APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 193 of 2017
&
IA NO. 449 OF 2018

Dated : 21st December 2018

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF :

1. **GMR Kamalanga Energy Limited**
   New Shakti Bhawan,
   Building No. 30 – New Uddan Bhawan,
   Opposite Terminal – 3,
   Indira Gandhi International Airport
   New Delhi - 110037

2. **GMR Energy Limited**
   Building No. 302 – New Uddan Bhawan,
   Opposite Terminal – 3,
   Indira Gandhi International Airport
   New Delhi - 110037 .... **APPELLANTS**

Versus

1. **Central Electricity Regulatory Commission**,
   3rd & 4th Floor, Chanderlok Building,
   36, Janpath,
   New Delhi - 110001

2. **Bihar State Power (Holding) Company Limited**
   1st Floor, Vidyut Bhawan,
   Bailey Road, Patna – 800 001.

3. **Prayas (Energy Group)**
   Unit III A & B, Devgiri,

Joshi Railway Museum lane,
Kothrud Industrial Area,
Kothrud, Pune,
Maharashtra – 411038. .... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Amit Kapur
Mr. Vishrov Mukerjee
Mr. Yashaswi Kant
Ms. Raveena Dhamija

Counsel for the Respondent(s) : Mr. M. G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anusha Bardhan
Mr. Shubham Arya for R-2 & 3

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. Brief facts that led to the filing of the present appeal are as under:

2. This appeal is directed against the orders of the Central Electricity Regulatory Commission (CERC) dated 7-4-2017 in Petition No. 112/MP/2015. The Appellant approached CERC claiming compensation on account of certain events in consequences of change in law which have impacted Appellant's thermal project in the State of Orissa during its operating period.

3. Appellant approached Commission seeking compensation on various counts which are detailed as under:

(i) Shortfall of domestic linkage coal due to deviation from National Coal Distribution Policy (NCDP) and changes in Fuel Supply Agreements.

(ii) Increase in cost of railway freight on account of development surcharge and busy season surcharge.

(iii) Carrying cost.

(iv) Change in source of coal allocated at the time of bid submission [from Mahanadi Coal Fields Limited (MCL) to Eastern Coal Fields Limited (ECL)] resulting increase in cost of fuel.

(v) Cancellation of the Captive Coal Blocks pursuant to judgment passed by the Hon'ble Supreme Court of India.

(vi) Change in mode of coal transportation from rail to road by MCL.

(vii) Add on premium price on the notified price of coal supplied to tapering linkage holders.

(viii) Increase in the rate of Minimum Alternate Tax (MAT) rate.

(ix) Impact on interest on working capital and return on equity on incremental working capital and margin money for such

working capital resulting from the aforesaid change in law events.

4. Above claims were rejected by virtue of impugned order; therefore, the Appellant is before this Tribunal.

5. Admitted facts in the present case are as under:

6. GMR Kamalanga Energy Limited (GKEL), a subsidiary of GMR Energy Limited (GER) runs a coal-fired 1050 MW (3x350 MW) power project at Kamalanga Village in the district of Dhenkanal in Odisha. It supplies power under the following different long term Power Purchase Agreements (for short PPAs):

    (a) 262.5 MW gross power to GRIDCO in terms of the bilateral PPA dated 28.09.2006 (amended on 04.01.2011.

    (b) 350 MW power to Haryana Discoms based on competitive bidding through the following back-to-back arrangements:

        (i) Agreement with PTC dated 31.10.2007, which was substituted by a PPA on 12.03.2009; and

        (ii) PTC agreements with Haryana Distribution Companies dated 07.08.2008, delivery point being Haryana STU bus-bar.

(c) 282 MW gross power to Bihar SEB based on competitive bidding in terms of the PPA dated 09.11.2011 (Bihar PPA).

7. We are concerned with supply of power to Bihar SEB under above PPA.

8. The supply of power was in lieu of competitive bidding by the Appellant in terms of PPA dated 9-11-2011. The cut off date in terms of Bihar PPA is 28-3-2011 since bid deadline is 4-4-2011.

9. The Appellant's contention is that Central Commission failed to appreciate the amendment to the NCDP 2007 and the Revised Tariff Policy qualified as change in law under Bihar PPA. The deviation from NCDP and Revised Tariff Policy qualifies as change in law event in terms of ***Energy Watchdog Vs. CERC & Ors***[1] judgment. They contend that shifting of source of coal from MCL to ECL is change in law since this resulted in increased cost to the Appellant due to increase of charges and higher grade of coal being supplied. All LOAs and FSAs envisaged supply of coal from MCL. Therefore, shifting source of coal amounts to change in the consent and approval in terms of Bihar PPA since it happens subsequent to the cut off date.

[1] (2017) 14 SCC 80

10. They further contend that the Ld. Commission failed to appreciate the delay in operationalization and subsequent cancellation of captive coal blocks as an event of change in law. This finding was without any reasoning and according to Appellant it is against established principles of natural justice.

11. According to Appellant, change in mode of transportation from rail to road also caused increase in transportation and handling cost of coal to the Appellant. The Commission failed to note that notification dated 29-9-2014 issued by MCL indicating all IPPs and CPPs located within 50 kilometres will have supply of coal through rail. This was a new condition for obtaining coal from MCL which amounts to change in law event.

12. They further contend that Ld. Commission did not appreciate that the add on premium on the notified price of coal supplied under tapering linkage did qualify as a change in law. Appellant contends that when this was placed in terms of Bihar PPA, the grade of coal as agreed was Grade E & F. However, in terms of FSA with ECL, after change from MCL to ECL, coal supplied was Grade G10 with add on premium price which ultimately increased the price per unit heat value of the coal which is substantially higher as compared to the price at the time of placing of the bid.

13. They also contend that Commission failed to appreciate that the Busy Season Surcharge is levied pursuant to notification issued by the Ministry of Railway, Government of India. The circular and notification issued in this regard have to have the statutory force which was clearly held by the Hon'ble Supreme Court in the case of ***Rashmi Metaliks Limited and Anr. Vs. Union of India and Ors.***

14. Appellant GKEL further contend, the Central Commission was not justified in not appreciating increase in the rates of Minimum Alternate Tax (MAT) as change in law event. The Revised Tariff Policy dated 28-1-2016 issued by Ministry of Power, Government of India, acknowledges increase in taxes and levies as a change in law event and provides pass through of the cost involved. In terms of ***Energy Watchdog*** judgment, Revised Tariff Policy dated 28-1-2016 is stated to be force of law. As per extant Accounting Standards, Income Tax and MAT are to be treated as expenses. Therefore, compensation in this regard, ought to have been allowed.

15. Appellant GKEL also contend that increase of interest on working capital and return of equity on incremental working capital margin money increase on account of change in law event has to be compensated. CERC has not given any finding on this issue. Actual quantification has to be done at the end of each financial year.

16. On the above contentions, following questions of law were raised by Appellant GKEL for our adjudication:

A. Whether the Ld. Central Commission has erred in holding that the changes in the Fuel Supply Agreement and deviation from the New Coal Distribution Policy is not a Change in Law event in terms of Article 10 of the Bihar PPA?

B. Whether the Ld. Central Commission has erred in holding that the cancellation of the Captive Coal Block, which was the premise on which energy charges were quoted, pursuant to the Judgment of the Supreme Court dated 25.08.2014 and Order dated 24.09.2014 in W.P. Crl. No. 120 of 2012 is not a Change in Law event in terms of Article 10 of the Bihar PPA?

C. Whether the Ld. Central Commission has erred in holding that the transfer of certain quantity of coal from MCL to ECL is not a Change in Law event in terms of Article 10 of the Bihar PPA?

D. Whether the Ld. Central Commission has erred in holding that the change in mode of coal transportation from Rail to Road is not a Change in Law event?

E. Whether the Ld. Central Commission has erred in holding that the add-on premium price on the notified price of coal being charged by Coal India Limited (**"CIL"**) is not a Change in Law

event in terms of Article 10 of the Bihar PPA?

F. Whether the Ld. Central Commission has erred in holding that the increase in railway freight imposed by way of Development Surcharge and Busy Season Surcharge is not a Change in Law event in terms of Article 10 of the Bihar PPA?

G. Whether the Ld. Central Commission has erred in holding that the increase in the rate of MAT brought about by the Income Tax Act, 2012 does not amount to a Change in Law event in terms of Article 10 of the Bihar PPA?

H. Whether the Ld. Central Commission has erred by not deciding the issue of Impact on interest on working capital and return on equity on incremental working capital and margin money for such working capital resulting from the aforesaid change in law events.

17. Primary contention of Mr. M. G. Ramachandran, learned counsel appearing for Respondent No. 2 & 3 is with regard to the word 'Law' and what amounts to change in law:

18. According to him, the term 'Law' cannot possibly refer to the commercial decision and activities of the Government. If the PPA is interpreted according to its purpose and intent, the intention of the parties cannot be that changes in price in coal or transportation be

considered as changes in law. Therefore, according to him, the decisions of the Government company or its agency cannot be construed as law since they are enforcement of contractual rights. Therefore, he contends that they do not have force of law, namely statutory enforcement.

19. Learned counsel for the Respondents relied on ***Nabha Power Limited and Anr. Vs. Punjab State Electricity Corporation Ltd. & Anr.*** in Appeal No. 29 of 2013 dated 30-6-2014 wherein it was held as under:

> "*32. In the light of the rival contentions let us look into the definition of the term 'Law' which reads as under:*
>
> *"Law" means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and order of the Appropriate Commission;"*
>
> *33. So, as per this definition law is:*
>
> *(a) Statute; or*
>
> *(b) Ordinance; or*

(c) Regulation; or

(d) Notification; or

(e) Code; or

(f) Rules; or

(g) Any interpretation of any of them by the Indian Government instrumentality and having the force of law as provided in the definition of the term 'Law".

34. The careful reading of the definition of the law would make it clear that the decision or order would relate to the decision of the Appropriate Commission. This means it is only the decisions and orders of the Appropriate Commissions that are included in the term "law".

35. Thus, the term 'law' has been defined including only the statutory laws, notification, regulations, ordinances, codes and rules etc. and not a decision of the Indian Government Instrumentality.

36. The specific reference to the decision and orders relating to the Appropriate Commission would reveal that the decision of the Government is not a law, till they assume statutory form mentioned specifically."

20. Learned counsel for Respondents therefore, contend that the term 'Law' cannot possibly refer to the commercial decision and activities of the Government.

21. It is brought to our notice that in case of the judgement in ***Naba Power*** of 2014, change in imposition of customs duty has been held to be change in law. But relief was declined since change in law occurred before the cut off date.

22. It is noted that similar contentions were raised in ***Adani Power (Rajasthan) Limited vs. RERC*** in Appeal No. 119 of 2016, so also in Appeal Nos. 111 of 2017 and 290 of 2017 titled ***GMR Warora Energy Limited Vs. CERC***. Learned Counsel for the Appellant contends that irrespective of nature or type of function, as long as the conditions under Article 10 are satisfied, it will amount to change in law, therefore, he argues that Article 10 neither lays down sovereign function as a precondition for change in law nor does it differentiate between sovereign and commercial function.

23. From the judgment in ***Energy Watchdog Vs. CERC & Ors.***, the relevant portions read as under:

> *"**56.** However in sofar as the applicability of Clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under Clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under Clause 13.1.1. It is clear from a reading of*

the Resolution dated 21-6-2013, which resulted in the letter of 31-7-2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18-3-2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31-7-2013, the following letter, which is set out in extenso states as follows:

FU-12/2011-IPC (Vol-III)
Government of India
Ministry of Power
Shram Shakti Bhawan, New Delhi
Dated: 31-7-2013

To,
The Secretary,
Central Electricity Regulatory Commission,
Chanderlok Building, Janpath,
New Delhi

Subject: Impact on tariff in the concluded PPAs due to shortage in domestic coal availability and consequent changes in NCDP.
Ref. CERC's D.O. No. 10/5/2013-Statutory Advice/CERC dated 20-5-2013.
Sir,

In view of the demand for coal of power plants that were provided coal linkage by Govt. of India and CIL not signing any fuel supply agreement (FSA) after March 2009, several meetings at different levels in the Government were held to review the situation. In February 2012, it was decided that FSAs will be signed for full quantity of coal mentioned in the letter of assurance (LoAs) for a period of 20 years with a trigger level of 80% for levy of disincentive and 90% for levy of incentive. Subsequently, MoC indicated that CIL will not be

able to supply domestic coal at 80% level of ACQ and coal will have to be imported by CIL to bridge the gap. The issue of increased cost of power due to import of coal/e-auction and its impact on the tariff of concluded PPAs were also discussed and CERC's advice sought.

2. After considering all aspects and the advice of CERC in this regard, Government has decided the following in June 2013:

(i) taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of annual contracted quantity (ACQ) for the remaining four years of the 12th Plan.

(ii) to meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt.

(iii) higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.

3. Ministry of Coal vide letter dated 26-7-2013 has notified the changes in the New Coal Distribution Policy (NCDP) as approved by the CCEA in relation to the coal supply for the next four years of the 12th Plan (copy enclosed).

4. As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case-to-case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LoA for the remaining four years of the 12th Plan for the already concluded PPAs based on tariff based competitive bidding.

5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case-to-case basis in public interest. The appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government.

This issues with the approval of MOS(P)I/C.
Encl: As above.

Yours faithfully,
sd/-
(V. Apparao)
Director

This is further reflected in the revised Tariff Policy dated 28-1-2016, which in Para 1.1 states as under:

1.1. In compliance with Section 3 of the Electricity Act, 2003, the Central Government notified the Tariff Policy on 6-1-2006. Further amendments to the Tariff Policy were notified on 31-3-2008, 20-1-2011 and 8-7-2011. In exercise of powers conferred under Section 3(3) of the Electricity Act, 2003, the Central Government hereby notifies the revised Tariff Policy to be effective from the date of publication of the resolution in the Gazette of India.

Notwithstanding anything done or any action taken or purported to have been done or taken under the provisions of the Tariff Policy notified on 6-1-2006 and amendments made thereunder, shall, insofar as it is not inconsistent with this Policy, be deemed to have been done or taken under provisions of this revised policy.

Clause 6.1 states:

6.1. Procurement of power

As stipulated in Para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the

Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.

However, some of the competitively bid projects as per the guidelines dated 19-1-2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in letter of assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by appropriate Commission on a case-to-case basis, as per advisory issued by Ministry of Power vide OM No. FU-12/2011-IPC (Vol-III) dated 31-7-2013.

57. *Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, 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 payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central*

> *Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."*

24. It is well settled in the case of ***Natural Resources Vs. Reliance Industries (2010)7 SCC 1*** that the Government is responsible for the allocation of natural resources. Neither Coal India nor its subsidiaries can enter into an agreement for supply of coal without the consent or permission of Government.

25. In addition to the above decision, we place reliance in the case of ***Kusum Ingots & Alloys Vs. Union of India***[2], it was held that executive instruction devoid of any statutory backing would also be considered as 'law'. Para 26 is relevant which reads as under:

> *"26. In fact, a legislation, it is trite, is not confined to a statute enacted by Parliament or the legislature of a State, which would include delegated legislation and subordinate legislation or any executive order made by the Union of India, State or any other statutory authority. 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."*

[2] ***(2004) 6 SCC 254***

26. In the present appeal, we are concerned with the notifications and circulars issued by Coal India Limited and Ministry of Railways which are nothing but Indian Governmental Instrumentalities. Whether such notifications / circulars are covered under the scope of law. So far as facts are concerned in terms of LOA dated 8-7-2009 for 2.384 MMT and LOA dated 25-7-2008 for 2.140 MT., GMR was allocated coal under these two LOAs. The two coal linkages have to be considered as grant of Government of India since FSAs can be pursuant to the aforesaid allocation.

27. Similar contentions were raised in Appeal No. 119 of 2016 and Appeal No. 277 of 2016. After referring to Articles 298 and 77 of the Constitution, this Tribunal rightly opined that Article 298 and 77 of the Constitution are complementary to each other as far as the scheme of carrying out the business / commercial activity by Government of India / State Government is concerned. The Corporations / companies which carry out business falling under various Ministries and Department of both Government of India and State Government are the creations of Government of India or creations of Parliament and State Assembly by making enactments. Their formations have force of law. The PPA in this case also

defines the Indian Government Instrumentalities which includes all departments, corporations / companies like Coal India Limited or Indian Railways formed under different Statutes. Over and above this, various stipulations envisaged under RFP and PPA have to be considered before arriving at any event as a change in law event.

28. We do not find any reason to differ from the above opinion so far as the opinion of the Tribunal in ***Adani***'s case (Appeal Nos. 119 and 277 of 2016).

29. Therefore, the contention of the Respondents 2 & 3 that Corporations cannot be considered as executive bodies or Governmental instrumentalities to issue instructions cannot be accepted.

30. Article 1.1 of Bihar PPA defines "Law", Indian Government Instrumentality as under:

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

> *"Indian Governmental Instrumentality" shall mean the Government of India, Government of Bihar, Government of Jharkhand 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 the Procurer."*

31. Now let us consider the relevant clauses to understand what amounts to "Change in Law" and how the word 'Law' is defined in the PPA in question.

    Article 10 of PPA in the present case refers to change in law which reads as under:

> *"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, adotption, 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 India 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.

  10.2 Application and Principles for computing impact of Change in Law

  10.21 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.

  ...

  10.3 Relief for Change in Law

  ...

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."

Operating Period:

"Operating Period" shall mean the period commencing from the Delivery Date, until the Expiry Date or date of earlier termination of this Agreement in accordance with Article 2 of this Agreement."

32. We have to see whether the claims raised by Appellant GKEL fall within the scope of Article 10. In the light of above Clauses / Articles of PPA, we are of the opinion, the distinction between commercial decisions and statutory impositions is not relevant so far as adjudication of a change in law event in terms of Bihar PPA. As long as an event qualifies a change in law in terms of Bihar PPA, one has to apply the plain and simple meaning and it does not depend upon whether the goods or services supplied are commercial or not.

33. We will now consider different claims of Appellant GKEL and its entitlement.

34. **Increase in cost of railway freight on account of development surcharge and busy season surcharge:**

Learned counsel, Mr. Ramachandran appearing for Bihar Discoms contends that the Appellant had the option of quoting escalable charges to specifically deal with future price index since the escalation index is notified by Ld. CERC from time to time which provides for impact of change in price of coal and freight rate charges.

35. Learned counsel for Appellant refers to judgment of the Tribunal in Appeal No. 288 of 2013 ***Wardha Power Company Ltd. Vs. Reliance Infra. Limited & Anr.*** to contend that Tribunal rejected the applicability of escalation index in determining compensation due to an affected party on account of change in law.

> *24. We find that as per the provisions of the PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The minimum financial impact to qualify for claim of compensation is also linked to the increase in expenses/decrease in revenue of the seller. "*
>
> *25. For example, if the tax on cost of coal has been increased from 5% to 8%, then for computing the impact of Change in Law, only the increase in the actual expenditure of Seller due to increase in tax from 5% to 8% has to be*

considered. This is because if the tax had not increased, the Seller would have paid tax of 5% on the actual cost of coal. With the Change in Law, the Seller has now to pay 8% on the actual cost of coal. Therefore, to restore the Seller to the same economic position as if such Change in Law has not occurred, the Seller has to be compensated for additional tax of 3% on the actual cost of coal. However, the Seller will have to submit proof regarding payment of tax on coal.

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 co-relate 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 Judgment in Appeal No.288 of 2013 Page (27) 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."

36. Reading of the above paragraphs, it is clear that escalation price pertains to increase in base price and it does not cover increase in taxes and duties. This fact was reaffirmed by Tribunal in ***Adani***

judgment so also ***GMR Warora*** (mentioned above) wherein they have held as under:

> "*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.*"

37. It is relevant to mention the letter issued by Ministry of Power dated 27-8-2018 which reads as under:

"*No. 23/43/2018-R&R*
Government of India
Ministry of Power
***

Shram Shakti Bhawan, New Delhi
Dated, the 27th August, 2018

To

The Chairperson
Central Electricity Regulatory Commission,
Chanderlok Building, Janpath,
New Delhi.

Subject: Direction to the Central Electricity Regulatory Commission under section 107 of the Electricity Act, 2003 for allowing pass-through of any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, after the award of bids, under "Change in Law" unless otherwise provided in the PPA

Sir,

Para 6.2 (4) of Tariff Policy 2016 provides that after the award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, the same may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission.

2. It has been brought to the notice of this Ministry that Generating Companies are facing difficulties in getting pass-through of changes in cost due to any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality under "Change in Law" by Appropriate Commission. The difficulty is mainly because of considerable time being consumed in the approval process resulting into severe cash flow problems to the Generating Companies. This has also resulted in stress in the Power Sector.

3. Now, in order to address the above issue and ensure sustainability of the electricity market in the larger public interest, the Central Government, in exercise of the powers conferred under section 107 of the Act, hereby issues this direction to the Central Electricity Regulatory Commission:

a) Any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, may be treated as "Change in

Law" and may unless provided otherwise in the PPA, be allowed as pass through.

b) *Central Commission will only determine the per unit impact of such change in domestic duties, levies, cess and taxes, which will be passed on.*

c) *A draft order for determination of per unit impact under change in law shall be circulated by Central Commission to all the States / Beneficiary on 14th Day of filing of petition. Any objection/ representation shall be submitted by them within 21 days of filing of petition.*

d) *The order for pass through giving the calculation for per unit impact will be issued within 30 days of filing of petition.*

e) *The impact of such Change in law shall be effective from the date of change in law.*

f) *Where CERC has already passed an order to allow pass through of changes in domestic duties, levies, cess and taxes in any case under Change-in-law, this will apply to all cases ipso facto and no additional petition would need to be filed in this regard.*

4. This issues with the approval of Minister of State (Independent Charge) for Power and New and Renewable Energy, Government of India.

Yours faithfully,

(D. Chattopadhyay)
Under Secretary to the Govt. of India
Tel: 2373 0265

Copy to:

1. All Joint Secretaries/Directors/Deputy Secretaries, Ministry of Power
2. PS to MOS(I/C) for Power & NRE
3. PPS to Secy(P), PPS to AS(SNS), PPS to CE(R&R), PS to Director (R&R)
4. Technical Director, NIC, Ministry of Power with the request to upload this communication on MoP's website."

In the light of above discussion, we are of the opinion, Appellant GKEL is entitled for increase in the freight on account of levying of development surcharge and busy season surcharge which were not part of basic price of coal.

38. **Carrying Cost:**

Learned counsel for Respondents further referring Article 10.5 read with Article 8.8 of PPA contend that provisions of contract must be read as a whole and they shall be read together and harmoniously construed. Therefore, compensation can only be in terms of PPA. Similar contention was raised in the case of ***Adani Power Limited Vs. CERC*** referred to as ***Adani Carrying Cost*** judgment in Appeal No. 210 of 2017 pronounced on 13-4-2018. The relevant paragraphs read as under:

"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.

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 then 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.

xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid – 01 PPA."

39. The contention that payment is due only after issuance of supplementary bill raised by Bihar Discoms and that payment is due only after issuance of supplementary bill and they relied upon ***SLS Power Limited Vs. APERC & Others [A. No. 150 of 2011]*** and ***NTPC Vs Madhya Pradesh State Electricity Board***[3]***.***

40. Similarly, contentions were considered and rejected in ***Adani Carrying cost*** judgment in Appeal No. 210 of 2017. It reads as under:

"...
From the above it can be seen that the Central Commission has held that there is provision of payment of late payment surcharge if the payment is not made by the Respondents 2 to 4 beyond 30 days of raising of bills. There is no provision for payment of carrying cost from the effective date of

[3] Reported in ***2011 15 SCC 580***

Change in Law event till the Change in Law is approved by the Central Commission. Further the Central Commission has held that in case of SECL the liability was crystallised after the enhancement of royalty by the State Government and interest became payable because of failure to pay the amount as per the liability. And hence the facts of present case are distinguishable from SECL case.In NTPC case as there was no provision in regulations or the PPA hence interest is not applicable to NTPC due to revision in tariff. Regarding judgement in SLS case the Central Commission has distinguished it from the present case as there is no redetermination of tariff in present case and there was redetermination of tariff in SLS case. Hence interest is not payable in present case.

vii. After going through the SLS case we find that this Tribunal has held that the principle of carrying cost has been well established in the various judgments of this Tribunal and the carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time and accordingly, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in the said judgment."

41. In the light of opinion already expressed by this Tribunal in the earlier Appeal, we are of the opinion Appellant GKEL is entitled for amounts under heading Carrying Cost.

42. (a) **Shortfall of domestic linkage coal due to deviation from National Coal Distribution Policy (NCDP) and changes in Fuel Supply Agreements.**

(b) Cancellation of the Captive Coal Blocks pursuant to judgment passed by the Hon'ble Supreme Court of India.

These two issues are taken together since they are interconnected.

43. It is not in dispute that the Appellant had sought fuel requirement for the project and secured the same both under firm coal linkage as well as captive coal blocks situated at Rampia and Dip Side Rampia coal blocks in Odisha (Tapering linkage as against Captive Coal Blocks).

44. So far as firm linkage of 2.14 MTPA for 500 MW, it came to be approved by Standing Linkage Committee-LT on 2-8-2007. Letter of Assurance came to be issued by MCL on 25-7-2008. The minutes of Standing Linkage Committee-LT clearly indicate that the LOA for 500 MW was already issued in 2006 in favour of GMR Energy Limited. Further, the developer has been allocated a coal block jointly with others. CEA informed that since the coal block is likely to take time for development, application for seeking tapering linkage for 550 MW may be considered. Having regard to recommendation of CEA, the Committee authorized issuance of LOA by CIL for capacity of 550

MW on tapering basis in accordance with the provisions of New Coal Distribution Policy (NCDP) of 2007.

45. Subsequently, LOA also came to be issued on 25-7-2008 wherein the preamble reads as under:

> *"In consideration of the request by M/s. GMR Energy Limited, Phase-I, Kamalanga, Dist. Dhenkanal, Orissa (hereinafter referred to as " the Assured") for issuance of Letter of Assurance (hereinafter referred to as " LOA") requiring 21.40 Lakh Tonnes per annum (tpa) of E/F Grade coal for its 500 MW Power Plant [to be] located at Phase-I, Kamalanga, Dist. Dhenkannal, Orissa (hereinafter referred to as "the Plant"), from about April, 2010, as requested by the Assured, Mahanadi Coalfields Limited (hereinafter referred to as "the Assurer") hereby provisionally assures that it would endeavour to supply coal to the Assured subject to the following terms and conditions:*
>
> *... ..."*

46. On 06.11.2007, in terms of Annexure A-8 of the Appeal, the Ministry of Coal intimated its decision to allocate Rampia and Dip Side Rampia coal blocks in Odisha to a consortium comprising of GMR Energy Limited and five other allottees as confirmed. It is also clear from this document that Appellant's share in the captive coal was 4.6 MTPA which corresponds to 1000 MW capacity and also to the

aggregate quantity assured under firm and tapering linkage. In terms of Annexure-10 of the Appeal, tapering linkage for 2.384 MTPA for 550 MW came to be approved on 12-11-2008 by Standing Linkage Committee-LT for the project. Consequent LOA came to be issued on 8-7-2009. In terms of this Letter, the tapering linkage was to be made available till development of coal from Rampia Coal Block was completed.

47. It is not in dispute that Appellant GKEL and MCL signed FSA on 26-3-2013 (firm linkage) for 1.819 MTPA. The quantity came to be increased to 2.0009 MTPA on 13.11.2013 and further increased to 2.14 MTPA on 18.9.2014. These are evident at Annexure A-12 of the appeal papers.

48. FSA came to be executed on 28-8-2013 in respect of tapering linkage for 0.6556 MTPA corresponding to the PPAs in operation at that time. This quantity again came to be increased to 0.8669 MTPA on 18-9-2014.

49. It is not in dispute that by letter dated 26-2-2014, CIL transferred 1.517 MT of coal which was part of the MCL tapering linkage of 2.384 MTPA to Eastern Coal Fields Limited (ECL). Consequently, on 20-5-2014, ECL signed FSA with Appellant GKEL for 0.238 MTPA. This quantity was increased to 0.29425 on 29-5-2014 and further increased to 0.626535 MTPA on 24-9-2014.

50. According to Appellants, the coal requirement of projects which had been assessed prior to NCDP 2007, had the assurance of coal supply up to 100% of normative requirement. GKEL's coal requirement was assessed on 2-8-2007; therefore, they are covered by virtue of Clause 2.2 in terms of which GKEL is entitled to supply of 100% of the quantity as per normative requirement without any stipulation as to supply of imported coal.

51. As against this, argument of the Respondents is that Appellant did not have the LOA or FSA at that stage; therefore, Clause 5.2 of NCDP 2007 alone applies. Therefore, CIL may have to import coal as may be required from time to time. It is further contended that in terms of the above-said Clause, LOA came to be issued on 25-7-2008 and subsequently FSA came to be entered into between the parties which provides for supply of coal to be supplied by MCL for domestic as well as imported coal. Since Appellant did not raise any objection at the time of LOA or signing of FSA, Appellant is entitled to financial benefit only with regard to domestic coal. The Respondents further contended that LOA was much prior to cut-off date 28-3-2011. Therefore, the commitment of coal to be supplied by CIL/MCL was through its mines as well as imported coal. Therefore, Appellant could not have assumed 100% domestic coal availability while submitting the bid for Bihar PPA.

52. According to Respondents, even in terms of Clause 2.2 of letter dated 18-10-2007, there was no commitment to supply 100% of coal.

53. Clause 2.2 at Office Memorandum pertaining to New Coal Distribution Policy dated 18-10-2007 (Annexure A-4 of the Appeal) reads as under:

> *"2.2 Power Utilities including independent Power Producers (IPPs) / Captive Power Plants (CPPs) and Fertilizer Sector*
>
> *100% of the quantity as per the normative requirement of the consumers would be considered for supply of coal, through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL. The units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal and linkage/Letter of Assurance (LOA) approved as well as future commitments would also be covered accordingly."*

54. According to Respondents, in terms of Clause 5.2 it only refers to enforceable LOA and thereafter Fuel Supply Agreement; therefore 100% of the quantity as per the normative requirement was not assured. Clause 5.2 reads as under:

> *"5.2 For new commitments including short-term tapering commitment to consumers having captive coal block, Power Utilities, CPPs, IPPs, Fertilizer units, and others would be issued an enforceable Letter of Assurance for Supply of coal and thereafter they would be entitled to enter into FSA within*

> *a stipulated time subject to fulfilment of certain conditions to be stipulated therein. For Power Utilities including Independent Power Producers (IPPs) and Captive Power Plants (CPPs), cement sector and sponge iron sector, the present system of linkage committee at the level of Government would continue. CIL will issue LoA after approval of applications by the Standing Linkage Committee (Long-term). However, for other sectors the task of issuing letter of assurance, will be the responsibility of CIL.*
>
> *In order to meet the domestic requirement of coal, CIL may have to import coal as may be required from time to time, if feasible. CIL may adjust its overall price accordingly. Thus, it will be the responsibility of CIL/Coal companies to meet full requirement of coal under FSAs even by resorting to imports, if necessary."*

55. Reading of Clause 2.2 clearly indicates the power plant which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal would also be covered under Clause 2.2. Therefore, none of the other Clause would apply. In terms of LOA dated 25-7-2008 there was 21.40 lakh tons per annum (TPA) of E/F Grade coal for 500 MW power plant from about April 2010 was provisionally assured. By another Letter dated 8-7-2009 pertaining to tapering linkage, they assured 2.384 million tons per annum of F Grade coal for 550 MW project was assured. In the light of these two LOAs, one has to quantify shortfall in coal against the quantum assured in the LOAs in favour

of Appellant GKEL. Clause 5.2 of NCDP 2007 pertains to new linkages and does not apply to Appellant.

56. Mr. M. G. Ramachandran, learned counsel refers to Fuel Supply Agreement – Clause 4.1.1, 4.3.1, 4.3.2 and 4.6.1 (Pages 380 – 383 Vol II of Appeal Paper Book) which reads as under:

> *"4.1.1 The Annual Contacted Quantity of Cola agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser, shall be 18.19 Lakh Tes. per Year **from the Seller's mines and/or from import**, as per Schedule 1. For part of Year, the ACQ shall be prorated accordingly. The ACQ shall be in the proportion of the percentage of Generation covered under long term Power Purchase Agreement(s) executed by the Purchaser with the DISCOMs either directly or through PTC(s) who has/ have signed back to back long term PPA(s) with DISCOMs. Whenever, there is any change in the percentage of PPA(s), corresponding change in ACQ shall be effected through a side agreement. Such changes shall be allowed to be made only once in year and shall be made effective only from the beginning of the next quarter. However, in no case ACQ should exceed the LOA quantity as mentioned in Schedule 1.*
>
> ……..
>
> *4.3 Sources of Supply*
>
> *4.3.1 The Seller shall endeavor to supply coal from own sources as mentioned in Schedule I. In case the seller is not in a position to supply the Scheduled Quantity (SQ) of coal from such sources as indicated in Schedule I, the **Seller shall have the option to supply the balance quantity of coal through import, which shall not unless otherwise agreed between the parties, exceed 15% of the ACQ in the year 2012-13, 13-14 and 14-15, 10% of the ACQ in the year 2015-16 and 5% of the ACQ** for the year 2016-17 and onwards. Seller may at its discretion, make such arrangements for supply of imported coal through CIL and/or other enterprises. Accordingly, the Purchaser has to enter into a Side Agreement with CIL and/or Seller, as the case may be, in addition to this Agreement. The Side Agreement dealing with the terms*

and conditions for supply of imported coal would be an integral part of this Agreement.

4.6 Compensation for Short delivery/lifting

4.6.1 If for a Year, the Level of Delivery by the Seller, or the Level of Lifting by the Purchaser falls below ACQ with respect of that Year, the defaulting Party shall be liable to pay compensation to the other Party for such shortfall in Level of Delivery or Level of Lifting as the case may be ("Failed Quantity") in terms of the following:

<table>
<tr><th rowspan="2">Source</th><th rowspan="2">Level of Delivery/Lifting of Coal in a Year</th><th colspan="3">Percentage of Penalty for the failed quantity (at the rate of weighted average of Base Prices of Grades of coal supplied)</th></tr>
<tr><th>2012-13,2013-14 & 2014-15</th><th>2015-16</th><th>2016-17 onwards</th></tr>
<tr><td>Imported + Domestic Qty</td><td>Below 100% but up to 80% of ACQ</td><td>NIL</td><td>NIL</td><td>NIL</td></tr>
<tr><td rowspan="3">Applicable for Imported Coal Only</td><td>Below 80% but up to 75% of ACQ</td><td rowspan="3">0-1.5</td><td rowspan="2">0-1.5</td><td>0-1.5</td></tr>
<tr><td>Below 75% but up to 70% of ACQ</td><td>-</td></tr>
<tr><td>Below 70% but up to 65% of ACQ</td><td>-</td><td>-</td></tr>
<tr><td rowspan="6">Applicable for Domestic Coal Only</td><td>Below 75% but up to 70% of ACQ</td><td>-</td><td>-</td><td>0-5</td></tr>
<tr><td>Below 70% but up to 65% of ACQ</td><td>-</td><td>0-5</td><td>5-10</td></tr>
<tr><td>Below 65% but up to 60% of ACQ</td><td>0-5</td><td>5-10</td><td>10-20</td></tr>
<tr><td>Below 60% but up to 55% of ACQ</td><td>5-10</td><td>10-20</td><td rowspan="3">20-40"</td></tr>
<tr><td>Below 55% but up to 50% of ACQ</td><td>10-20</td><td rowspan="2">20-40</td></tr>
<tr><td>Below 50% of ACQ</td><td>20-40</td></tr>
</table>

He contends that the modification of 2007 Policy by 2013 Policy is applicable to the extent of modification in terms of the above Clauses of FSA.

57. We are afraid that this may not be correct position since the Clause 4.6.1 of FSA relates to penalty on account of short supply and it applies to both the parties. Further this Article does not have any effect on the obligation of MCL to supply coal up to ACQ. Therefore, it shall be reckoned against the quantum assured in the LOA and not Article 4.1.1 of FSA. The Revised Tariff Policy allows shortfall / in linkage coal to the quantum assured / LOA / FSA.

58. According to Appellants, on account of shortfall of domestic linkage coal due to deviation from the NCDP 2013 and changes in fuel supply agreements, they have sustained increase in expenditure. As against this learned counsel for Respondent No. 2 & 3 admit that in terms of ***Energy Watchdog***, ***Adani Power***, and ***GMR Warora*** cases, NCDP is a law within the definition of the term 'law'. According to learned counsel, in the present case, unless conditions contained in Article 10 are satisfied, they are not entitled for such claim. They further contend that it has to be a change in expenditure as a consequence of law. According to them NCDP 2013 has not led any impact on the Appellant as fuel supply agreement entered into by the Appellant was prior to NCDP 2013 and the Ministry of Power itself restricts coal allocation to a specified percentage. Change in law according to them has to be considered with reference to reduction in coal availability due to

NCDP 2013. They refer to 4.3 of FSA dated 26-3-2013 which reads as under:

> *"4.3 Sources of Supply*
>
> *4.3.1 The Seller shall endeavour to supply coal from own sources as mentioned in Schedule 1. In case the seller is not in a position to supply the Scheduled Quantity (SQ) of coal from such sources as indicated in Schedule 1, the Seller shall have the option to supply the balance quantity of coal through import, which shall not unless otherwise agreed between the parties, exceed 15% of the ACQ in the year 2012-13, 13-14 and 14-15, 10% of the ACQ in the year 2015-16 and 5% of the ACQ for the year 2016-17 and onwards. Seller may at its discretion, make such arrangements for supply of imported coal through CIL and / or other enterprises. Accordingly, the Purchaser has to enter into a Side Agreement with CIL and / or Seller, as the case may be, in addition to this Agreement. The Side Agreement dealing with the terms and conditions for supply of imported coal would be an integral part of this Agreement.*
>
> *4.3.2. For supply of coal through import as stated in clause 4.3.1 above, the Purchaser shall agree to have back to back arrangement, if so required with the Importing Agency to be notified by the Seller / CIL and deposit 100% of payable amount in advance. The commercial terms and conditions for such supply shall be regulated as per Side Agreement.*

59. The impact or effect of change in law has to be considered against the originally assured quantum of coal. LOAs and NCDP of 2007 are

much prior to PPA between the parties, i.e. 9-11-2011. Learned Counsel for Respondents, Mr. M. G. Ramachandran also submitted that Appellant GKEL was aware that there will be a shortfall of domestic linkage coal and imported coal may be supplied.

60. Learned Counsel for Appellant rightly brought to our notice Para-58 of ***Energy Watchdog*** judgment which is reproduced here-in-under:

> *"58. However, Shri Ramachandran, learned Senior Counsel for the appellants, argued that the Policy dated 18-10-2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013, which modifies the 2007 Policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources. It is to this limited extent that change in law is held in favour of the respondents. Certain other minor contentions that are raised on behalf of both sides are not being addressed by us for the reason that we find it unnecessary to go into the same. The Appellate Tribunal's judgment and the Commission's orders following the said judgment are set aside. The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within Clause 13 of the PPA as has been held by us in this judgment."*

61. Under these circumstances, when bid submitted by GKEL for Bihar PPA was premised on SLC-LT allocation and LOA when FSA had not been entered into between the parties as on the cut-off date what should be the consequence? If the bid was based on the SLC allocation and LOA prior to cut-off date indicated in PPA dated 9.11.2011, any new condition including supply of imported coal or penalty provisions cannot be taken into consideration.

62. In terms of judgment of the Apex Court in ***Manohar Lal Sharma vs. The Principal Secretary &Ors***, the Captive Coal Blocks came to be cancelled. Normative date of production of the coal block was 17-10-2013. This block was allowed to Appellant GKEL on 17-1-2008. It is not in dispute that the delay in development of coal block was on account of Go-No-Go policy of the MoEF which was beyond the control of the developers. The same came to be recorded in the minutes of the meeting between Inter-Ministerial Group held on 7-7-2015 to review issue of bank guarantee so also the letter dated 16-1-2014 issued by the Ministry of Coal (Annexure A-24, page-620, Vol.III of the Appeal Paper Book). On account of the reasons beyond the control of GKEL operationalization of the Captive Coal Block was delayed.

63. In lieu of the Captive Coal Blocks tapering linkage was extended and subsequent cancellation of the coal block was intimated in terms of

letter dated 16-1-2014 (Annexure A-13, page 510 of Appeal Paper Book). MoU dated 2-7-2015 between MCL and GKEL (Annexure A-23, page 615, 616, 617 of Appeal Paper Book and Annexure-A-27, Page 638 of Appeal Paper Book) indicate that tapering linkage was also extended. Since cancellation of coal block was on account of judgment of the Apex Court in 2014, event subsequent to cut-off date, this also amounts to change in law.

64. In the light of the above foregoing reasons, shortfall of firm linkage of coal as well as tapering linkage of coal, GKEL is entitled to be compensated for meeting the expenditure involved in procuring coal from alternate sources to meet the shortfall of coal from domestic sources.

65. **Add on premium price on the notified price of coal supplied to tapering linkage holders**

Central Commission opined that the add on premium price over and above the notified price of coal under tapering linkage is not change in law in terms of Bihar PPA. The Commission opined as under in the impugned order:

> *"52. We have considered the submissions of the Petitioners and Prayas. The Petitioners have not placed on record any document with regard to add on procurers price on the notified price of coal for supplies under tapering linkage holders nor have explained as to how the said*

event can be considered under Change in Law in terms of Article 10.1.1 of the Bihar PPA. In any case, it appears that the premium charged by the coal company for the add-on price on the notified price of coal is the result of contractual arrangement between the Petitioners and MCL and therefore cannot be recovered under Change in Law."

66. According to Appellants, this opinion of Commission is wrong since FSA pertaining to tapering linkage signed between the parties on 28-8-2013 for capacity of 2.384 MTPA as several Clauses envisages with reference to add on price under what circumstances such add on price should be levied. Clause 9 of the FSA refers to price of coal as under:

> *"**9.1(a)Add-on Price:***
> *For coal supplies after the Normative Date of Production, additional 40% of the Base Price shall be payable by the Purchasers as 'Add-on price' for coals of GCV of 5800 kCal/Kg and below.*
> *… …"*

Even in the FSA entered into between ECL and the Appellant on 29-5-2014 after transferring certain quantum of coal supply from MCL to ECL (tapering linkage), such clauses pertaining to price of coal and add on price were noted which defines price of coal similar to the above mentioned meaning but additional percentage of the price is reduced from 40% to 20%. Except this, all other contents of Clauses 9, 9.1(a) are exactly the same.

67. Tapering linkage was granted till operationalization of captive coal blocks. Captive coal block had to be developed on or before 17-10-2013. As already stated above, for the reasons beyond the control of GKEL, delay in operationizing the coal block had occurred on account of Go-No-Go policy of MOEF. Therefore, it had to rely on the tapering coal linkage. This fact is not denied.

68. Meanwhile, on 25-8-2014 by virtue of judgment of the Hon'ble Apex Court in the case of ***Manohar Lal Sharma vs. The Principal Secretary &Ors***, entire allocation of coal block made by Screening Committee from 14-7-1993 onwards in 36 meetings and allocations made through the Govt. dispensation route were held to be illegal. As a consequence, de-allocation order came to be passed on 24-9-2014 which cancelled allocation of 204 coal blocks including Rampia etc. with immediate effect. Therefore, Captive Coal Block came to be cancelled. Prior to this, the delay between October 2013 till date of judgment, it was on account of Go-No-Go policy of MOEF which was beyond the control of Appellant. Additional 40% or 20% of the base price was payable by the purchasers as "add on price" for coals after the normative date of production. On account of reasons mentioned above between the scheduled date of coal block and the judgment in ***Manohar Lal Sharma***, it was a case of

force majeure and from the date of judgment, it was on account of change in law (due to NCDP of 2013).

69. According to the Appellants, if Captive Coal Block had not been cancelled and if development of coal block was not delayed because of Go-No-Go policy, GKEL would not have to pay add on premium. For the reasons stated above, since the delay in development of Captive Coal Block and subsequent cancellation of the Block by virtue of judgment of Hon'ble Apex Court the consequential financial impact on account thereof in respect of add on premium is also covered as change in law.

70. Apparently, add on premium was not part of LOA and tapering linkage policy. Therefore, we are of the opinion, Appellant GKEL is entitled for compensation for increase in cost due to continued use of tapering linkage coal on account of delay in development of coal block as well as eventual cancellation of blocks by judgment.

71. **(a) Change in mode of coal transportation from rail to road by MCL**

(b) Cost involved in changing the supply from MCL to ECL

On these aspects, Central Commission opined as under:

"*49. We have considered the submissions of the Petitioners and Prayas and perused the notification*

*issued by MCL with regard to change in the mode of coal transportation from railway to Road Mode. The Petitioners have not placed on record any document to prove that the above notification has been **issued pursuant to any Act of the Parliament**. On the other hand, a perusal of Schedule 1 of the FSA dated 26.03.2012 between the petitioner and MCL shows the mode of transport of coal as Rail/Road. Clause 4.11.1 and 4.11.2 of the FSA provides for supply of coal transportation by both Rail and Road. Therefore, FSA provides for an alternative mode of transportation by road. Since the change in transportation flows from the contractual agreement between the Petitioners and Coal India Limited, the same cannot be covered under Change in Law.*"

72. Notifications issued by Govt. corporations also have statutory force. Therefore, for the following reasons, Appellant GKEL is entitled to compensation on account of change in the mode of coal transportation from rail to road. They submit as under:

"28. GKEL had quoted the escalable inland transportation charges considering 100% transportation of coal through rail mode in line with the escalable index published by the Ld. Central Commission. It is pertinent to note that CERC escalable index published for escalable inland transportation is for rail mode only.

29. Subsequently, MCL vide its notification dated 29.09.2014 informed that all IPP's and CPP's whose plants are situated within a radius of 50 km from the

nearest mine of MCL, will get the rail entitlement for 70% of coal supplied. Remaining 30% coal will be supplied by road mode, w.e.f. October 2014. Conversion of the mode of Coal Transportation from rail to road led to increase in transportation and coal handling cost for the plants, which are designed for receipt of coal by rail mode. Further, in terms of the Clause 4.3.3 of the FSA, it was stated that coal shall be offered by MCL b road/rail up to 5% of the ACQ.

30. Accordingly, the change in the mode of coal transportation from Rail mode to Road mode (including increase from 5% to 30% transport by road) constitutes a change in law event in terms of the following:-

(a) The change has been brought about due to notification by MCL.

(b) MCL, a subsidiary of CIL which is a corporation under the control of Government of India, making it an Indian Governmental Instrumentality.

(c) The change in mode of transportation occurred after the Cut-Off Date and has caused additional expenditure for GKEL.

73. They further contend that it was always contemplated that the project would have rail as mode of transportation. Therefore, according to them, the delivery point have not been defined as colliery sidings or colliery loading points as the case may be coupled with Schedule-I of the FSA indicating delivery point as Budhapank railway station, it is always clear that mode of

transportation intended to be rail.

74. According to Appellant, coal supplied to the project was through a merry go round system in which railway wagons are diverted to the site. As such the project was premised and set up on the basis of supply of coal by rail. Subsequently, MCL by a notification dated 29-9-2014 informed that all IPPs and CPPs whose plants are situated within a radius of 50 km from the nearest mine of MCL will get the rail entitlement for 70% of coal supplied. Remaining 30% coal will be supplied by road mode, w.e.f. October 2014 (Annexure A-35, page 923, Volume-IV of Appeal Paper Book).

75. The Appellant further contended that Clause 4.3.3 of FSA gives an option to the seller to offer coal up to 5% ACQ to be lifted by purchasers on their own by transport arrangement by road/road-cum-rail or another mode. This dispensation was available only till such time the main railway lines of the mines were not operational. The railway lines were operational when coal supply commenced to the project; therefore clause 4.3.3 will not apply to the facts of this case, is the stand of the Appellant. According to them since FSA is based on a model agreement in a given case where supply by road being

undertaken, the Clause may apply. According to Appellant, the definition of delivery point, rail was the agreed mode and the road transportation was limited to 5% in exigencies till main railway lines of coal mines were made operational.

76. As against this, the Respondents contend that the charges related to mode of transportation of coal cannot be considered as change in law since it relates to contractual and commercial arrangement. According to them, the change is not the change on account of decision of the government to exercise its right under the contractual arrangement, i.e. FSAs 26-3-2013 and 28-8-2013 and further they do recognise the mode of transport as rail and road. This is very clear from the Schedule-I of FSA dated 28-8-2013 (Page-478, Volume-II of Appeal Paper Book). It is further contended that the reference to Budhapank railway station under Schedule-I is a Rake Fit Station and not delivery point. Even if it were to be delivery point, it is merely the place of delivery and cannot limit the mode of transport up to delivery point.

77. Over and above this, Clause 9.2.5 of FSA refers to the obligation of the purchaser to bear the entire freight charges irrespective of the mode of transportation of the coal supply.

Therefore, they contend that the deemed delivery point and mentioning of rail does not indicate that the supply of coal was always envisaged by rail. The model FSA in 2008 was prior to cut-off date. Even this Model FSA provides for supply of coal through rail or road. Similarly, Clause 9.2.5 whereby the entire cost of transportation irrespective of mode of transportation had to be borne by the purchaser. The notification dated 29-9-2014 is nothing but an exercise of the right of the MCL to transport coal through road and rail.

78. We have gone through the Clauses in the FSA both Model FSA and the FSA. Clause 9.2.5 clearly mentions irrespective of mode of transportation of coal, cost has to be borne by the purchaser. This includes road as well. That apart, in LOA where coal supply was assured, there was no offer to supply coal only by rail. In that view of the matter, the Schedule to FSA clearly indicating rail or road would indicate (its) option of MCL how coal has to be transported. Similarly, the source of supply from MCL to ECL and the claim that this has resulted in increase in the price of coal cannot be considered for the simple reason in the Schedule to FSA it clearly indicate any other source/MCL. Therefore, this also cannot be taken into consideration. This issue is held against Appellant.

79. **Increase in the rate of Minimum Alternate Tax (MAT) rate**

This is already covered by the judgment of this Tribunal wherein the same came to be rejected. This Tribunal in the judgment in Appeal Nos. 111 of 2017 and 290 of 2017 in the case of *M/s GMR Warora Energy Ltd. (GWEL) VS CERC & Ors.* opined as under:

> *"xxiv. From perusal of the provisions of the Change in Law Article we find that the change in MAT is not resulting in change in cost or revenue of GWEL for selling electricity to MSEDCL/the Discom. Accordingly, there is no legal infirmity in the observations of the Central Commission on this issue.*
>
> *xxv. GWEL has relied on the judgement of Hon'ble Supreme Court in the JK Industries Case on this issue. We have gone through the said judgement and we find that the issue in the said judgement and the issue in hand are different and hence in view of facts and circumstances of the present case the said judgement is not applicable to the present case."*

80. In the light of this Tribunal having concluded the opinion on the issue of MAT we decline to consider the same. Therefore, this issue is answered against Appellant GKEL.

81. **Impact on interest on working capital and return on equity on incremental working capital and margin money for such working capital resulting from the aforesaid change in law events**

In the very same judgment of *M/s GMR Warora Energy Ltd. (GWEL) VS CERC & Ors.*, this Tribunal has opined as under:

> *"xxviii. After perusal of the RFP/PPA, we also observe that the tariff to be quoted was all-inclusive tariff and there is no provision for separately allowing IWC arising out of Change in Law events. GWEL has contended that it has to be restored to the same economic position and hence it is entitled for compensation on account of increase in IWC. We observe that the Change in Law provision is to restore GWEL to same economic position as if the Change in law event has not occurred by way of increase/decrease in tariff. This does not mean that the differential tariff (if any) is to be determined component wise as done for Section 62 based PPAs as the bidder was required to quote an all inclusive tariff for a period of 25 years considering all relevant aspects. Hence, the contention of GWEL is unsustainable."*

82. Since the RFP/PPA in the present case also are similar to the case of *M/s GMR Warora Energy Ltd. (GWEL) VS CERC & Ors.,* we decline to accept the claim of the Appellant on this. Therefore, the same is rejected.

83. **In view of the discussion, reasoning mentioned above, the Appeal is partly allowed. The Impugned Order dated 7-4-2017 is set aside. The matter stands remanded back to the Central Commission to pass consequential orders in the light of our**

observations as mentioned above on the issues relating to compensation on account of change in NCDP (cancellation of Captive Block vis-a-vis tapering linkage), busy season surcharge and developmental surcharge, carrying cost and add on premium price.

84. **We further observe that the said consequential orders are to be passed within two months from the date of receipt of copy of this order by the Commission. All the parties are directed to appear before the Commission concerned on 7-1-2019. Since the matter is pending for long time, all endeavours must be extended for completion of assessment within the time schedule.**

85. **Needless to say that the pending IAs, if any shall stand disposed of.**

86. **No order as to costs.**

87. Pronounced in the Open Court on this 21st December, 2018.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd