**In the Appellate Tribunal for Electricity,**
**New Delhi**
**(Appellate Jurisdiction)**

**Appeal No. 35 of 2016 & IA Nos. 90 & 189 of 2016**

**Dated: 1st August, 2017**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson**
**Hon'ble Mr. I.J. Kapoor, Technical Member**

**In the matter of :-**

**GMR- Kamalanga Energy Limited (GKEL)**
**Skip House**
**25/1 Museum Road**
**Bangalore – 560 025**

**... Appellant**

**Versus**

1. **Central Electricity Regulatory Commission (CERC)**
**4th Floor, Chanderlok Bulding,**
**36, Janpath,**
**New Delhi 110 001** **...Respondent No. 1**

2. **GRIDCO Limited**
**Janpath, Bhubaneshwar – 751 022**
**Orissa** **...Respondent No. 2**

3. **Central Electricity Supply Utility of Orissa**
**2nd Floor, Idco Tower**
**Janpath, Bhubaneswar – 751 022**
**Orissa** **...Respondent No. 3**

4. **North Eastern Electricity Supply Company of Orissa Limited**
**Januganj, Balasore – 756 019**
**Orissa** **...Respondent No. 4**

**5. Western Electricity Supply Company of Orissa Limited**
**Burla, Distt. Sambalpur – 768 017**
**Orissa ...Respondent No. 5**

**6. Southern Electricity Supply Company of Orissa Limited**
**Court peta, Berhampur**
**Ganjam – 760 004**
**Orissa ...Respondent No. 6**

**Counsel for the Appellant(s)**: **Mr. Amit Kapur**
**Mr. Vishrov Mukherjee**
**Mr. Rohit Venkat**

**Counsel for the Respondent(s): Mr. K.S. Dhingra for R-1**

**Mr. Raj Kumar Mehta**
**Mr. Abhishek Upadhyay**
**Mr. Elangbam P. Singh**
**Ms.Himanshi Andley for R-2**

## JUDGMENT

## PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

## Appeal No. 35 of 2016 & IA Nos. 90 & 189 of 2016

1. The present Appeal is being filed by GMR Kamalanga Energy Ltd. (hereinafter referred to as the **"Appellant"**) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the **"Act"**) challenging the Order dated 12.11.2015 (**"Impugned Order"**) passed by the Central Electricity Regulatory Commission (hereinafter referred to as the **"Central Commission"**), in Petition

No.77/GT/2013 for determination of tariff in respect of supply of 262.5 MW (i.e. 25% of 1050 MW) power to GRIDCO from (3 x 350 MW) of the Kamalanga Thermal Power Plant (hereinafter referred to as the **"Station"**), for the period from 1.4.2013 to 31.3.2014. The present Appeal is concerning about the disallowance of certain time overruns, additional Auxiliary Power Consumption (APC) & their consequential impacts and non-consideration of the Bench Mark norms while determining the capital cost.

2. The Appellant is a public limited company incorporated under the provisions of the Companies Act, 1956 on 28.12.2007. The Appellant is a project company which was set up by GMR Energy Limited **("GEL")** to undertake the construction and operation of the Station.

3. The Respondent No. 1 is Central Electricity Regulatory Commission (CERC) exercising jurisdiction and discharging functions in terms of the Act.

4. The Respondent Nos. 3 to 6, namely Central Electricity Supply Utility of Orissa ("CESU"), North Eastern Electricity Supply Company of Orissa Limited ("NESCO"), Western Electricity Supply Company of Orissa Limited ("WESCO") and Southern Electricity Supply Company of Orissa Limited ("SOUTHCO") are the Distribution Licensees (hereinafter collectively referred to as the "**Discoms**") in the State of Odisha being the beneficiaries of the power procurement by GRIDCO (the Respondent No. 2) which is engaged in business of bulk purchase and bulk sale of power to the Discoms and trading of surplus power.

5. **Facts of the present Appeal:**

a) Govt. of Odisha (GoO) and GEL entered into Memorandum of Understanding (MOU) dated 9.6.2006 with validity for three years, for setting up of 1000 MW thermal power plant at Kamlanga, Dhenkanal, Odisha. In terms of the MOU, the nominated agency by GoO shall have the right to purchase 25% of the power from the power plant in accordance with Power Purchase Agreement (PPA) to be executed.

b) GRIDCO (the nominated agency of GoO) entered into the PPA dated 28.09.2006 with GEL (the parent company of the Appellant) in terms of the MOU dated 09.06.2006 for purchase of 25% power from the Station at a tariff determined by the Appropriate Commission, purchase of entire quantum of power produced in excess of 80% PLF at variable cost and incentive (incentive to be determined by the Appropriate Commission) and purchase of entire quantum of infirm power at variable cost. The power is being procured by GRIDCO on behalf of and for supply to Odisha Discoms.

c) On 28.09.2006, GRIDCO filed a petition before the State Commission of Odisha for approval of the PPA entered into between GRIDCO and GEL wherein GRIDCO made a statement that PPA was entered into in pursuance of the MOU. This PPA was approved by the State Commission of Odisha on 20.08.2009 along with other IPPs. While approving the PPA, the State Commission directed GRICDO and the Appellant to file petition for

approval of tariff under Section 62 read with Section 79 (1) (b) of the Electricity Act, 2003, before the Central Commission.

d) On 29.01.2009, a Supplementary MOU was executed between GEL and GoO effecting changes and amendments pursuant to the Rehabilitation and Resettlement Policy of GoO regarding employment of oustees of the project and local people of State of Odisha. On 20.08.2009, another Supplementary MOU was executed between GEL and GoO for substitution of GEL with the Appellant.

e) The Appellant signed long term PPAs under competitive bidding route with Haryana on 12.03.2009 for supply of 300 MW through Power Trading Corporation (PTC) and with Bihar on 9.11.2011 for supply of 260 MW from the Station.

f) The Appellant awarded EPC Contract to SEPCO (Chinese Company) on 28.8.2008. Notice to Proceed (NTP) was issued to SEPCO by the Appellant on 27.5.2009. Financial closure of the project of the Appellant was also achieved on 27.05.2009. The schedule of the Station was reckoned from the date of issue of NTP/Financial Closure.

g) On 28.10.2010, a supplementary MOU was executed between GoO and the Appellant for extension of the original MOU dated 09.06.2006 for a further period of two years and increase in project size from 1000 MW to 1400 MW. Further, on 04.01.2011, a revised PPA was executed between the Appellant and GRIDCO, revising the installed capacity of the Project to 1400 MW and replacing the counterparty to the PPA from GEL to the Appellant.

h) On 23.03.2013, the Appellant filed Petition No. 77/GT/2013 before the Central Commission for determination of tariff in respect of supply of 262.5 MW (i.e. 25% of 1050 MW) to Respondent No. 2 from 3 x 350 MW Kamalanga Thermal Power Plant for the consumption by the Odisha Discoms. Commercial Operation Date (COD) of Unit-I of the Station was 30.04.2013. COD of Unit-II & III was 12.11.2013 & 25.3.2014 respectively.

i) In the said Petition, the Appellant had claimed a time overrun of 17 months for Unit-I, 22 months for Unit-II and 24 months for Unit-III, in the commissioning of the Project on account of the following grounds:

i. Delay of 7 months, being initial delay in Land Acquisition of 823.32 acres (other than forest land) for all units of the Power Plant;

ii. Delay of 8 months in project completion due to delay in acquisition of forest land of 78.03 acres for BTG, coal handling plant, etc. which were under the main Project Area. This delay was concurrent with the EPC contract related delays;

iii. Delay in the acquisition of land required for railway siding, approach road, etc. owing to injunctive orders passed by the High Court of Odisha.

iv. Delay of 10 months for Unit-I, 11 months for Unit-II and 13 months for Unit-III on account of non-availability of highly skilled and experienced foreign workers due to Change in law in terms of the Visa Policy of the Government of India (GoI);

v. Delay of 3.5 months for permission to conduct COD post synchronization of Unit-II due to high hydro conditions and grid constraints limited evacuation to 350 MW; and

vi. Delay of 4 months for permission to conduct COD post synchronization of Unit-III due to grid constraints limiting evacuation to 350 MW.

j) On 31.07.2014, in compliance with the Record of Proceedings (ROP) dated 03.06.2014, issued by the Central Commission, the Appellant filed an Affidavit placing on record the information as sought by the Central Commission. Further, on 23.01.2015, the Appellant filed an additional Affidavit, placing on record additional information/submissions.

k) On 12.11.2015, the Central Commission passed the Impugned Order wherein the Central Commission has disallowed certain claims of the Appellant. Aggrieved by the Impugned Order the Appellant has preferred the present Appeal before this Tribunal.

6. **Questions of Law:**

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

a) Whether the Impugned Order is *Per Incuriam* the Judgment of this Tribunal dated 27.04.2011 in the case of Maharashtra State Power Generation Co. Ltd. Vs. Maharashtra Electricity Regulatory Commission in Appeal No. 72 of 2010 (“MSPGCL Judgment”)?

b) Whether the Central Commission has erred in dis-allowing the claim of the Appellant pertaining to time-overrun on account of delay in land acquisition and non-availability of skilled foreign personnel for implementation of the EPC Contract?

c) Whether the Central Commission has erred in arriving at the conclusion that the delays and time-overruns were not beyond the control of the Appellant and that the same is attributable to the Appellant in the teeth of extant legal provisions and material on record?

d) Whether the Central Commission has erred in dis-allowing the time overrun due to delays in Land Acquisition for all three units of the Power Plant even though the same was beyond the control of the Appellant and was on account of uncontrollable parameters for which the Appellant is entitled to be compensated in terms of time and cost over-run?

e) Whether the Central Commission failed to appreciate that in terms of the MOU and the provisions of the Odisha Land Reforms Act, the responsibility for acquisition of land for the project is that of Government of Odisha and IDCO in light of the legal bar against acquisition of land by private entities?

f) Whether the Central Commission failed to appreciate that delay in acquisition of land and grant of forest clearance for the land on which critical project components like BTG and CHP were to be set up was an uncontrollable event beyond the control of the Appellant?

g) Whether the Impugned Order is *per incuriam* the Udupi Power Corporation Judgment since it is contrary to the principles set out by this Tribunal with respect to apportioning responsibility for land acquisition and computation of delay on account of change in visa policy?

h) Whether the Central Commission has erred in computing Auxiliary Power Consumption by allowing only 6.5% as opposed to 9.74% as claimed by the Appellant?

i) Whether the Central Commission has erred in not granting the consequential increase in capital cost, IDC and financing cost?

j) Whether the Central Commission has erred in not considering the Benchmark norms approved by it while determining to capital cost in accordance with Regulation 7(2) of 2009 Tariff Regulations?

7. We have heard at length the learned counsel for the parties and considered carefully their written submissions, arguments putforth during the hearings etc. Gist of the same is discussed hereunder.

8. The learned counsel for the Appellant has made following arguments/submissions for our consideration on the issues raised by it:

a) The Central Commission has wrongly applied the principles laid down by this Tribunal in MSPGCL Judgment to disallow the claims

of the Appellant. The MSPGCL Judgement has classified the reasons of delay as due to factors entirely attributable to the generating company, due to factors beyond the control of the generating company and situation not covered in the said factors. The Central Commission has acted in an arbitrary manner and failed to carry out the prudence check in line with the applicable regulations and MSPGCL Judgment passed by this Tribunal. The Appellant ought to be given benefit of time overrun due to factors beyond its control. The events that delayed the execution of the Appellant's project are on account of Force Majeure and Change in Law which are beyond the control of the Appellant. The reasons for time overrun are on account of:

(i) delay of 7 months being the initial delay in project implementation due to delay in acquisition of land of 823.32 acres (other than forest land) for all three units of the Power Plant is a Force Majeure event, which was beyond the control of the Appellant and was on account of uncontrollable factor.

(ii) delay of 8 months in project completion due to delay in possession of land on which critical project elements like BTG, coal handling plant, etc, were to be set up was delayed due to delay in the grant of Forest Clearance by the GoI. Possession of the said land measuring 78.03 acres was handed over to the Appellant only on 12.12.2012. These are the events beyond the control of the Appellant. This delay is concurrent with the delays due to EPC contract related issues.

(iii) delay in handover of land and completion of construction work in relation to the railway siding, Direct Approach

Road (DAR), MGR system etc. were on account of orders issued by the Hon'ble High Court of Odisha directing status quo to be maintained. The delay occurred due to uncontrollable factors beyond the control of the Appellant. The Appellant tried to mitigate the delay by adopting appropriate legal remedies in the form of applications for vacation of status quo orders.

(iv) Change in Law in terms of the Visa Policy of GoI leading to non-availability of skilled and experienced foreign workers for 10 months for Unit-I, 11 months for Unit-II and 13 months for Unit-III. This is a Change in Law and Force Majeure event, beyond the control of the Appellant.

b) The Regulation 7 (2) of the CERC (Terms and Conditions for determination of Tariff) Regulations, 2009 (hereinafter referred as the **"Tariff Regulations, 2009"**) stipulates that the capital cost will be admitted by the Central Commission after prudence check for determination of tariff. The time overrun was caused due to events beyond control of the Appellant. These include delays in land acquisition, Forest Clearance, development of DAR & MGR, obtaining necessary permissions etc. The reasons for delay were submitted to the Central Commission by the Appellant. The Appellant has taken all steps to mitigate the impact of these events.

c) The process of land acquisition began in July, 2007. 823.32 acres of land was required to be acquired for main plant area. The agreement with EPC Contractor (SEPCO) was executed on 28.8.2008 and Notice to Proceed (NTP) was issued on 27.5.2009.

As per the agreement with SEPCO total land for the project was to be handed over to it within 2 months of issue of NTP. The project schedule was premised based on this critical input to be fulfilled by the Appellant. As per EPC contract if NTP is not issued by 31.10.2008 there was a provision of price adjustment for project cost. However, the Appellant was able to manage the project cost till the issuance of NTP in May, 2009. If NTP has been issued in 2010 after completion of the land acquisition, it would have impacted the project cost by way of increase in EPC cost. The possession of major portion of land (515.31 acres) on which critical path activities were to be carried out was handed over to the Appellant only on 10.2.2010 after a delay of 7 months. The Appellant made payments to IDCO prudently as and when demand was raised by it. Land required for the main plant was transferred to GoO in May, 2009 but the disbursement of compensation to the land owners was delayed by GoO leading to delay in handing over possession of land to the Appellant. Dates of possession of land are as below:

| Village | Area (in acres) | Date of Possession |
|---|---|---|
| Senapathi Berana | 82.49 | 24.9.2009 |
| Bhagabatpur | 35.40 | 24.9.2009 |
| Managalpur | 190.12 | 24.9.2009 |
| Kamalanga | 515.31 | 11.2.2010 |
| Total | 823.32 | |

Further, there was delay in acquisition of 32.55 acres of land meant for main plant including BTG area for which possession was given in December, 2012. In this regard, the Appellant has put on record the various communications between the Appellant, IDCO and GoO.

d) Forest land area of 78.03 acres was handed over to the Appellant only in December, 2012 after issuance of Forest Clearance on 07.1.2011. This land was required for erection of Coal Handling

Plant (CHP) and other critical portions of the Station. The Appellant has applied for diversion of forest land in January, 2007. The Appellant took necessary steps for compulsory afforestation and expeditiously complied with all the requirements for grant of forest clearance by Ministry of Environment and Forest (MOEF) and referred to various communications exchanged in this regard. The Appellant vide its affidavit dated 31.7.2014 before the Central Commission submitted informations in relation to delay in land acquisition. No queries/ objections were raised by the Central Commission/ Respondent No. 2 on the same.

e) The Central Commission has erred in holding that the delay in land acquisition is not attributable to GoO/ Odisha Industrial Development Corporation (IDCO). The Central Commission failed to appreciate that as per MOU the land for the Station was to be acquired by GoO through its nodal agency IDCO and hand over it to the Appellant 'free from all encumbrances". Further, as per Odisha Industrial Infrastructure Development Corporation Act, 1980, IDCO is the designated agency to acquire and make available land to industrial undertakings. PPA entered between the parties was premised on the MOU. In this backdrop, the Central Commission has erred in holding that the delay in land acquisition was attributable to the Appellant.

f) The Central Commission has erred in not appreciating that the delay in land acquisition related to DAR & MGR was due to pending litigations before the Hon'ble High Court of Odisha. Writ petition no. 5559 of 2012 was filed on or around 23.3.2012 challenging land acquisition for the project. On 6.4.2012, Hon'ble

High Court of Odisha passed an order to maintain status quo regarding possession of land in question (related to construction of MGR).This status quo order was vacated only on 19.10.2012 by Hon'ble High Court of Odisha. Possession of this land was handed over to the Appellant on 31.10.2012. In 2012, 5 writ petitions were filed before the Hon'ble High Court of Odisha for the land related to DAR. Hon'ble High Court of Odisha issued status quo orders in the months on June/July, 2012. This status quo order was vacated only on 20.8.2013 by Hon'ble High Court of Odisha. During pendency of possession of DAR land, the Appellant proactively made alternative arrangements by coordinating with other State agencies so that there is minimal impact on the project erection activities. Further, the activities related to acquisition of land for MGR/ DAR were going on between the Appellant and IDCO & GoO since 2007/ 2008 respectively. The Central Commission has erred in holding that the Appellant ought to have made alternative arrangements for construction of the DAR. The reason for delay in possession of these lands due to court order was beyond the control of the Appellant.

g) The Central Commission also failed to appreciate that resistance from locals (during 2010 to 2013) also resulted in delay in acquisition of land. In this regard First Information Reports (FIR's) were also filed by the Appellant. This was again beyond the control of the Appellant.

h) The Central Commission has erred in allowing a total time overrun of only 3 months for delay in completion of the Project on account of a change in Visa Policy of the GoI leading to non-availability of

skilled work force, as against 10 months for Unit-I, 11 months for Unit-II and 13 months for Unit-III claimed by the Appellant. NTP was issued to SEPCO on 27.5.2009. On 20.8.2009, Ministry of Commerce and Industry issued a circular regarding obtaining employment visa to all foreign nationals who wanted to come to India for execution of projects. As per the said circular foreign nationals in India under business visa were asked to leave country by 30.9.2009. Subsequently Ministry of Home Affairs issued new visa category i.e. “Project Visa” and the number of visa grant was also capped. As a result SEPCO was constrained to drastically reduce foreign personnel for the project as detailed below:

| Year | Re-worked Scheduled deployment of manpower (Nos.) | Actual deployment of manpower (Nos.) |
|---|---|---|
| 2009 | 138 | 14 |
| 2010 | 517 | 61 |
| 2011 | 577 | 132 |
| 2012 | 419 | 190 |

The Central Commission has applied the judgment of this Tribunal in Appeal No. 108 of 2014 dated 15.05.2015 relating to Power Company of Karnataka Ltd. Vs. Central Electricity Regulatory Commission & Ors. (“Udupi Judgment”) without considering the principles laid down by this Tribunal in the said case and the difference in facts (impact at Udupi was in pre-commissioning stage whereas in present case it was during erection phase). The Impugned Order is per incurium the judgment of this Tribunal in the Udupi Case. The Central Commission has held that the Appellant/ EPC Contractor could have availed skilled manpower available in India. However, similar contention was rejected by this

Tribunal in the Udupi Judgment. The change in visa policy is not only a force majeure event but is also in nature of change in law which is beyond the control of the Appellant. The Appellant ought to have been granted time overrun claimed by it.

i) The Appellant has relied on the orders of the Central Commission viz. order dated 7.12.2015 in Petition No. 44/TT/2013 & order dated 15.5.2014 in Petition No. 88/TT/2011 allowing time overrun due delays in land acquisition beyond control of the petitioner. The Appellant has also relied on the judgement dated 31.10.2007 of this Tribunal in Appeal No. 159, 162 & 167 of 2005 in case of North Eastern Electric Power Corporation Ltd. Vs. Assam State Electricity Board & Ors. and judgement dated 15.5.2015 in Appeal No. 108 of 2014 in case of Power Company of Karnataka Ltd. Vs. CERC & Ors. related to condonation of delay for reasons beyond the control of the applicant. Regarding disallowance of delay related to forest area land the Appellant has quoted the judgement of Hon'ble Supreme Court in case of Secretary and Curator, Victoria Memorial Hall Vs. Howrah Ganatrantrik Nagrik Samity & Ors. (2010) 3 SCC 732.

j) The Appellant is entitled to grant of relief of time overrun of 17 months for Unit-I, 22 months for Unit-II and 24 months for Unit-III and its consequential relief.

k) The Central Commission has erred in allowing only 6.5% APC against 9.74% claimed by the Appellant. The Central Commission ignored the fact that during 2013-14 the Appellant was forced to operate its Station at low Plant Load Factor (PLF) due to grid

restriction by GRIDCO/ OPTCL. The Central Commission failed to consider for allowing higher APC while it was granted time extension due to grid restrictions by GRIDCO/ OPTCL. The Central Commission also failed to consider the affidavit dated 23.1.2015 of the Appellant wherein the Appellant submitted the summary of approved / actual APC of similar projects along with copies of respective State Electricity Regulatory Commission's Orders.

l) The Central Commission has erred in not considering the Bench Mark norms approved vide its order dated 4.6.2012 while determining the capital cost in accordance with clause (2) of Regulation 7 of Tariff Regulations, 2009. The hard cost of the Appellant's Station as on COD (25.3.2014) is Rs. 3986 Cr (Rs. 3.80 Cr./MW). The derived CERC benchmark hard cost escalated to March, 2014 works out to Rs. 5.27 Cr./ MW. The Appellant's benchmark hard cost is much lower than the Central Commission approved cost. Further, the capitalised cost of the Appellant (Rs. 5.56 Cr./MW) when compared with similar sizes projects is among the few projects having lowest cost per MW. The Central Commission should have considered the same while deciding the capital cost of the Appellant's Station.

9. The learned counsel for the Central Commission and Respondent No. 2 have made following submissions/ arguments for our consideration on various issues raised in the present Appeal:

a) While considering the Appellant's prayers for condonation of time overrun, the Central Commission has been guided by the principles

of prudence check laid down by this Tribunal in MSPGCL Judgement. The contention of the appellant that the Impugned Order is per incuriam this Tribunal's Judgment in MSPGCL case is misconceived. The enumeration of factors in the said judgment of this Tribunal is only illustrative and not exhaustive. The delay in acquisition of land for the main plant area was found to be on account of slackness of the Appellant and its non-coordination with the Governmental Authorities to expedite possession of land.

b) The Appellant has not given any details of steps taken by it to complete the project within time line of the MOU and/or reduce the delay in completion of the project. Further, the submission of the Appellant that GRIDCO has admitted that delay in land acquisition was a general problem, is misconceived. The Appellant was required to explain delay through CPM (Critical Path Method)/ PERT (Program Project Management Review Technique) chart. There is slackness on part of the Appellant as it leisurely wrote letters to various authorities for land acquisition. Major portion of land 823.32 acres out of total requirements of 1176.24 acres was made available to the Appellant on 11.2.2010. The Central Commission has rightly disallowed the delays on land acquisition stating slackness on part of the Appellant.

c) The Appellant has averred that initial delay in acquisition of land for main plant area, delay in acquisition of forest land, land for railway siding and MGR, direct approach road etc. and delay caused on account of change in Visa Policy were for reasons beyond its control and were within the purview of force majeure events as defined under Article 11 of the PPA.

Article 11 of the PPA reads as under:

*"11. Force Majeure*

*Neither 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, riots, strike, lock out, forces of nature, accident, act of God and any other reason beyond the control of concerned party. Any party claiming benefit of this clause shall reasonably satisfy the other party of existence of such an event and given written notice within a reasonable time to the other party to this effect. Generation/ 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."*

The Appellant has urged that the delays being uncontrollable events, the Appellant ought to be given the benefit of time overrun in terms of this Tribunal's judgment in MSPGCL case. The Appellant's reliance on Article 11 of the PPA is totally misconceived and misplaced. Article 11 of the PPA does not enable the Appellant to seek condonation of delay in commercial operation of the Power Project, but only insulates it against any loss suffered by GRIDCO on account of the delay for reasons beyond its control. The Appellant has not stated the efforts made by it to reasonably satisfy GRIDCO of the existence of force majeure event. The appellant has not even claimed to have issued notice to GRIDCO of existence of the force majeure events causing delay in execution of the Power Project.

d) The Appellant further stated that the possession of 823.32 acres of land required for the main plant area was handed over only by 11.2.2010, whereas the notification under Section 4(1) of the Land Acquisition Act for acquisition for which was issued on 12.7.2007. From the table provided by the Appellant regarding possession of land it can be seen that 308.01 acres of land (nearly 40% of the total land) was handed over to the Appellant on 24.9.2009 within a period of just 2 months from the agreed crucial date (27.07.2009 the date by which Appellant need to hand over land to SEPCO), other 515.31 acres were handed over with delay of nearly 6½ months from the crucial date. Against the same, the Appellant sought condonation of 7 months time overrun.

The Appellant's plea to seek condonation of the alleged delay of 7 months in handing over possession of land is untenable as it was not prudent for the Appellant to wait for acquisition of entire land needed for the main plant area for starting the construction work. The Appellant's plea for condonation of delay did not find favour with the Central Commission after prudence check as MOU provided only to facilitate acquisition of land through GoO/IDCO, PPA does not provide that land acquisition responsibility is that of GoO/IDCO. GoO/IDCO was alone not responsible for delay in land acquisition. No documentary evidence was placed for reasons regarding litigation and resistance from locals. It was mere slackness on part of the Appellant for coordination with the District Administration. The Appellant has also not placed anything on record to show that it made any serious efforts to expedite the takeover of the possession of the acquired land after issuance of notification under Section 6 of the Land Acquisition Act on

17.6.2008. The Appellant was having time of more than one year from 17.6.2008 to 27.7.2009 (to meet its obligation under EPC Contract), but the Appellant failed to take follow up action. The Appellant has also submitted that after possession of land on 24.9.2009, it carried out essential activities like soil investigation etc. Thus without further averment that the work was hampered or stopped because of non-delivery of possession of the balance land by 11.2.2010, there cannot be any justification of delay beyond 24.9.2009. The Appellant has claimed time overrun of 7 months till 10.2.2010 when it got possession of 823.32 acres of land. The copies of the FIRs pertain to period May, 2010 and onwards whereas the possession of 823.23 acres of land was already handed over to the Appellant by 11.2.2010. Accordingly, the alleged law and order problem in May, 2010 and afterwards did not have effect on acquisition of land for main plant area. The litigation before Hon'ble High Court of Odisha affected only very small area of land measuring 3.11 acres and that too during 28.6.2012 to 20.8.2013 and that too for DAR. At that point of time the project was ready for commissioning.

e) The delays in acquisition of 32.55 acres of private land meant for MGR, DAR, laying of water pipeline, transmission line etc. and 78.03 acres of forest land in main plant area have been dealt by the Central Commission at paras 26 and 27 of the Impugned Order and the Appellant has not questioned the correctness of the findings of the Central Commission and therefore have acquired finality. Moreover, the Appellant has not sought any relief based on above delays and has submitted that these delays were concurrent with

EPC Contract delays which did not hold up the completion of the project and therefore have to be overlooked.

f) The restrictions in employability of foreign nationals were promulgated by the Central Government in October/November 2009 and were thus known in February 2010 when major chunk of land was handed over to the EPC contractor for commencement of construction. In view of the restriction in engaging foreign skilled manpower, the alternative of availing the services of skilled manpower available within the country was to be considered by the Appellant in consultation with the EPC Contractor in order to minimise the effect of changes in the Visa Policy on the scheduled project completion period. By following the judgment of this Tribunal in Udupi Case, the Central Commission condoned time overrun of three months for each unit as the period in the said judgement overlaps with the period involved in the present Appeal.

COD of Unit-I was 30.4.2013, Unit –II was 12.11.2013 and that of Unit-III was 25.3.2014.The Appellant has not explained either before the Central Commission or this Tribunal the reasons for deviation from the schedule agreed under the EPC contract (subsequent units at an interval of 2 months) after Unit I was declared under commercial operation. Therefore, it can be safely concluded that unaccounted delay in commissioning of the Station was not attributable to the changes in the Visa Policy but were attributable to the Appellant or the EPC Contractor. However, considering the fact that the change in visa policy would have caused some initial hiccups on the re-organization/re-mobilization/rescheduling of manpower resources after taking over of the land for the project in February 2010, the total delay of 3 months was condoned and

allowed by the Central Commission as against the claim of the Appellant for 10 months in Unit I, 11 months in Unit II and 13 months in Unit III.

The delay condoned by the Central Commission is tabulated below:

| Unit No. | Financial Closure date | Scheduled COD | Actual COD | Time overrun (months) | Time overrun condoned (months) |
|---|---|---|---|---|---|
| I | 27.5.2009 | 27.11.2011 | 30.4.2013 | 17 | 3* |
| II | | 27.01.2012 | 12.11.2013 | 22 | 6.5$ |
| III | | 27.3.2012 | 25.03.2014 | 24 | 7# |

* On account of change in visa policy.

$ 3 months on account of change in visa policy and 3.5 months for delay after synchronisation.

# 3 months on account of change in visa policy and 4 months delay after synchronisation.

g) The Appellant has contended that as per the judgement of this Tribunal in MSPGCL case it is entitled to time overrun for reasons beyond its control. The Central Commission has submitted that the factors listed in the said judgement are only illustrative and not exhaustive as it uses the terms ‘e.g.’ and ‘etc.’. The analogous factors also disentitle the Appellant for condonation of delay. On other Orders/Judgements of Central Commission/ this Tribunal quoted by the Appellant, the Central Commission submitted that certain delays were condoned on the ground of law and order faced in acquisition of land. The Appellant has also for the first time produced additional documents before this Tribunal which were not placed before the Central Commission during pleadings before it.

Perusal of the additional letters (except letter dated 18.2.2009) submitted shows that the Appellant did not even make a formal request for possession of the acquired land. Accordingly, the question of verifying the Appellant's claim by the Central Commission or issuing summons to GoO or IDCO did not arise. During the period from 25.7.2009 (date by which Appellant was to handover land to SEPCO) to 23.9.2009 the Appellant did not make any serious efforts with GoO/IDCO to expedite possession of land, which seems to be for the reason that the Appellant was not able to achieve financial closure, which was achieved on 27.5.2009. Further, the provisions of CPC (Order IX & Order X with headings 'govern the parties') have no application to the non-parties and hence GoO/IDCO could neither be summoned nor their presence could be enforced.

h) The Respondent No. 2 stated that the Central Commission has erred in granting time overrun of 3.5 months and 4 months respectively for COD of Unit II and Unit III as it is not attributable to OPTCL/GRIDCO/SLDC. This was due to delay in completion of the Dedicated Transmission Line and shift in planning in respect of Pooling Station to where the power is to be delivered. An interim short term LILO arrangement at Kaniha/ Meramundali line was allowed with due permission from OPTCL, to avoid further delay in commissioning of the Units. The Appellant agreed to pay the ISTS charges since the delay for completion of Dedicated Transmission Line was on their part. Thus inspite of non-availability of any Transmission Line to CTU pooling station, the Appellant was allowed by OPTCL to complete COD of all the three units by evacuating power through STU connected interim arrangement.

Although, the Appellant was fully aware of the fact that the interim arrangement is only able to transmit maximum up to 350 MW, but, it wanted all their power to be evacuated through this interim arrangement, which is absurd. Had the Appellant planned properly for COD during Low Hydro Power Conditions, i.e. not around the rainy season, and had they adhered to the time line as per MOU, they could have achieved the COD without any difficulty. Therefore the delay due to grid restrictions/evacuation constraints was well within the control of the Appellant and there cannot be any justification to compensate the Appellant for their improper planning.

i) The Appellant in the tariff petition before the Central Commission prayed to allow APC of 7.55% based on the EPC Contract. In its subsequent affidavit dated 31.07.2014, the Appellant submitted that considering the normative APC parameters and additional allowance for special features (1.44%), APC allowable for the Power Project should be 7.94%. The Appellant vide affidavit dated 23.1.2015 pointed out that similar projects in other states were granted higher APC by the regulators. The Appellant in the said affidavit stated that it was entitled to Weighted Average APC of 9.74% for the year 2013-14 on the ground that the power plant was forced to operate at low plant load factor. The Appellant further submitted that it had installed additional systems to comply with the directives of Ministry of Environment and Forests, to meet the zero effluent discharge system to optimize the water usage. The Central Commission after considering all factors decided not to allow relaxed APC to the Appellant. In view of the rejection of the appellant's claim for APC of 7.55%, and calculating the Energy Charge based on norm of 6.5% specified under the Tariff

Regulations, 2009, the question of allowing APC of 9.74% which was claimed in the affidavit without furnishing calculations in support and without even formally amending the tariff petition, did not arise. The Appellant has not even challenged the impugned findings of the Central Commission in this regard. The Appellant cannot claim relaxation in norms of APC specified under the Tariff Regulations, 2009 as a matter of right as it would adversely affect the beneficiaries of the Power Project.

j) The Central Commission has allowed actual expenditure along with all increases in EPC and Non-EPC costs which were found beyond the control of the Appellant. The increase in IDC due to time overrun which was not beyond the control of Appellant was disallowed. The Appellant is trying to justify the actual capital expenditure of Rs. 6347.15 Cr. incurred and claimed in the tariff petition based on the plea that the hard cost and project cost were found reasonable, every cost should have been allowed without any deduction. Since the actual capital cost incurred based on investment approval and the capital cost found prudent and justified for tariff purpose are in different yard scale, the argument of the Appellant is devoid of merit and hence merits rejection.

The Appellant has alleged that the Central Commission has not considered the Benchmark capital cost norms while determining the capital cost of the Power Project. The Benchmark capital cost specified by the Central Commission, acts as guidance for prudence check of capital cost of projects of 500/600/660/800 MW unit sizes and there is no benchmark capital cost for 350 MW and cannot be derived linearly by extrapolating the costs from other unit sizes. The Central Commission had compared the hard cost of the Station with

the benchmark hard cost of 500 MW just to see how the hard cost of this project of unit size 350 MW stands and whether it is reasonable. Comparing with the Benchmark cost or with contemporary projects are different options available to the Central Commission to examine the reasonable use of capital cost as allowed by the Central Commission.The Benchmark capital cost norms are to be used for 'reference' or comparison' of the capital cost of a power project while exercising prudence check under clause (2) of Regulation 7 of the Tariff Regulations, 2009. Accordingly, comparison of capital cost with Benchmark capital cost norms and found comparable do not create any vested right in favour of the Appellant to claim the capital cost as incurred by the Appellant for the tariff purpose.

10. After having a careful examination of all the arguments and submissions of the rival parties on various issues raised in the present Appeal, our observations are as follows:-

a) The main issues raised by the Appellant in the present Appeal are regarding condonation of complete time overrun on account of delay in land acquisition for the project and due to change in visa policy by GoI as petitioned by the Appellant before the Central Commission. The Central Commission has partly allowed the time overrun vide its Impugned Order. The other issues are related to disallowance of higher APC and non-consideration of Benchmark capital cost by the Central Commission in the Impugned Order.

b) Let us first take all the questions of law together raised by the Appellant related to time overrun i.e. Question nos. 6 a) to 6 g). On

the Question No. 6 a) raised before us i.e. Whether the Impugned Order is *Per Incuriam* the Judgment of this Tribunal dated 27.04.2011 in the case of Maharashtra State Power Generation Co. Ltd. Vs. Maharashtra Electricity Regulatory Commission in Appeal No. 72 of 2010 ("MSPGCL Judgment")?, Question No. 6 b) i.e. Whether the Central Commission has erred in dis-allowing the claim of the Appellant pertaining to time-overrun on account of delay in land acquisition and non-availability of skilled foreign personnel for implementation of the EPC Contract?, Question No. 6 c) i.e. Whether the Central Commission has erred in arriving at the conclusion that the delays and time-overruns were not beyond the control of the Appellant and that the same is attributable to the Appellant in the teeth of extant legal provisions and material on record?, Question No. 6 d) i.e. Whether the Central Commission has erred in dis-allowing the time overrun due to delays in Land Acquisition for all three units of the Power Plant even though the same was beyond the control of the Appellant and was on account of uncontrollable parameters for which the Appellant is entitled to be compensated in terms of time and cost over-run?, Question No. 6 e) i.e. Whether the Central Commission failed to appreciate that in terms of the MOU and the provisions of the Odisha Land Reforms Act, the responsibility for acquisition of land for the project is that of Government of Odisha and IDCO in light of the legal bar against acquisition of land by private entities?, Question No. 6 f) i.e. Whether the Central Commission failed to appreciate that delay in acquisition of land and grant of forest clearance for the land on which critical project components like BTG and CHP were to be set up was an uncontrollable event beyond the control of the Appellant? and on Question No. 6 g) i.e. Whether the Impugned

Order is *per incuriam* the Udupi Power Corporation Judgment since it is contrary to the principles set out by this Tribunal with respect to apportioning responsibility for land acquisition and computation of delay on account of change in visa policy?, we observe as below:

These questions are to be dealt in two parts i.e. delay related to acquisition of land and delay related to change in visa policy by GoI.

A. **Time overrun due to delay in acquisition of land:** This is further divided into initial delay in project implementation, delay in acquisition of land due to delay in grant of Forest Clearance and delay in handover of land and completion of construction work in relation to the railway siding, Direct Approach Road (DAR), MGR system etc. on account of orders issued by the Hon'ble High Court of Odisha and local agitation.

i. The Appellant has contended that the reasons for handing over possession of land by IDCO to the Appellant were due to initial delay in acquisition of land, delay in grant of Forest Clearance by GoI & subsequent handover of the land by IDCO, litigations before the Hon'ble High Court of Odisha and local agitation. These reasons are beyond the control of the Appellant. The responsibility of providing land free from encumbrances as per MOU and also as per the legal position in the State of Odisha was that of IDCO. Accordingly, the Appellant requested 7 months delay in initial land acquisition, 8 months delay due to forest clearance and

unspecified time delay due to delay in land acquisition due to other reasons.

ii. Let us analyse the impugned findings of the Central Commission on the above issues. The relevant extracts are reproduced below:

> *"25. The petitioner has submitted that the delay due to land acquisition was outside the reasonable control of the petitioner. It is noticed that in terms of the MOU dated 9.6.2006 entered into by the petitioner with the Govt of Orissa, 2200 acres of land (approx) was required for the setting up the Thermal Power Plant and associated facilities (colony, coal transportation system, water transportation system, power evacuation system, ash disposal and other infrastructural facilities) by the petitioner. However, an aggregate of 1176.24 acres of land earmarked for the project was to be acquired by the Govt. of Orissa through its nodal agency, IDCO and handed over to the petitioner free from encumbrances. The petitioner has submitted that even though the process of acquiring 823.32 acres of land (out of the total requirement of 1176.24 acres) for main plant area began in July, 2007 with the issue of notices under Section 4(1) of the LA Act, 1894, the project land could not be acquired by the Govt. of Odhisa/IDCO to be handed over to the petitioner in time due to various reasons and delays on account of land acquisition litigation and resistance from locals. The respondent, GRIDCO has submitted that the problems related to the delay in land acquisition are general problems and the petitioner is well aware of such problems. It has further submitted that the major portion of land measuring 823.32 acres out of total requirement of 1176. 24 acres was made available to the petitioner well in time, and that the petitioner cannot presume that all the activities for execution of the project would commence only when the entire land is made available to the petitioner free from all encumbrances. It is noticed from the EPC contract dated 28.8.2008 entered into by the petitioner with SEPCO (Chinese EPC contractor) that the*

*"commencement date" is defined as the date on which NTP is issued to offshore supplier. NTP was issued on 27.5.2009 and the total land for the project was to be handed over to the EPC contractor not later than two months from the date of issue of NTP. It is also noticed that as per Article 2 of the said EPC contract, the petitioner (owner) is required to obtain all owner permits as may be required prior to the issue of NTP. It is further noticed that land acquisition has been delayed and the delivery of land to the petitioner materialized in a staggered manner starting from 24.9.2009 (Senapathi Berana) and culminated on 9.2.2010 when 515.31 acres of land (Kamalanga) was delivered to the petitioner. Accordingly, the petitioner has claimed the initial delay of 7 months in starting the construction activities due to delay in acquisition of land for the main plant on the ground that it is beyond its control. The petitioner has also submitted that the responsibility of land acquisition was that of Govt. of Odisha/IDCO under MOU dated 9.6.2006 and project land could not be acquired by the Govt. of Odisha/IDCO for handing over the same to the petitioner in time due to various reasons and delays on account of land acquisition litigation and resistance from locals. We are not convinced with the submission of the petitioner that the Govt of Odisha /IDCO alone was responsible for the delay in acquisition of land for the following reasons:*

*(i) In terms of the provisions of Land Acquisition Act, 1894, as amended from time to time, acquisition of land for public purposes, whether in respect of Government land, private land or forest land are all to be undertaken through Governmental authorities and therefore, the MOU provided for facilitating the acquisition of land through the Govt of Odisha/IDCO.*

*(ii) The provisions of the PPA do not provide that the responsibility towards land acquisition would be that of Govt of Odisha/IDCO.*

*26. Though the petitioner has submitted that the Project land could not be acquired by the Government of Odisha / IDCO and handed over to the petitioner in time for reasons such as delays due to land acquisition related litigations and resistance from locals, no documentary evidence has been furnished by the petitioner in support*

*the same. In the absence of any proper justification, it cannot be held that the delay due to land acquisition was attributable to the Govt of Odisha/IDCO. In our view, there has been slackness on the part of the petitioner in coordinating with the District Administration to ensure the timely completion of the process of acquisition of land for main plant. In this background, we hold that the said delay in the acquisition of land cannot be said to be beyond the control of the petitioner and the petitioner is responsible for the said delay.*

*27. It is further noticed from the submissions and the documents furnished by the petitioner that there has been delay on account of Forest clearance as the total forest land area of 78.03 acres (to be used for BTG, CHP, Cooling Towers etc.,) which was under the main plant area was granted by the Central Govt. on 7.1.2011, thereby resulting in the delay in completion of Coal Handling Plant and other critical portions of the power station. In addition to this, delays have also been noticed towards acquisition of land for Railway siding, Direct Approach Road on account of the Writ Petitions and Status quo orders passed by the Hon'ble High Court of Orissa. Only after the status quo orders were vacated during the years 2012 and 2013, the petitioner could obtain possession of this land for construction of MGR, Construction of DAR etc. It is observed that the stay order granted in March, 2012 was vacated by the Hon'ble High Court of Orissa only on 19.10.2012 and accordingly, the land was handed over to the petitioner on 31.10.2012. However, from the details submitted by the petitioner it is not clear as to why the petitioner could not acquire the said land prior to March, 2012 and why it had to wait till March 2012. In the absence of any proper clarification in the information submitted, the petitioner cannot be absolved of its responsibility for acquisition of land through timely action and proper coordination with the District Administration. As regards the delay in the Construction of DAR on account of the stay order of the Hon'ble Court, we are of the view that the petitioner could have explored some alternate route for DAR. In this background, we are inclined to hold that the delay in Construction of DAR was not beyond the control of the*

*petitioner. It is further noticed that there has been delay in the permission for use of land for raw water pipeline and the delay is of 488 days in the Boiler light up of Unit-I. However, no proper and cogent justification has been furnished by the petitioner for the delay in permission for Right of way. In the circumstances, we hold that the delay on this count is not beyond the control of the petitioner and the same is attributable to the petitioner. Accordingly, in terms of the principles laid down by the Tribunal in the judgment dated 27.4.2011 [(situation (i)], the initial delay of 7 months including the delays in the completion of MGR/Coal handling system, Construction of DAR and Construction of Raw water pipe line cannot be said to be beyond the control of petitioner and hence cannot be condoned. Therefore, the increase in cost on account of the said delay has to be borne by the petitioner. However, the Liquidated Damages (LD) and Insurance proceeds if any, received by the generating company, on account of the said delay, could be retained by the generating company."*

From the above it can be seen that the Central Commission has held that in view of Land Acquisition Act, 1894, the MOU only provides for facilitation of acquisition of land by GoO through IDCO and PPA does not provide it as responsibility of GoO. The Central Commission has further held that the Appellant has not placed any documentary evidence in support related to litigations and resistance from locals. In view of the Central Commission, there has been slackness on the part of the Appellant in coordinating with the District Administration to ensure the timely completion of the process of acquisition of land for main plant. In this background, the Central Commission has held that the said delay in the acquisition of land cannot be said to be beyond the control of the Appellant and the Appellant is responsible for the said delay.

Further, the Central Commission has held that the delays in the completion of MGR/Coal handling system, Construction of DAR and Construction of Raw water pipe line cannot be said to be beyond the control of the Appellant and hence cannot be condoned.

While dealing with the delay due to late Forest Clearance, the Central Commission mentioned that there has been delay on account of Forest Clearance as the total forest land area of 78.03 acres (to be used for BTG, CHP, Cooling Towers etc.) which was under the main plant area was granted by the GoI on 7.01.2011, thereby resulting in the delay in completion of Coal Handling Plant and other critical portions of the power station.

iii. In our view the first thing which needs to be dealt is that who was responsible for acquisition of land i.e. the Appellant or GoO through IDCO. In this regard let us first analyse the provisions of MOU dated 9.6.2006 (principal MOU which was amended on other terms and conditions in between and was extended for a period of further two years beyond initial validity of 3 years) with regard to land acquisition. The relevant extracts are reproduced below:

*"5. The areas of assistance and co-operation between the Government and GEL are listed below:*

*A. Land:*

*(i) GEL will require approximately 2200 acres of land for the purpose of setting up thermal power plant .....*

*(ii) .....*

*(iii) <u>The Government agrees to acquire, the required land as per Clause (i) above and hand over the required land free from all encumbrances to GEL through Orissa Industrial Infrastructure Development Corporation (IDCO) for the project and allied facilities.</u>*

*....."*

From the above it can be seen that GoO through IDCO agreed to acquire and handover the land to the Appellant free from all encumbrances. In our opinion this understating between the Appellant and GoO was in the form of commitment by GoO to acquire the land and handover it to the Appellant free from all encumbrances as the MOU also speaks of withdrawal of support/commitment of GoO in the event of non-implementation of the project. In this regard the relevant portion of the MOU is reproduced below:

*" I. General Clauses:*

*.....*

*.....*

*(viii) In the event of non-implementation of the project or part thereof, the corresponding support/ commitment of Government indicated in the MOU*

*with regard to the Project and coal blocks/ linked coal mines, incentives and concessions of the Government in particular shall be liable to be cancelled."*

iv. The above is also confirmed from the handover/ takeover statements placed on record with respect to Govt. /Private/Forest land signed between the IDCO and the Appellant which is in line with the provisions of the MOU.

v. As per the terms of the MOU, GRIDCO/the Respondent No. 2, the nominated agency was authorised by GoO to enter into PPA with the Appellant. The revised PPA dated 4.1.2011 entered into between the Appellant and the Respondent No. 2 have the following provisions related to the MOU.

*".....*

*WHEREAS a Memorandum of Understanding dated 26th September 2006 (which shall include all the supplemental deeds including that signed on 28th October' 2010) was entered into between GKEL and Govt. of Orissa and in line with the terms and conditions of said MOU the Power Purchase Agreement dated 28th September 2006 was entered into between GKEL and GRIDCO (hereinafter referred to as the principal PPA).*

*.....*

*.....*

*2.3 It is understood and agreed by and between the parties that GKEL shall meet all the obligations laid down in the principal MOU dated 26.9.2006 as well as subsequent MOUs signed between GKEL and Government of Orissa."*

As can be seen from above, PPA being bilateral agreement between the parties (i.e. the Appellant and GRIDCO), the commitments of the Appellant arising out of the MOU were incorporated in the PPA. This does not mean that the commitments made by GoO in the MOU are no longer valid merely not being mentioned in the PPA.

vi. From the perusal of provisions of Odisha Industrial Infrastructure Development Corporation Act, 1980 under Chapter-III (Functions and Powers of the Corporation) and chapter VI (Acquisition and disposal of land) quoted by the Appellant, it can be seen that IDCO is responsible for acquisition and disposal of land for industrial purposes in the State of Odisha. The relevant portion is reproduced below:

*"Functions*

*14. The functions of the Corporation shall be*

*(i) <u>generally to promote and assist in the rapid and orderly establishment, growth and development of industries, trade and commerce in State</u>; and*

*(ii) in particular, and without prejudice to the generality of Clause (i) to*

*(a) establish and manage industrial estates at places notified by the State Government;*

*(b) develop industrial areas notified by the State Government for the purpose and make them available for undertakings to establish themselves;*

*.....*

*.....*

*.....*

*General Powers of the Corporation*

*15. Subject to the provisions of this Act, the Corporation shall have power*

*(a) to acquire and hold such property, both movable and immovable, as the Corporation may deem necessary for the performance of any of its activities, and to lease, sell, exchange or otherwise transfer any property held by it on such conditions as may be deemed proper by the Corporation;*

*(b) to purchase by agreement or to take on lease or under any form of tenancy and land to erect such buildings and to execute such other works as may be necessary for the purpose of carrying out its duties and functions;*

*.....*

*(d) to modify or rescind such allotments, including the right and power to evict the allottees concerned on breach of any of the terms or conditions of the allotment;*

*.....*

*.....*

*(g) to enter into and perform all such contracts as it may consider necessary or expedient for carrying out any of its functions; and*

*(h) to do such other things and perform such acts as it may think necessary or expedient for the proper conduct of its functions and the carrying into effect the purposes of this Act.*

*.....*

*.....*

***Acquisition and disposal of land***

**Acquisition of land**

*31. (1) Whenever any land is required, by the Corporation for any purpose in furtherance of the objects of this Act, but the Corporation is unable to acquire it by agreement, the State Government may, upon an application of the Corporation in that behalf, order proceedings to be taken under the Land Acquisition Act, 1894 (1 of 1894) for acquiring the same on behalf of the Corporation as if such lands were needed for a public purpose within the meaning of that Act.*

*(2) The amount of compensation awarded and all other charges incurred in the acquisition of any such land shall be forthwith paid by the Corporation and thereupon, the land shall vest in the Corporation.*

*Transfer of Government lands to the Corporation*

*32. (1) For the furtherance of the objects of this Act the State Government may, upon such conditions as may*

*be agreed upon between the Government and the Corporation, place at the disposal of the Corporation any land vested in the State Government.*

*(2) After any such land had been developed by or under the control and supervision of the Corporation it shall be dealt with by the Corporation in accordance with the regulations made under this Act and the directions given by the State Government in that behalf.*

***Disposal of land by the Corporation***

*33. (1) Subject to any directions given by the State Government the Corporation may dispose of*

*(a) any land acquired by the State Government and transferred to it, without undertaking or carrying out any development thereon; or*

*(b) any such land after undertaking or carrying out such development as it thinks fit, to such person in such manner and subject to such terms and conditions, as it considers expedient for securing the purposes of this Act.*

*(2) The powers of the Corporation with respect to the disposal of land under Subsection (1) shall be so exercised as to secure, so far as practicable, that*

*(a) where the Corporation proposes to dispose of by sale any such land which is surplus to its requirement, the Corporation shall offer the land in the first instance to the persons from whom it was acquired, if they desire to purchase it, subject to such requirements as*

*to its development and use as the Corporation may think fit to impose;*

*(b) persons who are residing or carrying on business or other activities and any such land shall, if they desire to obtain accommodation on land belonging to the Corporation and are willing to comply with any requirements of the Corporation as to its development and use have an opportunity to obtain thereon accommodation suitable to their reasonable requirements on terms settled with due regard to the price Acquisition of land Transfer of Government lands to the Corporation Disposal of land by the Corporation at which any such land has been acquired from them.*

*(3) Nothing in this Act shall be construed as enabling the Corporation to dispose of land by way of gift, but subject as aforesaid; reference in this Act to the disposal of land shall be construed as reference to the disposal thereof in any manner whether by way of sale, mortgage, exchange, or lease or by the creation, of any easement, right or privilege or otherwise."*

vii. From the above discussions it can be concluded that the responsibility to acquire and handover the land to the Appellant free from all encumbrances is that of GoO/IDCO. Accordingly, the findings of the Central Commission that in view of Land Acquisition Act, 1894, the MOU only provides for facilitation of acquisition of land by GoO through IDCO and PPA also does not provide it as responsibility of GoO is misplaced and untenable.

viii. The Appellant has also quoted similar type of case and has referred to the judgment dated 15.5.2015 of this Tribunal in Appeal No. 108 of 2014 (Udupi Case) filed against the Central Commission's Order dated 20.2.2014 in petition no. 160/GT/2012. We have gone through this order of the Central Commission. The Central Commission in this order has allowed time overrun to the petitioner on account of delay in acquisition of land by State Govt. i.e. Govt. of Karnataka (GoK) through Karnataka Industrial Area Development Board (KIADB) holding it beyond the control of the petitioner and not attributable to it. This Tribunal has upheld the decision of the Central Commission by holding that land acquisition was the responsibility of GoK/ KIADB and land was to be handed over to Udupi Power by KIADB. This delay in delivery of land is a reason beyond the control of Udupi Power.

ix. In case of Udupi power, the respondents before the Central Commission have not denied the fact of delay in handing over the land to the petitioner. In the present case, the respondent, GRIDCO before the Central Commission has submitted that the problems related to the delay in land acquisition are general problems and the petitioner was well aware of such problems and a major portion of land measuring 823.32 acres out of total requirement of 1176. 24 acres was made available to the petitioner in February, 2010. Thus, in present case also the Respondent No. 2 i.e. GRIDCO has also not denied the fact of delay in handing

over the land to the Appellant. Despite similar facts in both the cases the Central Commission has taken different views. In the present case though the responsibility of handing over possession of land was that of GoO/IDCO, the Central Commission has held the Appellant is responsible for it quoting slackness on its part. On the finding of the Central Commission that the Appellant has not placed on record documentary evidence related to local agitation, we observe that and also submitted by the counsel of the Central Commission, the said problem was between May'2010 to 2013 which is after 10.2.2010 when 823.32 acres of land was handed over to the Appellant by IDCO. This also goes against IDCO for not providing the land in time despite timely payments made by the Appellant as and when demands were raised by it though main plant land was transferred in the name of GoO by May, 2009.

x. Date of Financial Closure i.e. 27.5.2009 has been taken as reference by the Central Commission for arriving at the Scheduled COD/ Actual COD of the Appellant's Station. The Appellant has claimed 7 months (i.e. from 27.7.2009, the date by which the Appellant was responsible for handing over possession of land to the EPC Contractor to 10.2.2010, the date when 823.32 acres of land was handed over to the Appellant by IDCO) time overrun due to initial delay in handing over of land to it by IDCO.

xi. In view of our discussions at 10 b) A. ii to x above we hold that the initial delay in possession of land to the Appellant was due to reason beyond the control of the Appellant and

the impugned findings of the Central Commission denying time overrun in initial delay of handing over possession of land to the Appellant by GoO/IDCO is set aside. The Central Commission is hereby directed to rework and grant consequential reliefs to the Appellant by considering time overrun from 27.7.2009 to 9.2.2010 i.e. initial delay in handing over possession of land to the Appellant for all the three units of the Station.

xii. Now let us deal with the delay related to grant of Forest Clearance by GoI. From the perusal of the Impugned Order we do not find any analysis by the Central Commission on this issue despite mentioning the same. We have already held that GoO/IDCO was responsible for handing over possession of land to the Appellant. The Appellant was handed over 78.03 acres of land which was under main plant area in December, 2012 due to delay in Forest Clearance by GoI. This delay is also beyond the control of the Appellant. However, we also observe that the Appellant has submitted that this delay was concurrent with the EPC contract related delays. This delay in handing over possession of forest land has not impacted the overall progress of the project as there was concurrent delay in EPC contract. The Appellant was not in a position to achieve early COD in case the forest land was available to it even before December, 2012. Hence we hold that this delay is not required to be condoned.

xiii. By holding the Appellant is responsible, the Central Commission has denied delays in the completion of

MGR/Coal handling system, Construction of DAR and Construction of Raw water pipe line etc due to delay in handing over possession of land to the Appellant. We have already held that GoO/IDCO was responsible for handing over possession of land to the Appellant and these delays in handing over possession of land to the Appellant by IDCO are beyond its control. We observe that the delays occurred in handing over this part of the land involving functional areas mentioned above in any case would not have impacted the COD after analysing the sequential erection/ construction activities involved in achieving the COD. We are of the opinion that in such a situation these delays have not impacted the overall progress of the project as they were not in the critical path. The Appellant was not in a position to achieve early COD in case the said portions of land were made available to the Appellant at an earlier date. Hence we hold that these delays are not required to be condoned.

xiv. The above discussion decides the issues raised in Question Nos. 6 a), 6 c), 6 d), 6 e), 6 f) and first half of Question No. 6 b) (i.e. related to delay in land acquisition) in favour of the Appellant to the extent as discussed at 10 b) A. ii to xiii above.

B. **Time overrun due to change in visa policy by GoI:**

i. The Appellant has contended that the Central Commission has applied the judgment dated 15.05.2015 of this Tribunal in Appeal No. 108 of 2014 - Power Company of Karnataka

Ltd. Vs. Central Electricity Regulatory Commission & Ors. ("Udupi Case") without considering the principles laid down by this Tribunal in the said case and the difference in facts (impact at Udupi was in pre-commissioning stage whereas in present case it was during erection phase). The Impugned Order is per incurium the judgment of this Tribunal in the Udupi Case. The Central Commission has held that the Appellant/ EPC Contractor could have availed skilled manpower available in India. However, similar contention was rejected by this Tribunal in the Udupi Case. The change in visa policy is not only a force majeure event but is also in nature of change in law which is beyond the control of the Appellant.

ii. Now let us examine the impugned findings of the Central Commission on this issue. The relevant portion of the Impugned Order of the Central Commission is reproduced below:

> *"Analysis & Decision*
>
> *30. We have examined the matter. As regards the Change in Visa policy by the Government of India for Chinese nationals, it is observed that the Ministry of Commerce and Industry, GOI, by its letter dated 20.8.2009 had issued clarification on the requirement of Visa for foreign nationals engaged in execution of projects/ contractual work in India. Subsequently, by letter dated 25.9.2009 further clarification was issued by the Ministry of Home Affairs, GOI, on this issue.*

*Some of the clarifications/conditions specified by the GOI in its letters above are extracted as under:*

*• Foreign nationals coming to India for executing projects/contracts in India will henceforth have to come only on employment visas.*

*• All foreign nationals currently in India on business visas (BV) and engaged in project or contract work should return to their home countries on expiry of their visas or by 31st October 2009 whichever is earlier. No visa extension will be granted in such cases.*

*• Foreign nationals have to obtain Employment Visas (EV) only from their country of citizenship in order to come to India to work on projects/ contracts.*

*• Employment visa to be issued in strict conformity with the Employment Visa Manual adhering to the listed guidelines:*

*• Employment visa to be granted to skilled or qualified professional; or to a person engaged or appointed by a company /organisation on contractor on employment basis at a senior level or skilled position such as technical expert /senior executive or in a managerial position etc. Employment visa not to be issued for routine, ordinary or secretarial/clerical jobs.*

*• Indian company engaging foreign nationals for executing projects /contracts in India shall be responsible for their conduct as well as departure from India.*

*• Ministry of External Affairs (MEA) will advise the Indian missions located in neighbouring countries not*

*to grant BV's to the foreign nationals who come to India for execution of projects/contracts.*

*Issuance of Employment visa to Chinese nationals*

*• Applications for EV to the Indian Mission in China by the Indian / Chinese company has to be submitted incorporating the following additional information:*

*• Educational qualifications and the current job, and*

*• Nature of job proposed to be performed in India*

*• Indian /Chinese company is also required to forward the copy of the visa application to Ministry of Home Affairs (MHA) (Foreigners Division)*

*• Indian Mission is also required to send the information so received to MHA (FD).Visa has to be processed by MHA within a period of 60 days.*

*• MHA on receiving the information / application forwards the same to the following two parties:*

*Intelligence Bureau (IB) and IB to give clearance within 15 days Ministry of Labour (MOL): MOL to give clearance within 45 days*

*• MEA as a point of caution will also collate details of Chinese nationals on projects in India since 1st January 2008 on BV from the Indian Missions in China. This shall be provided to IB.*

*31. <u>The guidelines for granting employment visas by Ministry of Labour & Employment, GOI, stipulates that employment visa for foreign personnel coming to India for execution of contracts may be granted by Indian missions to highly skilled and professionals to the</u>*

*extent of 1% of total persons on the project or maximum of 40 persons for each power project.*

*.....*

*.....*

*.....*

*34. We have examined the submission of the petitioner that the absence of sufficient number of experts from OEM, who are Chinese nationals, during the peak project construction activities has had a direct impact on the progress of the project (as the erection and commissioning of BTG was supplied by SEPCO) leading to the delay in the completion of the project. Similar issue was raised by Udupi Power Corporation Ltd (UPCL) in the tariff Petition No.160/GT/2012 filed before the Commission and the Commission after examining the relevant Circular/Memo of the GOI relating to the change in Visa Policy, had condoned the delay of 6 months by order dated 20.2.2014 and had accordingly granted relief to the petitioner. On Appeal, the Tribunal by judgment dated 15.5.2015 modified the said order and had allowed condonation of delay of only three months, on the ground that the requisite personnel was made available to the UPCL project by February, 2010. The relevant portion of the order is extracted as under:*

> *"76..... Further, employment visa was to be granted to skilled or qualified*

*professionals such as technical experts/technicians and not for routine, ordinary or secretarial/clerical jobs. The Ministry of Home Affairs also gave timeline for clearance by Intelligence Bureau within 15 days and Ministry of Labour within 45 days. All other directions were general directions. Ministry of Labour & Employment guidelines for granting employment visa stipulate granting of visa to the extent of 1% of total persons on the project or maximum 40 persons for each power project. Udupi Power has stated that in November, 2009, only 4 experts were issued visas and gradually number was increased to 12 in December 2009, 30 in January, 2009 and 45 in February 2010 and required number of 65 experts were present during May, 2010 to recommence the work. We, therefore, feel that delay of 3 months due to difficulties in the months from November, 2009 to January, 2010 only be allowed as by February 2010, 45 persons, which is as per the guidelines of the Ministry of Labour were available at the project."*

*35. As stated in the table under para 31 above, against the original scheduled deployment of manpower, the petitioner had negotiated with the EPC contractor for reduction in the foreign nationals proposed to be deployed and accordingly the minimum manpower*

*required to be deployed had been worked out. However, pursuant to the change in the Visa Policy, the actual deployment of manpower was far less than the original /revised manpower scheduled to be deployed in the Project. We are however not convinced with the submissions of the petitioner that the delay is on account of the reduction in the actual deployment of manpower due to change in Visa Policy. In our view, the finding of the Tribunal in the case of UPCL on this issue is relevant to the present case. As in the case of UPCL, the main plant supplier in the project of the petitioner is a Chinese EPC contractor. As regards the deployment of man power in terms of the guidelines of the Ministry of Labour, it is noticed that as against the original manpower requirement of 65 nos in 2009, the manpower had gradually increased to 45 nos in February, 2010 in the case of UPCL. In the present case, the actual manpower deployment had increased from 14 nos in 2009 to 61 nos in 2010. Thus, the required number of experts were available to the petitioner during 2010 in terms of the guidelines of the GOI. Moreover, the petitioner/ EPC contractor had the option of availing the services of skilled manpower available in India due to the reduction in the manpower in order to complete the said work as the fact that the restrictions in the number of Chinese Experts as per the new Visa Policy was known to the petitioner even before the start of the project work in February, 2010. Under these circumstances, due to Govt. of India Visa*

*Policy changes, the petitioner ought to have taken pre-emptive measures in consultation with the EPC contractor to source the remaining skilled experts from India in order to minimise the effect on the scheduled project completion period. In the above background, we do not find it justifiable to allow the total period of delay of 10 months for Unit-I, 11 months for Unit-II and 13 months for Unit-III, due to Chinese Visa Policy. However, considering the fact that the Change in Visa Policy had caused some initial hiccups in the reorganisation/remobilisation/rescheduling of man power resources after acquiring the land for the project in February, 2010, the total delay of 3 months only is condoned and allowed considering the difficulties faced by the petitioner for the period from 11.2.2010 to 10.5.2010, as against the claim of petitioner for 10 months in Unit-I, 11 months in Unit-II and 13 months in case of Unit-III. In our view, the delay for the said period of three months for the reasons stated is not attributable to the petitioner and is beyond the control of the petitioner. Accordingly, in terms of the principles laid down by the Tribunal in the judgment dated 27.4.2011 [(situation (ii)], the total delay of 3 months is condoned and the generating company is given the benefit of the additional cost incurred due to time overrun. However, the LD recovered from the contractor and the insurance proceeds, if any, would be considered for reduction of capital cost."*

The Central Commission based on the findings of this Tribunal in Udupi Judgement and considering the fact that the Change in Visa Policy had caused some initial hiccups in the reorganisation/remobilisation/rescheduling of man power resources after acquiring the land for the project in February, 2010, allowed the time overrun of 3 months for each unit as against the claim of petitioner for 10 months in Unit-I, 11 months in Unit-II and 13 months in case of Unit-III.

iii. On the contention of the Appellant regarding use of skilled manpower from India, the Central Commission has held that "*Moreover, the petitioner/ EPC contractor had the option of availing the services of skilled manpower available in India due to the reduction in the manpower in order to complete the said work as the fact that the restrictions in the number of Chinese Experts as per the new Visa Policy was known to the petitioner even before the start of the project work in February, 2010. Under these circumstances, due to Govt. of India Visa Policy changes, the petitioner ought to have taken pre-emptive measures in consultation with the EPC contractor to source the remaining skilled experts from India in order to minimise the effect on the scheduled project completion period."*

In this regard this Tribunal in Udupi case has held that *"We do not agree with PCKL that erection and commissioning activities could have been carried out without the Chinese experts. BTG was supplied by DEC, China. The erection and commissioning could not have been done on the absence of Chinese engineers/ experts as erection and*

*commissioning in the absence of supervision of Chinese experts would have an impact on warranties of the project."*

From the above it can be seen that the findings of the Central Commission are related to meet the requirement of shortfall vis-à-vis restrictions imposed by GoI and whereas the findings of this Tribunal in Udupi Case were in context of carrying out of commissioning activities without Chinese experts. Further, the Appellant also contested that the shortfall of Chinese experts was during construction phase as compared to commissioning phase in Udupi Case and hence time overrun of longer period needs to be granted. On this issue, we refer to the findings of this Tribunal in Udupi Case wherein 3 months' time overrun was granted based on fulfilment of availability of Chinese experts at the project as per the guidelines of GoI.

iv. We have gone through the impugned findings and submissions made by the parties and this Tribunal's judgement in Udupi Case quoted by the Central Commission. It is a fact that the presence of personnel of EPC Contractor is must for smooth execution of EPC Contract. In this case SEPCO being Chinese EPC Contractor, the requisite Chinese Experts were required at site to carry out erection and commissioning activities. We also observe that the actual deployment of Chinese Experts is much lower than the re-worked deployment of Chinese Experts as per EPC Contract. After careful examination, we find that the impugned findings of the Central Commission are well reasoned and in line with this Tribunal's findings in

Udupi Judgement. This Tribunal while deciding the issue in Udupi Judgement has considered deployment of Chinese experts based on circulars/clarifications issued by GoI. We find that the Central Commission after examining the issue in detail has prudently allowed time overrun of 3 months for each unit of the Appellant's Station. The findings of the Central Commission on this issue are upheld.

v. Accordingly, the issues raised in Question Nos. 6 g) and second half portion of Question No. 6 b) i.e. related to non-availability of skilled foreign personnel in implementation of the EPC Contract are decided against the Appellant.

c) Now on Question nos. 6 h) i.e. Whether the Central Commission has erred in computing Auxiliary Power Consumption by allowing only 6.5% as opposed to 9.74% as claimed by the Appellant?, we observe as below:

i. In this regard the Regulation 26 (iv) of the Tariff Regulations, 2009 is re-produced as below:

*"(iv) Auxiliary Energy Consumption*

*(a) Coal-based generating stations except at (b) below:*

| | | *With Natural Draft cooling tower or without cooling tower* |
|---|---|---|
| *(i)* | *200 MW series* | *8.5%* |
| *(ii)* | *300/330/350/500* | |

| | | |
|---|---|---|
| | *MW and above* | |
| | *Steam driven boiler feed pumps* | *6.0%* |
| | *Electrically driven boiler feed pumps* | *8.5%* |

*Provided further that for thermal generating stations with induced draft cooling towers, the norms shall be further increased by 0.5%"*

As per this regulation the normative APC of the Appellant's Station with induced draft cooling towers & steam driven boiler feed pumps works out to 6.5% .

ii. Now let us examine the impugned findings of the Central Commission on the issue of demand of higher APC by the Appellant. The relevant extracts are reproduced below:

*"112. It is evident from the submissions of the petitioner that the APC of 7.94% is mainly due to installation of some additional systems like High Concentrate Slurry disposal system, Additional water pumping system, Ash water reclamation system, Coal water treatment plant and Reverse Osmosis system. However, the petitioner has claimed the APC of 7.55% which include High Concentrate slurry Disposal (HCSD) system, additional water pumping system, Ash*

*water reclamation system, Coal waste water treatment Plant and Reverse Osmosis system as part of the auxiliary consumption. In our view the installation of these systems namely, Ash water reclamation, coal water treatment etc. are for meeting the zero discharge of effluents to optimize the water usage as per the environmental norms. The systems for zero discharge of effluents have been installed in most of the existing plants based upon which the APC norm of 6.5 %has been specified by the Commission under the 2009 Tariff Regulations. In case of Indira Gandhi Super Thermal Project of Aravalli Power Company Pvt. Ltd, the generating company (APPCL) had not sought for any relaxation in the APC, even though high density Ash slurry system was installed. In case of smaller size units like Feroze Gandhi Unchahar TPS (2x210 MW) of NTPC, the actual APC during the period 2009-14 was 8.13% with motor driven Boiler Feed Pump and in case the consumption of motor driven BFP is considered as 2.5%, then the APC works out to 5.6%. Also, in the case of Simhadri STPS Stage- I (2x500 MW) of NTPC, the actual APC during the period 2008-13 was 5.58 % with steam driven BFP (which is less than norm of 6%). Considering these factors in totality, we are not inclined to exercise the Power to relax and allow the prayer of the petitioner for relaxation in the APC norm to 7.55% as claimed by the petitioner. Accordingly, the prayer of the petitioner is not allowed and the APC of 6.5% has*

*been allowed in accordance with the 2009 Tariff Regulations for the purpose of tariff."*

From the above it can be seen that the Central Commission while deciding the APC norm of 6.5% for the Station of the Appellant, has reasoned out clearly by comparing with actual APC of other stations and also considering the Appellant's contention of additional systems at its Station. With this background the Central Commission denied to exercise power to relax on the prayer of the Appellant for higher APC.

iii. The Appellant has contended that since it has been granted time overrun by the Central Commission due to grid restrictions imposed by GRIDCO/OPTCL, it is entitled for higher APC of 9.74% during 2013-14. The Central Commission has not deliberated on this contention of the Appellant for the period 2013-14. The Central Commission has submitted that the Appellant has not submitted the calculations in support of its claim of 9.74% in its affidavit dated 23.1.2015. Further, the Central Commission contended that in view of rejection of claim of higher APC in totality the question of allowing 9.74% during 2013-14 does not arise. It is observed that COD of Unit-I/II/III of the Appellant's Station are 30.4.2013/12.11.2013/25.3.2014 respectively. It means that only one Unit-I (350 MW) can be in operation till 11.11.2013, two units (700 MW) can operate from 12.11.2013 to 24.3.2014 and three units (1050 MW) can operate from 25.3.2014 to 31.3.2014. The Appellant has submitted that due to grid restrictions by OPTCL, it was

allowed to generate 350 MW only. In our opinion, it means that the Appellant was not able to operate more than one unit at a time and the unit that can be operated can run on full load (350 MW) unless there is some problem in the unit (s) which is on the account of the Appellant. Thus, running a unit on full load does not require higher APC as claimed by the Appellant. In view of the same this claim of the Appellant is misplaced.

iv. Regarding Appellant's claim of higher APC, the counsel for the Central Commission has submitted that the Appellant has not challenged the findings of the Central Commission and it has followed the statutory regulations in this regard. Under the 'power to relax' regulation the Appellant cannot rightfully claim for relaxation of the APC norm. It is up to the discretion of Central Commission after examining the details submitted by the Appellant to exercise the said regulation.

v. We have gone through the submissions made by the parties, provisions of Tariff Regulations, 2009 and perusal of the impugned findings of the Central Commission. We find that the Central Commission while arriving at the conclusion has deliberated the issue in detail and the impugned findings of the Central Commission regarding the comparison with the similarly placed generating companies' compliance to the environmental norms and other features have not been contested by the Appellant. The Appellant has relied on the orders of the other State Commission which are not binding on the Central Commission. In view of the same, we are of

the considered opinion that there is no infirmity in findings of the Central Commission for allowing APC of 6.5% as per its Tariff Regulations, 2009.

vi. Hence, this issue is decided against the Appellant.

d) On Question No. 6 i) i.e. Whether the Central Commission has erred in not granting the consequential increase in capital cost, IDC and financing cost?, we are remanding the Impugned Order to the Central Commission based on our decision taken above for allowance of time overrun due to initial delay in handing over possession of land to the Appellant by GoO/IDCO. The Appellant is entitled for consequential reliefs from the Central Commission on this count.

e) On Question No. 6 j) i.e. Whether the Central Commission has erred in not considering the Benchmark norms approved by it while determining to capital cost in accordance with Regulation 7(2) of 2009 Tariff Regulations?, we observe as below:

i. Let us have a look at the provisions of the Tariff Regulations, 2009. The first proviso to clause (2) of Regulation 7 of the Tariff Regulations, 2009 provides as under:

> *"Provided that in case of the thermal generating station and the transmission system, prudence check of capital cost may be carried out based on the benchmark norms to be specified by the Commission from time to time:"*

The Tariff Regulations, 2009 provide that the Central Commission may carry out prudence check of capital cost based on benchmark norms.

ii. The Central Commission vide order dated 4.6.2012 issued Benchmark Capital Cost (Hard cost) for Thermal Power Stations with Coal as Fuel. The relevant portion of the order are reproduced below:

> *"2. The Central Government in exercise of its power under section 3 of the Act, has notified the Tariff Policy vide Resolution No.23/2/2005-R&R (Vol.III) dated 6.1.2006. Para 5.3 of the Tariff Policy provides for the following among others:*
>
> *"while allowing the total capital cost of the project, the Appropriate Commission would ensure that these are reasonable and to achieve this objective, requisite benchmarks on capital costs should be evolved by the Regulatory Commissions."*
>
> *3. Keeping in view the above mandate of the Tariff Policy, first proviso to clause (2) of Regulation 7 of the 2009 Tariff Regulations ……..*
>
> *……..*
>
> *……..*
>
> *6. Resultant cost can at best be applied only as a prudence check rather than be used to determine the tariff. Model should not replace the price discovery model based on ICB tendering process.*

***Clarification and decision***

*.....*

*.....*

*.....*

*6.3 Ultimate comparable cost for prudence check will be the overall cost and not package wise cost. Optional packages will be accounted separately."*

From the above it is clear that the benchmark norms are to be used for prudence check of capital cost (hard cost) and not for determination of tariff. The prudence check will be based on overall hard cost with the provision of accounting of optional packages separately.

iii. Now let us examine the findings of the Central Commission while deciding the capital cost of the Appellant's Station. The relevant portion of the Impugned Order is reproduced below:

*"57. The Hard cost of the Project of the petitioner as on COD of the generating station is Rs. 4885.73crore. Accordingly, the hard cost per MW works out to Rs. 4.65 crore/MW (4885.73/1050). The hard cost of Rs. 4.65 crore/ MW includes cost of MGR as well as wagon Tripler and transmission line cost upto tie line. This hard cost however includes increase in EPC cost due to FERV of Rs. 448.66 crore up to 25.3.2014. Excluding this increase, the hard cost works out as Rs. 4437.07 crore which works out as Rs. 4.22 crore/MW. No bench mark capital cost for 350 MW size units*

*based on coal/ lignite fired has been specified by the Commission. However, the bench mark capital cost (Hard cost) for 500 MW unit size for a Green Field Project is Rs. 5.08 for the first unit, Rs. 4.71 crore/MW for the second unit and Rs. 4.48 crore /MW for the third unit. The hard cost of the project is comparable to the benchmark hard cost of 500 MW considering the fact that the benchmark hard cost does not include cost of MGR system and transmission line upto tie point etc. The hard cost of UPCL project allowed by the Commission in order dated 10.7.2015 in Petition No 160/GT/ 2012 is Rs. 4289.986 crore including FERV of Rs. 54.056 crore which works out to 3.57 crore/MW. The BTG Package in both the cases were supplied by Chinese Companies. The EPC package in case of UPCL was finalised in December, 2006, whereas the EPC Package of this project of the petitioner was finalised in August, 2008.The difference in hard cost of the project of the petitioner and the UPCL project could be attributed to the difference in exchange rates during 2006 and 2008 and due to high pre-operative expenses in case of the project of the petitioner. Since the EPC package was decided for the project through a process of ICB and the cost of project is comparable to 500 MW projects despite unit size being lower and without any advantage of economy of scale, the hard cost of Rs. 4437.07 crore excluding FERV increase is considered reasonable."*

From the above it can be seen that the Central Commission has mentioned that there is no benchmark norm for 350 MW units and has carried out prudence check while comparing with benchmark capital cost of 500 MW units and Udupi project. The Central Commission found the hard capital cost of the Appellant's Station is reasonable.

iv. The Central Commission submitted that the Benchmark capital cost norms are to be used for 'reference' or comparison' of the capital cost of a power project while exercising prudence check under clause (2) of Regulation 7 of the 2009 Tariff Regulations. The Capital Cost cannot be linearly derived in absence of norms for any specific size units. The Central Commission further submitted that comparison of capital cost with Benchmark capital cost norms and if found comparable do not create any vested right in favour of the Appellant to claim the total capital cost as incurred by the Appellant for the tariff purpose. In view of provisions of Tariff Regulations, 2009, Order on Benchmark Capital Cost and impugned findings, we are in agreement with the views of the Central Commission. Hence, the contention of the Appellant that the Central Commission has erred in not considering the Benchmark norms approved by it while determining to capital cost is misplaced.

v. Hence, this issue is also decided against the Appellant.

## ORDER

We are of the considered opinion that the issues raised in the present Appeal are devoid of merit except on one issue related to time overrun due to initial delay in handing over possession of land to the Appellant by GoO/IDCO which needs fresh consideration by the Central Commission in line with our decision taken above and accordingly the Appeal and I.A. are hereby partially allowed.

The Impugned Order dated 12.11.2015 passed by the Central Commission is confirmed except to the extent above. Matter is hereby remanded to the Central Commission only to the extent to grant consequential reliefs to the Appellant on account of our decision of allowing initial delay in handing over possession of land to the Appellant as ordered above.

No order as to costs.

Pronounced in the Open Court on this **1st day of August, 2017.**

**(I.J. Kapoor)**
**Technical Member**

**(Mrs. Justice Ranjana P. Desai)**
**Chairperson**

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**REPORTABLE/NON-REPORTABLE**

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