

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

APPEAL NO. 61 OF 2020

Dated: 22.09.2022

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

NTPC LTD,
NTPC Bhawan,
Core-7, SCOPE Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110003

... **Appellant(s)**

VERSUS

1. CENTRAL ELECTRICITY REGULATORY COMMISSION

Through its Secretary,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi- 110001

2. UTTAR PRADESH POWER CORP. LTD. (UPPCL)

Through Its Chief Engineer
Shakti Shawan
14, Ashok Marg
Lucknow - 226 001

3. JAIPUR VIDYUT VITRAN NIGAM LTD. (JVVN)

Through its Chief Engineer
Vidyut Bhawan, Janpath,
Jaipur-302005

4. AJMER VIDYUTVITRAN NIGAM LTD. (AVVN)

Through its Chief Engineer
Old Power House, Halhi Bhata,
Jaipur Road,
Ajmer – 305001

5. JODHPUR VIDYUT VITRAN NIGAM LTD. (JVVN)

Through its Chief Engineer
New Power House, Industrial Area,
Jodhpur – 343003

6. HARYANA POWER PURCHASE CENTRE (HPPC)

Through its Chief Engineer
Shakti Bhawan Sector - VI,
Panchkula
Haryana -134109

7. POWER DEVELOPMENT DEPARTMENT (PDD-J&K)

Through its Chief Engineer
Govt. of J&K, Civil Secretariat
Srinagar-190008

8. ELECTRICITY DEPARTMENT (CHANDIGARH)

Through its Chief Engineer
Union Territory of Chandigarh Addl.
Office Building Sector-9 D
Chandigarh - 160019

9. UTTARAKHAND POWER CORPORATION LTD. (UPCL)

Through its Chief Engineer
Urja Bhavan Kanwali Road,
Dehradun - 248 001

... Respondent(s)

Counsel for the Appellant (s) : Mr. S. Venkatesh
Mr. Ashutosh K. Srivastava
Mr. Bharath Gangadharan
Mr. Siddarth Nigotia
Mr. Shivam Kumar

Counsel for the Respondent (s) : Ms. Pradeep Misra
Mr. Suraj Singh
Mr. Manoj Kumar Sharma for R-2

J U D G M E N T (Oral)

PER HON'BLE MR JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. The appellant is a generating company which had entered into a Power Purchase Agreement ("PPA") on 25.02.2011 with second to ninth respondents (hereinafter collectively referred to as the beneficiaries or procurers) for sale of electricity generated from its generating station in terms of allocations made by Ministry of Power in the Government of India. In the wake of investment approval accorded on 30.07.2017, it proceeded to set up its generating station described as *Feroze Gandhi Unchahar*

Thermal Power Station, Stage-IV (1X500 MW) in District *Raebareli* of State of *Uttar Pradesh*. The unit-I of the said generating station was commissioned on 31.03.2017, the setting up of the project having suffered certain time overrun. The appellant had filed petition (no.197/GT/2017) before the Central Commission (“the Central Commission”) for approval of tariff in its respect for period from the date of its actual commercial operation (30.09.2017) to 31.03.2019.

2. In above context, the question of time overrun of 273 days came up for consideration, the Scheduled Commercial Operation Date (SCOD) being 31.12.2016 (i.e. 41 months from 30.07.2013, the date of investment approval), the actual COD having been achieved on 30.09.2017. Reliance was placed by the appellant on regulation 12(2) of 2014 tariff regulations framed by the Central Commission wherein “uncontrollable factors” are included in *force majeure* clause, the developer being entitled to claim relief against additional impact of time overrun or cost overrun on such account. The Central Commission, by order dated 06.12.2019, accepted the delay of 116 days (from 05.12.2016 to 31.03.2017) to be beyond control of the appellant and accordingly condoned the time overrun to that extent but declined the prayer for similar condonation of delay of further 157 days (beyond 31.03.2017).

3. The appeal at hand challenges the order dated 06.12.2019 of Central Commission to the extent it denies the condonation of appeal of 157 days as above.

4. The *force majeure* events on the basis of which the prayer for condonation of time overrun was pressed before the Central Commission included non-availability of ‘Sand and Moorum’ and unduly excess rainfall during the intervening period of June 2016 to October 2016.

5. In the context of the first mentioned reason, reliance is placed on order dated 13.01.2015 of National Green Tribunal prohibiting permissions to be granted by the State for carrying on sand mining. Further, reference is made to order dated 29.02.2016 of Allahabad High Court directing stoppage of excavation activities of minor minerals. The second above-mentioned explanation (excess rainfall) was pressed as a ground on the basis of material showing the rainfall recorded to the extent of 1229 mm in the region during the period June 2016 to October 2016 as against the normal average rainfall of 951 mm.

6. The Central Commission has recorded its views on the first above mentioned reason as under:

“14. It is evident from the above orders that extraction activity in respect of minor minerals were directed to be stopped which, in our view, had affected the supply of ‘sand and Moorum’ which are the essential raw materials used in the civil construction of the project. Consequent on this, the civil works of major packages in the main plant and balance of plant got affected from April 2016. Though the Petitioner has not furnished date of lifting of ban and resumption of the supply of minerals pursuant to the judgment of Hon’ble High Court, it is noticed from that Letter No. 715/86-2017- 57(s)/2017 dated 22.4.2017 from the Additional Chief Secretary, Uttar Pradesh, addressed to District officers, Mining Department that the State Government had directed for resumption of mining through e-auctioning procedure. In this background and in the light of the aforesaid orders of the NGT / High Court, we hold that delay caused by disruption in supply of ‘Sand and Moorum’ from April, 2016 till March, 2017 was beyond the control of the Petitioner.”

7. On the subject of excess rainfall, the appellant had also mentioned facts concerning the rise in the water table at the site location, its contentions having been recorded as under:

“19. The Petitioner vide its affidavit dated 24.1.2019 has submitted that the water table at site location was very high i.e. only 1.5 meter to 3 meter down from ground level. In justification of the same, the Petitioner has also submitted that due to this high water table, the execution time of underground works increased as the same required frequent dewatering and caused interruption in progress of civil foundation works. All the foundation works of critical areas including CW duct were adversely affected due to this high water table. Based on this, the Petitioner has submitted that the aforesaid delay is beyond the control of Petitioner and hence the delay may be condoned.”

8. However, the Commission did not agree with the appellant that the excess rainfall or rise in the water table could be construed as good grounds for time overrun of additional 157 days to be granted observing, *inter alia*, as under:

“18. It is noticed from the above that the time overrun due to excess rainfall as claimed by the Petitioner is for the period from June 2016 to October 2016. This period of delay coincides with the period of delay (April 2016 to March 2017) due to disruption in the supply of sand and minerals as discussed above. Since the period of delay in COD due to excess rainfall and flooding has been subsumed in the delay on account of ban on mining of minerals, the stoppage of work of the project for 5.5 months which had contributed to time overrun is deemed to have been condoned.

...

20. It is observed that Petitioner has not quantified the delay caused due to the difficulties faced by it because of high water table. In absence of such details and based on the table at para 5, Commission is of the view that impact of high water table and the reasons for which delay has been already condoned i.e non availability of ‘Sand and Moorum’ and ‘High Rainfall’, affected the activities till commissioning of the unit i.e 31.3.2017.”

9. The Commission has ruled thus:

“21. From the table under para 7 above as furnished by the Petitioner, it is noticed that the Scheduled commissioning date of the unit was 5.12.2016 and the same was delayed to 31.3.2017. This delay of 116 days has been attributed to cumulative impact of non-

availability of sand for prolonged durations, excess rainfall & water logging and high water table. In our view, the total delay of 116 days from 5.12.2016 to 31.3.2017 was beyond the control of the Petitioner and accordingly the time overrun on this count is condoned. For the further delay of 157 days (273-116) beyond 31.3.2017 in achieving the COD after commissioning, Petitioner has submitted that all the reasons which caused the delay till commissioning of the unit were also responsible for this further delay. This in our view is a very general statement and is not acceptable as these reasons i.e non-availability of sand for prolonged durations, excess rainfall & water logging and high water table, cannot be considered as valid reasons of further delay after achieving the commissioning of the unit. As such, in absence of valid reasons for the further delay of 157 days, we are not inclined to condone the same. As the SCOD of unit as submitted by the Petitioner is 31.12.2016, the time period envisaged from the scheduled commissioning of the unit (5.12.2016) to SCOD was 26 days. Accordingly, after allowing for the scheduled time period of 26 days as envisaged by the Petitioner, unit/station should have achieved COD on 26.4.2017 i.e 26 days after the commissioning date of 31.3.2017.

22. In view of the above discussions, out of the total time overrun of 273 days from the scheduled COD (31.12.2016) to the actual COD of the unit (30.9.2017), the delay of 116 days upto 26.4.2017 has been condoned and the delay of 157 days has not been condoned. Accordingly, the time overrun allowed/ disallowed is summarized as under:

Scheduled COD	Actual COD	Total Time overrun (days)	Time overrun allowed (days)	Time overrun disallowed (days)
31.12.2016	30.9.2017	273	116	157

23. Accordingly, the revised SCOD / actual COD for the generating station is as under:

SCOD	Revised SCOD	Actual COD
31.12.2016	26.4.2017	30.9.2017

”

10. We agree with the appellant that the Commission has failed to appreciate the prevalent circumstances in proper light. The moratorium or embargo imposed against mining of sand etc., as indeed excessive rainfall seen by the region have been treated as *force majeure* events but it cannot

be said that the effect thereof would have impaired the development activities only to the extent for the period for which time overrun has been allowed. The cascading effect of such events cannot be ignored. As was explained before the Commission on the basis of documents and photographs in support, the rainfall and flooding had rendered the overall movement of heavy vehicles virtually impossible. The safety, security and reliability standards obliged the developer not to rush into achieving the COD as that would have put human life and public property to undue risk. In these circumstances, the reasoning given by the Central Commission for denial of the condonation of time overrun to the extent of 157 days does not appeal to us.

11. There is an added reason why we find it difficult to uphold the view taken by the Central Commission. It has been submitted that it is a standard industrial practice that the commissioning activities after first synchronization before COD requires generally a period of six months. It appears that this has been recognised and even incorporated in the regulatory framework by the Central Commission, as reflected in the following part of regulation 8 of Central Electricity Regulatory Commission (Grant of Connectivity, Long-term and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (for short “Connectivity Regulations 2009”):

“(7) Notwithstanding anything contained in Clause (6) of this Regulation and any provision with regard to sale of infirm power in the Power Purchase Agreement, a unit of a generating station including a captive generating plant which has been granted connectivity to the inter-State Transmission System in accordance with these regulations shall be allowed to inter-change infirm power with the grid during the commissioning period, including testing and full load testing before the COD, after obtaining prior permission of the concerned Regional Load Despatch Centre for the periods mentioned as under:-

- (a) Drawal of Start-up power shall not exceed 15 months prior to the expected date of first synchronization and 6 months after the date of first synchronization.
- (b) Injection of infirm power shall not exceed six months from the date of first synchronization.”

[Emphasis supplied]

12. The justification particularly for clause(b) of sub-para (6) of regulation 8 of the Connectivity Regulation, 2009, was given by the statement of reasons issued on 06.05.2015 as under:

“7. POSOCO’s submissions: POSOCO has suggested that Sub-clause (b) of Clause (7) of Regulation 8 of the Principal Regulations may be reworded as follows:

“(b) Injection of infirm power shall not exceed six months from the date of first synchronization or till COD whichever is earlier.”

Commissions’ decision: ‘Infirm Power’ by definition is the power injected by a generating station or unit thereof before the COD. A period of six months has been envisaged in the regulations because normally generating stations take about six months’ time to complete all pre-commissioning activities...”

[Emphasis supplied]

13. It is pointed out that CERC has been generally following the above norm upholding period of six month between synchronization and COD, illustration being available in following part of order dated 06.05.2015 in petition no.229/GT/2010:

“17. ... As per the contract with the vendor of Steam Generator Package, the synchronization of Unit-I is 35 months from the date of award and for Unit-II & III at an interval of 3 months each. Accordingly, considering the SCOD after 6 months from the date of synchronization, the SCODs of Unit-I, Unit-II and Unit-III works out to 41 months, 44 months and 47 months respectively from the date of award of Steam Generator Package ...”

14. In contrast, in the case at hand, the Central Commission has allowed only 26 days, earlier envisaged in IA dated 30.07.2013 as the sufficient period prior to COD. We agree that not only in the light of the above norms

under Connectivity Regulations, 2009, as explained in 2015 by the Central Commission itself, but also, and particularly in the face of unforeseeable *force majeure* events which have led to substantial disruption in major activities, the delay of further 157 days (beyond 31.03.2017) also deserves to be condoned.

15. For the above reasons, the appeal succeeds. The delay of 157 days for which the Central Commission has declined to grant relief is condoned. The consequential order shall be passed by the Central Commission.

16. The appeal is disposed of in above terms.

Pronounced in open court on this 22nd Day of September, 2022

(Sandesh Kumar Sharma)
Technical Member

pr/tp

(Justice R.K. Gauba)
Officiating Chairperson