

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 92/MP/2020
along with
IA No. 5 of 2020
and
IA No. 66 of 2020**

Coram:

**Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P.K. Singh, Member**

Date of Order: 11th November, 2021

In the matter of:

Petition under Section 79(1)(c), Section 79(1)(f) and 79(1)(k) of the Electricity Act, 2003 read with Regulation 14 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long term Access and Medium-term Open Access inter-State Transmission and related matters) Regulations, 2009, seeking quashing of the letter & invoice dated 7.11.2019 and the letter dated 8.11.2019 issued by Power Grid Corporation of India Limited (PGCIL) for claiming transmission charges.

And

In the matter of

Raigarh Energy Generation Limited,
(formerly Korba West Power Company Limited),
6th and 7th Floor, Vatika City Point, M.G. Road,
Guargaon-122 002

...Petitioner

Versus

Power Grid Corporation of India Limited,
(Now known as Central Transmission of Utility of India Limited),
Saudamini, Sector-29, Gurgaon-122 001,
Haryana

....Respondent

Parties Present:

Shri Sanjay Sen, Senior Advocate, REGL
Shri Hemant Singh, Advocate, REGL
Shri Lakshyajit Singh Bagdwal, Advocate, REGL
Ms. Suparna Srivastava, Advocate, CTUIL
Shri Tushar Mathur, Advocate, CTUIL
Ms. Soumya Singh, Advocate, CTUIL
Shri Swapnil Verma, CTUIL
Shri Siddharth Sharma, CTUIL



ORDER

The present Petition has been filed by the Petitioner, Raigarh Energy Generation Limited, against retrospective operationalization of Long Term Access ('LTA') granted to the Petitioner and the demand of Rs. 142.975 crore raised by the Respondent, Power Grid Corporation of India Limited ('PGCIL'), in the capacity of Central Transmission Utility India Limited (hereinafter referred to as 'CTUIL') [earlier known as "the Central Transmission Utility (CTU)"], towards transmission charges for the period from 1.10.2017 to 8.7.2019 vide letter dated 7.11.2019 (along with invoice) and updated letter dated 8.11.2019. The Petitioner has made the following prayers:

"(a) Declare that the transmission charges cannot be imposed upon the Petitioner by the Respondent, keeping in mind the facts and circumstances of the present case;

b) Quash the impugned letter/invoice dated 07.11.2019 & impugned letter dated 08.11.2019 [Annexure P-1 (Colly.)] issued upon the Petitioner by the Respondent; and

c) Pass any order and/or any such orders as this Hon'ble Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of justice."

Background of the case

2. The Petitioner has submitted the following background of the case:

(a) The Petitioner has set up a 600 MW coal based thermal power plant (hereinafter referred to as 'the generating station') at village Chhotebhandar, Tehsil - Pussore, District Raigarh in the State of Chhattisgarh. The Petitioner executed a Bulk Power Transmission Agreement ('BPTA') dated 24.2.2010 with the Respondent, for the purpose of evacuation of 240 MW power from its generating station. As per the BPTA, the Respondent agreed to provide Long Term Access ('LTA') to the Petitioner in accordance with the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters)

Regulations, 2009 (hereinafter referred to as “the Connectivity Regulations”), as enshrined under Clause 3 of the BPTA.

(b) In terms of the BPTA, the Petitioner was under obligation to set up the generating station and the dedicated transmission line up to the pooling point of the Respondent as specified in the BPTA. Turbine-Generator set of Unit-1 (600 MW) of the generating station was synchronized on 8.10.2013 and full load was achieved on 31.3.2014, being the Commercial Operation Date (‘COD’) of the generating station. However, subsequent to commissioning of the generating station, due to various reasons beyond its control such as major accident at the generating station, it was completely shut down.

(c) The Respondent vide its letters dated 30.6.2017, 3.8.2017, 23.8.2017 and 12.9.2017 requested the Petitioner to open Letter of Credit (‘LC’) for the purpose of operationalization of 240 MW LTA. However, the Respondent never intimated the “effective/firm date” or the actual date of operationalization of LTA.

(d) The Petitioner vide its letter dated 23.11.2017 informed the Respondent that the accident that took place at the generating station was in the nature of Force Majeure as provided under Clause 9 of the BPTA, and accordingly requested the Respondent to keep the BPTA under abeyance. The Petitioner also filed Petition No. 269/MP/2017 before the Commission seeking deferment of operationalization of LTA owing to Force Majeure events, as stipulated under Clause 9 of the BPTA.

(e) The Petition No. 269/MP/2017 was admitted on 30.1.2018 and, thereafter, listed for hearing on 18.9.2018, 12.12.2018, 27.2.2019 and 4.7.2019. Vide Record of Proceedings (‘ROP’) for the hearing dated 4.7.2019, the Respondent was directed to operationalize the LTA granted to the Petitioner and complete the associated formalities as per the provisions of the Connectivity Regulations and the detailed procedure made thereunder.

(f) Pursuant to the above proceedings before the Commission, the Petitioner vide its letter dated 8.7.2019 relinquished its LTA for entire quantum

of 240 MW in terms of Clause 9 of the BPTA, on account of various force majeure events which the Petitioner faced qua the generating station.

(g) During the hearing held on 24.9.2019, the Petitioner sought permission of the Commission to withdraw Petition No. 269/MP/2017 on account of relinquishment of LTA. Accordingly, the Commission vide order dated 25.9.2019 permitted the Petitioner to withdraw the Petition and disposed of the aforesaid Petition.

(h) Subsequently, the Respondent, vide its representation dated 4.11.2019 (placed on its website) determined the relinquishment charges of Rs. 43.72 crore effective from 9.7.2019. Under the said representation, the Respondent also stated that the Petitioner would be liable to pay transmission charges from the date of effectiveness of LTA, i.e. from 1.10.2017, up to the date of relinquishment of the LTA quantum i.e. 8.7.2019.

(i) Against the above-mentioned levy of relinquishment charges on account of relinquishing LTA of 240 MW, the Petitioner has filed an Appeal (DFR No. 2311 of 2019) on 25.9.2019 before the Appellate Tribunal for Electricity ('the APTEL') against the order of the Commission dated 8.3.2019 in Petition No. 92/MP/2015 (that had dealt with issues of relinquishment of LTA) which is pending for disposal. As regards the levy of transmission charges from 1.10.2017 to 8.7.2019, the Petitioner has filed the present Petition.

(j) Subsequently, without operationalizing the LTA, the Respondent vide its letters dated 7.11.2019 and 8.11.2019 raised a demand of Rs. 142.97 crore towards transmission charges for the period from 1.10.2017 to 8.7.2019. The Petitioner vide its letter dated 26.11.2019 vehemently objected to the alleged relinquishment charges and the alleged transmission charges imposed by the Respondent on account of non-operationalization of LTA by the Respondent.

3. Aggrieved by aforesaid demand raised by the Respondent, the Petitioner has filed the present Petition seeking, *inter-alia*, quashing of the letters dated 7.11.2019



and 8.11.2019 of the Respondent. On merit, the Petitioner has mainly submitted as under:

(a) In terms of Regulation 14 of the Connectivity Regulations, the nodal agency (the Respondent herein) has to communicate an “effective/firm date” from which the LTA will be operationalized. There is no escape from the said obligation and it is upon the Respondent to fulfil the same. Therefore, the demand raised by the Respondent pertaining to transmission charges does not stand any merit since no effective/ firm date was ever communicated/ intimated by the Respondent to the Petitioner.

(b) The Respondent in its letter dated 8.11.2019 has referred to Clause 3.6.1 of the Billing, Collection and Disbursement Procedure (hereinafter referred to as ‘the BCD Procedure’) made under the Central Electricity Regulatory Commission (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 (hereinafter referred to as ‘the 2010 Sharing Regulations’), to contend that the Petitioner was required to open LC as payment security mechanism. The said clause provides that the Respondent had to indicate an “effective/firm date” of operationalization of LTA before raising any demand qua opening of LC. The Respondent vide its letters dated 3.8.2017 and 23.8.2017 only indicated the “expected date” of commissioning of transmission system and there was no mention of any effective date/ operationalization date of the LTA. Once the transmission system is commissioned, the Respondent is still required to issue a formal letter intimating operationalization/ effective date of LTA.

(c) The Respondent had filed its reply on 4.9.2018 in Petition No 269/MP/2017 filed by the Petitioner for deferment of LTA much after 1.10.2017 (the alleged date of operationalization of LTA). Nowhere in the said reply, the Respondent has stated that LTA granted to the Petitioner was operationalized. Had the Respondent already operationalized the said LTA on 1.10.2017, it would have rendered the said Petition infructuous.

(d) As recorded in the ROP for the hearing dated 4.7.2019 in Petition No. 269/MP/2017, in the context of pending National Company Law Tribunal (‘NCLT’) proceedings, the Respondent had itself submitted that transmission



system has been commissioned and NCLT process will not come in the way of operationalization of LTA. Therefore, it is an “admission” that the LTA was not operationalized earlier and that the Respondent sought permission from the Commission for operationalization of the said LTA. The Respondent further sought a response from the Petitioner as to whether it would relinquish or is ready to pay transmission charges once it is operationalized. Accordingly, after hearing the parties, the Commission directed the Respondent to operationalize the LTA granted to the Petitioner, which could have only been prospective. It is clear from the direction of the Commission in the ROP that the Respondent never operationalized LTA granted to the Petitioner, and accordingly, appropriate directions were passed for operationalization of LTA. Since LTA was not operationalized, the Respondent did not raise any invoice upon the Petitioner qua transmission charges.

(e) The legal position that liability to pay transmission charges arises only after the LTA is made effective/ operationalized. The issue has been dealt with and settled by the Commission in its order dated 8.3.2018 in Petition No. 229/RC/2015 and order dated 19.3.2019 in Petition No. 35/MP/2018. Time and again, the Commission has directed the Respondent to inform the “effective/firm date” for operationalization of LTA to customers.

(f) The letters dated 7.11.2019 and 8.11.2019 are self-contradictory as on one hand, the Respondent has itself admitted that the Commission directed the Respondent to operationalize the LTA granted to the Petitioner, while on the other hand, the Respondent sought to “retrospectively” operationalize the LTA, thereby raising the demand qua transmission charges from 1.10.2017 to 8.7.2019. The same is completely in teeth of the Connectivity Regulations as well as the provisions of the Electricity Act, 2003 (hereinafter referred to as ‘the Act’). There are no statutory provisions permitting retrospective operationalization of LTA and there was no such direction by the Commission during the hearing held on 4.7.2019.

(g) If the Respondent had indeed issued a communication regarding operationalization of LTA, the Petitioner would have been free to make a choice of either keeping the LTA or to exit/ relinquish the LTA. The Petitioner



relinquished the LTA eventually by its letter dated 8.7.2019 before such prospective operationalization of LTA.

(h) There being no direction of the Commission to operationalize the LTA retrospectively, the Respondent has completely misrepresented the explicit directions of the Commission during the hearing held on 4.7.2019 while issuing the letter/representation dated 4.11.2019 to state that the Petitioner shall be liable to pay transmission charges from 1.10.2017 (alleged date of operationalization) up to 8.7.2019 (date of relinquishment).

(i) It is settled principle of law that a delegated legislation can be implemented retrospectively only in the event the same is permitted by the parent Act. The Act nowhere contemplates promulgation, or implementation, of any delegated legislation with retrospective effect. This means that neither the LTA can be “retrospectively” made effective/ operationalized nor the transmission charges can be imposed “retrospectively”. The Respondent can only implement the provisions of the Connectivity Regulations prospectively.

(j) During the proceedings before NCLT, the Respondent never claimed the amount towards transmission charges which the Respondent is claiming now by operationalizing the LTA retrospectively from 1.10.2017. The Petitioner has taken into account all the claims which were placed before the Petitioner by the Resolution Professional (‘RP’) while placing its Resolution plan before NCLT. No such claim of transmission charges was placed by the Respondent before RP or NCLT. The Resolution Plan was approved by NCLT on 24.6.2019 and till such date, there was no claim of transmission charges raised by the Respondent which clearly demonstrates that LTA was not operationalized from 1.10.2017. Even otherwise, the claim of Respondent being prior to approval of Resolution Plan by NCLT shall get extinguished and the Respondent is not entitled to claim the transmission charges now.

(k) In any event, the Respondent cannot raise claim against the Petitioner since the erstwhile company (Korba West Power Company Limited) has already gone through the resolution process and the Committee of Creditors (‘CoC’) has distributed the funds of the erstwhile company. Further, it is a settled principle of law that CoC has the sole discretion for the distribution of



funds among the operational and financial creditors, and once the resolution plan is approved, any claim over and above such approval does not arise. In this regard, reliance has been placed on the judgment of the Hon'ble Supreme Court dated 15.11.2019 in Civil Appeal No. 8766-67 of 2019 (*Committee of Creditors of Essar Steel India Limited Through Authorized Signatory vs Satish Kumar Gupta & Ors*).

4. The matter was heard on 25.2.2020. During the hearing, the learned counsel for the Petitioner informed that the Respondent has challenged the NCLT order dated 24.6.2019, whereby the resolution plan in respect of erstwhile Korba West Power Company Limited ('KWPCCL') was approved, before National Company Law Appellate Tribunal ('NCLAT') regarding its claims towards transmission charges, wherein the order has been reserved by NCLAT. Accordingly, the learned counsel for the Petitioner requested to take up the matter after the outcome of the decision in the said Appeal. After hearing the learned counsel for the Petitioner, the Commission directed the Petitioner to submit, on affidavit, copy of the application made to CTUIL for grant of connectivity and LTA and copy of grant of LTA and Connectivity granted by CTUIL. The Commission directed the Respondent to submit the following information:

- (a) Details of letter/ communication operationalizing the LTA of the Petitioner and date indicated for operationalization of LTA along with letter; and
- (b) Details of LTAs made effective retrospectively, is any.

5. The Petitioner vide affidavit dated 16.3.2020 has submitted copy of final order dated 5.3.2020 passed by NCLAT, wherein the Appeal filed by the Respondent has been dismissed, as being barred by limitation. As a consequence of the same, it has been submitted that the claim of the Respondent, against the Petitioner Company,



does not survive. The Petitioner also reiterated its prayer for quashing of the impugned invoice and letter dated 7.11.2019 and letter dated 8.11.2019.

6. In compliance of the direction of the Commission, the Respondent vide its affidavit dated 21.8.2020 has submitted that since the mandatory statutory requirement of opening LC as per Regulation 8(5) of the Sharing Regulations was not fulfilled by the Petitioner, the Respondent could not operationalize LTA. Further, the Commission vide its order dated 5.11.2018 in Petition No. 12/SM/2017 had directed the Respondent to take steps to operationalize LTAs of the long-term transmission customers as per the provisions of the Connectivity Regulations. However, LTA could not be operationalized on account of the difficulties deliberated in the course of proceedings of suo moto Petition No. 12/SM/2017 and for the reason that the Petitioner was already before the Commission through its Petition No. 269/MP/2017 seeking deferment of LTA and further relief for its inability to generate power. The Respondent has also submitted the list of LTAs made effective, retrospectively.

7. Subsequently, the Petitioner filed IA No. 66 of 2020 on 13.8.2020 seeking direction to the Respondent to return the Bank Guarantee ('BG'), submitted in accordance with Clause 6 of the BPTA, meant to compensate the Respondent if the Petitioner makes an exit or abandons its project and which was required to be returned after a period of 6 months from the commissioning of Unit-I of 600 MW of the generating station on 1.4.2014. In the IA, the Petitioner brought on record subsequent developments in the matter and made the following submissions.

(a) The order dated 5.3.2020 of NCLAT dismissing the Appeal filed by the Respondent was challenged by the Respondent before the Hon'ble Supreme Court, by way of filing of a Civil Appeal No. 2711/2020. In the Civil Appeal, the



Respondent again agitated that it has a claim for alleged transmission charges and the relinquishment charges payable by the Petitioner.

(b) Hon'ble Supreme Court, vide its judgment dated 22.7.2020, upheld the decision of the NCLAT, thereby rejecting the claims of the Respondent towards alleged transmission charges and relinquishment charges.

(c) Since the Respondent in its Appeals filed before NCLAT and Hon'ble Supreme Court specifically agitated its claim towards the alleged transmission charges (as well as the alleged relinquishment charges/ compensation), both the said claims of the Respondent, against the Applicant do not survive. The claim having been rejected, cannot now be recovered from the Petitioner. The Respondent is now trying to overreach the judicial orders passed against it and seeking to abuse its dominant position by making an illegal claim and now withholding a bank guarantee that it otherwise cannot withhold.

Reply by Respondent

8. The Respondent, vide its reply dated 18.1.2021, has mainly submitted as under:

(a) In terms of the LTA granted to the Petitioner vide intimation dated 1.10.2009 for 600 MW which was revised to 240 MW vide intimation letter dated 24.2.2010, the transmission charges become due from schedule date of injection of power as mentioned in the BPTA, irrespective of actual date of commissioning of project.

(b) As per the BPTA, the transmission charges would become payable from the date of commissioning of the associated transmission system, provided the scheduled commissioning date of the generating units had also been reached. There was no exception agreed under the BPTA, nor could it be, as regards payment of transmission charges which meant that so long as the Respondent provided open access to KWPCCL under the BPTA, KWPCCL remained bound to pay transmission charges to the Respondent for the same. Accordingly, the impugned invoices of transmission charges have been raised from the date of commissioning of the transmission system as per the agreed

terms under the BPTA and as such, there cannot be said to be any infirmity in the same.

(c) The force majeure situations contemplated in Clause 9 of the BPTA related to the provision of open access in the transmission system of the Respondent and had no nexus with the issues, if any, faced by KWPCCL with regard to operation of its generating station. Therefore, once the transmission assets under the subject LTA had been implemented by the Respondent, the liability of KWPCCL to pay transmission charges for servicing the said assets was absolute.

(d) As per the Transmission Service Agreement (TSA) executed by the Petitioner with the Respondent, the Petitioner has agreed to pay the Point of Connection (PoC) charges for the subject LTA as calculated by the Implementing Agency i.e. the Respondent. Like BPTA, TSA also contains a provision for force majeure events (Clause 14) i.e. events which prevented the affected party from performing its obligations under the TSA. TSA recorded the mutually agreed obligations as regards providing of open access by the Respondent for the agreed quantum from the scheduled date of open access in the manner mentioned therein and payment of transmission charges by the Petitioner for availing such access in the manner provided under the Regulations of the Commission. The continuous operation of the generating station of KWPCCL was clearly not within the ambit of the TSA and did not absolve KWPCCL of its liability to pay PoC charges under the TSA.

(e) The levy of transmission charges on an LTA grantee for associated transmission system, is in accordance with the statutory/ regulatory mandate under Section 38(2) of the Act and Regulation 26 (Payment of Transmission Charges) of the Connectivity Regulations notwithstanding that power flow under the LTA takes place or not.

(f) Regulation 14 of the Connectivity Regulations relied upon by the Petitioner requires that, “while granting long-term access” i.e. in the LTA intimation letter, the Respondent must communicate the date from which the LTA is to be operationalized and the transmission charges which are likely to ensue upon the LTA grantee. Accordingly, since the LTA commencement date

and the estimation of transmission charges has also been clearly spelt out in the LTA intimation letters to KWPCCL, the requirements under Regulation 14 of the Connectivity Regulations have thus been duly complied with by the Respondent.

(g) The Detailed Procedure notified by the Commission under Regulation 27 of the Connectivity Regulations also emphasizes the obligation of the LTA grantee to pay transmission charges for the ISTS notwithstanding that the power flow by use of the ISTS is yet to begin. The Detailed Procedure further reiterates the regulatory requirement under the Connectivity Regulations that the LTA grantee is to keep available with the Respondent at all times (including during the project construction and pre-operationalization of LTA stage), the prescribed BG which may be encashed on the occurrence of the specified events. Further, when the LTA operationalization is approaching, the prescribed payment security mechanism with respect to the ISTS transmission charges is required to be made available with the Respondent.

(h) Article 12.3 of the TSA entered into between the Respondent and the Designated ISTS Customers in terms of the 2010 Sharing Regulations requires the Petitioner to open an LC (as also providing a BG) by way of a payment security mechanism.

(i) In terms of Clause 3.6.1 of the BCD Procedure, when the LTA is nearing operationalization i.e. when the associated transmission system is nearing its completion, then at least one month prior thereto, LC as payment security for payment of transmission charges is required to be furnished by the LTA grantee to the Respondent.

(j) The Petitioner has wrongly relied upon the order dated 19.3.2019 in Petition No. 35/MP/2018, without reference to the relevant orders passed by the Commission, to raise a misplaced plea that unless a firm date (and not an expected date) for LTA operationalization is intimated by the Respondent, there cannot be any LTA operationalization and consequently, there can be no levy of transmission charges under an un-operationalized LTA.

(k) The Commission has reiterated time and again that the LTA grantees are under a statutory as well as contractual obligation to pay transmission charges after commissioning of the transmission system executed based on the LTA, irrespective of whether they actually avail the long term access or not. In the order dated 8.3.2019 in Petition No.92/MP/2015, while prescribing the methodology for computation of relinquishment charges, the Commission has held that liability for payment of transmission charges shall commence from the date of operationalization of the last element in the associated transmission system (which is 1.10.2017 in the case of HCPTC-V in which LTA to KWPCCL had been granted) and as such, raising of transmission charges bills from the said date cannot be termed as “retrospective” as has wrongly been contended in the present Petition.

(l) Unit-I (600 MW) of the generating station was commissioned in March 2014 and dedicated transmission line was commissioned in June 2016. However, the commissioning of the transmission system identified for evacuation of power under the LTA was still underway. Despite the commissioning of its generating units, KWPCCL did not approach the Respondent for alternative arrangement for evacuation of power for which a provision had been made under the BPTA. Even prior to the commissioning of ± 800 kV Champa-Kurukshetra HVDC bipole, an elaborate exercise had been carried out in a meeting held on 4.11.2016 for operationalization of LTAs earlier granted with Jabalpur-Orai 765 kV Corridor/ Champa-Kurukshetra HVDC Phase-II against the 559 MW transmission capacity effectively made available after the surrender of the LTAs by different LTA applicants in terms of directions of the Commission in Petition No.84/MP/2016. Although the representatives of KWPCCL attended the said meeting, they did not express any interest in operationalization of the LTA in the meeting even though their generation project was at a higher priority than the other applicants who had opted for upgradation of LTA (in terms of application submission date). Subsequently, the HVDC bipole link was commissioned in two phases of 1500 MW each. The first phase (1500 MW of 3000 MW) was completed in March 2017 and prior to completion of the first phase, the eligible LTA customers (including KWPCCL) were requested to provide their consent towards operationalization of LTA with

Phase-I of the HVDC link in a meeting held on 23.3.2017 in accordance with the directions of the Commission issued vide Record of Proceedings for the hearing dated 14.2.2017 in I.A. No.30/2016 and I.A. No.7/2017 in Petition No.84/MP/2016. However, KWPCCL did not attend the meeting even though its generating station had been commissioned. Notwithstanding, the subject LTA was to become operational from the date of commissioning of Phase-II of the 1st pole of the ± 800 kV Champa-Kurukshetra HVDC link.

(m) When the commissioning of Phase-II of 800 kV Champa-Kurukshetra HVDC link was drawing near, the Respondent issued letters dated 30.6.2017, 3.8.2017, 23.8.2017 and 12.9.2017 to KWPCCL for establishment of payment security mechanism in the form of LC as was agreed under the BPTA and which was also the regulatory requirement under the 2010 Sharing Regulations. Instead of opening the requisite LC, KWPCCL, citing an accident at the power plant on 22.5.2017 at 10:12 p.m., invoked clause 9 of the BPTA and issued an undated notice of force majeure (received by the Respondent on 24.11.2017) seeking deferment of operationalization of the subject LTA.

(n) In the meantime, Phase-II (1500 MW) of 1st Pole of Champa-Kurukshetra HVDC link (3000 MW) which was a part of HCPTC-V was commissioned on 1.10.2017 and as such, the transmission system identified for power evacuation under the LTA granted to KWPCCL also got operational w.e.f. 1.10.2017. Accordingly, KWPCCL had been requested to open the required LC. However, acting contrary to the express terms under the LTA, KWPCCL continued to fail in the opening of LC owing to which, the LTA granted to it was not operationalized.

(o) KWPCCL then preceded to file Petition No. 269/MP/2017 seeking deferment of operationalization of LTA under force majeure (clause 9) of the BPTA and (clause 12) of the TSA on account of major accident at the generating station leading to shut down of the generating unit. The Respondent vide its reply dated 4.9.2018 objected to the prayer of deferment of LTA made by KWPCCL. The Respondent had, *inter-alia*, contended that the Respondent was within its rights to claim payment of transmission charges from KWPCCL under the subject LTA as there was no *inter-se* obligation agreed to or recorded

in the BPTA as regards the operation of the generating station so that the BPTA could be said to be frustrated on that account.

(p) In the context of non-opening of LCs by a number of IPPs for whom the implementation of nine HCPTCs had been undertaken by the Respondent and based on whose commitments, the Commission had granted regulatory approval to the Respondent vide order dated 31.5.2010 in Petition No. 233/MP/2009, the Respondent had filed a Petition being Petition No. 229/RC/2015 seeking directions from the Commission for defaults by IPPs in establishing the payment security mechanism as provided under the applicable Regulations. Vide order dated 8.3.2018, the Commission disposed of the said Petition and categorically held that in cases where the transmission system had been commissioned but the concerned generators/LTTCs had failed to establish the payment security mechanism, the Respondent was required to operationalize the LTA retrospectively from the date of commissioning of the entire transmission system and raise bills as per the applicable Regulations. The Commission further clarified that in case of relinquishment of LTA after its operationalization, the concerned generator was to be liable to pay transmission charges from the date of operationalization of the LTA till the date of relinquishment and relinquishment charges pursuant to that date in accordance with the methodology to be prescribed by the Commission in Petition No.92/MP/2015. Considering that the associated transmission system under the subject LTA had been commissioned on 1.10.2017, the LTA was required to be operationalized w.e.f. 1.10.2017 in accordance with the said order of the Commission. The Commission had also specifically directed that the transmission charges collected upon operationalization of LTA under the above order were to be *“reimbursed back to LTA customers under Sharing Regulations for the corresponding period”* which clearly showed that in the absence of operationalization of LTA for non-opening of LC, the remaining participants in the PoC pool were sharing the additional burden of servicing the already commissioned transmission assets. The non-operationalization of LTAs (including that of KWPCCL) on account of acts of omission by the generators/LTA grantee was thus causing financial loss and injury to the other participants in the PoC pool and their losses were required to be restituted through payment

of transmission charges upon operationalization of LTAs. The issue, however, still remained that most of these generators (including KWPCCL) did not have their generating stations operational and as such afforded no revenue streams even upon operationalization of their respective LTAs.

(q) Observing an inadequate progress in operationalization of LTAs as directed in the orders passed in Petition No.229/RC/2015, the Commission initiated suo-motu proceedings being Petition No.12/SM/2017 against the Respondent and, vide Record of Proceedings for the hearing dated 19.7.2017, the Respondent was directed to, *inter-alia*, place on record the details of generating stations where LTAs had been granted subject to commissioning of several transmission systems and details of the transmission systems which had been commissioned but corresponding LTAs had not been operationalized. The Respondent vide its affidavits submitted that it was complying with the direction of the Commission to operationalize the LTAs irrespective of whether LC was opened or not in respect of all LTAs except for LTAs of IPPs where generation was yet to be commissioned/ abandoned/ not in operation/ filed Petitions as there was no recourse to the dues in case of non-payment and the regulatory action to regulate power supply could also not be taken. The Respondent also submitted a list of seven generating stations (in which KWPCCL was also included) whose LTAs could not be operationalized by the Respondent as neither there was any power being generated nor there was any payment security mechanism established by them so that no specific regulatory action was possible in case of non-payment. The Commission vide order dated 5.11.2018 acknowledged the difficulties of the Respondent in operationalisation of LTA in cases similar to that of KWPCCL and held that there was no instance of any non-compliance of either any directions passed by the Commission or the applicable regulatory provisions by the Respondent in not operationalizing the said LTAs. The above proceedings were a reiteration of the factual position that the subject LTA had not yet operationalized, despite commissioning of the associated transmission system, owing to there being no power generation from the generating station and no payment security furnished by KWPCCL to the Respondent. The order dated 19.3.2019 passed in Petition No.35/MP/2018 relied upon by the Petitioner is liable to be read in

conjunction with the above orders of this Commission in so far as the “retrospective” LTA operationalization and the consequent liability to pay transmission charges is concerned.

(r) On 12.4.2019, KWPCCL filed an Application being IA No. 41/2019 seeking amendment of Petition No. 269/MP/2017 bringing on record initiation of insolvency proceedings against KWPCCL before the NCLT under Section 10 of the IBC 2016. It was also submitted that vide order dated 26.7.2018, the NCLT had appointed an Interim Resolution Professional (‘IRP’) and the Corporate Insolvency and Resolution Process (‘CIRP’) for KWPCCL had commenced w.e.f. 26.7.2018 for initial period of 180 days which was extended for further 90 days w.e.f. 22.1.2019. KWPCCL had also submitted that the necessary repair in the equipment of generation plant had been carried out but the work had not commenced owing to pending insolvency proceedings which was beyond the control of KWPCCL (and thus a force majeure) and had restricted its ability to abide by its contractual obligations including towards the Respondent because of which, KWPCCL was entitled to be exempted from any liability. Further, KWPCCL made an unequivocal submission that power generation from its generating station was to commence within a period of six months (approximately) after completion of insolvency proceedings. It followed as a natural corollary that for evacuation of power to be so generated, the subject LTA grant was to continue to subsist. KWPCCL admitted that pursuant to appointment of an IRP and by virtue of operation of Section 17(1) of the IBC 2016, the entire management of KWPCCL had vested in the IRP and the Board of Directors of KWPCCL stood suspended. Consequently, KWPCCL could not proceed with restoration of the generation plant and performance of its obligations under the transmission agreements executed with the Respondent. This meant that no revenue streams were yet to be available with KWPCCL and as such, the difficulty in operationalization of the subject LTA in the absence of a LC continued to exist.

(s) In the course of the above insolvency proceedings, vide Public Notice dated 7.8.2018, IRP appointed by NCLT had called for submission of claims by the creditors of KWPCCL as per Section 15 of the IBC 2016. However, due to non-operationalization of LTA and the pendency of proceedings in Petition



No.269/MP/2017 before the Commission, the Respondent was unable to raise its claim towards transmission charges against KWPCCL and as such, in the absence of a “debt due” towards transmission charges, the Respondent could file only a limited claim of Rs.3,19,36,312/- payable as on 5.12.2018 under the terms of the Memorandum of Understanding (MoU) dated 3.9.2016. While submitting the said claim, the Respondent categorically stated that the said claim only pertained to the dues as approved till the month of December 2018 on account of MoU dated 3.9.2016 executed with KWPCCL and the Respondent reserved its right to claim any further dues under the BPTA dated 24.2.2010 which could only be crystalized after final adjudication in Petition No. 269/MP/2017. Further, vide letter dated 29.1.2019, the Respondent again clarified to the IRP that in addition to the claim already filed by the Respondent, further dues towards transmission charges were also to be crystalized once the order in Petition No.269/MP/2017 was passed by this Commission. Since neither the said Petition was decided during the pendency of insolvency proceedings in NCLT nor was the subject LTA operationalized, the occasion for lodging of any claim towards transmission charges did not arise.

(t) Vide order dated 24.6.2019, NCLT disposed of the insolvency proceedings and approved Resolution Plan submitted by Adani Power Limited (“the Resolution Applicant”) in which the limited claim of Respondent to the tune of Rs.3,19,36,312/- was also factored in. It is evident from the order of NCLT that the Resolution Plan had taken into account only those financial and operational debts of KWPCCL which were due up till 1.4.2019 and did not include the debts which had not yet accrued to the company for any reason whatsoever. After payment of liquidation value to the operational creditors of KWPCCL whose debts had been admitted, all past dues of such operational creditors were to be written off in full and were to be deemed to be permanently extinguished as on 24.6.2019 (the NCLT approval date), which meant that the dues of operational creditors which were to accrue to the company in future, were not included since what had not yet accrued/ come into existence could not be extinguished. The Resolution Plan as approved for the Resolution Applicant had provided for a plan for resolution of insolvency of KWPCCL as a ‘going concern’, meaning thereby that the Resolution Applicant had taken over

the management of (the now solvent) KWPCCL with all its existing rights, which included the subject LTA rights existing in the favour of company.

(u) The approval of the Resolution Plan did not mean an automatic waiver or abatement of any legal proceedings pending by or against KWPCCL as they were the subject matter of the concerned competent authorities having their proper/ own jurisdictions to pass appropriate orders therein and the Resolution Applicant could approach the said authorities for appropriate reliefs.

(v) The judgment of Hon'ble Supreme Court in the matter of *Committee Creditors of Essar Steel India Ltd. Vs. Satish Kumar Gupta & Ors. [2019 SCC Online 1478]* (the "Essar Judgment") is not applicable in present case as the LTA had not been operationalized and the transmission charges were yet to be raised under the subject LTA. Thus, no subsisting claim of the Respondent was pending adjudication before the Commission. It is evident from the prayer of KWPCCL in IA No. 41/2019, to keep the operationalization of LTA in abeyance, that the Resolution Applicant was fully aware of the subsistence of the subject LTA and the charges it was required to pay after taking over KWPCCL post the insolvency proceedings once the subject LTA was operationalized.

(w) Subsequent to the approval of the Resolution Plan, the Respondent approached the National Company Law Appellate Tribunal ("NCLAT") claiming that the corporate debtor was liable to pay transmission charges and consequential amounts as per the BPTA and the applicable Regulations. The Appeal before NCLAT was dismissed as being time-barred without any adjudication on merits. Subsequently, Appeal filed against the judgment of NCLAT was also dismissed by the Hon'ble Supreme Court having found no infirmity in the order of NCLAT. In terms of the judgment of Hon'ble Supreme Court in the case of *Innoventive Industries Ltd. Vs. ICICI Bank & Anr. [(2018) 1 SCC 407]*, admittedly, the Respondent had wrongly approached NCLAT seeking inclusion of its future claims of transmission charges under the Resolution Plan. It is a settled principle of law that a bona fide perusal of a wrong remedy does not extinguish the vested legal rights and as such, approaching NCLAT was of no consequence in so far as the right of the Respondent to receive transmission charges upon operationalization of the



subject LTA or the relinquishment charges upon relinquishment of the subject LTA was concerned. The Petitioner is, therefore, wrong in contending that owing to the dismissal of Appeals by NCLAT and the Hon'ble Supreme Court, the claim of the Respondent towards transmission charges and/or relinquishment charges does not survive.

(x) The Respondent understands that whether by way of acquisition or merger or otherwise, KWPCCL ceased to exist as a corporate entity and the 'going concern' now came to be vested in the present Petitioner i.e. Raigarh Energy Generation Ltd. As recorded in ROP for the hearing dated 4.7.2019 in Petition No 269/MP/2017, the Respondent once again brought to the notice of the Commission the issues surrounding the operationalization of the subject LTA and submitted that the servicing of its assets was required to take place either in the form of transmission charges under an operationalized LTA or as relinquishment charges under a relinquished LTA in the event, the generating station was not in a position to generate power. The Petitioner is deliberately misinterpreting the above proceedings before the Commission as an "admission" on part of the Respondent of non-operationalization of the subject LTA owing to which no liability towards payment of transmission charges can be fastened upon it retrospectively. In the aforesaid proceedings, the Commission, *inter-alia*, directed the Respondent to operationalize the LTA. In view of the said directions read with its order dated 8.3.2018 in Petition No. 229/RC/2015, the subject LTA became liable to be operationalized retrospectively from the date of commissioning of the identified transmission system i.e. 1.10.2017 i.e. with Phase-II (1500MW) of 1st Pole of Champa-Kurukshetra HVDC link (3000 MW) which was a part of HCPTC-V corridor. Thus, the contention of the Petitioner herein that "retrospective operationalization of LTA" is wholly alien to the regulatory regime of the Commission, is completely wrong as is clear from the directions of the Commission in its order 8.3.2018. In any case, for the reasons set out hereinabove, any "retrospective" operationalization of LTA was in effect the operationalization from the date of commissioning of the associated transmission system which was as per the statutory/ regulatory/ contractual prescription and as such, could not be faulted with.

(y) Before the Respondent could issue the letter of operationalization of subject LTA to the concerned State Load Despatch Centre in compliance of the direction passed by the Commission, the Petitioner, vide its letter dated 8.7.2019 to the Respondent, relinquished the subject LTA on the grounds of occurrence of major accident at the project site, non-availability of firm PPA and distressed financial condition of the company contrary to its submission in IA No. 41/2019. In view of the law laid down by the Hon'ble Supreme Court in the matter of *Vijay Syal Vs. State of Punjab [(2003) 9 SCC 401]*, the Commission may take strict view of the acts of commission and omission by the Petitioner in pursuing the litigations before this Commission so that the provisions under the IBC 2016 are not misused for by-passing and/or defeating the regulatory provisions notified by the Commission.

(z) When Petition No.269/MP/2017 was listed for hearing on 25.9.2019, KWPCCL sought permission to withdraw the same which was allowed by the Commission vide its order dated 25.9.2019. Subsequently, the Respondent calculated the transmission charges and relinquishment charges payable by the Petitioner in terms of order dated 8.3.2019 in Petition No.92/MP/2015 amounting to Rs.43.72 crore w.e.f. 9.7.2019 and issued the letter and invoice dated 7.11.2019 and 8.11.2019 raising a demand of Rs.142,97,52,646/- towards transmission charges for the subject LTA from the date of commissioning of the associated transmission system i.e. 1.10.2017 till the date of relinquishment of the LTA on 8.7.2019. The issuance of the above letter and invoice was in accordance with the directions given by the Commission in Record of Proceedings for the hearing dated 4.7.2020 read with its order dated 8.3.2018 in Petition No.229/RC/2015.

(za) Considering that both the transmission charges and relinquishment charges were yet to be paid by the Petitioner, the BG furnished under the subject LTA was required to be kept alive. Accordingly, vide letter dated 7.4.2020 to Axis Bank Limited, the Respondent sought extension of BG of Rs.12 crore, by another year since the same was expiring on 31.5.2020. The Petitioner, vide its letter dated 15.5.2020, objected to extension of the BG on the ground that the LTA had been relinquished and there was no liability to pay transmission charges under an un-operationalized LTA, particularly in view of

the order passed by NCLT and the dismissal of Appeals of the Respondent against the said order. The Petitioner ultimately extended the BG vide letter dated 15.5.2020 “under protest” upto 31.8.2020, which has since then been extended to 30.11.2020 under the order of the Commission. The open access regime is “generating station” centric and the LTA is granted in the name of the “generating station” rather than the “generating company”. Thus, so long as the generating station survives, change in ownership by different generating companies would not affect the right of the generating station to use open access on payment of transmission charges, unless expressly relinquished. This right has devolved upon the present Petitioner upon the taking over of the erstwhile KWPCCL and as such, the corresponding obligation to keep the BG alive for the recovery of unpaid transmission charges/ relinquishment charges is also liable to be discharged by the Petitioner.

Rejoinder of the Petitioner to the reply of the Respondent

9. The Petitioner, vide rejoinder dated 5.3.2020, has mainly submitted as under:
- (a) The Respondent in its reply, specifically under paragraph 15, paragraph 28(i) and paragraph 29, has “admitted” that the LTA of the Petitioner was “not operationalized” during the pendency of Petition No. 269/MP/2017 which was filed by the erstwhile KWPCCL.
- (b) This categorical admission on the part of the Respondent is sufficient to decide the present Petition against the Respondent, as no transmission charges can be levied upon the Petitioner, since the LTA of the said Petitioner was never operationalized during its subsistence i.e., before relinquishment. Therefore, in terms of the order dated 8.3.2018 and order dated 19.3.2019 in Petition No. 229/RC/2015 and Petition No. 35/MP/2018 respectively, and Regulation 14 of the Connectivity Regulations, the impugned letter and invoice dated 7.11.2019 and impugned letter dated 8.11.2019, ought to be quashed by the Commission.
- (c) One of the primary contentions of the Respondent is that it can “retrospectively” operationalize the LTA on account of a reading of paragraph 55 of order dated 8.3.2018 in Petition No. 229/RC/2015. The said interpretation of the Respondent is fundamentally flawed, as the aforesaid paragraph 55 has



to be seen along with paragraph 63(b) and 63(d) of the said order. The said paragraph clarified that the Respondent cannot seek to recover transmission charges for the retrospective period without intimating the “firm” date of operationalization of LTA.

(d) The contention of the Respondent that the connectivity and LTA is granted to the generating station and not the generating company, is in the teeth of the philosophy behind the Insolvency and Bankruptcy Code, 2016. Once insolvency proceedings are initiated, then the financial creditors and operational creditors have to file their respective claims. Upon receipt of such claims, the RP makes a valuation of the assets and liabilities of the company under Insolvency. Thereafter, the decision of the Committee of Creditors is final, which is then implemented by the RP with respect to all the aforesaid claims. Therefore, once the aforesaid process is over, whether a claim has been made or the same has not been made, the said claim extinguishes. As such, having failed to operationalize LTA and raise claim before the aforesaid process of adjudication, it cannot now aver that LTA is operationalized from 1.10.2017. Once a company has been awarded to the present management pursuant to CIRP, no past claims can be permitted to surface, whether such claims were made or were not made before the RP.

(e) The submission of the Respondent, that it could not operationalize the LTA of the Petitioner as Petition No. 269/MP/2017 was pending adjudication, is frivolous. In Petition No. 269/MP/2017, the Petitioner (erstwhile KWPCIL) had only sought deferment of operationalization of LTA and there was no stay or interim relief granted to the Petitioner qua operationalization of LTA. As such, the Respondent, if at all it was ready for operationalization, was free to operationalize the LTA and thereafter raise transmission charges.

(f) In few of the proceedings (order dated 23.11.2020 in Appeal No. 437 of 2019 in the case of *Raigarh Energy Generation Limited vs. PGCIL & Ors.*) pertaining to relinquishment compensation before the APTEL, the Respondent sought permission to raise invoice against those generators who are either seeking declaration of insolvency in their favour, or against whom such CIRP proceedings are initiated by third party. Similar kind of approach should have

been taken by the Respondent if there were any doubts with respect to raising invoices and claim from the Petitioner before or during the proceedings in Petition No. 269/MP/2017. The Respondent's failure to take such steps absolves its right to claim transmission charges after the completion of insolvency proceedings.

(g) Clause 2 of the BPTA categorically provides that the payment of transmission charges by the Long Term Transmission Customer would be in accordance with the Regulations of the Commission. As per Regulation 14 of the Connectivity Regulations, the Respondent has to operationalize the LTA in terms of the BPTA for becoming eligible to collect transmission charges.

(h) The Commission in its order dated 13.12.2019 in Review Petition No. 13/RP/2019 (against order dated 19.3.2019 in Petition No 35/MP/2018) held that after the transmission assets are ready, the Respondent is duty bound to intimate the long-term customer about the firm date from which LTA shall be operationalized.

(i) The contention of the Respondent regarding intimation of operationalization of LTA, vide its letters dated 3.8.2017, 23.8.2017 and 12.9.2017, is completely false considering that the Respondent in the said letters did not inform about any firm date for operationalization of LTA. After the aforesaid letters, there is no letter issued to the Petitioner, in which the Respondent stated that the LTA would be operationalized from 1.10.2017. While dealing with similar issue in Petition No 229/RC/2015, the Commission held that CTUIL should have indicated firm date from which LTA was effective. In terms of said decision of the Commission, the aforesaid letters cannot be considered as the letters for operationalization of LTA.

(j) The Respondent during the hearing held on 4.7.2019 in Petition No. 269/MP/2017 had submitted that transmission system has been commissioned and NCLT process will not come in the way of operationalization of LTA. The same is an "admission" by the Respondent that LTA was not operationalized earlier, and that, the Respondent sought permission from the Commission for operationalization of the said LTA.

(k) Reliance of the Respondent on the order dated 8.3.2019 in Petition No. 92/MP/2015 is also entirely misplaced, as the said order simply provides that transmission charges are to be collected from the date of operationalization of LTA.

(l) NCLT in its judgment dated 24.6.2019 categorically held that post the payment of liquidation value, all dues of the Operational Creditors (excluding any workmen and employee) shall be “written off in full” and shall be, and be deemed to be, “permanently extinguished” as on the approval date of NCLT. The same meant that, as on the date of aforesaid order, no claims of any of the operational creditor (including any alleged claim of the Respondent qua transmission charges and relinquishment compensation) would survive.

(m) The reliance placed by the Respondent on paragraph 67 of the decision of the Hon’ble Supreme Court in the case of *Essar Steel India Ltd* case (as stated supra) is in fact against the Respondent. It is amply clear from the judgment that (i) the contention, that the claims which may exist apart from those decided on merits by the RP and by the Adjudicating Authority/APTEL can be decided by an appropriate forum in terms of Section 60(6) of the IBC 2016, is against the rationale of Section 31 of the IBC 2016 and (ii) a successful resolution Applicant cannot suddenly be saddled to face undecided claims after the resolution plan (in the present case, the Petitioner) submitted by it has been accepted. If the claim is accepted, it would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution Applicant who successfully take over the business of the corporate debtor. The aforesaid judgment is strictly applicable to the present case since the Respondent itself approached NCLAT and the Hon’ble Supreme Court, wherein its claim was held to be as barred by limitation, as the Respondent had failed to make its claim before the RP.

(n) Contention of the Respondent that pendency of Petition No. 269/MP/2017 prevented operationalization of LTA, is incorrect as no stay was granted by the Commission. Further, the judgment of Hon’ble Supreme Court in the case of *Innovative Industries Ltd.* (stated supra) relied on by the

Respondent has no relevance since the quoted paragraph is applicable for a “Financial Creditor”, while CTUIL is an “Operational Creditor”.

(o) The reliance placed by the Respondent for retrospective operationalization of LTA in terms of order dated 8.3.2018 in Petition No. 229/RC/2015, is completely erroneous as the above order only mandates that “firm” date for operationalization is to be intimated with respect to furnishing of payment security mechanism. In the present case, the Respondent vide letters dated 30.6.2017, 3.8.2017, 23.8.2017 and 12.9.2017 never provided any such firm date. Therefore, the Respondent cannot seek to levy transmission charges for a retrospective period, having failed to comply with the aforesaid.

10. The matter was heard on 6.8.2021 through video conferencing. After hearing the parties, the Commission directed the Petitioner and the Respondent to file their written submissions, if any. The Petitioner and the Respondent have filed their respective written submissions.

Written Submissions

11. The Respondent while reiterating its earlier submission, vide its written submissions dated 18.8.2021, has additionally submitted as under:

(a) Reliance is placed on the amendment (IA No. 41/2019) sought in Petition No. 269/MP/2017 and letter dated 15.5.2020 of the Petitioner to contend that it had been the clear intention and understanding of the present Petitioner right from the period that it participated in the insolvency proceedings as a resolution applicant that the subject LTA and all the rights, obligations and liabilities attached thereto, were to remain unaffected by the on-going insolvency proceedings inasmuch as the generating station was to start generation upon its repair and for evacuating the power so generated, the subject LTA was necessarily required.

(b) As regards observation of the Hon`ble Supreme Court in the matter of Committee of Creditors of Essar Steels India Ltd. Vs. Satish Kumar Gupta &



Ors. [2019 SCC Online 1478], the subject LTA has very much been in the knowledge of the successful Resolution Applicant and has in fact insulated from the insolvency proceedings (rather the pending insolvency proceedings are specifically pleaded as force majeure by the successful Resolution Applicant much after the approval of the resolution plan), no question of any “hydra head” popping up can at all arise. That being so, the insolvency resolution pleaded by the Petitioner as on the cut-off date for raising of any claims under the subject LTA is contrary to the admitted facts placed on record and as such, is liable to be rejected by the Commission.

(c) While raising the claim of Rs 3.19 crore before NCLT, the Respondent had duly informed that termination/ relinquishment charges also are to be paid by KWPCCL as per orders of the Commission in Petition No.229/RC/2015 and charges to be decided as per Petition No.92/MP/2015. This position was well within the knowledge of the present Petitioner who, as the resolution applicant, had submitted the resolution plan for its approval. Since NCLT in its order dated 24.6.2019 (paragraph 18.3) has acknowledged the jurisdiction of other authority for deciding pending proceedings before them, the Petition No.269/MP/2017 became liable to be decided by the Commission in exercise of powers vested under the Act unfettered by the approved resolution plan for KWPCCL.

(d) The filing of Appeal before NCLAT was a wrong remedy pursued bona fide by the Respondent. However, the same did not extinguish the vested legal rights of the Respondent to recover transmission charges and relinquishment charges under the subject LTA (*Sri Raja Tyada Pasupati Vs. Aryan Bank of Vizagapatnam [Appeal No.289/1926 decided on 6.8.1936]*).

(e) It cannot be argued that the claims of the Respondent towards transmission charges and relinquishment charges no longer survive in view of dismissal of its Appeals by NCLAT and the Hon`ble Supreme Court as the said Appeals were dismissed on the ground of limitation. In terms of judgment of Constitution Bench of Hon`ble Supreme Court in the case of *Bombay Dyeing and Manufacturing Company Ltd. Vs. State of Bombay & Ors. [AIR 1958 SC 328]* and the judgment of Allahabad High Court in the matter of *Hari Raj Singh Vs. Sanchalak Panchayat Raj, UP Government & Ors. [AIR 1968 All 246]*,

dismissal of the Appeals filed by the Respondent do not extinguish its right to raise the impugned invoices towards transmission charges and relinquishment charges and the said right can be, and has rightfully and legally, been agitated before this Commission in the present proceedings.

(f) The impugned invoices have been rightly raised by the Respondent upon the Petitioner and there is no infirmity in the same as has been alleged by the Petitioner. Pending discharge of the liability to pay charges under the impugned invoices (the liability towards relinquishment charges being subject to the outcome of pending Appeal before the APTEL), the Respondent is within its rights to retain the BG of Rs.12 crore available with it under the subject LTA as has also been held by this Commission in Petition No.242/MP/2017 (Power Grid Corporation of India Ltd. Vs. Aryan MP Power Generation Pvt. Ltd.) and also by the APTEL in Appeal No.173/2020 (Vedanta Ltd. Vs. Central Electricity Regulatory Commission & Ors).

12. The Petitioner, vide its written submissions dated 26.8.2021, has additionally submitted as under:

(a) After Essar Judgment, recently, the Hon'ble Supreme Court in the case of *Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited*, [reported in 2021 SCC Online SC 313], has further clarified the position of liabilities (including on matters of unpaid tax and other statutory dues) of the insolvent company that once the resolution process is over, even the "statutory dues" owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand "extinguished" and no proceedings in respect of such dues could be continued. Certainly, the Respondent cannot claim to be in certain exalted position of having a completely risk-proof business enterprise, so as to be able to recover money/ claims post-IBC process in manner different from other unsecured operational creditors.

(b) In Appeal No. 1334 of 2019 filed before NCLAT, the Respondent categorically put forth its "crystallized" claim of transmission charges, as well as relinquishment charges and submitted that the RP did not take into account the

aforesaid claim of the Respondent. However, NCLAT, while dismissing the Appeal on the ground of delay, observed that the Respondent failed to crystalize the alleged debt owing to pendency of matter before the Commission.

(c) The Respondent by pursuing remedies before IRP, NCLT, NCLAT and the Hon`ble Supreme Court has itself admitted that the money can be claimed only against the proceeds of the sale of KWPCCL and not from the new purchaser. Surely, that position does not and cannot be changed, so as to enable any recovery of past liabilities from the new purchaser.

(d) There was no claim of transmission charges before RP, because there could not have been one on account of non-operationalization of LTA. The same also amounts to an express waiver of the said charges, even if it is assumed, on a without prejudice and without conceding basis, that the said claim was at that time alive. In support, reliance has been placed on the judgment of the Hon`ble Supreme Court in the case of *Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel*, [reported in (2006) 8 SCC 726].

(e) In response to the direction of the Commission, vide ROP for the hearing dated 16.3.2020, to provide the details of letter/ communication operationalizing LTA of the Petitioner and date indicated for operationalization of LTA, the Respondent has filed an affidavit dated 21.8.2020, wherein the Respondent has completely failed to show any letter, document or any other communication which could establish that a “firm”/ “effective” date of operationalization of LTA was ever communicated to the Petitioner before the said LTA was relinquished on 8.7.2019.

(f) The Respondent cannot rely on any term of the BPTA to wriggle out of its obligation to give/ intimate a firm date for operationalization of LTA as per Regulations. The Hon`ble Supreme Court in the case of *PTC India Ltd. v. Central Electricity Regulatory Commission*, reported in (2010) 4 SCC 603 has observed that a contract is subordinate to the law. Therefore, the Commission was cognizant of the terms of BPTA when it interpreted the Regulation 14 of the Connectivity Regulations. Further, the reliance on Recital E of the BPTA, is of no benefit for an additional reason, which is that a recital is not part of a contract. In this regard reliance has been placed on the judgment of the

Hon`ble Supreme Court in the case of *Chairman, life Insurance Corp and others vs Rajiv Kumar Bhasker*, [reported in (2005) 6 SCC 188)].

(g) The BG of Rs. 12 crore furnished in terms of Clause 6 of the BPTA is required to be returned by the Respondent. The above BG was meant to compensate CTUIL only if the Petitioner makes an exit from its power project (or abandons). The Petitioner completed its construction activities, and commissioned Unit-I of its generating station on 1.4.2014. As per the aforesaid clause, post completion of such obligations by the Petitioner, the aforesaid BG was required to be returned after a period of 6 months, i.e., by 1.10.2014.

(h) The Commission in its order dated 10.05.2019 in Petition No. 96/MP/2018 had observed that BG provided under Clause 6 of the BPTA, is to be kept alive only till the commissioning of the project and once the same is commissioned, the BG has to be returned. The purpose of furnishing BG is for recovering the damages or transmission charges in case of failure to construct the generating station/ dedicated transmission system or in case of exit or abandonment of the project by the project developer, and that the BG cannot be used for any other purpose including for ensuring opening of LC/BG under Clause 2.0 of BPTA and Clause 3.6.3 of the BCD Procedure. As per Clause 7.3 of the Detailed Procedure made under the Connectivity Regulations, the Bank Guarantee is to be initially valid for a period up to six months after the expected date of commissioning schedule of generating unit(s).

(i) In view of the legal principles laid down by this Commission, there is no basis for the Petitioner to keep the BG alive in favour of the Respondent since the construction phase was already over in 2014. Therefore, this Commission ought to direct the Respondent to return the BG furnished by the Petitioner.

Analysis and Decision

13. We have considered the submissions of the Petitioner and the Respondent. To recapitulate the facts of the case briefly, the erstwhile KWPCCL had been granted LTA of 240 MW on target region basis for evacuation of power from its generating station. Pursuant thereto, erstwhile KWPCCL entered into BPTA on 24.2.2010 with the



Respondent for evacuation of 240 MW from its generating station. As per the BPTA, the transmission charges become payable from the date of commissioning of the associated transmission system, provided the generating station had also been commissioned. The generation station of erstwhile KWPCCL was commissioned in March 2014 and the dedicated transmission line falling within its scope (the 400 kV Korba West–Raigarh pooling station D/c transmission line) was commissioned in June 2016. When the transmission system associated with the subject LTA was nearing completion, the Respondent issued letters dated 30.6.2017, 3.8.2017, 23.8.2017 and 12.9.2017 to KWPCCL requesting for opening of LC for operationalization of granted LTA of 240 MW. The erstwhile KWPCCL, thereafter, filed Petition No. 269/MP/2017 seeking, *inter-alia*, deferment of operationalization of LTA claiming that its generating station was shut down on account of an accident at the generating station.

14. While the said Petition was pending, erstwhile KWPCCL went through the insolvency proceedings, initiated by its lenders, before NCLT under provisions of the IBC 2016. The said developments including the appointment of Resolution Professional were informed to the Commission during the hearing held on 18.9.2018 and subsequently, IA No. 41/2019 was also filed therein seeking amendments in the main Petition so as to include initiation of CIRP against KWPCCL under the force majeure event. Vide order dated 24.6.2019, NCLT disposed of the insolvency proceedings against KWPCCL thereby approving the Resolution Plan submitted by Resolution Applicant, namely, Adani Power Limited in which the claim of Respondent to the tune of Rs.3,19,36,312/- was also factored in. The Respondent has stated to have informed the Resolution Professional that erstwhile KWPCCL is also required to pay termination/ relinquishment charges as per the order of the Commission in



Petition No.229/RC/2015 and charges to be decided as per order of the Commission in Petition No.92/MP/2015.

15. During the hearing held on 4.7.2019 in Petition No. 269/MP/2017, the learned counsel for the Respondent informed the Commission about approval of the Resolution Plan on 24.6.2019 and submitted that transmission system for operationalization of LTA has already been commissioned and that insolvency proceedings will not come in the way of operationalization of LTA. After hearing the parties, the Commission directed the Respondent to operationalize LTA and to complete other associated formalities as per provisions of the Connectivity Regulations and Detailed Procedure made thereunder. However, before the Respondent could operationalize LTA, the Petitioner relinquished 240 MW LTA vide its letter dated 8.7.2019 with immediate effect. Consequently, the Petitioner sought withdrawal of Petition No. 269/MP/2017 during the hearing held on 24.9.2019 which was allowed by the Commission vide order dated 25.9.2019. Subsequently, the Respondent vide its letter dated 7.11.2019 and updated letter dated 8.11.2019 raised invoice of Rs. 142.97 crore towards transmission charges for the period from 1.10.2017 to 8.7.2019 by retrospectively operationalizing LTA with effect from 1.10.2017. The said letters have been challenged by the Petitioner in the present Petition.

Operationalization of LTA

16. The Petitioner has submitted that LTA was not operationalized on 1.10.2017 i.e. the date on which the transmission system [Phase-II (1500MW) of 1st Pole of Champa-Kurukshetra HVDC link (3000 MW)] identified for power evacuation under the LTA granted to the Petitioner got ready. However, we find that there is no dispute

in this regard. The Respondent has fairly conceded in its submissions that LTA was not operationalized on 1.10.2017 and has submitted that the same was retrospectively operationalized with effect from 1.10.2017. The Petitioner has submitted that LTA was operationalised on 7/8.11.2019 retrospectively with effect from 1.10.2017 after relinquishment of the said LTA on 8.7.2019 by the Petitioner so as to be able to raise invoice for recovery of transmission charges for the period from 1.10.2017 (date of readiness of transmission system) to 8.7.2019 (date of relinquishment of LTA by the Petitioner). Retrospective operationalization of LTA was done by the Respondent vide letter dated 7.11.2019 (along with invoice) and updated letter dated 8.11.2019.

17. The Respondent has submitted that LTA granted to the erstwhile KWPCCL could not be operationalized as KWPCCL failed to open LC (a payment security mechanism) prescribed in the Detailed Procedure issued under Regulation 27 of the Connectivity Regulations. The requirement to open LC was also required under provisions of the 2010 Sharing Regulations. It has been further argued that due to non-operationalization of LTA and pendency of proceedings in Petition No. 269/MP/2017, the Respondent was unable to raise its claim towards transmission charges against erstwhile KWPCCL. As such, in the absence of a “debt due” towards transmission charges, the Respondent could file only a limited claim of Rs.3,19,36,312/- payable as on 5.12.2018 under the terms of the MoU dated 3.9.2016. The Respondent has contended that as per the agreed terms under the BPTA dated 24.2.2010, transmission charges are payable from the date of commissioning of the associated transmission system provided the scheduled commissioning date of the generating units has also been reached and given that the associated transmission system having commissioned on 1.10.2017, the liability

to pay the transmission charges under the subject LTA also ensues from 1.10.2017 till LTA is relinquished on 8.7.2019.

18. The Respondent has further contended that LTA has been operationalized, retrospectively, in terms of the direction of the Commission during the hearing dated 4.7.2019 in Petition No 269/MP/2017 read with order dated 8.3.2018 in Petition No.229/RC/2015 and order dated 5.11.2018 in Petition No.12/SM/2017.

19. In view of the submissions of the Respondent as mentioned in paragraph 18 above, we deem it necessary to first deal with the proceedings in the Petition No. 229/RC/2015 and Petition No. 12/SM/2017.

Proceedings in Petition No. 229/RC/2015

20. The issue of non-opening of LC by IPPs (independent power producers) was brought before the Commission in Petition No. 229/RC/2015 by the Respondent wherein the specific issue dealt with by the Commission in order dated 8.3.2018 was as under:

“Issue No.5: How the cases of the LTA Customers shall be dealt with where the associated transmission system required for LTA operationalization as identified in BPTA have been commissioned but LC has not been opened and billing has not been started by CTU from the effective date of LTA?”

54. *As discussed in preceding paragraphs, the LC is an instrument for payment of recovery mechanism which can be invoked by the transmission service provider (in this case, the Petitioner is transmission service provider) on default of payment. The transmission service charges are payable from the date of commencement of LTA. Since, the Petitioner has already developed the transmission system identified in the BPTA, the LC is required to be in place immediately if not already done. The transmission service charges shall be payable from the date of commencement of LTA. Therefore, the Respondents are directed to comply with the regulatory requirements of availing the transmission service from the petitioner and open the LC within 30 days of the date of issue of the order.*

55. Where entire Associated Transmission System has been commissioned but the generator has not established payment security mechanism and/or the generating stations have not been commissioned, the CTU shall operationalize the LTA from the date of commissioning of the entire transmission system retrospectively and shall raise the bills as per Regulations in vogue. In case, a particular generator has done certain



transactions under STOA / MTOA post the date of commencement of LTA, the charges already paid towards such transactions shall be offset from the bills to be raised for the LTA.

Summary of Decisions:

63. The summary of our decisions is as under:

...

(b) Payment Security Mechanism is an important regulatory requirement for availing the transmission services and all Respondents are directed to open the LC for the required amount one month before the operationalization of LTA. CTU is directed to inform the firm dates to facilitate institution of Payment Security Mechanism.

...

(d) Where the entire transmission system has been commissioned but the generator has not established payment security mechanism and/or the generating station has not been commissioned, CTU shall operationalize the LTA from the date of the commissioning of the entire transmission system and raise the bills as per Regulation in vogue. ...

...

(f) With regard to Associated Transmission System commissioned but LTA being relinquished post the effective date of LTA, CTU shall estimate date of operationalization of LTA for all the generators under above paras (a) and (b), irrespective of whether they have relinquished the LTA. In case, LTA has been relinquished post effective date of LTA as estimated under above paras (a) and (b), the generator shall be liable to pay transmission charges for the period from effective date of LTA till the date of relinquishment and thereafter as determined by the Commission in Petition No. 92/MP/2015.

64. The LTA shall be made effective retrospectively for the entire quantum of LTA as per above paras (a), (b) and (c) irrespective of payment security established by all the generators including the above generators.

....”

21. Thus, in the aforesaid order, the Commission had specifically dealt with the cases of the LTA customers wherein the associated transmission system required for operationalization of LTA as identified in BPTA had been commissioned but LC had not been opened and billing of transmission charges had not been started by the CTUIL. The Commission had issued categorical directions to the Respondent to operationalize LTAs from the date of commissioning of the transmission system retrospectively, for the customers who had not established payment security mechanism even after commissioning of the associated transmission system. The Commission had also held that the transmission charges shall be payable from the



date of commencement of the LTA. Additionally, the Respondents therein (who were yet to open the requisite LC) were directed to open the LC within 30 days of the date of issue of the aforesaid order. The Commission had also directed CTUIL to raise the bills as per the Regulations in vogue. Also, as evident from the order, the directions relating to the operationalization of LTA and raising of bills in such cases were issued to CTUIL to be implemented in respect of all such generating stations and not only the Respondents therein. Thus, the case of erstwhile KWPCCL was also covered in terms of the above directions though it was not a party in the proceedings of Petition No. 229/RC/2015. Therefore, it was incumbent upon the Respondent to inform KWPCCL about the directions in that order and ensure compliance through operationalizing LTA irrespective of opening of LC by the Petitioner. However, nothing is placed on the record by the Respondent whether this direction of the Commission was conveyed to KWPCCL.

22. Further, there is nothing on the record to show that the Respondent complied with the directions of the Commission as regards operationalization of LTA of erstwhile KWPCCL in terms of direction given in Paragraph 63(b) of the above-quoted order dated 8.3.2018. The Commission vide Record of Proceedings for the hearing held on 25.2.2020 in this petition directed the Respondent to submit information corresponding to letter/ communication operationalizing LTA of KWPCCL/ the Petitioner. Perusal of the affidavit dated 21.8.2020 filed in response to the direction of the Commission, reveals that no such intimation regarding operationalization of LTA was given to erstwhile KWPCCL.

Proceedings in Petition No. 12/SM/2017

23. The Respondent has submitted that due to inadequate progress in operationalization of LTAs as per the directions of the Commission in the order dated 8.3.2018 in Petition No.229/RC/2015, the Commission initiated suo-motu proceedings in Petition No.12/SM/2017 against the Respondent. During the said proceedings, the Respondent pointed out difficulties in operationalization of LTAs in cases where the generation was yet to be commissioned or the same was abandoned or generating station was not in operation as there was no recourse to recover the dues of transmission charges in case of non-payment as regulation of power supply in such cases would have no effect. In case of erstwhile KWPCCL, it was informed by the Respondent (as recorded at Sl. No. 31 of table in paragraph 10(b) of the order dated 5.11.2018) that 240 MW LTA has not been operationalized as *“no generation at present, no LC established and no specific regulatory action is possible in case of non-payment”*. It is recorded in the order that this information was filed by CTUIL vide affidavit dated 8.6.2018. As against this, it is noted that LTA has been retrospectively operationalized w.e.f. 1.10.2017. Vide order dated 5.11.2018, the Commission disposed of Petition No.12/SM/2017 by observing that non-operationalization of LTAs have been due to difficulties being faced by the Respondent.

24. The Respondent has sought to justify non-operationalization of LTA of erstwhile KWPCCL on the ground that the Commission did not take any action for non-compliance of the direction of the Commission. We have gone through the said order and note that the said contention of the Respondent is not correct as there is no finding of the Commission ratifying non-operationalization of LTAs by the Respondent in such cases. In fact, in response to the direction sought by the

Respondent with regard to the manner of operationalization of LTA in such cases, the Commission refused to address such request for being outside the purview of the Petition. We note that Petition No. 12/SM/2017 was rather initiated against CTUIL for non-compliance of directions of the Commission. Therefore, the Commission had not considered plea of CTUIL to issue any directions to generators in that petition stating that the same was outside purview of that petition. The same is evident from the following extract of the order dated 5.11.2018:

“11. We have heard the representative of the CTU and perused documents on record. CTU, vide Record of Proceedings for the hearing dated 15.10.2015 in Petition No. 229/RC/2015, was directed to operationalize the LTA of LTTCs in full or part in terms of Regulation 8 (5) of the Sharing Regulations. CTU vide order dated 28.9.2016 in Petition No. 30/MP/2014, was further directed to review the cases and take necessary action for operationalization of LTA including part LTA and raising the bills for transmission charges on the generators. Since, CTU did not comply with the above directions, the Commission vide order dated 19.7.2017 issued show cause to CTU under Section 142 of the Act for non-compliance of Commission’s directions dated 15.10.2015 and 28.9.2016 and the provisions of Regulation 8 (5) of the Sharing Regulations.

16. The present suo motu Petition was initiated against CTU for non-compliance of the provisions of the Sharing Regulations and the directions of the Commission. CTU has expressed constraints in fully complying with the direction and has sought directions of the Commission in respect of operationalization of LTA in cases of abandonment of project by generators, long delays in commissioning of projects or in cases where the project is in abeyance. We have already stated that taking decision on these aspects is not within purview of this petition and that the CTU should take action as per provisions of the Regulations. However, we take note of the fact that CTU is facing difficulty in operationalization of LTA in certain cases. At paragraph 12 of this Order, the CTU has furnished details of LTAs granted, relinquished LTAs and LTAs pending operationalization. In view of details furnished by CTU and the fact that the non-operationalisation of LTAs is not in disregard to Orders of the Commission rather it is due to difficulties being faced by it. Therefore, we do not find merit in continuing with this petition and accept the plea of the CTU to discharge the notice under Section 142 of the Act against it and drop the present proceedings.”

25. However, the Commission reiterated its direction to CTUIL to take steps to operationalize LTAs of long term transmission customers as per the provisions of Regulations. The relevant extract of the order dated 5.11.2018 is as under:

“15. Further, CTU sought direction with regard to the manner of operationalization of LTA in cases of abandonment, abeyance or not commissioning of projects in time. CTU has also proposed the mechanism for the interim period, namely.....The Commission is of the view that decision on this issue



is outside the purview of the petition. However, CTU is directed to take steps to operationalize the LTAs of long term transmission customers as per provisions of the Regulations.

26. Therefore, contention of the Respondent is grossly misplaced that it was on account of non-issuing of direction by the Commission in Petition No. 12/SM/2017 that LTAs remained non-operationalized. The Respondent has not placed on record as to whether it filed any subsequent petition for the directions it sought in Petition No. 12/SM/2017 after the Commission held that directions sought by CTUIL were beyond scope of that petition.

27. Admittedly, the Respondent did not operationalize LTAs even after the aforesaid direction of the Commission vide order dated 5.11.2018 in Petition No. 12/SM/2017. It is surprising that contrary to the stand taken in proceedings in Petition No. 12/SM/2017 that LTA cannot be operationalised for generating stations not in operation, the Respondent, in this petition, has relied on the provisions of BPTA, TSA, Detailed Procedure notified under Regulation 27 of the Connectivity Regulations and orders of the Commission in its reply dated 18.2.2021 to contend that LTA holders are obligated to pay transmission charges after commissioning of associated transmission system irrespective of whether the power flows or not.

28. We are also of the view that after commissioning of associated transmission system or operationalization of LTA, as the case may be, the LTA holders are obligated to pay transmission charges irrespective of whether power flows or not. Therefore, it is far from understood as to what prevented the Respondent from operationalisation LTA of KWPCCL and raising of invoices for transmission charges in terms of direction of the Commission in order dated 5.11.2018 in Petition No. 12/SM/2017 and order dated 8.3.2018 in Petition No. 229/RC/2015.



Proceedings before NCLT

29. The directions in Petition No. 229/RC/2015 to operationalize LTA and raising of bills were issued by the Commission on 8.3.2018, whereas the Corporate Insolvency and Resolution Process for KWPCCL commenced thereafter only on 26.7.2018. Vide Public Notice dated 7.8.2018, IRP appointed by NCLT had called for submission of claims by the creditors of KWPCCL as per Section 15 of the IBC 2016 and, in response, the Respondent submitted its claim on 5.12.2018.

30. It is worth mentioning that the Commission had again issued directions to operationalize LTA vide order dated 5.11.2018 in Petition No. 12/SM/2017, which was prior to the submissions of claims by the Respondent before IRP on 5.12.2018.

31. It has been submitted by the Respondent that while submitting its claim of Rs. 3,19,36,312/- payable as on 5.12.2018, the Respondent categorically stated that the said claim only pertained to the dues as approved till the month of December 2018 on account of a Memorandum of Understanding dated 3.9.2016 executed with KWPCCL and the Respondent reserved its right to claim any further dues under the BPTA dated 24.2.2010 which could only be crystalized after final adjudication in Petition No. 269/MP/2017.

32. The submission dated 5.12.2018 made by the Respondent before IRP during CIRP is on record and it is observed that no submission was made regarding pendency of Petition No. 269/MP/2017 or related future dues. On the contrary, we note that against the specific information pertaining to '*Details of any dispute as well as the record of pendency or order of suit or arbitration proceedings*' sought in Form B, the Respondent did not make any submission before IRP.



33. In the instant petition, the Respondent in its reply dated 18.1.2021 has submitted that, vide letter dated 29.1.2019, it again clarified to IRP that in addition to the claim already filed by it, further dues towards transmission charges were also to be crystalized once the order in Petition No.269/MP/2017 was passed by the Commission. However, the said submission could not be found in the said correspondence dated 29.1.2019 made to IRP. However, what is there in the said correspondence dated 29.1.2019 to IRP and quoted by the Respondent in its final written submissions dated 18.8.2021 is the following:

“In addition to the above, termination/relinquishment charges also are to be paid by M/s. KWPCCL as per CERC orders in Petition No.229/RC/2015 and charges to be decided as per Petition No.92/MP/2016.”

34. We, thus, observe that the Respondent made an incomplete submission before IRP without clearly reflecting the liability towards transmission charges. However, the reason for the same is understandable, as the Respondent had not raised the bills towards transmission charges. For such a scenario, the Respondent itself is responsible. Had the Respondent complied with direction of the Commission in the orders dated 8.3.2018 in Petition No 229/RC/2015 and 5.11.2018 in Petition No. 12/SM/2017 to operationalize LTA and raise bills towards transmission charges, the Respondent could have crystalized the liability towards transmission charges before IRP.

35. Further, the reliance of the Respondent on pendency of Petition No. 269/MP/2017 is completely misleading as the said Petition was filed by erstwhile KWPCCL seeking deferment of LTA and there was no stay granted by the Commission on operationalization of LTA. The pendency of Petition No. 269/MP/2017 did not in any manner impede the operationalization of LTA and subsequent raising of bills towards transmission charges by the Respondent.

36. As mentioned above, the directions in Petition No. 229/RC/2015 to operationalize LTA and raise bills towards transmission charges had been issued by the Commission on 8.3.2018 prior to commencement of Corporate Insolvency and Resolution Process for KWPCCL on 26.7.2018. Further, the directions to operationalize LTA vide order dated 5.11.2018 in Petition No. 12/SM/2017 had been issued which was prior to the submissions of claims by the Respondent before IRP on 5.12.2018. Therefore, in our view, the contentions of the Respondent for operationalizing the LTA and raising of bills towards transmission charges after completion of CIRP under the IBC 2016 on the ground of pendency of Petition No. 269/MP/2017 is absolutely misplaced and not acceptable.

37. The Respondent has made certain allegations against the conduct of erstwhile KWPCCL and IRP by filing IA No. 41/2019. The same does not warrant any deliberation as the erstwhile company and IRP are no more associated with the asset under consideration after conclusion of process under the IBC 2016. Further, the same did not pose any difficulty for the Respondent to not raise its claims before IRP.

38. The Respondent has also contended that the present Petitioner, who was a Resolution Applicant before NCLT and who ultimately purchased KWPCCL, as a going concern, also understood the position as regards the subject LTA, which is evident from its letter dated 15.5.2020 to the Respondent stating as under:

“2. It is stated that we, Raigarh Energy Generation Ltd. (formerly KWPCCL), executed a Bulk Power Transmission Agreement (BPTA) dated 24.02.2010 with PGCIL for the purpose of availing Long-Term Access (LTA) to the tune 240 MW. We surrendered/ relinquished the said BPTA/ LTA, as per the option available to us under Regulation 18 of the CERC Connectivity Regulations 2009, vide our letter dated 08.07.2019, by invoking Clause 9 of the said agreement, on account of occurrence of certain force majeure events beyond our control.

.....



4. *In addition to the above, it is further stated that the aforesaid BG was furnished by REGL to PGCIL, pursuant to Clause 6 of the BPTA. From the said provision, it is evident that the BG was meant to compensate PGCIL, only if REGL/generator makes an exit or abandons its project. In this context, it is stated that REGL completed its construction activities, as contemplated in the aforesaid clause of the BPTA, and commissioned Unit-I of 600 MW of the power project on 01.04.2014. As per the aforesaid clause, post completion of such obligations by the generator/REGL, the BG is required to be returned after a period of 6 months. As such, the BG was required to be returned to REGL (KWPCCL), by 01.10.2014.*

.....”

39. Thus, it has been contended that the clear intention and understanding of the present Petitioner right from the period that it participated in the insolvency proceedings as a resolution applicant that the subject LTA and all the rights, obligations and liabilities attached thereto, were to remain unaffected by the on-going insolvency proceedings inasmuch as the generating station was to start generation upon its repair and for evacuating the power so generated, the subject LTA was necessarily required.

40. We do not find merit in the above submission of the Respondent for the fact that the present Petitioner never denied the subsisting nature of LTA. As a Resolution Applicant, it could only expect that all the operational creditors including the claim by the Respondent towards transmission charges, if any, would have been submitted during CIRP. The Resolution Applicant would also assess future liabilities based on the information provided with regards to pending suits in Form B. As observed above, the Respondent neither crystallized nor submitted claim towards transmission charges in Form B nor did it clearly state anything about imminent liability of transmission charges for the past period, which according to the Respondent was not done on account of pendency of Petition No. 269/MP/2017. As held earlier, pendency of Petition No. 269/MP/2017 was not mentioned by the Respondent for not making claims before IRP. Also, Petition No. 269/MP/2017 was a



Petition seeking deferment of LTA, which did not impede the ability of the Respondent to crystallize and claim transmission charges before IRP.

41. As regards dismissal of the appeals filed by the Respondent by NCLAT and the Hon`ble Supreme Court on basis of the same being time-barred, the Respondent has submitted that the said filing was a wrong remedy pursued bona fide by the Respondent and that the same did not extinguish the vested legal rights of the Respondent to recover transmission charges and relinquishment charges under the subject LTA. In this regard, the Respondent has placed reliance in the case of *Sri Raja Tyada Pasupati Vs. Aryan Bank of Vizagapatnam [Appeal No.289/1926 decided on 6.8.1936]*. It has been contended that the Appeals having been dismissed on ground of limitation, it could not be said that the claims of the Respondent towards transmission charges and relinquishment charges no longer survive. In this context, reliance has also been placed on the judgment of Constitution Bench of the Hon`ble Supreme Court in the matter of *Bombay Dyeing and Manufacturing Company Ltd. Vs. State of Bombay & Ors. [AIR 1958 SC 328]* and judgment of the Hon'ble Allahabad High Court in the matter of *Hari Raj Singh Vs. Sanchalak Panchayat Raj, UP Government & Ors. [AIR 1968 All 246]* to contend that dismissal of the Appeals filed by the Respondent do not extinguish its right to raise the impugned invoices towards transmission charges.

42. We have noted earlier that the Respondent had neither operationalized LTA of KWPCCL in time or even as per the direction of the Commission, nor raised claims of transmission charges properly before IRP during CIRP, and nor had filed appeal before NCLAT in a timely manner. In this situation, we do not appreciate the contention of the Respondent that its rights to raise invoices towards transmission



charges still exist. The objective behind initiation of the Corporate Insolvency Resolution Process under the IBC 2016 is final discharge of debt in full or part, as the case may be. Thus, with commencement of insolvency proceedings, the existing debt/ right had to be raised before the IRP and same ceased to exist once resolution is finalized.

43. The following observations in NCLT order dated 24.6.2019 is significant:

“Resolution Plan

The ‘Insolvency & Bankruptcy Code’ defines ‘Resolution Plan’ as a plan for insolvency resolution of the ‘Corporate Debtor’ as a going concern. It does not spell out the shape, color and texture of ‘Resolution Plan’, which is left to imagination of stakeholders. Read with long title of the ‘I&B Code’, functionally, the ‘Resolution Plan’ must resolve insolvency (rescue a failing, but viable business); should maximize the value of assets of the ‘Corporate Debtor’, and should promote entrepreneurship, availability of credit and balance the interests of all the stakeholders.

*In the backdrop of the object of the Code, it is amply clear that the **“Resolution is Rule and the Liquidation is an Exception”**. Liquidation brings the life of a corporate to an end. It destroys organizational capital and renders resources idle till reallocation to alternate uses. Further, it is inequitable as it considers the claims of a set of stakeholders only if there is any surplus after satisfying the claims of a prior set of stakeholders fully. “The Insolvency and Bankruptcy Code”; therefore, does not allow liquidation of a Corporate Debtor’ directly. It allows liquidation only on failure of corporate insolvency resolution process. It rather facilitates and encourages resolution in several ways.”*

44. From the above, it is apparent that the failure of the corporate insolvency resolution process would result in liquidation of the company. In light of threat of liquidation of assets, it would be suicidal for debtors, as is the case with Respondent herein, to withhold its claims which could be crystallized for recovery in future by the successful Resolution Applicant. As we have already held that the Commission had directed the Respondent to operationalize the LTA and raise bills and there were no pending litigations which prevented the Respondent from operationalizing LTA and raising bills towards transmission charges, the Respondent could have raised the claims before IRP in time, only if it had complied with the direction of the



Commission and there is nothing on the record to show that it was prevented from doing so.

45. Vide order dated 24.6.2019, the resolution plan submitted by the Petitioner was approved by NCLT. The relevant extract of the said order is as under:

“10.2Accordingly, the Resolution Applicant undertakes to pay Liquidation Value to all Operational Creditors (including any Governmental Authorities) (if any) in respect of their Admitted Operational Creditors Debt, in priority to payment to any Financial Creditors. In view of the above, post the payment of Liquidation Value, all due of the Operational Creditors (excluding any Workmen and Employee) shall be written off in full and shall be, and be deemed to be, permanently extinguished as on the NCLT Approval date.....”

20. We, the Adjudicating Authority, are of the considered opinion and also being satisfied that the Resolution Plan as approved by the Committee of Creditors (CoC) meets the requirements as referred to under section 30 (2) of the Code, accordingly IA 236 of 2019 is allowed with the above said observations and directions.”

46. The Appeal (Appeal No. 1334 of 2019) filed by the Respondent before the National Company Law Appellate Tribunal (NCLAT) was dismissed by NCLAT as being time barred as under:

“12. As the Appeal itself shows in Para 6 of the Appeal Memo, the Appellant is aware of the period of limitation of 30 days under Section 61 of IBC and also the legal position that this Appellate Tribunal can at the most condone period of 15 days beyond the period of 30 days. The Appeal itself states that the Appellant received knowledge of the Impugned Order by virtue of the pending proceeding Petition No. 269/MP/2017. The Learned Counsel for the Respondent has pointed out Annexure A-20 which is record of proceedings before the “CERC” dated 04.07.2019 where Learned Counsel of the Appellant made certain statements which have been noted as under:

.....

13. Learned Counsel for the Respondent referred to the above paragraphs from the said proceeding to state that the Appellant admittedly had noted all the passing of the Resolution Plan, at last on 04.07.2019. It is stated that when admittedly Appeal has to be filed at the most within 45 days from the date of the knowledge, the Present Appeal is apparently time barred. The ground raised in the Appeal Para 6 that during the pendency of the said proceedings before “CERC” the Appellant was not in a position to quantify the Operational Debt and do so only when the proceeding was initiated on 25th September, 2019 cannot be accepted. The Appellant had admittedly filed claim before the IRP/RP of which major part was admitted by the IRP/RP. Inability to quantify the Operational Debt, as claimed when again, be no reason or obstruction in filing of the Appeal against the Impugned Order. The other contentions raised by the Learned Counsel for the Appellant that because of the pendency of the proceedings before “CERC” the Appellant was unable to file the Appeal also deserves to be



rejected as nothing is shown that under law there was any bar to the Appellant from filing Appeal against the Impugned Order merely because proceeding was pending before "CERC".

14. Although the Appellant is making averments regarding the merits of the matter, and is relying on Judgment in the matter of Principal Director General of Income Tax (Supra), in our humble view, if we do not have jurisdiction to entertain the Appeal, we cannot and need not to go into the merits of the matter.

The Appeal is time barred for reasons stated above and thus, the same is dismissed as time barred."

47. The aforesaid judgment of NCLAT came to be challenged before Hon'ble Supreme Court of India by way of a civil appeal, being Civil Appeal No. 2711/2020. However, the Hon'ble Supreme Court vide final judgment dated 22.07.2020 upheld the decision of NCLAT.

48. According to the order of NCLT, post the payment of liquidation value, all the dues of all the operational creditors have been written off in full and shall be deemed to be permanently extinguished. In this regard, the Hon'ble Supreme Court in its judgment in the case of *Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta* [reported in (2020) 8 SCC 531] has observed as under:

"107. For the same reason, the impugned NCLAT judgment [Standard Chartered Bank v. Satish Kumar Gupta, 2019 SCC Online NCLAT 388] in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count."

49. In terms of the above judgment of Hon'ble Supreme Court, the Respondent is barred from raising any past claims from the Petitioner herein as the Successful



Resolution Applicant has to start from a fresh slate. This is because, in terms of the above judgment, it was the duty of the Respondent to submit its claim (towards transmission charges) for the Resolution Applicant to know exactly what has to be paid as and when it takes over and runs the business of the corporate debtor.

50. The position was further clarified by the Hon'ble Supreme Court including on matters of unpaid tax and other statutory dues in the case of *Ghanashyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited* [reported in 2021 SCC Online SC 313] as under:

"66. Vide Section 7 of Act No. 26 of 2019 (vide S.O. 2953(E), dated 16.8.2019 w.e.f. 16.8.2019), the following words have been inserted in Section 31 of the I&B Code.

"Including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed"

67. As such, with respect to the proceedings, which arise after 16.8.2019, there will be no difficulty. After the amendment, any debt in respect of the payment of dues arising under any law for the time being in force including the ones owed to the Central Government, any State Government or any local authority, which does not form a part of the approved resolution plan, shall stand extinguished.

68. The only question, which remains is, what happens to such dues if they pertain to a period wherein Section 7 petitions have been admitted prior to 16.8.2019.

69. To answer the said question, we will have to consider, as to whether the said amendment is clarificatory/declaratory in nature or a substantive one. If it is held, that it is declaratory or clarificatory in nature, it will have to be held, that such an amendment is retrospective in nature and exists on the statute book since inception. However, if the answer is otherwise, the amendment will have to be held to be prospective in nature, having force from the date on which the amendment is effected in the statute.

.....

77. It is clear, that the mischief, which was noticed prior to amendment of Section 31 of I&B Code was, that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an approval was granted to the resolution plan by NCLT; on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position, that once such a resolution plan was approved by the Adjudicating Authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished.



.....

86. As discussed hereinabove, one of the principal objects of I&B Code is, providing for revival of the Corporate Debtor and to make it a going concern. I&B Code is a complete Code in itself. Upon admission of petition under Section 7, there are various important duties and functions entrusted to RP and CoC. RP is required to issue a publication inviting claims from all the stakeholders. He is required to collate the said information and submit necessary details in the information memorandum. The resolution applicants submit their plans on the basis of the details provided in the information memorandum. The resolution plans undergo deep scrutiny by RP as well as CoC. In the negotiations that may be held between CoC and the resolution applicant, various modifications may be made so as to ensure, that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the Corporate Debtor is revived and is made an on-going concern. After CoC approves the plan, the Adjudicating Authority is required to arrive at a subjective satisfaction, that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of the I&B Code. Only thereafter, the Adjudicating Authority can grant its approval to the plan. It is at this stage, that the plan becomes binding on Corporate Debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution Plan. The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.

.....

91. It is a cardinal principle of law, that a statute has to be read as a whole. Harmonious construction of subsection (10) of Section 3 of the I&B Code read with subsections (20) and (21) of Section 5 thereof would reveal, that even a claim in respect of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority would come within the ambit of 'operational debt'. The Central Government, any State Government or any local authority to whom an operational debt is owed would come within the ambit of 'operational creditor' as defined under sub-section (20) of Section 5 of the I&B Code. Consequently, a person to whom a debt is owed would be covered by the definition of 'creditor' as defined under sub-section (10) of Section 3 of the I&B Code. As such, even without the 2019 amendment, the Central Government, any State Government or any local authority to whom a debt is owed, including the statutory dues, would be covered by the term 'creditor' and in any case, by the term 'other stakeholders' as provided in subsection (1) of Section 31 of the I&B Code.

.....

CONCLUSION

95. *In the result, we answer the questions framed by us as under:*

(i) That once a resolution plan is duly approved by the Adjudicating Authority under subsection (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution



plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

(ii) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;

(iii) Consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants its approval under Section 31 could be continued.”

51. In light of the order of NCLT and the judgments of the Hon'ble Supreme Court, the Respondent is barred from raising any claims with regards to transmission charges for the period prior to 24.6.2019 (i.e. the date on which the resolution plan was approved by NCLT) on the Petitioner. Accordingly, the impugned letters dated 7.11.2019 and 8.11.2019 are hereby set aside to the extent of claim of transmission charges up to 24.6.2019.

52. As regards claim of transmission charges after 25.6.2019, we note that the Petitioner has relinquished LTA w.e.f. 8.7.2019. Hence, the Petitioner shall be liable to pay transmission charges w.e.f 25.6.2019 till 8.7.2019.

Relinquishment Charges

53. The Petitioner in its IA No. 66/2020 filed on 13.8.2020 and written submissions dated 26.8.2021 has contended that since the Respondent in its Appeals before the NCLAT and the Hon'ble Supreme Court specifically agitated its claim towards the alleged transmission charges as well as the alleged relinquishment charges/ compensation, both the said claims of the Respondent, against the Petitioner do not survive. It has argued that the claim having been rejected, cannot now be recovered from the Petitioner. However, this contention of the Petitioner is contrary to its own submission in the Petition wherein it has



submitted that the present Petition is filed against levy of transmission charges by the Respondent and that the Petitioner has filed an Appeal (DFR No. 2311 of 2019) against levy of relinquishment charges before the APTEL against the Commission's order dated 8.3.2019 in Petition No. 92/MP/2015 which is pending adjudication.

54. The Petitioner cannot circumvent the responsibility of paying the relinquishment charges by relying on the judgment of Hon'ble Supreme Court as the said judgment only upheld the order of NCLAT wherein the Appeal filed by the Respondent was held as time-barred. There is no decision on merit as far as relinquishment charges are concerned. Further, LTA was relinquished on 8.7.2019 i.e. after the conclusion of CIRP on 24.6.2019. Therefore, the relinquishment charges shall be payable by the Petitioner subject to outcome of Appeals filed against the order of the Commission in Petition No. 92/MP/2015.

Issue of Bank Guarantee

55. The Petitioner has submitted that BG of Rs.12 crore has been furnished by the Petitioner in terms of Clause 6 of the BPTA. BG was meant to compensate the Respondent only if the Petitioner makes an exit from its power project (or abandons). As per the Petitioner, BG provided under Clause 6 of the BPTA is to be kept alive only till the commissioning of the project and once the generating station is commissioned, BG has to be returned. The Petitioner completed its construction activities, as contemplated in the aforesaid clause of BPTA, and commissioned Unit-I of 600 MW of the generating station on 1.4.2014. As per the aforesaid clause, post completion of such obligations by the Petitioner, the aforesaid BG was required to be returned after a period of 6 months, i.e., by 1.10.2014. In this regard, the Petitioner has relied on the order of the Commission dated 10.5.2019 in Petition No.

96/MP/2018 (*MB Power (Madhya Pradesh) Limited v. PGCIL*) and order dated 8.12.2017 in Petition Nos. 203/MP/2015 and 41/MP/2016 (*GMR Kamalanga Energy Limited v. PGCIL*).

56. We have gone through the above orders and note that the orders are not relevant to the present case as the specific issue of relinquishment of LTA was not being adjudicated in these orders. The relevant portion of order dated 5.2.2020 in Petition No. 11/MP/2017 with regard to relinquishment of LTA is extracted as under:

34. In fifth prayer, the Petitioner has sought a direction to CTU to return the Bank Guarantee of Rs.40.08 crore. We observe that the Petitioner shall be liable for payment of relinquishment charges as calculated by CTU in terms of this Order and Order dated 8.3.2019 in Petition No. 92/MP/2015. We direct that BG shall be kept alive by the petitioner till it makes payment of relinquishment charges as calculated by CTU. In case the Petitioner does not make payment of relinquishment charges to CTU in accordance with timeline provided in order dated 8.3.2019 in Petition No. 92/MP/2015, CTU shall encash the BG and adjust the same against relinquishment charges and return the balance amount, if any, to the Petitioner.

57. In view of the above quoted order, we direct that BG shall be kept alive by the Petitioner till it makes payment of relinquishment charges as calculated by the Respondent. Subject to outcome of Appeal filed against order dated 8.3.2019 in Petition No. 92/MP/2015, in case the Petitioner does not make payment of relinquishment charges to the Respondent, CTUIL shall be at liberty to encash the BG and adjust the same against relinquishment charges and return the balance amount, if any, to the Petitioner.

58. In light of the above discussions and findings, the Petition No. 92/MP/2020 and IA No. 5/2020 and IA No. 66/2020 are disposed of.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/
(I.S. Jha)
Member

sd/-
(P. K. Pujari)
Chairperson

