation of India Ltd. Vs. M/S.Garg Sons International 2014 (1) SCC 686.

7.17 We have carefully considered and analyzed the submissions of the parties and taken note of the rulings under various judgements of Hon'ble Supreme Court and this Tribunal. It is relevant to note that the core issue in the Appeal revolves around the consideration of force measure and resultant impact thereof. It is not in dispute that the Appellant after only few months of signing the BPTA informed CTU and second Respondent/Powergrid of the fact that its project is not being granted CFE despite having received all

other approvals, and clearances from the concerned government instrumentalities. The said impediment / force measure was notified/informed to all concerned in the JCC meeting held on 01.04.2011 and subsequently affirmed the same in numerous communications addressed to CTU / Powergrid and also placed in JCC meetings. It is noticed that by that time the Powergrid had not initiated any action for establishment of proposed transmission system for which even the investment approvals itself was obtained in 2013. We have perused the various relevant regulations of the Central Commission related to connectivity, sharing of transmission charges and losses, relinquishment of LTA etc. along with various provisions of BPTA referred to by both the parties. It is not in dispute that after execution of BPTA on 24.12.2010, the Appellant furnished a bank guarantee of Rs. 49.35 crores and even prior to signing up the BPTA, the Appellant had applied for grant of LTA on 20.10.2008 for the capacity of 987 MW and also deposited fee of Rs. 19,67,752 with Powergrid for undertaking the required system studies, based on which LTA was granted on 10.12.2010.

7.18 We have perused the impugned order dated 12.7.2016 passed by the Central Commission in Petition no. 315 /MP/2013 filed by the Appellant and note that the Central Commission has categorically observed that the Appellant had acted bona fide, the Appellant was affected by force majeure beyond its reasonable control, Powergrid not acting in prudent manner, Powergrid not suffering any loss at the time when the Appellant claimed force majeure etc. However, in utter contrast to the aforesaid findings, the Central Commission has held that the issue whether any charges are

liable to be paid by the Appellant would be decided based on the decision in other proceedings relating to relinquishment of open access capacity and levy of relinquishment charges, if any. We are not inclined to accept the observations of the Central Commission regarding interpretation of the Clause 9 (force majeure clause) of the BPTA holding that the Appellant can be entitled to relief only for temporary force majeure events and not for permanent force majeure events. Besides, the Central Commission could not render any definite view on the refund of bank guarantee furnished by the Appellant in terms of the BPTA amounting to Rs.49.35 crores.

7.19 We have carefully gone through various dates and sequence of events leading to setting up of generating project as well as required transmission system for evacuation of power to be constructed by second Respondent/Powergrid. What thus transpires is that in the present case, the generator despite having obtained almost all the clearances / approvals was still prevented for construction of the project by a government instrumentality, the TNPCB. In such cases, the statutory authorities involved in the planning of the transmission system specifically Central Transmission Utility (CTU) has to exercise a very crucial and critical role so as to strike a balance between the parties concerned. CTU, being creation of the statute (Electricity Act 2003) is required to carry out various functions as stipulated under section 38 (2)(b) of the Act. In the case in hand, the force majeure occurred immediately after few months of signing the BPTA and the same was duly informed to CTU / Powergrid. It is relevant to note that by that time there had been no activity by the Powergrid

for the proposed transmission system and actually, the process started nearly after 2 years with the investment approval, land acquisition etc. during 2013 only. In such a scenario, CTU is expected to take necessary corrective/remedial measures for the system planning,coordination and implementation of the same in consultation with all other stakeholders including CEA, the Appellant and Powergrid. The Central Commission in the impugned order has acknowledged various lapses on the part of CTU as well as Powergrid but the Appellant has been left to suffer even though being bona fide in undertaking various activities in line with construction of its project, signing BPTA, obtaining LTA, issuing notices of force majeure, etc.

7.20 Having regard to the submissions of the Appellant and the second Respondent, the impugned order, various judgements of the Apex Court and this Tribunal cited / relied upon by the parties, we are of the opinion that in the case in hand, the Appellant has acted in bona fide manner but has been made to suffer due to non-prudent action of the CTU / Powergrid. The BPTA is a contractual arrangement between the parties which includes the Appellant and also other generators who suffered due to force majeure conditions leading to cancellation or abandonment of the generating station. The BPTA, in such circumstances, sought to be either cancelled or modified taking into account the realistic conditions prevailing at that time. There have been numerous instances when BPTA / TSA have been cancelled or modified and the requisite Bank guarantees returned or exchanged among the parties. In view of the above facts, the resultant factors weigh in favour of the Appellant.

7.21 In the light of above, we are of the considered opinion that in the explained circumstances, the CTU/Powergrid has not discharged the vital responsibilities assigned to it under the Electricity Act with respect to planning and coordination relating to the Inter-state Transmission System and keeping the same in view the Appellant cannot be penalised for none of its default. Accordingly, the bank guarantee of Rs. 49.35 crores furnished by the Appellant is required to be returned without further delay.

8. **Issue No.2:-**

8.1 Learned Counsel for the Appellant submitted that in the beginning, there were seven DICs including the Appellant proposing to use the transmission system in question. However, later on only IL&FS used the transmission system. It is pertinent to mention that out of seven DICs, only two i.e. the Appellant and IL&FS signed the BPTA and other five did not come forward to even sign the BPTA. Learned counsel further submitted that the Central Commission in PetitionNo.315/MP/2013, Para No.34 has held that date of relinquishment is 26.07.2013 for the Appellant. Though, system investment approval was granted by Board of CTU/Powergrid on 28.01.2013 (meeting held on 03.01.2013), the actual work started quite later and scheduled COD of Nagapattam sub-station was indicated as October, 2014 while the entire transmission system was delayed inordinately. In any case, relinquishment was requested long before any work was started on transmission system. CERC at Para 19 in its order in Petition No.315/MP/2013 has observed that in the Third Joint Coordination Committee Meeting held on 01.04.2011, non-availability of CFE

being force majeure was informed to CTU/Powergrid which was further reiterated in the subsequent meetings held on 09.09.2011 and 02.12.2011.

8.2 Learned Counsel for the Appellant submitted that the Appellant had as far back as in April, 2011 informed CTU/Powergrid of the non- availability of CFE and subsequently reiterated the same as force majeure through its various letters addressed to the Powergrid. Even by letter dated 16.12.2011, the Appellant claimed the continuation of force majeure and also intimated that in the prevailing circumstances, the Appellant would not be using the proposed pooling station, however, as and when the second pooling station is planned, the Appellant can utilise the same if the generating station comes up. In response, Powergrid vide letter dated 17.01.2012 replied as under: –

> *"Here it may be mentioned that the subject common transmission system has been planned for IPPS including PEL generation project in the Nagapattinam / Cuddalore area. Hence, due to uncertainty of PEL generation project, development of transmission corridor cannot be put on hold, as it shall adversely affect the power evacuation from other generation projects in the area. Further, Powergrid shall not be able to reserve the capacity in the transmission corridor for a project which is uncertain"*.

8.3 In view of the above averment by Power Grid, learned counsel for the Appellant alleged that notwithstanding advance intimation of the force majeure in setting up of the project due to non-availability of CFE, the Powergrid went ahead in Planning and construction of the proposed pooling station on their own risk and cost by considering other generators of the Area. Therefore, it is not open to Powergrid to claim any right against the Appellant for any such transmission system for which the construction activities were

initiated by Powergridafter 2 years during the year 2013 and they had not incurred any expenditure at the time of force majeure notice. Even the investment approval was obtained in 2013 and no contract was awarded or otherwise construction work started. Learned Counsel for the Appellant was quick to point out that neither LTA was operationalised nor Powergrid suffered any financial loss due to any default of the Appellant. Hence, the Appellant is not liable to pay any damage to Powergrid including the relinquishment charges. When there was no construction of the transmission system and LTA being not operationalised, where is the question of paying the relinquishment charges.

8.4 ***Per contra*****,** Learned Counsel for the Respondent no. 2 / Powergrid contended that the present Appeal filed by the Appellant is not a case of force majeure under Clause 9 of BPTA and it is a clear case of abandonment of generation project. Such abandonment of the project amounts to payments of charges under Clause 18 of the Connectivity Regulations notified by the Central Commission. Learned counsel further brought out that there is no letter of refusal for grant of CFE by TNPCB and once a common transmission system is created on request of generating company, the said company is liable to share the transmission charges as per Sharing of Transportation Charges and Losses Regulations framed by Central Commission. In fact, the Appellant never constructed the project and, therefore, LTA was considered to be relinquished for which the Appellant is bound to share relinquishment charges under Regulation 18 of the Connectivity Regulations. Learned counsel further contended that vide its order dated 03.12.2018 passed in petition number 250/MP/2017, the

Central Commission has devised methodology for adjustment of the amount of relinquishment charges payable by generating company and held as under:-

> *"22. Since, the Petitioner has relinquished the LTA granted and the liability of the Petitioner for payment of relinquishment charges shall be decided in the light of the decision in Petition No. 92/MP/2015, we are of the view that there is no requirement todirect PGCIL to refund the encashed BG at this stage. However, if any amount becomes due and payable after adjustment of the relinquishment charges, the same shall be refunded by PGCIL to the Petitioner with 9% interest from the date of encashment till the date of payment."*

Learned counsel emphasized that the instant Appeal being a similar case can be disposed off with a direction to Powergrid to adjust the amount of relinquishment charges payable by the Appellant against the bank guarantee of Rs. 49.35 crores.

8.5 Learned counsel for the second Respondent/Powergrid vehemently submitted that during the pendency of the Appeal, the Commission has passed an order dated 09.03.2019 in Petition Np.92/MP/2015 which among others stipulated that the stranded transmission capacity resulted on account of the abandonment of projects shall also attract the relinquishment charges and liabilities as per methodology detailed in this order. Therefore, in view of the said order, the instant Appeal has been rendered infructuous.

<u>Our Findings</u> :-

8.6 To have a proper analysis of the issue, we have perused the impugned orders passed by the Central Commission in Petition No.315/MP/2013 as well as 256/TT/2018 and noted that even the Central Commission has acknowledged with concern the lapses on the part of CTU/Powergrid in planning and implementation of the reference transmission system. In the order against petition

No.315/MP/2013 among others, the Central Commission has held in Para 32 as under:-

> "*CTU should take periodic review of progress of generating projects and its transmission system and re-plan/review the transmission plans to adverse progress in generation projects. The review of transmission system would depend upon status of execution of transmission system. In case works for execution of transmission system has not been awarded, CTU can re-plan according to system studies at Standing Committee Meeting. In case works for execution of transmission project has been awarded and need arises to re-plan, CTU should discuss the same at Standing Committee Meeting and endeavour to ensure that transmission system required for the system conveying different meaning is only built and beneficiaries not to be saddled with charges of the system which is not required. It is also noted that PGCIL never brought difficulties faced by the generators for which evacuation systems were planned by CEA and CTU to the notice of the Commission. In our view, PGCIL has not discharged the vital responsibilities assigned to it under the Act with respect to transmission planning".*

Even in Petition No.256/TT/2018, CERC held in Para 58(vi) that Powergrid had not disclosed the status of the IPPs and firming up the targets beneficiaries with the existing DICs. The scheme was evolved based on the commitment of various IPPs. However, as per the statement of the PGCIL among the IPPS, only IL&FS and PEL were showing some progress but only IL&FS had entered into PPA for 540 MW with TANGEDCO and the remaining LTA quantum was untied (including PEL). In spite of it, the Powergrid went on to implement the scheme.

8.7 After careful consideration of the submissions of the parties and taking note of the findings in various impugned orders of the Central Commission and also the provisions under various Regulations of the Central Commission, it is relevant to note that in case of abandonment of a generating project, the generating company has to bear the relinquishment charges for the LTA

relinquishment as computed by the Central Commission. In the case in hand, prima facie, it emerges that excepting execution of BPTA neither transmission project was completed nor LTA operationalised at a time when the Appellant informed to all concerned regarding the force majeure event in setting up of its generating project solely due to non-grant of CFE. Having acknowledged, the likely possibility of generation project not coming, Powergrid proceeded duly recording that if the project of Appellant does not come, the proposed pooling station shall be utilised by other IPP's of the area where they have achieved good progress. It thus emerges that in its decision to go ahead with the transmission system, Powergrid itself kept in mind that the generation project of the Appellant will not come up. In light of these facts, it may be opined that it is not a case of LTA relinquishment as the LTA was never operationalized for the Appellant and no progress was done relating to the construction of reference transmission system. In fact, the investment approval for the transmission system as well as beginning of peripheral construction activities came up only in the year 2013 i.e. after 2 years from the date of notification regarding force majeure.

8.8 Apart from equitable considerations on the side of the Appellant, there are certain economic factors as well which tilt the balance totally in favour of the Appellant herein. These include an expenditure of above Rs. 300 crores by the Appellant in process of establishing the generating plant. In this regard, we also make reference to the judgement of the Hon'ble Supreme Court dated 09.05.2017 in the case of Shivashakti Sugars Limited versus Shree Renuka Sugar Limited and others under Civil Appeal

Nos.5040, 5041, 5042 and 5043 of 2014 regarding consideration of equity and economic factors while adjudicating an appeal. Under para 36, 37 and 38 of the said judgement, Hon'ble Supreme Court has held as under: –

> *"36. We have already highlighted the factors which weigh in favour of continuing the operations of the Appellant's factory. Apart from equitable considerations on the side of the Appellant, there are certain economic factors as well which tilt the balance totally in favour of the Appellant herein. These include expenditure of approximately Rs.300 crores by the Appellant in establishing the factory….*
>
> *37. It has been recognised for quite some time now that law is an inter disciplinary subject where interface between law and other sciences (social sciences as well as natural/physical sciences) come into play and the impact of other disciplines of law is to be necessarily kept in mind while taking a decision (of course, within the parameters of legal provisions). Interface between law and economics is much more relevant in today's time when the country has ushered into the era of economic liberalization, which is also termed as 'globalisation' of economy….*
>
> *It calls for an economic analysis of law approach, most commonly referred to as 'Law and Economics'. In fact, in certain branches of law there is a direct impact of economics and economic considerations play predominant role, which are even recognised as legal principles….*
>
> *In such an environment it becomes the bounden duty of the Court to have the economic analysis and economic impact of its decisions. We may hasten to add that it is by no means suggested that while taking into account these considerations specific provisions of law are to be ignored. First duty of the Court is to decide the case by applying the statutory provisions. However, on the application of law and while interpreting a particular provision, economic impact/effect of a decision, wherever warranted, has to be kept in mind….*
>
> *38 Even in those cases where economic interest competes with the rights of other persons, need is to strike a balance between the two competing interests and have a balanced approach. That is the aspect which has been duly taken care of in the instant case, as would be discernible from the concluding paragraph of this judgment…."*

8.9 It is relevant to note that the case of the Appellant is entirely different from the cases of other DICs including IL&FS. For example, in the case of IL&FS, notice ofrelinquishment was given

by it to Powergrid on 30.12.2016 for 540 MW which was accepted by the Powergrid on 03.05.2017 and they have also operationalised the LTA for some period making them additionally liable for POC charges as well which is not the case with the Appellant. We are of the considered opinion that relinquishment charges are therefore not payable by the Appellant, as subsequently decided by CERC.

ORDER

For the foregoing reasons,we are of the considered view that the issues raised in the present appeal have merits and hence, appeal is allowed. The impugned order passed by Central Electricity Regulatory Commission dated 12.07.2016 in Petition No.315/MP/2013 is hereby set aside to the extent of our findings and directions as stated Supra.

In view of the disposal of the Appeal, the pending IA No.561 of 2019 does not survive for consideration and, accordingly, stands disposed of.

No order as to costs.

Pronounced in the Virtual Court on this **19th day of May, 2020.**

(S.D. Dubey)
Technical Member

(Justice ManjulaChellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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