

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

Appeal No. 169 of 2018

Dated: 14th May, 2024

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

In the matter of:

M/s. Himachal Sorang Power Pvt. Ltd.
Having its registered office at Ashirwad Building, D-7,
Lane-1, New Shimla, Shimla – 171009. ...Appellant

Vs.

- 1) Central Electricity Regulatory Commission
Through its Secretary, 3rd and 4th Floor,
Chanderlok Building, 36, Janpath,
New Delhi – 110001.
- 2) Central Transmission Utility India Limited
Through its General Manager (Commercial),
B-9, Qutub Institution Area,
Katwaria Sarai, New Delhi – 110016.
- 3) Northern Regional Load Despatch Centre
Through its Chief General Manager,
18-A, Katwaria Sarai, New Delhi – 110016.Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Gopal Jain, Sr. Adv.
Mr. Hemant Singh
Mr. Chetan Kumar Garg
Ms. Ankita Bafna
Mr. Harshit Singh
Ms. Alchi Thapliyal

Ms. Lavanya Panwar
Ms. Sindhuja Rastogi
Mr. Biju Mattam
Mr. Shri Venkatesh
Mr. Siddharth Joshi
Mr. Varun Singh
Mr. Pratyush Singh
Ms. Nishtha Kumar
Mr. Somesh Srivastava
Mr. Sandeep Rajpurohit
Mr. Samarth Kashyap
Mr. Vikas Maini

Counsel for the Respondent(s) : Ms. Suparna Srivastava
Mr. Tushar Mathur
Ms. Astha Jain
Ms. Sanjana Dua for R-2

Ms. Anisha Chopra
Mr. Prashant Garg
Mr. Gajendra Singh for R-3

JUDGEMENT

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

1. The captioned Appeal has been filed by M/s. Himachal Sorang Power Private Limited (in short "HSPPL" or "Appellant") challenging the Order dated 26.09.2017 (in short "Impugned Order") passed by the Central Electricity Regulatory Commission (in short "CERC" or "Central Commission") in Petition No.32/MP/2017 filed by Power Grid Corporation of India Limited (in short "PGCIL") as Central Transmission Utility (in short "CTU") seeking direction against

HSPPL to pay the past and current dues pertaining to Transmission Charges along with surcharge and to open a Letter of Credit (in short “LC”).

2. Consequently, the Central Commission on 26.09.2017 allowed the Petition and passed the Impugned Order directing HSPPL to pay the outstanding Transmission Charges and also issued a prospective direction that Central Transmission Utility India Ltd. would continue to raise invoice upon HSPPL and that its successor’s assignees would be liable for payment of such charges, aggrieved by such a decision, the Appellant filed the captioned appeal.

Parties

3. The Appellant, HSPPL is a company inter-alia has set up a hydro generating station of a capacity of 100 MW (2x50) in the State of Himachal Pradesh (in short “HP”).

4. The Respondent No. 1, CERC is the Central Electricity Regulatory Commission having powers to adjudicate the matter in hand inter-alia vested with the functions under section 79 of the Electricity Act, 2003 (in short “Act”).

5. The Respondent No. 2, Central Transmission Utility India Ltd. (in short “CTUIL”) is a government company assigned with the powers and functions under section 38 of the Act, which were earlier enjoyed by PGCIL, however, the such functions and powers of CTU are carved out from PGCIL and vested with CTUIL.

6. The Respondent No. 3, NRLDC has been established by the Central Government for the Northern Region *inter-alia* to ensure integrated operation of the power system in the Northern Region.

Factual Matrix

7. The Appellant has submitted the list of Dates and Events, which has not been disputed by the Respondents, accordingly, noted as under: -

DATE	PARTICULARS
23.09.2004	Memorandum of Understanding (“MoU”) was executed between HSPPL and Government of Himachal Pradesh (“GoHP”) regarding implementation of Sorang Hydro Electric Project (“Sorang HEP” or “Project”) on the Sorang Nallah, tributary of Satluj river.
28.01.2006	Implementation Agreement (“IA”) was executed between GoHP and HSPPL.
12.12.2007	HSPPL submitted an Application to CTUIL, erstwhile PGCIL, for grant of Long Term Open Access (“LTA”) for a period of 25 years.
14.07.2008	CTUIL issued a letter to HSPPL stating that LTA would be granted subject to signing of the Bulk Power Transmission Agreement (“BPTA”).
15.01.2009	A meeting was convened by the Central Electricity Authority (“CEA”) to review the evacuation arrangement from the Sorang Project of HSPPL wherein it was decided that

DATE	PARTICULARS
	Jaypee Powergrid i.e. ISTS Licensee would make best efforts for commissioning of 400 kV D/C quad line from Karcham-Wangtoo to Abdullapur facilitating power evacuation from the Project. It was also agreed that HSPPL would construct the LILO portion from their switchyard to a suitable location near Karcham Wangtoo- Abdullaapur line (“KWA Line”).
30.05.2009	In the 27 th Standing Committee Meeting of Northern Region on Transmission Planning, it was agreed that HSPPL would be granted LTA subject to certain stipulations.
17.07.2009	<p>HSPPL was granted LTA, for a period of 25 years, with the date of commencement of open access being November 2010. As per the permission for LTA, BPTA with CTUIL was to be signed within one month of issuance of the LTA permission.</p> <p>It is also pertinent to mention that LTA was granted to HSPPL without any additional system strengthening in Inter State Transmission System (“ISTS”), since the evacuation of power was to be facilitated through KWA Line. KWA Line was planned and executed for facilitating power evacuation from Jaypee’s Project. However, HSPPL was granted 100 MW LTA on the available transmission margin in the said line.</p>
21.10.2009	BPTA was executed between CTUIL and HSPPL for transmission of power from the project of HSPPL for a period

DATE	PARTICULARS
	of 25 years from May 2011 or the actual date of COD. LILO of one circuit of Karcham Wangtoo – Abdullapur 400 KV D/c (Quad) Line at Sorang was to be constructed by the HSPPL to provide long-term open access to the HSPPL.
July 2010	Certain geological uncontrollable events occurred at the project site due to weak strata in Head Race Tunnel, strike by contractors/laborers, unforeseeable rains etc. In view, thereof HSPPL requested CTUIL to revise the date of commencement of open access from May 2011 to January 2012 due to anticipated delay in commissioning of its generating units.
25.01.2012	Thereafter, HSPPL again requested the CTUIL for extension of LTA commencement date. CTUIL out rightly rejected the request of HSPPL. In view, thereof HSPPL filed a Petition before the Central Commission being Petition No. 43/MP/2012 seeking extension of LTA commencement upto September 2012 due to force majeure events.
14.02.2012	CTUIL granted connectivity to the HSPPL's Project pursuant to its Application dated 24.11.2011.
06.03.2012	A Connection Agreement was executed between the HSPPL, CTUIL and M/s Jaypee Powergrid Ltd with regard to technical aspects and physical connectivity of the transmission line with the generating station of HSPPL
01.04.2012	KWA line was ready and commissioned from which HSPPL was entitled to avail open access. However, HSPPL has not

DATE	PARTICULARS
	been able to use the allotted capacity under the LTA due to several Force Majeure events delaying the commissioning of its Plant.
29.05.2012	HSPPL entered into a Transmission Service Agreement (“TSA”) with CTUIL. However, Jaypee Powergrid has till date not signed the TSA.
31.01.2013	The Central Commission vide its Order rejected the claim of HSPPL for further postponement of commencement of open access and held that the HSPPL was liable to pay the transmission charges to CTUIL from 1.4.2012 itself.
18.03.2013	HSPPL filed a Review Petition before the Central Commission being RP No. 02 of 2013 in Petition No 43/MP/2012.
10.10.2013	The Central Commission vide Order dated 10.10.2013, dismissed the Review Petition.
27.03.2014	Thereafter, aggrieved by the decision of the Central Commission, HSPPL filed an appeal before this Tribunal being Appeal No. 54 of 2014.
30.04.2015	This Tribunal vide its final judgment dated 30.4.2015 dismissed the Appeal filed by HSPPL and held that no force majeure took place after April 2012 and hence HSPPL is liable to pay the Transmission Charges to CTUIL.
October, 2015	Unit 1 of HSPPL’s Project achieved commissioning.

DATE	PARTICULARS
18.11.2015	During the trial run of Unit 2 of the plant a failure of Penstock occurred at anchor block - 7 and up-stream of anchor block – 6, which caused huge loss to the public property and the project along with fatalities.
28.11.2015	SDM, Sorang vide its letter dated 28.11.2015 directed the HSPPL to pay compensation to the people affected by the accident at the project site pending which the SDM directed that no repair/ construction activity will be undertaken by HSPPL.
31.03.2016	Auditor Report evincing a loss of Rs.600 Crores incurred as on 31.03.2016 due to the aforesaid Force Majeure event.
06.06.2016,	CTUIL vide its letters dated requested the HSPPL to pay the outstanding Transmission Charges and to open LC in favour of CTUIL. Similar letters were issued on 26.06.2016, 11.07.2016, 09.08.2016, 26.08.2016, 07.09.2016, 07.10.2016 09.11.2016.
08.12.2016	HSPPL vide its letter informed the CTUIL qua the Force Majeure event which occurred in November 2015 (i.e., accident resulting in Penstock burst) and also expressed its inability to pay the outstanding dues, as the accident at the project site had caused severe financial loss to HSPPL.
17.02.2017	The Central Commission notified the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) (Sixth Amendment) Regulations, 2017 on 17.02.2017

DATE	PARTICULARS
	<p>(“Grant of Connectivity Sixth Amendment Regulation”). It is pertinent to mention that even after the notification of Regulation 16 B NRLDC did not take any step to mitigate its alleged loss by reallocating the capacity under the LTA for scheduling Medium term and Short Term Open Access.</p>
14.02.2017	<p>CTUIL filed a Petition before the Central Commission being Petition No. 32/MP/2017 seeking direction against HSPPL to pay the past and current dues pertaining to Transmission Charges along with surcharge and to open the LC for an appropriate amount.</p>
26.09.2017	<p>The Central Commission passed the Impugned Order directing HSPPL to pay the outstanding Transmission Charges. The Central Commission also gave a prospective direction that CTUIL would continue to raise invoice upon HSPPL.</p>
29.09.2017	<p>HSPPL was not able to complete the construction of its Plant due to the accident and the consequences that have arisen there from and including restrictions on project work imposed by GoHP, it was forced to relinquish the LTA granted by the CTUIL. HSPPL vide its letter dated sought relinquishment of 100 MW LTA.</p>
12.10.2017	<p>The Order dated 26.09.2017 was communicated to the HSPPL vide letter dated 03.10.2017 which was received by HSPPL on 12.10.2017.</p>

DATE	PARTICULARS
31.10.2017	CTUIL granted the request of relinquishment subject to certain conditions being fulfilled.
21.11.2017	HSPPL filed the present Appeal.
15.11.2018	CTUIL in furtherance of the Central Commission's Impugned Order has issued notice of demand dated 15.11.2018 alleging to be a notice under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
26.11.2018	HSPPL in response to aforesaid demand notice made a detailed representation to CTUIL under Section 8(2) of the Insolvency and Bankruptcy Code, 2016
28.11.2018	HSPPL filed IA for Urgent listing and Interim Directions for stay of Impugned Order
30.11.2018	This Tribunal directed CTUIL not to precipitate the matter till next date of hearing.

Submissions of the Appellant

8. The Appellant is aggrieved by the decision of the Central Commission whereby it has been held that the Appellant is liable for payment of outstanding dues towards transmission charges alongwith surcharge in favour of the CTUIL, and further, liable to open Letter of Credit ("LC") in favour of the said Respondent, also, directed that the Appellant would not be permitted to inject power under Long-Term Open Access ("LTOA/ LTA")/ Short-Term Open Access ("STOA"), until it makes the aforesaid payment of outstanding charges.

9. On being asked, the Appellant informed that the Appellant duly paid all the outstanding transmission charges up to October, 2015 and also the monthly payments against the bills raised by the CTUIL till March, 2016.

10. It is the grievance of the Appellant that despite being aware of the occurrence of force majeure event, the CTUIL kept on raising transmission charges bills upon the Appellant, even though it was not availing open access under LTA.

11. However, on the request of the Appellant for relinquishment of the LTA, the CTUIL, on 31.10.2017, agreed to the request.

12. The Appellant submitted that the force majeure event is limited to the specific force majeure event which occurred at the Project site in November, 2015, as pleaded by the Appellant in the present case.

13. The Appellant submitted that the Impugned Order suffers from gross irregularities as it did not consider the 'Force Majeure' events presently being faced by HSPPL pursuant to the accident and consequences arising there from.

14. The Transmission Charges levied by CTUIL and partly paid by HSPPL subsequent to date of the Force Majeure event i.e., from 18.11.2015 are not payable by HSPPL in terms of the express mandate of Article 14 of the TSA or Article 13 of the BPTA, therefore, HSPPL cannot be held to be in breach of its contractual obligation as much breach is caused due to an event, which is '*Force*

Majeure' and beyond the reasonable control of HSPPL, the following key aspects are also necessary: -

(a) On 18.11.2015, during the trial run of Unit 2 of the plant, a failure of Penstock occurred, and the Penstock busted at two locations viz, at anchor block-7 and up-stream of anchor block-6.

(b) The aforesaid accident has caused huge loss to public property and to the project along with fatalities.

(c) In fact, various articles were also published in newspapers qua the above pen stock burst.

(d) At this stage, considering the damage caused to human life and property, GoHP directed the Appellant to halt work on the Project site, in fact, the aforesaid unforeseeable accident, which was beyond the control of HSPPL, the commissioning of the plant has been halted completely as per the directions of GoHP for stopping the construction activities during the pendency of the investigation and also, till such time the rehabilitation of the affected villages is complete, thus, the Appellant was not in a position to commence operations/ repairs of its plant.

(e) A copy of the letter dated 28.11.2015 issued by Sub Divisional Officer (C) Nichar at Bhabangar directing the Appellant to stop work with immediate effect until inquiry is complete due to the accident was placed on record, the relevant extract is quoted as under:

(f) As such, it was absolute impossibility for the Appellant to run its Plant, this fact distinguishes the present case with the earlier round of litigation involving force majeure in Petition No. 43/MP/2012.

(g) Further, vide the aforesaid letter dated 28.11.2015, SDM directed the Appellant to pay compensation to people affected by the accident and to maintain status quo towards the repair/ construction activity.

(h) Additionally, steep opposition was being faced by the Appellant from the local villagers, which impaired it from carrying out the resumption activities at the site, consequently, a letter was issued on 30.11.2017 by the Appellant to SDM, Nichar, to convince stakeholders to accept reasonable prices for land, and further, convene a meeting to resolve the issue and to start dismantling work of Anchor Block 9 in their own acquired land.

(i) Separately, the Appellant vide letter dated 08.12.2017 informed the Chief Engineer (Energy), Directorate of Energy, New Shimla that it had completed the required studies, finalized the planning and was in the process of commencing the reconstruction of damaged portion of the Penstock.

(j) Thereafter, in compliance to Government directions, the Appellant, on 08.01.2018, submitted a cheque of Rs. 16,56,558/- to SDM, Nichar, towards

the balance amount due and payable for damage caused to the properties of Village Baurang, also informing that till date, Rs. 1,05,87,427/- had been deposited towards the damage caused.

(k) Subsequently, a meeting was conducted in the Chairmanship of the SDM and the villagers of Baurang Village with a view to re-start the work on the Appellant's project and to settle price of the land with mutual consent, followed by another meeting again under the Chairmanship of the SDM and the villagers, wherein, certain resolutions were arrived at.

(l) On 18.06.2018, a report on another incident on landslide was submitted by the Appellant to the Chief Engineer (Energy), Directorate of Energy, New Shimla, stating that the landslide resulted into one casualty and one employee being critically injured and machinery damages to the tune of Rs. 80,00,000/- was also reported.

15. Therefore, submitted that, while passing the Impugned Order, the CERC did not consider the fact that the transmission charges levied by CTUIL upon the Appellant are not payable by the Appellant in terms of the express mandate of Article 14 of the TSA dated 29.05.2012 and Article 13 of the BPTA dated 21.10.2009, extracts of which are reproduced hereinunder:

Article 14 of the TSA dated 29.05.2012

"14.0 Force Majeure

14.1 An 'Affected Party' means any of the DICs or the ISTS Licensees whose performance has been adversely affected by an event of Force Majeure.

14.2A 'Force Majeure' means any given or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

14.6 Available Relief for a Force Majeure Event

.....

14.6.1.2 Each DIC or ISTS Licensee shall be entitled to claim relief for a Force Majeure Event affecting its performance in relation to its obligation under this Agreement;

.....”

Article 13 of the BPTA dated 21.10.2009

“13.0 FORCE MAJEURE

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 a failure is due to force majeure events such as fire, rebellion, mutiny, civil commotion, riot, strike, lock-out, forces of nature, accident, act of God and any other reason beyond the control of concerned party. But any party claiming the benefit if this clause shall satisfy the other party of the existence of such an event and given written notice within a reasonable time to the other party to this effect. Transmission drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.”

16. The Appellant pleaded that from the perusal of Article 14 of the TSA, it is abundantly clear that the Force Majeure Clause of the TSA is an inclusive clause and goes beyond the events described therein, therefore, in terms of Article 14 of the TSA or Article 13 of the BPTA, the accident resulting into Penstock burst and subsequent GoHP direction squarely qualifies as a Force Majeure event.

17. Additionally, it is clear that the above clauses clearly exclude any liability of payment of transmission charges on the part of the Appellant, including any relinquishment charges once the above events are declared as *force majeure* events, this is because the above provision contains the phrase “*any claim for any loss or damage whatsoever*”, which makes the above provision broad so that the

Project Developer cannot be fastened with any liability for events which are beyond its control.

18. Reliance was placed on the judgment of the Supreme Court in the case of ***Dhanrajmal Gobindram Vs. Shamji Kalidas & Co. AIR 1961 SC 1285***, wherein the Supreme Court has deliberated upon the scope of the Force Majeure in a contract and its consequences and has held as follows:-

*“17. McCardie, J. in Lebeaupin v. Crispin [(1920) 2 KB 714] 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, breakdown of machinery, which, though normally not included in “vis major” are included in “force majeure”. **An analysis of rulings on the subject into 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....”***

19. The unforeseeable accident at the project site was widely covered by various Newspapers, magazines, and news channels and once the information about the accident, which resulted in Penstock burst was published in the local and national Newspaper, therefore, the CTUIL cannot plead ignorance qua the knowledge of the accident, further, HSPPL vide its letter dated 08.12.2016 had duly informed the CTUIL about the accident at the project site which led to Penstock burst.

20. Reliance was also placed on the judgment dated 19.05.2020 passed by this Tribunal in Appeal No. 266 of 2016, titled *PEL Power Limited v. Central Electricity Regulatory Commission & Anr.*, regarding the issue that transmission charges are not payable in the event there is an occurrence of force majeure events *inter-alia* the following was held:

“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.”

21. Accordingly, pleaded that in view of the principle laid down in the above judgment, the Appellant is required to be exempted from payment of transmission charges from November, 2015 to the date of relinquishment of the LTA, i.e., 31.10.2017, consequently, the CTUIL may be directed to compute and refund the transmission charges paid by the Appellant from November, 2015 to April, 2016.

22. As informed, the Appellant has paid an amount of Rs. 66,08,45,578- (*Rupees Sixty Crores Eight Lakhs Forty-Five Thousand Five Hundred and Seventy Eight Only*) towards transmission charges and losses for the period from April, 2012 to March, 2016, even when there was no generation under the LTA due to the force majeure events, however, the issue period of dispute before us is the period starting from the date of occurrence of second force majeure event i.e. 18.11.2015 till the relinquishment of LTA.

23. Therefore, prayed that the unforeseeable events occurring from November, 2015 ought to be declared as *force majeure*, in express terms of the directions of

GoHP to the Appellant to halt all operations at the Project site during the relevant period, which also finally resulted in the Appellant relinquishing its LTA on 31.10.2017 inter-alia the Appellant is required to be refunded the transmission charges paid for the period from November, 2015 to April, 2016 (*i.e., the period covered under force majeure events as pleaded in the present case*); and the Appellant cannot be faulted and penalized due to the inability of the Respondent No. 2/ CTUIL in complying with its obligations under CERC Connectivity Regulations, 2010.

24. The Appellant also pleaded that this Tribunal, being the first appellate forum, can adjudicate the present appeal on merits

25. Regarding the non-appearance of the Appellant before the Central Commission, the Appellant could not appear before the Central Commission in the proceedings of Petition No. 32/MP/2017, in which the Impugned Order was passed, on account of the following difficulties:

(a) The Appellant was incorporated on 30.08.2004 as a public limited company, and in order to finance the Project, the Appellant availed of (i) Senior Rupee Term Loans of Rs. 504,00,00,000/-; and (ii) Subordinate Rupee Term loans aggregating to Rs. 72,00,00,000/.

(b) The Appellant further borrowed additional rupee term loans of Rs. 140,00,00,000/- in order to finance all costs and expenses for completing the Project;

(c) That, the Project was to be commissioned in two units of 50 MW each by 31.03.2015. Unit 1 was successfully commissioned on 31.10.2015, and during the final stages of commissioning of Unit 2 on 18.11.2015, there was a failure in a portion of the inclined surface pen stock, which ruptured at two locations leading to overflow of water and suspension of commissioning activities;

(d) As a consequence, and the resulting cost overrun, coupled with the sudden downturn in the economic situation and of the infrastructure sector in the country, the business operations of the Appellant came under severe stress, further resulting in hindering the Appellant to service its debt to various banks and financial institutions;

(e) The Appellant was originally promoted by Nagarjuna Construction Company Limited, Maytas Infra Private Limited, and SSJV Projects Private Limited. In 2012, IL&FS took over Maytas Infra's stake and NCC acquired SSJV's stake; and

(f) Since the occurrence of the *force majeure* events in 2015, the shareholding of the Appellant underwent restructuring, because of which there was no certainty and managerial decisions could not be timely taken, and that the same became a primary reason for the non-representation of the Appellant in the proceedings before the Ld. CERC.

26. In the above context, submitted that this Tribunal, being the first statutory appellate forum, can adjudicate the present appeal on merits, so as to put to rest a controversy that is pending for over 8 years, and the same is because the first appellate court is both a court of law as well as facts, reliance was placed on the judgment of the Supreme Court in case titled *Union of India v. K.V. Lakshman & Ors.*, reported in (2016) 13 SCC 124 (**Paras 26 to 30**).

27. In the light of above and bare perusal of Article 14.6 of the TSA or Article 13 of the BPTA would evince that the HSPPL is exempted from its obligation qua payment of Transmission Charges under the TSA on account of Force Majeure event., hence, the Transmission Charges levied by the CTUIL and partly paid by the HSPPL after date of the accident i.e., from 18.11.2015 are not contractually payable by the HSPPL.

28. It an undisputed position that the Penstock accident is a Force Majeure incident, neither CTUIL in its pleadings or oral submissions nor Central Commission while passing the Impugned Order has disputed the existence of the said Force Majeure Event, in light of such admitted position, the Appellant is not liable to pay transmission charges in terms Clause 13 of the BPTA, therefore, the Impugned Order deserved to be set-aside on this ground alone.

29. It is also his submission that CTUIL, while filing the Petition before the Central Commission, has suppressed the material facts which ought to have been considered by the Central Commission, the brief is placed as under: -

(a) CTUIL did not disclose or even make a whisper of the fact in its Petition before the CERC that the accident in question in the present matter happened at the Project site of Appellant in November 2015 which had completely halted Project works of Appellant.

(b) CTUIL failed to apprise the Respondent that TSA was entered between the Appellant and CTUIL, the said TSA till date remains unsigned by ISTS Licensee i.e. Jaypee Powergrid (which was not even made a party to the Petition).

(c) CTUIL has relied upon the BPTA in the proceedings before the CERC without disclosing the effect of CTUIL signing the TSA and the same remained unsigned by i.e. Jaypee Powergrid who is the ISTS Licensee.

(d) Jaypee Powergrid was a necessary party and was not arrayed as party by CTUIL in filing Petition No. 32/MP/2017, therefore, for non-joinder of necessary party, said Petition ought to have been dismissed.

(e) No dedicated transmission asset was developed by the Appellant, instead, Appellant's project is connected through LILO of one-circuit of Karcham Wangtoo-Abdullapur 400 kV D/C (Quad) line, the Karcham Wangtoo-Abdullapur 400 kV D/C (Quad) line has been constructed for evacuation of power from 1,000 MW Jaypee's Hydro Electric Project and the LILO arrangement for Appellant's project was done by Appellant itself the said line is capable for evacuation of more than 1000 MW, therefore, LTA was granted to Appellant from the available capacity margin.

30. Therefore, it is submitted that non-disclosure by the CTUIL qua the existence of TSA and the effect of Article 14.6 upon occurrence of Force Majeure event i.e.,

Penstock burst in the present case is material concealment of fact and therefore, the Impugned Order is liable to be set-aside.

Submissions of the Respondent No. 2, CTUIL

31. The CTUIL submitted that in spite of the Appellant has in its Appeal alleged the violation of Regulations 15A and 16B of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009, however, it has not pressed the same during the course of arguments in the present Appeal, as such, it is only the non-consideration of force majeure events by the Commission which is the agitated grievance before this Tribunal.

32. The factual matrix, as submitted by the Appellant and noted in the preceding paragraphs, is not repeated herein except the facts which are in addition for the sake of brevity.

33. None of the facts submitted by the Appellant were disputed before us by the Respondents, except the interpretation and applicability of various legal provisions, documents placed on record.

34. Submitted that the inter-se rights and obligations under the BPTA were with respect to providing of open access and payment of transmission charges from the agreed date the open access had been made available, irrespective that power from the transmission system was actually being evacuated or not.

35. The BPTA contained a force majeure provision i.e. Article 13.0, as aforequoted, *inter-alia*, providing that if any of the parties to the BPTA failed to carry out the terms of the BPTA on account of any of the specified force majeure events, then they were not liable for any claim for loss or damage arising out of such failure, the only terms of the BPTA related to providing of open access by Respondent No.2 for the agreed quantum from the scheduled date of open access and payment of transmission charges by the Appellant for availing such access from the scheduled date of commissioning of the generation project, there was no inter-se obligation agreed to or recorded in the BPTA as regards the Appellant's operation of its power project so that the BPTA could not be said to be frustrated on that account, the position in terms of the BPTA was thus that once the transmission assets qua the Appellant had been implemented by Respondent No.2 and the LTA had been made effective, the liability of the Appellant to pay transmission charges for the LTA was absolute.

36. Further, the LTA granted to the Appellant could also be relinquished by it subject to payment of compensation as determined by the Respondent No.1 Commission, thus, upon relinquishment, if any, the Appellant was to become liable to pay relinquishment charges as determined by the Commission, therefore, for the period that the LTA was operationalized and subsisted, the Appellant was liable to pay transmission charges to CTUIL and in case it chose to relinquish the same at a later stage, it becomes liable to pay relinquishment charges from the date of such relinquishment, in this manner, the two liabilities imposed under the BPTA were separate and distinct and there was no overlapping in the periods for the same.

37. In addition to the aforesaid BPTA, the appellant also signed a Transmission Service Agreement (TSA) dated 29.5.2012 wherein it bound itself to pay applicable transmission charges to CTUIL.

38. Further, submitted that as per the BPTA, the date of commencement of LTA was May, 2011 i.e. the expected date of commercial operation of the project or the actual commercial operation of the first unit of the project, whichever was earlier, however, vide letter dated 2.8.2010, the Appellant requested Respondent No.2 to revise the date of commencement of open access to January, 2012 and thereafter to May, 2012 on account of anticipated delay in the commissioning of the project due to unforeseen circumstances and requested for extension of commencement of open access accordingly.

39. The Appellant filed a Petition being Petition No.43/MP/2012 before the Respondent No.1 seeking extension of LTA commencement up-to September, 2012 due to alleged force majeure events and also to restrain Respondent No.2 from making any claims under the BPTA for payment of transmission charges, pursuant to it, vide Order dated 31.1.2013, the Central Commission disposed of the said Petition and rejected the Appellant's plea of force majeure and held the Appellant liable to pay transmission charges to Respondent No.2 from 1.4.2012.

40. The Appellant then filed a Review Petition being Review Petition No.2/RP/2013, which was also dismissed as the Appellant failed to make out any ground for review.

41. Being aggrieved, the Appellant filed an Appeal being Appeal No.54/2014 before this Tribunal which was disposed of vide Order dated 30.4.2015, *inter-alia* holding as under:

- (i) the delay caused in the commissioning of the generating station could not be a ground for avoiding the payment for the system capacity being reserved for the Appellant by Respondent No.2;
- (ii) there was no provision under clause 13 of the BPTA providing for any benefit for extension of time to recover from the effect of so called force majeure event;
- (iii) if the Appellant actually did not require transmission capacity to be reserved in its favour, the Appellant could have followed the procedure provided for relinquishment of long-term open access and upon such relinquishment, the transmission capacity would have been allocated to other persons who desired to have transmission capacity reserved:

“32. Right to use the system and the capacity reserved for the appellant was from April, 2012 and the delay caused in the commissioning of the generating station cannot be a ground for avoiding the payment for the system capacity being reserved for the appellant by the transmission licensee-respondent no.2. The Open Access Regulations provide a methodology for applying and obtaining open access as well as relinquishment of open access in case the open access customer does not require the open access. That procedure has not been followed by the appellant in this matter. If the appellant actually did not

require transmission capacity to be reserved in its favour, the appellant could have followed the procedure provided for relinquishment of long-term open access. Upon the relinquishment, the transmission capacity would have been allocated to other persons who desire to have transmission capacity reserved. In the case before us, the appellant chose to block the transmission capacity in the system/ long-term open access. Since the said capacity has been blocked, the same needs to be paid for by the appellant.”

- (iv) since the Appellant did not comply with the requirements of the BPTA in effectively invoking the force majeure clause to seek amendment of the BPTA for the commencement of the open access, no relief could be granted to it.

42. The Appellant accepted the above Order of this Tribunal and in compliance thereto, cleared all its outstanding dues towards transmission charges up to December, 2015 and also made the monthly payments of dues till the month of February, 2016. However, from March, 2016, the Appellant stopped making payment of transmission charges and even the Letter of Credit (LC) furnished as a payment security under the applicable Regulations was not extended beyond May, 2016. From 28.6.2016 till 9.11.2016, Respondent No.2 sent several letters to the Appellant calling for payments as well as establishment of LC but to no avail.

43. Vide letter dated 8.12.2016, the Appellant informed Respondent No.2 that power generation from its project had come to a stand-still and its generation assets were in the process of being taken over by another promoter, it was only

after infusion of funds by the new promoter that the outstanding transmission charges liability could be discharged, it was thus clear that the non-payment of transmission charges by the Appellant was not on account of any force majeure event as subsequently alleged by it but was due to paucity of funds, even otherwise, as per the Order dated 30.4.2015 passed by this Tribunal in Appeal No.54/2014, which had attained finality and was binding upon the Appellant, the Appellant was bound to discharge its liability to pay transmission charges for the subsisting LTA irrespective of any force majeure eventuality affecting the operation of its generating station.

44. The CTUIL also raised the issue of non-appearance of the Appellant before the Central Commission, however, as submitted by the Appellant that the Impugned Order was passed during the process of take over of the erstwhile company by the present owning company, which is also clear from the findings of the Central Commission and as also not disputed by the CTUIL.

45. We find it appropriate to consider the submission of the Appellant on this ground, the Central Commission while acknowledging the same has preferred to pass an *ex parte* order and also directing that in case of take over such charges shall be paid by the company taking over the project without ascertaining whether the erstwhile company was going through liquidation or similar legal mandates and whether in such circumstances the jurisdiction vests with the Central Commission.

46. Submitted that, in the absence of any stay from this, Respondent No.2 proceeded to avail its remedy for recovery of unpaid transmission charges as per the Order dated 26.9.2017 and raised a demand notice dated 15.11.2018 upon

the Appellant under the Insolvency and Bankruptcy Code, 2016 (IBC), the Appellant then filed an Application being IA No.1706/2018 seeking stay on the operation of the impugned Order pleading, inter alia, that if Respondent No.2 was allowed to proceed with the demand notice, there was a possibility of complete shutdown of the Appellant's project causing it great financial prejudice.

47. Vide Order dated 30.11.2018, this Tribunal directed Respondent No.2 not to precipitate the matter till the next date of hearing and posted the Appeal on 20.12.2018 and on the said date, the interim Order was made absolute during the pendency of the Appeal.

48. The CTUIL countered the contention of the Appellant that owing to an accident in its generating plant which had prevented the Appellant from commissioning its units and evacuate power therefrom through use of open access, a force majeure situation had occurred, relieving the Appellant from its liability to pay transmission charges for the subject LTA, inter-alia submitted that this Tribunal has examined the Appellant's plea of force majeure on account of alleged unforeseen circumstances encountered during the implementation of its generating units and vide its Order dated 30.4.2015 passed in Appeal No.54/2014, has rejected the said plea by holding [in paras 22, 26, 32] that the force majeure clause under the BPTA is not applicable to its case, the said finding continues to apply to the Appellant and in view thereof, its plea of force majeure as raised in the present Appeal is inadmissible, that being so, the plea of force majeure on account of unforeseeable hindrances in commissioning of the power plant is not sustainable.

49. The Appellant has contended that the CTUIL has deliberately not disclosed before the Respondent No.1 crucial facts relevant to adjudication of the disputes, is wholly incorrect and untenable, as has been stated hereinabove, the CTUIL has sent several letters dated 28.6.2016, 11.7.2016, 9.8.2016, 26.8.2016, 7.9.2016, 7.10.2016, 9.11.2016 to the Appellant calling for payments as well as establishment of LC but of no avail, vide letter dated 8.12.2016, the Appellant has ultimately informed him about the alleged penstock burst in its plant; however, the Appellant has acknowledged its liability to pay transmission charges to Respondent No.2/CTU, though after an imminent change in promoters, this was placed before the Central Commission as can be seen from the records that the CTUIL has placed all of above correspondences before the Commission at the time of filing of the Petition.

50. Further, a perusal of the impugned Order dated 26.9.2017 would show that the Central Commission has taken due cognizance of letter dated 8.12.2016 of the Appellant, however, the Appellant has deliberately failed to appear before the Central Commission despite several notices and has failed to put forth its case alongwith all relevant documents before the Central Commission, the Appellant therefore cannot be heard to raise allegations at the appellate stage that the Central Commission has failed to consider the alleged force majeure events being faced by the Appellant.

51. Notwithstanding, the Central Commission, after due consideration of Appellant's case, has held vide its Order dated 19.7.2018 that the Appellant cannot be allowed any relief for the same and has reaffirmed its decision of holding the Appellant liable for payment of transmission charges from 1.4.2012, the same is

in consonance with the findings of this Tribunal given in its Order dated 30.4.2015 passed in Appeal No.54/2014.

52. During hearing in the present Appeal, the Appellant has sought to place reliance on the Judgment of this Tribunal passed in Appeal No.266/2016 titled *PEL Power Ltd. Vs. Central Electricity Regulatory Commission & Ors.* in support of its claim of force majeure, the said Judgment (whose correctness is presently pending adjudication before the Supreme Court in Appeal No.2958/2020 filed by the CTU) is inapplicable to the issues raised in the present Appeal for the reason that:

- a. the same has been passed in the peculiar facts and circumstances of that case where there is an inability to use the proposed transmission infrastructure which has been informed prior to the implementation of such transmission infrastructure whereas in the present case, the transmission system under the Appellant's LTA has been implemented and commissioned and as such, is required to be serviced through payment of transmission charges; and
- b. the Appellant is governed in terms of the Order dated 30.4.2015 passed by this Hon'ble Tribunal in Appeal No.54/2014 which is an inter-party Order duly accepted and thereafter also complied with by the Appellant.

53. Also submitted that the CTUIL is responsible under the applicable Sharing Regulations for raising the transmission bills, collection and disbursement of transmission charges to ISTS transmission licensees, thus, once a generator is

connected to the transmission assets implemented by Respondent No.2, the liability of the said generator to pay transmission charges for servicing the said assets is absolute since under the entire regulatory scheme of coordinated transmission planning, transmission assets created for use by the generators/beneficiaries are necessarily required to be serviced and it is for this servicing that transmission charges become payable by the Appellant, this is also the finding of this Tribunal in its Order dated 30.4.2015 passed in Appeal No.54/2014 which holds the field.

54. Therefore, the transmission charges payable by the Appellant, which stood at Rs. 71,75,69,036/- (Principal dues – Rs 54,85,76,956/- and Surcharge dues till February, 2019 - Rs 16,89,92,080/-) remained unpaid, further, late payment surcharge as per CERC Regulations/MoP LPS Rules from March, 2019 onwards shall also be payable by the Appellant.

55. As such claimed that for the reasons set out hereinabove and more particularly in the Reply filed by the CTUIL, there is no merit in the present Appeal and the same is liable to be dismissed by this Tribunal, consequently, the Appellant is liable to pay to CTUIL, the transmission charges as billed upon it till relinquishment of its LTA.

Submissions of the Respondent No. 3, NRLDC

56. The Respondent No. 3 has countered the submissions of the Appellant on the issue of compliance Regulation 16B of the CERC (Grant of Connectivity, Long-term access and Medium-term open access in inter-state transmission and related

matters) (sixth amendment) Regulations, 2017, notified on 17th Feb 2017, by the NRLDC, accordingly, the Respondent No. 3 made submissions limited to this issue only.

57. However, the Appellant has not pressed the aforesaid issue during the course of arguments in the present Appeal, as such, the submissions of the NRLDC may not be relevant and are, therefore, not noted hereunder.

Conclusion

58. After perusing the documents placed on record and arguments made by the contesting parties, it is seen that the only issue to be considered by us is limited to whether the failure and busting of Penstock, which caused huge loss to the public property and the project along with fatalities and subsequent directions of the GoHP are force majeure event in terms of BPTA/ LTA.

59. It cannot be disputed that the SDM, Sorang vide its letter dated 28.11.2015 directed the HSPPL to pay compensation to the people affected by the accident at the project site pending which the SDM directed that no repair/ construction activity will be undertaken by HSPPL, further, all operational works have to be stopped.

60. It is also noted that the erstwhile company owning the generating plant was in deep financial stress and consequently, taken over by the new management during the period when the Impugned Order was passed.

61. Considering that the said accident was covered by newspaper, it cannot be argued that CTUIL was not aware of such an accident, also the Appellant informed the CTUIL on 08.12.2016.

62. We are satisfied that the directions issued by GoHP in the light of large scale damage caused to human life and property, the work on the project site was put to complete halt, in fact, the aforesaid unforeseeable accident, which was beyond the control of HSPPL, the commissioning of the plant has also been halted completely as per the said directions for stopping the construction activities during the pendency of the investigation and till such time the rehabilitation of the affected villages is complete, and therefore, the Appellant was not in a position to commence operations/ repairs of its plant, the copy of the letter dated 20.11.2015 vide which such directions were issued by the Sub Divisional Officer (C) Nichar at Bhabangar was placed on record.

63. Undisputedly, the Appellant was forced to halt all operations at its Plant, a fact distinguishing the present case with the earlier round of litigation involving force majeure in Petition No. 43/MP/2012.

64. The Appellant also approached the SDM, Nichar, in view of steep opposition from the local villagers, which impaired it from carrying out the resumption activities at the site, to convince stakeholders to accept reasonable prices for land, and further, convene a meeting to resolve the issue and to start dismantling work of Anchor Block 9 in their own acquired land.

65. We are satisfied the event under consideration is a force majeure event, the Appellant cannot be held responsible for any delay occurred because of the directions of the State Government.

66. It is, therefore, important to note the relevant clauses of BPTA/TSA in respect of force majeure and consequential effect, the relevant clauses provide as under:

- a) TSA- *‘Force Majeure’ means any given or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.*

- b) BPTA- *“no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as fire, rebellion, mutiny, civil commotion, riot, strike, lock-out, forces of nature, accident, act of God and any other reason beyond the control of concerned party.”*

67. The CTUIL submitted that there was no inter-se obligation agreed to or recorded in the BPTA as regards the Appellant's operation of its power project so that the BPTA could not be said to be frustrated on that account, thus, the force majeure event effecting the operation of generating station cannot be covered under the force majeure event of the BPTA.

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

69. The issue has already been settled by the judgment dated 19.05.2020, as noted in the preceding paragraphs, passed by this Tribunal in Appeal No. 266 of 2016, titled *PEL Power Limited v. Central Electricity Regulatory Commission & Anr.*, on the issue that transmission charges are not payable in the event there is an occurrence of force majeure events during the commissioning of a power project.

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

71. We, therefore, decline to accept such contention of the CTUIL.

72. The CTUIL also raised that the instant issue is duly covered by the judgment dated 30.04.2015 passed by this Tribunal, which has attained finality.

73. There is no dispute that the aforesaid decision of this Tribunal was not challenged by the Appellant, however, the issue in hand is whether the accident occurring on 18.11.2015 in the power plant and consequential directions of the GoHP are covered under the relevant force majeure Article of the BPTA/ LTA.

74. We observe that issue placed before this Tribunal in Appeal No. 54 of 2014 also relates to force majeure event, however, this Tribunal rejected the occurrence of force majeure event and invocation of force majeure Article inter-alia has held as under:

“26. We have carefully and deeply perused the aforementioned letters sent by the appellant only to find that there is no mention of the existence of the occurrence or existence of any geological surprise or force majeure event. Thus, we hold that no notice, informing occurrence or existence of any force majeure event as required by clause 13 of the BPTA entered into between the parties, had ever been given by the appellant to the respondent no.2 Power Grid by fulfilling the requirements of the provisions mentioned in clause 13. The appellant was bound to give a notice in writing within reasonable time to respondent no.2 informing it of the existence of force majeure event but such a notice had never been given. There is no compliance

of the provisions of Clause 13 dealing with force majeure under the said BPTA entered into between the appellant and the respondent no.2-Power Grid. We agree with the findings and reasonings recorded in the impugned order about the non-existence of force majeure event. Since there is no provision under Clause 13 of the BPTA providing for any benefit for extension of time to recover from the effect of the so called force majeure event, no benefit of the said submission of the appellant can be granted to it. The clause 13 simply provides that the 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. It does not provide for any kind of relaxation or extension of time to be granted to a developer to overcome or recover from the effect of such force majeure event.”

75. This Tribunal vide the aforesaid judgment has observed that there is no notice given for there is no mentioning of the existence of the occurrence or existence of any geological surprise or force majeure event, accordingly, rejected occurrence of force majeure event.

76. Further, the said judgment was passed on 30.04.2015 i.e. prior to occurrence of the force majeure event in the instant appeal i.e. on 18.11.2015.

77. We find no merit in the submissions of the CTUIL that the present case is totally covered by the said judgment, therefore, the instant case has to be examined whether the occurrence of event and subsequent developments are covered by force majeure.

78. As already observed by us, the contention of the CTUIL is totally irrational and misleading, this Tribunal in the aforesaid judgment has ruled that there is no occurrence of force majeure event as such invocation of force majeure Article is not applicable limited to the events considered therein, the events mentioned in the captioned appeal are different and have occurred after the passing of the aforesaid judgment.

79. We find it most unreasonable and unjust, the Central Commission while passing the Impugned Order and having all the correspondences and details, as submitted by the CTUIL as above, should have examined the case on the merit of occurrence of force majeure event in the light of the order passed by GoHP in restraining the Appellant from repairing, maintaining, and operating the plant.

80. The CTUIL also countered that the reliance placed by the Appellant on the judgment in Appeal No.266/2016 titled *PEL Power Ltd. Vs. Central Electricity Regulatory Commission & Ors.*

81. We are not satisfied with the submission of the CTUIL as the issue dealt in the judgment relied upon by the Appellant has categorically ruled that in the case of the occurrence force majeure event, the generator cannot be held liable to pay transmission charges, further, the reliance on the judgment dated 30.04.2015 by the CTUIL has already been dealt by us in the foregoing paragraphs inter-alia rejected as not applicable.

82. We agree that the CTUIL has statutory function of raising the transmission bills, collection, and disbursement of transmission charges to ISTS transmission licensees in accordance with applicable Regulations under the legal and contractual provisions, however, in case any generator connected to the ISTS system *inter-alia* exempted from making such charges because the terms and conditions specified under the contractual provisions, the CTUIL is bound by such conditions and cannot force the generator to pay such charges in contravention to such a provision, the applicability of judgment dated 30.04.2015 has already been dealt in the foregoing paragraphs, reiteration by the CTUIL is un-necessary and cannot be accepted as already concluded above.

83. In the light of above, we are satisfied that the impugned event occurring on 18.11.2015 and subsequent directions of GoHP is a force majeure event and accordingly, the Appellant cannot be held liable to pay any transmission charges till continuation of such event under the provisions of BPTA and TSA.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 169 of 2018 has merit and is allowed to the extent as concluded herein above.

The Impugned Order dated 26.09.2017 passed by the Central Electricity Regulatory Commission in Petition No.32/MP/2017 is set-aside.

The direction against HSPPL to pay the past and current dues pertaining to Transmission Charges along with surcharge and to open a Letter of Credit, and also the direction that the Appellant would not be permitted to inject power under Long-Term Open Access (“LTOA/ LTA”)/ Short-Term Open Access (“STOA”), until it makes the aforesaid payment of outstanding charges is also set aside,

The excess payment made by the Appellant pertaining to period after the date of occurrence of the Force Majeure Event i.e. 18.11.2015 shall be reimbursed to the Appellant alongwith carrying cost within three months.

The Appeal in terms of above alongwith pending IAs, if any, shall stand disposed of.

PRONOUNCED IN THE OPEN COURT ON THIS 14th DAY OF MAY, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

pr/mkj