

Ntpc Limited vs West Bengal State Electricity ... on 11 May, 2026

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO.23 OF 2018

Dated: 11.05.2026

Present: Hon'ble Ms. Seema Gupta, Officiating Chairperson
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

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

... Appellant

Versus

1. West Bengal State Electricity Distribution Company Limited
Through its Managing Director
Vidyut Bhawan, Block-DJ,
Sector - II, Salt Lake City,
Kolkata - 700091
2. Bihar State Power Holding Company Limited
Through its Managing Director
Vidyut Bhawan, Bailey Road,
Patna - 800001
3. Jharkhand Urja Vikas Nigam Limited
Through its Managing Director
Engineering Bhawan, HEC,
Dhurwa, Ranchi - 834004
4. Damodar Valley Corporation
Through its Chairman
DVC Towers, VIP Road,
Kolkata - 700054

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5. Power Department
Through its Secretary
Govt. of Sikkim, Kazi Road,
Gangtok, Sikkim - 737101
6. GRIDCO Limited

Through its Managing Director
24, Vidyut Bhawan, Janpath,
Bhubaneswar - 751007

7. Assam Power Distribution Company Limited
Through its Managing Director
Bijulee Bhawan, Paltan Bazar,
Guwahati - 782001
8. Tamilnadu Generation and Distribution Company Limited
Through its Managing Director
NPKRP Maaligail, 144, Anna Salai,
Chennai - 600002
9. Uttar Pradesh Power Corporation Limited
Through its Managing Director
Shakti Bhawan, 14, Ashok Marg,
Lucknow - 226001
10. Power Development Department (J&K)
Through its Secretary
Govt. of J&K Secretariat,
Srinagar - 190009
11. Punjab State Power Corporation Limited
Through its Managing Director
The Mall, Patiala - 147001
12. BSES Rajdhani Power Limited
Through its Managing Director
BSES Bhawan, Nehru Place,
New Delhi - 110019
13. BSES Yamuna Power Limited
Through its Managing Director

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Shakti Kiran Bldg., karkardooma,
Delhi - 110092

14. Tata Power Delhi Distribution Company Limited
Through its Managing Director
33 KV Sub Station Building,
Hudson Lane, Kingsway Camp,
New Delhi - 110009
15. Haryana Power Purchase Centre
Through its Chief Engineer
Shakti Bhawan, Sector-6,
Panchkula, Haryana - 134109
16. Rajasthan Urja Vikas Nigam Limited
Through its Managing Director

Vidyut Bhawan, Janpath,
Jyoti Nagar, Jaipur - 302005

17. Eastern Regional Power Committee
Through its Member Secretary
14, Golf Club Road, Tollygunje,
Kolkata - 700033

18. Eastern Regional Load Dispatch Center
Through its General Manager
14, Golf Club Road, Tollygunje,
Kolkata - 700033

19. Central Electricity Regulatory Commission
Through its Secretary
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi - 110001

... Respondent (s)

Counsel for the Appellant(s) : Sanjay Sen, Sr. Adv.
Adarsh Tripathi
Vikram Singh Baid
Ajitesh Garg
for App. 1

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Counsel for the Respondent(s) :

Amit Kapur
for Res. 1

Aashish Gupta
Puneeth Ganapathy
Chiranjeev Singh Marwaha
for Res. 2

Arijit Maitra
for Res. 6

Pradeep Misra
For Res. 9

Raj Bahadur Sharma
Mohit K. Mudgal
Sachin Dubey
For Res. 12 & 13

JUDGMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant NTPC Limited has, in this appeal, impugned the order dated 17.11.2017 passed by respondent no.19, the Central Electricity Regulatory Commission (hereinafter referred to as the Commission) in appellant's petition no.154/MP/2016, wherein the Commission has held that non-availability of water due to hydrological factors coupled with the diversion of water to Bangladesh in terms of the Indo-Bangladesh Water Sharing Treaty, 1996 did not fall within the scope of "force majeure" as envisaged in Article 8 of the Power Purchase Agreements executed between the appellant and the respondent nos.1-18.

2. The brief conspectus of the facts of the case giving rise to the instant appeal are noted hereinbelow.

3. The appellant, a Government of India undertaking and engaged in the business of generation as well as sale of electricity to various purchasers/beneficiaries in India, is a generating company as defined under section 2(28) of the Electricity Act, 2003. It runs various power generating stations throughout India, one of which is Farakka Super Thermal Power Station, Stages I & II (1600MW) and Stage-III (500MW), which is the subject matter of instant appeal and would be hereinafter referred to as the "Farakka Station". The electricity generated from the said generating station is supplied by the appellant to respondent nos.1 to 16 and in this regard the appellant has entered into Bulk Power Supply Agreements/Power Purchase Agreements with the respondents.

4. The Farakka Station has the total capacity of 2100MW and comprises of three units of 200MW each and three units of 500MW each. These units were commissioned on different dates between the years 1986 and 2012.

5. Water requirement for the said Farakka Station is being met through Ganga Feeder Canal. Flow of water in the Ganga Feeder Canal is controlled

and operated by Farakka Barrage Project Authority, Ministry of Water Resources, Government of India.

6. On 12.12.1996, a revised treaty was signed between the Government of People's Republic of Bangladesh and Government of India regarding sharing of Ganga water at Farakka for a period of 40 years. In pursuance to the said treaty, 35000 cusec of water was to be shared by diverting it to the Bangladesh annually. In order to mitigate the water availability from the Ganga Feeder Canal, the Board of Directors of the appellant in its 288th meeting convened on 26.06.2006, approved the construction of the lift pumphouse on the Ganga Feeder Canal.

7. On 19.01.2009, the Commission notified Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter referred to as the "Tariff Regulations, 2009", inter alia, providing for the norms and parameters for determination of tariff of the thermal generating stations for the tariff period from 01.04.2009 to 31.03.2014.

8. In terms of these regulations, appellant NTPC filed petition no.222/2009 before the Commission for determination of tariff for the said Farakka Station for the period from 01.04.2009 to 31.03.2014. In the petition, appellant had projected an additional capitalization of Rs.6810.00 lakhs for construction of the lift pumps with the following justification: -

"To augment water supply to the existing Cooling Water (CW) system which is unable to cater the CW requirement of the station due to drop in the water level of source feeder canal on account of revised Indo-Bangla Ganga water sharing Agreement. Scheme was agreed in MOP-GOI review meeting in 16.07.04."

9. The said petition was disposed of by the Commission vide order dated 14.06.2012 thereby determining the tariff of the Farakka Station for the period 2009-2014. As regards the capital expenditure on the installation of lift pumps, the Commission observed as under: -

"(c) Lift pumps

28. The petitioner has claimed expenditure of

Rs.6810.00 lakh during 2013-14 towards lift pumps against the CEA approved cost of Rs.12840.60 lakh. The petitioner has submitted that the installation of lift pump is required to augment water supply to the existing cooling water system which is unable to cater the cooling water requirement of the generating station due to drop in water level of source feeder canal on account of the revised Indo-Bangla Ganga water sharing agreement and the scheme agreed to by the Ministry of Power Government of India in its review meeting on 16.7.2004. As per the Indo-Bangladesh water sharing treaty, 1996 Bangladesh is given minimum 35000 cusecs of

water during the lean season (from 1st January to 31st May) and due to this cooling water supply gets affected during this period and consequently regular generation loss is being faced. The respondents GRIDCO, NDPL and UPPCL have objected to the capitalisation of this asset. The respondent, BSEB and BRPL have also submitted that the capitalisation under Regulation 9(2) is permissible only after the expenditure is incurred by the petitioner. The petitioner in its rejoinder dated 2.2.2012 to the reply of the respondent, GRIDCO has submitted that the scheme and investment on the said asset was in line with the provisions of the 2004 Tariff Regulations and approved during the period 2004-09, the work was being carried out during the tariff period 2009-

14. It has also submitted that since the requirement of this work is on account of the treaty of the Government of India, the expenditure falls under Regulations 9(2)(ii) of the 2009 Tariff Regulations and the same is admissible.

29. We have in this order decided that the additional capital expenditure projected to be incurred after the cut-off date, can be considered under Regulation 9(2) of the 2009 Tariff Regulations. Thus, taking into consideration that the requirement of this work is on account of diversion of water as per revised Indo-Bangla river water agreement, the expenditure claimed is allowed under Regulation 9(2)(ii) of the 2009 Tariff Regulations."

10. Thus, the Commission allowed additional capitalization of the expenditure related to installation of lift pumps despite the objections raised by the respondent beneficiaries.

11. On 02.05.2013, the appellant filed petition no.233/2013 seeking revision of Annual Fixed Charges for the Farakka Station on the basis of actual capital expenditure incurred for the Financial Years (FYs) 2009-10, 2010-11 & 2011-12 and for approval of projected expenditure for the years 2012-13 and 2013-14 as per Regulation 6(1) of Tariff Regulations, 2009. In this petition also, the appellant had projected an additional capitalization of Rs.6810.00 lakhs for installation of lift pumps for the years 2013-14. In the affidavit dated 28.10.2013 filed in the said petition, appellant stated reasons for non-capitalization of lift pumps claimed during the FYs 2013-14. The petition was disposed of by the Commission vide order dated 12.11.2014 thereby revising the tariff for Farakka Station after truing-up. The following extracted portion of the said order is material as it records the reasons given by appellant for non-installation of lift pumps: -

"Lift Pumps

19. The petitioner has claimed expenditure of Rs.11.97 in 2009-10, Rs.0.14 lakh in 2011-12 and Rs.6810.00 lakh

during 2013-14 towards lift pumps. However, vide affidavit dated 28.10.2013, the petitioner has not claimed the said expenditure for the year 2013-14 towards lift pumps.

20. It is observed that the Commission in order dated 14.6.2012 in Petition No. 222/2009 had considered the claim of the petitioner for capitalization of Rs.6810.00 lakh during 2013-14 towards Lift pumps and the same was allowed under Regulation 9(2)(ii) as under:

"29.... Thus, taking into consideration that the requirement of this work is on account of diversion of water as per revised Indo-Bangla river water agreement, the expenditure claimed is allowed under Regulation 9(2)(ii) of the 2009 Tariff Regulations

21. The petitioner vide affidavit dated 28.10.2013 had submitted that Lift Pump House is located at the bank of Ganga Feeder canal, outside the premises of the plant and in order to facilitate the execution of works of lift pump house, proper approach road was required for movement of material/equipments. The petitioner has also submitted that the above said approach road has been constructed and capitalized and accordingly, the claim for capitalization of Rs.11.97 lakh in 2009-10 and Rs.0.14 lakh in 2011-12 is towards the capitalization of construction of approach road for Lift Pump house.

22. The petitioner has further submitted that the expenditure of Rs.6810 lakh was
p r o j e c t e d t o b e i n c u r r e d

in 2013-14 towards installation of lift pumps was approved by the Commission in order dated 14.6.2013 based on the progress of erection activities. The petitioner has also submitted that in March 2013 while civil works related to this package were being carried out, there was sudden ingress of subsoil water from nearby Farakka feeder canal to lift pump house area and due to this unforeseen incident the excavation work of lift pump house was affected adversely due to flooding and was stopped. The petitioner has stated that after detailed investigation and deliberation with M/s IVRCL, the executing agency it was been decided to modify the deep dewatering system and also provide one row of sheet pile along feeder canal bank to stop recurrence of such incidence in future. The petitioner has submitted that the design of sheet pile are being finalized and the erection work can start only after dewatering of the lift pump house area and completion of civil work of lift pump house. Accordingly, the petitioner has submitted that the capitalization of lift pump scheme amounting to 6810 lakh may not be possible during 2013-14.

23. We have considered the submissions of the petitioner. The generating station has been allowed an amount of 2910.00 lakh as Compensation Allowance in terms of Regulation 19(e) of the 2009 Tariff Regulations, since many of the units are in operation for more than 10 to 25 years from its COD. As the Compensation allowance granted to the generating station is for meeting expenses

towards assets of capital nature including assets of minor nature, we are of the view that the expenditure towards construction of approach road to Lift pump house, even presuming that the Lift pump would be installed, in future, should be met from Compensation Allowance allowed to the generating station. Accordingly the claim of the petitioner for capitalization of 11.97 lakh in 2009-10 and 0.14 lakh in 2011-12 towards construction of approach road has not been allowed."

(Emphasis supplied)

12. Subsequently, on 19.08.2014, appellant filed another petition bearing no.274/2014 for revision of tariff for the Farakka Station for the period 01.04.2009 to 31.03.2014 after the truing-up exercise vide order dated 12.11.2014 passed in previous petition no.233/2013. The said petition no.274/2014 was disposed of by the Commission vide order dated 06.02.2017 thereby revising the tariff of Farakka Station. It would be pertinent to state here that the reasons recorded in order dated 12.11.2014 for non-capitalization of lift pumps by the appellant were reiterated in this order.

13. Thereafter, the Commission notified Central Electricity Regulatory Commission (Terms and
C o n d i t i o n s o f T a r i f f) R e g u l a t i o n s , 2 0 1 4 (h e r e i n a f t e r

referred to as the "Tariff Regulations, 2014") for the tariff period 01.04.2014 to 31.03.2019.

14. It appears that the appellant served letters dated 18.03.2016 upon the respondent nos.1 to 16 as notices regarding occurrence of force majeure event on account of unavailability of cooling water in the Farakka Station. Respondent No.18, the Eastern Regional Power Committee (in short ERPC) and respondent no.17, the Eastern Regional Load Dispatch Centre (in short ERLDC) were separately informed about the force majeure events vide letters dated 12.03.2016 and 11.03.2016 respectively. In these notices, the appellant contended that during the period from February, 2016 to March, 2016, owing to drastic fall in the water of Ganga Feeder Canal there was reduction in cooling water availability to the Farakka Station and accordingly the appellant was constrained to successfully shutdown each of the 06 units during such period. It was further contended that once the cooling water became available in the Ganga Feeder Canal, appellant restarted its units and resumed power generation, but the availability of generating stations (to be computed on yearly basis) reduced significantly on account of such forced shutdown of units for reasons beyond the control of the appellant. Consequently, the Annual Fixed Charges receivable by the appellant for the year 2015-16 were reduced due to such uncontrollable factors.

15. The appellant also raised the issue of shortage in cooling water as a "force majeure event" in the 32nd Commercial Sub-Committee meeting of ERPC held on 10.06.2016 and 33rd meeting of TCC/ERPC held on 25 June 2016.

16. Thereafter, the appellant approached the Commission with petition no.154/MP/2016 for relief on account of force majeure events affecting Farakka Station. Prayers made in the petition are extracted hereinbelow: -

"a) Declare that the unavailability of cooling water for the Petitioner's generating station at the Ganga Feeder Canal is a Force Majeure event under the PPAs;

b) Direct the Eastern Regional Power Committee, Respondent No. 17, and the Eastern Regional Load Dispatch Centre, Respondent No. 18, not to consider the periods during which the Petitioner's generating station or units thereof remained shut-down due to Force Majeure events for the purpose of calculating the Percent Plant Availability of the Petitioner's generating station;

c) Permit the Petitioner to raise revised bills on Respondent Nos. 1 to 16 on the basis of the Percent Plant Availability calculated by excluding the days on which the Petitioner's generating station remained shut-down due to Force Majeure events;

d) Direct Respondent Nos. 1 to 16 to pay the Petitioner the difference in tariff calculated on the basis of the revised bills raised by the Petitioner; and

e) Pass such other and further order(s) and/or directions as this Hon'ble Commission may deem just, fit and proper in the facts and circumstances of the case and in the interest of justice."

(Emphasis supplied)

17. This petition has been decided by the Commission vide impugned order dated 17.11.2017 denying any relief to the appellant as sought in the petition.

18. Accordingly, the appellant is before us in this appeal.

19. We have heard Mr. Sanjay Sen, learned senior counsel appearing for the appellant, Mr. Chiranjeev Singh Marwaha, learned counsel for the 2nd respondent, Mr. Arijit Maitra, learned counsel for the 6th respondent, Mr. Pradeep Misra, learned counsel for the 9th respondent and Mr. Sachin Dubey, learned counsel for the 12th and 13th respondents. We have also perused the impugned order as well as the written submissions filed on behalf of appellant, respondent nos.2, 6 and 9.

20. The core issue which arises for reconsideration in this appeal is whether the unavailability of water in the Ganga Feeder Canal on account of less rains and diversion of water to Bangladesh under water sharing treaty constitutes a "force majeure event" as envisaged in Article 8 of the PPAs executed between the appellant and the respondents.

21. The Commission, in the impugned order, has held that water sharing treaty with Bangladesh cannot constitute as force majeure event falling within the scope and definition of the term in the PPAs. It also held that the appellant should have undertaken measures for installation of lift pumps and the non-installation thereof being decision of the appellant, and therefore, the appellant cannot claim shortage of water in Ganga Feeder Canal as force majeure event under the PPAs.

Our Analysis: -

22. It is the case of the appellant that reduction in water in Ganga Feeder Canal during the months of February, 2016 and March 2016 was unprecedented. To buttress its contentions in this regard, appellant has relied on monsoon reports for the years 2014-15 which provide rainfall data for the period from the month of June to September 2015, letter dated 15.02.2017 of the Farakka Barrage Authority, and Indo-Bangladesh Water Treaty, 1996, under which there was diversion of water from

Feeder Canal. According to the appellant, the drastic reduction in the level of water in the Ganga Feeder Canal on account of deficient monsoon rains and diversion of water from the said Canal under the Indo-Bangladesh Water Treaty constitutes force majeure events due to which the appellant was constrained to shutdown each of 06 units of its power plant during the above period.

23. "Force Majeure" has been defined in Article 8.0 of the PPA dated 13.11.2010 executed between the appellant and the respondents, which is quoted hereinbelow: -

"8.0 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 a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock-out, forces of nature, accident, act of God or any other such reason beyond the control of concerned party. Any party claiming the benefit of this clause shall reasonably satisfy the other party of the existence of such an event and give written notice within a reasonable time to the other party to t h i s e f f e c t .

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."

24. Thus, the above noted provision in the PPA specifies the events such as war, rebellion, mutiny, civil commotion, riot, strike, lockout, forces of nature, accident, act of God or any other such event beyond the control of affected party which can be termed as force majeure events. Even though, the appellant has nowhere specified during the hearing of the appeal or in the written submissions as to under which head does the events projected by it, fall, yet it can be safely inferred that the force majeure events projected by the appellant would fall under the heads "forces of nature" and "act of God".

25. An act of God or forces of nature is an event which is direct, violent, sudden and irresistible act of nature and could not, by any amount of ability, even foreseen or if foreseen, could not by any amount of human care and skill have been resisted or prevented. Generally, those acts which are occasioned by elementary forces of nature unconnected with the agency of man or other causes will come under the category of "Act of God" e.g. storm, tempest, lightening, hightide etc. It is important to note here that such an event should not be unique or ought to have happened for the first time. It

is enough that the event is extraordinary and such as could not reasonably be anticipated or prevented.

26. We may profitably refer to the following observations of the Hon'ble Supreme Court on this aspect in *KSRTC v. Mahadev Shetty*, (2003) 7 SCC 197: -

"9. The expression "act of God" signifies the operation of natural forces free from human intervention, such as lightning, storm etc. It may include such unexpected occurrences of nature as severe gale, snowstorms, hurricanes, cyclones, tidal waves and the like. But every unexpected wind and storm does not operate as an excuse from liability, if there is a reasonable possibility of anticipating their happening. An act of God provides no excuse unless it is so unexpected that no reasonable human foresight could be presumed to anticipate the occurrence, having regard to the conditions of time and place known to be prevailing. For instance, where by experience of a number of years, preventive action can be taken, Lord Westbury defined the act of God (*damnum fatale* in Scotch Laws) as an occurrence which no human foresight can provide against and of which

human prudence is not bound to recognize the possibility. This appears to be the nearest approach to the true meaning of an act of God. Lord Blancaburgh spoke of it as "an irresistible and unsearchable providence nullifying our human effort".

27. In the instant case, in so far as the Indo-Bangladesh water sharing treaty is concerned under which minimum 35000 cusecs of water during the lean season i.e. from 01 January to 31 May is to be diverted towards Bangladesh from the Ganga Feeder Canal, is concerned, it is to be noted that the treaty existed since the year 1996 and was not signed for the first time in the year 2016. Therefore, the appellant had knowledge that such a treaty exists under which some minimum amount of water is to be diverted towards Bangladesh, and therefore, the said treaty cannot be put forth as an event of force majeure affecting the level of water in the Ganga Feeder Canal in the year 2016.

28. With regards to the drastic reduction of water in the Ganga Feeder Canal on account of deficient monsoon rains in the year 2015, it is to be noted that the appellant seems to have been aware about the deficient water level in the Gang Feeder Canal and the requirement to augment water supply

for cooling water system of the plant as far back as in the year 2009 when it filed petition no.222/2009 for determination of tariff for the said Farakka Station for the period from 01.04.2009 to 31.03.2014 in which the appellant projected an additional capitalization of Rs.6810lakhs for construction of lift pumps to augment water supply to the existing cooling water system. As already noted hereinabove, the petition was disposed vide order dated 14.06.2012 thereby allowing such expenditure under Rule 9(2)(ii) of 2009 Tariff Regulations. However, the appellant appears to have given up the capitalization of lift pump scheme, so allowed by the Commission in the order dated 14.06.2012, due to some technical problems faced during excavation work for the same. The reasons for the same have been noted by the Commission in subsequent order dated 12.11.2014 passed in petition no.233/2013 and were reiterated in order dated 06.02.2017 passed in petition no.274/2014.

29. Be that as it may, it is evident that the appellant was fully conscious about the steps to be taken towards providing contingency for fluctuation in the water level in the Ganga Feeder Canal and therefore, cannot claim that such a contingency arose all of a sudden and for the first time in the year 2016.

30. It is also manifest that the reduction of the water level in the Ganga Feeder Canal was well within the knowledge and contemplation of the appellant at least since the year 2009 when the appellant envisaged construction of lift pumps to remedy such situation. Even though the appellant was constrained to abdicate the idea of construction of lift pumps due to some technical reasons, it appears that no further mitigating steps were taken by the appellant till the year 2016. We are, therefore, in agreement with the view taken by the Commission that shutdown of the plant during the subject period was solely attributable to the delay on the part of the appellant in constructing the lift pumps or initiating any other mitigating steps in order to ensure consistent and required supply of the water for the cooling water system of the power plant. Hence, the appellant cannot be allowed

to take benefit of its own fault. In this regard, we find it apposite to refer to the following observations of the Delhi High Court in *Halliburton Offshore Services Inc v. Vedanta Limited and Another*, 2020 SCC OnLine DEL 2068: -

"69. The question as to whether Covid-19 would justify non- performance or breach of a contract has to be examined on the facts and circumstances of each case. Every breach or non-performance cannot be justified or excused merely on the invocation of Covid - 19 as a force majeure

condition. The court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non- performance due to the epidemic/pandemic.

70. It is the settled position in law that a force majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing nonperformance would be only in exceptional situations. As observed in *Energy Watchdog* (supra) it is not in the domain of courts to absolve parties from performing their part of the contract. It is also not the duty of courts to provide a shelter for justifying non-

performance. There has to be a 'real reason' and a 'real justification' which the court would consider in order to invoke a force majeure clause."

31. These observations of the Delhi High Court were quoted with approval by the Hon'ble Supreme Court in *Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission*, (2022) 4 SCC 657 in the following words.

"186. In *Halliburton Offshore Services Inc. v. Vedanta Ltd.* to which reference was made by Ms Anand, the Delhi High Court aptly remarked that the outbreak of a pandemic cannot be used as an excuse for nonperformance of a contract for which the deadlines were much before the outbreak itself. In the aforesaid case, the Delhi High Court rightly observed that the court, while considering the plea of non-performance of the condition due to outbreak of the Covid-19 pandemic, ought to examine factors such as the conduct of the parties prior to the outbreak.

187. Admittedly, the Appellant has landed itself in its present predicament, due to delay in making timely payments to the respondent power generating companies. There was no pandemic at the time of filing of the petition before the MERC in 2017 and the appeal before the APTEL in 2018. It, cannot,

therefore be said that the appellant defaulted in payment of bills by reason of its financial predicament as a result of the outbreak of Covid-19 in India, which was in March 2020."

32. Monsoon reports for the years 2014 and 2015, upon which much reliance was placed on behalf of the appellant, show that the deficiency in the rainfall during the months of June to September in these two years was 12% and 14% respectively. Such deficiency in the rainfall can be said to be only marginal and not a drastic one, as contended by the appellant. However, the appellant has failed to demonstrate that such a marginal deficiency was so exceptionally adverse and in excess of statistical levels of measurement of the last 100 years and therefore, could not have been anticipated.

33. In the letter dated 15.02.2017 sent by Farakka Barrage Authority to the appellant, in response to appellant's letter dated 03.02.2017, it has been stated that reduction in water level of the Ganga Feeder Canal is a normal phenomenon of each year. However, it has been stated that during lean season of 2016 flow of Farakka Feeder Canal reduced exceptionally in comparison to flow of recent years and such reduction in year 2016 in river and subsequently in the canal was not usual one, but

phenomena in comparison to recent past years. However, no supporting data or comparative analysis of the data for the past years was produced before the Commission or before this Tribunal by the appellant in support of these observations. Therefore, the Commission has rightly discarded such observations of Farakka Barrage Authority contained in its letter. Conclusion: -

34. In view of the above discussion, we concur that the findings returned by the Commission in the impugned order that the unprecedented fall in the water flow in Ganga Feeder Canal due to hydrological factors coupled with diversion of water to Bangladesh under the Indo-Bangladesh Water Sharing Treaty, 1996 did not constitute force majeure event under Article 8 of the PPAs. Therefore, we do not find any error or infirmity in the impugned order of the Commission. The appeal is devoid of any merit and is dismissed as such.

Pronounced in the open court on this the 11th day of May, 2026.

(Virender Bhat)
Judicial Member

(Seema Gupta)
Officiating Chairperson

REPORTABLE / NON-REPORTABLE

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