



March 2025

JSA secures relief for Brahmani Thermal Power Private Limited, as Appellate Tribunal for Electricity upholds force majeure-based relinquishment of Long-Term Access *sans* any liability

In a significant judgment, the Appellate Tribunal for Electricity (“**APTEL**”) in the case of **M/s Brahmani Thermal Power Private Limited vs. Central Electricity Regulatory Commission**¹ held that Brahmani Thermal Power Private Limited (“**BTPPL**”)² was entitled to relinquish its Long-Term Access (“**LTA**”) without any liability, due to force majeure events. By doing so, APTEL set aside Ld. Central Electricity Regulatory Commission’s (“**CERC**”) findings, by emphasising that the delay in land acquisition by the concerned State Government was a force majeure event beyond BTPPL’s control. APTEL returned these findings after considering Regulation 18 of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (“**Connectivity Regulations, 2009**”).

Brief facts

1. The Appellant, BTPPL formerly known as Navbharat Power Private Limited, planned to establish a 1050 MW (2x525 MW) coal-based thermal power plant in Odisha. For this, it executed a Memorandum of Understanding (“**MoU**”) with the State Government of Odisha on June 9, 2006. Under the MoU, the State Government through its instrumentality, Odisha Industrial Infrastructure Development Corporation (“**IDCO**”), was to acquire 1,200 (one thousand two hundred) acres of land and hand it over free from encumbrances to BTPPL for setting up the power plant. BTPPL thereafter executed a Bulk Power Transmission Agreement (“**BPTA**”) with Power Grid Corporation of India Limited (“**PGCIL**”) for LTA to the transmission network on June 7, 2010.
2. The land was identified and the acquisition process commenced. After certain payments by BTPPL, the Government of Odisha issued Section 4(1) notification under the Land Acquisition Act, 2013 on November 6, 2007, which was followed by Section 6(1) notifications on November 29, 2008, and December 11, 2008. BTPPL obtained clearances from various authorities in relation to the identified land, some even before the BPTA was executed.
3. On July 30, 2009, the Collector, Dhenkanal informed that the Project area of 546.98 (five hundred and forty-six point nine eight) hectares fell within the Ayacut area of Rengali Right Canal System (“**RRCS**”), which required the matter to be settled with the Water Resources Department. Thereafter, the Water Resources Department *inter alia* requested BTPPL to revise its requirement of land or relocate the project. BTPPL expressed its inability to relocate.

¹ Judgment dated March 20, 2025, in Appeal No. 235 of 2017

² BTPPL was represented by JSA team comprising Abhishek Munot, Malcolm Desai and Samikrith Rao.

4. Meanwhile, the MoU expired on December 31, 2011, and was not extended by the State Government. BTPPL had submitted a proposal reducing the share of Ayacut land and requested IDCO to initiate land acquisition process. BTPPL had also requested PGCIL to postpone the commercial operation date of the plant.
5. It was only on July 16, 2012, that the Department of Water Resources gave its in-principal acceptance to establishment of the plant in the Ayacut area of RRCS. BTPPL then wrote to the State Government of Odisha to seek resumption of the land acquisition process. It also sought extension of the MoU, but in vain.
6. Finally, BTPPL issued a force majeure notice on June 25, 2013, and sought relinquishment of the LTA and return of the bank guarantee submitted by it. PGCL advised BTPPL to approach CERC. Accordingly, BTPPL filed a petition³ before CERC claiming force majeure under the BPTA and return of the bank guarantee.
7. On April 12, 2017, CERC rejected BTPPL's claim of force majeure, ruling that the project was abandoned for commercial reasons and that force majeure under the BPTA only provided temporary relief, not an exit from obligations. CERC further held that BTPPL must pay relinquishment charges as per Regulation 18 of the Connectivity Regulations, 2009 and it was not entitled to a refund of the INR 36,00,00,000 (Indian Rupees thirty-six crore) bank guarantee.

Issue

Whether the BPTA was frustrated on account of force majeure events faced by BTPPL?

Findings of APTEL

Clause 9 of BPTA extends to permanent force majeure events

1. Clause 9 of the BPTA is not limited to only temporary force majeure events. The use of word 'practicable' in the last sentence of Clause 9 merely indicates that the agreement may be continued after the Force Majeure event ceases to exist if the affected party finds it practical so to do. To say that Clause 9 applies only in case of 'temporary failure to carry out the Terms of the Contract' would tantamount to adding words to the written agreement, which is impermissible.
2. APTEL in its earlier Judgment dated May 19, 2020 in *PEL Power Limited vs. CERC and Anr.*⁴ ("**PEL Power Judgment**") regarding an identical clause had held the same. There is no stay on PEL Power Judgment. The PEL Power Judgment was followed in judgment dated May 14, 2024, titled *Himachal Sorang Power Private. Limited vs. CERC and Ors.*⁵. The Appeal filed by Central Transmission Utility India Limited against the Himachal Sorang judgment has been dismissed by Hon'ble Supreme Court on August 27, 2024.

Force majeure events prevented BTPPL from setting up the plant

1. CERC's finding that the project was abandoned due to commercial reasons is entirely unreasoned. The practice of writing unreasoned and cryptic orders needs to be deprecated sternly. Though CERC's order could be set aside on the ground of it containing no reasons, the appeal was heard finally considering that it has been pending adjudication for more than 7 (seven) years.
2. The main reasons due to which the project could not be executed were: (a) failure on the part of the State Government to acquire land for project before expiry of the notifications issued under Sections 4(1) & 6(1) of the Land Acquisition Act, 2013; and (b) failure on the part of the State Government to extend/renew the MoU beyond December 31, 2011. Both these factors were undoubtedly beyond the control of BTPPL and therefore, constitute force majeure events contemplated under Clause 9 of the BPTA.

³ Petition No. 317/MP/2013

⁴ Appeal No. 266 of 2016

⁵ 2024 SCC OnLine APTEL 13

3. When the MoU dated June 9, 2006, clearly made it an obligation upon the State Government to acquire the land required for the project through IDCO and place it at the disposal of BTPPL free from any encumbrances, there was no reason or occasion for BTPPL to initiate land acquisition process. It is the State Government which has failed to fulfil its obligations under the MoU for which BTPPL cannot be held responsible.
4. Regulation 8 of the Connectivity Regulations, 2009 is only applicable in cases of voluntary relinquishment, without being affected by force majeure events.
5. As on June 25, 2013, when BTPPL issued force majeure notice, there was no stranded spare capacity in the lines in question, since no work began on these lines. This also rules out applicability of Regulation 18 of the Connectivity Regulations, 2009, which presupposes stranded capacity on account of relinquishment.
6. Therefore, CERC's order is set aside, and the Appeal is allowed. Central Transmission Utility India Limited is directed to return BTPPL's bank guarantee within 2 (two) weeks.

Conclusion

APTEL's judgment rightly recognises force majeure conditions faced by the generator which prevented operationalisation of the LTA under BPTA. It also respects the force majeure clause in the BPTA by not resorting to a pedantic interpretation of the clause to hold that it covers permanent force majeure events also. Furthermore, it upholds the force majeure clause of the BPTA even in light of Regulation 18 of the Connectivity Regulations, 2009, by expressly holding that there was no stranded capacity in the present matter.

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41 Ranked Lawyers



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21 Ranked Lawyers



12 Practices and
50 Ranked Lawyers



14 Practices and
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