IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 212 OF 2016
&
IA NOs. 459 & 525 of 2016

Dated: 7th November, 2017

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

In the matter of:-

MARUTI CLEAN COAL AND POWER LIMITED,
Registered office:
Ward No. 42, Building No. 14, Civil Lines
Near Income Tax Colony, Raipur, Chhattisgarh – 492001
Corporate office: 7th Floor,
Ambience Mall, office Tower,
Ambience Mall, NH – 8, Gurgaon – 122002 **... Appellant (s)**

AND

1. **POWER GRID CORPORATION OF INDIA LIMITED**
b-9, Qutab Institutional Area,
Katwaria Sarai,
New Delhi - 110016

2. **CENTRAL ELECTRICITY REGULATORY COMMISSION**
3rd and 4th Floor,
Chanderlok Building,
36, Janpath,
New Delhi - 110001 **...Respondent (s)**

Counsel for the Appellant(s)	:	Mr. Abhinav Vasisht, Sr. Adv. Mr. Sumit Goell Mr. Tanuj Agarwal Ms. Priya Chauhan Ms. Sonal Gupta
Counsel for the Respondent(s)	:	Mr. Sitesh Mukherjee Mr. Gautam Chawla Mr. Deep Rao Ms. Pragya Vatts for **R.1** Mr. Alok Shankar Mr. Sourav Jena for **R.2**

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON:

1. The Appellant is a company registered under the Companies Act, 1956. The Appellant is a long term access customer which is an independent power producer who had applied for and was granted long term access by Respondent No.1 from its generating station near Bilaspur in Chhattisgarh. The Appellant is also a designated inter-state transmission system customer in terms of Section 2(1)(1) of the CERC (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 ("**Sharing Regulations**"). Respondent No.1 is Power Grid Corporation of India Limited("**PGCIL**") which is a Government of India Enterprise

undertaking transmission related works and notified as a Central Transmission Utility under Section 38 of the Electricity Act, 2003("**the said Act**"). As per Regulation 4 and Regulation 2(1)(q) of the CERC (Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter State Transmission and related matters) Regulations, 2009 ("**Connectivity Regulations**"), PGCIL is also nodal agency for grant of long term access to inter-state transmission system. Respondent No.2 is Central Electricity Regulatory Commission ("**the CERC**") whose order dated 09/08/2016 passed in Petition No.79/MP/2016 is challenged in this appeal.

2. Gist of the facts as stated in the petition is as under:

(a) The Appellant had made an application to PGCIL seeking Long Term Open Access("**LTOA**") for transfer of 300 MW to be generated from its generating plant coming up in the State of Chhattisgarh. By letter dated 29/07/2009 PGCIL permitted LTOA to the Appellant for 300 MW with requirement of additional system strengthening. Open access

was permitted for 25 years from the date of commencement of open access. The point of injection of power was mentioned as WR Pooling Station (Bilaspur) for Chhattisgarh IPPs.

(b) By a separate letter dated 29/07/2009 PGCIL enclosed the intimation letter for providing LTOA and requested the Appellant to initial the Bulk Power Transmission Agreement ("**BPTA**"), a draft of which was attached to the letter and it was also requested that an undertaking to sign requisite BPTA upon its approval by the CERC be provided.

(c) On 24/02/2010 the BPTA was entered into between PGCIL and the Appellant and other generating companies as envisaged under Connectivity Regulations whereby PGCIL agreed to provide such open access required by long term transmission customers from the date and in the manner mentioned in annexures to the agreement for a period of 25

years. Under the BPTA, Long Term Access ("**LTA**") was granted to the Appellant for 171 MW (i.e. 126(WR) and 45(NR)). Ninety Six MW to be generated from the Appellant's generating plant was purchased by Chhattisgarh Power Trading Company Limited who was granted open access for the same under the BPTA. Based on the discussions in the joint meeting held and as per the BPTA signed along with B.G. submission on 24/02/2010 the LTOA details indicated vide letter dated 01/10/2009 were revised. All other terms and conditions as indicated in the earlier intimation letter dated 29/07/2009 remained the same.

(d) On 23/09/2010 Sharing Regulations were issued by the CERC which were published in the Gazette of India dated 24/09/2010. Billing, Collection and Disbursement ("**BCD**") Procedure was framed under Sharing Regulations. On 06/08/2012 Transmission Service Agreement ("**TSA**") was entered into

between the Appellant and PGCIL pursuant to Sharing Regulations.

(e) On 17/07/2015 PGCIL sent a letter to the Appellant requesting the Appellant to open a Letter of Credit of Rs.7.7 crores in favour of PGCIL towards the payment security mechanism as per the CERC Regulations. It was stated in the letter that transmission system required for LTA is scheduled for commissioning in August/September, 2015.

(f) On 31/07/2015 the Appellant commissioned its generating plant and started evacuating power using short term open access provided by the Western Region Load Dispatch Centre (WRLDC). As per the status given by PGCIL the identified transmission system was commissioned in August 2015 in relation to LTA granted to the Appellant. However, the date of commercial operation of the said transmission system has not been made known to the Appellant. On 28/10/2015 a

major accident/mishap took place at the generating plant of the Appellant whereby the bottom ash hoper of the boiler collapsed. According the Appellant this mishap was beyond its control. On 17/11/2015 PGCIL filed an application being Petition No.229/RC/2015 for cancellation of LTOA of the Appellant. Counsel for the Appellant pointed out to the CERC that Appellant had already opened a Letter of Credit and therefore notice issued against the Appellant needs to be withdrawn. In view of this statement the counsel for the PGCIL did not press the petition. On 28/12/2015 the Appellant sent a *Force Majeure* notice to the Executive Director (Commercial) and COO of PGCIL with a copy to GM(Commercial) wherein it was brought to the notice of the PGCIL that a major accident/mishap had taken place at the generating plant of the Appellant on 28/10/2015 whereby bottom ash hoper of the

boiler had collapsed making the plant un-operational and that accident was beyond the control of the Appellant. PGCIL was informed that restoration work is going on and the plant shall not be operational before March, 2016 and therefore till then the Appellant would not be able to evacuate power. PGCIL sent a reply dated 18/01/2016 to the *Force Majeure* notice issued by the Appellant stating that the terms of the TSA override any other agreement/arrangements pertaining to the development stage and therefore the provisions of the TSA shall be applicable in place of the provisions of BPTA dated 24/02/2010. It was further stated that therefore the communication dated 28/12/2015 cannot be treated as valid *Force Majeure* notice. On 01/12/2016 PGCIL sent an e-mail to WRLDC and NRLDC requesting them to operationalise LTA as the Letter of Credit is in place. Pursuant thereto, on 02/02/2016 WRLDC

sent an e-mail to the Appellant seeking clarifications with regard to expected date of revival of the units and the commencement of scheduling and also stated that without identifying beneficiaries WRLDC will not be in a position to commence schedules under LTA. By letter dated 03/02/2016 the Appellant informed PGCIL that plant was not likely to be operational as per latest estimates before June, 2016. PGCIL was requested not to operationalise LTA as the same cannot be utilised. It was requested that LTA may be utilised for other medium term/short term DICs.

(g) On 18/03/2016 PGCIL sent a POC bill-1 for the month of February, 2016 to the Appellant for an amount of Rs.4,00,57,859/- as per Sharing Regulations. On 05/04/2016 PGCIL sent another POC bill of March, 2016 for an amount of Rs.4,28,57,735/-. The Appellant by letter dated 20/04/2016 requested PGCIL to

withdraw the bills and not to raise further bills till the event of *Force Majeure* continues as the plant is un-operational. No reply was received by the Appellant from PGCIL. Thereafter PGCIL again issued bill for April, 2016. In the circumstances, the Appellant filed Petition No. 79/ MP/2016 before the CERC under Section 79(1)(f)(k) of the said Act to declare that that the mishap/accident which took place in the Appellant's plant as *Force Majeure* event and that the Appellant shall not be liable to pay POC charges. It was prayed that PGCIL may be requested to withdraw the POC bills.

(h) By the impugned order the CERC disposed of the petition holding that no case of *Force Majeure* was made out and that the Appellant's case is not covered by Clause 14 of the TSA. PGCIL is given liberty to raise POC bills and recover the POC charges from the Appellant in accordance with the Sharing Regulations.

3. We have heard Mr. Vasisht learned Senior Advocate appearing for the Appellant. We have perused the written submissions filed by him. Gist of the submissions is as under:

a) The Central Commission erred in coming to the conclusion that in view of Clause 2.1.2 of the TSA the Appellant's case is governed by the TSA. Recital D of the TSA clearly provides that the terms and conditions of the TSA would come into force after the transmission is actually brought into operation. LTA granted to the Appellant was operationalised only on 4/02/2016. Thus on 28/10/2015 it was the BPTA which was in force.

b) In any case, it is clear from Clause 2.1.2 of the TSA that even after the TSA comes into force, the BPTA is not completely superseded and in the event of conflict between the two, the TSA shall supersede but only in so far as sharing of transmission charges is concerned. Thus the BPTA was applicable and its terms could not have been ignored by the CERC.

c) Even the Sharing Regulations contain no provision which says that on coming into force of the TSA, the BPTA will stand overridden. Regulation 13 thereof makes that position clear.

d) Since the BPTA was applicable on the date of accident, one has to turn to Clause 9 thereof. Clause 9 of the BPTA mentions 'major accident' as one of the Force Majeure events. No notice period as a precondition to claim relief of Force Majeure event is prescribed in the BPTA.

e) The TSA does not get triggered on the commissioning of the transmission system. Recital D of the TSA states that it is only when the transmission system is actually brought into operation that the terms and conditions of the TSA would come into force.

f) The Sharing Regulations also make it clear that operationalisation of the transmission system is different from mere commissioning and it is on operationalisation of the transmission system

that the generator becomes liable to pay transmission charges. Regulation 8(5) is relevant for this purpose.

g) PGCIL started charging transmission charges from the Appellant from February 2016 after the transmission system was operationalised on 04/02/2016. The LC in favour of PGCIL was in place since 12/10/2015. If the TSA had come into force on commissioning of transmission system, then PGCIL would have charged the Appellant from October 2015. Thus from the conduct of PGCIL it is clear that the TSA had come into force only after the operationalisation of transmission system on 04/02/2016.

h) PGCIL should not rely on technical pleas to defeat the Appellant's claim.

i) No prejudice has been caused to PGCIL because of delay in issuing notice of Force Majeure event. LTA was not operationalised when the notice was sent.

j) Despite knowing that the Appellant was not in a position to evacuate power, PGCIL operationalised the LTA on 04/02/2016.

k) No reasons have been given by the CERC for holding that the accident was not beyond the control of the Appellant.

l) Prudent Utility Practices, as per the definition contained in the TSA pertain to transmission licensee only. However, the CERC has held that accident could have been avoided by following Prudent Utility Practices.

m) From the Internal Enquiry and Cause Analysis Report dated 10/11/2015 ("**the Internal Report**") it is clear that such accident had never happened earlier. It is clear that the Appellant had taken the required reasonable care.

n) When all parameters were normal, the Appellant cannot be expected to shut down the plant.

o) The Appellant had attended to all the problems faced by the plant. Hence, the judgment of the

Supreme Court in ***China Cotton Exporters v. Beharilal Ramcharan Cotton Mills Ltd.***[1] does not help PGCIL.

p) PGCIL had not disputed the contents of the Internal Report. The trippings mentioned in the Internal Report have to be seen in the light of the fact that the plant was in the initial period of operation.

q) Reports filed in this Tribunal show that the accident was beyond the control of the Appellant.

r) There is record to show that there was no negligence on the part of the Appellant.

s) As per Section 18 of the Indian Boilers Act, 1923, the Appellant had sent written intimation to the Chief Inspector of Boiler on 29/10/2015. The Inspector had visited the site and issued permission to repair the plant and had issued certificate dated 10/05/2016 in respect of completion of repair.

[1] (1961) 3 SCR 845

t) In view of the above the impugned order be set aside and consequential orders be passed in respect of encashed bank guarantee.

4. We have heard Mr. Mukherjee, learned counsel appearing for PGCIL. We have perused the written submissions filed by him. Gist of the submissions is as under:

(a) The Appellant's liability to pay transmission charges arises upon the commissioning of relevant transmission system required to evacuate power from the Appellant's generating station which in terms of the BPTA dated 24/02/2010 and thereafter the TSA dated 06/08/2012 was commissioned in August, 2015.

(b) The only way the Appellant could have been excused from paying transmission charges was if it had succeeded in establishing its Force Majeure claim.

(c) The Appellant has not adduced any evidence to establish that the accident which occurred on 28/10/2015 was a Force Majeure event.

(d) The Appellant failed to comply with the mandatory notice requirements prescribed under the BPTA and/or the TSA.

(e) The Appellant relied on its own Internal Report. It clearly indicates that the Appellant was fully in control of its power plant and no external uncontrollable factors had any role in occurrence of the accident.

(f) The TSA was effective from August 2015 onwards well before the accident dated 28/10/2015. Hence, the present case is covered by the TSA. In any event the Appellant has failed to make out any case for Force Majeure event under the BPTA.

(g) The Appellant failed to provide PGCIL adequate notice under the TSA as well as under the BPTA. The notice was bereft of material particulars

such as date of the Force Majeure event. The date of accident is deliberately suppressed.

(h) Based on Recital D and Article 2.1.2 of the TSA it is submitted that the provisions of the TSA including the Force Majeure clause i.e. Article 14 of the TSA, supersede the BPTA because the Force Majeure clause in both agreements are inextricably linked to the payment and sharing of transmission charges. It is evident from these provisions that the TSA becomes effective on the date of commissioning of the relevant transmission elements and not on the commencement of LTA.

(i) The commencement of LTA refers to the date on which the Appellant is entitled to use the commissioned transmission elements to transmit electricity to its beneficiaries. The Appellant's LTA commenced with effect from February 2016, after the Appellant opened the requisite LC in accordance with BCD under the Sharing Regulations. Thus it is from February 2016 that

PGCIL started raising POC bills on the Appellant when the Appellant opened the LC.

(j) Under Regulation 8(5) of the Sharing Regulations as well as under the TSA, the Appellant is liable to pay transmission charges notwithstanding the fact that its generating station was not operating in the period from February, 2016 to May, 2016.

(k) A generator is required to pay transmission charges irrespective of whether its plant is operational or whether LTA is used or not.

(l) The Appellant has not demonstrated why it took from November, 2015 to June, 2016 to commission its power plant.

(m) No Force Majeure relief may be granted either under the TSA or the BPTA in the absence of notice within the timelines specified thereunder (Judgment of this Tribunal in ***Himachal Sorang Power Ltd. v. Central Electricity Regulatory Commission & Ors. dated 30/04/2015 in Appeal No.54 of 2014***).

(n) Force Majeure claim can be successfully made only if the claimant establishes that it did all that was in its powers to prevent alleged Force Majeure event and that all steps were taken to recover from the alleged Force Majeure event in a time bound manner as soon as reasonably practicable.(***China Cotton*** *and* ***Himachal Sorang***). The Appellant has failed to establish both.

(o) The Sharing Regulations provide that where LTA has been granted on a target region basis and operationalised, on commissioning of the associated transmission system, a generator is required to pay transmission charges, irrespective of whether its plant is operational or whether the LTA is issued or not in this regard. The Appellant's inability to utilize the LTA is not a ground to excuse its liability to pay transmission charges.

(p) In view of the above, the appeal is devoid of merit and is liable to be dismissed.

5. The accident which is claimed as a Force Majeure event had taken place on 28/10/2015. Before we proceed further it is necessary to see whether the present case is covered by the BPTA dated 24/02/2010 or the TSA dated 06/08/2012. In this connection it is necessary to quote Recital D and Article 2.1.2 of the TSA. These provisions read as under:

> *"D. The development of an ISTS Scheme including any scheme which is under construction would continue to be governed in accordance with the Indemnification Agreement or Bulk Power Transmission Agreement or Transmission Service Agreement or any such agreement, as entered into between the concerned ISTS Licensee and the concerned DIC(s)(erstwhile beneficiary) to the extent relevant to the development, construction and commissioning of the elements referred therein till such time the said element is for commercial operation and actually brought into the operations, post which the terms and conditions of this TSA would come into force;"*

> *"2.1.2 In the event of any conflict between the existing Bulk Power Transmission Agreements (BPTA) or Transmission Service Agreement (TSA) and this Agreement, the terms of this Agreement shall supersede, as far as the sharing of transmission charges are concerned."*

6. Recital D indicates that the BPTA or any such agreement will be applicable till the transmission elements are actually brought into the operation, post which the terms and conditions of the TSA would come into force. The commissioning of the transmission elements refers to the technical and physical capability of the transmission assets required to evacuate power from the Appellant's power plant. Our attention is drawn to PGCIL's reply dated 14/10/2016 to which minutes dated 07/10/2015 of the Joint Coordination Committee Meeting of IPPs granted LTOA in Western Regions are annexed. Read with Clauses 2.1.1 and 2.2.2 of the BPTA the said minutes make it clear that the Appellant was duly informed about the commissioning of the identified transmission system with effect from August 2015 and the representative of the Appellant was present in the said meeting. Therefore after August 2015 the TSA would be applicable as per Recital D. The Appellant is not right in contending that the date on which LTA was granted to the Appellant i.e. 04/02/2016 the transmission system was brought into operation. Such an interpretation would be contrary to Recital D quoted above.

7. Article 2.1.2 of the TSA states that in case of any conflict between the existing BPTA or TSA, the terms of the TSA shall supersede, as far as the sharing of transmission charges are concerned. Since Force Majeure clauses in the BPTA as well as in the TSA are linked to the payment and sharing of transmission charges, the provisions of the TSA would supersede the BPTA.

8. The commencement of LTA refers to the date on which the Appellant is entitled to use the commissioned transmission elements to transmit electricity to its beneficiaries. It is rightly pointed out to us that the Appellant's LTA ought to have commenced from August 2015 when the transmission elements were commissioned but that could not be done because the Appellant defaulted in opening Letter of Credit in compliance with statutory requirement. Our attention is drawn to Clauses 3.6.1 and 3.6.3 of the BCD procedure under the Sharing Regulations whereunder the Appellant was required to open a Letter of Credit for 12 months. The Appellant opened Letter of Credit for a period of just six months and later opened amended Letter of Credit of 12 months validity. The Appellants LTA therefore commenced with effect from February 2016 after the Appellant opened Letter

of Credit. The submission that PGCIL started charging transmission charges from the Appellant from February 2016 after the LTA was opeationalised and that indicates that the TSA had come into force only after 04/02/2016 must therefore be rejected. It ignores the fact that the transmission elements were actually commissioned and brought into operation with effect from August 2015, which is the material date.

9. At this stage we may also quote definitions of the terms "Approved Injection", "Approved Withdrawal" contained in the Sharing Regulations and also Regulation 8(5) thereof. They read as under:

> "(*c) 'Approved Injection' means the injection in MW computed by the Implementing Agency for each Application Period on the basis of maximum injection made during the corresponding Application Periods of last three (3) years and validated by the Validation Committee for the DICs at the ex-bus of the generators or any other injection point of the DICs into the ISTS, and taking into account the generation data submitted by the DICs incorporating total injection into the grid:*
>
> *Provided that the overload capability of a generating unit shall not be used for calculating the approved injection:*
>
> *Provided further that where long term access (LTA) has been granted by the CTU, the LTA quantum, and where long term access has not been granted by the CTU, the installed capacity*

of the generating unit excluding the auxiliary power consumption, shall be considered for the purpose of computation of approved injection."

"(f) Approved Withdrawal" means the withdrawal in MW computed by the Implementing Agency for each application period on the basis of the actual peak met during the corresponding application periods of last three (3) years and validated by the Validation Committee for any DIC in a control area after taking into account the aggregated withdrawal from all nodes to which DIC is connected and which affect the flow in the ISTS, and the anticipated maximum demand to be met as submitted by the DIC:

Provided that the overload capability of a generating unit in which the DIC has an allocation or with which the DIC has signed an agreement, shall not be used for calculating the approved withdrawal under long term access (LTA)."

Regulation 8(5)

"…

(5) Where the Approved Withdrawal or Approved Injection in case of a DIC is not materializing either partly or fully for any reason whatsoever, the concerned DIC shall be obliged to pay the transmission charges allocated under these regulations:

Provided that in case the commissioning of a generating station or unit thereof is delayed, the generator shall be liable to pay Withdrawal Charges corresponding to its Long term Access from the date the Long Term Access granted by CTU becomes effective. The Withdrawal Charges shall be at the average withdrawal rate of the target region:

Provided further that where the operationalization of LTA is contingent upon commissioning of several transmission lines or elements and only some of the transmission lines or elements

have been declared commercial, the generator shall pay the transmission charges for LTA operationalised corresponding to the transmission system commissioned:

…"

10. A reading of the above provisions make it clear that a generator is required to pay transmission charges irrespective of whether its plant is operational or whether LTA is used or not. Thus the Appellant is liable to pay transmission charges notwithstanding the fact that its generating station was not operating from February, 2016 to May, 2016. If LTA capacity is blocked for the Appellant on the transmission grid, Regulation 8(5) stipulates that the Appellant will be liable to pay for the same irrespective of whether it actually utilised LTA or not. The Appellant's inability to utilise LTA is not a ground to excuse its liability to pay transmission charges. Therefore, the submission that PGCIL went on to operationalise LTA despite knowing that there was accident at the generation plant of the Appellant and that PGCIL showed undue haste is liable to be rejected.

11. We must now turn to the notice which the Appellant was required to serve on PGCIL of event of Force Majeure. Clause 14.4 of the TSA provides for notice. It reads as under:

"***14.4 Notification of Force Majeure Event***

14.4.1 The Affected Party shall give notice to the other Party and the CTU of any event of Force Majeure as soon as practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as practicable after reinstatement of communications, but not later than one (1) working day after such reinstatement

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party and the CTU regular reports on the progress of those remedial measures and such other information as the other Party and the CTU may reasonably request about the Force Majeure."

Thus the Appellant was required to give notice of the event of Force Majeure as soon as practicable but not later than 7 days after the date on which the Appellant knew or should reasonably have known of the commencement of the event of Force Majeure

and such notice is a pre-condition to the Appellant's entitlement to claim relief under the PPA. According to the Appellant the accident occurred on 28/10/2015. The Appellant informed PGCIL about the same by letter dated 28/12/2015 i.e. two months after the date of accident. Thus the notice is not as per Clause 14.4 of the TSA.

12. Clause 9.0 of the BPTA provides for notice. It reads as under:

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

Assuming that the provisions of the BPTA are applicable to the present case, the Appellant has not even abided by the

timeline of 30 days prescribed in the BPTA. It is not possible to accept the submission that the CERC should not have adopted a technical approach and should have condoned the delay in sending notice. When the contract between the parties provide for a notice period, the said provision cannot be overlooked or diluted. Proviso to Clause 14.4 of the TSA makes such a notice a pre-condition for claiming relief. The said provision cannot be reduced to a dead letter. Notice is not an idle formality. The claim of a party rests on it. It sets the claim of the party in motion. Any clause pertaining to notice has to be construed strictly. On this ground also the Appellant's claim is liable to be rejected. It must also be noted here that the notice is bereft of material particulars. It does not even mention the date when the accident in question occurred.

13. In this connection we may usefully refer to the judgment of this Tribunal in ***Himachal Sorang***, where the Appellant therein had not given the required notice contemplated under Clause 13 of the BPTA regarding occurrence of Force Majeure event. This Tribunal observed that where there are specific provisions to be compiled with for the applicability of Force Majeure events, the

said requirement cannot be ignored. The appeal was in the circumstances dismissed. Relevant paragraphs could be quoted:

> *"21. Now we are to decide whether the learned Central Commission failed to consider the impact of the force majeure event on the appellant's project and to allow reasonable time to mitigate the effects of the force majeure and restore work on site. We have quoted above the force majeure clause of the BPTA. The said clause 13 dealing with force majeure requires that the party claiming the benefit of the force majeure event shall satisfy the other party of the existence of such an event and give a written notice within a reasonable time to the other party to this effect and transmission and drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or cease to exist.*
>
> *26. We have carefully and deeply perused the aforementioned letters sent by the appellant only to find that there is no mention of the existence of the occurrence or existence of any geological surprise or force majeure event. Thus, we hold that no notice, informing occurrence or existence of any force majeure event as required by clause 13 of the BPTA entered into between the parties, had ever been given by the appellant to the respondent no.2 Power Grid by fulfilling the requirements of the provisions mentioned in clause 13. The appellant was bound to give a notice in writing within reasonable time to respondent no.2 informing it of the existence of force majeure event but such a notice had never been given. There is no compliance of the provisions of Clause 13 dealing with force majeure under the said BPTA entered into between the appellant and the respondent No.2-Power Grid.*
>
> *33. We hold that the learned Central Commission has considered the factum of force majeure event in letter and spirit by going through the communications sent by the appellant to the respondent no.2-Power Grid and correctly found that during the period there was no force majeure event. The notice of force majeure as required by the provisions of clause 13 dealing with force majeure under BPTA cannot be said to be a correct and legal notice because in the said communication we do not find any mention of the occurrence of existence of any force majeure event and no effort was made by the appellant to satisfy the opposite party, namely, the respondent no.2. The Central Commission has not erred in holding that the appellant did not*

comply with the requirements of the BPTA in effectively invoking the force majeure clause to seek amendment of the BPTA for the commencement of the open access."

14. We must now go to the alleged event of Force Majeure, that is, the accident dated 28/10/2015. On 28/10/2015 the rear 'S' panel of the Appellant's boiler furnace hopper got detached due to the accumulation of ash inside the boiler causing the trip. This resulted in discharge of molten ash killing one workman and injuring eleven persons. At this stage it is necessary to quote Clause 14.2 and relevant portion of Clause 14.3 of the TSA. They read as under:

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

"14.3 Force Majeure Exclusions

14.3.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Affected Party and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure.

14.3.6 Non-performance caused by, or connected with, the Affected Party`s:

(a) negligent or intentional acts, errors or omissions;

(b) failure to comply with an Indian Law; or

(c) breach of, or default under this Agreement"

15. As per Clause 14.2 an affected party can claim that the incident in question is covered by Force Majeure only if and to the extent that such event was not within its reasonable control, directly or indirectly and could not have been avoided if the affected party had taken reasonable care or complied with Prudent Utility Practices. It is pointed out to us by the counsel for the Appellant that as per the TSA Prudent Utility Practices pertain to transmission licensee. But even if we leave out Prudent Utility Practices, it is clear that the Appellant was required to prove that the event was not within its control directly or indirectly and could not have been avoided if the Appellant had taken reasonable care. In the same line Clause 14.3.1 of the TSA states that Force Majeure shall not include any event which is within the reasonable control of the affected party. As per Clause 14.3.6 inter alia non-performance caused by or connected with the affected party's negligent, intentional acts, errors or omissions, does not entitle the affected party to claim the benefit of Force Majeure clause.

16. The Appellant has relied on its Internal Report. It is submitted that the Internal Report states that on 11/10/2015 the accumulated ash in boiler furnace hopper and bottom ash hopper was cleaned and that just before the incident took place all the parameters of flue gas and air system were in normal range. Furnace draft was normal. The flow of ash was visible through the vibrating screen and reported normal. It is submitted that therefore the Appellant could have never expected that such accident can happen or there was any risk in operating the plant. It is submitted that whenever it was necessary the Appellant had put the plant under shutdown. The Appellant had replaced parts and was therefore prudent. It is submitted that the Appellant cannot be expected to keep its plant under shutdown when all parameters were normal. According to the Appellant the trippings mentioned in the internal report are nothing but initial teething problems.

17. To examine the Appellant's contentions we must analyse the Internal Report. The Internal Report states that in August 2015 the unit remained under shutdown. Repairing of the Wall Re-

heater tube leakages and Hard facing of both ID fans impellers was done. In September 2015 during operation vibrations of both ID fans were observed to be increasing. The unit was again shutdown. Tungsten carbide coating on both ID fan blades and dynamic balancing of both ID fans was done. The Internal Report further states that on 08/10/2015 the Drycon tripped due to overload problem and chain link failure. It was restarted at around 06.30 hrs after replacement of link. Drycon again tripped at 12.30 hrs on the same day due to chain-link failure and was restarted at 19.00 hrs after replacement of link. Drycon again tripped at 22.45 hrs and remained under maintenance throughout the day. On 09/10/2015 Drycon was restarted at 18.00 hrs but it again tripped at 21.30 hrs. The Internal Report further states that on 10/10/2015 Drycon was restarted after replacement of link pins at 03.45 hrs, but it again tripped at 05.03 hrs due to failure of yet another chain link. On 11/10/2015 the unit was under shutdown at 01.00 hrs. Repairs were carried out and the unit was synchronised on 14/10/2015 at 06.07 hrs. On 20/10/2015 at 06.29 hrs unit tripped due to loss of Flame (Boiler MFT Operated). Unit was synchronised at 10.33 hrs. The Internal Report further states that on

20/10/2015 at 21.19 hrs the unit was again taken under shutdown due to the failure of ash handling system PLC. After rectification on 23/10/2015 the unit was synchronised. On 27/10/2015 there was a tripping of bottom ash system at 19.35 hrs due to failure of chain tension hose. The hose was replaced and the Drycon system started at 22.00 hrs. During this period unit also tripped due to failure of ID fan lube oil pump and subsequent trippings of both the ID fans at 21.33 hrs. The Internal Report further states that the unit was again synchronised at 00.57 hrs of 28/10/2015 and was running smoothly till the incident occurred at 16.45 hrs on 28/10/2015.

18. Probable causes of the accident are given in the Internal Report as under:

> "**PROBABLE CAUSES**
>
> *Rear S panel of boiler furnace hopper got detached from its adjacent LHS and RHS water wall panels due to the load of ash accumulated inside the boiler furnace hopper.*
>
> *The probable cause of accumulation of Ash may be as under:-*
>
> 1. *Blockage in S panel opening which might have restricted the free flow of ash into the Drycon hopper. There might be rat holes in ash*

accumulated in the S Panel which allowed partial flow of ash to Drycon as ash flow was observed continuously in Drycon.

2. *There is a grid opening of size 150x150 mm below the each gate/Jaw crusher of the drycon system (total 6 Nos.). There is a possibility of blockage on the grid opening due to formation of Clinker that might have restricted the free flow of the ash onto Drycon Pan and resulted in ash accumulation inside the hopper and subsequently in the Boiler."*

19. It is evident from the Internal Report that the power plant tripped as many as 11 times from 30/07/2015 which is the commercial operation date of the power plant till 28/10/2015. In such a short span if the power plant fails 11 times it is a cause for concern. If there were such repeated breakdowns drastic and appropriate measures should have been taken by the Appellant instead of getting some repairs done and starting the power plant. There can be no dispute that the Appellant had complete control over the power plant. The Appellant should have taken a shutdown to find out the root cause of the accident. If the repairs carried out by the Appellant were ineffective, as was evident from the recurring tripping the Appellant should have taken other better and prudent steps on the advice of experts. Instead the Appellant negligently operated the power plant. The Appellant cannot be heard to say that it could not have apprehended or

predicted that any mishap would occur because the power plant was working smoothly. There was no smooth functioning at all. Therefore reasonable care should have been taken by the Appellant. The Appellant has not produced any evidence that it had taken any prudent steps indicative of reasonable care. There is intrinsic evidence to show that the operation of the boiler was within full control of the Appellant and the accident could have been avoided if the Appellant had taken reasonable care.

20. It was essential for the Appellant to establish that it did all that was in its power to prevent occurrence of the accident which it claims as a Force Majeure event. The Appellant failed to adduce any evidence to that effect. Reliance placed by PGCIL on the judgment of the Supreme Court in ***China Cotton*** in this behalf is apt.

21. It is also pertinent to note that the Appellant has failed to establish why it took time from November 2015 upto June 2016 to re-commission the power plant. In ***Himachal Sorang*** this Tribunal has held that if the claimant fails to restore or recover from the alleged Force Majeure for unreasonably long time, the

claimant cannot be entitled to any benefit on that score. Following are the relevant observations of this Tribunal.

> *"22. The Hon'ble Supreme Court in Dhanraj Gobindram's case (supra) observed that force majeure includes any event over which the performing party has no control. In the case in hand, no legal notice fulfilling the requirements of clause 13 had been given by the appellant to the respondent no.2 in order to get the benefit of such force majeure and it failed to satisfy the respondent no.2 about the existence of such force majeure event. If the grounds leading to the delay in commissioning of the appellant's power plant are to be considered, no material to substantiate the said grounds has been placed by the appellant on record either before the Central Commission or before this Appellate Tribunal. The only ground pressed during arguments in the Appeal by the appellant is regarding sufficient geological surprises affecting major works, for which no notice fulfilling the requirements provided under clasue 13 of the BPTA had been given. The learned Central Commission, in the impugned order, has given detailed and cogent reasons for not agreeing to the report prepared by Lahmeyer International Private Limited (Expert). We have quoted the said reasons in para 15.1 of this judgment. We find no force in the appellant's contention that the learned Central Commission did not cite sufficient or material reasons for disagreeing with the expert's report. We are further unable to agree to the contention of the appellant that the learned Central Commission failed to consider that the effects of the force majeure events, that occurred before 01.04.2012, had not ceased to operate. We agree to the finding recorded by the Central Commission in the impugned order because clause 13 dealing with force majeure clearly provides that the transmission/drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist. The said clause does not provide that the effect of force*

majeure to continue till the appellant is restored to its original position if there was no force majeure. If the appellant fails to restore or recover from the alleged force majeure for unreasonably long time, it cannot be held entitled to any benefit on that score."

Thus viewed from all angles it is not possible to come to a conclusion that the Appellant's case is covered by Force Majeure clause of the TSA. We cannot fault the CERC for taking such a view.

22. We must note that the Appellant has sought to file two other reports in this Tribunal in support of its contention that the accident in question was beyond its control. It is submitted that the Appellant did not file them before the CERC because PGCIL did not deny the contents of the Internal Report. We are not inclined to take the said reports on record at this belated stage. The Appellant ought to have filed independent reports to strengthen its case in the CERC. The explanation for not filing independent report is totally unacceptable. But as stated above even if one goes by the Internal Report it is not possible to hold that the Appellant was not in full control of the operation of the

boiler and that the Appellant had taken reasonable care to prevent the occurrence.

23. In the circumstances we find no substance in this appeal. The appeal is therefore dismissed. Needless to say that interim applications, if any stand disposed of.

23. Pronounced in the open court on this 7th day of November, 2017.

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]