

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

APPEAL NO. 119 OF 2016 & IA NOS. 668 & 674 OF 2016
AND
APPEAL NO. 277 OF 2016 & IA NO. 572 OF 2016

Dated: 14th August, 2018

Present: Hon'ble Mr. I.J. Kapoor, Technical Member
Hon'ble Mr. N. K. Patil, Judicial Member

APPEAL NO. 119 OF 2016 & IA NOS. 668 & 674 OF 2016

In the matter of:

M/s. Adani Power Rajasthan Ltd. (APRL)
31-A, 6th Floor, Mahima Trinita,
Plot No. 5, Swej Farm,
New Sanganer Road, Sodala,
Jaipur – 302019

.... Appellant

Versus

- 1. Rajasthan Electricity Regulatory
Commission (RERC)
Vidhyut Viniyamak Bhawan,
Sahakar Marg, Near State Motor Garage,
Jaipur – 302005** **.... Respondent No.1**
- 2. Jaipur Vidyut Vitran
Nigam Limited (JVVNL)
Vidyut Bhawan, Jyoti Nagar
Jaipur – 302005** **.... Respondent No.2**
- 3. Ajmer Vidhyut Vitaran
Nigam Ltd.(AVVNL)
Old Power House, Hathibhata,
Jaipur Road, Ajmer – 302005** **.... Respondent No.3**

**4. Jodhpur Vidhyut Vitaran
Nigam Ltd. (JdVVNL)
New Power House, Industrial Area
Jodhpur - 352001**

.... Respondent No.4

Counsel for the Appellant(s) : Mr. Amit Kapur
Mr. S. Venkatesh
Mr. Pratyush Singh
Mr. Vikas Maini
Ms. Abiha Zaidi
Ms. Alvia Ahmed
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Counsel for the Respondent(s) : Mr. R. K. Mehta
Ms. Himanshi Andley for R-1

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Ms. Neha Garg
Ms. Parichita Chowdhury
Mr. S.K. Jain (Rep.) for R-2 to 4

APPEAL NO. 277 OF 2016 & IA NO. 572 OF 2016

In the matter of:

**1. Jaipur Vidyut Vitran
Nigam Ltd. (JVVNL)
Vidyut Bhawan, Jyoti Nagar
Jaipur – 302005**

.... Appellant No.1

**2. Ajmer Vidyut Vitaran
Nigam Ltd. (AVVNL)
City Power House, Hathi Bhata,
Jaipur Road, Ajmer – 305001**

.... Appellant No.2

**3. Jodhpur Vidhyut Vitaran
Nigam Ltd. (JdVVNL)
New Power House, Industrial Area
Jodhpur - 342003**

.... Appellant No.3

Versus

**1. M/s Adani Power Rajasthan Ltd. (APRL)
31-A, 6th Floor, Mahima Trinity,
Plot No. 5, Swej Farm,
New Sanganer Road, Sodala,
Jaipur – 302019**

.... Respondent No.1

**2. Rajasthan Electricity
Regulatory Commission (RERC)
Vidyut Viniyamak Bhawan,
Sahkar Marg, Near State Motor Garage,
Jaipur – 302005**

.... Respondent No.2

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Ms. Neha Garg
Ms. Parichita Chowdhury

Counsel for the Respondent(s) : Mr. Amit Kapur
Mr. S. Venkatesh
Ms. Abiha Zaidi
Mr. Pratyush Singh
Mr. Vikas Maini
Ms. Alvia Ahmed for R-1

Mr. R. K. Mehta
Ms. Himanshi Andley for R-2

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The instant these two Appeals are being aggrieved filed by Adani Power Rajasthan Ltd.(hereinafter referred to as the “**APRL**”) and JVVNL, AVVNL & JdVVNL (hereinafter collectively referred to as the “**Discoms**”)under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the Order dated 15.3.2016 (“**Impugned Order**”) passed by Rajasthan Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in Petition No. RERC-577/15 wherein the State Commission has denied compensation on some Change in Law events sought by APRL as detailed out in Appeal No. 119 of 2016 and wrongfully allowed compensation on some other Change in Law events sought by the APRL as alleged by the Discoms in Appeal No. 277 of 2016 under the Power Purchase Agreement dated 28.1.2010 (“**the PPA**”).
2. The Appeal No. 119 of 2016 has been filed by APRL which is a generating company within the meaning of Section 2 (28) of the Act and has set up a Thermal Power Station at Kawai, District-Atru, Rajasthan with an installed capacity of 1320 MW (2 x 660 MW) (“**Kawai Project**”).
3. The Discoms have filed the Appeal No. 277 of 2016. They are the Distribution Licensees distributing power in their respective area of License in the State of Rajasthan.

4. The Rajasthan Electricity Regulatory Commission (RERC) is the Electricity Regulatory Commission in the State of Rajasthan discharging functions under the provisions of the Act and is the common Respondent in both the Appeals. Since the present Appeals are cross Appeals, the other Respondents in Appeal No. 119 of 2016 are the Discoms and the other Respondent in Appeal No. 277 of 2016 is APRL.

5. **Brief facts of the case are in nutshell as follows:**

a) Rajasthan Rajya Vidyut Prasran Nigam Limited (“RRVPNL”), authorised representative of the Discoms issued Request for Proposal (“RFP”) on 25.2.2009 for procurement of power on long term basis through Case-I Tariff Based Competitive Bidding process to meet the requirement of the Discoms. The RFP was revised in April 2009 to align with Case-I standard RFP issued by Government of India (GoI).

b) APRL has submitted its bid on 6.8.2009 and offered a total contracted capacity of 1200 MW from the Kawai Project. APRL became the successful bidder at a levelized tariff of Rs. 3.2483/kWh which was subsequently reduced to Rs. 3.238/kWh.

c) The Letter of Intent (LOI) was issued by RRVPNL to APRL on 17.12.2009. PPA was executed between APRL and the Discoms on 28.1.2010. The Scheduled Delivery Date under the PPA for supply of 1200 MW of power was 31.8.2013. The

Commercial Operation Date (COD) of Unit -1 of the Kawai Project was achieved on 31.5.2013.

- d) In terms of the PPA, 30.7.2009 is the cut-off which is seven days prior to bid deadline of 6.8.2009 to be considered for the purpose of claims under Change in Law. There have been many changes/modifications/introductions related to various statutory taxes, duties, impositions and charges etc. made by Indian Governmental Instrumentalities, which have affected the cost and revenue of the APRL. The Change in Law is defined under Article 10 of the PPA. APRL notified various Change in Law events to the Discoms in terms of Article 10.4.1 of the PPA and sought consequential reliefs.
- e) The Discoms had not considered the Change in Law events notices of APRL. APRL filed a Petition No. RERC-493 of 2014 before the State Commission under Section 86(1)(f) of the Act seeking compensation/tariff adjustment towards the said Change in Law events.
- f) Based on the observations of the State Commission vide order dated 29.4.2015 in Petition No. RERC-493 of 2014, the Discoms approached the State Commission through Petition No. RERC-493 of 2014 seeking approval of the State Commission for passing on the compensation to APRL on Clean Energy Cess and Central Excise Duty.
- g) The Discoms rejected the other claims of APRL under Change in Law. APRL approached the State Commission by way of Petition No. RERC-577 of 2015 under Section 86(1)(f) of the

Act for the adjudication of the disputes arising due to the rejection of Change in Law claims by the Discoms. On 27.10.2015, APRL filed an IA seeking additional reliefs on account of additional Change in Law events, which occurred after the filing of the said Petition.

- h) The State Commission passed the Impugned Order on 15.3.2016. Vide the Impugned Order the State Commission has allowed claims of APRL partly. The Change in Law events claimed by APRL and the decision of the State Commission is summarized below.

Change in Law claims allowed by the State Commission:

1.	Change in Rate of Royalty Payable on Domestic Coal
2.	Levy of Service Tax on Transportation of Goods by Indian Railways (IR)
3.	Increase in Fee for 'Consent to Operate'

Change in Law claims not dealt as they were already settled between APRL and the Discoms as per the provisions of the PPA:

1.	Clean Energy Cess
2.	Central Excise Duty

Change in Law claims not- allowed by the State Commission:

1.	Change in Pricing Mechanism of Coal from Useful Heat Value (UHV) Basis to Gross Calorific Value Basis (GCV)
2.	Increase in Sizing Charges for coal charged by Coal India Ltd. (CIL)
3.	Increase in Surface Transportation Charges
4.	Increase in Busy Season Surcharge on Transportation of Coal by Indian Railways
5.	Increase in Development Surcharge levied on Transportation of Coal by Railways
6.	Levy of Fuel Adjustment Component
7.	Levy of Port Congestion Surcharge
8.	Levy of Forest Tax
9.	Change in Classification of Coal for Train Load Movement

Change in Law claims not considered by the State Commission:

1.	Increase in Minimum Alternate Tax (MAT)
2.	Change in Service Tax Rate
3.	Chhattisgarh (CG) Paryavaran Upkar
4.	CG Vikas Upkar
5.	Restriction of Ash Content in Coal to 34%
6.	Carrying Cost

S. No. 1 to 5 above are not being pressed upon by APRL as the same are being considered by the State Commission in a separate petition filed by APRL.

Further, APRL is not insisting on the issues related to change in pricing mechanism from UHV to GCV basis and levy of Fuel Adjustment Component presently as they have no impact on APRL and the same have not been pressed upon.

- i) APRL has been aggrieved by the decision of the State Commission for not allowing and not considering the various events as above under Change in Law. The Discoms have

been aggrieved by the decision of the State Commission for allowing certain events as above under Change in Law and compensating APRL for the same.

- j) Being aggrieved by the Common Impugned Order dated 15.3.2016 passed by the State Commission, APRL and the Discoms have preferred the present Appeals.
- k) Since these two Appeals arise out of Common Impugned Order and involve common issues, we are disposing of these Appeals by passing Common judgement.

6. Questions of Law:

A. APRL has raised the following questions of law in the present Appeal No. 119 of 2016 for consideration are as follows:

- a) Whether the State Commission is justified in reading its own terms and conditions into the provisions of the PPA which otherwise provide APRL with consequential reliefs?
- b) Whether the State Commission in passing the Impugned Order has failed to give effect to the express provisions of the PPA?
- c) Whether the Impugned Order suffers from non-application of mind by the State Commission, inasmuch as it has proceeded to adjudicate upon the matter without

appreciating express intention and agreement between the parties?

- d) Whether the State Commission has failed to appreciate the wide import of the definition of Law as expressly provided under the PPA?
- e) Whether the State Commission in passing the Impugned Order has failed to appreciate the effect of Article 10.2.1 1st and 2nd bullet of the PPA, and the basic fundamental philosophy behind the Change in Law Provision?
- f) Whether the State Commission has erred in passing the Impugned Order by not appreciating that APRL has suffered recurring expenses on account of events that qualify as Change in Law?
- g) Whether the reliance of the State Commission upon the CERC Order is erroneous and misplaced?
- h) Whether the State Commission has erred by failing to appreciate that all rules, notification, orders and regulations under all laws by in force issued by an Indian Government Instrumentality in India constitute 'Law' under the PPA, and that the same are a Change in Law event upon their coming into effect so long as they have an additional recurring expenditure upon the generator?

- i) Whether the State Commission erred in not allowing various components as Change in Law events despite holding that the same lead to APRL incurring recurring expenditure?
- j) Whether the State Commission erred in relying upon the CERC Escalation Index without appreciating that Escalation Index is only applicable to inflation in core commodities in relation to power generation and in no manner can be extended to additional statutory impositions which were not contemplated at the time of bidding?
- k) Whether the State Commission erred by failing to appreciate that the purpose of the Change in Law provision under the PPA is for compensating the affected party to the same economic position, as if such Change in Law event never occurred?
- l) Whether the State Commission failed to appreciate that the PPA entered into between the parties provides for an exhaustive code regarding Change in Law and that the same has to be interpreted to give meaning to the understanding between the parties?
- m) Whether the State Commission failed to appreciate that the Change in Law provision has been introduced in the PPA to ensure that the parameters based on which APRL had bid for supplying power, if modified or changed in times to come, would not have a detrimental effect upon the parties?

- n) Whether the State Commission by way of the Impugned Order has rendered the provisions of Article 10.2.1 redundant and otiose?
- o) Whether the State Commission has erred by not dealing with the prayer wherein carrying cost incurred due to 'Change in Law' was sought by APRL?
- p) Whether the State Commission has arbitrarily without providing any reasons not considered various Change in Law events including the issue of carrying cost raised by APRL?
- q) Whether the State Commission erred in not allowing Change in Law items that squarely fall under Article 10 of the PPA?
- r) Whether the State Commission erred in rejecting Change in Law events that have force of law and impact the cost of generation of Appellant?

B. The Discoms have raised the following questions of law in the Appeal No. 277 of 2016 for consideration are as follows:

- a) Whether the State Commission is justified in granting taxes and duties as a part of the Change in Law clause in Article 10 which are not taxes applicable on supply of power?

- b) Whether the Change in Law clause in Article 10 of the PPA can include taxes and duties which are not on the supply of power?
- c) Whether the service tax applicable on transportation of goods, which service tax is reimbursable by the generator under a contract can be passed on as a Change in Law?
- d) Whether royalty on domestic coal is to be considered as a Change in Law under the terms of the PPA?
- e) Whether the fees for Environmental Clearance can be said to fall within the scope of the Change in law clause of the PPA?
- f) Whether the Change in Law clause can be invoked without examining the instrument under which the amounts are reimbursed by the generator, as to whether such instruments are statutory or contractual?
- g) Whether the Clean Energy Cess and Excise Duty can be termed to be on supply of power under the terms of the PPA?
- h) Whether the State Commission requires to examine each claim including the Clean Energy Cess and Excise Duty on its merits before the same can be allowed as Change in Law?

7. We have heard learned counsel appearing for the Appellants and the learned counsel appearing for the Respondents at considerable length of time. Submissions of the learned counsel appearing for the parties are considered hereunder.

8. The learned counsel Mr. Amit Kapur appearing for APRL submitted the following submissions for our consideration on the issues raised in the instant Appeals as follows:-
 - a) The State Commission in the Impugned Order has not allowed nine Change in Law events, which are in issue in the present Appeal. The State Commission has allowed five Change in Law events of which two were allowed vide order dated 29.12.2015 of the State Commission, which have not been challenged by any party and has attained finality.

 - b) The State Commission has not considered five Change in Law events. APRL has again approached the State Commission on these five events. APRL has claimed only four events (except MAT issue) before the State Commission in Petition No. 920 of 2016. The State Commission vide order dated 8.6.2017 rejected all the four claims of APRL. Against the said order, APRL has filed Appeal No. 284 of 2017 before this Tribunal which is pending. The State Commission has also not considered the prayer of APRL for payment of interest/ carrying cost on Change in Law claims.

- c) The State Commission was required to conduct a test whether the Change in Law event is covered under Article 10 of the PPA or not by analysing any increase in cost or revenue due to such event, whether the event is due to force of law, whether it has occurred after seven days before the bid deadline. If this criterion is satisfied then the said claim is required to be allowed under Change in Law.
- d) APRL has relied on the judgement of this Tribunal dated 19.4.2017 in case of Sasan Power Ltd. v. CERC &Ors. (Sasan Case) and has contended that the said judgement has dealt identical Change in Law events to hold that an imposition paid for carrying out the business if it has an impact on the revenue or expenditure of the Seller shall be considered as Change in Law and the provisions of the PPA shall be read in a manner that the said provisions do not become redundant. The Hon'ble Supreme Court in case of Energy Watchdog v. CERC 2017 (4) SCALE 580 has held that all notifications, policy, rule, ordinance, circular, etc. issued by government under statutory powers shall have force of law including Change in Policy.
- e) Change in pricing mechanism of coal from UHV basis to GCV basis: APRL in the written submissions has made it clear that they are not insisting this issue as of now while reserving its right of claim if need arises in future.
- f) Increase in sizing charges for coal charged by Coal India Ltd.:

At the time of Bid Deadline sizing charges were as per CIL notification dated 12.12.2007, which were, increased w.e.f 16.12.2013. The Gol in the exercise of powers under Section 18(1) & (2) of the MMDR Act notified the CC Rules 2004. Under Sub Section 3 of the said Rules, Gol has the power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal. The rates for sizing charges were increased by CIL vide notification No. 1181 dated 15.10.2009 and Notification dated 16.12.2013. The details are as below:

Particular	Rates w.e.f. 15.10.2009 (Rs./Ton)	Rate w.e.f. 16.12.2013 (Rs./Ton)
Within 200 mm – 250 mm	39	51
Size limited to 100 mm	61	79
Size limited to 50 mm	77	100

That increase in sizing charges was due to notification by an Indian Governmental Instrumentality i.e. CIL, which is a Change in Law event within the meaning of Article 10 of the PPA.

- g) Increase in Busy Season Surcharge on transportation of coal by Indian Railways:

At the time of Bid Deadline, Ministry of Railways (MoR) levied busy season surcharge at the rate of 5% as per rate circular no. 89 of 2007 dated 10.9.2007. MoR in exercise of powers conferred under Section 30, 31 and 32 of the Railways Act, 1989 has increased the busy season surcharge rate to 10% through circular No. 38 of 2011 dated 12.10.2011 and then

further increased to 12% through rate circular No. 28 of 2012 dated 27.9.2012. Thereafter, the said surcharge was further increased to 15% on 18.9.2013.

The revision of Busy Season Surcharge on the Base Freight rate, by the Ministry of Railways falls under the 1st Bullet of Article 10 of the PPA's and qualifies as an event of Change in Law. The State Commission has erred in holding that APRL was expected to take into account the possible revision in these charges while quoting the bid, and that freight charges, being a cost involved for procuring coal which is an input for generation of power, the same cannot be claimed under Change in Law.

h) Increase in Development Surcharge levied on transportation of coal by Railways:

At the time of Bid Deadline, the Development Surcharge on Coal Freight was 2% on Normal Tariff Rate (Basic Freight + Busy Season surcharge + Other charges) as specified vide circular No. 58 of 2007 dated 29.5.2007. Subsequently MoR, vide Rate Circular No. 38 of 2011 dated 12.10.2011 has increased the Development Surcharge on Coal to 5% of Normal Tariff rate.

The increase in development surcharge falls under the definition of Change in Law as prescribed under the 1st Bullet of Article 10 of the PPA. The State Commission has erred in denying any compensation under this claim on the basis that such surcharge cannot be equated to a surcharge levied as tax or cess by Finance Ministry under the Finance Act.

- i) Levy of Fuel Adjustment Component: The levy of fuel adjustment component presently has no impact on APRL and the same has not been pressed upon.
- j) APRL on the issues of Busy Season Surcharge, Port Congestion Surcharge and Development surcharge has contended that in terms of Article 77 (3) of the Constitution of India Executive Powers of GOI have been allocated to various ministries. The levy of said surcharges are determined and enforced through Rate Circulars notified by MoR from time to time under Railways Act. The said Surcharges are statutory in nature in the form of orders by Indian Government Instrumentality (MoR) and are covered under events under Change in Law in terms of the PPA. Changes in various surcharges are not covered in notification of escalation rates issued by CERC as CERC rates covers only variations in basic freight rate.
- k) Railways is not a commercial activity as the surcharges levied are statutory in nature imposed by sovereign and collected for the purpose of development of railway network, cross subsidy etc. and the Rate Circulars issued by MoR have force of law. APRL has relied on judgements on Hon'ble Supreme Court in case of Rai Sahib Jawaya Kapur and Ors. V. State of Punjab AIR 1955 SC 549, Rashmi Metaliks v. UOI (1998) 5 SCC 126, Kusum Ingots & Alloys v. Union of India (2004) 6 SCC 254 & (1973) 1 SCC 781 and Gulf Goans Hotels Company Ltd. v. Union of India & Ors. (2014) 10 SCC 673. Ultra Tech Cement

Ltd. v. UOI 2014 (4) KHC 190 Kerala High Court and KIOCL Ltd. v. Railway Board &Ors. WP(C) 532 of 2010 of Karnataka High Court are also relied on Rail Circulars being policy decisions of Gol.

- l) APRL continues to incur the said recurring expenses and is directly affecting the viability of the company. The impact due to Busy Season Surcharge, Development Surcharge and Port Congestion Surcharge is Rs. 65.77 Cr., Rs. 30.32 Cr. and Rs. 23.33 Cr. respectively until first quarter of 2015-16.
- m) The reliance of the Discoms on the judgement of Hon'ble Supreme Court in case of Union of India v. Sri Ladulal Jain and Chairman Railway Board &Ors. v. Chandirma Das & Ors. is misplaced and they have no relevance to the present case. In Union of India v. Sri Ladulal Jain case, the observations of Hon'ble Court regarding Railway being a business activity are limited to the finding regarding territorial jurisdiction in terms of Section 20 of CPC. The ratio that Gol carries a business of running Railways is not relevant to the issues involved in the present case. APRL is not making any claim against the Railways but the claim is to operationalise restitutive relief payable by the Discoms due to decision of Railway Board to change in/introduction of new surcharges under the PPA. The Hon'ble Supreme Court in Energy Watchdog Judgement has held that even a letter issued by Ministry of Power has force of law. On the same lines the rare circulars issued by MoR shall have force of law.

In Chairman Railway Board &Ors. v. Chandirma Das &Ors. case the observations of Hon'ble Court that running of Railways is a Commercial activity is entirely on different context regarding claims for establishing tortious and vicarious criminal liability of State for misdemeanour of its employees. Both the cases do not deal with the contractual issues.

- n) Forest Tax is levied under Chhattisgarh Transit (Forest Produce) Rules, 2001 under Indian Forest Act, 1927 and falls within first bullet of Article 10.1.1 of the PPA. The Hon'ble Supreme court in case of State of Bihar v. Ranchi Timber Trader's Association (1996) 5 SCC 276 has held that the State Governments are statutorily empowered to levy duty, fee, royalty or charges under the Forest Act to regulate transit of forest produce. CERC has also allowed the said charges in case of Sasan Power Ltd. v. MPPMCL vide order dated 17.2.2017. No appeal has been filed against the said order.
- o) Increase in surface transportation charges is pursuant to notification by Government Instrumentality i.e. CIL and qualifies for Change in Law under PPA.
- p) Change in classification of coal for trainload movement was done by MoR vide Rate Circular and qualifies for Change in Law under the PPA.
- q) The Discoms are challenging the settled issues of Clean Energy Cess and Central Excise Duty indirectly which have been settled by the State Commission vide order dated 29.12.2015. The payment of cess is a continuous liability on APRL. It is a

settled principle that what cannot be done directly cannot be achieved indirectly and the judgements in case of N Birendra Singh v. Priyokumar Singh (2006) SCC 650 & M C Mehta v. Kamal Nath & Ors. AIR 2000 SC 1997 are relied.

- r) The contentions of the Discoms that Royalty on coal and Central Excise Duty forms part of escalation index is misplaced as the CERC which notifies the escalation rates in case of GMR Kamalanga and Sasan Power Ltd. itself has allowed Royalty on coal under Change in Law. Reliance of the Discoms on the letter dated 20.7.2016 is misplaced as the same deals with Stowing Excise Duty instead of Central Excise Duty which has been claimed by APRL.
- s) Carrying Cost: On this issue APRL has contended that since inception concept of interest has been embodied in electricity business and has relied on provisions of the Electricity Supply Act 1948, Section 61 & 62 and other provisions of the Act and judgements of Hon'ble Supreme Court. The judgments relied by APRL are Energy Watchdog v. CERC 2017 (4) SCALE 580, SECL v. State of M.P. & Ors. (2003) 8 SCC 648 and Indian Council of Enviro- Legal Action v. Union of India & Ors. (2011) 8 SCC 161. The judgement of this Tribunal in OP No. 1 of 2011 has also been relied by APRL.
- t) 'Law' and 'Indian Government Instrumentality' under PPA make no distinction between sovereign and non- sovereign functions of the government. Once the conditions of Change in Law are met in terms of the PPA, the nature of function is irrelevant.

- u) On the issue of interpretation of contract APRL has relied on the judgements of Hon'ble Supreme Court in case of United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal (2004) 8 SCC 644, DLF Universal Ltd. & Anr. v. Director Town and Country Planning Deptt. Haryana &Ors. and Batch (2010) 14 SCC 1 and Rajasthan State Industrial Development and Investment Corporation & Anr. v. Diamond & Gem Development Corpn. India Ltd. & Anr. (2013) 5 SCC 470.
9. The learned counsel Mr. Anand K Ganesan appearing for the Discoms submitted the following submissions for our consideration on the issues raised in the instant Appeal as follows:-
- a) The claims of APRL need to be considered within the scope of Article 10 of the PPA dealing with Change in Law to be read with the definition of Law and Indian Government Instrumentality.
- b) The basis of contention of APRL under Article 77 of the Constitution that the circulars issued by CIL/MoR have force of law is misconceived. The relevant provision under the Constitution is Article 298 which deals with executive (government undertaking commercial functions). This aspect has been dealt by Hon'ble Supreme Court vide its judgements in case of Balmer Lawrie & Co. Ltd. v. Partha Sarathi Sen Roy (2013) 8 SCC 345, Agricultural Produce Market Committee v. Ashok Harikuni (2000) 8 SCC 61, Bakhtawar Singh Bal Kishan

- v. Union of India (1988) 2 SCC 293 and Thressiamma Jacob v. Deptt. Of Mining & Geology (2013) 9 SCC 725.
- c) The power of compulsory extraction of money is in the realms of sovereign power. The definition of Law under PPA requires the order/circular/notification to have force of law which could be exercised under Article 73/77 for Union of India and under Article 162 of the Constitution in case of a State.
- d) There are two basic principles on the power to tax in exercise of a sovereign power viz. liability on the basis of contract cannot be said to be tax as it is for goods and services and is not compulsory extraction of money and Article 265 of the Constitution provides for power to tax only by authority of law. On this issue the judgements on Hon'ble Supreme Court in case of Commissioner of Income Tax v. Macdowell & Co. Ltd. (2009) 10 SCC 755, Tata Iron & Steel Co. Ltd. & Anr v. State of Bihar & Or. 2017 SCC online SC 1521 and Distt. Council, Jowai Autonomus Distt. v. Dwet Singh Rymbai (1986) 4 SCC 38 have been relied.
- e) In the circumstances, the claim of APRL that the circulars of CIL/MoR are compulsory extraction of money in exercise of executive power is liable to be rejected.
- f) The activity of Railways is a business activity as has been settled by Hon'ble Supreme Court vide judgements in case of Union of India (UOI) v. Ladulal Jain (1964) 3 SCR 624 and Railway Board v. Chandiram Das (2000) 2 SCC 465, Baktawar Singh Bal Kishan v. Union of India (1988) 2 SCC 293 and

Kuldeep Singh v. Union of India AIR 1986 Del 56. Accordingly, the claim of APRL is liable to be rejected.

- g) Supply of coal is also a commercial activity and its pricing have been de-regulated w.e.f. 1.1.2000. The coal companies based on market forces fix the prices. The Report of Standing Committee on Coal and Steel (2013-14) has been relied by the Discoms. Fuel Supply Agreement signed between APRL and coal companies provides for price of coal notified by CIL from time to time. This cannot be termed as compulsory extraction of money. This Tribunal in case of Sasan Power Ltd. v. CERC &Ors. has held that change in prices of diesel was a commercial consideration and not Change in Law.
- h) APRL while relying on Energy Watchdog judgement has not explained how the instant case is covered under the said judgement and simply contended that the issue is covered. The said judgement supports the contentions of the Discoms. The reliance on Sasan Case by APRL is also misconceived as that case which deals with taxes as a part of Change in Law is different from the present case. The Change in Law clause is also different in present case.
- i) Increase in cost of Railway Freight in form of Busy Season Surcharge, Development Surcharge and Port Congestion Surcharge are merely components of dynamic pricing policy of Railways and they do not have force of law but are only commercial consideration under contract between APRL and Railways.

- j) The contention of APRL that only basic freight has been covered under the escalation formula is misconceived. The Change in Law clause cannot be interpreted based on nature of charges. Any grievance against components of escalation formula has different remedy.
- k) Arrangement of fuel is the responsibility of APRL. Any change in increase in sizing/crushing/ surface transportation charges is a contractual/ commercial issue between APRL and coal companies and such issues are not Change in Law. The contention that sizing charges have been issued under MMDR Act is erroneous as under MMDR Act, GoI only determines the grades and sizes of coal. The charges for particular grade and size is fixed by CIL which is a commercial activity.
- l) The bidders had an option to bid escalable and non-escalable component for energy charges. The escalation index notified by CERC has impact of change in price of coal and hence they cannot be considered as Change in Law. The bidders were aware of the escalation being allowed and should have bid accordingly. If all the charges were allowed to be made pass-through then there was no purpose of proving escalable and non-escalable components in the bid process.
- m) The claim of Forest Tax is also misconceived as no details have been provided by APRL including the notification regarding it.
- n) The claim of carrying cost is also erroneous as there is no provision in the PPA for such costs and the only provision in

PPA is related to interest on late payment if the payment is delayed by the Discoms arising out of the claims from Change in Law events. The judgement of this Tribunal in case of SLS Power Ltd. v. APERC & Ors. in Appeal No. 150 of 2011 has been relied. The NTPC case and Tata Power case relied by APRL are also differentiated from the present case in view of re-determination of tariff and specific categories where carrying cost is payable. Even in case interest is allowed the same shall not be at the rate of delayed payment surcharge but it should be on general principles of restitution.

- o) The State Commission has not given any directions on levy of Clean Energy Cess and Central Excise duty in the Impugned Order. The State Commission has stated that the same has been settled in accordance with the PPA. The Discoms had agreed to pay the said cess & duty amounts for two years 2013-14 & 2014-15 which has been directed by the State Commission vide order dated 29.12.2015. There is no agreement for payment of the said cess and duty beyond 2014-15 and also there is no direction in the Impugned Order for payment of the same beyond 2014-15.

- p) The relevant clause for applicability of taxes under Change in Law is the last bullet which is applicable on tax on supply of power and cannot be applied to any other bullet under the said clause. This is unlike other PPAs under Section 63 of the Act as in case of Sasan Power Ltd., Coastal Gujarat Power Ltd., Adani Power's PPA with GUVNL etc. The wordings of the said PPAs are consciously different.

- q) The PPA does not define the word 'supply' but the same has been defined in the Act at Section 2 (71) as sale of power. Thus, the PPA does not cover the taxes which are not on the taxable event of supply of power. In present case service tax, royalty on coal etc are not taxes on supply of power but other taxable events which are not covered in the PPA and cannot be allowed as Change in Law event. The judgement of Hon'ble Supreme Court in case of Godfrey Philips India Ltd. v. State of U.P. (2005) 2 SCC 515 has been relied.
- r) Claims under PPA affect public interest and therefore rights and obligations and claims under PPA cannot be allowed based on understanding or waiver between the parties. The same has been held by Hon'ble Supreme Court in case of All India Engineer Power Federation & Ors. v. Sasan Power Ltd. &Ors. (2017) 1 SCC 487.
- s) Excise duty and Royalty on coal forms part of escalation formula notified for Section 63 PPAs. This has been confirmed by Gol vide communication dated 20.7.2016.
- t) The issue of fee for Consent to Operate is related to responsibility of APRL to obtain environmental clearances at its own cost and expenses as per PPA and cannot be passed in guise of Change in Law. The State Commission has erred in allowing such costs under Change in Law. Further, the amount involved on this account is within 1% of LC amount and accordingly impermissible under Article 10.3.2 of the PPA.

- u) The Change in Law Article under PPA is exhaustive in nature and not inclusive in nature as it uses the expression 'means'. On this issue the judgement of Hon'ble Supreme Court in case of Bharat Coop. Bank (Mumbai) Ltd. v. Employees Union (2007) 4 SCC 685 has been relied. Thus, specific entries under Change in Law has to be considered for any relief.
- v) There is specific clause in the PPA related to taxes, the general clauses dealing with laws in general have to be interpreted as necessarily excluding taxes. This principle has been dealt by Hon'ble Supreme Court in case of South India Corporation (P) Ltd. v. Secretary Board of Revenue Trivandrum and Anr. (1964) 4 SCR 280. Further, it is a settled position in interpretation of statutes as well as interpretation of contracts that an interpretation would render a particular provision redundant is not an acceptable interpretation. On this issue the judgements of Hon'ble Supreme Court in case of JSW Infrastructure Ltd. v. Kakainada Seaports Ltd. (2017) 4 SCC 170, Life Insurance Corporation of India v. Dharam Vir Anand (1998) 7 SCC 348, National Agriculture Coop. Marketing Federation India Ltd. v. Gains Trading Ltd. (2007) 5 SCC 692, Life Insurance Corporation of India v. Mani Ram (2005) 6 SCC 274 and Dr. Arun Subrao Prabhu v. Rizvi Builders & Ors. (2009) SCC online Bom 1403 have been relied. The principle of construction that mention of specific inclusions results in exclusion of anything not mentioned expressly has been held in the judgement of Hon'ble Supreme Court in case of B Shankar Rao Badami v. State of Mysore (1969) 1 SCC 1.

- w) The Hon'ble Supreme Court in case of Rashtriyalspat Nigam Ltd. V. Dewan Chand Ram Saran (2012) 5 SCC 306 has explained the difference between liability under law and mere commercial arrangement.
- x) The Impugned Order also does not determine the compensation nor the date of compensation from which it becomes effective which is required in terms of the PPA. Therefore, the State Commission was required to decide the principle and also quantum of tariff/ compensation that is payable in case of Change in Law claim. The Impugned Order is liable to be set aside.
10. The learned counsel Mr. R K Mehta appearing for the State Commission submitted the following submissions for our consideration on the issues raised in the instant Appeal as follows:-
- a) APRL has sought compensation on 19 Change in Law events. The State Commission has allowed compensation on account of change in Royalty on Coal, levy of Service Tax on transportation of goods by Railways and increase in fee for Consent to Operate. The State Commission has not considered the claim on account of Clean Energy Cess and Central Excise Duty as they were already settled in terms of the PPA. Further, the State Commission has not considered the claims on account of increase in MAT, change in service tax rate, CG Paryavaran Upkar, CG Vikas Upkar and restriction of ash content in coal to 34% as the same were claimed on

hypothetical basis without incurring the same. These claims were made by APRL based on the order dated 30.1.2017 of this Tribunal. Rest of the claims i.e. nine in numbers were disallowed by the State Commission.

- b) The State Commission has reiterated its findings while disallowing the said nine claims of APRL under Change in Law. The State Commission has based the Impugned Order considering the judgement dated 12.9.2014 of this Tribunal in case of Wardha Power v. MERC, CERC order dated 30.3.2015 in case of GMR Kamalanga Energy Ltd. v. Dakshin Haryana Bijlee Vitaran Nigam Ltd., CERC order dated 3.2.2016 in case of Sasan Power Ltd. v. MP Power Management Co. Ltd., GERC order dated 21.10.2011 and MERC order dated 20.4.2015.
- c) The Energy Watchdog case relied by APRL is misplaced as it is mainly related to change in Coal Policy and consequent revision of Tariff Policy. The said judgement does not lay down general principle of law that all notifications, policy, rule, ordinance, circular etc. issued by any Government Instrumentality under statutory powers shall have force of Law. In case of Sasan Power judgement passed by this Tribunal it has been held that Finance Act and various notifications issued by Govt. in respect of Change in Law events are covered under Change in Law Article of the PPA therein.
- d) In case of the PPAs executed under Section 63 of the Act, the entire risk of costs and expenses except those specifically provided in the PPA are to be borne by the Seller. A careful

perusal of Article 10.1.1 of the PPA along with other provisions of the PPA, it becomes clear that every imposition by way of order, circular or notification issued by Indian Government Instrumentality does not qualify for compensation under Change in Law and every circular issued by MoR/CIL does not fall under Article 10.1.1 read with definition of Law at Article 1.1 of the PPA. Only such circulars which can be traced to the sovereign power of the government can be said to have force of law.

- e) If all events impacting cost of power or revenue of the generator qualify for compensation under Change in Law the purpose of competitive bidding under Section 63 of the Act would be lost. CERC escalation rates take care of variation in base rate, change in class of goods for freight etc. and cannot fall under Change in Law Article of the PPA.
- f) Further finally the learned counsel appearing for the Appellant vehemently submitted that in view of the well settled law by the Apex Court and by this Tribunal under various provisions of Electricity Act, 2003, the Impugned Order passed by the State Commission cannot be sustainable and is liable to be set aside granting the prayer sought by the Appellant in the instant Appeal in the interest of justice and equity.

11. We have heard learned counsel appearing for the Appellants and learned counsel appearing for the second Respondents at considerable length of time. We have gone through carefully the written submissions filed by the Appellant and the Respondents through their counsel and also taken into consideration the relevant material on records available in file. On the basis of the

pleadings available, the issues emerged in the instant appeals for our consideration are as follows:

A. APRL vide its Petition No. RERC-577/15 has sought compensation on 19 Change in Law events and carrying cost on the allowed compensation under Change in Law. The State Commission has allowed compensation only on three accounts namely change in Royalty on Coal, levy of Service Tax on transportation of goods by Railways and increase in fee for Consent to Operate. The State Commission has not considered the claim on account of Clean Energy Cess and Central Excise Duty. As per the State Commission the same were already settled in terms of the PPA. The State Commission has also dealt these claims in its order dated 29.12.2015. Further, the State Commission has not considered the claims of APRL on account of increase in MAT, change in service tax rate, CG Paryavaran Upkar, CG Vikas Upkar and restriction of ash content in coal to 34%. These claims have been made by APRL through a separate petition before the State Commission and are not being considered accordingly in the present judgement. Rest of the claims of APRL nine in numbers were disallowed by the State Commission.

a) The case of the Discoms is that the State Commission should have not allowed compensation on the said three accounts and contested that earlier allowed compensation on account of levy of Clean Energy Cess and Central Excise duty cannot be allowed from 2015-16 onwards. APRL has been aggrieved by disallowances under Change in Law and also disallowance of

carrying cost on compensation arising out of allowed Change in Law events.

- b) APRL and the Discoms have raised various questions of law related to disallowed/ allowed events under Change in Law. It would be prudent for us to analyse the disallowed/ allowed Change in Law events issue wise instead of taking the questions of law. It is a settled position in law that the rights and obligations of the parties arise from the PPA entered between them for procurement of power under Section 63 of the Act. The present claims of APRL and the contentions of the Discoms are to be viewed accordingly. This requires analysis of the claims of the parties under the provisions of the PPA. The relevant Articles of the PPA dealing with Change in Law provisions relied upon by the parties are reproduced below:

“1.1 Definitions

“Change in Law” shall have the meaning ascribed thereto in Article 10.1.1 of this Agreement.

“Indian Government Instrumentality” means Government of India, Government of State (s) of Rajasthan and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above State Government (s) or both, any political sub- division of any of them including any court or Appropriate Commission (s) or tribunal or judicial or quasi- judicial body in India but excluding the Seller and Procurer;

.....
“Law” shall mean in relation to this Agreement, all Laws including Electricity Law in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Government Instrumentality and having force of law and shall further include without limitation all rules, regulations, orders, notifications by an Indian Government Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions of the Appropriate Commissions.
.....

ARTICLE 10: CHANGE IN LAW

10.1 Definitions

In this Article 10, the following terms shall have the following meanings:

10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the Seller or any income to the Seller:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal

power to interpret or apply such Law, or any Competent Court of Law;

- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;
- any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

.....

10.3.2 During Operating Period

The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1 % of the value of the Letter of Credit in aggregate for the relevant Contract Year.

10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurers and the Appropriate Commission documentary proof of such increase/ decrease in cost of the Power Station or revenue/ expense for establishing the impact of such Change in Law.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law.”

From the above it emerged that, an event qualifies under Change in Law if it occurs starting from seven (7) days prior to the Bid Deadline resulting in any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller. The events are classified as below:

- The enactment/coming into effect/adoption/ promulgation/ amendment/ modification or repeal of any law in India which also includes rules and regulations framed pursuant to such Law. Change in interpretation/ application of any Law by any Indian Governmental Instrumentality having the legal power to interpret/ apply such Law, or any Competent Court of Law.
- Requirement for obtaining new consents/ clearance/permits or change in the terms and conditions prescribed for obtaining any Consents/ Clearances/

Permits or inclusion of any new terms or conditions for obtaining such Consents/ Clearances/ Permits.

- Any change in tax/introduction of any tax made applicable for supply of power by the Seller as per the terms of the PPA.

During Operating Period, the compensation is payable only when the amount due to Change in Law events is in excess of an amount equivalent to 1 % of the value of the Letter of Credit (LC) in aggregate for the relevant Contract Year.

The Seller is required to produce documentary proof of the Change in Law event and is also required to give notice to the Procurers as per PPA.

- c) Before discussing the issues there is a need to address a common issue raised by the Discoms related to allowance of tax under Change in Law in terms of the PPA. According to the Discoms that as per the 5th bullet of the Article 10.1.1 of the PPA change in tax or introduction of any new tax is only applicable to supply of power which also means sale of power if definition of supply is taken in terms of the Act. The Discoms have contended that if there is specific provision dealing with the tax under Change in Law then other provisions of Change in Law Article are not allowed to deal with the tax and as such no other tax implications are allowed to be covered under Change in Law under the PPA. The Discoms have also relied on some judgements of Hon'ble Supreme Court on this issue. We have gone through the said judgements and we observe that according to the judgements relied by the Discoms, the taxes

once dealt in a particular clause of a contract then there is no scope for considering taxes under other clauses of a contract.

d) APRL has submitted that the generator undertakes many activities to ensure supply of power to the Discoms. APRL has relied on the judgement of Hon'ble Supreme Court in case of State of A.P. v. NTPC (2002) 5 SCC 203 wherein it has been held that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. According to the said judgement, the applicable taxes on inputs for generation of power can be construed to be taxes on supply of power. APRL has further contended that if the contention of the Discoms is accepted than the Change in Law provision would be applicable during the Operating Period and the applicability of the said provision will become redundant during Construction Period. There is some strength in the contention of APRL as there will be no applicability of Change in Law provisions if there are changes in tax/duties/levies etc. rates or imposition of new tax/duties/levies etc. during Construction Period and on input costs related to power generation.

e) APRL has further contended that the reliance of the Discoms on the maxim 'expressum facit cessare tactium' meaning when express inclusions are specified, anything which is not mentioned explicitly is excluded is misplaced as the Hon'ble Supreme Court in case of Assistant Collector of Central Excise Calcutta Division v. National Tobacco Company of India Ltd. (1972) 2 SCC 560 has held that the rule of prohibition by necessary implication could be applied only where a specified

procedure is laid down for performance of duty or where there is an express prohibition.

- f) The Discoms have also reproduced the definition of Change in Law under different PPAs under Section 63 of the Act. We have gone through the said provisions and we find that the other provisions of the PPA are similar to that in the other PPAs under Section 63 of the Act except the fifth bullet which is additional specifically covering tax on supply of power. The judgements of the Hon'ble Supreme Court relied upon by the Discoms were under different context and could not be equated to the scheme of power procurement by Discoms under Section 63 of the Act which is based on guidelines issued by GoI under different scenarios wherein the treatment of taxes depends upon the specific conditions of the RFP and tariff quotes by the bidders.
- g) In view of our discussions as above and after duly considering the earlier judgements of this Tribunal, we are of the considered opinion that any change in tax/levies/ duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms.

A. Issues raised by APRL:

- i. Now let us consider the nine claims of APRL/Appellant, which were disallowed by the State Commission in the Impugned Order. Some of the issues have been clubbed for

convenience and brevity. APRL has submitted that the issue related to change in price mechanism of coal from UHV to GCV basis and levy of fuel adjustment component presently have no impact on APRL and the same have not been pressed upon. Accordingly, we are dealing with the other seven issues and the issue of carrying cost in this judgement.

- ii. First, we take the three claims related to MoR i.e. increase in Busy Season Surcharge, Development Surcharge and Port Congestion Surcharge on coal freight. Let us examine the impugned order of the State Commission on the said issues reproduced as below:

“36. The Commission observes that the Busy Season Surcharge on Coal Transportation has been imposed by the Ministry of Railways. The increase made by Ministry of Railways in our view cannot come within the scope of ‘Change in Law’ as provided in the PPA though it may increase transportation charges. The increase has to be incurred by the Petitioner as an additional cost in the coal cost which has to be to its account. Merely because Railway under its power imposes surcharge on coal transportation, it cannot be equated to a surcharge levied as tax or cess of Finance Ministry under Finance Act. The Petitioner was expected to take into account the possible revision in these charges while quoting the bid. As already stated, the Petitioner was expected in terms of para

2.7.2.4 of the RfP to include in quoted tariff all costs involved in procuring the inputs. Since freight charges are a cost involved for procuring coal which is an input for generating power for supply to Discoms under the PPA, the Petitioner cannot claim any relief under change in law on account of revision in freight charges. Accordingly, the claim of the Petitioner on this account is disallowed. Therefore, Commission does not accept the claim.

37. The Petitioner submitted that at the time of Bid Deadline, the Development Surcharge on Coal Freight was 2% on Normal Tariff Rate (Basic Freight + Busy Season surcharge + Other Charges) being the rate as specified in Circular No. 58 of 2007 dated 29.05.2007. Subsequently the GOI, Ministry of Railways, issued a Rate Circular No. 38 of 2011 dated 12.10.2011 to increase the Development Surcharge on Coal to 5% of Normal Tariff Rate. The increase in Development Surcharge from 2% to 5% squarely falls under the definition of Change in Law as prescribed under the 1st Bullet of Article 10 of the PPA.

39. The Commission observes that the Development Surcharge levied on Coal Transportation has been imposed by the Ministry of Railways. The increase made by Ministry of Railways in our view cannot come within the scope of 'Change in Law' as provided in the PPA though it may increase transportation charges.

The increase has to be incurred by the Petitioner as an additional cost in the coal cost which has to be to its account. Merely because Railway under its power imposes surcharge on coal transportation, it cannot be equated to a surcharge levied as tax or cess of Finance Ministry under Finance Act. Therefore, as discussed at para 37, Commission does not accept the claim.

50. In Commission's view, the levy of Port Congestion Surcharge does not qualifying as an event of Change in Law under 1st Bullet of Article 10.1.1 of the PPA as contended by the Petitioner. We observe that the levy gets covered in fuel price escalation and hence cannot be allowed as Change in Law.

From the above reasoning it can be seen that the State Commission has disallowed the claim of APRL on Busy Season Surcharge and Development Surcharge by saying that these charges cannot be equated to a surcharge levied as tax or cess of Finance Ministry under Finance Act. Further, APRL was expected to take into account the all costs involved in procuring the inputs/ possible revision in such charges while quoting the bid in terms of the RFP. In case of Port Congestion charges, the State Commission has observed that the levy is covered in fuel price escalation and hence cannot be allowed as Change in Law.

- iii. It is held that the Port Congestion charges are levied by the MoR and the State Commission has observed that the levy is covered in fuel price escalation. The State Commission has erred to that extent. The claim of APRL for Port congestion charges have to be evaluated under transportation charges.
- iv. Now let us analyse the provisions of the RFP. The relevant extract from the RFP is reproduced below:

“2.4.1.1 (B) xi. The Quoted Tariff, as in Format 4.10, shall be all inclusive tariff up to the Interconnection Point and no exclusion shall be allowed. The Bidder shall take into account all costs including capital and operating costs, statutory, taxes, levies, duties while quoting such Tariff. It shall also include any applicable transmission costs and transmission losses from generation source to the Interconnection Point. Availability of inputs necessary for supply of power shall be ensured by the Seller and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the plant location must be reflected in the Quoted Tariff.”

From the above it can be seen that the tariff quoted by the Bidder has to be all inclusive tariff including capital and operating costs, statutory taxes, levies, duties and the responsibility of the same lies with the Bidder.

- v. Perusal of the RFP reveals that the Bidder was required to quote escalable/ non-escabale inland transportation charges.

CERC based on the freight rate circulars issued by MoR notifies the escalation rates for inland transportation of domestic coal.

- vi. Before proceeding further let us consider the contentions of the Discoms that the circulars / notifications etc. issued by MoR do not have force of law. While claiming so the Discoms have relied on Article 298 of the Constitution. The relevant extract from the Constitution is reproduced below:

*“298. Power to carry on trade, etc. The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose: Provided that (a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and
(b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament”*

From the above it is manifest that, the Article 298 deals with executive power of Govt/ State Government to carry out trade/ business and has demarcated the areas of such trade/ business between the Union and the State.

- vii. According to the Discoms the Article 298 of the Constitution as above deals with executive (government undertaking commercial functions). The Discoms have contended that this aspect has been dealt by Hon'ble Supreme Court vide its judgements in case of Balmer Lawrie & Co. Ltd. v. Partha Sarathi Sen Roy (2013) 8 SCC 345, Agricultural Produce Market Committee v. Ashok Harikuni (2000) 8 SCC 61, Bakhtawar Singh Bal Kishan v. Union of India (1988) 2 SCC 293 and Thressiamma Jacob v. Deptt. Of Mining & Geology (2013) 9 SCC 725.
- viii. The Discoms have further vehemently contended that, the activity of Railways is a business activity as has been settled by Hon'ble Supreme Court vide judgements in case of Union of India (UOI) v. Ladulal Jain (1964) 3 SCR 624 and Railway Board v. Chandiram Das (2000) 2 SCC 465, Baktawar Singh Bal Kishan v. Union of India (1988) 2 SCC 293 and Kuldeep Singh v. Union of India AIR 1986 Del 56 and the claim of APRL is liable to be rejected.
- ix. The learned counsel appearing for the APRL/Appellant has contended that the notifications, circulars etc. issued by the Indian Government Instrumentality have force of law in accordance with Article 77(3) of the Constitution. The relevant extract from the Constitution is reproduced below:

“77(3) The President shall make rules for the more convenient transaction of the business of the Government of

India, and for the allocation among Ministers of the said business.”

The learned counsel appearing for the APRL/Appellant has contended that the business of Gol has been allocated vide Gol allocation of business rules which allocate the business of Gol and distributes the subjects among the departments. APRL has further contended that the Rate Circulars of MoR are issued under Railways Act, 1989 and have force of law. The relevant extracts from the Railways Act are reproduced below:

“2 (35) “rate” includes any fare, freight or any other charge for the carriage of any passenger or goods;

.....

30. Power to fix rates.—

(1) The Central Government may, from time to time, by general or special order fix, for the carriage of passengers and goods, rates for the whole or any part of the railway and different rates may be fixed for different classes of goods and specify in such order the conditions subject to which such rates shall apply.

(2) The Central Government may, by a like order, fix the rates of any other charges incidental to or connected with such carriage including demurrage and wharfage for the whole or any part of the railway and specify in the order the conditions subject to which such rates shall apply.

31. Power to classify commodities or alter rates.—The Central Government shall have power to—

(a) classify or re-classify any commodity for the purpose of determining the rates to be charged for the carriage of such commodities; and
(b) increase or reduce the class rates and other charges.”

From the above it can be seen that Gol through Ministry of Railways have powers under the statute to fix rates/ other charges and can classify/ re-classify the commodity. This can be done in the form of general or special orders.

- x. We are of the considered opinion that the Articles 298 and 77 of the Constitution cannot be read in isolation and they are complimentary to each other as far as the scheme of carrying out the business/ commercial activity by Gol/ State Government is concerned. The Corporations/ Companies are carrying out businesses under various ministries and departments of Gol/State Govt. are the creations from the Act of the Parliament/ State Assembly. Their formation is having force of law. The PPA defines the Indian Government Instrumentality, which includes departments and corporations/companies like those that IR/CIL formed under a statute. Further, there are various other stipulations under the RFP and the PPA, which are required to be considered before arriving at any event as an any Change in Law event.
- xi. We have carefully gone through the judgements relied by the Discoms and we find that the context of the said judgements is different from that of the case in hand presently. The said judgements cannot be directly applicable to the facts and

circumstances of the case as the present case has to be analysed based on the provisions of the PPA under Article 10 which are related to notifications, circulars, order etc. issued by the Indian Government Instrumentality which have force of law.

- xii. APRL has relied on judgements on Hon'ble Supreme Court in case of Rai Sahib Jawaya Kapur and Ors. V. State of Punjab AIR 1955 SC 549, Rashmi Metaliks v. UOI (1998) 5 SCC 126 &(1973) 1 SCC 781 and Gulf Goans Hotels Company Ltd. v. Union of India & Ors. (2014) 10 SCC 673. Ultra Tech Cement Ltd. v. UOI 2014 (4) KHC 190 Kerala High Court and KIOCL Ltd. v. Railway Board &Ors. WP(C) 532 of 2010 of Karnataka High Court are also relied on Rail Circulars being policy decisions of Gol. APRL has further contended that Hon'ble Supreme Court's judgement in case of Rai Sahib Ram Jawaya Kapur and Ors. v. State of Punjab has held that executive can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by legislature. In terms of Hon'ble Supreme Court's judgement in (1998) 5 SCC 126 and the power of Railway Board to fix charges in terms of Section 30 of the Railways Act is untrammelled and enforceable. We have gone through the said judgements and find these judgements not substantial.

APRL has also relied on the judgement of Hon'ble Supreme Court in case of Kusum Ingots and Alloys v. Union of India (2004) 6 SCC 254 on the issue that executive instructions without any statutory backing would also be considered as

‘Law’. We have perused the said judgement. The relevant extract from the said judgement is reproduced below:

“26..... In a case where the field is not covered by any statutory role, executive instructions issued in this behalf shall also come within the purview thereof.”

According to the above judgement the executive instructions issued on a missing field under statute will have force of law.

APRL, on the issue of interpretation of contract has relied on the judgements of Hon’ble Supreme Court in case of United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal (2004) 8 SCC 644, DLF Universal Ltd. & Anr. v. Director Town and Country Planning Deptt. Haryana &Ors. and Batch (2010) 14 SCC 1 and Rajasthan State Industrial Development and Investment Corporation & Anr. v. Diamond & Gem Development Corpn. India Ltd. & Anr. (2013) 5 SCC 470.

We have carefully gone through the said judgements and find that the Hon’ble Court has held that the terms of the contract have to be strictly read and natural meaning is to be given to it. Hon’ble Court has further held that outside aid in a contract can only be sought only when the meaning is ambiguous. In the present case too while interpreting the PPA we cannot artificially divide the circulars, notifications, rules etc. issued by Indian Government Instrumentality as issued under sovereign functions/ non-sovereign function of the Government.

- xiii. From the above it is crystal clear that the Circulars issued by MoR regarding Busy Season Surcharge, Development Surcharge and Port Congestion Charges which have bearing on costs of the Kawai Project of APRL have force of law.
- xiv. It is also observed that the State Commission has concluded that the CERC Escalation Rates covers only the Base Freight Rate. This is obvious from the observations of the State Commission at various paras in the Impugned Order. The relevant extract from the Impugned Order is reproduced below:

“43. Further, it is observed that the Base Freight Rate is being used by the CERC for computation of the Escalation Index. Service Tax on Transportation being levied additionally as a percentage of Normal Tariff Rate, is not covered in the escalation rates notified by CERC.

.....

47. Commission observes that there is merit in this contention of Respondents. It is noted that CERC computes escalation in the Base Freight. Any variation in base freight due to any reason including FAC gets reflected in the escalation index. Therefore, we hold that the Fuel Adjustment Component does not qualify as a change in law event as claimed by the Petitioner.

.....

56. The Commission notes that class 150 of Railways freight schedule was applicable to the Petitioner at the time of bid deadline. The change in class to 145 was vide notification dated 16.03.2015, which is subsequent to the bid deadline.

Commission observes that the CERC Index, which uses Base Freight Rate linked to the class of goods, includes the impact of change in class for railway freight for coal from 140 to 150.”

- xv. APRL/Appellant has further submitted that, MERC has allowed the Development Surcharge and Busy Season Surcharge under Change in Law in Case No. 163 of 2014. Let us examine the findings of the MERC on the said issues. The relevant extract from the order of MERC is reproduced below:

“J. Development Surcharge on Coal Transportation

12.35 The Commission notes that:

(a) Increase in Development Surcharge on Coal Transportation has been effected by the Ministry of Railways, Gol in exercise of powers under Sections 30, 31 and 32 of the Railways Act, 1989. Rate Circulars issued by the Ministry of Railways are akin to Orders issued pursuant to an Act, in this case the Railways Act, 1989, by an Indian Governmental Instrumentality, i.e. Indian Railways.

(b) Thus, the increase in Development Surcharge on Coal Transportation falls within the definition of “Law” and Article 13.1.1(i) of the PPA.

(c) At the time seven days prior to the bid deadline, i.e. 14.2.2008, the applicable “Development Surcharge on Coal Transportation” was 2% of the Normal Tariff Rate (NTR) as notified in Rate Circular No. 28 of 2007 dated 29.5.2007.

That rate has been revised to 5% vide Rate Circular No. 38 of 2011 dated 12.10.2011.

(d) Further, as mentioned earlier, only the Base Freight Rate is being used by the CERC for computation of the Escalation Index. Development Surcharge on Coal Transportation, being levied additionally as a percentage of NTR, is not covered in the escalation rates notified by CERC.

12.36 In view of the above, the Commission finds that the increase in Development Surcharge on Coal Transportation is a "Change in Law" event as per Article 13.1.1(i) of the PPA and satisfies the requirements as explained in Paras. 12.6 and 12.8 above.

K. Busy Season Surcharge on Coal Transportation

12.37 The Commission observes as follows:

(a) Busy Season Surcharge on Coal Transportation has been imposed by the Ministry of Railways, Govt in exercise of powers conferred by Section 30, 31 and 32 of the Railways Act, 1989. Rate Circulars issued by Ministry of Railways are akin to the Orders issued pursuant to the Act, i.e. the Railways Act, 1989 by an Indian Governmental Instrumentality, i.e. Indian Railways.

(b) Thus, the introduction of Busy Season Surcharge on Coal Transportation falls within the definition of "Law" and Article 13.1.1 (i) of the PPA.

(c) The imposition of Busy Season Surcharge on Coal Transportation is admittedly subsequent to seven days prior to the Bid Deadline, i.e., on 29.03.2011, vide Rate Circular

No. 13 of 2011. The rate of 5% was subsequently increased to 10%, 12% and then to 15% vide Rate Circular Nos. 38 of 2011 (dated 12.10.2011), 28 of 2012 (dated 27.09.2012) and 24 of 2013 (dated 18.09.2013), respectively.

(e) Further, as mentioned in para. 12.32 above, only the Base Freight Rate is being used by the CERC for computation of the Escalation Index. Busy Season Surcharge on Coal Transportation, being levied additionally as a percentage of the Base rate, is not covered in the escalation rates notified by CERC.

12.38 Considering the above, the Commission is of the view that imposition and further increase in Busy Season Surcharge on Coal Transportation are "Change in Law" events as per Article 13.1.1(i) of the PPA and meet the requirements set out at Paras. 12.6 and 12.8 above."

Now let us consider the provisions of Article 13.1.1 of the PPA in Case No. 163 of 2014. The relevant extract is reproduced as below:

"ARTICLE 13: CHANGE IN LAW 13.1. Definitions

In this Article 13, the following terms shall have the following meanings:

13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law or;

(ii) A change in interpretation of any law by a competent court of law, tribunal, Indian Governmental Instrumentality provided such court of law, tribunal, Indian Governmental Instrumentality is final authority under law for such interpretation.

But shall not include (i) any change in withholding tax on income or dividends distributed to the shareholder of the seller, or (ii) change in respect of UI charges or frequency interval by an appropriate commission.

.....”

The provisions of Article 13.1.1 (i) of the PPA under MERC is similar to that of the PPA under instant case.

- xvi. From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed for basic freight rate only. Accordingly, any such change by Indian Governmental Instrumentality herein Indian Railways has to be necessarily considered under

Change in Law event and need to be passed on to APRL. In terms of the PPA, such changes in the surcharges and levy of new Port Congestion Surcharge which do not exist at the time of cut-off date falls under 1st bullet of Article 10.1.1 of the PPA read with the definitions of the 'Law' and 'Indian Government Instrumentality' under the PPA.

According these issues are answered in favour of APRL/Appellant.

- xvii. Now we considered the fourth issue i.e. increase in Sizing Charges for coal charged by CIL. Let us first examine the impugned findings of the State Commission. The relevant extract from the Impugned Order is reproduced below:

"26. CERC in its recent orders dated 03.02.2016 in the case of GMR-Kamalanga Energy Ltd. Vs Dakshin Haryana Bijli Vitran Nigam Ltd. &Ors (Petition No.79/MP/2013) has on similar claim held that

"58. We have considered the submissions of the petitioner. Prior to 1.1.2000, the Central Government under Section 4 of the Colliery Control Order, 1945, was empowered to fix the grade-wise and colliery-wise prices of coal. Subsequently, based on the recommendations of Bureau of Industrial Costs and Prices (BICP), Government of India decided to deregulate the prices of all grades of coking coal and A, B, and C grades of non-coking coal from 22.3.1996.

Subsequently, based on the recommendation of the Committee on Integrated Coal Policy, the Government of India decided to de-regulate the prices of soft coke, hard coke and D grade of non-coking coal with effect from 12.3.97. The Government also decided to allow CIL and SCCL to fix prices of E, F and G grades of non-coking coal once in every six months by updating the cost indices as per the escalation formula contained in the 1987 report of the BICP and on 13.3.1997, necessary instructions were issued to CIL and SCCL in this regard. The pricing of coal was fully deregulated after the Colliery Control Order, 2000 notified on 1.1.2000 in supersession of the Colliery Control Order, 1945. Under the Colliery Control Order, 2000 the Central Government has no power to fix the prices of coal. Therefore, the prices of coal from CIL and its subsidiaries were market based. Only the pricing methodology was UHV basis at the time of bid submission which was switched over to GCV based pricing w.e.f. 1.1.2012 vide Govt. of India notification dated 30.12.2011. In our view, any decision affecting the price of inputs for generating electricity including coal cannot be covered under Change in Law except the statutory taxes, levies and duties having an impact on the cost of or revenue from the supply of electricity to the procurers. As already noted, para 2.7.2.4 of the RfP required the bidders to reflect all costs involved in procuring the inputs (including statutory taxes, duties and levies thereof) in the quoted tariff. Moreover, the

petitioner has quoted stream 1 tariff consisting of non-escalable capacity charges and non-escalable energy charges, thereby taking all risks of price escalation in inputs including coal. Therefore, change from UHV to GCV based pricing cannot be covered under change in law. Hon`ble Appellate Tribunal for Electricity in the judgment dated 12.9.2014 in Appeal No. 288 of 2013 has observed as under:

“According to the bidding documents, the Appellant is not entitled to any increase in energy charges on account of increase in base price of fuel. However, the impact on account of change in the expenditure due to Change in Law has to be allowed as per the actuals subject to verification of proof submitted by the Appellant.”

In the light of above judgement also, the change in the base price of fuel on account of switchover from the UHV method to GCV method of coal pricing is not admissible under change in law.”

27. While agreeing with CERC, Commission is of the view that the change in methodology for calculation of the cost of coal by Coal India Ltd. (CIL) is only a means to arrive at the coal cost. Merely because CIL is a Government instrumentally, the change in method made by it cannot be considered as change in law as contemplated in PPA. Commission is of the view that every change/action made by

Government instrumentally will not fall within the category of change in law unless the same comes under Clause 10 of the PPA. Therefore, we do not allow the claim made on this ground.

iii. Increase in Sizing Charges for Coal Charged by Coal India Ltd.

28. The Petitioner has submitted that at the time of Bid Deadline, sizing charges were applicable in accordance with CIL notification dated 12.12.07. The said prices were increased first vide CIL Notification No. 1181 dated 15.10.09 and then further increased vide CIL Notification w.e.f 16.12.2013. Increase in sizing charges is pursuant to notification by a Governmental Instrumentality, which is a Change in Law event within the meaning of 1st Bullet of Article 10 of the PPA.

29. The Respondent Discoms have not accepted increase in Sizing Charges for Coal as an event of change in law under article 10 of the PPA, for the reason that these issues are being agitated and pending before the CERC. Respondents also contended that fuel handling and transportation charges are not payable as escalation index covers these items.

30. Commission is of the view that the increase in Sizing Charges for Coal is part of the methodology for the calculation of the cost of coal decided by Coal India Ltd. (CIL). Commission while agreeing to CERC order dt. 03.02.2016 at

para 28 above has already held that merely because CIL is a Government instrumentally, the change in method of charging made by it for coal pricing cannot be considered as change in law as contemplated in PPA. Therefore, we do not allow the claim made due to increase in sizing charges by CIL.”

The State Commission based on the order of CERC has held that increase in Sizing Charges for Coal is part of the methodology for the calculation of the cost of coal decided by CIL and merely CIL being Indian Government Instrumentality the change in method of charging made by it for coal pricing does not qualify for Change in Law event and dismissed the claim of APRL.

- xviii. APRL has contended that the Gol under Sub Section 3 of the CC Rules, 2004 (notified under MMDR Act) has the power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal and hence any change in sizing charges of coal by CIL an Indian Government Instrumentality qualifies for Change in Law event.

We hold that Gol under the said Rules have power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal. Here the case is not that the Gol have changed the sizing of coal under the said Rules, the case is that CIL has changed the sizing charges for coal for sizes, which already existed as specified by the Gol. The change in sizing charges of coal by

CIL is part of coal pricing mechanism. Further, in terms of the RFP, APRL was required to quote an all-inclusive tariff including coal costs in escalable/ non-escalable components based on the risks perceived by APRL. Accordingly, this contention of APRL is misplaced.

- xix. In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgement of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We uphold the findings of the State Commission.

Accordingly, this issue is answered against APRL/Appellant.

- xx. Now we move on to the fifth issue i.e. levy of Forest Tax. Let us examine the findings of the State Commission in the Impugned Order. The relevant extract is reproduced below:

“x. Levy of Forest Tax

51. The Petitioner submitted that at the time of Bid Deadline, no Forest Tax was applicable on coal. Thereafter, the Forest Department, Chhattisgarh State Government vide its letter 6658/2012/Bilaspur dated 31.10.2012 conveyed to SECL that, in accordance with Chhattisgarh Government, Forest Department letter No. 3541/2531/2010/10-2/Budget dated 06.10.2012, forest tax @ Rs. 7/ton under Chhattisgarh Transit (Forest Produce Rule) 2001 will be leviable on coal

mined and transported from SECL mines which are located in Forest area with effect from 01.11.2012.

52. The Respondent Discoms have contended that this is not a 'Forest Tax' but a fee imposed by the government for transportation of forest produce and such fee for transportation pass is similar to toll/entry fee and does not meet the criteria of "Change in Law".

53. In Commission's view, this is not a "Forest Tax" as contended. It is a fee imposed by the Government of Chhattisgarh for transportation of forest produce. Such fee for transportation pass is akin to toll / entry fees and does not meet the criteria of "Change in Law" stipulated in the Change in Law Articles of the PPA. Therefore, the Commission disallows the Levy of Forest Tax on Coal as a "Change in Law" event.

From the above it can be seen that the State Commission has treated the claim of APRL regarding levy of forest tax as a fee similar to toll/ entry fee, which does not meet the criteria under Change in Law event and denied the claim.

- xxi. APRL has contended that similar type of fee has been allowed by the CERC in case of Sasan Power Ltd. vide order dated 17.2.2017. We have gone through the said order and we find that CERC has allowed levy of forest transit fee under Change in Law, which is subject to the outcome of the judgement of Hon'ble Supreme Court wherein appeal is pending to be

disposed of on the said issue. On the other hand, the MERC has disallowed the levy of forest tax on the same premise as has been done in the Impugned Order.

- xxii. It is observed that the claim of APRL for the said fee at the rate of Rs. 7/ton has been levied based on Chhattisgarh Government, Forest Department letter dated 6.10.2012, under Chhattisgarh Transit (Forest Produce Rule) 2001 on coal mined and transported from SECL mines located in Forest area with effect from 1.11.2012. There was no such fee applicable as on cut-off date of the bid deadline. Accordingly, APRL could not have envisaged for factoring it in its bid. The levy of Forest Tax/Fee cannot be considered as a part of pricing mechanism for coal and hence it cannot form part of CERC Escalation Rates for coal. Accordingly, there has been increase in expenses related to coal due to such levy and the same falls under the category of first bullet of Article 10.1.1 of the PPA read with the definitions of the 'Law' and 'Indian Government Instrumentality' under the PPA. This is also in line with the judgement of this Tribunal in Appeal No. 288 of 2013 as discussed above. Accordingly, the State Commission has not justified in rejecting the benefit claims of the APRL/Appellant.

In view of the above, this issue is answered in favour of APRL/Appellant.

- xxiii. Now we move on to the sixth issue i.e. increase in Surface Transportation Charges. Let us examine the findings of the

State Commission in the Impugned Order. The relevant extract is reproduced below:

“iv. Increase in Surface Transportation Charges

31. The Petitioner submitted that at the time of Bid Deadline, surface transportation charges were applicable as per Coal India Limited (“CIL”) notification dated 12.12.2007. Subsequently, CIL, vide Notification No. 1181 dated 15.10.2009 and Notification no. 2340 dated 13.11.2013, increased the Surface Transportation Charges. Increase in surface transportation charges is pursuant to notification by a Government instrumentality, which qualifies as an event of Change in Law according to 1st Bullet of Article 10.1.1 of the PPA.

32. The Respondents have contended that the said issues are being agitated and pending before CERC. Respondent further contended that the said issues are also covered under the escalation index issued by CERC, therefore the same is not acceptable to the Respondents.

33. Commission is of the view that the increase in Surface Transportation Charges for Coal is part of the methodology for the calculation of the cost of coal decided by Coal India Ltd. (CIL). Commission while agreeing to CERC order dt. 03.02.2016 at para 28 above has already held that merely because CIL is a Government instrumentally, the change made by it in method for coal pricing cannot be considered as change in law as contemplated in PPA. Therefore, we do

not allow the claim made due to increase in Surface Transportation Charges by CIL.”

For similar reasons as that for increase in sizing charges of coal by CIL, the State Commission has disallowed the increase in surface transportation charges by CIL.

xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland Transportation Charges. There is no separate component surface transportation charges either in the bid or in the standard bidding documents. We observe that APRL was supposed to consider all the cost inputs for generation of power in its bid as per the RFP. It is presumed that the surface transportation charges charged by CIL forms part of cost of coal and it was the responsibility of APRL to consider the same in its bid appropriately.

xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we do not find any

legal infirmity in the decision of the State Commission on this issue.

Hence, this issue is answered against APRL/Appellant.

xxvi. Now we come to the seventh issue raised by APRL i.e. Change in Classification of Coal for Trainload movement. Let us first examine the findings of the State Commission on this issue. The relevant extract from the Impugned Order is reproduced below:

“xi. Change in Classification of Coal for Train Load Movement

54. The Petitioner submitted thatsuch change in classification has resulted in reduction of burden on the Petitioner. The same has been notified by the Petitioner to the Respondents vide letter dated 06.06.2015 even though such change is in favour of Respondents.

55. Respondent Discoms contended that the benefit due to change in freight rate is being passed on through the CERC escalation rate and therefore not acceptable to the Respondents.

56. The Commission notes that class 150 of Railways freight schedule was applicable to the Petitioner at the time of bid deadline. The change in class to 145 was vide notification dated 16.03.2015, which is subsequent to the bid deadline. Commission observes that the CERC Index, which uses

Base Freight Rate linked to the class of goods, includes the impact of change in class for railway freight for coal from 140 to 150. Thus, the impact of change in freight rate due to change in freight class is being passed on through the CERC escalation rate. Therefore, the Commission does not consider this event as “Change in Law” as per Article 10.1.1 of the PPA.”

The State Commission has held that the change in freight rate due to change in class for railway freight for coal is factored in through CERC escalation rate and hence same cannot be considered as a Change in Law event.

- xxvii. We also hold that such changes in classification of railway freight for coal is reflected in the escalation rate for transportation issued by CERC and hence automatically gets factored into the tariff and as such could not be considered as a Change in Law event. In the present case, although it was projected to be beneficial to the Discoms but the said benefits are automatically being passed on to the Discoms by a way of CERC escalation rates.

Accordingly, this issue is decided against APRL.

- xxviii. Now we have reached to the final issue raised by APRL related to carrying cost on the allowed Change in Law events. For the sake of brevity, we are not discussing the claims of APRL and counter claims of the Discoms on this issue as the said issue has been decided by this Tribunal in its judgement dated

13.4.2018 in Appeal No. 210 of 2017 in case of Adani Power Ltd. v. CERC wherein this Tribunal after detailed analysis has allowed carrying cost on the allowable Change in Law events. The claims and counter claims of the parties have been taken into account while applying the said decision of this Tribunal in the present judgement. We straight way come to the relevant portion of the said judgement which is reproduced below:

“12 d)

.....

ix. In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in

SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:

“13.4 Tariff Adjustment Payment on account of Change in Law 13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from (a) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or (b) the date of order/ judgement of the Competent Court or tribunal or Indian Government instrumentality, if the Change in Law is on account of a change in interpretation of Law.

(c) the date of impact resulting from the occurrence of Article 13.1.1.

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.

x. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful

status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA."

This Tribunal vide above judgement has considered that allowed Change in Law events are to be passed onto the Procurer by a way of adjustment to the tariff. Further, it has been held that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event(s).

xxix. Now let us analyse the provisions of the PPA in the present case in light of the above judgement of this Tribunal. The relevant extract from the PPA is reproduced below.

"10.2 Application and Principles for computing impact of Change in Law

10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due

regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.”

From the above it can be seen that due to Change in Law event, the affected party is to be restored to the same economic position as if Change in Law event has not occurred.

Further, from the perusal of the PPA we hold that the allowed Change in Law event (s) is to be passed on to the Procurer by way of adjustment in Tariff.

xxx. We also observe that the PPA in the present case is having similar provisions as in case of the judgement of this Tribunal produced above on the issue related to the carrying cost.

Accordingly, in view of our discussions as above, this issue is considered in favour of APRL/Appellant.

B. Issues raised by the Discoms:

- i. The issues related to Clean Energy Cess and Central Excise Duty have been raised by the Discoms and contested that the same are payable only until FY 2014-15 as agreed earlier and according to the order dated 29.12.2015 of the State Commission. Let us first examine the impugned findings of the

State Commission on these issues. The relevant extract from the Impugned Order is reproduced below:

“9. At the outset we make it clear that we are not examining the claims relating to clean energy cess& central excise duty in this order as these have been settled in accordance with the terms of PPA.....”

The State Commission has not analysed the claim of APRL on the issues of Clean Energy Cess and Central Excise Duty as the same has been settled in accordance with the terms of the PPA.

- ii. At this juncture it is important for us to analyse the order dated 29.12.2015 of the State Commission on the said issues. The relevant extract of the order dated 29.12.2015 is reproduced below:

“12. We note that APRL has submitted its claims to Discoms on 28.05.2015 pursuant to the order of this Commission dated 29.04.2015. Discoms verified these claims through a committee and has come with the present I.A. seeking approval of the Commission to grant relief to M/s Adani Power Rajasthan Ltd. under the following heads:

(a) Clean Energy Cess impact for the FY 2013-14 and 2014-15.

(b) Central Excise Duty impact for the FY 2013-14 and 2014-15.

.....

14. Duly considering the stand of Discoms on allowing two claims which is not disputed by APRL, the Commission allows the two 'Change in Law' events agreed to by the Discoms after verifying them in the light of provisions of PPA.
15. Commission, therefore, allows Discoms to pay compensation to APRL under the following heads after verifying actual payments made by APRL to the concerned authority.
(a) Clean Energy Cess impact for the FY 2013-14 and 2014-15
(b) Central Excise Duty impact for the FY 2013-14 and 2014-15."

From the above it can be seen that the State Commission has allowed the said claims of APRL under Change in Law in view of the provisions of the PPA. The State Commission has allowed the claim of APRL on the said issues for the FYs 2013-14 & 2014-15.

- iii. APRL has submitted that this Tribunal has allowed indirect taxes vide judgement dated 19.4.2017 in case of Sasan Power Ltd. v. CERC in Appeal No. 161 of 2015 and excise duty has been allowed by CERC in order dated 6.2.2017 in case of Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd. and order dated 1.2.2017 in case of Emco Energy Ltd. v. MSEDCL and no appeal has been filed against these orders. Counsel for the APRL/Appellant has further submitted that the order dated 29.12.2015 has not been challenged by the Discoms.

Accordingly, it has been contended that the said order dated 29.12.2015 has attained finality.

- iv. It is observed that in the Impugned Order, the State Commission has held that the issues of Clean Energy Cess and Central Excise Duty have been settled under Change in Law between the Discoms & APRL in accordance with the terms of the PPA. The State Commission has not given any further direction for compensation on the said issues for the period beyond FY 2014-15. It is observed that the issue regarding Clean Energy Cess and Central Excise Duty are covered under Change in Law settled position between APRL and the Discoms and the same has also been held by the State Commission vide order dated 29.12.2015 which has not been challenged by the Discoms. Accordingly, this issue has attained finality and APRL is entitled to receive compensation on account of any increase in the Clean Energy Cess and Central Excise Duty. The contention of the Discoms that the said claims have to be examined by the State Commission for the period beyond 2014-15 is unsustainable as there can be no two interpretations on same issues under the same Change in Law provisions in terms of the same PPA. Even otherwise, as decided in the preceding paragraphs the change in taxes/ duties etc. which leads to increase in input costs for power generation is covered under the Change in Law provisions of the PPA. Accordingly, the changes in Clean Energy Cess and Central Excise Duty which could not be envisaged at the time of cut-off date are Change in Law events and APRL is to be compensated for the same.

Accordingly, these issues are answered against the Discoms.

- v. The Discoms have also challenged the other three Change in Law events which were allowed by the State Commission. Now we will deal them in the forthcoming paragraphs.
- vi. First, we take the issue of Change in Rate of Royalty payable on Domestic Coal. The relevant extract from the Impugned Order is reproduced below:

“i. Change in Rate of Royalty Payable on Domestic Coal.

18. The Petitioner has submitted that the Government of India, Ministry of Coal, issued a Notification No. G.S.R. 349(E) dated 10.05.2012 to increase the rate of royalty on Coal from 5% to 14% ad-valorem on the price of coal. Therefore, the said enhancement in the rate of Royalty on coal squarely falls under 1st Bullet of Article 10 of the PPA as an event of Change in Law and hence the Petitioner needs to be compensated for the same.

19. Respondent Discoms contended that Royalty charges cannot be treated as tax but these constitute fee and the same were in existence at the time of bid submission and therefore do not qualify as change in law.

20. Commission has considered this claim. ‘Royalty’ is charged under notification issued as per the provisions of Mines & Minerals (Regulations and Development) Act, 1957 and rate of royalty is liable for change once in three (3) years. Petitioner has claimed the difference in royalty now payable.

21. The contention of the Respondent that royalty was in existence at the time of submitting the bid and hence does not qualify for change in law claim, has to be rejected as mere existence of levy on the date 7 days prior to the bid deadline will not disentitle the Petitioner from making the claim unless it is shown that royalty rate has not changed since then. Hon'ble Supreme Court while dealing with the cases relating thereto has held that the royalty is a tax imposed on the minerals extracted which includes coal.

22. Therefore, change in rates of royalty on coal falls within the 1st bullet of Article 10.1.1 of PPA and the Petitioner has to be allowed the impact of change.”

The State Commission has concluded that as per the decision of Hon'ble Supreme Court the Royalty is a tax imposed on the minerals extracted and it falls within the 1st bullet of Article 10.1.1 of the PPA and hence APRL is to be compensated for the same.

- vii. APRL has also relied on the judgement of this Tribunal in case of Wardha Power v. Reliance Infrastructure Ltd. in Appeal No. 288 of 2013 wherein the PPA had same Change in Law provisions and this Tribunal has allowed Change in Law event on account of change in rate of Royalty. We have gone through the said judgement and we observe that the contentions on APRL are correct as this Tribunal has allowed compensation to Wardha Power due to increase in tax on coal. The relevant portion from the judgement is reproduced below:

“26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant’s perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to correlate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.”

From the above it can be seen that this Tribunal has held that it is not correct to correlate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated by the bidder will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such

price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.

- viii. The Discoms have contended that the Rate of Royalty on Coal and Central Excise Duty forms part of CERC Escalation Index and has produced letter dated 20.7.2016 issued by Ministry of Commerce & Industry, Gol before this Tribunal in support of the same. The relevant extract from the letter is reproduced below:

“This has reference..... Seeking clarification on whether price used for compilation of Wholesale Price Index (WPI) of Non-Coking Coal is inclusive of royalty and service tax.

It is informed that pithead run of mine price notified by Coal India Ltd. along with royalty @14% and stowing excise duty are used to compute the price of Non-Coking Coal. No other charges are taken into consideration at present.

From the above it can be seen that Gol has clarified that run of mine price along with royalty and stowing excise duty are used to compute the price of Non-Coking Coal by CIL.

- ix. We observe that in view of the judgement of this Tribunal as quoted above, the letter issued by Gol has no application in the instant case. APRL has also contended that CERC, which publishes the escalation rates, has also allowed the Royalty on coal as a Change in Law event in its Orders. We observe that the contention of APRL is right. CERC has considered change

in rate of Royalty as a Change in Law event in Sasan Power Ltd. and GMR Kamalanga cases.

In view of our discussions as above, the issue of Royalty is decided against the Discoms.

- x. Now let us take the issue related to levy of Service Tax on transportation of goods by Indian Railways. Let us examine the findings of the State Commission on this issue. The relevant extract from the Impugned Order is reproduced below:

“vii. Levy of Service Tax on Transportation of Goods by Indian Railways

40. The Petitioner submitted that at the time of Bid Deadline no service tax was applicable on total freight on transportation of goods by rail. Subsequently the GOI, Ministry of Finance (“MoF”) vide Notification No. 9/2010 dated 27.02.2010 brought Transportation of Goods by Rail under the ambit of Service Tax. However, through various notifications including Notification No. 43/2012 dated 02.07.2012, the same was kept in abeyance till 30.09.2012. The applicability of the same from 01.10.2012 has been notified through Circular No. 27 of 2012 dated 26.09.2012 issued by Ministry of Railway, GOI and Service Tax was started to be levied @ 3.708% effective rate (12.36% service tax with abatement of 70%). The Service Tax rate has been further increased to 14% w.e.f. 01.06.2015 vide Ministry of Finance Notification No. 14/2015 dated 19.05.2015. Further, with effect from 15.11.2015, Swatch Bharat Cess has been

levied @ 0.5% as a duty on service tax over and above 14% Service Tax payable by the Petitioner. Therefore, in this case the event of levy of Service Tax on transportation of goods by railways is squarely covered under the 1st and 5th Bullet of Article 10.1.1 of the PPA and the same cannot be relegated to the CERC escalation index.

41. The Respondents have contended that the impact of change in imposition of Service tax on total freight on Transportation of goods by Rail is being passed on through the escalation rate and therefore not acceptable to the Respondents.

42. Commission observes that Service Tax has been levied on Total Freight on Transportation of Goods by Rail vide the Ministry of Finance, GoI Notification No. 9/2010 dated 27.02.2010 and Rate Circular No. 27 of 2012 dated 26.09.2012 of Ministry of Railways. The Notification was issued subsequent to 30.07.2009 (7 days prior to the bid deadline) and satisfies the Change in Law criteria as per PPA provisions.

43. Further, it is observed that the Base Freight Rate is being used by the CERC for computation of the Escalation Index. Service Tax on Transportation being levied additionally as a percentage of Normal Tariff Rate, is not covered in the escalation rates notified by CERC.

44. In view of above, the Commission considers levy of service tax on transportation of goods by Indian Railways as "Change in Law" as per Article 10.1.1 of the PPA and the Petitioner needs to be compensated for bringing him to the

same economic position as existing at the time of bid deadline.”

The State Commission has allowed Service Tax based on Ministry of Finance notification and Rate Circular of MoR and has considered the same as Change in Law event.

- xi. Thus, we also hold that in view of our decision on tax issue as above the levy of Service Tax by MoR on transportation of coal which was not earlier levied as on cut-off date and falls under the category of Change in Law event. Accordingly, there is no legal infirmity in the order of the State Commission on this issue.

Hence, this issue is answered against the Discoms/Appellant.

- xii. Now let us take the last issue raised by the Discoms related to increase in fees for ‘Consent to Operate’ under the Environmental Laws of the State. Let us examine the findings of the State Commission on this issue. The relevant extract is reproduced below:

“xii. Increase in Fees for ‘Consent to Operate’ Required Under Rajasthan Air (Prevention & Control of Pollution) Rules, 1983 and Rajasthan Water (Prevention & Control of Pollution) Rules, 1975

57. The Petitioner through Interlocutory Application submitted that at the time of Bid Deadline as per the Notification dated 25.05.2007 the application fee for

'Consent to Operate' under Rajasthan Air and Water Act was Rs. 91,500/- each [Rs. 61,000 X 1.50] for air and water, i.e., a total of Rs. 1,83,000/-. Subsequently, the State Government vide Gazette Notification dated 10.12.2010 amended the above referred rules to increase the Fees from Rs. 61,000/- per annum to Rs. 2,49,000/-. Further, vide Notification dated 05.06.2015, the fees was revised to Rs. 48,000 + Rs. 1000 per Crore of incremental investment above Rs. 50 Crore. It is submitted that the effect of the said Notification is that annual Fees required for Consent to Operate has increased to Rs. 2,12,34,000/-. The Petitioner has notified the same to the respondents vide letter dated 22.10.2015. The event of increase in fee for consent to operate has led to increase in cost of generation and such increased cost needs to be reimbursed by the Respondents.

58. Respondents in reply contended that as per clause 3.1.1 (f) and 4.2.1 (a), the Seller has to obtain and maintain all consents, clearance and permits required for supply of power to the Procurers as per the terms of the PPA. Also it is the duty of the Petitioner to challenge such exorbitant rates. Petitioner has not submitted any proof of applicability or challenge.

59. The contention of the Respondents that seller has to obtain and maintain all consents, clearance and permits required for supply of power at its cost is untenable as the cost to be incurred for operation of plant if increased has to be compensated.

60. The Commission notes that the item under change in law claim existed at the rate of Rs. 91,500/ton at the time of bid

deadline. It is further noted that the increase in fee for consent to operate was notified by Rajasthan Government and thus falls under third bullet of Article 10.1.1 to qualify as change in law. Therefore, the extra amount is to be paid by the Petitioner to the Rajasthan Government every year as a fee for the "Consent to Operate". Such additional fee which was not envisaged at the time of bidding therefore falls under the last but one bullet, hence has to be allowed."

From the above it can be seen that the State Commission based on the notification issued by Government of Rajasthan regarding change in the condition for 'Consent to Operate' has allowed the increase in fee for 'Consent to Operate' under Change in Law as it has resulted in recurring expense to APRL.

- xiii. We have gone through the details related to 'Consent to Operate' and we observe that the Govt. of Rajasthan has changed the terms and conditions prescribed for obtaining any Consents, by a way of increasing the fee for Consent to Operate which affects the economic position of APRL and it falls under the fourth bullet of the Article 10.1.1 related to Change in Law of the PPA. The same has been observed by the State Commission and we do not find any error or perversity in the findings recorded by the State Commission.

Accordingly, this issue is also answered against the Discoms.

ORDER

For the forgoing reasons, as stated above, we are of the considered view that the issues raised in the present Appeal No. 119 of 2016 have merits as discussed above.

Hence, the instant Appeal being Appeal No. 119 of 2016 and IA Nos. 668 and 674 of 2016 are hereby partly allowed and the Impugned Order dated 15.3.2016 passed by the State Commission is hereby set aside to the extent as indicated above.

The matter stands remanded back to the State Commission to pass consequential orders as per our observations/directions as above on the issues related to Busy Season Surcharge, Development Surcharge, Port Congestion Charges, Forest Tax and Carrying Cost.

The State Commission is also directed to prescribe a mechanism of payment of Change in Law compensation in its order.

We are of the considered opinion that the Appellants have failed to make out any case on merit on the issues raised in the Appeal No. 277 of 2016. Hence, the Appeal No. 277 of 2016 is hereby dismissed devoid of merit. The IA No. 572 of 2016 also stands disposed of as having become infructuous.

No order as to costs.

Pronounced in the Open Court on this **14th day of August, 2018.**

(Justice N. K. Patil)
Judicial Member

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REPORTABLE/NON-REPORTABLE

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(I.J. Kapoor)
Technical Member