IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 184 of 2020 &
IA No. 1963 of 2024 and IA Nos. 374, 985 and 986 of 2026

Dated: 14.05.2026

Present: Hon'ble Mr. Virender Bhat, Judicial Member
Hon'ble Mr. Ajay Talegaonkar, Technical Member

IN THE MATTER OF
Tripura State Electricity Corporation Ltd.
Bidyut Bhawan, North Banamalipur,
Agartala, Tripura – 799 001.

…**Appellant**

Versus

1. North Eastern Electric Power Corporation Ltd.
   Brookland Compound, Lower New Colony
   Shillong, Meghalaya – 793 003

2. North Eastern Regional Power Committee
   NERPC Complex, Dong Parmaw, Lapalang,
   Shillong, Meghalaya – 793 006

3. North Eastern Regional Load Despatch Centre
   Dongteih, Lower Nongrah, Lapalang,
   Shillong, Meghalaya – 793 006.

4. Central Electricity Regulatory Commission
   Through its Secretary
   3rd & 4th Floor, Chanderlok Building
   36, Janpath, New Delhi – 110 001.

…**Respondent(s)**

Counsel for the Appellant(s) : Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Alabhya Dhamija
Mr. Vikas Maini
Mr. Samarth Kashyap
Mr. Ranjeet Mishra

Counsel for the Respondent(s) : Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Mr. Arvind Kumar Dubey for R-1

Mr. Sethu Ramalingam for R-4

JUDGEMENT

PER HON'BLE MR. AJAY TALEGAONKAR, TECHNICAL MEMBER

1. The Present Appeal has been filed by Tripura State Electricity Corporation Limited (in short "TSECL") challenging the order dated 04.04.2019 passed by the Central Electricity Regulatory Commission (in short "CERC"/ "Respondent No. 4") in Petition No. 128/GT/2017 with regard to approval of tariff of Tripura Gas Based Power Plant (101 MW) for the period from COD of its Gas Turbine unit to 31.03.2019.

Description of the Parties

2. The Appellant, TSECL is a government company incorporated under the provisions of the Companies Act pursuant to the restructuring of the Power Department of the Government of Tripura in terms of the provisions of the Electricity Act, 2003. The Appellant is a deemed licensee engaged in the business of generation, transmission and distribution of electricity in the State of Tripura. The Appellant is also the sole beneficiary and off-taker of power generated from the Tripura Gas Based Power Project which is the subject matter of the present Appeal.

3. Respondent No. 1, North Eastern Electric Power Corporation Ltd. ("NEEPCO") is a Government of India undertaking engaged in the business of generation and sale of electricity in the North Eastern Region of India. Respondent No.1 is the developer of the Tripura Gas Based Power Project situated at Monarchak, Sepahijala District, Tripura and was the Petitioner before the Central Commission in Petition No.128/GT/2017 seeking approval of tariff for the said generating station.

4. Respondent No. 2, North Eastern Regional Power Committee ("NERPC") is a Regional Power Committee constituted under the Electricity Act, 2003 for the North Eastern Region.

5. Respondent No. 3, North Eastern Regional Load Despatch Centre ("NERLDC") is the Regional Load Despatch Centre for the North Eastern Region established under the Electricity Act, 2003.

6. Respondent No. 4, the Central Electricity Regulatory Commission (CERC), is a statutory regulatory body constituted under Section 76 of the Electricity Act, 2003.

Factual Matrix of the Case

7. Respondent No.1 entered into a Power Supply Agreement ("PSA") dated 19.03.2008 with the Appellant for establishment of a Tripura Gas Based Power Project. Under the said Agreement, NEEPCO was required to install a gas-based power plant of 104 MW capacity against the availability of natural gas to the extent of 0.5 MMACMD as confirmed by ONGC. The Appellant was designated as the sole off-taker of power generated from the Project.

8. The PSA further provided that NEEPCO would obtain the requisite approvals and clearances from the competent authorities including approval of the capital cost of the Project.

9. The Ministry of Power, Government of India accorded investment approval for execution of the Tripura Gas Based Power Project of 100 MW (nominal) + 20% at Monarchak, West Tripura vide communication dated 14.07.2009 at an approved estimated cost of Rs.421.01 Crore including IDC of Rs.27.47 Crore at December 2008 price level with a debt-equity ratio of 70:30.

10. As per the approved schedule, the Gas Turbine (GT) was to be completed within 26 months from the zero date and the Steam Turbine (ST) within 36 months from the zero date, the zero date being reckoned from the date of investment decision.

11. For implementation of the Project, NEEPCO awarded the Letter of Intent dated 23.07.2010 to BHEL for execution of the Project. The commissioning period stipulated therein was 32 months for the Gas Turbine and 36 months for the Steam Turbine. Subsequently, revised investment approval on Revised Cost Estimate-I (RCE-I) was accorded by the Ministry of Power on 23.02.2011 at a revised cost of Rs.623.44 Crore including IDC of Rs.51.09 Crore at November 2010 price level with debt-equity ratio of 70:30.

12. The actual commissioning was not achieved within the stipulated time. The actual synchronization and commissioning of the units took place as under:

- Gas Turbine- March 2015;
- Steam Turbine- January 2016

13. The Commercial Operation Dates declared for the units were:

- Gas Turbine- 24.12.2015;
- Steam Turbine- 31.03.2017

14. On 08.05.2017, NEEPCO filed Petition No.128/GT/2017 before CERC seeking approval of tariff for the Tripura Gas Based Power Plant for the period from COD of the Gas Turbine unit till 31.03.2019. CERC issued order dated 04.04.2019 ("Impugned Order") in which it condoned the delay in commercial operation and approved the capital cost claimed by the NEEPCO.

15. Aggrieved by the Impugned Order, the Appellant has preferred the present appeal.

16. The Appellant has prayed for the following relief before us:

> *"(a) allow the present appeal and set aside order dated 04.04.2019 passed by the Central Commission in CERC No. 128/GT/2017 to the extent challenged in the present appeal.*
>
> *(b) Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper."*

Issues for Consideration

17. We note from the Impugned Order that there was delay of 33 months in commercial operation of GT block and 44 months in case of ST/combined cycle. Out of this delay, 8 months delay in case of GT and ST/combined cycle has been

attributed by NEEPCO to the BHEL, the originally appointed EPC contractor. BHEL wanted to offload part of the contract to NTPC BHEL Power Projects Private Limited ("NBPPL", a joint venture of NTPC and BHEL), which was agreed by NEEPCO with initial resistance. Further, a delay of 25 months and 36 months in commercial operation of GT and ST respectively, has been attributed to non-supply of gas by ONGC.

18. Based on the submissions of the parties, we have framed following issues for our consideration:

Issue No. 1: Whether CERC erred in allowing Time Overrun of 8 months for GT and ST attributable to BHEL?

Issue No. 2: Whether CERC erred in allowing Time Overrun of 25 months and 36 months for GT and ST respectively attributable to ONGC?

Issue No. 3: Whether CERC erred in allowing the Cost-Overrun?

Submissions of the parties, and our Analysis and Conclusions thereon

"Contracts warrant crafting and not mere drafting."

— Henrietta Newton Martin-Legal Professional & Author

Issue No. 1: Whether CERC erred in allowing Time Overrun of 8 months for GT and ST attributable to BHEL?

19. The Appellant has submitted that CERC erred in condoning the delay arising from the decision of Ministry of Heavy Industries and Public Enterprises and Ministry of Power, GoI to offload a portion of the EPC works awarded to BHEL to the NBPPL. It was contended that this decision materially contributed to the delay in project execution. The Appellant further submitted that NEEPCO had initially declined to approve such offloading on the ground that it constituted a post-contractual deviation and altered the proposal approved by PIB/CCEA. In this context, reliance was placed on the communication dated 11.01.2011 issued by Ministry of Heavy Industries and Public Enterprises to Ministry of Power, seeking facilitation of the transfer of part EPC works to NEEPCO. Subsequently, after a delay of nearly five months, the proposal was considered by the Board of Directors of NEEPCO on 20.05.2011 and approved on 26.05.2011.

20. On this basis, the Appellant has contended that the time overrun was attributable to the acts and omissions of NEEPCO and its agents/vendors, particularly BHEL, and therefore such delay could not be passed on to the consumers. It was argued that the matter constituted a bilateral dispute between NEEPCO and its agents/vendors, for which consumers ought not to be burdened.

21. The Appellant has placed reliance upon the judgments of this Tribunal in ***Power Grid Corporation of India Ltd. vs. CERC & Ors., Appeal No. 58 of 2012*** and ***Power Grid Corporation of India Ltd. vs. CERC & Ors., Appeal No. 180 of 2011*** wherein it was held that delays arising on account of defects in equipment,

transportation issues or disputes between the utility and its vendor are bilateral and contractual in nature and the consequential IDC and IEDC cannot be passed on to the beneficiaries/consumers.

22. The Appellant has submitted that this Tribunal in the aforesaid judgments, observed that the responsibility to ensure proper execution, transportation and commissioning of equipment lies upon the utility and its contractor/vendor and consumers cannot be burdened with additional tariff on account of such delays. Reliance was also placed on the observations of the Tribunal that in terms of the Preamble and Section 61(d) of the Electricity Act, 2003, consumer interest is required to be safeguarded while determining tariff.

23. The Appellant further relied upon the judgment of this Tribunal in ***Pragati Power Corporation Ltd. vs. Central Electricity Regulatory Commission & Ors., Appeal No. 175 of 2015*** wherein it was held that mere prudent selection of an EPC contractor such as BHEL is not sufficient to absolve the generating company of responsibility for delays in project execution.

24. It was submitted that selection of a contractor and execution of the project are distinct aspects and the conduct of the parties during execution of the contractual arrangement is required to be examined on a case-to-case basis. The Appellant contended that the situations referred to in the ***Maharashtra State Power Generation Company Limited vs. MERC (Judgment dated 27.04.2011 in Appeal No. 72 of 2010)*** were merely indicative and not exhaustive.

25. The Appellant submitted that neither the Appellant nor the consumers could be made to bear the consequences of the acts, omissions and delays attributable

to NEEPCO and its agents/vendors, including BHEL and ONGC and on this ground alone the present Appeal deserves to be allowed.

26. On the other hand, Respondent No.1 has submitted that in April 2008 NEEPCO had invited tenders for appointment of an EPC contractor through the International Competitive Bidding route. However, only one bid was received from Gammon-Sadelmi which did not qualify on techno-commercial parameters resulting in cancellation of the tender process. Thereafter, the EPC Contract was awarded to BHEL following negotiations conducted by a high-level Negotiation Committee comprising members of the Central Electricity Authority and officials of NEEPCO since BHEL's quoted price was initially found to be excessively high.

27. Respondent No.1 submitted that the EPC Contract was awarded to BHEL on 23.07.2010. Subsequently, through letters dated 19.08.2010, 22.09.2010 and 12.10.2010, BHEL proposed offloading part of the EPC works to NBPPL. NEEPCO initially expressed its inability to accept the proposal on the ground that such offloading would constitute a post-contractual deviation and alter the proposal originally placed before the PIB/CCEA which contemplated execution of the entire EPC package by BHEL.

28. It was further submitted that the Ministry of Heavy Industries and Public Enterprises by letter dated 11.01.2011 requested the Ministry of Power to facilitate transfer of part of the EPC works to NBPPL,and thereafter the Ministry of Power vide communication dated 26.04.2011 approved the offloading of a portion of the EPC works from BHEL to NBPPL.

29. Respondent No.1 has contended that executive instructions issued by the Government are binding and enforceable and in this regard reliance was placed

on ***Kusum Ingots and Alloys vs. Union of India (2004) 6 SCC 254***. Accordingly, NEEPCO was bound to comply with the directions issued by the Central Government and therefore the delay arising therefrom could not be attributed to NEEPCO.

30. Respondent No.1 has further submitted that CERC after examining the justifications furnished by NEEPCO including the issues relating to mechanical erection works by BHEL and non-availability of gas by ONGC correctly concluded in the Impugned Order that the delay was not attributable to NEEPCO applying the principles laid down by this Tribunal in ***Maharashtra State Power Generation Company Limited vs. Maharashtra Electricity Regulatory Commission (Judgment dated 27.04.2011 in Appeal No. 72 of 2010).***

31. It was also contended that there was no imprudence on the part of NEEPCO in selecting BHEL as contractor particularly when such actions were undertaken pursuant to directions and approvals of the Government of India. Accordingly, Respondent No.1 submitted that, in terms of Clause 3.2 of the PSA, the time and cost overrun in the present case cannot be said to be attributable to NEEPCO.

Submissions of Respondent No. 4- CERC

32. CERC submitted that Clause 3.2 of the Power Purchase Agreement would apply only in cases where the delay is attributable to NEEPCO. It was contended that CERC had called upon NEEPCO to furnish detailed information regarding the entire delay in commissioning of the Project and upon a thorough examination concluded that there was no imprudence on the part of NEEPCO.

33. CERC submitted that the Impugned Order specifically dealt with the different components of delay, namely:

(i) delay of 8 months in mechanical erection of equipment applicable to the Gas Turbine ("GT") and combined cycle Steam Turbine ("ST") discussed in paragraphs 17 and 18 of the Impugned Order;

(ii) delay of 25 months in commissioning of the GT on account of non-availability of gas, discussed in paragraphs 19 to 22; and

(iii) delay of 36 months in commissioning of the Steam Turbine Generator ("STG") combined cycle discussed in paragraphs 23 and 24 of the Impugned Order.

34. According to CERC, after conducting a detailed analysis of the aforesaid factors, the Respondent Commission rightly concluded that the delay in commissioning of the Project was not attributable to NEEPCO. Consequently, Clause 3.2 of the PPA was held to be inapplicable to the facts and circumstances of the present case.

35. CERC further submitted that the Appellant's reliance upon ***Maharashtra State Power Generation Company Limited vs. Maharashtra Electricity Regulatory Commission (Judgment dated 27.04.2011 in Appeal No. 72 of 2010)*** was misplaced in light of the findings recorded in paragraph 15 of the Impugned Order.

36. These submissions of CERC are common to Issue nos. 1 and 2.

Analysis and Conclusion on Issue No. 1

37. We note that the Respondent No. 1 have relied on the judgement of this Tribunal dated 27.04.2011 ***in MSPGCL vs MERC, Appeal No. 72 of 2010***

("MSPGCL judgement"). This judgement has also been relied upon by CERC in the Impugned Order. The relevant extract of this judgement is reproduced below:

> *"7.4. The delay in execution of a generating project could occur due to following reasons:*
>
> *i) due to factors entirely attributable to the generating company, e.g., imprudence in selecting the contractors/suppliers and in executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in providing inputs like making land available to the contractors, delay in payments to contractors/suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improper co-ordination between the various contractors, etc.*
>
> *ii) due to factors beyond the control of the generating company e.g. delay caused due to force majeure like natural calamity or any other reasons which clearly establish, beyond any doubt, that there has been no imprudence on the part of the generating company in executing the project.*
>
> *iii) situation not covered by (i) & (ii) above.*
>
> *In our opinion in the first case the entire cost due to time over run has to be borne by the generating company. However, the Liquidated Damages (LDs) and insurance proceeds on account of delay, if any, received by the generating company could be retained by the generating company. In the second case the generating company could be given benefit of the additional cost incurred due to time over-run. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any, to reduce the capital cost. In the third case the additional cost due to time overrun including the LDs and insurance proceeds could be shared between the generating company and the consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/suppliers. If the time schedule is taken as per the terms of the contract, this may result in imprudent time schedule not in accordance with good industry practices."*

38. It is seen from the Impugned Order that the CERC has concluded that there is no imprudence on the part of the NEEPCO in selection of the BHEL as contractor and that the resons for delay fall under para 7.4(ii) of the MSPGCL judgement i.e.

reasons beyond the control of the generating company NEEPCO. The same argument has been put forward before us by NEEPCO.

39. In the case in hand, based on the circumstances mentioned by NEEPCO leading to appointment of BHEL as EPC contractor, we are satisfied there was no imprudence in appointment of BHEL as EPC contractor. However, we note that in the reasons attributable to the generating company under para 7.4 (i) of the MSPGCL judgement also includes imprudence "in executing contractual agreements including terms and conditions of the contracts"; and we need to examine whether conduct of NEEPCO falls under this categoty.

40. The Appellant has raised several issues relating to the way the original EPC contractor namely BHEL was allowed to jettison part of the contract in favour of NBPPL. The thrust of the Appellant's argument is that the contractual issues between generating company and its contractors are bilateral in nature and should not lead to increased capital cost for tariff determination to the beneficiary who had no say in these matters. To buttress their argument, the Appellant has referred to this Tribunal's judgements dated 10.05.2012 in ***PGCIL vs CERC & Ors, Appeal No. 180 of 2011*** and dated 24.09.2013 in ***PGCIL vs CERC & Ors, Appeal No. 58 of 2012.*** Since the latter judgement relies on the former, we are only extracting relevant portion of judgement in Appeal No. 180 of 2011:

> *"12. The facts in the reported case are completely different as the Hon'ble Court was referring to the bilateral contract between the parties where the clause appeared. The Central Commission has not unjustifiably held that the damages in the form of IDC and IEDC should not be passed on to the beneficiaries. The manufacturer of ICT and its transportation is essentially a matter between the appellant and its vendor. This is a matter contractual between them alone. A number of factors, namely, whether in the construction of the ICT at the manufacturer's end there were defects or not, whether adequate precautionary measures were taken for transportation of the machine or not, whether the ICT was sent back with utmost dispatch or*

> *not, whether there was any delay in effecting repairs or not, whether there was any agreement between the appellant and the manufacturer or not, what were the terms and conditions, if any, so agreed to between the manufacturer and the appellant, in this regard are all unknown and in the circumstances it cannot be said in a broad sweep that the delay can not be attributed to appellant and/or the manufacturer. Rightly the Commission has said in the impugned order that it is a bilateral issue between the manufacturer and the appellant. Responsibility is upon both to ensure that the machine is transported and journeyed safely and it cannot be said that the parties must not take into account the condition of road for transportation. It is not a case of breakdown, while working without any human fault, of machinery all on a sudden over which the party could not have any prior control. In the circumstances, it cannot be said that the order complained of is devoid of reasonable analysis of the factual situation and the Commission committed any illegality."*

41. Though the above mentioned judgment is about manufacturing defects but the broad principle that contractual issues are bilateral in nature between the generating company and its contractor can be applied here. Similarly, as in the case referred to above where issues arose concerning the contractual provisions relating to manufacturing defects and the manner of their implementation, the present case also gives rise to several questions pertaining to the contractual framework, namely:

(i) whether the contract contained any provision permitting full or part exit or termination by a party;

(ii) if such an exit provision existed, whether the contract contemplated payment of any compensation or damages upon exercise of such right of exit;

(iii) if compensation or damages were indeed contemplated, whether the same were enforced or sought to be enforced by the generating company; and

(iv) if the contract neither contained an effective exit provision nor provided for any meaningful compensatory mechanism, whether the same would

not indicate inadequacy or weakness in the contractual arrangement itself.

42. These matters clearly fall within the exclusive domain of the generating company, including the negotiation, drafting and enforcement of the contractual terms. The beneficiary-Appellant neither had any role in nor any control over the terms and conditions of such contract. In ***Coats Viyella India Ltd. vs. India Cement Ltd. and Anr. (2000) 9 SCC 376***, the Hon'ble Supreme Court has held that where the agreement was a principal-to-principal contract, the liabilities arising thereunder remained confined to the contracting parties and could not be diverted to third parties merely because of separate arrangements entered into by one of the parties.

43. We are also not impressed with the argument of NEEPCO that it had initially resisted exit of BHEL and handing over of the contract to NBPPL; and that it had to follow the executive instruction. The letter dated 26.04.2011 from Joint Secretary, Ministry of Power, which NEEPCO as termed as executive instructions is actually a D.O letter. The content of this letter dated 26.04.2011 is reproduced below:

> *" Please refer to your letter no. NEEPCO/D(T)/TGBP-18 dated 4th April, 2011. It has been decided in the meeting of Secretaries, Power and Dept. of Heavy Industry that BHEL will off-load the work of Monarchak Project (100 MW) to NBPPL. However, BHEL will continue with all its contractual obligation.*
>
> *You are requested to convey your consent on the above to BHEL with a copy to this Ministry at the earlies."*

44. NEEPCO has relied upon the ***Kusum Ingots and Alloys vs Union of India, (2004) 6 SCC 254*** to contend that executive instructions are binding and enforceable. We find the said judgement to be wholly inapplicable to the present case. The issue before the Hon'ble Supreme Court in Kusum Ingots case was confined to determination of territorial jurisdiction of a High Court under Article 226 (2) of the Constitution and the question as to when a cause of action can be said to arise.

45. In that context, the Hon'ble Supreme Court observed that legislation may include delegated legislation, subordinate legislation, executive orders and even executive instructions and further examined whether issuance of such orders/ instructions could give rise to a part of the cause of action for the purposes of territorial jurisdiction. However, the judgment nowhere lays down any proposition regarding the binding nature, enforceability or legal sanctity of executive instructions *inter se* parties. The reliance placed by NEEPCO on the said judgment for that proposition is therefore misplaced. In any case, the letter in question here is a D.O. letter that too making a request to NEEPCO to offload a part of EPC work from BHEL to NBPPL. In our view D.O letter is not an executive instruction. We note a judgement regarding implementability of advice in D.O letter in judgement dated 04.11.2020 of Madhya Pradesh High Court in ***Suresh Madhukar Ganorkar vs Union Of India, (W.P No. 11076/2020).*** The relevant extract of this judgement is reproduced below:

> *"10. By said D.O private establishment are advised to extend their coordination by not terminating their employees particularly casual or contractual workers from job or reduce wages.* ***Letter is given number DO which means Demi Official Letter. Demi Official Letters are different from Official Letters in that they are in formal. Demi Official Communication is resorted to when writer wishes to make clear to addressee that he, the writer, is not using his authority rather his relationship with addressee to communicate a request or suggestion. Impugned letter is only an advice to private***

> ***establishment so that consequences of pandemic can be dealt with effectively.*** *On going through order dated 17.05.2020, it is clear that certain directions were issued by National Disaster Management Authority in excise of their power under Section 6 of Disaster Management Act, 2005, such order is dated 24.03.2020, 14.04.2020, 01.05.2020. Said orders are passed as lock-down measures to contain the spread of COVID-19 in the country. NEC in exercise of power under Section 10(2)(l) of Disaster Management Act, 2005 has issued orders in respect of lock-down measures on 24.03.2020, 29.03.2020, 14.04.2020, 15.04.2020 and 01.05.2020. From perusal of all the documents filed by petitioners as well as by respondents, it is clear that letter dated 20.3.2020 relied upon by petitioners is not a direction or advisory issued under Disaster Management Act, 2005 but only a Demi Official Letter in form of an advice issued to Chief Secretary of the State's. Such letter does not have statutory force and it cannot be implemented. Petition for implementation of such advisory is not maintainable before High Court."*
>
> *(Emphasis supplied)*

46. The Appellant has also relied on the clause 3.2 and 12 of the PSA. These clauses are extracted below:

> *"3.2 NEEPCO shall obtain in principle clearance for setting up the project from appropriate commission/authority including approval of capital cost of project. No time and cost overrun due to reasons attributable to NEEPCO shall be entertained by the Bulk Power Customer.*
>
> *…*
>
> *12.0 Force Majeure:*
>
> *Both the parties shall ensure compliance of the terms of this agreement. However, no party shall be liable for any loss or damage whatsoever arising out of failure to carry out the terms of this agreement to the extent that such failure is due to force majeure events such as rebellion, mutiny, civil commotion, riot, strike, lock out, fire, explosion, flood, drought, cyclone, lightening, earthquake, war or other forces, accident, landslide, sabotage, terrorism, malicious act of kidnapping or act of God. But, any party claiming the benefit of this clause shall satisfy the other party of the existence of such an events)."*

47. However, the setteled position is that regulations on a specific subject can make inroads into the agreements ***(PTC India Limited vs. CERC (2010) 4 SCC 603).*** When we go through the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 ("CERC Tariff Regulations 2014"), which were applicable during the period of 2014-19 when the generating station was commissioned, we come across Regulation 3 (54) (definition of SCOD), Regulation 10 (Prudence Check of Capital Expenditure), Regulation 11 (Interest during construction (IDC), Incidental Expenditure during Construction (IEDC)) and Regulation 12 (Controllable and Uncontrolable factors). These Regulations are extracted below:

> *"(54) **'Scheduled Commercial Operation Date or SCOD'** shall mean the date(s) of commercial operation of a generating station or generating unit or block thereof or transmission system or element thereof as indicated in the Investment Approval or as agreed in power purchase agreement or transmission service agreement as the case may be, whichever is earlier;*
> *…*
>
> ***10. Prudence Check of Capital Expenditure:** The following principles shall be adopted for prudence check of capital cost of the existing or new projects:*
> *(1) In case of the thermal generating station and the transmission system, prudence check of capital cost may be carried out taking into consideration the benchmark norms specified/to be specified by the Commission from time to time:*
>
> *Provided that in cases where benchmark norms have not been specified, prudence check may include scrutiny of the capital expenditure, financing plan, interest during construction, incidental expenditure during construction for its reasonableness, use of efficient technology, cost over-run and time over-run, competitive bidding for procurement and such other matters as may be considered appropriate by the Commission for determination of tariff:*
> *Provided further that in cases where benchmark norms have been specified, the generating company or transmission licensee shall submit the reasons for exceeding the capital cost from benchmark norms to the satisfaction of the Commission for allowing cost above benchmark norms.*
>
> *(2) The Commission may issue new guidelines or revise the existing guidelines for vetting of capital cost of hydro-electric projects by an*

independent agency or an expert and in that event the capital cost as vetted by such agency or expert may be considered by the Commission while determining the tariff for the hydro generating station.

(3) The Commission may issue new guidelines or revise the existing guidelines for scrutiny and approval of commissioning schedule of the hydro-electric projects in accordance with the tariff policy issued by the Central Government under section 3 of the Act from time to time which shall be considered for prudence check.

(4) Where the power purchase agreement entered into between the generating company and the beneficiaries provides for ceiling of actual capital expenditure, the Commission shall take into consideration such ceiling for determination of tariff for prudence check of capital cost.

11. Interest during construction (IDC), Incidental Expenditure during Construction (IEDC)

(A) Interest during Construction (IDC):

(1) Interest during construction shall be computed corresponding to the loan from the date of infusion of debt fund, and after taking into account the prudent phasing of funds upto SCOD.

(2) In case of additional costs on account of IDC due to delay in achieving the SCOD, the generating company or the transmission licensee as the case may be, shall be required to furnish detailed justifications with supporting documents for such delay including prudent phasing of funds:

Provided that if the delay is not attributable to the generating company or the transmission licensee as the case may be, and is due to uncontrollable factors as specified in Regulation 12 of these regulations, IDC may be allowed after due prudence check:

Provided further that only IDC on actual loan may be allowed beyond the SCOD to the extent, the delay is found beyond the control of generating company or the transmission licensee, as the case may be, after due prudence and taking into account prudent phasing of funds.

(B) Incidental Expenditure during Construction (IEDC):

(1) Incidental expenditure during construction shall be computed from the zero date and after taking into account pre-operative expenses upto SCOD:

Provided that any revenue earned during construction period up to SCOD on account of interest on deposits or advances, or any other receipts may be taken into account for reduction in incidental expenditure during construction.

(2) In case of additional costs on account of IEDC due to delay in achieving the SCOD, the generating company or the transmission licensee as the case

may be, shall be required to furnish detailed justification with supporting documents for such delay including the details of incidental expenditure during the period of delay and liquidated damages recovered or recoverable corresponding to the delay:

Provided that if the delay is not attributable to the generating company or the transmission licensee, as the case may be, and is due to uncontrollable factors as specified in regulation 12, IEDC may be allowed after due prudence check:

Provided further that where the delay is attributable to an agency or contractor or supplier engaged by the generating company or the transmission licensee, the liquidated damages recovered from such agency or contractor or supplier shall be taken into account for computation of capital cost.

(3) In case the time over-run beyond SCOD is not admissible after due prudence, the increase of capital cost on account of cost variation corresponding to the period of time over run may be excluded from capitalization irrespective of price variation provisions in the contracts with supplier or contractor of the generating company or the transmission licensee.

12. Controllable and Uncontrollable factors: *The following shall be considered as controllable and uncontrollable factors leading to cost escalation impacting Contract Prices, IDC and IEDC of the project :*

(1) The "controllable factors" shall include but shall not be limited to the following:
a) Variations in capital expenditure on account of time and/or cost overruns on account of land acquisition issues;
b) Efficiency in the implementation of the project not involving approved change in scope of such project, change in statutory levies or force majeure events; and
c) Delay in execution of the project on account of contractor, supplier or agency of the generating company or transmission licensee.

(2) The "uncontrollable factors" shall include but shall not be limited to the following:
i. Force Majeure events.; and
ii. Change in law.

Provided that no additional impact of time overrun or cost over-run shall be allowed on account of non-commissioning of the generating station or associated transmission system by SCOD, as the same should be recovered through Implementation Agreement between the generating company and the transmission licensee:

> *Provided further that if the generating station is not commissioned on the SCOD of the associated transmission system, the generating company shall bear the IDC or transmission charges if the transmission system is declared under commercial operation by the Commission in accordance with second proviso of Clause 3 of Regulation 4 of these regulations till the generating station is commissioned:*
>
> *Provided also that if the transmission system is not commissioned on SCOD of the generating station, the transmission licensee shall arrange the evacuation from the generating station at its own arrangement and cost till the associated transmission system is commissioned."*

48. We note that in this case, the PSA does not mention any completion date. However, from the clause 3.2, it is clear that it relies on the investment approval for referencing time and cost over-run. We also notice from the Impugned Order that CERC has also rightly computed time over run with reference to the definition of SCOD which in turn gives upper limit as per investment approval. However, CERC has erred in not considering Regulation 12 which puts "*Delay in execution of the project on account of contractor, supplier or agency of the generating company or transmission licensee*" under the category of controllable factors. Therefore, according to CERC's own tariff regulation (Regulation 11 read with Regulation 12), the cost escalation empacting Contract Prices, IDC and IEDC should not have been allowed. Even NEEPCO has attributed the delay to BHEL; the only contention advanced by NEEPCO is that it cannot be held responsible for the same.

49. Further, NEEPCO initially opposed the proposal of BHEL for off-loading a part of the contract to NBPPL, though the same was subsequently accepted. The record indicates that considerable time was consumed in the process of deliberation and approval of the said proposal, which contributed to the delay in execution. Without expressing any opinion on whether BHEL was justified in seeking such off-loading or whether the initial stand of NEEPCO was correct, it

cannot be denied that the delay arising from the decision-making process is attributable, at least in part, to NEEPCO.

50. In view of the above analysis, we are of the opinion that NEEPO can not absolve itself from the responsibility of time over run of 8 months by attributing it to BHEL. Further, according to Regulation 11 and 12 of the CERC Tariff Regulations 2014, the factors attributable to the contractors falls in the category of controllable factors and calls for disallowance of the cost escalation impacting contract prices, IDC and IEDC. **Therefore, we conclude that CERC erred in allowing time over-run of 8 months, which was attributed by NEEPCO to BHEL.**

Issue No. 2: Whether CERC erred in allowing Time Overrun of 25 months and 36 months for GT and ST respectively attributable to ONGC?

51. The Appellant has submitted that CERC erred in condoning the delay attributed to non-supply of gas by ONGC.The Appellant has pointed out that under the Gas Supply Agreement ("GSA") dated 05.06.2008, ONGC was required to commence supply of gas with effect from 23.03.2013; however, the actual supply commenced only on 03.02.2015. The Appellant has contended that the dispute pertaining to delay in gas supply was purely contractual and bilateral in nature between NEEPCO and ONGC. It was submitted that the Appellant was not a privy to the GSA executed between the parties and, therefore, no liability arising out of such contractual issues could be fastened upon the consumers.

52. The Appellant submitted that the case sought to be set up by NEEPCO/ Respondent No.1 that the commissioning delay was caused due to force majeure events beyond its control is wholly misconceived and unsupported by the contractual framework between the parties.

53. The Appellant contended that Clause 12 of the Power Sale Agreement specifically enumerates the circumstances constituting force majeure including events such as rebellion, riots, strikes, fire, explosion, flood, earthquake, war, landslide, sabotage, terrorism and acts of God. It was submitted that the clause further mandates that the party claiming force majeure must establish the existence of such events to the satisfaction of the other party.

54. According to the Appellant, in view of the express terms of Clause 12 of the PSA, NEEPCO is estopped from enlarging the scope of the force majeure provision by treating executive directions, delays by contractors or difficulties faced by agents/vendors in procurement of raw materials as force majeure events. It was further submitted that no force majeure notice was ever invoked by Respondent No.1 under the PSA seeking protection under the said clause. Hence, the PSA, being a commercial contract is required to be interpreted strictly in accordance with its terms and no meaning beyond the express provisions thereof can be imported. In support thereof, reliance was placed on ***Nabha Power Ltd. vs. PSPCL & Ors., (2018) 11 SCC 508***.

55. The Appellant further submitted that both parties were bound by the terms of the PSA which clearly delineated their respective rights and obligations and therefore Respondent No.1 could not raise pleas dehors the agreement. It was also contended that neither Clause 12 of the PSA nor Regulation 3(25) of the

CERC Tariff Regulations 2014 was considered or discussed by CERC in the Impugned Order.

56. According to the Appellant, there was no finding whatsoever regarding force majeure in the Impugned Order and the plea has been raised by Respondent No.1 for the first time in the present Appeal. The Appellant additionally submitted that the GSA executed between NEEPCO and ONGC contained specific provisions under Clause 23.2 enabling termination and other legal remedies in the event of breach.

57. However, Respondent No.1 failed to disclose any action or remedy pursued against ONGC for non-performance under the said agreement. It was therefore contended that, having waived its contractual remedies under the GSA, Respondent No.1 cannot seek to pass on the consequences of such breach to the Appellant and the consumers.

58. The Appellant submitted that CERC erred in condoning the delay which was solely attributable to NEEPCO. It was contended that CERC failed to appreciate the true import of Clause 3.2 of the Power Sale Agreement which specifically provides that NEEPCO shall obtain the requisite approvals, including approval of the capital cost of the Project and that no time or cost overrun attributable to NEEPCO shall be entertained by the Bulk Power Customer.

59. The Appellant submitted that the aforesaid clause must be interpreted to include delays caused not only directly by NEEPCO but also by its agents/vendors, including BHEL and ONGC. It was further contended that Clause 3.2 of the PSA is required to be read conjointly with Clause 6 of the Investment Approval on the Revised Cost Estimate-I dated 23.02.2011 which stipulates that any increase in

cost beyond the approved RCE-I, except on account of foreign exchange variation as per contract shall be borne by NEEPCO from its own resources/borrowings and that NEEPCO shall not seek any budgetary support from the Government.

60. Respondent No.1 referred to Clauses 3.2 and 7 of the PSA executed between the parties on 19.03.2008. Clause 3.2 provides that NEEPCO shall obtain the requisite approvals including approval of the capital cost of the Project and that no time and cost overrun attributable to NEEPCO shall be entertained by the Bulk Power Customer. Reliance was also placed on Clause 7 of the PSA relating to tariff determination which stipulates that tariff for supply of power from the Project shall be determined by the Central Commission and pending such determination, provisional tariff could be worked out by NEEPCO based on the applicable CERC Regulations and estimated completion cost subject to subsequent adjustment upon final tariff determination by the Central Commission.

61. On the other hand, the Respondent No.1 submitted that the delay in commissioning of the GT and the combined cycle ST Generator was not attributable to NEEPCO.

62. Respondent No.1 has submitted that the delay in commissioning of the Project was primarily caused by non-supply of gas by ONGC under the GSA. It was contended that although ONGC was contractually required to commence gas supply from 23.03.2013, actual supply commenced only on 03.02.2015.

63. According to Respondent No.1, the delay occurred due to reasons beyond its control, particularly the delay on the part of ONGC in laying the gas pipeline. It was further submitted that considering the terrain and location of the Project, procurement of gas from any alternate source was not feasible. Respondent No.1

submitted that the Gas Turbine (65.42 MW) had already been made ready by September 2013 as per the letter dated 11.07.2013 issued by the Central Electricity Authority to ONGC. It was further pointed out that the Government of Tripura, through letters dated 14.08.2013 and 07.09.2013 addressed to the Ministry of Petroleum and Natural Gas had also intimated that the Gas Turbine would be ready from September 2013 onwards. Despite the readiness of the Gas Turbine, Respondent No.1 submitted that synchronization could only take place on 11.03.2015 and commercial operation was declared on 24.12.2015 due to delayed and intermittent gas supply by ONGC.

64. It was submitted that gas supply commenced only on 03.02.2015 and remained intermittent during the periods from 24.08.2015 to 07.09.2015 and from 05.10.2015 to 16.10.2015. According to Respondent No.1, continuous gas supply was available only between 27.11.2015 and 29.02.2016 after which the supply was again discontinued.

65. Respondent No.1 further relied upon the letter dated 25.05.2016 issued by the Secretary, Ministry of Petroleum and Natural Gas following a meeting involving the Ministry of Power, ONGC, and NEEPCO wherein it was intimated that ONGC would be in a position to supply the full contracted quantity of gas on a sustained basis only by the end of December 2016.

66. Respondent No.1 submitted that the delay was wholly beyond its control and that it had taken all possible steps to mitigate the consequences thereof. It was therefore contended that the case squarely falls within scenario (ii) contemplated in ***MSPGCL vs. MERC & Ors. (Judgment dated 27.04.2011 in Appeal No. 72 of 2010***.

Analysis and Conclusion on Issue No. 2

67. We note that to support the case of the delay due to the non-suply of gas by the ONGC, the Appellant has advanced similar argument as in case of delay attributable to BHEL, namely the matter is bilateral contractual issue and as a beneficiary it had no control over it.

68. In this case also, we find no imprudence in selection of ONGC as supplier of the gas. We are also unable to agree with Appellant that NEEPCO could have simply terminated the GSA. In the absence of an operational gas grid in the North-Eastern Region at the relevant time (the implementation of the North East Gas Grid project having commenced much later), there appears to have been little practical alternative but to continue the contractual arrangement with ONGC. However, NEEPCO could have secured itself (and in turn the beneficiary) by having appropriate provision for penalty in case of breach of contract in general and non-supply of gas in particular. It appears that either such penalty provision was not there in the GSA or it was not enforced. In this case too, the analysis about delay attributable to suppliers falling in the category of controllable factors is equally applicable in accordance with Regulation 11 and 12 of the CERC Tariff Regulations 2014.

69. We do not find force in the contention of the NEEPCO that non-supply of gas is a Force Majeure event. Even if for the time being we disregard the rival contention of the Appellant that there was not even whisper of such argument before CERC, and that this has been put forward for the first time before us at the appellate stage, we find that the nature of this event matches neither with the definition of Force Majeure as contained in clause 12 of the PSA nor with that in Regulation 3 (25) of the CERC Tariff Regulations 2014. If it was Force Majeure

event of the ONGC for the purpose of GSA, such event does not become Force Majeure event of NEEPCO, since this has not been specificcaly mentioned in the PSA.

70. **In view of the above analysis, in response to question (ii) also we conclude that CERC erred in allowing time over-run of 25 months and 36 for delay in commercial operation of GT and ST respectively attributable by NEEPCO to the non-supply of gas by ONGC.**

Issue 3: Whether CERC erred in allowing the Cost-Overrun?

71. The Appellant has submitted that CERC erred in allowing the cost overrun claimed by Respondent No.1. It was contended that the principal components contributing to the cost overrun included;

(i) freight and insurance costs,
(ii) cost of plant civil works executed by BHEL,
(iii) establishment expenses, and
(iv) Interest During Construction (IDC).

72. According to the Appellant, the increase in such costs occurred due to the acts, omissions and delays attributable to NEEPCO and/or its agents and vendors. The Appellant further submitted that CERC failed to appreciate that the issues relating to both time overrun and cost overrun were essentially bilateral and contractual disputes between NEEPCO and its contractors/vendors and therefore the consequences thereof could neither be condoned nor passed on to the Appellant and the consumers.

73. It was argued that consumers/beneficiaries cannot be burdened with higher tariff arising out of delays attributable to Respondent No.1 and its vendors. The Appellant also contended that in terms of the Preamble and Section 61(d) of the Electricity Act, 2003, the Commission is under a statutory obligation to safeguard consumer interests and ensure supply of electricity at reasonable rates. It was submitted that permitting the claims of Respondent No.1 to be added to the capital cost would impose an unwarranted financial burden upon consumers contrary to the mandate of the Act.

74. The Appellant has submitted that CERC erred in relying upon the letter dated 14.06.2017 issued/vetted by the Central Electricity Authority ("CEA") while determining tariff for FY 2017-19. It was contended that CERC failed to appreciate that due to delays attributable to NEEPCO, the project cost had escalated to Rs. 1062.24 Crores at October 2016 price level which was still pending approval from the Ministry of Power ("MoP").

75. The Appellant has pointed out that the Impugned Order itself records that Revised Cost Estimate-II ("RCE-II") for Rs. 1062.24 Crores was submitted to the MoP on 27.02.2018 and approval thereof was still awaited. Despite acknowledging the absence of approval, CERC proceeded to determine tariff on the basis of the said projected cost which according to the Appellant is contrary to Section 61(d) of the Electricity Act, 2003.

76. The Appellant further submitted that there was a substantial and unjustified escalation in various cost components between the approved RCE-I and the projected RCE-II, resulting in an overall financial impact of Rs. 341.64 Crores. The increase included freight and insurance costs from Rs. 6 Crores to Rs. 39.44 Crores (557% increase), plant civil works by BHEL from Rs. 55.66 Crores to Rs.

178.63 Crores (220.93% increase), establishment expenses from Rs. 10 Crores to Rs. 103.08 Crores (930% increase) and IDC from Rs. 51.09 Crores to Rs. 143.24 Crores (180% increase).

77. According to the Appellant, such steep escalation would impose an undue burden upon the beneficiaries and consumers. In view thereof, the Appellant contended that reliance upon the CEA-vetted letter dated 14.06.2017, in the absence of final approval from the MoP was wholly misplaced and ought not to have been considered by CERC while passing the Impugned Order.

78. The Appellant further submitted that if the capital cost determined by CERC is not aligned with the terms of the PSA and the approved RCE-I cost sanctioned by the MoP, the end consumers would be burdened with an increased retail tariff of approximately Rs. 0.57/kWh which would be contrary to Section 61(d) of the Electricity Act. In support thereof, reliance was placed upon MSPGCL vs. MERC & Ors., Appeal No. 72 of 2010.

79. The Appellant submitted that the tariff determination undertaken by CERC defeats the very purpose and object behind the establishment of the gas-based power plant in the State of Tripura. It was contended that the Project was conceived with the objective of ensuring supply of electricity at reasonable and affordable tariff to consumers in the State.

80. According to the Appellant, if the tariff determined under the Impugned Order is allowed to prevail, the substantial escalation in project cost would compel the Appellant to levy higher tariff in order to meet mounting arrears and recurring tariff liabilities. Consequently, the consumers of the State would be deprived of the intended benefit of affordable electricity from the gas-based generating station.

81. On the other hand, the Respondent No.1 has submitted that although the actual capital cost approved under RCE-I by the Ministry of Power vide approval dated 23.02.2011 was Rs. 623.44 Crores at November 2010 price level, the completion cost subsequently escalated to Rs. 1062.24 Crores at October 2016 price level. However, it was contended that such escalation was not attributable to NEEPCO.

82. Respondent No.1 submitted that similar to RCE-I, the RCE-II for Rs. 1062.24 Crores was also examined by the Central Electricity Authority, Ministry of Power, Government of India, which, vide letter dated 14.06.2017 found the revised cost estimate to be "generally in order." The letter dated 14.06.2017 is as follows:

> *"The RCE-11 (October, 2016 Price Level) for Tripura Gas Based Power Project, Monarchak is estimated as Rs. 1062.24 crore (as per NEEPCO letter dated 26.05.2017) including the hard cost of Rs. 919.00 crores and IDC, FC & actual FERV amounting to Rs. 143.24 crore based on the debt/equity ratio 70:30 and is generally in order."*

83. The said estimate included hard cost of Rs. 919 Crores along with IDC, financing charges and actual FERV amounting to Rs. 143.24 Crores based on a debt-equity ratio of 70:30. Respondent No.1 reiterated that the delay and consequent cost escalation were not attributable to NEEPCO.

84. Respondent No.1 further submitted that substantial dues amounting to Rs. 103,68,43,949/- for the period 2017-19 remained outstanding from the Appellant despite repeated demands for payment. It was further contended that vide letter dated 03.03.2022, the Appellant itself admitted liability to the extent of 50% of the total arrears.

85. Respondent No.1 has also submitted that the Appellant had signed the reconciliation statement of outstanding dues as on 31.12.2022 which incorporated the revised project cost and tariff determined by CERC in its Order dated 26.06.2021 passed in Petition No. 271/GT/2019 concerning truing-up of tariff for the period 24.12.2015 to 31.03.2019.

86. According to Respondent No.1, the Appellant by signing the reconciliation statement accepted the capital cost and tariff determined in the truing-up proceedings. It was further submitted that no appeal had been preferred against the said truing-up order and, therefore, the Order dated 26.06.2021 had attained finality.

87. Respondent No.1 additionally contended that the Appellant was aware of the escalated project cost as early as 2015. It was submitted that the Appellant had been given the option either to surrender or continue with the allocated power in terms of the PPA.

Submissions of Respondent No. 4- CERC

88. With regard to the revised capital cost, Respondent No. 4 relied upon paragraph 34 of the Impugned Order wherein the Respondent Commission observed that since the time overrun had been condoned and the Central Electricity Authority had recommended the completion cost of Rs. 1062.24 Crores, the said cost was considered for tariff determination.

89. In response to the Appellant's contention that the approved tariff would impose an undue burden, Respondent No. 4 submitted that the tariff had been computed strictly in accordance with the applicable statutory provisions.

Analysis and Conclusion on Issue No. 3

90. We have extracted clause 3.2 of the PSA in earlier part of this judgement. This clause refers to in-principle approval including that of the capital cost of the project from appropriate commission/ authority. Since Ministry of Power, GoI had conveyed the original investment approval vide letter dated 14.07.2009 and Revised Estimate (RCE-I) vide letter dated 23.02.2011, it is clear that the GoI is the appropriate authority in this case. The second sentence of this clause also mentions that no time or cost overrun attributable to NEEPCO shall be entertained by the TSECL . This effectively means that the capital cost contained in such approval will be the ceiling limit. It is clear from paragraphs 29 and 34 of the Impugned Order that CERC has treated letter dated 06.10.2015 from Director, CEA to Under Secretary, Ministry of Power as revised approved cost estimate (RCE-II). In view of the forgoing, we find considerable weight in the contention of the Appellant that aforesaid letter from CEA was recommendation to the Ministry of Power and that CERC has erred in assuming this to be the revised investment approval.

91. We are conscious of the fact that regulations on a specific subject have overriding effect on the provisions of the agreement, and therefore, the capital cost mentioned in the RCE-I would not automatically become a ceiling. In this regard, Regulation 10 of the CERC Tariff Regulation 2014 is relevant, which we have extracted in the earlier part of this judgement. Sub-Regulation (4) of this Regulation provides that if the power purchase agreement between the generating company

and the beneficiaries provide for the ceiling limit of capital expenditure, the same shall be taken into consideration by the Commission. Therefore, in accordance with CERC Tariff Regulation, the least CERC should have done was to carry out the prudence check on the capital cost with RCE-I as reference. However, since RCE-I is at 2010 price level, the capital cost mentioned in it may have to be brought to the appropriate price level.

92. In the earlier part of this judgement, we have also extracted Regulation 12 of the CERC Tariff Regulations 2014 which requires CERC to consider controllable and uncontrollable factors leading to cost escalation impacting Contract Prices, IDC and IEDC of the project. This Regulation also inter-alia places delay in execution of the project on account of contractor, supplier or agency of the generating company in the category of controllable factors. In our analysis on Issue Nos. 1 and 2, we have already concluded that NEEPCO is not entitled to IDC and IEDC for the delay, which has been attributed by it to BHEL and ONGC. In view of the Regulation 12, we are of the opinion that any cost escalation impacting Contract Prices due to delay also need to be disallowed.

93. Since we have disallowed any cost attributable to the period of delay, any performance guarantee, LD, penalty or insurance proceeds relating to delay, if received, shall be retained by the NEEPCO.

94. We are not impressed with the argument of Respondent No.1 that the Appellant had signed the reconciliation statement of outstanding dues as on 31.12.2022, which incorporated the revised project cost and tariff determined by CERC in its Order dated 26.06.2021. There was no stay on the Impugned Order and therefore signing of the reconciliation by the Appellant only reflcts legally prevailing position, and in no way forfeits their right to appeal.

95. **Therefore, in view of the forging we conclude that the prudence of the capital cost need to be checked with reference to RCE-I and not in accordance with cost mentioned in the letter dated 14.06.2017 vetted by CEA. The RCE- I was at 2010 price level and therefore the capital cost mentioned in it has to be brought to the appropriate price level. Further, any cost escalation impacting Contract Prices due to delay also need to be disallowed.**

96. We find it pertinent to state that after we had reserved Judgement in this Appeal, the Appellant had filed two IAs Nos. 986 and 985 of 2026 with the prayer for urgent listing and directions to Respondent No. 1 to withdraw invoices dated 02.03.2026 from PRAAPTI Portal respectively. These IAs were in view of the trigger date being 17.05.2026. Since, we are pronouncing the judgment before this trigger date, no further directions are required in the aforesaid IAs. The same stand disposed off as having become infructuous.

ORDER

For the reasons as stated above, we are of the considered view that the captioned Appeal No. 184 of 2020 has merit and is allowed.

The Impugned Order dated 04.04.2019 passed by the CERC in Petition No. 128/GT/2017 is set aside to the extent it:

a) condones the time overrun of 8 months attributable to BHEL in execution of the EPC contract;

b) condones the time overrun of 25 months and 36 months attributable to delay in supply of gas by ONGC for commissioning of the GT and ST respectively; and
c) allows capitalization of cost escalation, including escalation impacting contract prices, IDC and IEDC, arising out of the aforesaid delays.

The matter is remanded to CERC for fresh determination of tariff and admissible capital cost in terms of the observations made in this Judgment. CERC shall carry out prudence check of the capital cost with reference to RCE-I and not in accordance with cost mentioned in the letter dated 14.06.2017 vetted by CEA. The capital cost approved in the RCE- I was at 2010 price level and may have to be brought at the appropriate price level.

The Captioned Appeal and pending IAs, if any, are disposed of in the above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 14th DAY OF MAY, 2026.

(Ajay Talegaonkar)	**(Virender Bhat)**
Technical Member	**Judicial Member**

REPORTABLE / ~~NON-REPORTABLE~~

kns/mkj/kks