In the Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 48 of 2015

Dated: 10th May, 2016

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

In the Matter of:

M/s Maithon Power Ltd.
Jeevan Bharti, 10th Floor,
Tower I, 124,
Connaught Circus,
New Delhi – 110 001 **... Appellant(s)**

Versus

1. **Central Electricity Regulatory Commission**
   3rd and 4th Floor, Chanderlok Building,
   36, Janpath,
   New Delhi – 110 001.

2. **Tata Power Delhi Distribution Limited**
   Having its Registered Office at :
   33 kV Grid Sub Stateion Building,
   Hudson Lane, Kingsway Camp,
   New Delhi – 110 009

3. **Damodar Valley Corporation**
   Having its Registered Office at:
   DVC Headquarters,
   DVC Towers, VIP Road,
   Kolkata – 700 054.

4. **West Bengal State Electricity Distribution Co. Ltd.**
   Having its Registered Office at:
   Vidyut Bhavan,
   Bidhannagar, Sector-11,
   Kolkota – 700 091

5. **Tata Power Trading Co. Ltd.**
   Having its Registered Office at :
   Corporate Centre, 'A' Block,
   34, Sant Tukaram Road,
   Carnac Bunder,
   Mumbai – 400 006 **... Respondent(s)**

Counsel for the Appellant(s) : Mr. Amit Kapur,
Mr. Vishal Anand and
Mr. Janmali Manikala, Advs.

Counsel for the Respondent(s) : Mr. Alok Shankar for R.2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUIDICIAL MEMBER

Maithon Power Ltd. (hereinafter referred to as the '***appellant***') has filed the present appeal under Section 111 of the Electricity Act, 2003, challenging two findings recorded in the Impugned Order dated 19.11.2014, passed by the learned Central Electricity Regulatory Commission (in short '***Central Commission***') in Petition No.274 of 2010 in the matter of approval of capital cost and determination of generation tariff for the period from the date of commercial operation of Unit No.1 and Unit No.2 of the Maithon Right Bank Thermal Power Plant (***project***) to 31.03.2014, whereby the learned Central commission has disallowed interest during construction and partly disallowed the cost of secondary fuel.

2) Following are the grievances of the appellant in this appeal:

(i) That the Central Commission has wrongly held that there is a delay of 2.3 months in case of Unit No.1 and 3.3 months in case of Unit No.2 in achieving Commercial Operation Date (***COD***) of the project by the appellant from Zero date of the project date i.e. 25.10.2007. Consequently, the Central Commission has disallowed Interest During Construction (***IDC***) of cost of Rs.98.99 Crores holding that the said delay is attributable to the appellant. The delay has wrongly been attributed to the appellant since the Central Commission has erroneously and arbitrarily refused to condone the delay of :

(a) 158 days, i.e. from 25.10.2007 to 31.03.2008, due to delay in handing over of Raiyati land to the appellant by Damodar Valley Corporation (DVC).

(b) 80 days due to non-availability of construction power from DVC. Accordingly, the appellant procured unreliable and intermittent supply of power from Jharkhand State Electricity Board (***JSEB***)

(ii) That the Central Commission has disallowed the cost of Light Diesel Oil (***LDO***) which has been used in addition to the Heavy Fuel Oil (***HFO***) as secondary fuel oil for start up and shut down of the Units post declaration of the commercial operation of the Unit No.2 of the project.

3) The appellant, namely, Maithon Power Ltd., has set up a generating station with a capacity of 1050 MW (2 x 525) at Maithon in the State of Jharkhand. The appellant is a public limited company incorporated on 26.07.2000 under the Companies Act, 1956, having its office at New Delhi. The appellant is a Joint Venture Company (***JVC***) between Tata Power Company Limited (***Tata Power***) having an equity participation of 74% and Damodar Valley Corporation (DVC) having an equity participation of the remaining 26%.

4) The respondent No.1, the Central Commission is a statutory body functioning under the Electricity Act, 2003 empowered under Section 79 (1) (b) of the Electricity Act, 2003 with the functions to regulate the tariff for inter-State generating companies, other than those owned or controlled by the Central Government, under its jurisdiction.

4.1) Respondent No.2 is Tata Power Delhi Distribution Limited (***TPDDL***), erstwhile North Delhi Power Ltd (***NDPL***), a successor of the Delhi Vidyut Board engaged in the business of distribution and retail supply of electricity in the North and North West circles of the National Capital Territory of Delhi (***NCTD***). It is a joint venture between Tata Power (holding 51% equity and management control) and GoNCTD (holding 49% equity through its wholly owned Delhi Power Company Ltd.). The appellant had entered into a tripartite Power Purchase Agreement (***PPA***) for sale of 300 MW power with TPDDL through Tata Power Trading Company Limited (***TPTCL***).

4.2) Respondent No.3 is Damodar Valley Corporation (***DVC***) constituted under the Damodar Valley Corporation Act, 1948 for the development of Damodar Valley spreading across Jharkhand and West Bengal with three participating Governments, namely, the Central Government, the Government of West Bengal and the Government of Jharkhand (***GoJ***). DVC, *inter alia*, supplies electricity to West Bengal State Electricity Distribution Company Ltd. (***WBSEDCL***) and JSEB and some 120 high tension industrial consumers in West Bengal and Jharkhand. DVC has an equity participation of 26% in the appellant company. The appellant and DVC entered into a long term PPA dated 28.09.2006 for a period of thirty years for the sale of 300 MW power on round the clock basis.

4.3) Respondent No.4 is West Bengal State Electricity Distribution Co. Ltd. is the distribution licensee engaged in the business of distribution of electricity in the State of West Bengal, which had entered into a Power Sale Agreement (***PSA***)

dated 24.12.2008, for purchase of 150 MW electricity on round the clock basis from TPTCL, which in turn is purchasing power from the appellant. The said PSA has specifically extended for purchase of an additional 150 MW capacity (total 300 MW) from the appellant, TPTCL.

4.4) Respondent No.5, TPTCL is a trading company which is engaged in the business of inter-State power trading pursuant to a category 'F' license granted by the Central Commission. TPTCL had entered into PPA's with the appellant for the purchase of 600 MW of electricity, which in turn is to be sold to TPDDL and WSEDCL.

5) The relevant facts of the case are as under:

5.1) That during 1989 the project was conceived with the support from erstwhile USSR. Accordingly, the proceedings for acquisition were initiated as early as 1989-1993. After the breakup of the USSR, the land acquisition proceedings slowed down.

5.2) That in 1998, the project was decided to be developed by a joint venture between DVC and BSES. On 13.08.1998, Ministry of Power, the Government of India, conveyed its clearance to DVC for setting up the Maithon Project through a joint venture with BSES Ltd. and accordingly, the company was incorporated in the year 2000. Due to the same, the land acquisition proceedings gained momentum during the year 2000. However, the said joint venture did not materialize.

5.3) That in 2003-04, the title deed/possession certificate of the Raiyati Land of 565 acres was transferred to DVC without taking physical possession of the land. The entire stretch of Raiyati Land was not in contiguous form and was spread across in separate patches throughout the project area with intermittent plots of forest lands between the Raiyati land areas.

5.4) That in and around 2005, Tata Power initiated discussions with DVC for a joint venture to set up the project. The joint venture was approved by Ministry of Power on 02.03.2005. DVC and Maithon entered into a shareholders agreement on 02.09.2005. Maithon Power could not start the work at the site until the transfer of Government land of 116 acres and the transfer of the forest land of 436 acres after grant of final (stage II) clearance on 02.04.2007.

5.5) That on 18.09.2007, the Ministry of Environment and Forest (MoEF) issued environmental clearance for the expansion of the project from 1000 MW (4 x 250 MW) to 1050 (2 x 525 MW).

5.6) That on 08.11.2007, the appellant was granted confirmation for the term loan by the lead banker i.e. State Bank of India. While the funding of the project was getting finalized, the Board of Directors issued the Notice to proceed on 20.10.2007.

5.7) That immediately after the zero date, in order to complete the project in a timely manner, the appellant commenced work on the project and in the period during 3rd and 4th quarter of FY 2007-08, the major concerns pertaining to the rehabilitation package for 1646 project affected persons i.e. land oustees and homestead oustees remained unresolved. The appellant was not allowed entry into the project site by the Project Affected Persons (***PAPs***) on the ground that no Resettlement & Rehabilitation Package (***R&R package***) had been put in place. In order to resolve the issue, the appellant took the initiative to enter into an agreement with the PAPs and rehabilitation and resettlement committee was formed by the Government under the stewardship of District Commissioner, Dhanbad, consisting of representatives from the appellant and the 12 displaced villages. After prolonged discussions, the R&R agreement was signed and executed between the appellant and R&R committee on 31.03.2008. After execution of the R&R agreement and after approval of the R&R scheme by the Energy Department of GoJ, the appellant took physical possession of the Riyati Land.

5.8) That the DVC having been vested with Raiyati land for the appellant, the project was required to finalize the R&R package with the GoJ and hand over the physical possession of the Raiyati Land to the appellant. Till the zero date DVC did not finalize R&R package with the GoJ. To avoid any further delay in commencing construction of the project, the appellant initiated the process of finalization of R&R package. In spite of the best efforts by the appellant, there was a delay of 158 days in acquiring the physical possession of the land. The delay due to handover of Raiyati land was an uncontrollable factor for the appellant and in fact, the appellant had taken all the reasonable steps to finalize the R&R policy so that it could receive physical possession of the said land. Accordingly, the delay of 158 days on account of the same ought to have been allowed by the Central commission.

5.9) That the project is located in the DVC command area and DVC has an exclusive rights for supply of power to any consumer in the command area. Hence, the appellant had applied to DVC for supply of 10 MVA construction power on 24.11.2006. The nearest DVC sub-station to Maithon sub-station is the Kalyaneswari sub-station, about 20 KM from the project site.

5.10) That the line for supply construction power to the project was constructed and charged by DVC on 03.06.2010 with a delay of 484 days.

5.11) That the delay in providing construction power by DVC to the appellant was on account of the following:

a) DVC had to carry out the site survey, evaluation and load study for constructing the lines to supply construction power to the project .

b) DVC was required to obtain construction clearance and No Objection Certificate from Jharkhand State Pollution Control Board (***JSPCB***)

c) After the construction of the line was completed, the installed facilities were to be inspected by CEA for issuance of commercial clearance certificate for charging the 33 kV line.

d) In the process of obtaining the Right of Way (***RoW***) for laying the lines between Kalyaneswari and Maithon's Sub-Station, several unanticipated obstructions were faced from the local population which delayed the final charging of the lines and availability of construction power at the project site.

5.12) That in order to ensure timely completion of the project, the appellant made alternate supply of power from Jharkhand State Electricity Board w.e.f. 06.09.2008 onwards for construction purpose till the supply of power from DVC was arranged. Till June, 2010, the construction power for the project was solely dependent on power to be supplied by JSEB which was extremely unreliable with power-cuts ranging from 2-8 hours on daily basis, regarding which the appellant had received several communications, viz. letter dated 19.03.2010, 27.09.2009 and 25.08.2009 from its principal contractors, namely, M/s Simplex, M/s L&T and M/s BHEL.

5.13) That high pressure welding and structural works are executed during the initial phase of the construction. Due to the intermittent power supply from the zero

date, till the commencement of supply of construction power from DVC, i.e. 03.06.2010 had adversely affected the construction of the project in a timely manner. The average interruption of power was approximately 3 hours on a daily basis, which is equivalent to 80 man days.

5.14) That the appellant/petitioner, namely, Maithon Power Ltd., filed the aforesaid Petition No.274 of 2010 which has been disposed of by the Impugned Order which is under challenge before us in the instant appeal.

6) We have heard Mr. Amit Kapur learned counsel for the appellant and Mr. Alok Shankar learned counsel for respondent No.2. We have gone through the written submission filed by the appellant and perused the impugned order including the material available on record. No written submission was received from the respondent side.

7) The following issues arise for our consideration:

(i) Whether the learned Central commission is legally justified in ordering wrongful disallowance of the Interest During Construction (IDC)?

(ii) Whether the learned Central Commission is justly and correctly justified in ordering part disallowance of cost of secondary fuel?

8) **Our issue-wise consideration:**

Issue No.(i): Wrongful disallowance of the IDC. On this issue, the following contentions have been made on behalf of the appellants:

8.1) That the appellant had issued letter of intent to M/s BHEL (Boiler Turbine Generator contractor) on 17.08.2007. The said letter defined zero date as 25.10.2007 and specified the completion schedule of Unit 1 as 36 months from zero date and unit-2 as 42 months from the zero date of the project. There was a delay of 10 months in commissioning Unit-1 and 15 months in commissioning Unit-2 of the said project. The learned Central commission has condoned the delay of 7.7 months for Unit-1 and 11.7 months for Unit-2.

8.2) The timeline of the project is detailed in the following table:

Unit	Zero Date	Scheduled Cod as per LOI	Actual COD	Delay	Allowed	Disallowed
Unit No.1	25.10.2007	36 months –	01.09.2011	10 months &	7.7 months	2.3 months

		24.10.2010		7 days	(224 days)	
Unit No.2	25.10.2007	42 months – 24.04.2012	24.07.2012	15 months	11.7 months (344 days)	3.3 months

8.3) That the Central Commission has not allowed the delay of 158 days occurred on account of transfer of Raiyati land by DVC to appellant on account of the fact that DVC is a joint venture of the appellant.

8.4) That while disallowing the delay on account of handing over of Raiyati land by DVC to the appellant, the learned Central Commission has ignored the fact that DVC is a statutory corporation established on 07.07.1948 under the Damodar Valley Corporation Act, jointly by the Central Government, the Government of West Bengal and the Government of Jharkhand for the purpose of developing the Damodar Valley.

8.5) That DVC Act 1948 specifies statutory functions of DVC under Section 12 of the DVC Act, Section 18 of the DVC Act mandates that no person shall without the permission of DVC shall sell electricity in the Damodar Valley Corporation area. Section 22 of the DVC Act grants power to DVC to do anything that may be necessary or expedient for the purposes of carrying out its functions under the said Act, including the power to acquire and hold movable and immovable property as it may deem necessary to lease, sell or otherwise transfer such property.

8.6) That since it had been vested with the Raiyati land for the Maithon Power project, DVC was required to finalize the resettlement and rehabilitation package with the Government of Jharkhand and hand over physical possession of the land to the appellant. However, till the zero date, DVC did not finalize the said R&R package with the Government of Jharkhand. The appellant to avoid further delay in commencing construction of the project, initiated the process of finalization of R&R package but in spite of the best efforts of the appellant, there was a delay of 158 days in acquiring the physical possession of the land.

8.7) That the delay due to hand over of Raiyati land is an uncontrollable factor of the appellant and in fact the appellant had taken all the reasonable steps to finalize the R&R policy but in spite of best efforts of the appellant the delay of

158 days had occurred on account of the same which ought to have been allowed by the Central Commission.

8.8) That the project is located in the DVC command area and DVC has the exclusive rights to supply power to the command area. The line for supply construction power to the project was constructed and charged by DVC on 03.06.2010, with the delay of 484 days, which delay had occurred on account of DVC which was required to carry out site survey, evaluation and load study for constructing the lines, to obtain construction clearance and No Objection Certificate from Jharkhand State Pollution Control Board. Further, after the construction of the line, the installed facilities were to be inspected by CEA for issuance of commercial clearance certificate for charging the 33 kV line. Further, in the process of obtaining right of way, for laying the lines, several unanticipated obstructions were faced by the appellant from the local population which caused the aforesaid delay.

8.9) That till June, 2010, the construction power was solely dependent on the power to be supplied by JSEB, which was unreliable due to power cuts, ranging from 2-8 hours on daily basis due to intermittent power supply form zero date i.e. 25.10.2007. Till the commencement of supply of construction power from DVC on 03.06.2010, the same had adversely affected the construction of the project in a timely manner.

8.10) That the learned Central Commission has failed to consider the fact that the aforesaid reasons for delay are beyond the control of the appellant because till such time the DVC complied with all the regulatory and statutory clearance, it was not possible for DVC to provide construction power to the appellant. Therefore, in the said circumstances, neither the appellant nor DVC could ensure regular supply of power for the construction of the project. The findings of the Central Commission to disallow IDC, due to delay of 80 days on account of delay in arranging reliable supply of power, is not tenable.

8.11) That the IDC is computed on the loan provided by the lenders of the project from the date of first installment of disbursal loan amount. During the time period from the zero date of the project i.e. 25.10.2007 till 01.03.2008, there had been no impact on the beneficiaries on account of IDC since no project specific loan had been disbursed by the lenders before 01.03.2008. Hence, there is no burden on the beneficiaries on account of IDC till 01.03.2008.

8.12) That this Appellate Tribunal should direct the Central Commission to condone the delay of 2.3 months for Unit-1 and 3.3 months for Unit-2 of the project in achieving the COD due to reasons which resulted in the aforesaid delay and consequently allow the IDC of Rs.98.99 crores which has wrongly been also allowed by the Central Commission due to delay in commissioning of the project.

8.13) The learned counsel for the respondents having taken us through the various aspects of the Impugned Order have justified and vindicated the findings recorded in the Impugned Order craving for dismissal of the appeal.

9) **Our consideration and conclusion on issue No.(i) :**

9.1) We have deeply considered the contentions raised by the appellant on this issue of disallowance of interest during consideration. Without repeating the same contention of the appellant here again, we directly proceed now towards our own discussion and conclusion. Before we analyze the matter on this issue we deem it proper to reproduce the relevant part of the Impugned Order, which is as under:

"***Impugned Findings***

"21. The petitioner was directed to submit additional information on the Scheduled commercial operation date (SCOD) as per investment approval of the board of the petitioner company. In response, the petitioner vide affidavit dated 21.7.2014 has submitted that the Letter of Intent (LOI) was issued to M/s BHEL (BTG contractor) vide letter dated 17.8.2007 and as per LOI, the completion schedule had been defined as 36 months for Unit-I and 42 months for Unit-II from the commencement date stipulated in the Notice To Proceed (NTP). The petitioner has also submitted that the Board through Resolution dated 24.10.2007 had issued NTP and the 'zero date' of the project has been considered as 25.10.2007.

….

31. It is observed that the delay of 158 days in handing over Land to the petitioner was on account of the delay on the part of DVC to frame R&R package in consultation with the State Government of Jharkhand. We notice that State Government had transferred the private land to DVC

during 2003-04 and DVC being a joint partner of the petitioner ought to have taken appropriate steps so that the R&R package was settled and physical possession of the Land was handed over to the petitioner well before the 'Zero date' on 25.10.2007. In view of above, we hold that the delay of 158 days due to handing over Land to the petitioner is attributable to the petitioner as the same was not beyond its control. Accordingly, we hold that the petitioner is responsible for time overrun involved in the commissioning of the project on this count.

33. The submission of the petitioner as regards the delay of 80 days due to non-availability of construction power supply by DVC, on the ground that it had no control over DVC cannot be accepted. DVC is a joint venture partner of the petitioner and since the project was being commissioned in the DVC Command Area for supply of electricity, the petitioner should have taken all efforts to ensure that the project is supplied the required power for construction. Accordingly, the submission of the petitioner for condonation of delay of 80 days due to non-availability of construction power is rejected and we hold that the petitioner is responsible for time overrun involved in the commissioning of the project, on this count.

…

39. Based on the above discussions, we hold that the time over run of 7.7 months (224 days) for Unit-I and 11.7 months (344 days) for Unit-II is not attributable to the petitioner as the same was beyond its control. Accordingly, we hold that the petitioner is not responsible for time overrun involved in the commissioning of the project. However, the time over run of 2.3 months for Unit-I and 3.3 months for Unit-II is attributable to the petitioner and hence the same prayer of the petitioner to condone the time overrun is not acceptable.

…

56. As decided above, the time overrun of 2.3 months for Unit-I and 3.3 months for Unit-II is for reasons attributable to the petitioner and the same has not been condoned. In view of this, the Interest During Construction (IDC), after factoring this delay has been worked out. Accordingly, no IDC is payable for the said period of time over

run of the project to the petitioner. Based on this, the Capital cost allowed for the units of the generating station are as under:

(in lakh)

	Unit I	***Unit II***	***Total***
Capital Cost Claimed	*251749.00*	*174035.00*	*425784.00*
Less: Un-discharged Liabilities	*0.00*	*30415.00*	*30415.00*
Less: IDC claimed in (1) above	*32944.00*	*29396.00*	*62340.00*
Add: IDC allowed	*28016.00*	*24424.00*	*52440.00*
Less: Refund of Excise Duty	*1983.00*	*1646.00*	*3629.00*
Capital Cost Allowed	***244839.00***	***137002.00***	*381841.00*

9.2) It appears from the Impugned Order that the appellant/petitioner was directed to submit additional information on the schedule Commercial Operation Date as per investment approval of the Board of the petitioner Company. In response the appellant vide affidavit dated 21.07.2014 submitted that the letter of intent was issued to BHEL, a BTG contractor, vide letter dated 17.08.2007 and as per the letter of intent, the completion schedule has been defined as 36 months for Unit-I and 42 months for Unit-II from the commencement date stipulated in the Notice to Proceed (***NTP***). The appellant also submitted that the Board, through a resolution dated 24.10.2007 had issued NTP and the zero dated of the project had been considered as 25.10.2007.

9.3) The Central Commission has also observed in the Impugned Order that the delay of 158 days in handing over land to the appellant was on account of delay on the part of DVC to frame R&R package in consultation with the State Government of Jharkhand. The State Government has transferred the private land to DVC during 2003-04 and DVC being a joint partner of the appellant ought to have taken appropriate steps so that the R&R package was settled and physical possession of the land was handed over to the appellant well before the zero date on 25.10.2007. Considering these aspects of the delay, the Central Commission has held that delay of 158 days due to handing over of land to the appellant was attributable to the appellant as the same was beyond its control. On this basis, the Central Commission has held the appellant liable for time overrun involved in the commissioning of the project on this account.

9.4) It also appears from the Impugned Order that the delay of 80 days was due to non-availability of construction power supplied by DVC, on the ground that the

appellant had no control over DVC. The Central Commission appears to have rightly rejected the said contentions of the appellant, holding that DVC is a joint venture partner of the appellant and since the project was commissioned in the DVC command area for supply of electricity, the appellant should have taken all efforts to ensure that the project is supplied the required power for the construction. Discussing these aspects of the matter, the Central Commission has rightly rejected the contention of the appellant for condonation of delay of 80 days due to non-availability of construction power and rightly has held that the appellant is responsible for time overrun involved in commissioning of the project.

9.5) After considering the submission of the appellant/petitioner and going through the details given in the Impugned Order, we agree to the view taken by the Central Commission in the Impugned Order, that the time overrun of 7.7 months (224 days) for Unit-1 and 11.7 months (344 days) for Unit-2 is not attributable to the appellant as the same was beyond the control of the appellant. We also re-affirm the view that the appellant is not responsible for time overrun in the commissioning of the project. We also agree to the observations of the Central Commission in the Impugned Order that the time overrun of 2.3 months in Unit-1 and 3.3 months in case of Unit-2 is attributable to the appellant.

9.6) It is established from the record that the time overrun of 2.3 months in Unit-1 and 3.3 months in case of Unit-2 is due to the reasons attributable to the appellant and the Central Commission has rightly not condoned the same. The Interest During Construction, after factoring this delay has rightly been worked out by the Central Commission. We do not find any perversity or illegality in this finding of the Central Commission that no IDC is payable for the said period of time overrun of the project of the appellant. Further, we hold that the Central Commission has rightly allowed the capital cost for the generating station by giving details in a table in the Impugned Order.

9.7) In view of the above discussion, contentions of the appellant on this issue are sans merit and liable to be rejected. Accordingly, while agreeing to the view recorded by the Central Commission in the Impugned Order, we decide this issue No.(1) against the appellant.

10) **Issue No.(ii):** Partial disallowance of secondary fuel oil. On this point, the appellant had contended as under:

10.1) That the learned Central Commission, while disallowing the cost of landed price of LDO of the secondary fuel, has ignored the Regulation 20 of CERC (Terms and Conditions of Tariff) Regulations 2009. As per Regulation 20, while computing cost of secondary fuel oil consumption, the weighted average landed price of the secondary fuel oil for the year in Rs./ml has to be considered. It does not restrict the computation of secondary fuel to the landed price of the main secondary fuel oil only.

10.2) That the Central Commission, while allowing cost of secondary fuel, has wrongly relied on Regulation 18 (1) (a) (ii) of the CERC Tariff Regulations 2009 which only deals with computation of interest on working capital.

10.3) That secondary fuel oil is required to initiate the combustion process within the steam generator/boiler of a coal based Thermal Generating Station which is thereafter replaced by primary fuel i.e. coal after attaining a particular load of the unit.

10.4) That HFO has a relatively higher viscosity than the LDO, viscosity being a measure of the resistance to the flow of a petroleum fuel. The viscosity HFO increases when the oil is cooled and decreases when it is heated. Hence, the HFO must be deployed at the temperature at which the viscosity is reduced to facilitate the flow of the oil. This process is carried out at low temperature in order to generate steam in the boiler. HFO cannot be fired initially for ignition, in case of cold start up. LDO is generally used to ignite the fire inside the boiler and then the steam generated through such firing is utilized to heat the HFO storage facility to reduce the viscosity of HFO which can be fired to increase the temperature inside the furnace.

10.5) That during cold start up of the unit, LDO is fired from one elevation of boiler as the initial cold start up conditions are not suitable for HFO firing. The fuel injection from this single elevation is capable of raising the unit generation up to 7.5% of the Maximum Continuous Rating (MCR). Once the unit achieves this generation level of 7.5% of the MCR and the system achieves a temperature of at least 200°C, it becomes suitable for HFO firing at three other boiler elevations. The gross generation of the unit should rise to the level of 30% of

the MCR which implies that the balance of 22.5% MCR should be supported by HFO firing.

10.6) That in the present case, the technical specifications provided by BHEL for Unit-1 and 2 of the project envisaged the use of two types of secondary fuel oils namely HFO and LDO. Accordingly, the appellant has utilized a mix of LDO and HFO in the ratio 25:75. Hence, it is appropriate to consider the mix of LDO and HFO in the ratio of 25:75 (7.5% MCR: 22.5% MCR). Hence, the Central Commission ought to have considered the landed price of HFO and LDO while computing the price of the secondary fuel oil for the FY 2012-13 and 2013-14. After CDO of Unit-2, as technically, HFO cannot be fired in isolation for the inherent characteristics.

10.7) That the Central Commission has considered the landed price of HFO to compute the cost of entire secondary fuel oil consumption post COD of Unit-2 and therefore, findings are incorrect and liable to be set aside. The landed price of LDO is higher than the HFO and ignoring the same for the computation of the normative cost of secondary fuel oil consumption post COD of Unit-2 has adverse financial impact on the appellant by Rs.0.70 crores for FY 2012-13 and Rs.1.50 crores for FY 2013-14. Hence, this Appellate Tribunal after setting aside the impugned findings should direct the Central Commission to re-compute the secondary fuel expenses post COD of Unit-2 of the project.

11) **Per contra**, the learned counsel for the respondents have drawn our attention to the reasoning recorded by the Central Commission in the Impugned Order on this issue saying that the said findings are legal and correct one, requiring no interference at this stage in this appeal.

12) **Our consideration and conclusion:** Having cited the detailed submission of the appellant, we now directly proceed to our own conclusion. Before reaching our conclusion, we reproduce the relevant part of the Impugned Order on this issue, which is as under:

"***Impugned Findings***

"91. The petitioner has submitted that the generating station received HFO license quite late as compared to that of LDO license which delayed the process of HFO system commissioning & stabilization. It has submitted the generating station was thus constrained from using HFO

fully as Secondary fuel even after the commissioning of Unit-1. The petitioner has further submitted that as per Regulation 20(2) of the 2009 Tariff Regulations, the weighted average Landed Price of LDO and HFO has been computed in order to arrive at the initial Landed Price of secondary fuel oil for the years 2012-13 and 2013-14. The petitioner has also submitted that during cold Start-up of the unit, oil firing is required up to 30% of the MCR and in the process first LDO is fired up to 7.5% of the MCR and then for remaining 22.5% HFO is fired. Accordingly, the petitioner has submitted that it is appropriate to consider a mix of LDO & HFO in the ratio of 25:75.

92. We have examined the matter. We do not agree with the submission of the petitioner for considering a mix of 25:75 as LDO: HFO as secondary fuel oil to compute the cost of secondary fuel oil. It is evident from the submissions of the petitioner that HFO is the main secondary fuel oil for the generating station. Sub-clause (ii) of clause (1) of Regulation 18 of the 2009 Tariff Regulations provides that in case of more than one secondary fuel oil, cost of fuel oil stock for the main secondary fuel oil shall be allowed. Accordingly, we reject the contention of the petitioner. However, considering the fact that the petitioner had to use Light Diesel Oil (LDO) for Unit-I even after COD due to pending of explosive license for HFO from Petroleum and Explosives Safety Organization (PESO) and since Unit-I was using only one secondary fuel oil i.e. LDO during stabilization and after COD, the cost of LDO has been allowed for Unit-I from the COD to till the COD of Unit-II. In the meantime, the petitioner has received permission for storage of HFO and the same is presently used as main secondary fuel oil. Accordingly, for Unit-II/generating station, the HFO, shall be considered as secondary fuel oil for the purpose of tariff."

13) We quote below Regulation 18 and 20 of the CERC (Terms and Conditions of Tariff) Regulations, 2009:

"***18. Interest on Working Capital*** *(1)The working capital shall cover:*

(a) Coal-based/lignite-fired thermal generating station

…

(ii) Cost of secondary fuel oil for two months for generation corresponding to the normative annual plant availability factor, and in case of use of more than one secondary fuel oil, cost of fuel oil stock for the main secondary fuel oil."

20. Expenses on secondary fuel oil consumption for coal-based and lignite-fired generating station. *(1) Expenses on secondary fuel oil in Rupees shall be computed corresponding to normative secondary fuel oil consumption (SFC) specified in clause (iii) of regulation 26, in accordance with the following formula:*

SFC – Normative Specific Fuel Oil consumption in ml/kWh

= SFC x LPSFi x NAPAF x 24 x NDY x IC x 10

Where,

LPSFi – Weighted Average Landed Price of Secondary Fuel in Rs./ml considered initially

NAPAF – Normative Annual Plant Availability Factor in percentage

NDY – Number of days in a year

IC – Installed Capacity in MW

(2) Initially, the landed cost incurred by the generating company on secondary fuel oil shall be taken based on actuals of the weighted average price of the three preceding months and in the absence of landed costs for the three preceding months, latest procurement price for the generating station, before the start of the year.

The secondary fuel oil expenses shall be subject to fuel price adjustment at the end of the each year of tariff period as per following formula:

SFC x NAPAF x 24 x NDY x 1C x 10 x (LPSFy – LPSFi)

Where,

LPSFy = The weighted average Landed Price of secondary fuel oil for the year in Rs./ml"

14) It is true that secondary fuel oil is required to initiate the combustion process within the steam generator/boiler of a coal based Thermal Generating Station which is thereafter replaced by primary fuel i.e. coal after attaining a particular

load of the unit. It is also true that Heavy Fuel Oil has a relatively higher viscosity than the LDO.

15) According to the appellant, the generating station received HFO license quite late as compared to the LDO license which delayed the process of HFO system commissioning and stabilization. The generating station was thus constrained from using HFO fuel as secondary fuel even after the commissioning of the Unit-1. As per Regulation 20(2) of the Tariff Regulations 2009, the weighted average landed price of LDO and HFO has been computed in order to arrive to ensure price secondary fuel oil for the year 2012-13 and 2013-14. Further contention of the appellant is that during cold star up of the units, oil firing is required up to 30% of the MCR and in the process first LDO is fired up to 7.5% of the MCR and then for remaining 25.5% HFO is fired and it is appropriate to consider the mix of LDO and HFO of 25:25. The learned Central Commission after going through the aforesaid Regulations of Tariff Regulations 2009 and the contentions of the parties, has not agreed to the submissions of the appellant/petitioner. According to the appellant, HFO is the main secondary fuel oil for the generating station and under Regulation 18(1)(ii) of Tariff Regulations 2009 in case of more than one secondary oil, the cost of fuel oil stock for the main secondary fuel oil shall be allowed. The learned Central Commission rejected the said contention of the appellant considering the fact that the appellant had to use LDO for Unit-1 even after COD due to pendency of explosive license for HFO from petroleum safety organization and since Unit-1 was using only two secondary fuel oil i.e. LDO during stabilization and after COD, cost of LDO has been allowed for Unit-1 from the COD of Unit-2. In the meanwhile, the appellant had received permission for storage of HFO and the appellant is using the same as secondary fuel oil. The learned Central Commission while deciding the said issue has clearly with held that for Unit-2/generating station, the HFO, shall be considered as secondary fuel oil for the purpose of tariff.

16) In view of the above discussion, we do not find any perversity or illegality in the findings recorded in the Impugned Order. All the contentions of the appellant on this issue are without merits and are liable to be spurned and this issue is also decided against the appellant.

17) Since both the issues have been decided against the appellant, the instant appeal merits dismissal.

ORDER

The instant appeal, *being Appeal No.48 of 2015*, is hereby dismissed and the Impugned Order dated 19.11.2014, in Petition No.274 of 2010, is hereby upheld.

No order as to costs.

Pronounced in open court on this ***10th day of May, 2016***.

(I. J. Kapoor)
Technical Member

(Justice Surendra Kumar)
Judicial Member

✔ **REPORTABLE / ~~NON-REPORTABLE~~**